



Maritime Piracy Judicial Monitor

A EUROJUST Report



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Foreword

Cooperation among the Member States and with non-European countries has been a key factor in the decrease in the number of the pirate attacks in the important shipping lanes in the Gulf of Aden during the past four years. Countries have worked together, both to ensure free passage through the international waters in this region, and to bring pirates to justice. The European Union is actively contributing to the deterrence, repression and disruption of piracy off the coast of Somalia, while the Council of the European Union has extended the EU's counter-piracy Operation ATALANTA until 12 December 2016.

Eurojust continues to support judicial cooperation among the Member States and with third States in the investigation and adjudication of maritime piracy incidents. In the past years, practitioners in a number of Member States have found themselves involved in judicial proceedings against alleged pirates, and Eurojust has offered its assistance to the relevant national authorities by organising coordination meetings to solve the practical and legal challenges faced in their cases. To provide practitioners with an additional forum to report on legal obstacles and solutions, Eurojust produced the Maritime Piracy Judicial Monitor, first published in September 2013.

We now present you with the second issue of the Maritime Piracy Judicial Monitor, to which all Member States have been offered the opportunity to contribute. The result is a comprehensive collection of legislation and judgments. In addition, this issue offers a unique insight into the first joint investigation team set up in a maritime piracy case. This issue also draws the readers' attention to the apparent shift of the immediate piracy threat from East to West Africa, and its judicial implications. We believe that practitioners across Europe will profit from the analysis contained in this Eurojust report.

As the Maritime Piracy Judicial Monitor focuses on a specific audience, specifically law enforcement officials and practitioners within the judiciary, the distribution of this report is limited. Recipients are kindly requested not to further disseminate their copy.

Finally, Eurojust would like to express its gratitude to all contributors to this report.

We wish you an informative read and hope that the second issue of the Maritime Piracy Judicial Monitor will be of advantage to your important work in this field.

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President

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Table of Contents

1. Introductory remarks	6
2. Legal framework	7
2.1. Introduction	7
2.2. Updates in international law.....	7
2.2.1. Conventions	7
2.2.2. UN SC Resolutions.....	8
2.3. Transfer agreements concluded with third States	9
2.3.1. EU Council Joint Action 2008/851/CFSP.....	9
2.3.2. Exchange of Letters between the European Union and Kenya	10
2.3.3. Exchange of Letters between the European Union and Seychelles	11
2.3.4. Agreement between the European Union and Mauritius	12
2.3.5. Agreement between the European Union and Tanzania.....	13
2.3.6. Other transfer or extradition agreements with third States.....	14
2.4. Maritime piracy legislation in Member States and selected third States	15
2.4.1. Introduction.....	15
2.4.2. Bulgaria.....	16
2.4.3. Czech Republic.....	16
2.4.4. Estonia.....	18
2.4.5. Ireland	19
2.4.6. Greece	20
2.4.7. Croatia	22
2.4.8. Cyprus.....	23
2.4.9. Latvia	24
2.4.10. Lithuania	26
2.4.11. Luxembourg.....	27
2.4.12. Hungary	28
2.4.13. Malta	29
2.4.14. Austria.....	30
2.4.15. Poland.....	31
2.4.16. Portugal	32
2.4.17. Romania.....	33
2.4.18. Slovenia.....	34
2.4.19. Slovak Republic	35
2.4.20. Finland	36
2.4.21. Norway.....	38

2.4.22. USA.....	39
2.5. Conclusions.....	42
3. Judicial decisions.....	43
3.1. Introduction.....	43
3.2. France.....	44
3.2.1. France – <i>Tanit</i>	44
3.2.2. France – <i>Carré d’As</i> and <i>Le Ponant</i> (ECtHR).....	45
3.3. Germany.....	48
3.4. Italy.....	54
3.5. The Netherlands.....	58
3.5.1. The Netherlands – <i>Ceto</i>	58
3.5.2. The Netherlands – <i>Choizil</i> (skipper).....	60
3.5.3. The Netherlands – <i>Dhow</i>	61
3.6. Poland.....	66
3.7. Spain.....	68
3.7.1. Spain – <i>Izurdia</i>	68
3.7.2. Spain – <i>SPS Patiño</i>	72
3.8. USA.....	76
3.9. Conclusions.....	77
4. JIT Nemesis.....	79
4.1. Introduction.....	79
4.2. Germany.....	80
4.3. The Netherlands.....	86
4.4. Europol.....	89
4.5. Conclusions.....	91
5. Current trends in the field of maritime piracy.....	92
5.1. Introduction.....	92
5.2. The decrease in piracy in the Gulf of Aden.....	93
5.3. The gap between the threat in the Gulf of Guinea and its judicial response.....	96
5.4. Conclusions.....	99
6. Concluding remarks.....	100
7. List of abbreviations.....	102
8. Methodology and acknowledgements.....	104

1. Introductory remarks

The maritime piracy incidents off the coast of Somalia have continued decreasing since the peak reached in 2011. At judicial level, the consequences of the large number of attacks against vessels flying the flag of the Member States or involving other interests of the Member States are still clearly visible. Many national courts have tried criminal cases against Somali pirates, both within and outside the European Union, and several proceedings are ongoing.

To support piracy prosecutors in their important endeavour, the College of Eurojust initiated a maritime piracy project on 18 September 2012, which resulted in the first Maritime Piracy Judicial Monitor (MPJM) being published in September 2013. The present Report was produced following the approval of the College on 8 October 2013 for the continuation of the MPJM. This Report is geared towards all Member States, Norway and the United States of America (USA). In this respect, it differs from the first issue, the scope of which was limited to the nine Member States that participated in the coordination meetings on maritime piracy held at Eurojust. The objective of this Report is to enhance the expertise of European maritime piracy prosecutors and provide them with additional tools for ongoing and future cases. For this purpose, and for ease of reference, the Report is divided into four main chapters, which can easily be read separately.

Chapter 2 contains an overview of the applicable legal framework and bilateral agreements on the transfer of suspected pirates. This chapter can be used as a reference point, in conjunction with the legal framework reported in the MPJM 2013, as it complements the corresponding chapter in the MPJM 2013. The piracy provisions of 19 Member States, as well as Norway and the USA, are presented in the protocol order of the Member States.

Chapter 3 presents judicial decisions that were either rendered in first instance or are a follow-up to cases presented in the MPJM 2013. The analysis highlights practical and legal issues brought forward in the decisions. The human rights aspects discussed in subsections 3.2.3 and 3.5.3 may be of common concern to several countries, as are the challenges regarding minors tried for maritime piracy, as presented in Section 3.4. and subsection 3.7.1. The general challenge of pursuing maritime piracy cases due to the lack of evidence is obvious from the Polish case (Section 3.6), which is also interesting in that it is one of the first judicial decisions reported concerning piracy in West Africa.

Chapter 4 presents a record of the process of establishing and running a JIT in the field of maritime piracy, JIT Nemesis. The chapter is based on interviews with the Dutch and German public prosecutors who initiated and participated in the JIT. Information was also provided by Europol in its capacity as host of the JIT.

Chapter 5 discusses the decrease in the number of piracy incidents in the Gulf of Aden and recognises the shift of piracy activity to West Africa. It highlights the different shape of the phenomenon in the Gulf of Guinea and examines the judicial response to this current threat.

While incorporating information provided by national authorities to the widest extent possible, this Report does not claim to be exhaustive, and is not intended to cover all aspects of the judicial response to the maritime piracy phenomenon. Instead, it focuses on selected issues that were acknowledged by the national authorities as recurring features in maritime piracy cases.

2. Legal framework

2.1. Introduction

An overview of the legal framework applicable to maritime piracy was first introduced in the MPJM 2013, in which the definitions of piracy and the jurisdictional bases to prosecute this crime were presented.¹ The purpose of this chapter is to update and supplement the information available in the MPJM 2013.

Firstly, this chapter presents relevant changes that took place in the international legal framework after the publication of the MPJM 2013. Since no changes have occurred that affect the key international legal instruments – the major international treaties that address maritime piracy – this chapter focuses on the recent United Nations (UN) Security Council (SC) Resolutions renewing the anti-piracy measures authorised by the previous relevant Resolutions with respect to piracy off Somali territory.

Secondly, this chapter discusses bilateral international agreements on transfer of suspected pirates for prosecution concluded with third States in the African region by the European Union, as well as by several countries covered by this Report.

Finally, this chapter provides information on piracy-related national legal provisions of those Member States that were not featured in the MPJM 2013 and, additionally, of two third States (Norway and the USA). Similar to the overview included in the MPJM 2013, the overview in this chapter focuses on the legal provisions establishing universal and extra-territorial jurisdiction with respect to piracy and related offences, and on the legal provisions defining and criminalising the relevant conduct.

The content of this chapter is based mainly on the information received from the national authorities of the Member States, Norway and the USA via their National Desks and Liaison Prosecutors at Eurojust, in response to the questionnaires within the framework of Eurojust cases 920/NMNL-2012 and 1026/COLL-2014. In situations in which any additional information available from open sources was used to supplement the information received from the national authorities, the source of the information is indicated separately. The texts of national legal provisions quoted in section 2.4, with the exception of those concerning Ireland and the USA, are unofficial English translations provided by the National Desks and Liaison Prosecutors at Eurojust. Section 2.4 does not constitute an exhaustive overview of the national law provisions applicable to piracy cases. As is evident from the judicial decisions analysed in Chapter 3 of this Report, other legal provisions may also be applicable, depending on the circumstances of the case.

2.2. Updates in international law

2.2.1. Conventions

The international legal framework governing maritime piracy and armed robbery at sea is shaped by three major international treaties:

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

¹The overview in the MPJM 2013 covered relevant international legislative provisions established by three international treaties regulating piracy: the Geneva Convention on the High Seas (1958), the United Nations Convention on the Law of the Sea (1982), and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), as well as relevant national legislative provisions of nine Member States: Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Sweden and the UK.

All the Member States and Norway are parties to UNCLOS (the USA is not a party to UNCLOS, but is a party to the 1958 Geneva Convention), and all the Member States, Norway and the USA are parties to the SUA Convention.²

The framework established by these Conventions was discussed in the MPJM 2013, with the focus on the definitions of piracy and armed robbery at sea provided by the Conventions, as well as on the law enforcement and adjudicative universal jurisdiction authorised by the Conventions with respect to these crimes. No changes have taken place in the legal framework established by these Conventions since the publication of the MPJM 2013.

2.2.2. UN SC Resolutions

Additionally, the MPJM 2013 discussed the extended jurisdictional basis established by the UN SC Resolutions for the exercise of the law enforcement universal jurisdiction with respect to piracy off the Somali coast. Since the publication of the MPJM 2013, the anti-piracy measures adopted by the UN SC Resolutions and, in particular, the authorisations for the extended jurisdictional basis were renewed with SC Resolution 2125 adopted on 18 November 2013³ and, most recently, SC Resolution 2184 adopted on 12 November 2014.⁴

With Resolution 2184, paragraph 13, the UN SC renewed for a further period of twelve months from the date of the Resolution, i.e. until 12 November 2015, the authorisations granted to the states and regional organisations cooperating with Somali authorities in the fight against piracy and armed robbery at sea off the coast of Somalia, which were first stipulated in SC Resolution 1846 (2008)⁵, paragraph 10:

- (a) Enter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, [...]; and
- (b) Use, within the territorial waters of Somalia, [...], all necessary means to repress acts of piracy and armed robbery at sea;

and in SC Resolution 1851 (2008)⁶, paragraph 6:

- 6. [...] undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea [...].

In a manner similar to the previous UN SC Resolutions adopted on this matter, SC Resolution 2184 emphasizes that the authorisations have been renewed with the prior consent of the Somali authorities and are applicable only with respect to Somalia. The renewed authorisations do not affect any rights or obligations of the states under international law with respect to any other situation, and do not establish any new rule under customary international law (SC Resolution 2184, paragraph 14).

Finally, SC Resolution 2184, paragraph 17, calls upon all states, particularly the states that have a jurisdictional link to committed piracy offences (flag, port and coastal states, states of the nationality of victims or perpetrators of piracy and armed robbery, and other states with relevant jurisdiction under international and national law), to cooperate in the fight against piracy off the coast of Somalia. The SC specifically calls for cooperation in determining jurisdiction with respect to suspected pirates and armed robbers, and in investigation and prosecution of persons responsible for acts of piracy and armed robbery. The SC emphasizes the importance of bringing to justice those key figures of criminal networks involved in piracy who plan, organise, facilitate, or illicitly finance or profit from piracy attacks, and of ensuring that all apprehended pirates are handed over to judicial authorities and are subject to judicial process.

² For the official texts and status of the treaties, see United Nations, Treaty Collection: [Convention on the High Seas](#) (1958), [United Nations Convention on the Law of the Sea](#) (1982), and [Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation](#) (1988) (last visited: 8 April 2015).

³ [Resolution 2125 \(2013\)](#) adopted by the Security Council at its 7061st meeting, on 18 November 2013 (last visited: 8 April 2015).

⁴ [Resolution 2184 \(2014\)](#) adopted by the Security Council at its 7309th meeting, on 12 November 2014 (last visited: 8 April 2015).

⁵ [Resolution 1846 \(2008\)](#) adopted by the Security Council at its 6026th meeting, on 2 December 2008 (last visited: 8 April 2015).

⁶ [Resolution 1851 \(2008\)](#) adopted by the Security Council at its 6046th meeting, on 16 December 2008 (last visited: 8 April 2015).

2.3. Transfer agreements concluded with third States

2.3.1. EU Council Joint Action 2008/851/CFSP

The European Union has concluded bilateral international agreements on the transfer of suspected pirates and armed robbers with four third States in the African region: Kenya, Seychelles, Mauritius and Tanzania. Each of these third States is a party to the SUA Convention⁷ and UNCLOS⁸. The concluded agreements facilitate international cooperation in combatting piracy in the region, particularly by helping to remedy uncertain legal situations that may arise from the unsatisfactory regulation of piracy under the national law of the seizing state and the different interpretations of the provisions of UNCLOS and the SUA Convention.⁹

The agreements refer to the transfer of suspected pirates and armed robbers apprehended in the framework of the military mission, Operation ATALANTA, by the EU-led naval force (EUNAVFOR) established by EU Council Joint Action 2008/851/CFSP of 10 November 2008¹⁰ (the Joint Action), amended by Council Decision 2012/174/CFSP of 23 March 2012¹¹. Article 12 of the Joint Action specifically deals with adjudicative jurisdiction and provides the legal basis for conclusion of agreements between the European Union and third States on the transfer of suspected pirates captured by EUNAVFOR for prosecution in third States.

With respect to the prosecution of suspects apprehended during within Operation ATALANTA, Article 12, paragraph 1 of the Joint Action requires that these persons must be transferred either to the competent authorities of the state of the vessel that took them captive, or, if that state cannot or does not wish to exercise its jurisdiction, to a Member State or third State that wishes to exercise its jurisdiction. Paragraph 2 specifies that, when the suspects are apprehended in territorial waters, internal waters or the archipelagic waters of a state in the region of the activity of Operation ATALANTA, the suspects may be transferred to the competent authorities of the state concerned or, with the consent of that state, to competent authorities of another state. Paragraph 3 of this article indicates that no persons may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights:

Article 12, Transfer of persons arrested and detained with a view to their prosecution
[...]

3. No persons referred to in paragraphs 1 and 2 may be transferred to a third State unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment.

To implement at national level the approach established by Article 12 of the Joint Action and, particularly, to provide a legal basis for the exercise of national jurisdiction or the transfer to another jurisdiction of the suspected

⁷ International Maritime Organization, [Status of Conventions – Excel chart listing ratifications by State](#) (last visited: 8 April 2015).

⁸ United Nations, Treaty Collection, [Status of the United Nations Convention on the Law of the Sea](#) (last visited: 8 April 2015).

⁹ As has been discussed in Chapter 2 of the MJPM 2013, UNCLOS does not impose a duty on states to combat piracy, nor does it require states to criminalise piracy under their national laws; the exercise of universal jurisdiction by the seizing state is optional (Article 105 UNCLOS). This situation gave rise to the strict interpretation that UNCLOS grants the competence to prosecute exclusively to the seizing state, and not to any other state. Other commentators are of the opinion that transfers of pirates for prosecution in other jurisdictions are compatible with UNCLOS, as UNCLOS does not expressly prohibit such transfers. Under the SUA Convention, the situation is different: the Convention establishes the obligation both to criminalise the offences of piracy and armed robbery at sea and to exercise jurisdiction or extradite (Articles 6 and 10 SUA Convention). As a result, some Member States have addressed piracy by criminalising it expressly as a crime; others criminalised certain relevant acts, but did not refer to them as piracy. With regard to the exercise of the jurisdiction, the practice of the Member States also varies: some Member States have prosecuted suspected pirates and armed robbers in a number of cases, when certain conditions were met, while other Member States were more reluctant. See also R. Gosalbo-Bono and S. Boelaert, *The EU's Approach to Combating Piracy at Sea*, in *The Law and Practice of Piracy at Sea – European and International Perspectives*, edited by P. Koutrakos and A. Skordas, Hart Publishing Ltd, 2014, ISBN: 978-1-84946-412-3, pp. 113-118.

¹⁰ EU 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 (last visited: 8 April 2015).

¹¹ Council Decision 2012/174/CFSP of 23 March 2012 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 (last visited: 8 April 2015).

pirates apprehended by the national navy participating in Operation ATALANTA, adoption of a national legislative act may be required in the Member States. For example, in Finland, upon the decision taken by the Government on the country's participation in Operation ATALANTA, the Parliament adopted a specific act for that purpose: the Act on the Handling of Criminal Matters concerning Persons Suspected of Piracy or Armed Robbery in connection with EUNAVFOR Atalanta, the European Union Military Crisis Management Operation (1034/2010) (the Act).

The Act adopted by the Finnish Parliament applies to the procedure to be followed in situations in which, within Operation ATALANTA, a person apprehended as a suspect of piracy or armed robbery is kept on board a vessel under Finnish flag, or in other cases in which Finland is asked whether it will exercise criminal jurisdiction in the matter (Section 1, Scope of application). Section 6 (Decision to abstain from exercising criminal jurisdiction) of the Act stipulates that, if no criminal investigation is initiated by Finland, the relevant provisions of SC Resolution 1816 (2008)¹² and the Joint Action shall apply to the transfer of the suspect for criminal investigation and prosecution. Section 6 specifically indicates that:

[...] an apprehended person kept on board a vessel under Finnish flag shall not be transferred to a state where he or she may be sentenced to death penalty or subjected to torture or any other inhuman treatment or where there is a reason to believe that conditions for fair trial are not met, or to a state from which this person may be transferred to a state referred to above.

The transfer agreements concluded by the European Union with Kenya, Seychelles, Mauritius and Tanzania ensure that the requirements established by paragraph 3 of Article 12 of the Joint Action are met. They define the conditions for the transfer of captured persons and related seized property from EUNAVFOR to the respective country, as well as for the treatment of such persons after their transfer. Each of these agreements explicitly expresses the commitment to treat the persons in question humanely and in accordance with international human rights obligations. The following four sub-sections elaborate the specific details of the agreements concluded by the European Union with these four countries.

2.3.2. Exchange of Letters between the European Union and Kenya

The agreement with Kenya was concluded on 6 March 2009 in the form of an Exchange of Letters between the European Union and the Government of Kenya.¹³ The agreement was applicable from the date of its signing, but was terminated by Kenya from 30 September 2010, due to practical difficulties which the country's criminal justice system was facing with the implementation of the agreement. Currently, transfers to Kenya remain possible only on a case-by-case basis.¹⁴

According to Section 1 (Definitions), the scope of application of the agreement is limited to piracy as defined in Article 101 of UNCLOS. Consequently, the incidents taking place in the territorial waters of Somalia do not fall within the scope of the agreement, notwithstanding the expanded jurisdiction established by the UN SC Resolutions¹⁵ authorising the nations patrolling the Gulf of Aden to enter Somali territory to capture Somali pirates. The definition of 'transferred person' covered by the agreement includes 'any person suspected of intending to commit, committing, or having committed, acts of piracy'; therefore, not only completed piracy attacks but also preparation and attempt fall within the scope of the agreement.

Furthermore, the agreement establishes the following general principles of cooperation (Section 2, General Principles):

¹² [Resolution 1816 on the Situation in Somalia](#) (2008) adopted by the Security Council at its 5902nd meeting, on 2 June 2008 (last visited: 8 April 2015).

¹³ Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by EUNAVFOR, and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer (available from the website of the [European External Action Service - Treaties Office Database](#)) (last visited: 8 April 2015), OJ L 79, 25/03/2009, p. 49.

¹⁴ Gosalbo-Bono and S.Boelaert, *op. cit.*, p. 121, also European Union External Action website [Europa – EEAS – EU Fight against Piracy](#) (last visited: 8 April 2015), also CNN: *Kenya ends agreement with EU to prosecute suspected Somali pirates*, by Lillian Leposo, for CNN, October 4, 2010 (last visited: 8 April 2015).

¹⁵ See MPJM 2013, *Jurisdiction to apprehend pirates under UN Security Council Resolutions (on piracy off Somali territory)*, p. 9.

- Kenya will accept, upon request of EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy and will submit such persons to its competent authorities for investigation and prosecution.
- EUNAVFOR will transfer persons only to competent law enforcement authorities of Kenya.
- The parties will treat the transferred persons humanely and in accordance with international human rights obligations.

With respect to the treatment, prosecution, trial and sentencing of transferred persons (Section 3) and the prohibition of the death penalty (Section 4), the agreement guarantees the following rights of transferred persons:

- To be brought promptly before a judge who will decide without delay on the lawfulness of the detention;
- To be entitled to trial within a reasonable time;
- In the determination of any criminal charge, to be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
- Any transferred person charged with a criminal offence will be presumed innocent until proven guilty according to law.
- In the determination of any criminal charge, every transferred person will be entitled to the minimum guarantees, including the rights: to be informed in a language which he understands; to prepare his defence; to communicate with a counsel; to be tried without undue delay; to be tried in his presence; to defend himself; to have legal assistance assigned where the interests of justice so require, and without payment in a case if he does not have means to pay; to examine evidence against him and to obtain the attendance and examination of witnesses on his behalf; to have the free assistance of an interpreter; not to be compelled to testify against himself or to confess guilt.
- Any transferred person convicted of a crime will be permitted to have his conviction and sentence reviewed by or appealed to a higher tribunal in accordance with the law of Kenya.
- Kenya will not transfer any transferred person to any other state for the purpose of prosecution without prior consent from EUNAVFOR.
- No transferred person will be sentenced to death. Kenya will take steps to ensure that any death sentence is reduced to a sentence of imprisonment.

Since the enactment of the Merchant Shipping Act in 2009, the national law of Kenya comprehensively incorporates the provisions of UNCLOS and the SUA Convention. The Merchant Shipping Act extends the jurisdiction of the Kenyan courts to piracy committed by non-nationals on the high seas, and defines piracy and armed robbery against ships (Section 369), as well as other offences against safety of ships (Section 370) in accordance with the definitions of UNCLOS and the SUA Convention.¹⁶

2.3.3. Exchange of Letters between the European Union and Seychelles

The agreement with Seychelles was concluded on 26 October 2009 in the form of an Exchange of Letters between the European Union and the Republic of Seychelles,¹⁷ applicable as of 30 October 2009. The agreement constitutes a transitional solution, pending the conclusion of a mutually acceptable transfer agreement between the European Union and the Republic of Seychelles on the transfer of pirates and armed robbers to the territory of Seychelles.

The scope of application of the agreement with Seychelles is narrower than the scope of application of the

¹⁶ The relevant provisions of the Merchant Shipping Act of Kenya are available from: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

¹⁷ Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer (available from the website of the [European External Action Service - Treaties Office Database](#)) (last visited: 8 April 2015), OJ L 315, 02/12/2009, p. 37.

agreement with Kenya. While the latter applies to the transfer of any person detained or arrested by EUNAVFOR in the framework of its military operation, the agreement with Seychelles applies, as a general rule, only to those suspected pirates and armed robbers captured in the course of the EUNAVFOR operation in the exclusive economic zone, territorial sea, archipelagic waters and internal waters of the Republic of Seychelles (with the extension of the application to the incidents involving protection of Seychelles' vessels and Seychelles' citizens on board foreign vessels, as well as other circumstances on the high seas, at the discretion of the Republic of the Seychelles).

With respect to the investigation, prosecution, trial and treatment of transferred persons, the agreement with Seychelles ensures the following conditions:

- The European Union provides Seychelles with financial, human resource, material, logistical and infrastructural assistance for the detention, investigation, prosecution, trial, imprisonment and repatriation of the suspected or convicted pirates and armed robbers.
- The Attorney General of the Republic of Seychelles has at least 10 days from the date of transfer to decide on the adequacy of the available evidence in view of prosecution. If he decides that the evidence is not sufficient, EUNAVFOR shall take the full responsibility of transferring the suspect back to his country of origin within 10 days of EUNAVFOR having been notified of such a decision.
- Any transfer of suspected pirates and armed robbers is to be carried out in accordance with the 'Guidance for the Transfer of Suspected pirates, armed robbers and seized property to Seychelles' prepared by the Attorney General of the Republic of Seychelles.
- The agreement contains commitments of the Government of Seychelles with regard to fundamental human rights and the right to due process, similarly to the commitments included in the agreement with Kenya (except the commitment with regard to death penalty, as death penalty is abolished by Seychelles).
- Finally, Seychelles confirm that none of the transferred persons will be further transferred to any other state without prior written consent from EUNAVFOR.

The national criminal law of Seychelles provides an effective basis for prosecution of piracy. Article 65 (Piracy), paragraph 2 of the Penal Code of Seychelles authorises universal jurisdiction with respect to piracy. The definitions of piracy and a pirate ship, which closely follow the definitions provided by UNCLOS, are established by paragraphs 4 and 5 of this article. Attempt, conspiracy, aiding and abetting to commit piracy are criminalised by paragraph 3 of this article.¹⁸

2.3.4. Agreement between the European Union and Mauritius

The agreement with the Republic of Mauritius was concluded on 14 July 2011¹⁹ and was applicable from the date of its signing. The scope of the agreement covers 'transfer of persons suspected of attempting to commit, committing or having committed acts of piracy within the area of operation of EUNAVFOR, on the high seas off the territorial seas of Mauritius, Madagascar, the Comoros Islands, Seychelles and Réunion Island, and detained by EUNAVFOR' (Article 1, Aim). The content of the agreement is modelled after the agreements with Kenya and Seychelles; it lists the conditions with respect to treatment, prosecution and trial of transferred persons, including commitments with regard to fundamental human rights and the right to due process.

On 24 June 2014, Council Decision 2011/640/CFSP of 12 July 2011²⁰ on the conclusion of the Agreement

¹⁸ The relevant provisions of the Criminal Code of Seychelles are available from the website greybookseylii.org (last visited: 8 April 2015).

¹⁹ Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer (available from the website of the European External Action Service - Treaties Office Database) (last visited: 8 April 2015), OJ L 254, 30/09/2011, p. 3.

²⁰ Council Decision 2011/640/CFSP of 12 July 2011 on the signing and conclusion of the Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer (last visited: 8 April 2015).

between the European Union and Mauritius was annulled by judgment of the Court of Justice of the European Union in case C-658/11, *Parliament v. Council*,²¹ on the grounds that the Council did not comply with the requirement of Article 218(10) TFEU in the process of adoption of this Decision. Article 218(10) TFEU provides that the Parliament 'shall be immediately and fully informed at all stages of the procedure' for negotiating and concluding international agreements envisaged in that article. As to the consequence of the infringement of Article 218(10) TFEU, the Court noted that the procedural rule laid down in Article 218(10) TFEU constitutes 'an essential procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure thereby vitiated' (paragraph 80 of the judgment).

The Court ordered the effects of the annulled Council Decision to remain in force, as 'annulment of the contested decision without maintenance of its effects would be liable to hamper the conduct of operations carried out on the basis of the EU-Mauritius Agreement and, in particular, the full effectiveness of the prosecutions and trials of suspected pirates arrested by EUNAVFOR' (paragraph 90 of the judgment). Thus, the annulment of the agreement has no impact on the prosecutions and trials ongoing before Mauritian courts on the basis of transfers of suspected pirates to Mauritius that took place before the Court's ruling.

The national law of Mauritius provides for regulation of piracy and related offences through the Piracy and Maritime Violence Act²² adopted in 2011. The Act criminalises piracy and other unlawful acts, including ship hijacking and acts endangering safe navigation, in accordance with the definitions of UNCLOS and the SUA Convention, and provides a comprehensive framework for prosecution of persons suspected of having committed piracy and related offences who are transferred to Mauritius on the basis of the agreements with the European Union and other states.

2.3.5. Agreement between the European Union and Tanzania

The most recent agreement was concluded with the United Republic of Tanzania,²³ signed on 1 April 2014 and applicable from the date of its signing. The agreement regulates 'the transfer from EUNAVFOR to Tanzania of persons suspected of intending to commit, committing or having committed acts of piracy and detained by EUNAVFOR, and associated property seized by EUNAVFOR, and for their treatment after such transfer' (Article 1, Aim). Therefore, preparation and attempt of piracy, as well as a completed piracy attack, are covered by the scope of the agreement. Piracy is defined with reference to Article 101 of UNCLOS (Article 2, Definitions), with the consequence that piracy incidents taking place in the territorial waters of Somalia (or any other coastal state) are excluded from the scope of this agreement.

As with the agreement with Kenya, the aim of this agreement (Article 2, Aim) is defined broadly to include the transfer of any person detained by EUNAVFOR in the framework of its military operation, without any limitations related to the location of the piracy incident. However, Tanzania has the right to accept the proposed transfers 'on a case by case basis' and only upon the decision by the Tanzanian competent law enforcement authority that 'there are reasonable prospects of securing a conviction' (Article 3, General principles). The list of the general principles of cooperation stipulated in Article 3 is as follows:

- Tanzania may accept, upon the request of EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy and submit such persons to its competent authorities for investigation and prosecution. Agreement on acceptance of a proposed handover will be made on a case by case basis by Tanzania, taking into account all relevant circumstances including the location of the incident.

²¹ Judgment of the Court (Grand Chamber) of 24 June 2014 in Case C-658/11: Action for annulment under Article 263 TFEU brought on 21 December 2011 by European Parliament v. Council of the European Union (last visited: 8 April 2015).

²² The Piracy and Maritime Violence Act of Mauritius is available from the website FAOLEX (Legal Office of the Food and Agriculture Organization of the United Nations), faolex.fao.org (last visited: 8 April 2015).

²³ Council Decision 2014/198/CFSP of 10 March 2014 on the signing and conclusion of the Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the United Republic of Tanzania (available from the website eur-lex.europa.eu) (last visited: 8 April 2015), OJ L 108, 11.4.2014, pp. 3-8.

- EUNAVFOR shall transfer persons only to competent law enforcement authorities of Tanzania.
- The Parties shall treat the transferred persons humanely and in accordance with international human rights obligations.
- Transfers shall not be carried out before the competent law enforcement authorities of Tanzania decide on the basis of evidence forwarded by EUNAVFOR that there are reasonable prospects of securing a conviction of persons detained by EUNAVFOR.

Article 4 (Treatment, prosecution and trial of transferred persons) establishes the commitments of the parties with respect to fundamental human rights and the right to due process in a manner similar to the commitments included in the agreements with other third States (Kenya, Seychelles and Mauritius). Paragraph 8 of this article stipulates the right of Tanzania to transfer convicted persons to a third State, which complies with human rights standards, with a view to serving their sentences in that third State. Such transfer may be performed after consultation with the European Union; in case of serious concerns about the human rights situation in that third State, no transfer shall take place before a satisfactory solution is found through consultations between the parties. Article 5 (Penalty) requires that no person transferred under this agreement shall be tried for an offence that has a maximum punishment that is more severe than a sentence of life imprisonment.

The national law of Tanzania defines and criminalises piracy through the provisions in the Penal Code and the Merchant Shipping Act of 2003. The Penal Code, Section 66²⁴, applies solely to acts committed either against a Tanzanian ship or by a Tanzanian national; it defines piracy as any unlawful act of violence against a ship or against any person or property on board that ship, or as voluntarily participation in the operation of a ship intended for the purpose of performing such an act. The Merchant Shipping Act of 2003 provides the definition of piracy (Section 341) and other unlawful acts including ship hijacking and acts endangering safe navigation (Article 342)²⁵ in accordance with the relevant provisions of UNCLOS and the SUA Convention.

2.3.6. Other transfer or extradition agreements with third States

Among the countries covered by this Report, only the UK, Norway and the USA have concluded bilateral Memoranda of Understanding (MoU) with third States on transfer of suspected pirates.

The UK has bilateral MoUs with Seychelles, Mauritius and Tanzania (in the past, also with Kenya, but the MoU was suspended by Kenya in 2010) allowing the transfer of suspected pirates for prosecution in these countries. The UK can also rely upon the agreements concluded by the European Union, although this assurance is usually not necessary in the presence of a bilateral MoU. To date, only the MoU with Seychelles and the MoU with Kenya have been used to transfer suspected pirates (all the transferred suspects have been convicted and sentenced to imprisonment). To assist with piracy prosecutions in East Africa, the UK has seconded a prosecutor to the Office of the Attorney General of Seychelles (the secondment has been in place for more than three years); additionally, UK prosecutors are seconded to UK Foreign and Commonwealth posts in Kenya and Ethiopia.

Norway has an MoU in place with the authorities of Seychelles on the transfer of pirates, under which suspects arrested by the Norwegian Navy may be transferred to Seychelles for prosecution.

The USA has an MoU on transfer and prosecution of pirates with Seychelles (in the past, also with Kenya, but it has been terminated by Kenya in 2010). The MoU regulates 'the conditions of transfer of suspected pirates and seized property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea'. The scope of application of the MoU covers acts of piracy as defined by Article 101 of UNCLOS (Section 2, Definitions). Section 3, paragraph 5 of the MoU contains a provision confirming the commitment of the parties to treat transferred persons

²⁴The Penal Code of the United Republic of Tanzania is available from: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

²⁵The Merchant Shipping Act of Tanzania is available from the website of FAOLEX (Legal Office of the Food and Agriculture Organization of the United Nations), [faolex.fao.org](#) (last visited: 8 April 2015).

humanely and in accordance with their obligations under applicable international human rights law.

Finally, Portugal has not concluded any specific transfer agreements or another instruments of judicial cooperation with a third State with respect to suspected pirates. However, Portugal is a party to the Convention on Extradition between Member States of the Community of Portuguese Speaking Countries, signed in Praia on 23 November 2005. Article 3 of the Convention refers specifically to maritime piracy as one of the offences with respect to which extradition under the Convention cannot be refused on the grounds that the committed crime is of political nature, as long as all other prerequisites for extradition are fulfilled (Article 3, paragraphs 1b and 2b).

2.4. Maritime piracy legislation in Member States and selected third States

2.4.1. Introduction

The overview of the relevant national legal provisions presented in this section builds on the similar overview introduced in the MPJM 2013, in which national laws of nine Member States that contributed to the MJPM 2013 were presented (Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Sweden and the UK). The overview focused on the definitions of offences that constitute maritime piracy, and on universal jurisdiction and different types of extra-territorial jurisdiction applied by these nine Member States with regard to this crime. The information provided by the national authorities of these Member States in response to the questionnaire of July 2014 within the framework of Eurojust case 1026/COLL-2014 indicates that, in these Member States, no relevant legislative changes took place since the publication of the MPJM 2013.

Therefore, this section focuses solely on the Member States that were not covered in the MPJM 2013 and, additionally, on two third States (Norway and the USA). For the purpose of this overview, the provisions establishing universal jurisdiction and extra-territorial jurisdiction have been considered. The term 'extra-territorial jurisdiction' has been used to refer to the following types of national criminal jurisdictions acknowledged under international law:

- flag state jurisdiction,
- active nationality (or active personality) jurisdiction,
- passive nationality (or passive personality) jurisdiction (i.e. jurisdiction based on the nationality of the victim), or
- protective jurisdiction (i.e. jurisdiction on the basis of the effect of the crime on the interests of the state).

The term 'universal jurisdiction' has been used to refer to jurisdiction assumed by states regardless of the place where the act is committed, the nationality of the perpetrator, and the nationality of the victim.

The content of this section is based mainly on the information received from the national authorities of the Member States, Norway and the USA in response to the questionnaires within the framework of Eurojust cases 920/NMNL-2012 and 1026/COLL-2014. In cases in which any additional information available from open sources was used to supplement the information received from the national authorities, the source of the information is indicated separately. Every effort was made to ensure the accuracy of the information contained in the overview, particularly the information obtained from open sources. In those cases, the information was verified by the respective National Desk or Liaison Prosecutor at Eurojust. However, the presented information does not constitute an exhaustive overview of all national law provisions that may be applicable to piracy cases.

2.4.2. Bulgaria

Description of criminal acts constituting piracy

Bulgarian criminal law contains no reference to maritime piracy as a specific offence. Depending on the circumstances of the case, the following articles of the Criminal Code may apply: Article 142a (unlawful deprivation of another person of liberty), Article 143 (coercion, i.e. compelling another person to do, to omit or to suffer something contrary to his will, by using for that purpose force, threats or abuse of authority), Article 143a (hostage-taking), Article 144 (unlawful threat), and Articles 198 and 199 (robbery).

General provisions on preparation and attempt are contained in Articles 17, 18 and 19 of the Criminal Code. Attempt to commit the above-mentioned offences is criminalised by virtue of Article 18. Preparation, as a general rule, is punishable only if specifically provided by law. Preparation to commit the above-mentioned offences is not punishable, except the preparation to commit robbery, which is criminalised by Article 200 of the Criminal Code.

Jurisdiction over acts of piracy

Article 4, paragraph 1, of the Criminal Code of Bulgaria establishes extra-territorial jurisdiction on the basis of the principle of nationality. Article 5 provides for extra-territorial jurisdiction on the basis of the protective principle and the principle of passive personality. In addition, Article 6 of the Criminal Code authorises national courts to exercise universal jurisdiction, particularly, according to paragraph 2 of this article, when that is stipulated in an international agreement to which Bulgaria is a party.

Articles 4, 5 and 6 of the Bulgarian Criminal Code read as follows:

Article 4

- (1) The Criminal Code shall apply to the Bulgarian citizens also for crimes committed by them abroad.

Article 5

The Criminal Code shall also apply to foreign citizens who have committed crimes of general nature abroad, whereby the interests of the Republic of Bulgaria or of Bulgarian citizens have been affected.

Article 6

- (1) The Criminal Code shall also apply to foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected.
- (2) The Criminal Code shall also apply to other crimes committed by foreign citizens abroad, where this is stipulated in an international agreement, to which the Republic of Bulgaria is a party.

2.4.3. Czech Republic

Description of criminal acts constituting piracy

The offence of maritime piracy is not expressly mentioned in the national criminal law of the Czech Republic. Section 290 of the Czech Criminal Code criminalises acts constituting elements of maritime piracy by providing for criminal liability of anyone who, on board a civil vessel, with intent to acquire or exercise control over such vessel, uses violence or a threat of violence against another person, threatens another person with death, bodily harm or extensive damage, or exploits the vulnerability of another person. The preparation of such acts is expressly criminalised by paragraph 3 of this section.

Section 290 of the Czech Criminal Code reads as follows:

Section 290, Gaining Control over an Aircraft, Civilian Vessels and Fixed Platform

- (1) Whoever on board of an aircraft, civilian vessel, or a fixed platform on a continental shelf with the intention to gain or exercise control over the aircraft, civilian vessel, or fixed platform
 - a) uses violence against other persons or a threat of imminent violence,
 - b) threatens another person with death, bodily harm, or causing extensive damage, or
 - c) exploits vulnerability of another person,
 shall be sentenced to imprisonment for eight to fifteen years or to confiscation of property.
- (2) An offender shall be sentenced to imprisonment for twelve to twenty years or to an exceptional sentence of imprisonment, eventually in parallel to this sentence also to confiscation of property, if he/she
 - a) causes grievous bodily harm to at least two persons or death by the act referred to in Sub-section (1),
 - b) commits such an act during a state of national emergency or state of war.
- (3) Preparation is criminal.

Furthermore, depending on the circumstances of the case, the Czech Republic may rely upon Section 311 of the Criminal Code defining a terrorist attack. Paragraph 1, sub-paragraphs (b) and (e) of this section prohibit, *inter alia*, hostage-taking, kidnapping, hijacking of a ship or exercising control over it resulting in jeopardising life or health of people or security of the ship or exposing property to risk of extensive damage. Paragraph 4 of this section expressly criminalises the preparation of this offence.

Attempt to commit acts stipulated by Sections 290 and 311 of the Criminal Code is criminalised by virtue of Section 21 of the Criminal Code, which is the general provision of attempt.

Jurisdiction over acts of piracy

The Criminal Code of the Czech Republic provides for extra-territorial jurisdiction on the basis of the principle of the flag state (Section 5), the principle of active personality (Section 6), and the principle of passive personality (if an act is committed abroad at the place that is not subject to any other jurisdiction) (Section 7, paragraph 2).

The application of Czech law to acts committed abroad by foreign nationals is subject to the subsidiary principle of universality, which authorises the application of Czech law, if the committed acts are also punishable under the law of the territory in which they were committed and if the offender is apprehended in the Czech Republic and is not extradited (Section 8, paragraph 1). Furthermore, Czech law is applicable to acts committed abroad by a foreign national or stateless person for the benefit of a legal entity or an entrepreneur registered in the Czech Republic (Section 8, paragraph 2).

Section 9 of the Criminal Code incorporates international treaty obligations of the Czech Republic into domestic law by authorising national courts to exercise jurisdiction when stipulated by an international agreement to which the Czech Republic is a party.

The above-mentioned sections of the Czech Criminal Code read as follows:

Section 5, Principle of the Flag

The criminality of an act committed outside the territory of the Czech Republic on board of a ship or any other vessel or an aircraft or other means of air transport registered in the Czech Republic shall also be assessed in accordance to the law of the Czech Republic. The place of commission of such an act shall be assessed according to Section 4(2) and (3).²⁶

²⁶Section 4, paragraphs 2 and 3, of the Czech Criminal Code read as follows:

- (2) A criminal offence shall be considered as committed in the territory of the Czech Republic
 - a) if an offender committed the act here, either entirely or in part, even though the violation or endangering of an interest protected by the criminal law occurred or was supposed to occur, either entirely or in part abroad, or
 - b) if an offender violated or endangered an interest protected by criminal law or if such a consequence was supposed to occur, even partially, within the territory, even though the act was committed abroad.
- (3) Participation is committed in the territory of the Czech Republic,

Section 6, Principle of Personality

The law of the Czech Republic shall also apply to assessment of criminality of an act committed abroad by a citizen of the Czech Republic or a person with no nationality, who has been granted a permanent residence in its territory.

Section 7, Principle of Protection and Principle of Universality

(1) [...].

(2) The law of the Czech Republic shall also apply to assessment of criminality of an act committed abroad against a Czech national or a person without a nationality, who has been granted permanent residence in the territory of the Czech Republic, if the act is criminal in the place of its commission, or if the place of its commission is not subject to any criminal jurisdiction.

Section 8, Subsidiary Principle of Universality

(1) The law of the Czech Republic shall also apply to assessment of criminality of an act committed abroad by a foreign national or a person with no nationality, who has not been granted permanent residence in the territory of the Czech Republic, if

- a) the act is criminal also under the law effective in the territory of its commission, and
- b) the offender was apprehended in the territory of the Czech Republic and was not extradited or transferred to another state or to another authority entitled to criminal prosecution.

(2) The Czech law shall be applied to determine the liability to punishment for an act committed abroad by a foreign national or a stateless person with no permanent residence permit on the territory of the Czech Republic, if the offence was committed in the benefit of a legal person with a seat or its structural component on the territory of the Czech Republic; or in the benefit of a natural person who is an entrepreneur and has enterprise, its structural component or its registered office on the territory of the Czech Republic.

(3) However, such offender shall not be sentenced to a more severe punishment than that stipulated under the law of the State on whose territory the crime was committed.

Section 9, Jurisdiction Stipulated by International Treaty

(1) Criminality of an act shall be assessed according to the law of the Czech Republic also if an international treaty incorporated into the system of law (hereinafter referred to as 'international treaty') stipulates so.

(2) The provisions of Sections 4 to 8 shall not apply if it is not admissible according to an international treaty.

2.4.4. Estonia

Description of criminal acts constituting piracy

Article 110 of the Estonian Penal Code defines maritime piracy as a separate offence that includes such acts as attacking, seizure or destruction of a ship, attacking or detention of persons, or seizure or destruction of property on board the ship by the use of violence. To qualify as a piracy offence under this article, the acts must be committed on the high seas or in a territory outside the jurisdiction of any state.

Article (§) 110 of the Estonian Penal Code reads as follows:

Article (§) 110, Piracy

(1) The attack, seizure or destruction of a ship on the high seas or in a territory outside the jurisdiction of any state, or attacking or detention of persons on board such ship, or seizure or destruction of property on board such ship by using violence, is punishable by 2 to 10 years' imprisonment.

(2) The same act, if it causes:

- 1) the death of a person;

-
- a) the act of the offender has been committed within its territory; which is determined analogically according to Sub-section (2), or
 - b) if the accomplice of the act committed abroad partially acted within its territory.

- 2) major damage; or
- 3) a danger to the life and health of a large number of people, is punishable by 6 to 20 years' imprisonment.

Attempt to commit piracy is not specifically criminalised. The general criminal law provision on attempt (Article 25 of the Penal Code) applies. By virtue of paragraph 2 of this article, an attempt is deemed to have commenced at the moment when the person directly commences the commission of the offence.

Preparatory acts to commit piracy are not criminalised, as preparation for a criminal act is punishable only when the preparatory act comprises the necessary elements of an offence foreseen in the Estonian Penal Code.

Jurisdiction over acts of piracy

The Estonian Penal Code authorises the exercise of universal jurisdiction with respect to piracy by virtue of the wording of Article 110, paragraph 1, which stipulates that Article 110 applies to acts committed 'on the high seas or in a territory outside the jurisdiction of any state'.

In addition, the Estonian Penal Code allows the exercise of extra-territorial jurisdiction on the basis of the flag state principle (Article 6, paragraph 2), the principles of active nationality and passive nationality (Article 7), and on the basis of a binding international agreement, when the applicability of Estonian penal law to an act committed abroad arises from the provisions of that agreement (Article 8).

The relevant articles of the Estonian Penal Code read as follows:

§ 6. Territorial applicability of penal law

(1) [...].

(2) The penal law of Estonia applies to acts committed on board of or against ships or aircraft registered in Estonia, regardless of the location of the ship or aircraft at the time of commission of the offence or the penal law of the country where the offence is committed.

§ 7. Applicability of penal law by reason of person concerned

The penal law of Estonia applies to an act committed outside the territory of Estonia if such act constitutes a criminal offence pursuant to the penal law of Estonia and is punishable at the place of commission of the act, or if no penal law is applicable at the place of commission of the act and if:

- 1) the act is committed against a citizen of Estonia or a legal person registered in Estonia;
- 2) the offender is a citizen of Estonia at the time of commission of the act or becomes a citizen of Estonia after the commission of the act, or if the offender is an alien who has been detained in Estonia and is not extradited.

[...].

§ 8. Applicability of penal law to acts against internationally protected legal rights

Regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to an act committed outside the territory of Estonia if the punishability of the act arises from an international agreement binding on Estonia.

2.4.5. Ireland

Description of criminal acts constituting piracy

Irish domestic law does not contain any specific reference to piracy other than the reference contained in the Piracy Act of 1837, which created the offence of piracy punishable by death. The Act still remains in force and the offence still exists, but is no longer punishable by death (the death penalty was abolished in 1964).

Section II of this Act criminalises piracy as follows:

Punishment of Piracy when Murder is attempted²⁷

II. And be it enacted, That from and after the Commencement of this Act whosoever, with Intent to commit or at the Time of or immediately before or immediately after committing the Crime of Piracy in respect of any Ship or Vessel, shall assault, with Intent to murder, any Person being on board of or belonging to such Ship or Vessel, or shall stab, cut, or wound any such Person, or unlawfully do any Act by which the Life of such Person may be endangered, shall be guilty of Felony, and being convicted thereof shall suffer Death as a Felon.

In addition to the above-mentioned Piracy Act of 1837, the acts related to piracy and armed robbery at sea may be covered by a range of other common law offences and statutory offences (theft and fraud offences, criminal damage, false imprisonment, etc.).

Jurisdiction over acts of piracy

In 1996, Ireland ratified UNCLOS.²⁸ In 2001, an attempt was made to incorporate the piracy provisions of UNCLOS into Irish domestic law, when the Law of the Sea (Repression of Piracy) Bill was introduced in the Irish Parliament; however, in 2005, the proposed bill was ultimately withdrawn.²⁹

In the absence of domestic statutory provisions authorising universal jurisdiction with respect to piracy, the piracy provisions that are laid down in UNCLOS and that are part of customary international law on piracy may be deemed as constituting a part of Irish domestic law by virtue of Article 29(3) of the Irish Constitution:

International Relations, Article 29³⁰

[...].

3. Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States.

[...].

2.4.6. Greece

Description of criminal acts constituting piracy

Article 215 of the Greek Code of Public Maritime Law (Act No 187/1973) criminalises piracy and provides the definition of piracy and a pirate ship:

Article 215, Piracy³¹

1. Piracy is committed by anyone aboard a ship who, by using corporal violence or threat thereof against persons, commits acts of depredation against another ship on the high seas with the intention to take possession of objects so obtained.
2. A ship is considered a pirate ship if it is intended by the persons in control thereof to be used for the purpose of committing the acts referred in the previous paragraph or has been used for this purpose and remains under the control of the pirates.
3. Acts of piracy referred to in paragraph 1 are punishable with a sentence of imprisonment; the same penalty is imposed on the captain and the officers in control of the pirate ship. The sentence of up to 10 years of imprisonment is imposed on the members of the crew of the pirate ship who were aware of its aims.

The attempt to commit piracy is not specifically criminalised; therefore, the general provision defining an

²⁷ Quoted as available from the website irishstatutebook.ie (last visited: 8 April 2015).

²⁸ United Nations, Treaty Collection, [Status of the United Nations Convention on the Law of the Sea](#) (last visited: 8 April 2015).

²⁹ Houses of the Oireachtas – Legislative Observatory: Bills 1997-2015 – [Law of the Sea \(Repression of Piracy\) Bill 2001](#).

³⁰ Quoted as available from the website irishstatutebook.ie (last visited: 8 April 2015).

³¹ Quoted as available from: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

attempt and providing for the penalty for an attempt (Article 42, paragraph 1, of the Greek Penal Code) is applicable.

Jurisdiction over acts of piracy³²

Article 8 of the Greek Penal Code stipulates piracy as a crime covered by universal jurisdiction. By virtue of this article, Greek criminal law applies to acts committed abroad by nationals and non-nationals, regardless of the laws of the location of their commission. Additionally, Article 8 establishes a basis for exercising universal and extra-territorial jurisdiction with respect to 'any other crime covered by special provisions or international conventions that are signed and ratified by the Greek state, providing for the application of the penal laws of Greece'.

In addition, the Greek Penal Code authorises extra-territorial jurisdiction in respect of acts committed on a Greek vessel (Article 5, paragraph 2) and in respect of acts committed by a Greek national or against a Greek national, if the act is punishable according to the laws of the state of its commission or has been committed in a failed state (Articles 6 and 7).

The relevant articles of the Penal Code read as follows:

Article 5, Crimes committed within the Greek territory

1. [...].
2. Greek vessels and aircrafts are considered part of the Greek territory wherever they are situated, unless they are subjected to foreign law in accordance with international law.

Article 6, Crimes committed by Greeks abroad

1. Greek penal laws also apply on any act that they regard as a felony or misdemeanour, which has been committed abroad by a Greek, if such act is regarded as a punishable act by the laws of the country where it has been committed, or if it has been committed in a country under constitutional turmoil.
2. Prosecution may be turned against an alien who was Greek at the time when the act was committed. Moreover, prosecution may also be turned against a person who acquired the Greek nationality after the act was committed.
[...].

Article 7, Crimes committed by aliens abroad

1. Greek penal laws are also applied to an alien for an act committed abroad that is regarded by Greek penal laws as a felony or misdemeanour, if this act was committed against a Greek citizen and it is also considered as a punishable act according to the laws of the country where it was committed or if it was committed in a country under constitutional turmoil.
[...].

Article 8, Crimes committed abroad that are always punishable according to the Greek laws

Greek penal laws apply to Greeks and aliens, irrespective of the laws of the place where the crime was committed, for the following acts committed abroad:

[...];

(f) Piracy;

[...].

- (k) Any other crime covered by special provisions or international conventions that are signed and ratified by the Greek state, providing for the application of the penal laws of Greece.

³² Additional source used to supplement the information provided by the Greek authorities in their response to the Eurojust questionnaire: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

2.4.7. Croatia

Description of criminal acts constituting piracy

The criminal law of Croatia does not provide for maritime piracy as a specific offence. The unlawful acts constituting an attack on a vessel at sea or its cargo are covered by Article 223 of the Criminal Code of Croatia:

Article 223, Attack on an Aircraft, Vessel or Immovable Platform

- 1) Whoever uses force or serious threats with the aim of assuming control over a civil aircraft in flight, a civil vessel at sea or an immovable platform shall be sentenced to imprisonment for a term of between three and fifteen years.
- 2) Whoever uses force or serious threats in a civil aircraft in flight, on a civil vessel at sea or an immovable platform or plants on a civil aircraft, vessel or immovable platform a device or substances which can destroy or damage it, if such an act can endanger the safety of flight or voyage, shall be sentenced to imprisonment for a term of between one and ten years.
- 3) Whoever with the aim of destroying or damaging a civil aircraft in flight, a civil vessel at sea or its cargo, or an immovable platform uses firearms or causes an explosion or starts a fire shall be sentenced to imprisonment for a term of between three and fifteen years.
- 4) [...].
- 5) If as a result of the criminal offence referred to in paragraph 1, 2, 3 or 4 of this Article one or more persons die or an aircraft or vessel is destroyed or other considerable damage to property is caused, the perpetrator shall be sentenced to imprisonment for a term of at least five years.
- 6) If in committing the criminal offence referred to in paragraph 1, 2, 3 or 4 of this Article a perpetrator intentionally kills one or more persons, he/she shall be sentenced to imprisonment for a term of at least ten years or to long-term imprisonment.
- 7) [...].

The attempt to commit the above-mentioned acts is criminalised by virtue of Article 34 of the Croatian Criminal Code, which is the general provision on attempt. It stipulates that an attempt is punishable with respect to those criminal offences for which a sentence of imprisonment of five years, or a more severe punishment, may be imposed.

Jurisdiction over acts of piracy

The Croatian Criminal Code authorises extra-territorial jurisdiction based on the principles of active nationality, passive nationality and universality.

Article 14 of the Criminal Code provides that criminal law of the Republic of Croatia is applicable to Croatian citizens or persons with permanent residence in Croatia who commit a criminal offence abroad (the principle of active nationality). Article 15 of the Criminal Code provides that the criminal law of the Republic of Croatia is applicable to an alien who, outside the territory of Croatia, commits a criminal offence against a Croatian citizen, a person with a permanent residence in Croatia, or a legal person registered in Croatia (the principle of passive nationality). The active nationality- or passive nationality-based jurisdiction is applicable if the committed offence is also punishable under the law of the country of its commission. However, the requirement of double criminality does not apply with respect to criminal offences provided for by the international treaties to which the Republic of Croatia is a party.

In addition, Article 16 of the Criminal Code provides for jurisdiction based on the principle of universality, according to which the criminal law of the Republic of Croatia is applicable to anyone who commits a criminal offence, including an offence committed outside the territory of the Republic of Croatia, which the Republic of Croatia is required to punish under an international treaty.

2.4.8. Cyprus³³

Description of criminal acts constituting piracy

Section 69 of the Criminal Code of Cyprus (Cap. 154 of the Laws of Cyprus as amended by Law 15(I)/1999) establishes the offence of piracy as defined by Article 101 of UNCLOS:

69 Any person who performs any act which constitutes piracy is guilty of an offence and is liable to imprisonment for life.

For the purposes of this section the following acts constitute 'piracy':

- (a) any illegal act 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 in the international airspace against another aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place within or outside the jurisdiction of the Republic of Cyprus;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts rendering it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in paragraphs (a) or (b) above.

Acts of armed robbery at sea, which do not fall within the scope of the crime of piracy provided by Section 69, may be covered by Section 282 (Definition of robbery) and Section 283 (Punishment of robbery) of the Criminal Code. Other relevant offences may include Section 80 (Carrying arms to terrorise), Section 285 (Assault with intent to steal), Section 286 (Armed entering [sic] upon the property of another, with intent to steal), and Section 290 (Demanding property with menaces [sic], with intent to steal) of the Criminal Code.

The attempt to commit acts of piracy as referred to in Section 69 of the Criminal Code of Cyprus, as well as the inciting, facilitating, concealment, conspiring and assisting with the aim of committing these acts, is expressly criminalised by Section 90, paragraph 1, of the Protection of Cyprus Ships against Acts of Piracy and Other Unlawful Acts Law of 2012 (Law 77(I)/2012):

90. (1) Subject to the provisions of section 69 of the Criminal Code, Cap. 154 and Laws of 1962 to 2011, a person:
- (a) committing or attempting to commit an unlawful act against a ship and/or the persons on board a ship and/or the cargo transported; or
 - (b) inciting and/or facilitating the committing and/or the concealment of the committing of any of the acts referred to in paragraph (a) of this subsection; and/or
 - (c) conspiring and/or cooperating and/or assisting with the aim of committing and/or concealing the committing of any of the acts referred to in paragraphs (a) and/or (b) of this subsection; shall be guilty of an offence and shall be liable on conviction to imprisonment for life.

The offence of attempted robbery is specifically provided by Section 284 of the Criminal Code. Conspiracy to commit such acts is covered by Section 371 of the Criminal Code, which is the general provision on conspiracy. Conspiracy to commit a felony itself constitutes a felony punishable by imprisonment of up to seven years. Aiding and abetting to commit acts of robbery are covered by the general provision on aiding and abetting (Section 20 of the Criminal Code).

³³In the absence of a response by the national authorities of Cyprus to the questionnaires within the framework of Eurojust cases 920/NMNL-2012 and 1026/COLL-2014, the section has been drafted on the basis of open source information and has been verified with the Cyprus National Desk. The open sources: Department of Merchant Shipping, [Downloads – Miscellaneous – Legislation – The Protection of Cyprus Ships Against Acts of Piracy and Other Unlawful Acts Law of 2012 \(Law 77\(I\)/2012\)](#) (last visited: 8 April 2015) and Information submitted by the Republic of Cyprus on piracy national legislation (submitted pursuant to IMO Circular letter No. 2933 of 23 December 2008), United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

Jurisdiction over acts of piracy

Section 5 of the Criminal Code of Cyprus stipulates different bases for establishing criminal jurisdiction of the courts of Cyprus. Under the provisions of Section 5(1)(e)(ii), the courts of Cyprus have universal jurisdiction over the offence of piracy ('committed by anyone in any foreign state', the term 'foreign state' including any vessel registered in any state).

In addition, Section 91 of the Protection of Cyprus Ships against Acts of Piracy and Other Unlawful Acts Law of 2012 (Law 77(I)/2012) establishes the jurisdiction of the courts of Cyprus with respect to criminal offences committed against ships in the territorial waters of another state:

91. (1) Subject to the provisions of section 20 of the Courts Laws and with the proviso of subsection (2) of this section, the Courts of the Republic have jurisdiction over all criminal offences committed in violation of the provisions of this Law or of the regulatory or administrative acts issued thereunder.
- (2) In relation to criminal offences committed against ships under section 90(1) of this Law, the Courts of the Republic have jurisdiction in the following cases in relation to such offences committed in the territorial sea of another State:
 - (a) when the State in the territorial sea of which the offence was committed is unable to prosecute the offence due to inadequate or non-existent relevant legislation;
 - (b) when the State in the territorial sea of which the offence was committed grant[s] to the Republic jurisdiction over the offence;
 - (c) when the legislation of the State in the territorial sea of which the offence was committed is in conflict with the provisions of the legislation of the Republic in relation to the protection of human rights.

Other jurisdictional links include the nationality of the victim, the nationality of the offender, the flag of the attacked ship, the flag of the capturing warship/other Government-authorised ship, the offender being found on the territory of the Republic of Cyprus, and the offender being captured on the high seas or in the territorial waters of the Republic of Cyprus. Although these jurisdictional links are not strictly relevant to the establishment of jurisdiction of the courts of Cyprus over the offence of piracy (because of the availability of universal jurisdiction), they may be of relevance with regard to the establishment of jurisdiction over the acts that constitute armed robbery at sea, as well as with regard to the exercise of the Attorney General's discretion to decide whether to proceed with a prosecution before the courts of Cyprus.

2.4.9. Latvia

Description of criminal acts constituting piracy³⁴

Latvian criminal law does not contain any reference to maritime piracy as a specific offence. Some elements of an act of piracy are covered by Section 268 of the Criminal Law of the Republic of Latvia. Paragraph 1 of this section criminalises illegal seizure of a water transport vehicle; paragraphs 2 and 3 of this section criminalise the commission of the same act with such aggravating circumstances as the commission of the act by an organised group, with involvement of violence, a threat of violence, an accident or another serious consequence, or the death of one or more human beings.

Section 268, Seizure of an air or water transport vehicle³⁵

- (1) For a person who commits seizing an air or water transport vehicle, except vehicles of small dimensions, on the ground, in water or during a flight, the applicable punishment is deprivation of liberty for a term not exceeding seven years, with or without probationary supervision for a term not exceeding three years.
- (2) For a person who commits the same acts, if they have been committed by a group of persons

³⁴ Additional source used: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

³⁵ Quoted as available from the website [likumi.lv: Legislation of the Republic of Latvia, the Criminal Law \(in the Latvian language\)](#) (last visited: 8 April 2015).

pursuant to prior agreement or involve violence or threats of violence, or an accident or other serious consequences have been caused thereby, the applicable punishment is deprivation of liberty for a term of not less than two and not exceeding twelve years, with or without probationary supervision for a term not exceeding three years.

- (3) For a person who commits acts provided for in Paragraph one or two of this Section, if the death of two or more human being is caused thereby, the applicable punishment is deprivation of liberty for a term of not less than three and not exceeding fifteen years, with probationary supervision for a term not exceeding three years.

Additionally, depending on the circumstances of the case, Section 88 (terrorism) of the Criminal Law of the Republic of Latvia may be applicable. Paragraph 1 of this section criminalises, *inter alia*, kidnapping, taking of hostages and hijacking of means of sea transport. Other possibly relevant provisions include Section 116 (murder), Section 125 (intentional serious bodily injury), Section 132 (threat to commit murder and to inflict serious bodily injury), Section 153 (kidnapping), Section 154 (seizure of hostages), and Section 176 (robbery).

Attempt to commit maritime piracy is not specifically criminalised; general provisions of the Criminal Law of the Republic of Latvia on attempt apply (Section 15 defining completed and uncompleted criminal offences and Section 53 determining punishment for the preparation and attempt to commit a crime).

Jurisdiction over acts of piracy

The Criminal Law of the Republic of Latvia authorises the exercise of extra-territorial jurisdiction on the basis of the flag state principle (Section 3 of the Criminal Law), the principle of active personality (Section 4, paragraph 1, of the Criminal Law) and the principle of passive personality (Section 4, paragraph 3, of the Criminal Law). In addition, Section 4, paragraph 4, of the Criminal Law authorises treaty-based extra-territorial jurisdiction by stipulating that Latvian criminal law applies to crimes committed by foreigners abroad in cases provided for in international agreements binding upon the Republic of Latvia.

The relevant sections of the Criminal Law of the Republic of Latvia read as follows:

Section 3, Applicability of the Criminal Law to aircraft, sea and river vessels outside the territory of Latvia

A person who has committed a criminal offence outside the territory of Latvia on an aircraft, or a sea or river vessel or other floating means of conveyance, if this means of conveyance is registered in the Republic of Latvia and if it is not provided otherwise in international agreements binding upon the Republic of Latvia, shall be held liable in accordance with this Law.

Section 4, Applicability of the Criminal Law outside the territory of Latvia

- (1) Latvian citizens, non-citizens and foreigners who have a permanent residence permit for the Republic of Latvia, shall be held liable, in accordance with this Law, in the territory of Latvia, for an offence committed in the territory of another state or outside the territory of any state regardless of whether it has been recognised as criminal and punishable in the territory of the commission of the offence.
- (2) [...].
- (3) Foreigners who do not have permanent residence permits for the Republic of Latvia and who have committed serious or especially serious crimes in the territory of another state which have been directed against the Republic of Latvia or against the interests of its inhabitants, shall be held criminally liable in accordance with this Law irrespective of the laws of the state in which the crime has been committed, if they have not been held criminally held liable or committed to stand trial in accordance with the laws of the state where the crime was committed.
- (4) Foreigners who do not have a permanent residence permit for the Republic of Latvia and who have committed a criminal offence in the territory of another state, in the case provided for in international agreements binding upon the Republic of Latvia, irrespective of the laws of the state in which the offence has been committed, shall be held liable in accordance with this Law if they have not been held criminally liable for such offence or committed to stand trial in the territory of another state.

2.4.10. Lithuania

Description of criminal acts constituting piracy

The offence of piracy is established by Article 2511 of the Lithuanian Criminal Code:

Article 2511, Piracy

1. A crew member or a passenger of a civil watercraft or aircraft in an open sea or any other territory which is not subject to jurisdiction of any state who, seeking to gain material or any other personal benefit, unlawfully restrains the watercraft or aircraft, a person, a group of persons or property of others situated in that watercraft or aircraft, or who uses physical or psychic[al] violence against a person or a group of persons, shall be punished by imprisonment for a term of four up to eight years.
2. A crew member of military watercraft, state watercraft or an aircraft who evokes a riot during which the control of the watercraft or aircraft has been overtaken, or who participates in the riot and commits acts provided for in paragraph 1 of this Article, or who commits the acts provided for in paragraph 1 of this Article by using a firearm, explosive device or any other means or instrument that is dangerous to human life or health, shall be punished by imprisonment for a term of six up to ten years.
3. Any person who commits acts provided for in paragraphs 1 or 2 of this Article which cause very severe consequences, shall be punished by imprisonment for a term of ten up to twenty years or life imprisonment.
4. Any person who uses a watercraft or aircraft being aware that it has been used to commit the acts provided for in paragraphs 1, 2 or 3 of this Article and the watercraft or aircraft is under control of the persons who have committed the acts, shall be punished by a fine or arrest, or imprisonment for a term of up to five years.
5. A legal entity shall also be held liable for the acts provided for in this Article.

Preparatory acts and attempt to commit piracy are covered by the general provisions of the Lithuanian Criminal Code on preparation and attempt (Article 21, Preparation for commission of a crime, and Article 22, Attempt to commit a criminal act).

Jurisdiction over acts of piracy

Article 7 of the Lithuanian Criminal Code, which establishes universal jurisdiction with respect to certain crimes specified in the international treaties binding on Lithuania, expressly refers to piracy as one of the crimes covered by this provision. By virtue of Article 7, Lithuanian criminal law applies to acts constituting piracy regardless of the citizenship and place of residence of the perpetrator, the place of commission of the crime and the punishability of the crime under the laws of the place of its commission.

In addition, Article 4 of the Lithuanian Criminal Code authorises extra-territorial jurisdiction based on the flag state principle. Article 5 of the Lithuanian Criminal Code provides for extra-territorial jurisdiction based on the principle of active nationality (the requirement of double criminality applies, according to Article 8, paragraph 1, of the Lithuanian Criminal Code).

The relevant articles of the Lithuanian Criminal Code read as follows:

Article 4, Validity of criminal law in respect of the persons who have committed criminal acts within the territory of the state of Lithuania or on board the ships or aircrafts flying the flag or displaying marks of registry of the state of Lithuania

1. The persons who have committed criminal acts within the territory of the state of Lithuania or on board the ships or aircrafts flying the flag or displaying marks of registry of the state of Lithuania shall be held liable under this Code.
[...].

Article 5, Criminal liability of citizens of the Republic of Lithuania and other permanent residents of Lithuania

for the crimes committed abroad

Citizens of the Republic of Lithuania and other permanent residents of Lithuania shall be held liable for the crimes committed abroad under this Code.

Article 7, Criminal liability for crimes provided for in treaties³⁶

Persons shall be liable under this Code regardless of their nationality and place of residence, also of the place of commission of the crime and whether the committed crime is subject to punishment under the laws of the place of its commission, where they commit the following crimes subject to liability under treaties:

[...];

9) Piracy (Article 2511);

[...].

Article 8, Criminal Liability for the Crimes Committed Abroad

1. A person who has committed abroad the crimes provided for in Articles 5 and 6 of this Code shall be held criminally liable only where the committed act is recognised as a crime and is punishable under the criminal code of the state of the place of commission of the crime and the Criminal Code of the Republic of Lithuania. Where a person who has committed a crime abroad is prosecuted in the Republic of Lithuania, but a different penalty is provided for this crime in each country, the person shall be subject to a penalty according to laws of the Republic of Lithuania, however it may not exceed the maximum limit of penalty specified in the criminal laws of the state of the place of commission of the crime. [...].

2.4.11. Luxembourg

Description of criminal acts constituting piracy

The term 'piracy' is not expressly mentioned by the national criminal law of Luxembourg. The unlawful acts against the safety of maritime navigation are provided by Article 65-1 of the Law of 14 April 1992 ('Code disciplinaire et pénal pour la marine') as amended by the Law of 27 October 2010 ('Lutte contre le terrorisme en matière maritime', a law approving the SUA Convention and its Protocol of 1988, and amending the Law of 14 April 1992 establishing the disciplinary and criminal marine code) (hereinafter, the 'Law'). The list of crimes provided by Article 65-1, paragraph 1, of the Law closely follows the definition of illegal acts provided by Article 3 of the SUA Convention. It includes seizure of a ship or exercising control over a ship by the use of violence or threat of violence, or commission of other acts that endanger safe navigation: performing an act of violence against a person on board a ship, destroying a ship or causing damage to a ship or to its cargo, placing on a ship a device or substance which can destroy the ship or cause damage to the ship or to its cargo, etc.

Article 65-1, paragraph 1, of the Law establishes the punishment of imprisonment from ten to fifteen years for anyone who commits these offences. Paragraph 2 of this article establishes the punishment of imprisonment from fifteen to twenty years, if the committed offences caused results as foreseen by Sections 399 and 400 of the Penal Code of Luxembourg (bodily injury and serious bodily injury). The punishment of imprisonment from twenty to thirty years is established if the committed offences caused results as provided by Section 401 of the Penal Code (unintentional death of the victim). Intentional homicide committed in connection with one or more offences listed in Article 65-1, paragraph 1, of the Law is punishable by life imprisonment.

Attempt to commit offences provided by Article 65-1 of the Law is criminalised by virtue of Article 51 of the Criminal Code, which is the general provision on attempt. The offences provided by Article 65-1 of the Law are considered as 'crimes' (the criminal law of Luxembourg contains three categories of offences, the 'crime'

³⁶ Quoted as available from the website of [the Parliament of the Republic of Lithuania \(Lietuvos Respublikos Seimas\) – The Criminal Code, approval and entry into force](#) (last visited: 8 April 2015).

being the most serious). Under Article 51 of the Criminal Code, an attempt to commit a crime is punishable if the required conditions are met.

Preparatory acts to commit offences provided by Article 65-1 of the Law are specifically criminalised by Article 65-2 of the Law. The preparatory acts are punishable by the same penalties as the offences themselves, even if the preparatory acts have not effectively been used in the commission of the offence or in the attempt to commit it.

Jurisdiction over acts of piracy

The Law of 14 April 1992 ('Code disciplinaire et pénal pour la marine') as amended by the Law of 27 October 2010 ('Lutte contre le terrorisme en matière maritime', a law approving the SUA Convention and the Protocol of 1988, and amending the Law of 14 April 1992 establishing the disciplinary and criminal marine code) (hereinafter, the 'Law') contains a range of provisions establishing extra-territorial jurisdiction over offences provided by the Law.

Article 68 of the Law defines that offences committed on board a ship flying the flag of Luxembourg are deemed committed in the territory of Luxembourg. The article establishes the competence of the national judicial authorities with respect to these offences, depending on the category of the offence. Furthermore, Article 68-1 stipulates that the offences referred to in Article 65-1 of the Law, committed 'against a ship' flying the flag of Luxembourg, are regarded in the same way as the offences committed 'on board' that ship.

Article 69 of the Law establishes extra-territorial jurisdiction on the basis of the principle of active personality, by stipulating the liability of a master or a crew member of a ship registered in Luxembourg for any act violating the Law committed outside the territory of Luxembourg. Paragraph 2 of this article expressly stipulates that the offences provided by, *inter alia*, Articles 65-1 and 65-2 of the Law, committed abroad by a national of Luxembourg or an alien, can be prosecuted and tried in Luxembourg.

Article 69-1 of the Law states that any person who committed abroad an offence as stipulated by Article 65-1 of the Law can be prosecuted and tried in Luxembourg if an extradition request was made and the person was not extradited.

2.4.12. Hungary

Description of criminal acts constituting piracy

No specific crime of maritime piracy exists in Hungarian criminal law. Maritime piracy and robbery at sea can be investigated and prosecuted, *inter alia*, as kidnapping (Article 190 of the Criminal Code), murder (Article 160 of the Criminal Code), causing bodily harm (Article 164 of the Criminal Code), robbery (Article 365 of the Criminal Code), unlawful seizure of a vehicle (Section 320 of the Criminal Code), etc., depending on the circumstances and the consequences of the acts.

The attempt to commit a maritime piracy crime is not specifically criminalised in Hungarian criminal law; the general provision criminalising an attempt applies (Article 10 of the Criminal Code).

Jurisdiction over acts of piracy

Article 3 of the Act C of 2012 on the Criminal Code establishes the scope of application of Hungarian criminal law. Paragraph 1b of Article 3 provides for jurisdiction with respect to criminal offences committed outside the territory of Hungary on commercial ships or watercraft sailing under the Hungarian flag. Article 3, paragraph 1c, provides for jurisdiction with respect to crimes committed abroad by Hungarian nationals.

Hungary can also exercise jurisdiction with respect to crimes committed by foreigners abroad, if the act

constitutes a criminal offence under Hungarian law and under the law of the country of its commission; or the act constitutes a criminal offence that is to be prosecuted under an international treaty ratified by Hungary (Article 3, paragraph 2a). A jurisdictional basis is also provided with respect to crimes committed by foreigners abroad against a Hungarian national or legal entity (Article 3, paragraph 2b).

Article 3 of the Act C of 2012 on the Criminal Code reads as follows:

Section 3, Territorial and personal scope

(1) Hungarian criminal law shall apply:

- a) [...];
- b) to criminal offenses committed on commercial ships or watercraft sailing or aircraft flying under Hungarian flag outside the territory of Hungary;
- c) to any act of Hungarian citizens committed abroad, which are criminalised in accordance with Hungarian law.

(2) Hungarian criminal law shall, furthermore, apply:

- a) to any act committed by non-Hungarian citizens abroad, if:
 - aa) it is punishable as a criminal offense under Hungarian law and in accordance with the laws of the country where committed,
 - ab) it is recognized as an offense against the State, excluding espionage against allied armed forces, regardless of whether or not it is punishable in accordance with the law of the country where committed,
 - ac) it constitutes a criminal act under Chapter XIII or XIV, or any other criminal offenses which are to be prosecuted under international treaty ratified by an act of Parliament;
- b) to any act committed by non-Hungarian citizens abroad against a Hungarian national or against a legal person or unincorporated business association established under Hungarian law, which are punishable under Hungarian law.

(3) In the cases described in Subsection (2) criminal proceedings are opened by order of the Prosecutor General.

2.4.13. Malta

Description of criminal acts constituting piracy

The definition of piracy and a pirate ship as stipulated in the domestic criminal law of Malta fully incorporates the definitions contained in Articles 101, 102 and 103 of UNCLOS. Article 328N of the Maltese Criminal Code reads as follows:

Article 328N

(1) For the purposes of this subtitle 'piracy' means 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 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 of the acts referred to in paragraph (a) committed by the crew or passengers of a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft;

- (c) 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;
 - (d) any act of inciting or of knowingly facilitating an act described in paragraph (a) or (b) or (c).
- (2) For the purposes of this Title, 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 sub-article (1) or if the ship or aircraft has been used to commit any such act and the ship or aircraft remains under the control of the person guilty of that act.
- (3) Any person guilty of piracy under this article shall be liable:
- (a) where the offence consists in any of the acts referred to in sub-article (1)(a) and (b) when accompanied with the loss of life of any person, to the punishment of imprisonment for life;
 - (b) where the offence consists in any of the acts referred to in (1)(a) and (b) when not accompanied with the loss of life of any person, to the punishment of imprisonment not exceeding thirty years;
 - (c) where the offence consists in any act referred to in sub-article (1)(c), to the punishment of imprisonment for a term not exceeding eight years;
 - (d) where the offence consists in any act referred to in sub-article (1)(d), to the punishment laid down for the act incited or facilitated.

Attempt to commit acts of piracy is not specifically criminalised. The criminal law provision on attempt, Article 41 of the Criminal Code, applies to all offences including piracy.

Jurisdiction over acts of piracy

The jurisdiction with respect to maritime piracy is provided by Article 3280 of the Maltese Criminal Code. The article authorises the exercise of jurisdiction on the basis of the principle of active personality, the flag state principle and the principle of passive personality:

Article 3280

- (1) Without prejudice to the provisions of article 5, the Maltese courts shall also have jurisdiction over the offences laid down in this article where the offence is committed:
 - (a) by any citizen of Malta or permanent resident in Malta;
 - (b) by any person while on board any ship, vessel or aircraft belonging to Malta;
 - (c) by any person against any ship, vessel or aircraft belonging to Malta or against the person or property of any citizen of Malta or permanent resident in Malta.
- (2) For the purposes of this article a ship, vessel or aircraft shall be deemed to belong to Malta in the same circumstances mentioned in article 5(2).

2.4.14. Austria

Description of criminal acts constituting piracy

Austrian criminal law does not criminalise piracy as a specific offence. Illegal acts relating to maritime piracy as defined by Article 101 of UNCLOS are covered by relevant crimes included in the Austrian Criminal Code (e.g. illegal acts of violence, bodily injury, murder, deprivation of liberty, etc.).

Section 15 of the Criminal Code contains the general provision on attempt, according to which penalties for offences apply not only for completed offences but also for any attempt or contribution to an attempt.

Jurisdiction over acts of piracy

Austrian law provides a range of possibilities to establish jurisdiction over offences committed outside Austrian

territory. First of all, in cases in which an offence has been committed partly within and partly outside Austrian territory, the entire offence is considered to be committed in Austria, with the consequence that Austrian jurisdiction is established, even if only the smallest part of the conduct has taken place in Austria and the rest outside Austrian territory.³⁷

Section 63 of the Austrian Criminal Code provides for extra-territorial jurisdiction on the basis of the flag state principle: Austrian jurisdiction applies to crimes committed on board an Austrian ship, regardless of where it is situated.

Section 64 of the Criminal Code lists offences with respect to which Austria has extra-territorial jurisdiction without the requirement of double criminality. Paragraph 1, sub-paragraph 6, of this section includes in this list the offences which Austria is bound to prosecute according to the obligation arising from international treaties.

Section 65 of the Criminal Code establishes extra-territorial jurisdiction on the basis of the principle of active personality with respect to offences other than those referred to in Sections 63 and 64 of the Criminal Code. According to Section 65, Austria has jurisdiction with respect to offences committed anywhere in the world by Austrian nationals or by foreigners who are present in Austria and may not be extradited, provided that the requirement of double criminality is fulfilled. However, if the act is committed in a location outside any criminal jurisdiction, such as on the high seas, the requirement of double criminality does not apply.

2.4.15. Poland

Description of criminal acts constituting piracy

Piracy is referred to by Article 170 of the Polish Criminal Code, which provides for criminal liability for anyone who 'arms or adapts a sea vessel designed to perform piracy', or 'agrees to serve on such a vessel':³⁸

Article 170

Whoever arms or adapts a sea vessel designed to perform an act of piracy on the high seas, or agrees to serve on such a vessel shall be subject to the penalty of the deprivation of liberty for a term of between 1 and 10 years.

In addition, Article 166 of the Criminal Code criminalises illegal seizure of a ship; paragraphs 2 and 3 of this article stipulate aggravating circumstances such as commission of this act by directly endangering life or health of many persons, causing the death of a person or inflicting grievous bodily harm to many persons. Article 168 of the Criminal Code specifically criminalises the preparatory acts to commit, *inter alia*, the offence stipulated by Article 166 of the Criminal Code.

Other offences under the Criminal Code that may be relevant to acts of piracy and armed robbery at sea include murder (Article 148), infliction of grievous bodily injury (Articles 156 and 157), deprivation of liberty (Article 189), use of force or illegal threat with the purpose of compelling another person to act in a specified manner (Article 191), hostage-taking (Article 252), and participation in an organised criminal group (Article 258).³⁹

The attempt to commit maritime piracy is not specifically criminalised; the general provisions of the Criminal Law on attempt apply (Articles 13, 14 and 15 of the Criminal Code).

³⁷ This information is based on a statement included by Austrian authorities in their response to the questionnaire within the framework of Eurojust case 1026/COLL-2014, but the reference to the relevant section of the Criminal Code was not mentioned by Austrian authorities in their response.

³⁸ Additional source used: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015). Article 170 is quoted as is available from the website of the [International Money Laundering Information Network \(IMoLIN\)](#) (last visited: 8 April 2015).

³⁹ Additional source used: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

*Jurisdiction over acts of piracy*⁴⁰

Chapter XIII of the Polish Criminal Code establishes liability for offences committed outside the Polish territory. Article 109 authorises extra-territorial jurisdiction based on the principle of active personality, including the jurisdiction over the offences committed abroad by non-Polish citizens, if the perpetrator is present in Poland and no decision on his extradition has been taken. Article 110 provides for extra-territorial jurisdiction based on the principle of passive personality. In both cases, according to Article 111, criminal liability is subject to the requirement of double criminality.

Furthermore, Articles 112 and 113 of the Criminal Code provide for extra-territorial jurisdiction without the requirement of double criminality. Article 112 authorises the jurisdiction based on the protective principle; paragraph 3 of this article stipulates its applicability to offences 'against essential economic interests' of the country. Article 113 provides for the jurisdiction with respect to offences, which Poland is obliged to prosecute under international agreements.

2.4.16. Portugal

Description of criminal acts constituting piracy

Portuguese domestic criminal law does not refer to maritime piracy as a specific crime. Maritime piracy or armed robbery at sea can be prosecuted if the committed acts qualify as criminal offenses included in the Portuguese Criminal Code, such as, *inter alia*, seizure or hijacking of an aircraft, vessel, railway train or public passenger transport vehicle (Article 287), attack on the safety of air, water or railway transport (Article 288), dangerous driving of a means of air, water or railway transport (Article 289), launching a projectile against an air, water or land vehicle (Article 293), murder and aggravated murder (Articles 131 and 132), bodily injury and grievous bodily injury (Articles 143 and 144), kidnapping (Article 161), and robbery (Article 210).⁴¹

The attempt to commit acts of piracy is not specifically criminalised; the general criminal law provisions defining the attempt (Article 22 of the Criminal Code) and stipulating the punishment of the attempt (Article 23 of the Criminal Code) are applicable.

Jurisdiction over acts of piracy

Jurisdictional links with respect to crimes committed outside Portuguese territory are provided in Articles 4 and 5 of the Criminal Code. Article 4 authorises the applicability of Portuguese criminal law to acts committed on board Portuguese ships. Article 5, paragraph 1, provides for a range of possibilities to establish extra-territorial jurisdiction based on the principles of active and passive personality (subparagraphs b, e, f and g), as well as jurisdiction with respect to certain listed offences, including kidnapping, provided that the offender is found in Portugal and cannot be extradited (subparagraph c). In addition, Article 5, paragraph 2, provides for extra-territorial applicability of Portuguese criminal law to acts that Portugal has undertaken to prosecute under an international treaty.

Articles 4 to 6 of the Criminal Code read as follows:

Article 4, Territorial applicability: general principle

Except when it is contrary to international treaties or conventions, Portuguese penal law is applicable to acts committed:

[...]

⁴⁰ In the absence of the response by Poland to the questionnaire within the framework of Eurojust case 920/NMNL-2012, the source used was: United Nations, Division for Ocean Affairs and the Law of the Sea, [National Legislation on Piracy](#) (last visited: 8 April 2015).

⁴¹ Additional source used: the Criminal Code of Portugal (English version) provided by the Portuguese National Desk at Eurojust; the Criminal Code in the Portuguese language is available from the website of [Procuradoria-Geral Distrital de Lisboa](#) (District Attorney General Lisbon) (last visited: 8 April 2015).

- b) On board of Portuguese ships or aircraft[s].

Article 5, Acts committed outside the Portuguese territory

- 1- Unless otherwise provided in an international treaty or convention, the Portuguese criminal law is also applicable to acts committed outside the national territory:
 - a) When constituting the offences falling within articles 221, 262 to 271, 308 to 321 and 325 to 345;
 - b) Against Portuguese nationals, by Portuguese nationals ordinarily living in Portugal at the time the acts were committed, and found therein;
 - c) When constituting the offences falling within articles 159 to 161, 171, 172, 175, 176 and 278 to 280, provided the offender is found in Portugal and cannot be extradited nor surrendered pursuant to the execution of a[n] European arrest warrant or of another instrument of international cooperation binding upon the Portuguese State;
 - d) When constituting the offences falling within articles 144, 163 and 164, when the victim is a minor, provided that the offender is found in Portugal and cannot be extradited or surrendered as a result of the execution of a[n] European arrest warrant or of another instrument of international cooperation binding upon the Portuguese State;
 - e) By Portuguese nationals, or by foreigners against Portuguese nationals, whenever:
 - i) The offenders are found in Portugal;
 - ii) Such acts are also punishable by the law of the place where they have been committed, unless no punitive power is exerted in the place of the act; and
 - iii) Such acts constitute an extraditable offence, but extradition cannot be granted or it is decided not to surrender the offender in execution of a European arrest warrant or of another instrument of international cooperation binding upon the Portuguese State;
 - f) By foreigners found in Portugal and whose extradition is sought, where the concerned acts constitute extraditable offences, but extradition cannot be granted or it is decided not to surrender the offender in execution of a[n] European arrest warrant or of another instrument of international cooperation binding upon the Portuguese State;
 - g) By a legal person or against a legal person having its registered office in the Portuguese territory.
- 2- The Portuguese criminal law also applies to acts committed outside the national territory, which the Portuguese State has undertaken to decide upon under any international treaty or convention.

2.4.17. Romania

Description of criminal acts constituting piracy

The crime of piracy is included in the Romanian Criminal Code as a specific crime. Article 235 defines piracy as a theft perpetrated on the high seas through violence or threats, or the depredation of a ship on the high seas, or infliction of a shipwreck with the intention of depredation of the cargo or the robbery of the persons on board the ship. Article 236 of the Criminal Code stipulates that the death of victim is an aggravating circumstance of the crime of piracy.

Article 235, Piracy

- (1) The theft perpetrated [on] the high seas through violence or threats by the crew or the passengers of a ship against the goods on that ship or another one shall be punished with the penalty of imprisonment between 3 and 15 years and deprivation of rights.
- (2) Depredation of a ship [on] the high seas or determining [sic] a shipwreck by all means with the intention of depredation of the cargo or the robbery of the persons being on board the ship shall be sanctioned with the penalty of imprisonment as provided at para (1).

- (3) If the act of piracy caused bodily harm, the penalty is the imprisonment between 5 and 15 years and deprivation of rights.
- (4) The piracy also covers the acts perpetrated on an aircraft or the acts perpetrated by means of aircraft[s] against ships and vice-versa.

Article 236, Robbery or piracy causing death

If the facts incriminated by Articles 233 to 235 caused the death of the victim, the punishment is the imprisonment between 7 and 18 years and deprivation of rights.

The attempt to commit acts of piracy is criminalised by virtue of Articles 33 and 237 of the Romanian Criminal Code. According to Article 33, paragraph 1, an attempt is punishable only when the law expressly provides for that. In addition, according to Article 237, the attempts to commit offences stipulated by Articles 233 to 235 of the Criminal Code are punishable. The preparatory acts to commit piracy are not criminalised as such; they are rather punished as a distinctive crime, such as illegal possession of firearms, illegal possession of explosives, etc.

Jurisdiction over acts of piracy

According to Article 8 of the Romanian Criminal Code, an offence is considered as being committed within the territory of Romania even if only a part of the act or its results have taken place in the territory of Romania or on board a ship flying the Romanian flag.

Exercising extra-territorial jurisdiction based on the nationality of the offender is authorised by Article 9 of the Criminal Code, provided that the committed offence is punishable by Romanian law with a term of imprisonment longer than 10 years. In other cases, Romania can exercise jurisdiction if the requirement of double criminality is fulfilled or if the act has been committed in a location outside any criminal jurisdiction (such as the high seas). In addition, extra-territorial jurisdiction on the basis of the principle of passive personality and the protective principle is provided by Article 10 of the Criminal Code.

Moreover, according to Article 11 of the Criminal Code, Romania can exercise jurisdiction over offences committed abroad by non-nationals who are voluntarily located within the Romanian territory, if the committed offence is among the offences that Romania has undertaken to suppress on the basis of an international treaty, and if the extradition or surrender of the offender has been refused.

2.4.18. Slovenia

Description of criminal acts constituting piracy

Article 374 of the Slovenian Criminal Code specifically criminalises piracy as an unlawful act of violence or detention, or any act of depredation, committed by a member of the crew or a passenger of the vessel on the high seas or in a location outside the jurisdiction of any state and directed against another vessel or against persons or property on board such vessel. The definition follows the elements of the definition provided by Article 101 of UNCLOS.

Article 374, Piracy

- (1) The member of the crew or the passenger of a vessel or an aircraft, with the exception of the warship or aircraft and public ship or aircraft, who by violating the rules of international law and with the intention to procure a property or non-property benefit for himself or for a third person or to cause substantial damage to a third person, on the high seas or in a place outside the jurisdiction of any state, commits an unlawful act of violence or detention, or any act of depredation, directed against another vessel or aircraft, or against persons or property on board such vessel or aircraft, shall be sentenced to between one and ten years in prison.
- (2) The act referred to in the preceding paragraph shall also be considered piracy if it is committed by a member of the crew of a warship or a public ship or an aircraft whose crew has unlawfully mutinied and taken control of the vessel or aircraft.

- (3) If the offences referred to in paragraph 1 or 2 of this Article result in the death of one or more persons or significant damage to property, the perpetrator shall be sentenced to between five and fifteen years in prison.

Attempt to commit piracy is covered by the general provision criminalising an attempt, i.e. Article 34 of the Criminal Code. Paragraph 1 of this article stipulates that an attempt to commit any offence, for which the sentence of three years' imprisonment or a heavier sentence may be imposed, is punishable.

Preparatory acts to commit piracy are covered by the provision on criminal conspiracy, Article 295 of the Criminal Code. Article 295 provides for the criminal liability of anyone who agrees with another person to commit a criminal offence, for which a punishment of five years' imprisonment or a heavier sentence may be imposed.

Jurisdiction over acts of piracy

Slovenian criminal law authorises extra-territorial jurisdiction based on the flag state principle, the principle of active personality, the principle of passive personality and universal jurisdiction. Article 10, paragraph 2, of the Criminal Code provides for the applicability of the Slovenian Criminal Code to anyone who commits an offence on board a Slovenian ship, regardless of the location of the ship at the time of the commission of the offence. In addition, Article 12 of the Criminal Code provides for extra-territorial jurisdiction with respect to offences committed abroad by Slovenian citizens. Article 13, paragraph 1, of the Criminal Code authorises jurisdiction with respect to offences committed abroad by aliens against Slovenian nationals.

Article 13, paragraph 2, establishes jurisdiction with respect to offences committed abroad by a foreign national against a foreign national or a foreign state, provided that the offender is apprehended on Slovenian territory and is not extradited. In such cases, the conditions for the exercise of jurisdiction are stipulated by Article 14 of the Criminal Code, including the requirement of double criminality. If the requirement of double criminality is not met, jurisdiction may still be exercised, provided that the committed act at the time of its execution was considered a criminal offence according to the customary rules and general principles of law recognised by the international community.

In addition, Article 13, paragraph 3, stipulates the applicability of Slovenian criminal law to offences that are to be prosecuted regardless of the place of their execution according to an international treaty or by virtue of general principles of law recognised by the international community.

2.4.19. Slovak Republic

Description of criminal acts constituting piracy

Criminal law of the Slovak Republic does not categorise piracy as a specific crime. The relevant conduct is partially covered by Section 291 of the Criminal Code, which criminalises acts endangering the safety of an aircraft or a vessel:

Section 291, Threat to the Safety of an Aircraft or a Vessel

- (1) Whoever, on board of an aircraft or a vessel, with the intent to obtain or take control over such means
 - a) uses violence against another person or the threat of imminent violence,
 - b) threatens another person with death, bodily harm or infliction of damage of a large extent, or
 - c) abuses the vulnerability of another person,shall be punished by a prison sentence of ten to fifteen years.
- (2) A prison sentence of fifteen to twenty years shall be imposed upon an offender if he committed an act referred to in Subsection 1
 - a) and thus caused grievous bodily harm or death, or

- b) in a more serious manner of conduct.
- (3) A prison sentence of twenty to twenty-five years or a life prison sentence shall be imposed upon an offender if he committed an act referred to in Subsection 1
 - a) and thus caused grievous bodily harm or death of several persons,
 - b) as a member of a dangerous group, or
 - c) in a crisis situation.

In addition, depending on the circumstances of the case, the country may rely upon other relevant sections of the Criminal Code, *inter alia*, Sections 144 and 145 on murder, Section 185 on hostage-taking, and Section 186 on kidnapping for ransom.

Attempt to commit acts of piracy is not specifically criminalised. General provisions criminalising preparation and attempt are provided in Sections 13 and 14 of the Criminal Code.

Jurisdiction over acts of piracy⁴²

With respect to offences stipulated by Section 291 of the Criminal Code, as well as the offences stipulated by Sections 144, 145, 185 and 186 of the Criminal Code, if they are committed outside Slovak territory, jurisdiction can be established on the basis of Sections 3, 4, 5, 6 and 7 of the Criminal Code.

Section 3, paragraphs 1 and 2, provide that an offence is considered as being committed on Slovak territory in cases in which an act is committed partly within and partly outside Slovak territory, or the illegal results of the act occurred partly within and partly outside Slovak territory. Paragraph 3 of this section provides for jurisdiction over offences committed abroad on board a ship sailing under the flag of the Slovak Republic.

Section 4 provides for extra-territorial jurisdiction with respect to an offence committed abroad by a Slovak national or a foreign national who has been granted permanent residence in the Slovak Republic (the principle of active personality). Section 5 provides that extra-territorial jurisdiction can be exercised with respect to offences committed abroad against a Slovak national (the principle of passive personality), provided that the committed act constitutes a particularly serious crime⁴³ and the requirement of double criminality is fulfilled, or the act is committed outside any criminal jurisdiction.

In addition, Section 6, paragraph 1, authorises the applicability of the Slovak Criminal Code to an offence committed abroad by a foreign national who does not have a permanent residency status in the Slovak Republic, provided that the requirement of double criminality is fulfilled, and the offender is apprehended or arrested on Slovak territory and is not extradited. Section 7, paragraph 1, authorises the applicability of the Slovak Criminal Code to determine criminal liability for acts stipulated by an international treaty binding on the Slovak Republic.

2.4.20. Finland

Description of criminal acts constituting piracy

In Finland, piracy is defined and criminalised by virtue of the national provisions that define international offences and their punishability under Finnish criminal law:

Criminal Code of Finland (39/1889), Chapter 1, Section 7 - International Offence

⁴²In the absence of the response by the national authorities of the Slovak Republic to this question in the questionnaire within the framework of Eurojust case 920/NMNL-2012, the source used: the text of the Slovak Criminal Code (unofficial English translation of the relevant Sections of the Criminal Code was provided by the Slovak Desk at Eurojust) and General Assembly of the United Nations, Legal - Sixth Committee, 'The scope and application of the principle of universal jurisdiction', the information submitted by the Permanent Mission of the Slovak Republic to the United Nations (last visited: 8 April 2015).

⁴³According to Section 11, paragraph 3, of the Slovak Criminal Code, a crime is considered a particularly serious crime if it is punishable by a custodial penalty of more than eight years.

- (1) Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence). Further provisions on the application of this section shall be issued by Decree.
[...].

Decree on the application of chapter 1, section 7 of the Criminal Code (627/1996)

Section 1

- [1] In the application of chapter 1, section 7 of the Criminal Code the following offences are deemed international offences:
[...]
- (11) [...] homicide, assault, deprivation of liberty or robbery directed at a person on board a vessel or aircraft, or seizure, theft or damage of a vessel, aircraft or property on board a vessel or aircraft that is to be deemed piracy as referred to in the United Nations Convention on the Law of the Seas (Treaties of Finland 50/1996) (118/1999).

Therefore, piracy is understood as defined in Article 101 of UNCLOS, including the requirement that the act is committed on the high seas or in a location outside the jurisdiction of any state.

In addition, the relevant conduct may be covered by Chapter 34, Section 11, of the Criminal Code, which criminalises hijacking:

Chapter 34, Section 11 - Hijacking

- (1) A person who by violence or a threat of violence or otherwise unlawfully
- (1) intervenes in the piloting of an aircraft, a merchant vessel at sea, a rail traffic vehicle in traffic or a motor vehicle in mass transit,
 - (2) takes control of an aircraft, a merchant vessel at sea or a rail traffic vehicle in traffic so that flight safety, shipping safety or rail traffic safety are endangered or takes control of a motor vehicle in mass transit so that traffic safety is seriously endangered, or
 - (3) takes control of a fixed platform
shall be sentenced for hijacking to imprisonment for at least two and at most ten years.
- (2) An attempt is punishable.
- (3) If the hijacking referred to in subsection 1(1) or 1(2) endangers flight safety, shipping safety or rail traffic safety only slightly, or causes less than serious danger to other traffic safety, and the offence, in view of the nature of the violence or threat or of the nature of the other unlawful means used in the offence or the other circumstances connected with the offence, is of minor significance also when assessed as a whole, the offender shall not be sentenced for hijacking but for those other offences that the act constitutes.

While the attempt to commit hijacking is stipulated in paragraph 2 of the same section of the Criminal Code that criminalises hijacking (Chapter 34, Section 11), preparatory acts are not criminalised. Attempts and preparatory acts to commit homicide or aggravated assault crimes (the provision for the preparatory act is Chapter 21, Section 6a), hostage-taking (Chapter 25, Section 4a), and aggravated robbery (Chapter 31, Section 2a) are criminalised.

Jurisdiction over acts of piracy

The universal jurisdiction with respect to piracy is authorised by the provisions of Chapter 1, Section 7, of the Criminal Code of Finland and the Decree on the application of Chapter 1, Section 7, of the Criminal Code as cited above.

In addition, Chapter 1 of the Finnish Criminal Code contains extensive rules on other forms of extra-territorial jurisdiction. Finnish criminal law applies to an offence connected to a Finnish vessel (Chapter 1, Section 2, of

the Criminal Code). Finnish criminal law also applies to an offence committed outside of Finland and directed at a Finnish citizen, a Finnish corporation, foundation or other legal entity, or a foreigner permanently resident in Finland (Chapter 1, Section 5, of the Criminal Code).

Furthermore, Finnish law applies to an offence committed abroad by a Finnish citizen (Chapter 1, Section 6, of the Criminal Code). The extra-territorial jurisdiction on the basis of the active nationality principle is not limited to Finnish citizens, but also covers persons permanently resident in Finland, citizens of other Nordic states or persons permanently resident in one of those states (Chapter 1, Section 6, paragraph 3, of the Criminal Code). The provisions on the jurisdiction on the basis of active and passive nationality are applicable if the committed act is punishable by imprisonment of more than six months.

As a rule, a criminal case concerning an offence committed abroad may not be investigated in Finland without a prosecution order by the Prosecutor-General. Certain exceptions to this rule exist, for instance in situations in which the offence has been committed by a Finnish citizen or directed against Finland (Section 12 of the Criminal Code).

2.4.21. Norway

Description of criminal acts constituting piracy

Norwegian national law contains no reference to piracy as a specific offence. Acts of illegal takeover of control of a vessel or other interference with its sailing are included in Section 151a of the General Civil Penal Code of Norway:

Section 151a

Any person who on board a ship or aircraft by violence, threats or otherwise unlawfully and forcibly takes control of the vessel or aircraft or otherwise interferes with its sailing or flying shall be liable to imprisonment for a term of not less than two years and not exceeding 21 years. The same penalty shall apply to any person who by similar means unlawfully and forcibly takes control of any installation or construction on the continental shelf*. Under especially extenuating circumstances the penalty may be reduced below the prescribed minimum.

Any person who aids and abets such an offence shall be liable to the same penalty.

An attempt may be subject to the same penalty as a completed felony.

(*the Norwegian continental shelf)

Other illegal acts relevant to piracy and armed robbery at sea are provided by the sections of the General Civil Penal Code on extortion (Section 266) and robbery (Section 267).

An attempt to commit the acts mentioned in Section 151a is punishable by virtue of that section; a conspiracy (association/agreement) to commit these acts is punishable under Section 159 of the General Civil Penal Code:

Section 159

Any person who conspires with anyone with intent to commit any of the felonies or kinds of felony referred to in sections 148, 151a, 151b, first paragraph, 152 second paragraph, 153 first, second or third paragraph, or 154, or who aids and abets thereto, shall be liable to imprisonment for a term not exceeding 10 years.

In addition, the general provision on attempt, Section 49 of the General Civil Penal Code, which defines the acts constituting a punishable attempt, may apply.

The conspiracy to commit robbery is criminalised by Section 269 of the General Civil Penal Code which, in addition to the punishment for anyone 'who conspires with any person to commit a robbery', also provides for the punishment for anyone who, 'for the purpose of committing a robbery equips or begins to equip any vessel, or who aids and abets thereto'.

Normally, preparatory acts that have not reached the level of attempt are not criminal offences in Norway. However, if the preparatory acts constitute a part of activities of an organised criminal group, the preparatory acts may constitute a criminal offence under Section 162c of the General Civil Penal Code:

Section 162c

Any person who conspires with another person to commit an act that is punishable by imprisonment for a term of not less than three years, and that is to be committed as part of the activity of an organized criminal group, shall be liable to imprisonment for a term not exceeding three years unless the offence comes under a more severe penal provision. An increase of the maximum penalty in the case of a repeated offence or a concurrence of felonies is not to be taken into account.

An organized criminal group is here defined as an organized group of three or more persons whose main purpose is to commit an act that is punishable by imprisonment for a term of not less than three years, or whose activity substantially consists of committing such acts.

Jurisdiction over acts of piracy

Offences under Section 151a (illegal takeover of control of a vessel or aircraft), Section 266 (extortion), and Section 267 (robbery) are expressly mentioned among the offences covered by universal jurisdiction exercised by Norway, if these offences are committed abroad by a foreigner (Section 12, paragraph 4a, of the General Civil Penal Code).

In addition, Section 12 of the General Civil Penal Code provides other bases for Norwegian extra-territorial jurisdiction. Paragraph 1d of this section states that acts committed on board a Norwegian vessel in the open sea are considered as being committed in the realm of the Norwegian state. Paragraph 2 of this section provides for jurisdiction with respect to offences committed on any Norwegian vessel, wherever it may be, by a member of its crew or any other person travelling on the vessel (flag state principle-based jurisdiction). Paragraphs 3 and 4b of this section authorise jurisdiction with respect to offences committed abroad by a Norwegian national, a person domiciled in Norway or a foreigner residing or staying in Norway (active nationality principle).

2.4.22. USA

Description of criminal acts constituting piracy

Piracy is included in the criminal law of the USA as a specific offence defined according to 'the law of nations':

18 U.S.C. § 1651, Piracy under law of nations

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.

In addition, the acts that do not fall within the scope of the definition of piracy may be covered by the provision establishing the offence of violence against maritime navigation:

18 U.S.C. § 2280, Violence against maritime navigation

(a) Offences. –

(1) In general. – A person who unlawfully and intentionally –

- (A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
- (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;
- (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;
- (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;

- (E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship;
- (F) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship;
- (G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or
- (H) attempts or conspires to do any act prohibited under subparagraphs (A) through (G),

shall be fined under this title, imprisoned not more than 20 years, or both; and if the death of any person results from conduct prohibited by this paragraph, shall be punished by death or imprisoned for any term of years or for life.

- (2) Threat to navigation. – A person who threatens to do any act prohibited under paragraph (1) (B), (C) or (E), with apparent determination and will to carry the threat into execution, if the threatened act is likely to endanger the safe navigation of the ship in question, shall be fined under this title, imprisoned not more than 5 years, or both.
[...]

The USA does not have a general attempt statute. The attempt and/or preparatory acts to commit piracy are criminalised by virtue of the fact that the piracy statute, 18 U.S.C. § 1651, incorporates by reference the UNCLOS definition of piracy, which includes ‘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’ and ‘any act of inciting or of intentionally facilitating an act’ of piracy. In addition, 18 U.S.C. § 2280 specifically includes attempts and conspiracies to commit violence against maritime navigation (18 U.S.C. § 2280(a)(1)(H)).

In addition, the USA also has a general conspiracy law, which provides:

18 U.S.C. § 371, Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Jurisdiction over acts of piracy

The provision 18 U.S.C. § 1651 on piracy enables the USA to exercise universal jurisdiction with regard to this crime. In addition, 18 U.S.C. § 2280 on violence against maritime navigation provides for territorial and extra-territorial jurisdiction consistent with mandatory and optional bases provided in the SUA Convention:

18 U.S.C. § 2280, Violence against maritime navigation

[...]

(b) Jurisdiction. – There is jurisdiction over the activity prohibited in subsection (a) –

(1) in the case of a covered ship, if –

(A) such activity is committed –

(i) against or on board a ship flying the flag of the United States at the time the prohibited activity is committed;

(ii) in the United States; or

- (iii) by a national of the United States or by a stateless person whose habitual residence is in the United States;
- (B) during the commission of such activity, a national of the United States is seized, threatened, injured or killed; or
- (C) the offender is later found in the United States after such activity is committed;
- (2) in the case of a ship navigating or scheduled to navigate solely within the territorial sea or internal waters of a country other than the United States, if the offender is later found in the United States after such activity is committed; and
- (3) in the case of any vessel, if such activity is committed in an attempt to compel the United States to do or abstain from doing any act.
[...]
- (d) Delivery of suspected offender. – The master of a covered ship flying the flag of the United States who has reasonable grounds to believe that there is on board that ship any person who has committed an offense under Article 3 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation may deliver such person to the authorities of a State Party to that Convention. Before delivering such person to the authorities of another country, the master shall notify in an appropriate manner the Attorney General of the United States of the alleged offense and await instructions from the Attorney General as to what action to take. [...]

2.5. Conclusions

The provisions of the two major conventions governing maritime piracy and other acts of illegal violence at sea, UNCLOS and the SUA Convention,⁴⁴ in essence, provide for two things: firstly, they define the respective offences for the purposes of international law, and, secondly, they set up frameworks for exercising jurisdiction by states with respect to these offences. UNCLOS defines piracy and provides for universal jurisdiction with respect to piracy. The SUA Convention defines a broader list of acts of illegal violence at sea and, instead of providing for universal jurisdiction, obliges states to establish jurisdiction with respect to these offences through their national laws and to prosecute the apprehended suspected offenders or to extradite them to another state that can exercise jurisdiction.

An important part of the international legal framework regulating piracy in the African region is created by the UN SC Resolutions that authorise extended enforcement jurisdiction with respect to piracy off the coast of Somalia. The authorisations granted by the UN SC Resolutions are currently renewed until November 2015.

Furthermore, bilateral agreements for transfer of apprehended pirates have been concluded by the European Union and by some individual states with relevant countries in Africa. These agreements allow for transfer of suspected pirates for prosecution in the countries in the region, and thus contribute to the creation of the framework for judicial cooperation in bringing pirates to justice.

The national legal frameworks of the countries covered by this Report vary significantly in terms of how they define piracy and other acts of illegal violence at sea in their national legislation, and which jurisdictional requirements must be met in order for the country to prosecute the captured offenders.

With respect to the definition of piracy under national law, the overview in section 2.4 demonstrates that the majority of the states presented in the overview do not have a reference to piracy in their domestic criminal law provisions. All the states presented in the overview can be organised into three categories:

- 1) States that define piracy accordingly to the definition provided by the law of nations or UNCLOS, either by an explicit reference to it, or by its incorporation in the national law, or by formulating the national definition closely in line with the language of the international definition⁴⁵: Cyprus, Malta, Slovenia, Finland and the USA (five states).
- 2) States that define piracy as a specific crime under their national law but do not follow the definition of piracy provided by UNCLOS: Estonia, Ireland, Greece, Lithuania, Poland and Romania (six states).
- 3) States that have no reference to piracy as a specific crime in their national laws (for the prosecution of piracy, these states would rely on other relevant offences provided by their domestic criminal law, including the offences criminalising acts of illegal violence at sea covered by the SUA Convention): Bulgaria, Czech Republic, Croatia, Latvia, Luxembourg, Hungary, Austria, Portugal, Slovak Republic, Norway (10 states).

Concerning national legal provisions on jurisdiction, the overview in section 2.4 demonstrates that universal jurisdiction with respect to piracy is not expressly mentioned in the national criminal legislation of the majority of the states discussed in this Report. In this regard, the states can be organised into two categories:

- 1) States with domestic legislation expressly authorising universal jurisdiction with respect to piracy: Estonia, Greece, Cyprus, Lithuania, Finland and the USA (six countries).
- 2) States with no universal jurisdiction with respect to piracy expressly mentioned in their domestic legislation (for the prosecution of piracy and other acts of illegal violence at sea, these states would rely on other jurisdictional bases establishing extra-territorial jurisdiction): Bulgaria, Czech Republic, Ireland, Croatia, Latvia, Luxembourg, Hungary, Malta, Austria, Poland, Portugal, Romania, Slovenia, Slovak Republic, Norway (15 countries).

⁴⁴ The Geneva Convention on the High Seas (1958) is not discussed here, as its piracy-related articles were subsequently included in the more recent UNCLOS. Currently, a majority of the states that are parties to the 1958 Geneva Convention are parties to UNCLOS (see MPJM 2013, *Definition of Piracy under International Law*, p. 6; *Jurisdiction under International Law to Apprehend Pirates*, p. 8; and *Jurisdiction under International Law to Prosecute Pirates*, p. 10).

⁴⁵ The definition of piracy provided by Article 101 of UNCLOS contains five 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; 5) the act must take place on the high seas and other places outside the jurisdiction of any other state (see MPJM 2013, *Definition of Piracy under International Law*, pp. 6-7).

3. Judicial decisions

3.1. Introduction

National courts both within and outside the Member States have adjudicated maritime piracy cases in the past few years and, as a result, have rendered a number of fascinating decisions in an unusual field of law. At a point in time when maritime piracy incidents in the region off the coast of Somalia seem to be at their lowest level in several years, the judicial authorities face challenges in trying cases concerning this phenomenon and need to steadily build up expertise.

To support prosecutors in their endeavour to bring pirates to court, this chapter presents a number of maritime piracy decisions that date mainly from the past two years. In some cases, a decision or order goes back to an earlier date if this document served as a preparatory document in the pre-trial phase of the case.

The judicial decisions analysed highlight practical and legal issues considered by the national courts in six Member States and by the European Court of Human Rights (ECtHR). This analysis of the most prominent European maritime piracy cases, presented in the English language, may assist practitioners in pursuing their cases, as obstacles encountered and solutions found by foreign colleagues may serve as lessons learned or best practice. While some categories of legal issues addressed in the decisions are similar to those in the MPJM 2013, others are new.

The objective of the analysis has been to highlight those factual and legal aspects that are specific to cases of maritime piracy and explain why and how certain decisions were made. In cases in which the courts in some countries provide brief judgments containing only the main findings, particularly in France and Spain, the decisions of the investigating judge or another authority at the pre-trial stage of the case have been used to create a more complete picture of the case.

The collection of cases analysed in this chapter is not exhaustive. In response to the questionnaire of July 2014, several Member States provided Eurojust with the latest judicial decisions issued by their national courts. Some decisions concern cases that were recently tried in courts of first instance. An interesting Polish decision concerning a case off the coast of Nigeria has been included. A few cases reported in the MPJM 2013 were subject to appeal or cassation and the outcome of these cases is included in the present chapter. Other decisions have been retrieved from open sources, including the informative judgments rendered by the European Court of Human Rights concerning the *Carré d'As* and *Le Ponant* cases that were analysed in the MPJM 2013.

As additional cases may be tried in the years to come, Eurojust welcomes receiving new judicial decisions on maritime piracy from the national authorities for possible future analysis and reporting.

3.2. France

3.2.1. France - *Tanit*

Procedure: Pre-trial proceedings, Investigation Chamber of the Court of Appeal of Rennes (*Chambre de l'instruction de la cour d'appel de Rennes*); 1st Instance, *Cour d'Assises* of Ille-et-Vilaine (Judgment no. 49/2013), France

Date of decision: 18 January 2013 and 18 October 2013

Introduction

On 18 October 2013, the *Cour d'Assises* of Ille-et-Vilaine convicted three Somali pirates for the hijacking of a French yacht, the *Tanit*, in April 2009. The incident took place more than 900 kilometres off the Somali coast, more precisely off the coast of the region of Puntland. The *Tanit* was sailing in the direction of Seychelles, when a pirate skiff forced the yacht to stop. Showing their weapons and firing some shots to ensure that they would not meet resistance, the five pirates then boarded the vessel. The crew, composed of five persons, including a married couple and their three-and-one-half-year-old son, were taken hostage. A few days later, a French naval vessel established contact with the hijacked vessel and ransom negotiations were initiated. The pirates refused a ransom payment of EUR 100 000 and decided not to carry out any negotiations before reaching shore. When the sailing ship was some 27 kilometres from the coast, the French naval forces boarded the *Tanit*. During the incident, one of the hostages and two pirates were fatally injured. The other hostages were liberated and the surviving pirates were arrested and brought to France for prosecution. The bodies of the deceased pirates were handed over to the Puntland authorities.

The three accused were charged with hijacking a ship using violence or threat of violence, stopping (*arrêter*), kidnapping, detaining or illegally restraining several persons, among whom was a minor under the age of 15 years. Several aggravating circumstances applied to the criminal acts. First, the perpetrators acted as part of an organised group, and, second, the offences were committed against a minor under the age of 15 years. Initially, the death of one hostage as a consequence of the crimes committed by the accused was also brought forward as an aggravating circumstance.

Legal findings

Under French law, the investigating judge makes the decision to bring the case to trial. In this case, this decision was appealed by the accused, challenging the claim that their acts had caused the death of one hostage. On 18 January 2013, the Investigation Chamber of the Court of Appeal of Rennes (*Chambre de l'instruction de la cour d'appel de Rennes*) issued a decision, in which it upheld the appeal of the accused and partly amended the decision of the investigating judge. According to the Investigation Chamber of the Court of Appeal, the hostage was hit by a bullet from a weapon fired by one of the French naval commandos who stormed the hijacked vessel. As the pirates had not provoked the incident and the death was caused by an act from outside (*intervention extérieure*), the chain of causality had been broken and the death of the hostage could not be imputed to the accused.

In its assessment of the decision issued by the investigating judge, the Investigation Chamber of the Court of Appeal of Rennes also considered *ex officio* all alleged offences and the aggravating circumstances that were not disputed. It confirmed the facts as summarised above and found that the accused were to be tried for hijacking a ship using violence or threat of violence, stopping (*arrêter*), kidnapping, detaining or illegally restraining several persons, among whom was a minor under the age of 15 years. The Investigation Chamber of the Court of Appeal further held that the accused had refused the ransom payments, which eventually forced the French

Navy to intervene and to prevent the hijacked vessel from reaching the coast. In addition, the Investigation Chamber of the Court of Appeal noted that the pirates had chosen not to voluntarily free the hostages, which under Article 224-1 of the French Penal Code would have led to a lower maximum penalty.

With regard to the organised nature of the pirate activities, the Investigation Chamber of the Court of Appeal found that the hierarchical structure of the organisation had been established and the pirates were recruited and paid by this organisation to commit acts of piracy.

Conviction and sentence

The *Cour d'Assises* convicted the accused of the crimes as charged, committed in the international waters of the Indian Ocean off the coast of Somalia, and sentenced the accused to nine years' imprisonment. The *Cour d'Assises* further ordered the confiscation of the weapons that had been seized from the pirates. The judgment by the *Cour d'Assises* was not appealed and has become final.

3.2.2. France - *Carré d'As* and *Le Ponant* (ECtHR)

Procedure: European Court of Human Rights, *Hassan and Others v. France* (Case Nos. 46695/10 and 54588/10) and *Ali Samatar and Others v. France* (Case Nos. 17110/10 and 17301/10)

Date of decision: 4 December 2014

Background

Two judgments concerning piracy attacks against vessels sailing under French flag were reported in the MPJM 2013.

First, the *Carré d'As* case concerned the hijacking of a yacht in the Gulf of Aden in September 2008. A case was brought against six defendants and a decision by the Juvenile Court of Paris (*Cour d'Assises des mineurs de Paris*) was rendered on 30 November 2011. The decision was appealed and on 1 February 2013 the Juvenile Court of Seine and Marne (*Cour d'Assises des mineurs de Seine et Marne*) upheld the acquittal of all charges for one of the defendants and confirmed the sentences of the under-aged defendant to four years' imprisonment. The Juvenile Court of Seine and Marne also confirmed the sentences of two defendants to six years' imprisonment and of one accused to eight years' imprisonment. Only in relation to one defendant was the sentence reduced from eight to seven years' imprisonment for lack of proof of a certain alleged fact.

Second, *Le Ponant* was a cruise ship that was attacked by pirates off the coast of Somalia in April 2008. On 14 June 2012, the *Cour d'Assises* in Paris rendered a decision concerning six accused. Two accused were acquitted of all charges and the others received prison sentences ranging from four to ten years.

Decisions by the Court of Appeal and Court of Cassation

The pirate attacks took place in April and September 2008, respectively. In the aftermath of the arrests of the suspects and in parallel to the ongoing judicial proceedings against them, the suspects in both cases filed complaints to the Investigation Division of the Paris Court of Appeal (*Cour d'Appel*), claiming that their arrest and detention under the control of the French authorities had not been in accordance with Article 5 of the European Convention on Human Rights (ECHR). The complaint in the *Ponant* case referred to the fact that the six applicants had been apprehended by an intervention brigade of the French Gendarmerie on Somali territory. The interception took place on 11 April, after the release of the French nationals that had been taken hostage on the *Ponant*. The legal basis for the apprehension was a note by the Somali Transitional Federal Government, under Article 7 of SC Resolution 1816, authorising the French authorities to enter Somali territorial waters and take all necessary measures. The applicants were then transferred to France by military aircraft on 15 April and were taken into police custody. On 18 April, the alleged pirates were brought before an investigating judge.

In a judgment of 6 April 2009, the Paris Court of Appeal ruled that the proceedings had been lawful. Under the circumstances of this case, the time span between the arrest and the first appearance before the investigating judge were not in breach of the requirement of promptness under Article 5 ECHR. The Court of Cassation in its judgment of 16 September 2009 dismissed the applicants' appeal, referring to the insurmountable circumstances of the case, including the approval that was needed from the Somali authorities before the applicants could be transferred to France.

The suspects in the Carré d'As case similarly lodged an appeal with the Paris Court of Appeal, which was dismissed in a judgment of 6 October 2009. In the opinion of the Paris Court of Appeal, the arrest and detention had not breached Article 5 ECHR, as the measures taken were in line with SC Resolution 1816. Also, in this case, the Court of Appeal referred to the wholly exceptional circumstances of the case. Four of the suspects appealed the decision and on 17 February 2010, the Court of Cassation dismissed the appeal on grounds similar to those in the *Ponant* case.

ECtHR judgments

With the dismissal of the appeals by the Court of Cassation, the decisions became final in France and the defendants in both the *Ponant* (*Ali Samatar and Others v. France*) and *Carré d'As* (*Hassan and Others v. France*) cases lodged applications with the ECtHR in March and August 2010, respectively.⁴⁶ The applicants reiterated their claim that the arrest and detention prior to their appearance before the investigating judge were in breach of Article 5 ECHR. On 4 December 2014, the ECtHR rendered its judgments in the cases and found that a violation of Article 5(1), the right to liberty and security, and of Article 5(3), which imposes the requirement of bringing an arrested or detained person promptly before a judge, had been committed.

Article 5(1)

The applicants in the *Hassan and Others* case claimed a lack of legal basis for the deprivation of their liberty by the French authorities. More specifically, they contested that UN SC Resolution 1816 provided a sufficient basis for such measures. The ECtHR found that Resolution 1816 had been adopted three months prior to the commission of the criminal offences and France belonged to the states that cooperated with the Somali authorities and were authorised to enter the territorial waters of Somalia. Also having regard to Article 105 UNCLOS, which recognises the right of the state that carried out the seizure to decide upon the penalties to be imposed, the ECtHR found sufficient legal basis for the apprehension of the pirates. In light of these provisions, the requirement of foreseeability of the law was fulfilled. However, at the time of the criminal offences, French legislation did not contain provisions adapted to the specific situation of preventing acts of piracy. In addition, the legal framework for the detention of persons apprehended on the high seas was not in conformity with the requirements set out in the case law of the ECtHR. Accordingly, the Court concluded that the legal framework did not provide sufficient safeguards against arbitrariness.

Article 5(3)

A claim of violation of the right to be brought promptly before a judge, as set out in Article 5(3) ECHR, was brought forward by the applicants in both cases. The ECtHR accepted the exceptional circumstances in which the French authorities had carried out the anti-piracy actions, to resolve an immediate crisis involving French nationals. Considering further that the interventions took place more than 6 000 km from Paris, and in light of the difficulties to organise a transfer from the Horn of Africa to France, the ECtHR held that the length of detention between the arrest of the applicants and their arrival in France was acceptable. In addition, no indications were given that the transfer had taken more time than necessary.

⁴⁶ *Hassan and Others v. France* (Case Nos. 46695/10 and 54588/10) and *Ali Samatar and Others v. France* (Case Nos. 17110/10 and 17301/10), European Court of Human Rights, 4 December 2014 (last visited: 8 April 2015).

However, these considerations by the ECtHR only applied to the time between the decision by the French authorities to intervene in the hostage situation and the transfer of the suspects to French territory, 11 days in the *Ali Samatar and Others* case and at least 18 days in the *Hassan and Others* case. With regard to the time period between their arrival and their being brought before a judge, some 48 hours in both cases, the ECtHR found a breach of the right to appear promptly before a judge. The ECtHR also pointed out that being under the control of a prosecution office was not sufficient to fulfil this requirement. While a detention period of two or three days had not been seen as a violation of the requirement of promptness in some ECHR case law, the detention period was not intended to allow the prosecuting authorities to further intensify their investigations before bringing formal charges. The period between the decision to intervene in the hijackings and the defendants' arrival on French territory should have allowed the authorities to prepare for the arrival of the suspects with full knowledge of the case.

Violations of the ECHR - Just satisfaction

Having found violations of Article 5 in both cases, the ECtHR held that the applicants should receive just satisfaction for the non-pecuniary damage they had suffered and for costs and expenses incurred.

3.3. Germany

Germany - *Marida Marguerite*

Procedure: 1st Instance, District Court of Osnabrück (*Landgericht Osnabrück*, Case No 10KLS – 710 Js 21274/13), Germany

Date of decision: 17 April 2014 (date of the written verdict 19 June 2014)

Introduction

On 17 April 2014, the District Court (*Landgericht*) of Osnabrück rendered a judgment against a Somali citizen, convicting him to 12 years' imprisonment for kidnapping and extortion. The facts of this case refer to the hijacking of the chemical tanker *Marida Marguerite* on 8 May 2010 by Somali pirates, 120 nautical miles south of the Omani port of Salalah. On 28 December 2010, after eight months, the ship was released after a ransom of US\$ 5 million had been paid. The crew later reported that they had been abused and tortured by the pirates.

On 29 April 2013, the defendant was subjected to a check by the police at the Central Railway Station in Munich, Germany, because of alleged illegal residence. His fingerprints proved that he was one of the pirates involved in the hijacking. The match was a result of a cross-check that was conducted with fingerprints taken from documents left on board by the pirates. On 7 May 2013, he was arrested at the refugee camp in the city of Giessen on the basis of an Arrest Warrant issued by the local court (*Amtsgericht*) of Osnabrück.

The facts

The hijacking of the *Marida Marguerite* began on 8 May 2010, in the Gulf of Aden, as the tanker traversed the 'pirate alley' — an area of water between Somalia and Yemen known for its large number of hijackings — on its way from India to Rotterdam. The ship was wrapped in razor wire, and sailors were ready to grab fire hoses to jettison any pirates who attempted to board.

A small skiff loaded with six men, all carrying rifles, was gaining on the tanker. The pirates first fired a rocket-propelled grenade that arched over the *Marida Marguerite*, then another. The ship slowed down and a sailor threw a ladder over its starboard side. The six Somali pirates, armed with AK-47s, stepped onto the deck and headed straight for the bridge, where they ordered the captain to sail toward Somali waters. Two days later, the ship was anchored off the Somali coast, where 60 armed pirates boarded. One of them picked up a satellite phone and contacted a representative of the shipping company in Germany. The negotiations for ransom began (initially the pirates asked for US\$ 15 million). The captain and other crew members were pressed about the value of the tanker, its cargo, its food and fuel supplies, and its ability to produce fresh water.

During the hijacking, the crew lived on the bridge. The pirates roamed the ship and looted whatever valuables they could find. They also chewed copious amounts of khat, a stimulant. In July, another pirate skiff approached the tanker, and a pirate asked for fresh water. The *Marida Marguerite* had a fuel-hungry desalination system that removed salt from seawater to make it safe for drinking. The captain, worrying that he would waste valuable fuel to make fresh water for pirates, refused the request.

Incensed by the captain's resistance, the pirates dragged him and the chief engineer to different sides of the ship, blindfolded them and started shooting guns into the air. The pirates then strung them to pipes and let them hang by their arms. Later, the pirates threatened that the ship was about to be handed over to a terrorist group.

The pirates also once dangled the chief engineer and the captain over the sea, as if they were going to be thrown overboard. Then the pirates strapped a plastic bag over the captain's head so that he felt like he was

suffocating. By early September, with fuel running low, the pirates' tactics became more extreme. They stripped the captain naked, placed tight plastic ties around his genitals and locked him in a freezer.

By December, after scores of calls, the pirates and the German company had reached an agreement on a US\$ 5 million ransom. In late December, the pirates lined the crew members up on the deck of the ship as a small plane circled overhead, checking that they were alive. Then the plane dropped two containers filled with US\$ 5 million in cash. On 28 December 2010, the last pirates left the tanker.

Charges

The defendant was charged with the following offences:

- Article 239a(1) of the German Criminal Code (Abduction for the purpose of blackmail): to have abducted a person in order to exploit, for the purpose of blackmail (Article 253), the concern of a third person for the welfare of the victim;
- Article 253(1) and (4) of the German Criminal Code (Blackmail): to have unlawfully caused a person with threat of serious harm to commit an act and thereby caused damage to the assets of that person or of another in order to enrich himself or a third person, thereby having unlawfully acted on a commercial basis and as a member of a gang whose purpose is the continued commission of blackmail;
- Article 316 c(1) No. 1b of the German Criminal Code (Attacks on air and maritime traffic): to have used force in order to gain control of a ship employed in civil maritime traffic;
- Article 224(1) No. 2, 4 and 5 of the German Criminal Code (Causing bodily harm by dangerous means): to have caused bodily harm by acting jointly with another by using a weapon or other dangerous instruments and by methods that pose a danger to life.

Jurisdiction

No direct reference to jurisdictional issues is present in the indictment or the verdict. However, according to open sources,⁴⁷ jurisdiction was given to Germany since the crime was committed on a tanker that belonged to a shipping company in Emsland, Lower Saxony, Germany.

In addition, the USA exercised jurisdiction in a piracy case concerning the *Marida Marguerite*. Proceedings were initiated in the USA against a Somali citizen, who acted as the ransom negotiator on the *Marida Marguerite*. On 27 April 2012, the ransom negotiator was convicted by a federal jury in Norfolk, Virginia, USA, for his involvement in the pirating of the *Marida Marguerite* and in the pirating of an American yacht, the *S/V Quest*, and taking hostage four US citizens who were ultimately killed before their release could be secured. On 13 August 2012, the US Attorney for the Eastern District of Virginia announced that the defendant was given multiple life sentences⁴⁸.

Securing of evidence at the crime scene and hearings of the crew

As soon as the last pirates left the tanker, the crew received detailed instructions via fax on how to secure documents and other objects that were left by the pirates on the tanker. They were instructed not to touch the objects with their bare hands and to store them in plastic bags. The crew followed those instructions, enabling a thorough forensic analysis (e.g. of the fingerprints) to be carried out later.

On 3 January 2011, the tanker arrived in Salalah, Oman, and an investigative team of the Regional Criminal Intelligence Service of Lower Saxony went on board and conducted hearings of the crew and secured forensic

⁴⁷ German court ensures fair trial for pirates: expert, *Deutsche Welle*, 18 April 2014. Available from <http://www.dw.de/german-court-ensures-fair-trial-for-pirates-expert/a-17576706> (last visited: 8 April 2015).

⁴⁸ Somali Hostage Negotiator in *S/V Quest* and *M/V Miranda* [sic] *Marguerite* Piracies Sentenced to Multiple Life Sentences, The United States Attorney's Office, Eastern District of Virginia. Available from <http://www.fbi.gov/newyork/press-releases/2012/somali-hostage-negotiator-in-s-v-quest-and-m-v-miranda-marguerite-piracies-sentenced-to-multiple-life-sentences> (last visited: 8 April 2015).

evidence until 7 January 2011. Photographs were made of the crew members and fingerprints, as well as DNA samples, were taken from the crew for comparison purposes. Various documents and electronic data were secured.

Identification of the defendant

When checked by the police at the Central Railway Station in Munich, Germany, on 29 April 2013, the defendant used a false identity. In subsequent hearings and until the trial took place, he did not reveal his true identity. His fingerprints, however, proved that he was one of the pirates. Initially, the German authorities assumed that the defendant would be the pirate who acted as accountant since the fingerprints were found on a document that listed the distribution of the ransom. A victim had also confirmed the resemblance of the defendant to the accountant, on the basis of photographs.

The real identity of the defendant was established on the basis of

- photographs gathered by undercover acquisition of information by the Regional Criminal Intelligence Service of Lower Saxony;
- witness statements of three irregular migrants travelling together with the defendant, who identified him and informed that they were on their way to Norway;
- a witness statement of a Somali citizen who was heard in Norway and could identify the defendant as being the son of his aunt;
- the SIM card of the defendant (an evaluation of the telephone data led to the identification of the witness in Norway);
- witness statements of pirates who were in detention in the USA;
- witness statements of crew members; and
- material evidence: the name of the defendant appears in several documents that were left on board by the pirates, and his fingerprints were detected on some of the documents.

In addition, the defendant was directly identified during the trial by the four crew members who were heard as witnesses. During the trial, the defendant eventually revealed his true identity.

Establishment of the course of the hijacking and ransom negotiations and the individual role of the defendant

a) Plea of the defendant during the trial

At the start of the trial, the defendant made use of his right to remain silent. Later, he testified via a statement approved by his defence lawyer and at the end of the trial by personal testimony.

The defendant admitted to being involved in the hijacking, to guarding hostages and carrying an AK-47 rifle. He denied the allegations that he was a leader of the pirates and stated that he was unaware of any torture being inflicted.

The District Court, however, established that the statements from the defendant during the entire proceeding were contradictory, incomplete, remote from reality and inconsistent. In his statements, he attempted to justify his behaviour. At first, the defendant denied all accusations. Only partially and later did he admit those facts, which were proven beyond doubt by other means.

b) Witness statements during the trial

Detailed, credible and coherent testimony was delivered by four crew members, representatives of the German shipping company and the German police officers who had secured evidence at the crime scene, conducted hearings of the crew members and analysed the intercepted calls between the shipping company and the pirates.

c) Mutual legal assistance (MLA)

During the trial at the District Court of Osnabrück, the captain and the chief engineer could not be heard as witnesses because they could not be reached. Upon order dated 21 January 2014, the two witnesses were summoned to their last known addresses in India and Ukraine on the basis of MLA requests. No reply was received by the Indian and Ukrainian authorities until the end of the trial.

According to a statement from the German Federal Office of Justice (*Bundesamt für Justiz*) dated 14 April 2014 (which was read out during the trial), the execution of such MLA requests in India takes more than one year. In addition, a transmission of the summons via consular channels was not possible. The Liaison Officer from the German Criminal Intelligence Service working at the German Embassy in New Delhi informed authorities that she could not directly get in touch with the captain, since the Indian government would consider it as a gross infringement of Indian sovereignty. The Regional Criminal Intelligence Service of Lower Saxony had tried to contact the captain via e-mail to establish his willingness to testify. The captain, who was still highly traumatised, did not react.

The Liaison Officer from the German Criminal Intelligence Service working at the German Embassy in Kiev informed authorities by letter dated 16 January 2014 (which was read out during the trial) that the chief engineer, according to his mother, would be at sea until August 2014.

Therefore, the District Court based its findings on the testimony of the police officers who conducted the hearings of the captain and the chief engineer on board the tanker in January 2011. The Court acknowledged the reduced evidential value.

The police officer who had conducted the hearing with the captain noted that during the hearing, in January 2011, the captain was well prepared. The captain had small hand-written notes, in which he secretly had noted down the events during the hijacking in a chronological and detailed manner. During the hearing, the police officer also witnessed first-hand the skin damage on the wrist of the captain (as a result of the torture). The police officer also reported that he had met the captain in the USA, where he took the witness stand in a federal courtroom in Virginia during the trial against the negotiator of the pirates. The captain at that time was still strongly marked by the cruel treatment and torture he had suffered.

Another MLA request summoning the first officer as a witness was sent to Bangladesh; however, no reply was received from the authorities in Bangladesh.

d) Other evidence

In addition to the witness statements, the District Court took additional evidence into consideration in establishing the course of the hijacking, the ransom negotiations and the leading role of the defendant.

The most important corroborative evidence was the numerous documents left on board by the pirates, on which either fingerprints of the defendant were found or the name of the defendant appears (e.g. fingerprints of the defendant on the lists concerning the distribution of the ransom; and the name of the defendant on a list of the members of a 'committee of judges' established by the pirates). The Regional Criminal Intelligence Service of Lower Saxony produced an expert report on the fingerprints, which was read out during the trial. With regard to the content of the secured documents, a linguistic expert was heard as a witness during the trial.

Some documents (faxes of handwritten notes of the captain and the chief engineer, as well as faxes between the pirates and the shipping company) were introduced as evidence in the so-called *Selbstleseverfahren* according to Article 249(2) of the German Code of Criminal Procedure, which states that 'the reading may be dispensed with if the judges and the lay judges have taken cognisance themselves of the wording of the certificate or the document and the other participants have had an opportunity to do so' (the documents are thus not read out during the trial). In addition, the District Court viewed photographs of the tanker, taken two days before the hijacking, and after the release in January 2011.

Limited prosecution according to Article 154a of the German Code of Criminal Procedure

During the trial, the District Court, with the consent of the Public Prosecution Office, decided to discontinue the prosecution with respect to two offences mentioned in the indictment according to Article 154a(2) of the German Code of Criminal Procedure (which regulates that the prosecution may be limited to the remaining parts of the act if certain parts of one act, or multiple infractions committed through the same act, do not carry weight compared to the expected sentence or measure of reform and prevention): Article 316 c(1) No. 1b of the German Criminal Code: *Attacks on air and maritime traffic*.

The prosecution was limited during the trial to the other offences in the indictment, as determining the exact time when the defendant agreed with the organisers of the hijacking to participate was not possible; the prosecution was thus not able to determine whether the defendant was participating in the offences from the beginning of the hijacking. The District Court could only establish that the defendant was on board the *Marida Marguerite* for the first time no later than the end of May 2010. The District Court noted that the defendant was not on board the tanker between 11 August 2010 and 9 September 2010 (a time period during which mock executions were conducted) and that he did not order, nor was he personally involved in, the torture of crew members. Therefore, the prosecution under Article 224(1) of the German Criminal Code: *Causing bodily harm by dangerous means*, was limited in accordance with Article 154a of the German Code of Criminal Procedure.

However, the District Court also noted that the defendant at least tacitly accepted the use of extreme violence against the crew to increase the pressure on the German shipping company. He did not appear to care about the welfare of the crew and was merely interested in extracting the highest possible ransom.

Sentencing

The District Court agreed with the prosecutor who had argued that the defendant was a leading member of the pirate gang, had taken important decisions on board, had considerable responsibility, was a member of a committee of judges established by the pirates and, at times, led the group. In addition, he played a significant role in the distribution of the ransom money. Insufficient evidence was present to prove, with a sufficient degree of certainty, that he was one of the investors, as claimed by the prosecution.

The defendant was convicted to 12 years' imprisonment for kidnapping and extortion according to Article 239 a(1) of the German Criminal Code, '*Abduction for the purpose of blackmail*'; Article 253(1) of the German Criminal Code, '*Blackmail*'; Article 255 of the German Criminal Code, '*Blackmail and use of force or threats against life or limb*'; Article 250(2) No.1 of the German Criminal Code, '*Aggravated robbery*'; Article 25(2) of the German Criminal Code, '*Liability as Principals*'; and Article 52 of the German Criminal Code, '*One act violating multiple laws or the same law more than once*'. The German Criminal Code foresees a penalty of five to fifteen years' imprisonment for these offences, and the public prosecutor had sought a prison sentence of 12 and one-half years.

In its motivation for the sentence, the District Court took a series of mitigating and aggravating factors into consideration. In its findings on mitigating factors, the District Court noted that the defendant had no criminal record, that several years had elapsed since the underlying criminal acts and that the defendant originates from a country with hardly any public order, a culture of violence and devastating economic and political circumstances, which have influenced the everyday life of the defendant to an extent that he decided to participate in the hijacking of the tanker, also in order to be able to provide for his family.

Another mitigating factor was the special sensitivity of the defendant toward detention (considerable language barriers, a different cultural background, no relations in Germany, and difficulty for him to maintain contact with his family from prison). To a limited extent, his partial confession during the trial was also taken into consideration.

As an aggravating factor, the District Court highlighted, in particular, the intensity and extraordinary length of the hijacking (eight months), in which the defendant had significant involvement. The crew, composed of 22 seamen, was subject to death threats and torture. The defendant at least tacitly accepted the use of extreme violence against the crew to increase the pressure on the German shipping company.

Other aggravating circumstances were the considerable economic damage and the psychological effects of the hijacking on the crew (some crew members still suffer from long-term effects; the captain is highly traumatised).

The District Court did not follow the charge in the indictment of an 'especially serious case of blackmail' according to Article 253(4) of the German Criminal Code, due to a lack of commercial or continued commission of the crime (commercial commission is defined as a repeated commission to obtain a non-temporary, not inconsiderable, source of income).

3.4. Italy

Italy - Montecristo (juveniles)

Procedure: Appeal, Juvenile Court of Appeal of Rome (*Corte di Appello di Roma, sezione minori*, Judgment no. 120/2012), Italy

Date of decision: 6 October 2012

Italy - Montecristo (juveniles)

Procedure: Cassation, Supreme Court (*Corte di Cassazione, Sezione II penale*, Judgment no. 307/2013, 52058/2012 R.G.N.R.), Italy

Date of decision: 4 February 2013

Italy - Montecristo

Procedure: Appeal, Court of Appeal of Rome (*Corte di Assise di Appello di Roma*, 48819/11 R.G.N.R.; 35/13 Reg. Gen.; 54/13 Reg. Sent.), Italy

Date of decision: 20 January 2014 (release of the findings on 12 December 2013)

Italy - Montecristo

Procedure: Cassation, Supreme Court (*Corte di Cassazione, Sezione III penale*, Judgment no. 2855/2015), Italy

Date of decision: 29 October 2014

Background

On 10 October 2011, the Italian vessel *Montecristo* was attacked by a group of heavily armed pirates while cruising in the Gulf of Aden. After receiving confirmation that the vessel was under attack, the crew of the *Montecristo* was brought to a protected area, where they were able to maintain control of the ship's engines and rudder throughout the attack. Contacts were made with the military forces operating in the area. Two days later, a UK vessel and a US vessel belonging to the international force operating in the Indian Ocean (NATO operation OCEAN SHIELD) went to rescue the *Montecristo* and its crew. Upon the conclusion of the rescue operations, the pirates were arrested and then transferred to the Italian naval vessel *Andrea Doria*.

The *Montecristo* case marked 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, all Somali nationals belonging to a very organised and structured group, were prosecuted. This case was first reported in MPJM 2013 (subsections 4.1.4. and 4.2.3.).

The juvenile proceedings

As part of the preliminary proceedings in the *Montecristo* case, four of the accused were found not to have reached the age of majority at the time of attack against the Italian vessel. Their case was then separated from the proceedings against the adult defendants, and heard by a separate court, the Juvenile Court of Rome (*Tribunale per i minorenni di Roma*). The case against the eight adult pirates was held, both at first instance and appeals levels, before the *Corte di Assise* in Rome, which consists of two professional judges (including the Presiding Judge) and six jurors (*giudici popolari*).

The judgment issued by the first instance Juvenile Court of Rome on 16 June 2012 found the defendants guilty of maritime piracy (Article 1135 of the Italian Navigation Code), attempted kidnapping for ransom, unlawful

possession of war weapons, and assault and damage of a naval ship. Based on these findings, they were all sentenced to eight years' imprisonment.

On 6 October 2012, the Juvenile Court of Appeal of Rome confirmed the first instance judgment in its entirety and reaffirmed the defendants' convictions to eight years' imprisonment. Each of the juvenile defendants lodged an appeal before the Supreme Court against the judgment issued by the Juvenile Court of Appeal of Rome.

On 4 February 2013, the Supreme Court rendered its final judgment (Supreme Court 2013 Judgment). The Court dismissed all defendants' appeals and confirmed the convictions entered in the first instance and reaffirmed in the appeal.

By virtue of the Supreme Court's judgment of 4 February 2013, the sentences imposed against the juvenile pirates who participated in the attack against the vessel *Montecristo* and its crew in October 2011 are now final.

The ordinary proceedings (adults)

The judgment of the Court of Appeal of Rome of 27 November 2012 (MPJM 2013, subsection 4.1.4.), concluding the first instance proceedings against the eight adult pirates, found all defendants guilty of the crimes of maritime piracy (Article 1135 of the Italian Navigation Code), attempted kidnapping for ransom, unlawful possession of war weapons, and assault and damage of a naval ship. The leader of the pirates was sentenced to nineteen years' imprisonment, and seven other pirates were each sentenced to sixteen years' imprisonment. All defendants appealed the judgment.

In its judgment, rendered on 20 January 2014 (Court of Appeal 2014 Judgment), the Court of Appeal dismissed all defendants' appeals and confirmed the factual and legal findings provided in the first instance judgment, including the defendants' responsibility for the crimes of maritime piracy (Article 1135 of the Italian Navigation Code), attempted kidnapping for ransom, unlawful possession of war weapons, assault and damage of a naval ship.

However, the Court of Appeal reduced the sentences originally imposed on the defendants. Thus, the leader of the pirates received a lower sentence of fifteen years' imprisonment. The other defendants were all sentenced to twelve years' imprisonment. The Court held that in applying a more lenient sentence, it bore in mind 'the tragic living conditions of the Somali population, the extremely young age of all defendants, and the precarious conditions of their personal lives'. According to the Court, the latter were such that the defendants were on the brink of starvation at the time of their arrest. They 'benefitted from the dietary regime that they enjoyed while in custody [...] to the effect that they gained weight [after their arrest]' (Court of Appeal 2014 Judgment, p. 48).

An appeal was then lodged before the Supreme Court against the judgment issued by the Court of Appeal. On 29 October 2014, the Supreme Court issued its judgment rejecting all grounds for review, and upholding the defendants' convictions and sentences affirmed by the Court of Appeal. The judgment of the Supreme Court, dated 29 October 2014, brings to an end the proceedings against the adult perpetrators of the piracy attack against the *Montecristo*. Their convictions and sentences are now final.

Legal findings

Although tried before different judges, juvenile and adult defendants in the *Montecristo* case were charged with and eventually convicted of the same offences. Their proceedings had many aspects in common, including two interesting legal issues that were raised by their defence, first before the Court of Appeal, and subsequently before the Supreme Court.

a) Jurisdiction

Defence counsel argued that, in keeping with a strict interpretation of the principle of territoriality, the Italian courts lacked the required jurisdiction to adjudicate acts of piracy that occurred outside Italian territorial waters.

The Supreme Court rejected this argument. First, it acknowledged that, in keeping with the principle of territoriality, acts, including acts of piracy, committed on ships sailing under the flag of Italy are covered by Italian territorial jurisdiction. In addition, the Supreme Court clarified that a special set of recently enacted statutory provisions (such as Law no. 12 of 24 February 2009 (Law no. 12/2009)), regulating the 'extension of Italian participation in international missions'), introduced certain forms of non-territorial jurisdiction with regard to acts of maritime piracy.

Pursuant to Article 5, paragraph 4, of Law no. 12/2009 and in accordance with Article 12 of the Code of Criminal Procedure, 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, 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 OCEAN SHIELD and Operation ATALANTA.

In particular, Article 5, paragraph 4, of Law no. 12/2009 states that the above-mentioned 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. Article 5, paragraph 4, of Law no. 12/2009 attributes jurisdiction over piracy and related acts committed on the high seas or territorial waters to the Public Prosecution Office and courts based in Rome.

Based on the foregoing, the Supreme Court held that 'when acts of piracy are committed in the area of the Gulf of Aden and off the coast[s] of Somalia, against the Italian State or Italian ships, citizens, commodities or interests, such acts shall be punishable under the Italian laws and jurisdiction' (Supreme Court 2013 Judgment, p. 11).

The Supreme Court added that such acts, when amounting – as in the instant case – to 'piracy' as provided under Article 1135 of the Italian Navigation Code, are subject to Italian laws and jurisdiction

without any limitations on account of the place where the crime took place, i.e. irrespective of whether they were carried out in the Italian territorial waters or high seas or another state's territorial waters, [...] for they were committed against an Italian ship within the area of operation of Operation Ocean Shield, which fall under the jurisdiction of the Italian competent courts in Rome pursuant to Article 5 of Law no. 12/2009

(Supreme Court 2013 Judgment, pp. 11-12).

b) Due process

The defendants further claimed that their due process rights were infringed, especially their right to be 'informed [...] of the nature and grounds of the allegations' levelled against them, as provided under Article 111, paragraph 3, of the Italian Constitution.

They argued that such infringement materialised when they were tried and convicted for a crime – 'kidnapping for ransom' – with which they were not formally charged.

In fact, none of the defendants – including the juveniles – was charged with the crime of kidnapping for ransom as punishable under Article 630 of the Italian Penal Code. Instead, they were indicted for the different (and more serious) offence of 'kidnapping for terrorism purposes', per Article 289*bis* of the Italian Penal Code.

The prosecutions' underlying theory was that the pirates responsible for attacking the *Montecristo* were linked to the Somali-based terrorist group Al-Shabaab, and that they kidnapped the *Montecristo* crew with the goal of using the ransom money to support or to facilitate Al-Shabaab's terrorist activities.

According to the Italian prosecutors, the conduct (the act(s) of kidnapping) carried out by the pirates was supported by two different but concurring mental elements: the specific intent (*dolus specialis*) to commit the crime in order to obtain the ransom *and* the specific intent of supporting a terrorist organisation by providing the ransom (in whole or in part) so obtained. In the presence of such *dolus specialis*, the ordinary crime of 'kidnapping for ransom' becomes the more serious offence of 'kidnapping for terrorism purposes'.

The triers of fact in both the juvenile and ordinary first instance proceedings carefully tested the prosecution theory against the evidence presented at trial. They found that sufficient evidence was presented to sustain a conviction for the ordinary crime of 'kidnapping for ransom', as both the conduct (the acts of kidnapping) and mental element (the acts were carried out with the knowledge and intent to kidnap for ransom) required under Article 630 were proven.

However, they further found that the prosecution did not present sufficient evidence to support the allegations that the pirates carried out the kidnapping with the specific intent to support Al-Shabaab. Accordingly, they dismissed the allegations made under Article 289*bis*, and convicted all defendants for the (less serious) crime of kidnapping for ransom pursuant to Article 630.

The defendants claimed that, since they were never charged under Article 630, a conviction entered pursuant to that provision would violate their rights to be informed of and to defend themselves. For these reasons, they requested the Court of Appeal and the Supreme Court to quash their convictions for the crime of 'kidnapping for ransom'. The Court of Appeal and the Supreme Court rejected this argument in both the juvenile and ordinary proceedings, and upheld the convictions under Article 630.

In general, both courts noted that, in keeping with Article 521 of the Italian Code of Criminal Procedure, the judge has, with limited exceptions, the right to modify the legal definitions applicable to the facts or apply a different legal definition than that provided in the indictment for the same facts. In the instant case, it was upheld that the trier of fact has exercised this right properly, and within the limitations provided under Article 521.

The courts found that both elements of the crime of 'kidnapping for ransom' (the conduct as well as the specific intention of gaining an unlawful profit) were already provided in the indictment, in which the accused persons were alleged to have kidnapped the crew to obtain a ransom. In the courts' view, by means of that allegation, they were informed that the prosecution would have sought to prove that they kidnapped the crew to obtain a ransom for their release.

In the courts' reasoning, the fact that such allegation was not made under Article 630 but was instead charged as 'kidnapping for terrorism purposes' punishable under Article 289*bis* is not determinative. In this regard, the courts stated that both crimes are 'identical except for the *quid pluris* of the terrorist purposes' required by Article 289*bis* (Supreme Court 2013 Judgment, p. 16). Based on the foregoing, the courts found that the accused persons' defence rights, particularly that of being informed of the material allegations of which they were accused, were not infringed (*see* Court of Appeal 2014 Judgment, p. 32; and Supreme Court 2013 Judgment, p. 16).

3.5. The Netherlands

3.5.1. The Netherlands - *Ceto*

Procedure: 1st Instance, District Court of Rotterdam (*Rechtbank Rotterdam*, Case No 10/960227-12, published as ECLI:NL:RBROT:2014:119), the Netherlands

Date of decision: 10 January 2014

Introduction

In a judgment dated 10 January 2014, the District Court of Rotterdam rendered a decision in a case concerning a pirate involved in violent acts against the Dutch Navy in the waters off the coast of Somalia in the Indian Ocean. At the time of the events, the accused pirate acted as an armed guard on board a *dhow*, the *Mohsen*, which was originally a fishing vessel that had been hijacked by pirates and used for acts of piracy. On 24 October 2012, the Dutch Navy vessel Hr. Ms. Rotterdam, which was participating in an international anti-piracy mission, was in the vicinity of the *Mohsen*. Some Dutch marines were sent out in a rigid hull inflatable boat (RHIB) to assess the situation on board the *dhow*. Allegedly, the pirates opened fire on the Dutch Navy personnel. After the first exchange of fire, an explosion took place on the *Mohsen*, after which the vessel caught fire. At least one of the original crew members of the *Mohsen* was killed in the exchange of fire and others were injured. The remainder of the crew members ended up in the water and were rescued by the Dutch Navy.

The prosecution charged the suspect with piracy, or, alternatively, attempted murder or the commission of violent acts against persons on board a vessel, and requested a prison sentence of eight years with reduction for time spent in preventive custody.

Jurisdiction of the Court

The defence challenged the validity of the indictment on the basis of lack of clarity regarding the vessels involved in the attack. In addition, the indictment was allegedly unreadable due to the use of brackets in the text. The claim was rejected, as an amended version of the indictment set out which vessels were involved. The argument that the use of brackets made the indictment unreadable was dismissed as such argument did not have a legal basis.

The defence also claimed a lack of jurisdiction of the court, claiming that the accused was under the age of 18 in October 2012, when the offences took place. In the alternative, the defence requested that the results of the examination to confirm the age of the accused should be received before taking a decision in this regard. In the opinion of the District Court, the age of the suspect did not lead to a lack of jurisdiction of the court. Even if the suspect was proven to have been under the age of 18 at the time of the offences, all judges held such qualifications that they could try cases against minors. As for the question of whether the accused was, indeed, a minor when the crimes were committed, the District Court referred to its decision during the court hearings, according to which this fact had not been established. While the indictment referred to 1 January 1997 as the date of birth of the suspect, which implied that he was a minor in October 2012, the defence never argued that the accused was a minor. In addition, statements made by the suspect confirmed that he was above the age of 18 in October 2012. The statements in question were made when the suspect was interviewed by the Royal Marechaussee regarding the course of events and, thus, not in the context of establishing his age. While the accused, during the court hearing, claimed that he was underage, the District Court gave more weight to his earlier statements. It also considered the inconclusive nature of the scientific assessment of his age through analysis of his bones, and declared the claim of lack of jurisdiction unfounded.

Procedural issues

Challenges were raised concerning the procedure at pre-trial stage. The defendant claimed that the rights of the accused were breached, which should have barred the prosecutor from pursuing the case. The defence referred to the fact that no recording of the statements taken from the crew on board the Dutch Navy vessel had taken place and this omission infringed the right of the accused to examine the statements. However, the District Court dismissed the claim as the defence had not specified how this omission had negatively affected the rights of the accused, also taking into account that the defence had taken the opportunity to interview these witnesses at a later stage. The District Court further dismissed the arguments that information related to one witness statement and photographs of the attack were not, or not properly, disclosed by the prosecution. In the view of the District Court, such differences of opinion were not uncommon in piracy cases and thus did not constitute a reason to bar the prosecutor from pursuing the case.

Fair trial issues

The defence brought forward the argument that the statements given by certain witnesses should be excluded from evidence, as the accused was not granted the right under Article 6(3)(d) of the ECHR to examine or have examined witnesses against him. The request to hear these witnesses had been granted by the District Court. However, as some witnesses were of Iranian or Somali nationality, the attempts by the investigating judge to get in contact with the witnesses had failed due to the difficult diplomatic relationship with Iran, and the security situation and lawlessness in Somalia. With regard to those witnesses that the defence had not been in a position to examine at all, the District Court found that, according to existing jurisprudence, the statements given by a certain witness could still be used in evidence, to the extent that the statement is corroborated by other evidence that support those parts of the statement that are incriminating or disputed. The District Court concluded that, under this condition, the statements of two important eye witnesses that had been examined by the defence were also admitted into evidence, even though the accused did not have access to the complete case file.

With regard to the two witnesses whose statements were considered important for proving the alleged offences, the defence argued that the poor quality of the testimonies should lead to a reduced evidentiary value of evidence to such an extent that the statements could not be used at all. The quality and reliability of the testimony was influenced by the context and time at which the statements were made, the difficult communication during the interview with one of the witnesses and the quality as such of the interviews. The District Court concluded that even in situations in which interpreters are used and communication is difficult, the witness' message can still be extracted. With regard to the fact that the witnesses were interviewed in difficult circumstances, more specifically after their vessel was caught up in an exchange of fire and after the crew members ended up in the water and eventually were rescued, the District Court recognised the inferior quality of the statements made shortly after the incident. A similar conclusion was drawn regarding the quality of the questions and the interview in general that was conducted on board the Dutch Navy vessel in the aftermath of the attack. The District Court ruled that these statements could only be used if corroborated by other evidence.

Proof of piracy and (attempted) murder or violence against a person on board a vessel

a) Piracy

Article 381 of the Criminal Code of the Netherlands stipulates the crime of piracy. The article provides two types of crime, one being the commission of violent acts against other vessels or their crews on the high seas. The other type requires that the seaman had knowledge of the use of the vessel for the purpose of using such acts of violence on the high seas. In addition, the crime of piracy can be committed either as the skipper or as a crew member.

As the evidence showed that the commission of the violent acts did not take place on the high seas, the accused was acquitted of the first type of piracy crime. With regard to the knowledge of the accused that the vessel was to be used for acts of violence against other vessels, insufficient evidence was presented to prove such knowledge. The accused was acquitted of the piracy charges.

b) Murder, attempted murder or violence against a person on board a vessel

The accused was further charged with murder, alternatively attempted murder or violence against a person, under Article 385b of the Dutch Criminal Code. With regard to these acts committed against the members of the crew of the vessel *Mohsen*, proof of the active participation or commission of the crime was required. The District Court found that no consistent statement as to active participation of the accused had been provided and acquitted the accused of these charges.

What was proven, however, was that the accused was among those armed guards that patrolled the vessel. As to the question whether the accused was passively involved in the commission of violent acts against the crew of the *Mohsen*, the District Court found that no intent needed to be proven for the consequences of the activities carried out by the accused. The close and conscious cooperation with others in an armed activity was sufficient to prove the passive participation of the accused in the acts of violence against the crew, as the chances were good that the weapons would actually be used against another vessel or its crew. As the evidence showed such close and conscious cooperation on the part of the accused, the District Court found him guilty of passively participating in the commission of violent acts under Article 385b of the Dutch Criminal Code.

The defence referred to the use of the weapons as an act of self-defence against the Dutch Navy, either because the Dutch Navy opened fire against the vessel *Mohsen* or due to the fact that the Dutch Navy pointed weapons at the *Mohsen* when approaching the vessel. The claim was dismissed, as evidence showed that targeted fire was opened against the Dutch Navy.

Sentencing

The accused was sentenced to two years' imprisonment. The length of the prison term was justified by the fact that the accused (and his co-accused) had used violence against Dutch Navy personnel. His acts endangered the lives of those members of the Dutch Navy that approached the pirate vessel in a small, unprotected RHIB. The District Court took into account the fact that the active participation of the accused had not been proven. In addition, the personal circumstances of the accused, such as the poignant societal situation in Somalia, were considered by the District Court but did not detract from the seriousness of the events.

3.5.2. The Netherlands - *Choizil* (skipper)

Procedure: Cassation, Supreme Court (Hoge Raad, Case No ECLI:NL:HR:2014:286), the Netherlands. (Court of Appeal Case no. ECLI:NL:GHSGR:2012:BY6938)

Date of decision: 11 February 2014

Background

A judgment in a case concerning an attack by Somali pirates against a sailing vessel, the *Choizil*, was rendered by the District Court of Rotterdam on 12 August 2011. Five suspects were accused of piracy, having threatened the crew and boarded the sailing ship. All accused were convicted to prison sentences of either five and one-half or seven years, depending on their role as either skipper or crew member. An analysis of the decisions concerning two of the accused was included in the MPJM 2013 (subsection 4.1.6.). The decisions in question were appealed and the sentences of both the skipper and crew member were reduced to four years and six months. For lack of sufficient evidence regarding his role as captain of one of the pirate vessels, the sentence of the skipper was lower than that pronounced by the Court of Appeal.

Supreme Court decision

The *Hoge Raad*, the Supreme Court of the Netherlands, only renders decisions on points of law and criminal procedure and, accordingly, the facts as established by the lower courts are not considered anew. The request for renewed consideration or *cassation* in this case mainly concerned the question whether the court had jurisdiction to try the case. The claim brought by the appellant addressed the alleged lack of jurisdiction in this case, based on a breach of the principle of equality. According to the appellant, suspects in other cases had been released or sent away without trial, while the suspects in this case were tried and sentenced. The decision to try the suspects in the case at hand allegedly constituted such a serious breach of the principle of equality that the prosecutor should have lost his right to pursue the case and bring charges against the suspects. The appellant held that this claim, which had been raised before the Court of Appeal, had erroneously been rejected by that court or, alternatively, had not been sufficiently reasoned by the Court of Appeal.

The Supreme Court cited the relevant parts of the decision of the Court of Appeal, in which the latter had referred to prosecutorial discretion and to the fact that pursuing the cases against the suspects in question was in the public interest. In addition, the Court of Appeal had argued that the resemblance between the cases at hand and other cases, in which the suspects had been released, was not such that the principle of equality had been breached in relation to the accused in this case.

The Supreme Court added that even if charges erroneously were not brought in relation to a suspect whose actions should have led to criminal charges, such error does not in and of itself lead to a lack of jurisdiction to pursue the case against the suspect in this case.⁴⁹ Accordingly, the Supreme Court confirmed the findings of the Court of Appeal and rejected the claim brought by the accused.

3.5.3. The Netherlands - *Dhow*

Procedure: Appeal, Court of Appeal of The Hague (*Gerechtshof 's-Gravenhage*, Case No 22-004920-12, published as ECLI:NL:GHDHA:2014:1006), the Netherlands. (First instance: Case No ECLI:NL:RBROT:2012:BX9986)

Date of decision: 21 March 2014

Background

On 12 October 2012, the District Court of Rotterdam rendered a judgment in a piracy case concerning nine suspects involved in a piracy incident off the coast of Somalia in April 2011. A Dutch naval vessel, operating in the region as part of an international anti-piracy mission, noticed the *Feddah*, an Iranian *dhow*, heading in the direction of Somalia. Attempts to get in contact with the *Feddah* failed and subsequently crew members of the Dutch naval vessel approached the hijacked fishing vessel in two RHIBs for inspection. The armed confrontation between the *Feddah*, on the one hand, and the Dutch naval vessel and the RHIBs, on the other, took place as the RHIBs approached the fishing vessel. The confrontation resulted in the death or injury of a number of individuals of Somali nationality present on the *dhow*. Sixteen pirates were arrested, nine of whom were brought to trial.

The suspects were charged with piracy, or, alternatively, attempted murder or the commission of violent acts against persons on board a vessel. The prosecution requested a custodial sentence of 10 years with reduction for the time spent in custody. The District Court of Rotterdam convicted the accused and sentenced them to four and one-half years' imprisonment. An analysis of the decision of the District Court of Rotterdam was included in the MPJM 2013 (subsection 4.1.7.). Both the defence and the prosecution appealed the decision.

⁴⁹Reference was made to earlier jurisprudence by the Supreme Court in a similar matter of law. See Supreme Court Judgment, 16 April 1996, *Nederlandse Jurisprudentie*, NJ 1996/527, rov. 7.7.

The Court of Appeal also imposed imprisonment custodial sentence of four and one-half years. Whereas the sentence was the same as that rendered by the District Court of Rotterdam, the Court of Appeal overruled the former decision due to differences in the legal considerations and findings. The judgment summarised below concerns only one of the accused, but is representative of all the rulings in this case.

Jurisdiction of the Court

As in the *Choizil* case,⁵⁰ the Court of Appeal of The Hague *ex officio* considered the jurisdiction of the Dutch court to try the crime of piracy as laid down in Article 381 of the Dutch Criminal Code and the competence to try such cases on the basis of international treaties. With regard to domestic law, the jurisdictional basis for the crime of piracy can be found in the chapeau and subsection 5 of Article 4 of the Dutch Criminal Code. However, according to Article 94 of the Constitution of the Netherlands, the domestic provisions should be in compliance with any treaty obligations, in this case UNCLOS and the SUA Convention. The Court of Appeal referred in particular to Articles 100, 105 and 110 of UNCLOS and found that this treaty allows for the application of universal jurisdiction for states that arrest alleged pirates, although limited, however, to acts committed on the high seas. As regards the competence to try acts committed within the territorial waters of Somalia, the Court of Appeal referred to a number of UN SC Resolutions, including SC Resolution 1816, on the basis of which the EU Naval Coordination Cell (EUNAVCO) was established. The tasks of this military coordination cell were to be exercised under Council Joint Action 2008/851/CFSP of 10 November 2008.⁵¹ Article 12(1) of this Council Joint Action provided the necessary jurisdictional basis for the Dutch court. After considering all provisions, the Court of Appeal of The Hague concluded that the Netherlands had jurisdiction to try the case with regard to the crime of piracy.

The defence claimed that a Dutch court did not have jurisdiction to try the crime of attempted manslaughter or murder, as the offences did not take place on board a Dutch vessel. The Court of Appeal found that Article 4, subsection 8, under a, of the Dutch Criminal Code provides a jurisdictional basis for crimes included in Articles 287, 288 and 289, among which are attempted manslaughter and murder, if committed against a Dutch seagoing vessel. The offences need not have taken place on board the Dutch vessel. The Court of Appeal further considered that the RHIBs qualified as seagoing vessels. With regard to an argument of the defence that only acts of piracy committed for terrorist purposes could be tried, the Court of Appeal found that the Protocol to the SUA Convention did not exclude the possibility to try crimes other than those committed for terrorist purposes. The Court of Appeal concluded that the prosecution of the attempted manslaughter or murder was also in accordance with requirements of Article 94 of the Constitution of the Netherlands.

Procedural issues

The defence brought forth a number of challenges, claiming procedural mistakes or omissions that should have barred the prosecutor from pursuing the case. The most important challenges are reflected below. Prior to addressing the alleged procedural breaches, the Court of Appeal generally confirmed the view of the District Court of Rotterdam that the primary goal of the Dutch naval vessels in the Somali region is the escorting of vessels of the World Food Programme in the Horn of Africa and the prevention of hijackings of commercial vessels. In light of these objectives, military interests understandably played a primary role during the operations and criminal procedural rules at the beginning of an investigation, during which only military personnel were present, were of secondary importance. In addition, the Court of Appeal stressed that only serious breaches of procedural law that directly affect the interests of the accused can lead to the prosecutor being barred from pursuing the case.

⁵⁰ The Netherlands – *Choizil*, Court of Appeal of The Hague (*Gerechtshof's-Gravenhage*, Case No LJN: BY6938, New Case No ECLI:NL:GHSGR:2012:BY6938), 20 December 2012, in MPJM 2013, pp. 64-66.

⁵¹ 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, OJL 301/33.

a) Boarding of the hijacked fishing vessel and seizure of goods

The defence claimed that the Dutch Navy did not act in accordance with the law when approaching, boarding and subsequently arresting the alleged pirates on the *dhow*. The Court of Appeal found that as the Dutch Navy carried out an inspection within its mandate, no breach had occurred prior to the armed confrontation, nor at the stage of boarding the fishing vessel and arresting the accused. The facts and circumstances of the case showed a suspicion of ongoing piracy activities, which triggered the naval vessel to approach and board the hijacked fishing vessel. In addition, sufficient warning had been given prior to the boarding. In light of these facts, the Court of Appeal also dismissed the claim that the seizure of goods, including weapons, munition, ladders and mobile telephones, was unlawful. Article 105 of UNCLOS provided a sufficient basis for the possibility to seize goods when carrying out a military mission.

b) Arrest and detention - Article 5 ECHR

The defence contested the lawfulness of the arrest and the period of time during which the accused was held in custody. With regard to the basis for the arrest, the Court of Appeal referred to Article 105 of UNCLOS and Article 7 of the SUA Convention for the period prior to the involvement of the prosecution service and subsequently to Article 539a of the Dutch Code of Criminal Procedure. Giving consideration to all the applicable procedural safeguards, the Court of Appeal concluded that no such breach of the timeframe for lawful detention could be established that had a negative impact on the prosecutor's right to pursue the case.

c) Audiovisual recording of interviews

On the basis of national guidelines regarding audiovisual recording of interviews, the defence claimed a breach that could not be remedied. The prosecution argued that no proof had been brought forward to show that any interest of the accused had been breached or any negative consequence for the accused had been caused by the failure to record the interviews. The Court of Appeal found that no intentional breach or gross negligence on the part of the prosecution could be established that could lead to barring the prosecutor from pursuing the case. Any unintentional breach that could not be remedied might be considered, however, as influencing the evidentiary value of the statements made.

d) Fair trial - Article 6 ECHR

Referring to Article 6 ECHR, the defence argued that some interviews with suspects and witnesses had been conducted exclusively as part of the military mission and, thus, not in accordance with the requirements of a fair criminal procedure. The Court of Appeal found that while the interviews in question had been conducted by a military officer in the immediate aftermath of the incident, the facts and circumstances of the case did not indicate any intentional breach of procedural rules, nor were any breaches established for which the prosecution service could be held responsible. In addition, the Court of Appeal considered that the case file, to which the defence also had access, clearly set out the course of events, thus enabling questioning of the involved persons at a later stage, including the military officer who carried out the first interviews. No violations were established that would have barred the prosecutor from pursuing the case.

e) The principle of equality before the law

The Court of Appeal affirmed the opinion of the District Court of Rotterdam that as the Netherlands applied the principle of opportunity, the prosecutor had the discretionary power to independently determine against which suspects a case would be opened. With regard to a possible breach of the equality principle, the Court of Appeal found that, in piracy cases in particular, establishing similarities between the circumstances in past and present cases was difficult. Accordingly, as no clear pattern could be discerned, and as some suspects had been prosecuted and others sent away without prosecution in other cases, no breach of the equality principle had taken place. The decision on which cases to prosecute remained within the broad discretion of the prosecutor.

f) Cooperation with the Dutch Navy

The defence claimed that military interests had prevailed in this case, which led to the interests of the accused being neglected. For example, the Dutch Navy had not shared information relevant to the criminal case, nor had they informed the prosecutor about the existence of essential evidence. The Court of Appeal set out the facts and sequence of events and found that certain interviews and steps taken by the Dutch Navy primarily may have served the purpose of the ongoing anti-piracy mission. In addition, the status of the suspect was not entirely clear immediately after the incident took place. However, even if the lack of full cooperation by the Dutch Navy had been established, the actions they took could not be considered an omission by the prosecutor to secure the rights of the accused. The fact that certain information, such as the confidential NATO Rules of Engagement, was not shared with the prosecution and never formed part of the case file was understandable, considering the concrete operational interests of state security in this case. No circumstances had been established by which the procedural safeguards or fundamental rights of the accused had been violated to an extent that rendered the process unfair.

Co-perpetration of piracy and attempted murder

Based on the available evidence, the Court of Appeal found the accused responsible for the crime of piracy as a co-perpetrator. Based particularly on witness testimonies, the Court of Appeal established that the accused, together with other Somali nationals, formed a group whose objective was hijacking vessels. Evidence demonstrated that on the day of the incident, the accused was on board the *Feddah*. According to established jurisprudence, co-perpetration requires that the various perpetrators knowingly and closely cooperate with each other. Having regard to this requirement, the Court of Appeal found that the accused formed a strong group of perpetrators, armed with automatic weapons, munition, fuel, water, food and ladders, that headed to the open sea for the purpose of hijacking ships. The Court of Appeal also considered the *modus operandi* of the perpetrators, the place in which they were apprehended and the clear leadership within the group. In addition, no alternative scenarios, such as a fishing expedition, had been established.

The Court of Appeal found that while weapons had been fired from the *Feddah* in the direction of Dutch Navy personnel, evidence was lacking or insufficient to demonstrate that the accused was the perpetrator of the attempted murder, manslaughter or violence against Dutch Navy personnel. The Court of Appeal held that while co-perpetration of the crime of piracy had been proven, additional evidence was needed for the close link between the acts of piracy and the actual commission of violence. With regard to co-perpetration, criminal intent had to be proven not only regarding cooperation between the members of the group, but also for the actual acts of violence. In this case, evidence did not prove direct involvement of the accused in the shooting incident, or who had fired the weapons. No evidence had been brought forward demonstrating that the accused had been involved in the planning or organisation of the attempted murder or acts of violence against the Dutch Navy personnel. In light of these findings, the Court of Appeal acquitted the accused on this charge.

Sentencing

Having overruled the decision rendered by the District Court of Rotterdam due to partial differences in its findings and decisions, the Court of Appeal sentenced the accused to four and one-half years' imprisonment. The Court of Appeal reiterated that the offence was of a very serious character, as the activities of the pirates off the coast of Somalia endangered the security of commercial sea routes and put pressure on international shipping and on the delivery of humanitarian aid to Somalia. Great international and military efforts had been made to end piracy in the Somali region. Huge amounts of ransom money had been paid as a consequence of the hijacking of vessels, money that was also used to professionalise the piracy business. In addition, the seriousness of the crime was apparent from the fact that the crew of the hijacked vessel had been held hostage for approximately two months, causing prolonged distress and insecurity.

The Court of Appeal recognised, however, that the accused had not been the skipper of the pirate vessel, nor did he belong to the group of pirate leaders or to those who made large profits out of piracy activities. Neither had the accused been found to have used weapons or other forms of violence. While the Court of Appeal also considered the deplorable personal circumstances of the accused and his imprisonment in a foreign country as mitigating the offences committed, it stressed the fact that such circumstances could only be of limited significance in light of the seriousness of the offences.

3.6. Poland

Poland - *MDPL Continental One*

Procedure: Decision on discontinuation of investigation, Appellate Public Prosecutor's Office of Szczecin, Poland (Reference: Ap V Ds. 31/13)

Date of Decision: 17 December 2013

Facts

On 27 September 2013, the prosecutor of the Appellate Public Prosecutor's Office of Szczecin initiated proceedings in a case concerning the kidnapping of crew members – including one Polish citizen – from a vessel flying the flag of Singapore, the *MDPL Continental One*, off the coast of Nigeria. On 13 June 2013 at 22:00, the *MDPL Continental One* was approached by two fibreglass boats. At first unnoticed, the perpetrators took control of the vessel, plundered the cabins and finally took the captain, the chief engineer, the boatswain and the Polish citizen hostage at gunpoint. The perpetrators brought the hostages to a camp onshore. Upon the conclusion of successful negotiations, the hostages were exchanged for ransom on 24 June 2013. The Polish citizen kidnapped along with the crew of the *MDPL Continental One* safely returned to Poland on 26 June 2013.

Legal framework

According to the Appellate Public Prosecutor's Office of Szczecin, the modalities under which the kidnapping of the crew of the *MDPL Continental One* was carried out gave rise to two distinct but concurring criminal offences: the offence of unlawful deprivation of liberty provided under Article 189, paragraph 1, of the Polish Penal Code, and the illegitimate taking control of a ship using deceit, violence, or threat, sanctioned pursuant to Article 166, paragraph 1, of the Polish Penal Code.

Deprivation of liberty

Article 189, paragraph 1, punishes the unlawful deprivation of liberty of a human being with the sanction of imprisonment for a period between three months and five years. In the event that the period of such deprivation amounts to seven days or longer, the sanction is increased to a period between one and 10 years.

In the present case, four crew members, including the Polish citizen, were deprived of their liberty by being taken hostage by a group of armed men. The four crew members, after having been forcibly removed from their vessel and placed on a pirate skiff, were taken to the perpetrators' camp onshore. The captives were unaware of their location onshore, as they were forced to keep their heads down during their transfer. The captives were kept prisoner in a camp subject to round-the-clock surveillance. Eleven days after the initial kidnapping, the perpetrators exchanged their hostages for ransom.

Using deceit, violence or threat to take control of a ship

Article 166, paragraph 1, prohibits taking control of a ship through the use of deceit, violence or threat. This offence is considered to be an offence against public safety. In the present case, the victims were forced at gunpoint to give up control of their ship. An unknown number of armed perpetrators approached the vessel, entered the upper deck, ordered crew members out of their cabins, pointed AK-47 rifles at them and stole their belongings, such as mobile telephones and laptops. Four crew members, including the Polish citizen, were forcibly placed onto a pirate skiff and transferred to the perpetrators' camp. They remained in captivity until their release, eleven days later.

Decision on discontinuation

On 17 December 2013, the Appellate Public Prosecutor's Office of Szczecin issued a decision to discontinue the investigation due to the impossibility to identify the alleged perpetrators.

The decision was based on Article 322(1) of the Polish Code of Criminal Procedure. This article provides the legal basis for discontinuation of preliminary proceedings if no sufficient grounds to justify the preparation or issuance of an indictment can be established.

In the present case, the Appellate Public Prosecutor's Office of Szczecin acknowledged that determining the identities, exact number (estimated to be between 23 and 25) and location of the kidnappers was impossible. The only information available to the Appellate Public Prosecutor's Office of Szczecin was that their appearance and demeanour led to the conclusion that they came from various parts of Nigeria, as they spoke local languages and English. No supporting evidence, such as photographs of the perpetrators or records of their names, was available.

Furthermore, the apparent lack of judicial cooperation with the foreign states directly affected by or implicated in the kidnapping represented a major setback in the Polish authorities' efforts to bring those allegedly responsible to justice. The decision makes reference to the difficult geopolitical situation in the foreign state in which the kidnapping took place, Nigeria, as a factor preventing the successful execution of any request for judicial assistance with the objective of identifying or locating the perpetrators. The decision further noted that neither the country of the shipowner nor the states of the other crew members conducted any judicial proceedings in relation to the kidnapping of the *MDPL Continental One*.

Against this background, the Appellate Public Prosecutor's Office of Szczecin decided to terminate the investigation, with the option to resume it in the future if further information leading to the identification of the alleged perpetrators of the kidnapping of the *MDPL Continental One* could be obtained.

3.7. Spain

3.7.1. Spain - *Izurdia*

Procedure: Preliminary proceedings, National Pre-Trial Examining Court (*Juzgado Central de Instrucción*, n. 3, reference n. 0000112/2012); 1st Instance, Criminal Chamber of the National Court (*Audiencia Nacional*, Judgment n. 1/2015)

Date of decisions: 12 October 2012 and 2 February 2015

Introduction

On 2 February 2015, the Criminal Chamber of the National Court, the *Audiencia Nacional* (the ‘Criminal Chamber’), sentenced six Somali pirates to a total of sixteen and one-half years’ imprisonment for attempted seizure of the Spanish fishing vessel *Izurdia* under Articles 616 and 616*quater* of the Spanish Penal Code, and for participation in a criminal organisation involved in committing acts of piracy under Article 570*bis*, 1, 2b and 3 of the Spanish Penal Code.

Facts

On 10 October 2012, the *Izurdia* was attacked in international waters of the Indian Ocean. Seven individuals approached the *Izurdia* in a skiff, carrying assault rifles and rocket propelled grenades (RPGs). The private security guards on board the *Izurdia* spotted the skiff approaching at high speed and informed the captain, who immediately adopted preventive security measures according to security protocol. The crew was consequently transferred to the machine room, except for the captain and the chief of operations, both of whom remained on the bridge. The security fence surrounding the vessel was raised and the captain transmitted an SOS signal via very high frequency (VHF) radio. The pirates approached the ship and opened fire with assault rifles while evasive manoeuvres were made and warning shots were fired from the *Izurdia*. An RPG launcher was spotted on the skiff. The skiff continued approaching the vessel despite the warning shots. Once the skiff was at a range of 0.7 – 0.9 miles from the *Izurdia*, the private security guards opened fire on the pirate vessel. The skiff then turned and escaped without suffering any damage.

On the same day, the captain of a Dutch naval vessel, the *HNLMS Rotterdam*, participating in NATO’s counter-piracy mission, ‘Ocean Shield’, was informed that the *Izurdia* was under attack. He was also notified about the exchange of fire, which lasted until the skiff abandoned the attack and escaped. In the afternoon of the same day, the French naval vessel *La Fayette* initiated the first searches of the skiff by helicopter. Later, the Dutch naval vessel joined the searches by closing off any possible routes that the skiff could have used to disappear.

The skiff was spotted the next day, 11 October, by the helicopter based aboard the *HNLMS Rotterdam*. After some warning gunfire, the skiff stopped and the pirates surrendered. The Dutch naval officers met with no resistance from the pirates, nor did they find any weapons on the skiff. In cooperation with the Dutch authorities and the Dutch Prosecution Service, the seven suspects were taken on board the Dutch vessel, together with the skiff and its equipment, which were to be used as evidence in the criminal proceedings.

Jurisdiction

The jurisdiction of the National Pre-Trial Examining Court was determined on the basis of Article 616 of the Spanish Penal Code, which applies to the crime of piracy committed by any person who, by violence, intimidation or deceit, seizes, damages or destroys an aircraft, ship or another kind of vessel or platform at sea, or attacks persons, cargo or property found on board thereof. The National Pre-Trial Examining Court also referred to Article 23.4(c) of the Spanish Organic Law of the Judicial Power, which provides for the possibility

of extension of Spanish jurisdiction to acts of piracy if, among other things, a ship is sailing under the Spanish flag and if any member of its crew possesses Spanish nationality.

On the basis of the information provided by the Dutch authorities, the circumstances of the attack and the detention of the suspects, the investigating judge concluded that Article 616 of the Spanish Penal Code applied to the facts in this case. In addition, the fact that the *Izurdia* flew the Spanish flag and that part of its crew possessed Spanish nationality gave grounds for establishing the jurisdiction of the National Pre-Trial Examining Court also under Article 23.4(c).

The Criminal Chamber of the National Court confirmed its adjudicatory jurisdiction over the case and added that the Dutch naval vessel, the *HNLMS Rotterdam*, which intervened in the pursuit and detention of the suspects on 11 October 2012, was operating under the mandate of the naval force of the European Union within Operation ATALANTA. They operated in cooperation with the Spanish naval vessel *B.A.A.Castilla*, to which the detainees were transferred.

The jurisdiction of both courts (National Pre-Trial Examining Court and National Court) did not give rise to objections in the course of the proceedings.

Decision of the investigating judge

In the preliminary proceedings, the investigating judge of the National Pre-Trial Examining Court decided on the detention of six suspects on the basis of Article 539 of the Spanish Criminal Procedure Act. The decision was based on the qualification of the above-described facts as serious crimes and on his consideration that reasonable grounds to believe that the suspects were responsible for the described facts had been established. In addition, his decision was based on the conclusion that a high risk was present that the suspects would escape justice, considering the geographic location of the incident (a region in permanent state of conflict, lacking the rule of law). The application of the preventive coercive measure was further based on the fact that the National Pre-Trial Examining Court could not impose a less intrusive measure on the suspects.

The above decision was confirmed in the indictment stating that the circumstances, which justified the adoption of the preventive measure (provisional detention without possibility of being granted bail), remained unchanged.

Indictment

Following the outcome of the preliminary proceedings carried out at the National Pre-Trial Examining Court, the Central Economic and Tax Crimes Unit initiated an investigation into the described criminal event, which resulted in an indictment issued against six suspects on the basis of Articles 616 and 616*quater* of the Spanish Penal Code.

The indictment was based mainly on the following evidence:

- *Material evidence seized on the skiff and from the suspects* on the day of their arrest, indicating that the suspects were involved in acts of piracy, in particular in the absence of fishing equipment on board that would explain the legal activity of the skiff.
- *Testimony of sailors* witnessing that RPGs and several assault rifles were dropped into the sea from the skiff, along with small-calibre weapons, when the suspects were faced with the risk of capture by the Dutch military forces. This testimony, together with *the circumstances before the arrest of the suspects* as described in the Dutch military report on the attack against the *Izurdia*, constituted principal evidence for the trial. The report stated that the skiff had continued towards the *Izurdia* despite requests to stop and warning lights from the Dutch naval vessel, which consequently had to open fire to make the skiff stop.

- *Testimony of the captain of the Izurdia* describing the dynamics of the attack, which forced him to activate the pirate alert.
- *Testimony of the members of the private security team* on board the *Izurdia* describing the details of the attack and their response to it.

Procedural issues

a) Minors

The doctor on the Dutch naval vessel conducted an age assessment of the suspects after their arrest, and certified that all except one suspect had reached the age of majority. Consequently, the investigating judge of the National Pre-Trial Examining Court determined that this Court lacked competence to render decisions regarding the minor, as the Spanish Law on the Criminal Responsibility of Minors only provides competence to the National Pre-Trial Examining Court in cases of terrorism.

b) Challenging the expert reports

During the main hearing, the defence challenged the expert report confirming the proven facts as described above and the intelligence report concerning the composition and objectives of the criminal group that attacked the *Izurdia*. The Criminal Chamber rejected all the objections of the defence by stating that such objections should be made in a timely manner at an appropriate phase of the proceedings, in order to be considered by the Criminal Chamber. Therefore, the Criminal Chamber held that the defence had not acted in good faith with regard to the proceedings by objecting to the expert reports during the main hearing, particularly when such evidence had been previously approved, either expressly or tacitly. The Criminal Chamber further noted that the expert reports should have been challenged, at the latest, during the defence's preliminary motion. Finally, the Court decided to reject the objections for being untimely and too generic.

Proof of piracy

The provisions on the offence of piracy are laid down in Articles 616 and 616*quater* of the Spanish Penal Code. According to the defence, Article 616 requires the perpetration of criminal activity, meaning that the attempt to commit the act of piracy should not fall under this provision. The Criminal Chamber held that the Spanish vessel, the *Izurdia*, was proven to be the object of an attempted assault, during which firearms were used against the vessel and its crew. The attack was unsuccessful only because of prompt intervention by the private security staff on board the vessel, which, in accordance with the reasoning of the Criminal Chamber, implied the perpetration of the criminal offence of piracy, as its objective was fully carried out.

The Criminal Chamber further explained that the crime, as laid down in Article 616 of the Spanish Penal Code, is an offence against the international community, as it breaches protected international air and maritime traffic and supra-individual legal rights. The first part of the description of the offence includes unlawful seizure, damaging or destruction that in the opinion of the Criminal Chamber applied to the case concerned, as a consequence of the fact that an armed attack against the vessel and its crew was carried out. In the opinion of the Criminal Chamber, this consumed the second part of the description of the offence referring to the above-listed acts perpetrated 'against persons, cargo and property' on the vessel. The Criminal Chamber reasoned that the second part of the provision does not require an effective seizure or disabling of the vessel, as the description also applies to an attempted attack against persons, cargo and property on board a vessel. The Criminal Chamber concluded that the proven facts of this case can be considered as falling under the second form of piracy, which does not require a final result of the acts of piracy, but merely activity.

The proven facts referring to the pursuit and detention of the skiff by the Dutch naval vessel constitute an offence of piracy *sui generis* under Article 616*quater* of the Spanish Penal Code, which criminalises disobedience and

resistance to any warships, military aircraft and other ship or aircraft bearing clear signs, identifiable as being in the service of the Spanish state and is authorised for such purposes, while committing acts of piracy listed in Article 616.

Proof of participation in a criminal organisation

The proven facts constituted the offence of participation in a criminal organisation under Article 570*bis* 1, 2b and 3 of the Spanish Penal Code. This article defines a criminal organisation as an association composed of two or more persons, of a solid nature or formed for an indefinite period, sharing tasks and responsibilities in a coordinated and concerted manner and with the objective of perpetrating offences, as well as of completing the perpetration of repeated offences. According to the jurisprudence of the National Court, participation in a criminal organisation constitutes a so-called 'status offence', which implies a different behaviour than simple participation by the criminal organisation in a planned offence.

Accordingly, the defining element of the crime is membership in the criminal organisation with respect to its hierarchical structure and permanent nature, and to its main purpose of committing future offences, rather than participation in a sole concrete criminal offence.

On the basis of the evidence provided, the Criminal Chamber concluded that all the defendants were members of an organisation formed for the perpetration of acts of piracy, predominantly constituting persons of Somali origin, and located in the Hobyo-Harardhere area. Based on intercepted telephone communications between one of the group's leaders and one defendant, authorities established that this criminal organisation was part of a wider criminal network.

Sentencing

The Criminal Chamber found the defendants guilty of piracy under the Articles 616 and 616*quater* of the Spanish Penal Code and of participation in a criminal organisation under Article 570*bis* 1, 2b and 3 of the Spanish Penal Code. The Criminal Chamber established that all the defendants were actively, directly and voluntarily participating in the perpetration of the mentioned offences (Article 28 of the Spanish Penal Code). All of the defendants were members of the crew on the skiff that attempted to attack the Spanish fishing vessel, and all of them were equipped with firearms, thus excluding any other reasonable conclusion that the purpose of their presence was legal.

The defendants were sentenced to eleven years in prison under Article 616. In addition, the Criminal Chamber sentenced the defendants to one year and six months' imprisonment under Article 616*quater* of the Spanish Penal Code.

Concerning the criminal offence of participation in a criminal organisation under Article 570*bis* 1, 2b and 3 of the Spanish Penal Code, imprisonment from two up to five years is foreseen if the organisation is formed for the perpetration of serious offences, including piracy. A higher sentence, ranging from three years and six months up to five years of imprisonment, is foreseen if the use or availability of weapons is involved. On this legal basis, and considering that one of the objectives of the criminal acts was the limitation of personal freedom (the planned seizure of the vessel, thereby limiting the liberty of movement of its crew), the Criminal Chamber imposed on each of the defendants a sentence of four years in prison.

3.7.2. Spain - SPS *Patiño*

Procedure: 1st Instance, Criminal Chamber of the National Court (*Audiencia Nacional*, Judgment n. 64/2013)

Date of decision: 30 October 2013

Introduction

The ruling in the *Patiño* case was issued by the Criminal Chamber of the National Court, *Audiencia Nacional* (the 'Criminal Chamber') in criminal proceedings against six Somali nationals accused of committing the offence of *participation in a criminal organisation* (Articles 570bis 1, 2(b) and 3 of the Spanish Penal Code), *piracy* (Article 616ter) and *possession and storage of weapons of war* (Articles 566.1 1st, 567.1 and 570 of the Spanish Penal Code). The prosecutor requested the Criminal Chamber to order the accused to pay compensation to the Spanish Army for the attack on a Spanish naval vessel, the *Patiño*, during the events under consideration by the Criminal Chamber.

During the trial, the defence attempted to absolve the defendants of criminal responsibility by claiming that the presumption of their innocence was violated during the proceedings.

Facts

The Criminal Chamber declared as proven fact that one of the defendants was a member of a criminal organisation dedicated to the attack and looting of vessels navigating in the area of the Indian Ocean. The Criminal Chamber further stated that membership by the other defendants in the same criminal organisation had not been proven.

On 12 January 2012, the *Patiño* was approached by a pirate skiff, while participating in manoeuvres in the context of Operation ATALANTA, at approximately 100 nautical miles from the coast of Somalia. Once at a short distance from the Spanish ship, the pirates opened fire on the *Patiño* using AK-47s and threatening to use an RPG against the vessel. The *Patiño* initiated combat procedures and engaged in brief combat with the skiff. After a two minute exchange of fire, the skiff escaped, abandoning its attempt to board the vessel.

Approximately 45 minutes after the attack, some members of the *Patiño*'s crew boarded the ship's helicopter to search and pursue the skiff and its crew. The skiff was located and seized by members of the Spanish Navy. In a brief exchange of fire, four out of six subjects on board of the skiff were wounded.

The Spanish authorities found cash, fuel containers, food and drinks, satellite and mobile telephones and a spent shell corresponding to assault rifles on the skiff. The crew of the skiff had thrown their weapons (assault rifles and an RPG launcher) into the sea before being detained by the Spanish sailors.

Legal findings

a) Evidence

The Criminal Chamber highlighted the fact that the defence did not challenge the legal or constitutional basis of any evidence produced by the prosecution. The evidence provided consisted mainly of statements of sailors on the *Patiño*, factual reports, videos and recordings of the attack and its outcome and information provided by European authorities in the framework of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000.

The Criminal Chamber also offered preliminary considerations on the more general legal issues, particularly circumstantial evidence, the presumption of innocence and the principle of *in dubio pro reo*. The Criminal Chamber indicated that the legal basis of the presumption of innocence is given in Article 11(1) of the Universal Declaration of Human Rights of 10th December 1948, Article 14(2) of the International Covenant on Civil

and Political Rights of 16 December 1966 and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms. On this legal basis, and considering the jurisprudence of the Constitutional Court of Spain, the Criminal Chamber concluded that one of the practical consequences of the presumption of innocence is that the burden of proof during the trial rests with the prosecution. The Criminal Chamber also qualified the presumption of innocence as *iuris tantum*.

The Criminal Chamber stressed that, to be admissible at trial, incriminatory evidence must be legally obtained and produced during the trial (with the exception of so called anticipated or pre-constituted evidence). The Criminal Chamber further tried to draw a substantial division between the two legal principles by stating that despite the close relationship between the two principles, and although both principles are an expression of a generic *favor rei*, the principle *in dubio pro reo* can be applied only if, on the one hand, after evaluating the evidence, the Court has doubts regarding its incriminatory nature (Decision of the Constitutional Court 25/1988). On the other hand, the presumption of innocence refers to the existence of an illegal act and the involvement of the accused; the adjudicating body must weigh the evidence (incriminating and exonerating) presented during the trial and base its decision thereupon.

The Criminal Chamber stated that jurisprudential doctrine has established that the principle *in dubio pro reo* is at the discretion of the judge, and thus excluded from constitutional review (Decisions of 13 December 1989, 20 April 1990 and 6 July 1992).

Referring to the possibility of founding its decision on circumstantial evidence, the Criminal Chamber additionally explained that, according to constitutional law, the presumption of innocence (Article 24.2 of the Spanish Constitution) does not exclude the possibility of issuing a conviction based on circumstantial or indirect evidence, as direct evidence is not always available. An absolute requirement of direct evidence could lead to generalised impunity and to serious societal unrest.

The Criminal Chamber concluded that on, the basis of the above reasoning, it could not rationally assess the circumstantial evidence due to its inconclusive and broad characteristics. Basing the decision of the Criminal Chamber on such evidence could open the door to potential violations of the presumption of innocence, especially when the evidence is so general that any of the possible alternative conclusions cannot be excluded (Constitutional Court: 28 June 1999).

b) Use of information gathered in previous piracy attacks

In the course of the proceedings, the prosecution established that two of the mobile telephone SIM cards found in the pirate skiff had been used to contact the same numbers that were used by the perpetrators of different piracy attacks and kidnappings in the area. These perpetrators were detained between November 2011 and April 2012. The prosecution also determined that the DNA of one of the accused, which was obtained at the crime scene, matched a genetic profile that had been established during the investigation into the piracy attack on the German vessel *Hansa Stavanger*. The DNA found on the crime scene was recorded and cross-matches were performed in the databases of the International Criminal Police Organization (INTERPOL) and Europol.

One of the defendants requested permission to notify his father. The contact telephone number matched a number to which several calls were made during the *Hansa Stavanger* incident. The same telephone number was also used in piracy attacks on the ships *Marida Marguerite* and *MV Victoria*. The Criminal Chamber considered the above findings as proof.

c) Proof of piracy

The Criminal Chamber found that the defendants' participation in the above-described acts of piracy was established. The Criminal Chamber took the circumstances surrounding the defendants' arrest into account:

their detention on the skiff after failing to carry out the attack on the *Patiño*; the absence of similar skiffs in the vicinity of the place of the attack; the hiding of evidence of the attack on the *Patiño* by throwing the weapons used into the sea; and the injuries suffered by the defendants at the time of their arrest, caused by bullets compatible with the ammunition on board the *Patiño*. The Criminal Chamber concluded that these circumstances, including the detention of the alleged pirates on board the skiff, confirmed that these individuals perpetrated the attack on the *Patiño*.

Sentencing

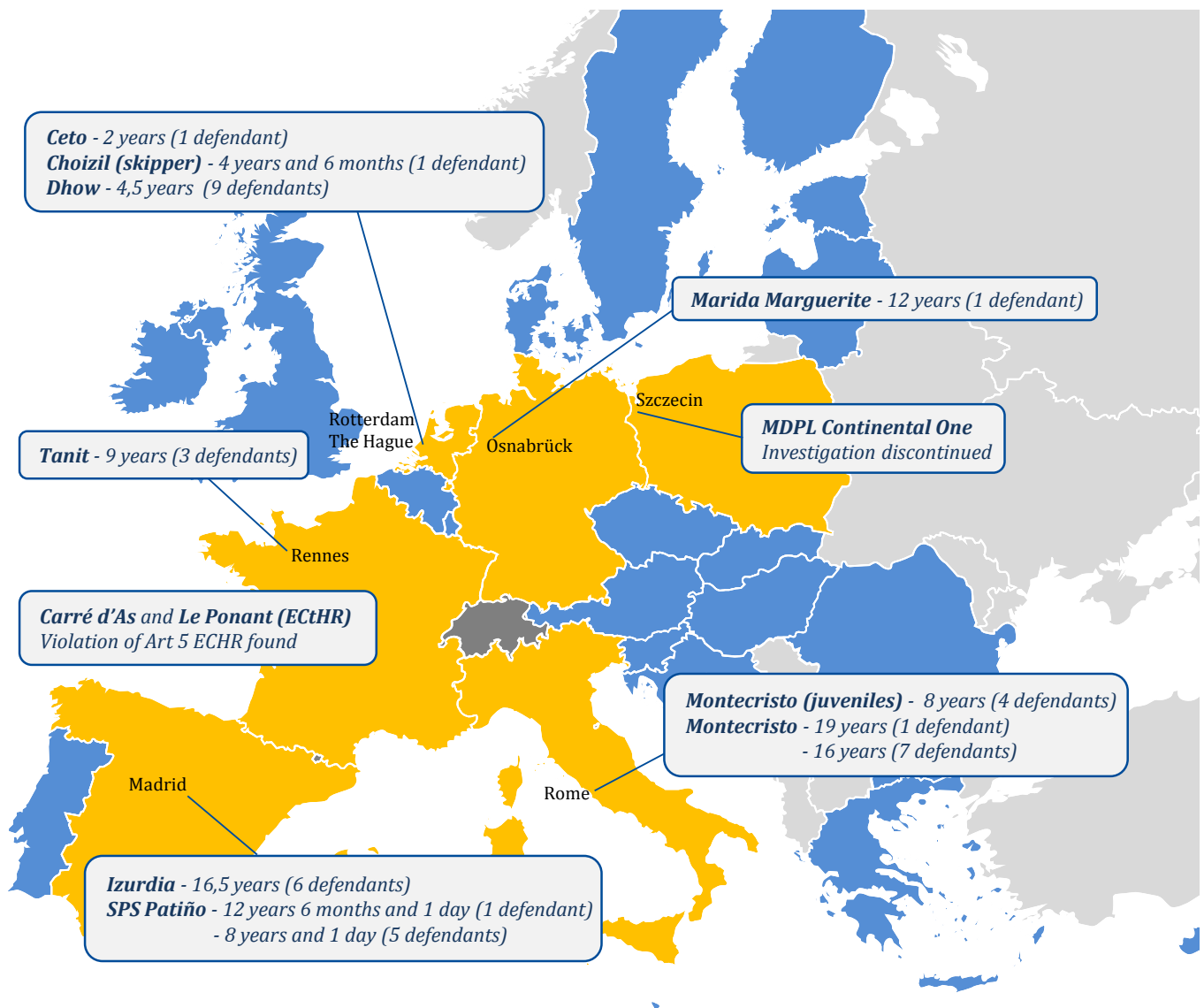
The Criminal Chamber found the defendants guilty of piracy under Article 616^{ter} of the Spanish Penal Code, and ownership and storage of weapons of war under Articles 566.1 (1), 567.1 and 2 and 570 of the Spanish Penal Code. The defendants were sentenced under Article 616 to five years and one day in prison. The specific circumstances of the case, including the non-completion of the criminal offence, were considered in mitigation at the sentencing stage. The Criminal Chamber further sentenced the defendants under Articles 566.1 (1), 567.1 and 2 and 570 of the Spanish Penal Code to three years' imprisonment and disqualification from possession and use of weapons for a period of six years.

Concerning the criminal offence of participation in a criminal organisation under Article 570^{bis} (1), (2) and (3) of the Spanish Penal Code, the Criminal Chamber concluded that such participation was only established with respect to one defendant. On the basis of a match detected between a telephone number, provided by the defendant, and a telephone number that was used in previous piracy attacks, the involvement of the defendant in similar criminal events of piracy was established beyond a reasonable doubt. Additionally, his DNA profile matched a genetic profile collected at the crime scene of another piracy incident. Reaching a conclusion with the same level of certainty that other defendants were involved in similar criminal events was not possible. The defendant was sentenced to four years and six months in prison under Article 570^{bis}. In accordance with the Spanish system, this sentence was to be added to the two other sentences (to five years and one day, and to three years of imprisonment).

Damage liability

The Criminal Chamber imposed on all the defendants an obligation to pay compensation for the damage caused to the Spanish Army vessel.

Outcome of the cases in the European Union



3.8. USA

Maersk Alabama The US Department of Justice is contributing to the efforts against piracy through investigations and prosecutions of 28 pirates who were involved in attacks on US ships. For example, on 18 May 2010, in a New York federal court, one defendant pleaded guilty to felony counts of hijacking maritime vessels, hostage-taking, and kidnapping in connection with the 2009 hijacking of the *Maersk Alabama* container ship off the Somali coast. The defendant was sentenced to 33 years and nine months' imprisonment.

USS Nicholas and USS Ashland The USA also brought two prosecutions in the US District Court for the Eastern District of Virginia arising from two separate attacks in April 2010 on US naval vessels patrolling the seas off Somalia. The five defendants who attacked the *USS Nicholas* were convicted and sentenced to imprisonment for life plus 80 years. The Fourth Circuit affirmed their convictions. Five of the defendants who attacked the *USS Ashland* were convicted by a jury on 27 February 2013. On 28 February 2014, the court found the statutory penalty of a life sentence to be unconstitutional. In May 2014, the court sentenced the defendants to sentences ranging from 360 months to 510 months. One of the defendants involved in the *USS Ashland* attack pleaded guilty in the US District Court for the Eastern District of Virginia to charges relating to that attack. He received a 30-year sentence in November 2010. The same defendant also pleaded guilty in the US District Court for the District of Columbia to charges arising from his participation in the hijacking of the *M/V CEC Future*, a Danish-owned merchant ship, in the Gulf of Aden in November 2008. In April 2011, he received a sentence of 25 years' imprisonment for that attack.

M/V CEC Future A Somali national was arrested on 20 April 2011 and indicted on piracy and hostage-taking charges, based on his role as a negotiator on behalf of Somali pirates during the takeover of the *M/V CEC Future*. After dismissal of the conspiracy to commit piracy charge, the jury acquitted the defendant of the remaining piracy charge. The jury was further unable to reach a verdict on the hostage-taking counts, and a mistrial was declared. The US authorities announced that this defendant would not receive a second trial.

S/V Quest Concerning an attack on a US-flagged ship, a federal grand jury in the Eastern District of Virginia indicted 13 Somalis and one Yemeni on 8 March 2011. They were charged with pirating a yacht, the *S/V Quest*, and taking hostage four US citizens, who were ultimately killed before their release could be secured. Eleven defendants pleaded guilty and were sentenced to life imprisonment. The June 2013 jury trial for the remaining defendants resulted in a guilty verdict on all counts. On 2 August 2013, the jury rejected the death penalty sought by the US government. In November 2013, the three defendants were sentenced to 19 consecutive life sentences, two concurrent life sentences, plus 30 years. In addition, on 13 April 2011, the Department of Justice announced the apprehension of a fifteenth person involved in the attack on the *S/V Quest* as a negotiator. On 27 April 2012, a jury found the defendant guilty of piracy, hostage-taking, and related charges arising out of both the *S/V Quest* attack and an attack on the *Marida Marguerite* in May 2010. The court sentenced him to multiple life terms plus 10 years. His conviction was affirmed on appeal.

3.9. Conclusions

The cases brought before courts in different Member States highlight a number of challenging legal and practical issues of interest to the reader.

A crucial legal issue is the jurisdiction of national courts to try piracy cases, given the location of the piracy attacks far from the territory of the adjudicating state. In the Spanish *Izurdia* case, the jurisdictional issue was easily solved, as the *Izurdia* flew the Spanish flag and part of its crew had Spanish nationality. The courts in the Netherlands have often addressed the question of jurisdiction to try piracy cases in some detail. For example, in the *Dhow* case, the Court of Appeal of The Hague considered the jurisdiction of Dutch courts to try piracy cases and found that prosecution was in accordance with both domestic law and the international treaty obligations by which the Netherlands is bound. In the *Choizil* case, the Supreme Court of the Netherlands addressed the competence of the court after a claim that the piracy case should not have been tried at all as it constituted a breach of the principle of equality. The claim was based on the fact that, in other cases, pirates were sent away without trial, which would breach the right of the accused to be treated equally with other persons in similar cases. The Supreme Court rejected the claim and confirmed that the case could be adjudicated. In the *Ceto* case, the competence of the court was challenged on the basis of the age of the accused, who was thought to be a minor. The District Court of Rotterdam found that the age of the accused had been sufficiently established and held that the District Court could have tried the accused even if he was a minor, as the trial judges possessed the requisite qualifications.

A recurring challenge encountered by maritime piracy prosecutors has been to establish the age of the accused, as many pirates were very young at the time of the offences and claimed that they were minors. The consequences of an age assessment that resulted in the accused being considered a minor have varied. In the *Izurdia* case, the investigating judge of the National Pre-Trial Examining Court determined that in relation to one defendant found to be a minor, the court lacked competence to try the case. The Italian *Montecristo* case shows a different outcome. Several of the accused were minors, and, instead of being exempt from prosecution, the minors were tried by the Juvenile Court of Rome.

Collecting evidence to prove that the offences have been committed has generally been challenging, considering the circumstances in which the crimes are committed. However, some encouraging examples of successful forensic data and other evidence collection can be found among the decisions presented in this Report. In the German *Marida Marguerite* case, the fingerprints of the accused arrested in Germany linked him to the pirate attack, as the same fingerprints were found on board the hijacked vessel. The *Patiño* case also profited from the forensic data found on a previously hijacked vessel, the *Hansa Stavanger*.

In several cases, the hijacking has resulted in one or more fatalities. One of the hostages was killed during the boarding of the French *Tanit*, and the death was allegedly the consequence of the crimes committed by the pirates. The court found that as the hostage was hit by a bullet fired by one of the commandos who stormed the vessel, the accused could not be held responsible for that fatal injury. In the *Ceto* case, the Dutch court established passive participation in the piracy offence. However, to prove that the accused was criminally liable of murder or attempted murder of members of the crew on the hijacked vessel, proof of the active participation of the accused was needed. The active participation of the accused in the killing could not be established, which led to the acquittal of the accused on this charge.

The circumstances under which piracy attacks are carried out and the subsequent arrests and investigations conducted are prone to human rights concerns, particularly regarding the right to a fair trial. The accused in the *Montecristo* case claimed that their right to be informed of the nature and grounds of the charges against them had been infringed. While they based their claim on a constitutional right, the accused in the Dutch *Dhow* case referred directly to their rights under Articles 5 and 6 of the ECHR, contesting the lawfulness of their

arrest and the period spent in custody. In addition, the accused claimed that certain interviews with suspects and witnesses had not been held in accordance with the requirements of a fair criminal procedure. In both cases, the alleged breaches were not established.

The importance of human rights considerations in piracy cases was taken to a new level when the convicted pirates in the *Carré d'As* and *Le Ponant* cases filed a complaint with the ECtHR in Strasbourg. The ECtHR found that while the delay in transferring pirates was understandable, the time between the arrival of the pirates on French territory and their appearance before a judge should be limited to a maximum of 48 hours. The ECtHR also pointed to the necessity of having in place a sufficiently clear legal framework applicable to maritime piracy to ensure that national legislation is in compliance with the requirement of foreseeability.

All cases contained in this chapter concern participants in actual piracy attacks. At this point in time, no judgments have been rendered in cases against high-level members of piracy organisations. The apprehension of known pirate leaders has proven cumbersome and the money trail of ransom payments is difficult to follow. While not included in the present overview, the UK case *Masefield AG v. Amlin Corporate Member Ltd* may be mentioned in relation to ransom payments in piracy cases. The case was tried by a commercial court and concerned the loss of value of the cargo on board a hijacked vessel, the *Bunga Melati Dua*. One of the interesting aspects of this case is the discussion on the piracy phenomenon in Somalia and the *modus operandi* of the pirates, which shows a clear pattern that confirms the idea of an organisation behind the attacks.

As mentioned in the introduction to this chapter, the collection of cases is not exhaustive. Cases are ongoing in the Member States and in countries outside the European Union. For example, in Belgium, proceedings against a pirate leader are currently in progress. With regard to cases adjudicated in the third States represented at Eurojust, the USA brought several recent cases to the attention of the drafters of this Report.

On a final note, a novelty among the decisions collected for the purpose of this Report must be highlighted. This is the Polish case concerning the attack on the *MDPL Continental One*, in which a Polish crewmember was taken hostage. This case was the first case in which a decision has been reported that relates to the piracy incidents off the coast of Nigeria. Until now, the increasing number of piracy attacks in West Africa did not seem to have a direct impact on the work of the judicial authorities in the Member States, as the piracy phenomenon in that region is somewhat different from piracy committed off the coast of Somalia. However, the Polish case shows that future cases related to West Africa may well contain a European component and be brought before national courts in Europe.

4. JIT Nemesis

4.1. Introduction

The importance of international judicial cooperation in maritime piracy cases was apparent since the first coordination meeting on maritime piracy held at Eurojust in 2009. At the request of the Netherlands, the prosecuting authorities from affected Member States met to consider how they could profit from information exchange and cooperation among practitioners to ensure that they were well equipped to prosecute alleged pirates. While the offence is one of the oldest international crimes, the only maritime piracy trials known were those that took place in previous centuries. Hence, contemporary experience in piracy prosecutions needed to be built up. In addition, the organisation or enterprise behind pirate attacks proved to be quite limited, which meant that most piracy cases were interlinked.

On the initiative of the Netherlands, the National Public Prosecutor's Office (National PPO) of the Netherlands and the Office of the Public Prosecutor of Osnabrück (PPO Osnabrück), Germany, decided to set up a joint investigation team (JIT) to facilitate direct cooperation between the national authorities, and were joined by the Office of the Public Prosecutor of Hamburg (PPO Hamburg).

JIT Nemesis was the first European JIT on maritime piracy, established in January 2012. It proved successful and provided the involved authorities with useful information and evidence that contributed to convictions in several cases. To retain the knowledge and experience gathered through this JIT, Eurojust invited the prosecutors from the three PPOs involved in the JIT to share their experience for this Report. Interviews with the PPO Osnabrück and the National PPO of the Netherlands were held on 29 September and 25 November 2014, respectively. Europol, as the host of the JIT, was also invited to contribute its own experience with JIT Nemesis. This chapter contains the outcome of the two interviews, presented chronologically, and Europol's experience with the JIT.

Since the PPO Osnabrück took on the first maritime piracy case, the interviewed public prosecutor has been responsible for all ongoing piracy prosecutions. In this capacity, he provided extensive information on the establishment of the JIT, the legal framework and cooperation within the JIT. He also provided additional information on recent cases, which are sketched below as impressions from investigations conducted in the framework of the JIT.

The interview with the Dutch prosecutor focused exclusively on her experience with JIT Nemesis in her prior capacity as prosecutor responsible for maritime piracy at the National PPO. As the initiator of the JIT cooperation, she offered valuable information on the involvement of the National PPO in the first piracy cases and the procedure leading up to the establishment of the JIT, as well as on the lessons learned.

The last part of the chapter contains an informative contribution by the Senior Specialist and Project Manager at Europol's Focal Point Maritime Piracy (FP Maritime Piracy) with an account of Europol's activities in the field of maritime piracy in the context of the investigations carried out by JIT Nemesis.

4.2. Germany

Background - Involvement of PPO Osnabrück

The involvement of the PPO Osnabrück in a piracy investigation was triggered by a demand for ransom after a pirate attack on the cargo ship *MS Victoria* in 2009 and the hijacking of the crew, which lasted from 8 May – 10 July 2009. As the piracy investigation in this case concerned a vessel that was registered in Lower Saxony, this German federal state and the PPO of Osnabrück had jurisdiction.

According to the prosecutor responsible for the case, one-third of German shipping companies are registered in Lower Saxony, most notably in the town of Emden, which is a port, and the town of Haren, which is located along the Dortmund-Ems Canal. A large port, Eurohafen Emsland, is located there, which explains the registration of companies specifically in this area. Every week, approximately 10 vessels registered in Lower Saxony pass through the Gulf of Aden.

The first actual prosecution in Osnabrück of a person suspected of piracy was triggered by the arrest of an individual travelling from Somalia to Norway. This individual did not carry any travel documents and was apprehended by the border guards in Munich, Germany, on 29 April 2013 (see Section 3.3).

In a comparison of his fingerprints with those collected in the context of another piracy investigation, related to the chemical tanker *Marida Marguerite*, the German authorities found a match. As the *Marida Marguerite* was registered in Lower Saxony, the suspect was transferred to Lower Saxony from Munich, which falls under the jurisdiction of another federal state, Bavaria.

By reason of connections found between several hijacking cases with German and Dutch interests involved, particularly through cross-matches of telephone data that linked organisers, financiers and negotiators, the JIT was founded in 2011.

Domestic legal framework

The German Criminal Code does not contain any specific crime of maritime piracy, but defines the crime of ‘attack on air and maritime traffic’ (Section 316c). Moreover, acts of piracy may meet other definitions of crime contained within the Criminal Code, particularly robbery, extortion, deprivation of liberty, kidnapping and hostage-taking, criminal damage to property, as well as offences against life and bodily integrity.

Crimes falling under the definition of ‘attack on air and maritime traffic’ carry a punishment of not less than five years of imprisonment, which means that these criminal offences are tried by a court called the *Landgericht*. Cases in which the sentence is expected to exceed four years are tried by the *Landgericht* (as opposed to the *Amtsgericht*, which only deals with offences that will not result in sentences higher than four years of imprisonment). The *Marida Marguerite* case was tried by the *Landgericht*, consisting of three professional judges and two laymen.

The legal basis for a JIT agreement concerning maritime piracy are the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, and the Council Framework Decision of 13 June 2002 on Joint Investigation Teams. The authority to sign such a JIT agreement lies with the PPO in the specific German federal state that has jurisdiction over the alleged crimes. As previously mentioned, JIT Nemesis investigated cases in which PPO Osnabrück exercised jurisdiction, based on the fact that the vessels involved were registered in Lower Saxony. However, in cases in which no such jurisdictional link exists, PPO Hamburg has jurisdiction (Sections 10 and 10a of the German Code of Criminal Procedure).

With regard to the interest in JIT Nemesis at political level, the involvement of Germany in a maritime piracy-related JIT was welcomed due to the economic interests involved in the hijackings and subsequent ransom

payments. At the time of the establishment of the JIT, requests had been made by the German Parliament to the government to take action in relation to maritime piracy. While the independent prosecutors are not obliged to carry out a prosecution at the request of the government, the support from federal level for actions against maritime piracy was an additional incentive to decide in favour of setting up the JIT, while at local level, the intense cooperation within a JIT could burden the limited budget of a PPO.

Procedure for signing and approving the JIT

With the experience of some cases concerning German registered vessels hijacked in 2009 and 2010, the prosecutor participated in a coordination meeting held at Eurojust in 2011, at which links between the hijackings investigated by German authorities (a.o. *MS Victoria*, *Marida Marguerite*, *Emsriver*, *Susan K*, *Hansa Stavanger*, *York*, *Longchamps*) and those investigated by the Dutch authorities (*Marathon* and *Choizil*) were discovered.

The Dutch public prosecutor, Ms Henny Baan, suggested the establishment of a task force on the investigation and prosecution of acts of piracy for the purpose of exchanging information relevant to the linked German and Dutch cases. While the German authorities were interested in cooperation and in sharing the available information, German legislation requires a legal basis for the official exchange of information, both at law enforcement and judicial levels. As both Germany and the Netherlands had opened investigations into piracy cases a legal basis for a task force was present. However, if another country had wanted to share information available to the task force without having opened an investigation, no legal basis would have been found for the exchange unless that state sent a formal MLA request. Accordingly, the preferred option for Germany was to set up a JIT, which would allow the sharing of all relevant information among the JIT members. Subsequently, a bilateral meeting was set up to further elaborate on the links between the German and Dutch cases and to draw up a draft JIT agreement.

At national level, the PPO Osnabrück was responsible for, first, verifying that resources for possible JIT cooperation were available both at judicial and police levels. Second, PPO Osnabrück was to decide, at the level of the PPO, whether a JIT was necessary to accomplish the mission of bringing piracy suspects to justice. Third, the JIT agreement needed to be drafted together with the partners involved. Finally, the PPO was to report to the Prosecutor General of Lower Saxony, who would then seek the approval of the Ministry of Justice of Lower Saxony and ultimately the Federal Office of Justice in Bonn (the Federal Office of Justice is the Central general authority of legal assistance matters at the federal level). After ensuring that all the formalities that applied to the agreement were correct, approval was given to the PPO Osnabrück to sign the agreement.

On 10 November 2011, the JIT agreement was signed by the prosecutors of Germany and the Netherlands and by Eurojust at a meeting held at Eurojust. The PPO Hamburg approached the PPO Osnabrück and expressed their wish to join the JIT as a member. Due to time constraints, the PPO Hamburg and the Federal Criminal Police Office (*Bundeskriminalamt* - BKA) signed the agreement as members of the JIT some weeks later. As the BKA was carrying out an investigation, it chose to become a full member of the JIT. Another alternative for the BKA would have been to act as the central authority for the coordination of activities carried out by the JIT.

By reason of the ongoing piracy investigation in Belgium, there was an interest among the JIT members to invite the Belgian authorities to join the JIT. Due to the limited availability of resources at the Belgian Prosecution Service, it decided not to become a member of the JIT. Nevertheless, cooperation between the Belgian authorities and the JIT was very good.

The JIT agreement entered into force on 1 January 2012 for a period of 12 months. A decision to extend the JIT was made twice. The JIT was active until 31 December 2013.

Objectives and results of the JIT

The objectives of the JIT were clearly set out: 1) clarify the structures of the criminal organisation; 2) describe the *modus operandi*; 3) gather information and evidence; 4) identify key figures; 5) arrest and convict key figures; and 6) discover the cash flow models and eventually freeze assets.

Most of the objectives were achieved. The JIT was able to establish the structure of this criminal organisation and the *modus operandi* of the piracy enterprise; an ‘investor’ looks for a ‘project’ worth financing and then puts together a hijacking team and collects skiffs and weapons and other necessities for a successful attack.

Partly through good cooperation and information exchange with the naval forces, the JIT was able to gather evidence to pursue the cases in Germany and the Netherlands. The key players within the piracy enterprise were identified and several arrest warrants were issued, among others against one of the few piracy ‘godfathers’. Arrest warrants were issued in the cases concerning the vessels *Marida Marguerite*, *Emsriver*, *MS Victoria* and *Susan K*, and actual arrests were carried out in the *Susan K* and *Marida Marguerite* cases. The suspects were caught on German territory.

The JIT was able to gain understanding of the money transfers worldwide and established that at least some of the ransom money was invested in projects in the region, including in Kenya. Money was also transferred through Norway to Dubai. The Hawala banking system was used, which made tracing the money more complicated than in cases in which regular money transfer systems and banks are used. Identifying and locating the money proved difficult, meaning that neither the German nor the Dutch authorities could freeze assets of any suspects. With regard to the German vessels that were hijacked, the JIT could confirm that ransom payments were almost always paid. The payments were dropped off from airplanes by pilots, who worked as private contractors, into small vessels that quickly disappeared from the location.

To achieve its objectives, the JIT established contacts with the naval forces (Operation ATALANTA), multilateral organisations including the UN and INTERPOL, private partners such as shipping and security companies, as well as non-Member States. The JIT members carried out interrogations of victims and suspects worldwide, including in Spain, France, the USA, Denmark, Germany, the Netherlands and Seychelles. The German authorities sent MLA requests to approximately 30 countries, including the USA, France, Spain, Norway and Belgium. The JIT was also assisted by Europol’s analysis of the information gathered and data retrieved during the investigation.

Legal and practical challenges

Some challenges were experienced on three different levels. First, despite the fact that each country participating in the JIT was bound and somewhat restricted by its own legislation, the JIT members did their utmost to be flexible towards the other partners. In this case, as the German and Dutch legal systems are rather similar, most obstacles could be overcome. Second, each authority involved had its own hierarchical structure and goals. The independent prosecutors could take their own decisions and work directly with the local police, but were also dependent on other authorities, such as the Federal Criminal Police Office. These structures may have prolonged the decision-making process in some instances. Finally, each participant in the JIT naturally had his or her own style and working methods. Due to these differences, several discussions about formal issues took place in the first months of the JIT cooperation. The JIT experience in this case proved that the more players of different views and backgrounds in a team, the more challenges are encountered in developing teamwork.

Lessons learned

The JIT agreement was set up to assist in parallel investigations into acts of piracy that took place outside the territories of the JIT members, while normally investigations concern acts that occur within the territory of the

participating authorities. This situation caused the work of JIT Nemesis to be somewhat different from other JITs in which national authorities carry out activities on their own territory.

The experience of PPO Osnabrück showed that the involvement of the prosecutors at the very beginning of the investigation is beneficial to the results of the JIT, as is direct contact between the prosecutor and the investigators. In investigations of this complexity, the international partners, among which are Eurojust, Europol and INTERPOL, should be involved from the beginning to get organised, to get direct access to a central database and to have swift and professional analysis of the data received.

To achieve the best results, a common strategy for the various investigations and common states of play and a common evaluation of the activities, involving both prosecutors and investigators, are all important. Cooperation between Germany and the Netherlands also showed that the most effective investigations and prosecutions can be carried out if they proceed approximately at the same pace in both countries.

International cross-border cooperation in complex cases profits from strong partners. From the German perspective, the fact that the Dutch prosecutor was in a position to pay regular visits to the JIT investigators working at Europol contributed significantly to the success of the JIT.

In maritime piracy cases, good contacts with the naval forces involved are essential when gathering information. In one instance, when a regular MLA request proved unsuccessful, the naval forces were able to provide the necessary information, including names and telephone numbers, which proved to be crucial, as they linked an attack to one of the German suspects.

Benefits of the JIT

The German cases/investigations benefitted from the support given by Eurojust, both in hosting the coordination meetings at which the first links between the German and the Dutch cases were discovered, and in setting up the JIT. The JIT Manual developed by Eurojust provided the JIT members with valuable support. In addition, Eurojust provided essential translation services to the JIT. Valuable assistance was also given by Europol, as the host of the JIT. Europol also carried out cross-checks of fingerprints and provided other analytical reports.

The JIT benefitted from the fact that investigators were based at Europol for one and one-half years. This centralised working method brought good results, mostly by reason of the easy contacts between the investigators and the Europol analysts. For the last six months of the JIT, the investigators worked from their respective Member States. The decentralisation led to less direct contacts and less intense communication within the JIT.

To finance its activities, the JIT applied for direct funding from the European Union and received a grant of EUR 500 000. As the JIT investigators were funded by their respective Member States, the EU funding was used partly to finance the travelling of the JIT investigators to take witness statements in various countries. Having received this EU grant, no application for Eurojust funding was made for this JIT. Operating within the JIT, the investigators were able to avoid double work, as some tasks could be spread between the members, resulting in savings of both personal and financial resources.

One of the main reasons for setting up a JIT is that it provides the national authorities with a legal basis for swift and flexible information exchange. In this case, the JIT members benefitted from the possibility to receive information that only one of the JIT members was in a position to obtain. From the German perspective, this benefit most notably concerned information related to money transfers made from Norway to Dubai in the United Arab Emirates (UAE). Due to the fact that Germany did not have an existing treaty with the UAE on this matter, the exchange of information could only have been possible on the basis of a bilateral agreement between these two states. However, the death penalty in UAE legislation and the human rights issue involved prevented Germany from entering into an agreement that would allow the exchange of this kind of information.

The solution was found in the Dutch authorities requesting the data on the money transfers, based on a pre-existing agreement between the Netherlands and the UAE. Among the JIT members, this piece of information could then easily be shared with the German authorities. Similarly, the authorities in one JIT Member State may for various reasons be in a better position to cooperate with other actors involved. The shipping companies are important actors in piracy cases. A good bilateral relationship between one JIT member and the private company simplified the information-gathering process, also for the other JIT members.

Finally, the complexity of the investigations and the circumstances in which the crimes were committed demonstrated that this type of cross-border crime requires and benefits from strong international cooperation. In a field in which prosecutors and law enforcement personnel have little experience of the subject matter, a JIT allows the members to profit from each other's experience.

Impressions from investigations conducted in the framework of the JIT

As mentioned above, one of the cases investigated by the JIT was the *Marida Marguerite* case. The case began with the arrest of an individual after a check by the border guards in Bavaria. This individual was on his way from Somalia to Norway. His case was treated as a case of illegal immigration and he was first brought before the city court in the town of Giessen. When his fingerprints matched those found in the investigation into the attack on and hijacking of the vessel *Marida Marguerite*, which was registered in Lower Saxony, he became a piracy suspect in a case dealt with by the PPO Osnabrück.

Ransom demands had been made by the pirates after the hijacking of the *Marida Marguerite* and the German authorities decided to carry out telephone interceptions to record the negotiations for ransom payments. The negotiations for the ransom payments were made by telephone from Somalia to the shipping company in Germany. As the shipping company was located in Germany, the crime of blackmail (Section 253 of the German Criminal Code) could be considered to have been committed on German territory. Fingerprints, DNA, documents and telecommunication data found in this investigation were analysed to identify the perpetrators and to find links to other cases.

Under German law, witness testimony should be given in German, using a translator, if needed. As the interrogations were required to be conducted on board the *Marida Marguerite* in Oman and as permission to bring the witnesses on shore was not granted, the statements were made in the English language, using video recordings. Whereas this development was new to German procedure, no difficulties were encountered on the part of the prosecution in submitting the evidence, nor were any objections made by the defence.

Cooperation with non-Member States worked well. MLA requests were sent to countries in the region, including Oman, Kenya and Djibouti. An MLA request to Oman was necessary for the investigators to be able to enter the country to preserve evidence of the attack and to carry out the crime scene investigation, as well as to interview the crew members. The MLA request to Djibouti was executed within three days of receipt and the request to Oman within three weeks.

A judgment was rendered in this case on 17 April 2014 (*see* analysis of the judgment at Section 3.3.). The case concerning the *Susan K* began with the arrest of one individual after a check by the police in Saxony-Anhalt. His fingerprints were compared with those found by the German authorities when carrying out the crime scene investigation on the hijacked *Susan K* and matched those found on documents on board the vessel. The suspect was also recognised on the basis of statements from crew members on board the *Susan K*. The suspect was believed to have been some sort of 'commander' of the pirate group and the son of one of the investors.

As in the *Marida Marguerite* case, a shipping company registered in Lower Saxony was asked to pay ransom, which triggered an investigation into the attack on and hijacking of the *Susan K*. By September 2014, the investigation into the hijacking had finished, and attempts were being made to trace the identified suspects.

Four arrest warrants were issued. The German authorities requested a red notice to be published by INTERPOL and the fingerprints of the arrested individual were sent for cross-checks to Europol and INTERPOL.

For the purpose of the investigation in the *Susan K* case, witnesses of Indian nationality were brought to Germany to give statements as crew members about the hijacking of the vessel. Thanks to the good relationship built up between the investigators and the crew members in the aftermath of the release of the crew, the German authorities were able to keep in contact with the witnesses and to ensure that their travel to Germany could be arranged. The expenses involved were covered by the German authorities.

Under German law, carrying out telephone intercepts during the ransom negotiations was possible in the Osnabrück investigations as the telephone calls were made between the pirate negotiator and the shipping company registered in Lower Saxony. Permission to carry out the telephone intercepts was requested from the shipping companies, as creating a good relationship between law enforcement and judicial authorities, on the one hand, and the involved shipping companies, on the other hand, was considered important. However, under German law, telephone intercepts could also have been carried out without the permission of the shipping company.

As the hijacking of the *Susan K* took place outside German territory and the crime scene investigation was conducted in Oman, where the hijacked vessel was brought, permission to carry out the investigative tasks needed to be requested from Oman. Similarly, permission was requested from the Marshall Islands, which was the flag state of the *Susan K*. As the USA represents the national interests of the Marshall Islands in similar matters, the German authorities worked together with the relevant US Naval Criminal Investigative Service (NCIS) representative during the investigation.

4.3. The Netherlands

Background - Involvement of the National PPO

The National Public Prosecutors' Office (National PPO) in Rotterdam first became involved in a piracy investigation after an attack on a vessel registered in the Netherlands Antilles. The vessel concerned was the *Samanyolu* (see analysis of the judgment in MPJM 2013, pp. 59-61).

The attack on this vessel took place in the Gulf of Aden. The seamen on board the vessel decided to defend themselves and as they were not armed, they used lamps that were available to them to produce torches that they threw overboard onto the pirate skiffs. The pirates were forced to leave their skiffs and were rescued from the water and arrested by a Danish Navy vessel that was situated in the attack vicinity.

The arrested pirates were kept in custody on the Danish Navy vessel, but because the attacked vessel was Dutch, the Dutch authorities assumed jurisdiction, and began an investigation into the incident.

The Danish Navy handed over the suspects to the Dutch authorities on the basis of Article 8 of the SUA Convention, according to which '[t]he master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offences set forth in Article 3', which in turn sets out the applicable piracy crimes. The delivery of the alleged pirates from the Danish Navy to Dutch law enforcement authorities took place in Bahrain, on the basis of an MLA request by the Dutch authorities and with the assistance of the Liaison Officer of the Netherlands National Police Services Agency.

Initially, the case was referred to the Financial, Environmental and Food Safety Offences Office, which has a mandate to prosecute cases with a maritime dimension. However, as the case allegedly concerned an act of piracy, it was assigned to the National PPO, which focuses on international forms of organised crime and the coordination of efforts to combat terrorism, people smuggling and similar offences that are not confined to the jurisdiction of a district court or a court of appeal.

As the vessel was registered in the Netherlands Antilles, a decision to refer the case to the National PPO was made on the basis of Article 36 of the Charter for the Kingdom of the Netherlands, according to which the Netherlands, the Netherlands Antilles and Aruba shall accord one another aid and assistance.

Having become involved in the *Samanyolu* case in January 2009, the National PPO was approached again some months later when ransom demands were made to the Dutch owner of the vessel *Marathon*, which had been attacked by pirates. The Dutch investigation showed that the main suspect allegedly served as a negotiator in several cases, and by cross-matching data, the Dutch authorities found links to German and Belgian investigations. A coordination meeting at Eurojust laid the foundation for the cooperation between the Netherlands and Germany that resulted in the setting up of a JIT.

Domestic legal framework

The Netherlands can try the crime of piracy under Article 381 of the Dutch Criminal Code. Paragraph 1 of this article provides that:

[a] person 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

[; or]

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.

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

The National PPO had authority to sign the JIT agreement, as the competent body to prosecute piracy cases. At political level, piracy prosecutions were not considered a priority in the Netherlands, which meant that the National PPO preferred cooperation with Germany and other states to make the best use of available resources.

Procedure for signing and approving the JIT

The Dutch authorities initiated the first coordination meeting at Eurojust, which was held on 6 July 2009. Due to limited resources for prosecuting a piracy case, the Dutch authorities wished to combine efforts and share data immediately and not wait until the investigations were concluded. The easiest way to achieve these goals was to contact Eurojust and Europol at this stage, as Eurojust offered the possibility of coordinating the efforts of prosecutors involved in piracy cases and Europol's database could easily be used for cross-matching data from the various piracy investigations.

The Dutch National PPO proposed setting up a task force on the investigation and prosecution of acts of piracy, which would allow the authorities involved to consider the evidence in several cases and build one strong case as opposed to pursuing separate cases. Sharing evidence was considered particularly important in these piracy investigations, as clear links between the cases and the individuals involved were found and the chance of not being able to build a successful case based exclusively on information gathered in one investigation was significant.

As both the Dutch National PPO and the PPO Osnabrück shared the same interests and goals and the establishment of a task force did not prove to be a feasible option, the two prosecutors decided instead to set up a JIT. The draft JIT agreement was approved by the Head of the National Public Prosecutor's Office and finally by the College of Prosecutors General. The Dutch authorities also applied for EU funding directly for a JIT between the Netherlands and the Osnabrück authorities.

Meanwhile, an attack was committed on a German vessel, *MV Taipan*, the crew of which was rescued by the Dutch Navy. The vessel flew the German flag and the *Landgericht* in Hamburg was considered to have jurisdiction to try the case. Having taken on this case, the PPO Hamburg was prompted to become a member of the JIT.

Lessons learned

JIT cooperation in complex cases such as those concerning piracy should be subject to thorough consideration beforehand, as the legal systems may differ on crucial points. In this case, the JIT cooperation worked well as the legal systems in Germany and the Netherlands are similar.

From the Dutch perspective, the implications of the jurisdiction of the individual German federal states in piracy cases, and the independence of the PPOs of the *Länder* in establishing a JIT, should be taken into consideration at the outset to ensure that the appropriate authorities and procedures are followed. The same consideration applies both to the prosecuting authorities and the law enforcement authorities. In this JIT, both the Federal Criminal Police Office (*Bundeskriminalamt - BKA*) and the State Criminal Police Office (*Landeskriminalamt - LKA*) of Lower Saxony were involved, each of which has its own mandate and work process.

Benefits of the JIT

Some of the results of the JIT were presented at the Eurojust coordination meeting in September 2013 and at a meeting at Europol for the law enforcement officials and prosecutors involved. As indicated by the Dutch prosecutor, the members of the JIT and the national authorities of the participating states could have profited from a further evaluation meeting to identify best practice and lessons learned after the expiration of the JIT agreement.

The investigators working on various cases within the JIT were brought together at Europol, meaning that the loss of information was minimised as compared to working in different locations. The efficiency of the team was enhanced by the weekly visit of the Dutch prosecutor to the team of German and Dutch investigators to discuss the progress made and to address any problems or issues on the spot.

The members of the JIT held a board meeting every third month, in the Netherlands, Osnabrück and Hamburg, respectively, to address tactical questions, such as when the collection of evidence could be considered sufficient to issue an arrest warrant against a suspect.

4.4. Europol

Support to JIT Nemesis

JIT Nemesis was actively supported by Eurojust and Europol's FP Maritime Piracy; *see* Section 5.2.). While Europol had provided support to JITs in the past, JIT Nemesis was the first time that an active investigation team operated from Europol HQ.

The Europol analytical team was integrated into the team of JIT investigators and the permanent interaction between the analytical and investigative efforts provided significant added value. As the JIT was organised in this manner, the Europol analytical team was in a position to deliver analysis tailored to the specific needs of the investigators. The relevant data, in the right format and at the right time, was delivered to FP Maritime Piracy. The analytical team, using tools such as Social Network Analysis (SNA) and forensic data including DNA traces and fingerprints, was able to provide a large volume of high-quality analysis, thus demonstrating that quality information will produce a quality outcome in terms of understanding underlying patterns/networks and other investigative leads. As a result of the activities of the JIT, four arrest warrants were issued and still more investigative leads may be exploited.

Partial findings

As maritime piracy seems to be a highly organised activity, carried out by a hierarchical, criminal enterprise, one of the objectives of the JIT and Europol was to try to identify key players (organisers, financiers, negotiators). People involved at the top of the maritime piracy enterprise are counted in the tens, not the hundreds. One of the problems is that these targets belong to the socio-economic elite of the country and in some cases may even enjoy high-level diplomatic protection.

Formal identification of individuals in a highly unstable, lawless environment with no formal central government or civil registration proved very difficult. People very often are only known by first name and nickname. Following the money trail was also a very challenging task. Ransom money is physically dropped in sealed bags, divided on the spot, used in the community and transferred through various informal unregulated banking systems, such as Hawala. Bank accounts are rarely used and the banking sector seldom provides information on transactions related to maritime piracy activities. Intelligence suggests that some of the funds are re-invested in real estate and other semi-legal or criminal enterprises, such as the khat trade.

Maritime piracy is a form of organised crime, not terrorism. No evidence has been found that terrorist groups were involved in maritime piracy activities. However, at least some of the proceeds of maritime piracy could have ended up with terrorist organisations, particularly Al-Shabaab. Europol has found at least a functional link between Al-Shabaab and some of the pirate groups. If one criminal organisation operates unhindered within an area controlled by an armed group, a reasonable assumption to make is that an implicit understanding exists between the two groups, which very often translates into paying a sort of revolutionary tax.

Challenges

Since the expiry of the JIT agreement, FP Maritime Piracy has continued its activities. One of the challenges in counter-piracy activities that Europol identified was information exchange. This is the key element in coordinating the approach of the international community. However, given the number of international players involved – both military and law enforcement – this information exchange can be problematic.

Europol relied mostly on communication data for the analysis of networks, as this type of data allows for the reconstruction of networks and hierarchy. Some of that data was obtained through military channels using

classified means and, given the classification issues, receipt of such data by a law enforcement agency such as Europol was not always possible.

One permanent task of FP Maritime Piracy was the enhancement of information exchange with the EUNAVFOR Operation ATALANTA. Owing to the personal commitment of both the military and Europol professionals, this cooperation was optimal. However, to date no legal framework allows for a direct exchange and cooperation between a military Common Security and Defence Policy (CSDP) mission, which has a law enforcement component, and Europol. Presently, Europol can only exchange information with civilian CSDP missions through the use of a Member State channel. This issue has been considered by the European External Action Service (EEAS) and will be the subject of debate within the Political and Security Committee (PSC). Meanwhile, Europol continues its cooperation with EUNAVFOR.

4.5. Conclusions

The experiences of the first JIT on maritime piracy confirm that this judicial cooperation tool was particularly beneficial for the Dutch and German piracy investigations. As the organisational structures behind the pirate attacks proved to be quite limited in scope, many piracy cases were linked through investors, leaders or negotiators, or through forensic data, such as DNA and fingerprints. For this reason, the possibility to exchange information without formalities that is a common feature for all JITs proved very valuable for JIT Nemesis. Both Member States profited from the information gathered and used it for the purposes of their own judicial proceedings, which resulted in several convictions.

Most of the objectives set for the JIT were met and, importantly, the structures of the criminal organisation and the *modus operandi* employed were established. The JIT also identified the key players within the piracy enterprise, and issued arrest warrants on this basis. The results of the joint efforts further confirmed that the money trail is difficult to trace, as traditional banking systems are seldom used and the information sometimes held by banks is rarely shared with the investigating authorities.

At the outset, the JIT faced certain legal and practical challenges. The differences in legal systems and the fact that the authorities involved are bound by their hierarchical structures and objectives were considered restricting factors. The identified obstacles were addressed early on and as the legal systems of Germany and the Netherlands are rather similar, the JIT cooperation was very fruitful.

JIT Nemesis profited from the involvement of prosecutors at the very beginning of the investigation and the direct contacts between prosecutors and investigators. The experience also showed that international cooperation and the early involvement of international partners such as Eurojust contributed to good results at the trial stage. The interviewed JIT prosecutors and Europol stressed that operating from one location brought advantages to the work of JIT Nemesis, facilitating both daily interaction between investigators and analysts and the weekly progress meetings with the prosecutorial authorities.

Whether another European JIT will be set up in the context of maritime piracy is questionable now that maritime piracy off the coast of Somalia is declining and the current piracy threat has taken a different shape (see Chapter 5). However, the positive results of JIT Nemesis demonstrate that a JIT can be a valuable tool in complex cases of maritime piracy, in which the crimes were committed far from the state in which the criminal offences eventually will be adjudicated.

5. Current trends in the field of maritime piracy

5.1. Introduction

In their answers to the questionnaire circulated by Eurojust in 2014, several national authorities have referred to the shifting of the piracy threat from the East to the West African coast, and expressed their concerns about the judicial implications of the rising threat in the Gulf of Guinea. With the goal of assisting the judicial authorities that may become or are already involved in the prosecution of West Africa-based piracy cases, Eurojust has further analysed the answers provided to the 2014 questionnaire, taking into consideration the relevant shipping industry's statistics and regional and international organisations' assessments.

The analysis of such a vast portfolio of sources confirms that two new trends have emerged in recent years in the field of maritime piracy.

First, starting in 2012, the number and intensity of piracy attacks off the coast of Somalia have greatly declined. Although far from being over, the threat posed to vessels and their crews navigating the waters of the Gulf of Aden is believed to have been significantly reduced. The perception that piracy off the coast of Somalia has greatly declined over the last four years appears to be fully corroborated by available statistics. Indeed, according to the International Maritime Bureau (IMB) of the International Chamber of Commerce (ICC), incidents attributable to Somalia-based pirates have plummeted to 15 in 2013 and 11 in 2014, from 237 recorded in 2011⁵².

A second trend that has emerged in recent years is the increase in the number of piracy attacks perpetrated in the area of the Gulf of Guinea⁵³ – primarily off the coasts of Nigeria, Togo and Benin. Nowadays, pirates based in West African countries appear to pose a bigger threat to the international community than those operating in Somalia and neighbouring countries. Again, the statistics seem to support the idea that the piracy threat shifted from the East to the West African region over the past two years. The IMB estimates that the piracy attacks carried out in 2014 and 2013 in the area of the Gulf of Guinea were 39 and 48, respectively, i.e. more than three times the number of attacks originating from the Gulf of Aden during the same period of time.⁵⁴ When comparing individual states, an even more startling figure emerges: the piracy attacks that took place in Nigeria in 2014 (18) were six times those that were carried out in Somalia (3), making Nigeria the third most affected country in the world.⁵⁵

The emergence of a new West African threat also raises serious concerns at EU level. The Gulf of Guinea's geographical location makes it a crucial maritime route for commercial shipping connecting Europe with West, Central and South Africa. Furthermore, the importance of West African waters for the transport of crude oil from the area explains the political and economic importance of counteracting West African piracy activities. The rise of such piracy in the Gulf of Guinea has a clear and deep impact on the EU's economic interests, essentially on the trade of goods.

As acknowledged in the EU Strategy on the Gulf of Guinea of 17 March 2014 (EU Strategy), the European Union and the states of the region of the Gulf of Guinea

have major common economic, developmental, commercial and security interests. The region has a long coast line, and is rich in resources which are crucial both for local employment and consumption, and for trade with Europe. Maritime trade to and from the Gulf of Guinea is largely conducted by the EU. There is an average of

⁵² ICC International Maritime Bureau, *Piracy and armed robbery against ships*, Report for the period 1 January – 31 December 2014, p. 5.

⁵³ In keeping with the approach adopted in the EU Strategy on the Gulf of Guinea (17 March 2014), for the sake of this Report, the geographical scope of the Gulf of Guinea embraces the 6 000 km coastline from Senegal to Angola; see EU Strategy on the Gulf of Guinea, 17 March 2014, p. 1.

⁵⁴ ICC International Maritime Bureau, *Piracy and armed robbery against ships*, Report for the period 1 January – 31 December 2014, p. 5.

⁵⁵ *Ibid.*, p. 6.

30 EU flagged or owned vessels at any one time in the Gulf of Guinea. [...] Europe imports about half of its energy needs, of which nearly 10% of its oil and 4% of its natural gas come from the Gulf of Guinea. Nigeria, Angola, Equatorial Guinea and Gabon are significant suppliers of crude oil, and Nigeria of natural gas.⁵⁶

Securing global shipping lanes in the Gulf of Guinea is then regarded as of the utmost importance for the Member States, which are directly affected by the hijacking and robbery of their ships in the area.

5.2. The decrease in piracy in the Gulf of Aden

The decrease in the number of piracy attacks carried out off the coast of Somalia may be attributed to a number of concurring factors at legal, operational and political level. Thus, the progress made in the political stabilisation in Somalia, the new international legal framework that allows *all* states to directly intervene against piracy attacks carried out within or off the coast of Somalia, as well as the successful deployment of preventive measures to secure the area of the Gulf of Aden, proved decisive. Combined, they resulted in a higher number of Somali pirates being arrested and prosecuted – which in turn may have worked as a deterring factor against other would-be pirates.

A new international legal framework after SC Resolution 1816 (2008)

At the start of the Somalia-based piracy crisis, the applicable international law framework was such that affected states could only act to protect from or respond to pirates operating in the international waters of the Gulf of Aden. The situation in the Gulf of Aden could not have been more favourable to pirates, '[for] international shipping must pass through a narrow corridor, [and they were] able to launch attacks in international waters and then quickly return to Somali territorial waters'.⁵⁷ At that time, in 2008, the Somali central government – then, the Transitional Federal Government (TFG) – was lacking 'the capacity to interdict, or upon interdiction to prosecute pirates or patrol and secure the waters off the coasts of Somalia, including the international sea lanes and Somalia's territorial waters'⁵⁸. If the Somali authorities could not keep their territorial waters free from pirates, no one else was authorised to do so under the international law provisions then in force.

Faced with this problem, the SC intervened by passing a series of resolutions⁵⁹ – starting in 2008 with SC Resolution 1816 (2008), which authorised 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'. Per 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 paragraph 6 of 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'.

Preventive measures

The amendment of the applicable international legal framework, followed by the (at least partial) stabilisation of the newly empowered central government institutions in Somalia, paved the way for successful deployment of preventive measures in the Gulf of Aden region, designed to secure the sea lanes in the Gulf of Aden, and to interdict pirates operating therein.

⁵⁶ EU Strategy on the Gulf of Guinea, 17 March 2014, p. 2.

⁵⁷ 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, p. 1, available at: <http://www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia> (last visited: 8 April 2015).

⁵⁸ SC Resolution 1816 (2008), UN Doc. S/RES/1816 (2008), p. 1.

⁵⁹ The series includes the following SC Resolutions: 1816 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1950 (2010), 2020 (2011) and 2102 (2013).

Preventive measures included the joint maritime law enforcement operations carried out at international level, such as EUNAVFOR Operation ATALANTA, active since 2008 (*see* subsection 2.3.1), and NATO Operation OCEAN SHIELD, launched in 2009. Not only did the navy ships deployed within the framework of such international operations prove to be a phenomenal tool for discouraging pirates from attempting to attack the escorted vessels, but they greatly assisted national authorities in apprehending, keeping under temporary custody and eventually transferring the suspected pirates to the competent *fora*.

Maritime security in the region received a boost from the adoption and implementation of the shipping industry's Best Management Practices (BMPs) for Protection against Somali Based Piracy. BMPs are intended to assist ships in avoiding, deterring or delaying piracy attacks in the High Risk Area, which includes the Gulf of Aden. As with previous BMPs' versions, the latest version (BMP4) is endorsed by virtually all industry organisations, EUNAVFOR as well as the UK Maritime Trade Operations (UKMTO). The UKMTO office in Dubai acts as the primary point of contact for merchant vessels and liaison with military forces in the region and during an attack in the High Risk Area.

In addition, the reinforcing of hulls and employment of Privately Contracted Armed Security Personnel (PCASP) on board commercial ships played a major role in securing the shipping lanes through the Gulf of Aden.⁶⁰

The better the evidence collection and data sharing, the more effective the judicial response

The upgrade of the legal and operational frameworks enabled all states and, particularly, the directly affected ones (e.g. the state of flag or of nationality of crew members), to successfully apprehend and prosecute the pirates operating in the Gulf of Aden. As a result, hundreds of Somali pirates were arrested and then brought to justice in Member States or other States, such as Mauritius and Seychelles, pursuant to transfer agreements (*see* subsections 2.3.3 and 2.3.4).

Clearly, the large-scale judicial response provided against East African pirates greatly benefitted from the changes in legal and operational conditions. For one, navy ships patrolling the Gulf of Aden within the framework of international operations were now able to arrest suspected pirates on Somali territory (and waters), and transfer them to the competent judicial authorities. However, those conditions, *per se*, would not fully explain the reasons why so many proceedings against Somali pirates, including those analysed in this Report (*see* Chapter 3), were successful, notwithstanding the many difficulties typically arising in maritime piracy cases.

Indeed, the maritime environment poses unique difficulties to investigators and prosecutors.

To start with, evidence collection may be severely hampered by logistical difficulties connected to availability of the crime scene. For example, if the hijacked vessel is released years after its seizure, some of the original evidence, especially of organic origin, may no longer be available to the forensic investigators by the time they gain access to the crime scene areas. In addition, investigating and prosecuting piracy cases may present complex transnational evidentiary links difficult to untangle. As noted by INTERPOL,

a single piracy case will often affect several different nations. Vessels may be flagged, owned and operated by different countries and manned by multinational crews. The pirates, the navy which captures them and the nation willing to investigate and prosecute the case are also likely to be diverse⁶¹.

Data collection and information sharing between the military, law enforcement and judicial bodies of the affected countries then become crucial.

Thus, part of the success of many East African piracy prosecutions may have come from significant enhancements in the field of evidence collection and data exchange provided by key players in the counter-piracy operational support field, such as Europol and INTERPOL.

⁶⁰ ICC International Maritime Bureau, *Piracy and armed robbery against ships*, Report for the period 1 January – 31 December 2014, p. 19.

⁶¹ <http://www.interpol.int/Crime-areas/Maritime-piracy/Maritime-piracy> (last visited: 8 April 2015).

Europol opened FP Maritime Piracy in January 2010, with the objective of providing operational (analytical) support to Member States' law enforcement authorities dealing with maritime piracy investigations. In this regard, one of the FP's tasks is to cooperate and enhance information exchange with the EUNAVFOR Operation ATALANTA. To date, this FP contains approximately 82 000 entities generating well over 600 000 links, which, in turn – after in-depth analysis – may produce relevant investigative leads. The FP is the largest law enforcement repository of Somali piracy-related information available to investigating and other relevant authorities in the Member States. For example, in 2013, FP Maritime Piracy produced and shared 116 analytical products, including reports based on DNA and fingerprint data, as well as analysis of pirates' networks and hierarchy. Twelve Member States have signed up to the FP, and the NCIS, as well as two international organisations, Eurojust and INTERPOL, are associated with this specific FP. As seen, Europol's FP Maritime Piracy was instrumental in the success of JIT Nemesis (*see* Section 4.4).

INTERPOL established a dedicated unit – the Maritime Piracy Task Force (Task Force) – to combat maritime piracy in January 2010. It was subsequently renamed the Maritime Security Sub-Directorate (MTS) in October 2013. The MTS continued the work of the Task Force, providing operational support to improve evidence collection and exploitation, as well as facilitating information exchange through its global piracy database. With regard to operational support in the field of evidence collection, INTERPOL has successfully deployed Incident Response Teams (IRT) during post vessel release processes. IRTs help facilitate the collection, storage and sharing of evidence and information collected during the crime scene examination and crew debriefing conducted with the local law enforcement authorities, following the release of hijacked vessels.

INTERPOL's Global Database on Maritime Piracy (Global Database) is a customized analytical database, "designed to consolidate information about piracy off the coast of Somalia and facilitate the development of actionable analysis for law enforcement"⁶². Originally developed by INTERPOL's National Central Bureau (NCB) in the United States, the Global Database became operational in July 2011, and was transferred the following year to the INTERPOL General Secretariat Headquarters in Lyon, where it is currently being administered by MTS.

The key principle behind the Global Database is to serve as a central repository of piracy-related information for use by the law enforcement community who are conducting investigations with a view to future prosecution. The Global Database helps build more complete, coherent profiles of suspected pirates, their activities, networks and associations, and identify links between different piracy incidents that can assist states in proactively exploiting evidence in their possession and supports the sharing of information across multiple jurisdictions for that purpose. While initially customized for Somali piracy, the Global Database is also being used to support countries investigating piracy and armed robbery incidents at sea in the Gulf of Guinea and Southeast Asia.

The Global Database includes over 100 000 records, including: personal details of pirates and financiers; pirates' telephone numbers and phone records; hijacking incidents; vessels; and currency and bank accounts used in ransom payments. One of its biggest operational advantages is that the Global Database's content is not classified and can be shared within the international law enforcement community, in accordance with INTERPOL's Rules on processing data (RPD).

A big decrease, with one big caveat

As stated above, the steady decline in the number of attacks, and consequently of the threat currently posed by Somali piracy, is widely acknowledged and supported by quantitative data. Nevertheless, many states (including France, Germany, Greece and Norway) have warned that the problem is not over yet, and might experience a sudden revival. Indeed, in their responses to the Eurojust questionnaire of July 2014, they have pointed to the risk of a resurgence or revitalisation in the pirates' activities in the Gulf of Aden region due to the huge difficulties still faced by the Somali central government in rescuing the country from its 'failed' status.

⁶² United Nations SC Resolution 2020 (2011), UN Doc S/RES/2020 (2011), paragraph 19.

Despite all its efforts, major parts of Somali territory (and waters) are still lawless, unstable areas prone to criminality. In addition, because of the financial burden that preventive measures place on states and shipping companies, the latter may be tempted to start reducing the costs by lowering the level of preventive measures below the critical level needed to keep the pirates away.

5.3. The gap between the threat in the Gulf of Guinea and its judicial response

To adequately respond to the skyrocketing increase in piracy attacks carried out in the Gulf of Aden, the international community has stepped up its efforts to secure the safe passage of vessels through that area and has created the legal and operational conditions needed to interdict and apprehend pirates. As mentioned above (*see* Section 5.2), these efforts went as far as the redesign of the international legal framework to facilitate the interdiction and apprehension of pirates (by means of SC Resolutions 1816 (2008) and 1851 (2008)); and the setting up of complex joint naval operations under the auspices of NATO and the European Union, tasked to escort vessels through the areas of operation of the Somali pirates. Ultimately, these combined efforts enhanced the national authorities' ability to bring the alleged pirates, along with their associates and facilitators, to justice.

In contrast, scarce information is available concerning prosecutions or judicial proceedings initiated in Member States against pirates operating off the coast of the Gulf of Guinea, pirates that, according to the IMB, are said to have been responsible for 18 per cent of all pirate attacks reported worldwide in 2013⁶³, and for making Nigeria the third most affected country in the world in 2014.⁶⁴ Indeed, very few cases against West African piracy are reported, in stark contrast to the multitude of proceedings against Somali pirates held in Member States or elsewhere, by means of transfer agreements with third States. Italy, France and Greece are amongst the very few Member States in which investigations against acts of piracy committed in the West African region were opened.

The apparent gap between the emerging threat in the Gulf of Guinea and its international judicial response may be due to a combination of the following two factors: i) the 'inward' nature of West African piracy as a result of being a commodity-based criminal phenomenon (*see below*); and ii) the capacity-building type of intervention adopted by the international community.

West African piracy as a commodity-based criminal phenomenon

In general, criminal activities typically connected to piracy are armed robbery at sea, kidnapping for ransom and hijacking with the intent to commit commodity theft.

Incidents are regarded as a robbery at sea when a vessel is boarded, within internal waters, territorial sea and archipelagic waters, with the intent to steal ship stores, equipment, and/or the crew's personal effects. The offenders are often armed with guns, knives and similar weaponry. This type of crime is considered opportunistic and most likely to take place when the vessel is in port. In this category, hostage-taking merely serves the purpose of minimising disturbances in the execution of the robbery, including the escape.

Only a very limited number of kidnappings for ransom have been reported in West Africa within the past few years. Instead, these attacks have been characteristic of maritime crime happening off Somalia's coast. During such attacks, vessels are boarded with the primary goal of holding the crew hostage and consequently negotiating a ransom payment. In order to do so successfully, the crew is often brought to unknown locations on land.

By far the most frequent form of piracy attacks in the Gulf of Guinea is the hijacking of vessels by pirates intending to steal cargo, preferably refined oil products. The cargo's value is the main determinant for pirates to attack in West Africa's waters, resulting in the vessel's crew becoming a hindrance to as opposed to a means

⁶³ Allianz Global Corporate & Specialty, Safety and Shipping Review 2014, p. 27, available at: <http://www.agcs.allianz.com/assets/PDFs/Reports/Shipping-Review-2014.pdf> (last visited: 8 April 2015).

⁶⁴ ICC International Maritime Bureau, *Piracy and armed robbery against ships*, Report for the period 1 January – 31 December 2014, p. 6.

of extortion. A high degree of violence is a characteristic of the pirates' behaviour against crew members. West African pirates typically do not hold the hijacked ship or its crew for an extended period of time, but only for as long as is necessary for the pirates to remove the ship's cargo, and collect the money and other valuable items in the crew's possession.

In an 'ordinary' kidnapping for ransom, where the crew itself is in essence the pirates' main prize, the pirates are (opportunistically) committed to ensuring that the crew survives the attack, so that a ransom can be requested and obtained at a later stage. West African pirates' main goal is instead to win crew members potential resistance in the shortest and most resolute possible way (i.e. even by assaulting, injuring or killing them) in order to obtain in the shortest possible time all valuable items in their possession, and then leave with the ship's cargo. In the words of the United Nations Office on Drugs and Crime (UNODC), '[t]he crew of the target vessel, rather than being the object of the attack, is simply an impediment, to be offloaded as quickly as possible'⁶⁵.

Thus, West African piracy can be regarded as a commodity-based type of crime, rather than a ransom-oriented offence. Pirates operating in the Gulf of Guinea are most often after what is transported in the hijacked vessels' cargo (oil, chemical products, etc.), rather than the ransom they could obtain through the kidnapping of their crew.

The 'inward' nature of commodity-based piracy

The hijacking of vessels for the purpose of stealing cargo appears to define the preferred area of operations of the West African pirates. According to the Threat Assessment Report on Transnational Organized Crime in West Africa released by the UNODC in 2013, two requirements are necessary for this type of attack to prevail: 1) a location where pirates can safely offload the hijacked ship's cargo; and 2) a market in close proximity that allows the quick distribution of cargo of undeclared, i.e. unlawful, origin.⁶⁶

As stated by the Africa Center for Strategic Studies (ACSS), 'the Gulf of Guinea piracy is the organized, sometimes highly sophisticated, illicit taking of oil. [The pirates] steal the oil, make a couple of black market circles of the stuff, and then deposit it back into the global supply'⁶⁷. According to the ACSS, 'the oil is moved from ship to ship on the black market until it eventually finds its way again into the legal global crude market [...]'.⁶⁸

Commodity-based piracy is an inward-projected type of criminality. West African piracy unfolds within the (relatively) limited range of the Gulf of Guinea waters, and the offloading sites and markets, closely located in the mainland. Incidentally, most of the hijacked ships and kidnapped crews may well be foreign. But the impact of their (foreign) nationality is limited, and not essential to the success of the pirates' operations. West African piracy operates as a 'closed circuit' – the oil is unlawfully taken and introduced in legitimate businesses, often without leaving the same country from which it was stolen or offloaded.

Ransom-based piracy attacks follow a very different, outward dynamic. They are essentially crimes of international character. They all, inevitably, contain some features that link the attackers to jurisdictions other than that of the pirates. This type of piracy typically concerns foreign crew members (who are seen as the most profitable targets). In addition, ransom payments are normally negotiated by a third party not located in the pirates' jurisdiction (the ship owner directly or through a law firm or the insurer). At some point, in any kidnapping for ransom committed by a Somalia-based pirate group, one element will expand the boundaries well beyond the geographical limitations of the Gulf of Aden. Such an element could be, for example, the

⁶⁵ United Nations Office on Drugs and Crime, *Transnational Organized Crime in West Africa: A Threat Assessment*, 2013, p. 50, available at: http://www.unodc.org/documents/data-and-analysis/tocta/West_Africa_TOCTA_2013_EN.pdf (last visited: 8 April 2015).

⁶⁶ Ibid.

⁶⁷ Malaquais, Assis, 'Ask the Expert: The Growing Threat of Oil Pirates in West Africa's Gulf of Guinea', Africa Center for Strategic Studies, 29 March 2012, available at: <http://africacenter.org/2012/03/ask-the-expert-the-growing-threat-of-oil-pirates-in-west-africa%E2%80%99s-gulf-of-guinea> (last visited: 8 April 2015).

⁶⁸ Ibid.

telephone calls made from Somalia to the shipping company in Germany, where the ransom for the release of the cargo ship *MS Victoria* and its crew was negotiated (see Section 4.2).

Because of the ‘closed circuit’ nature and inward dimension of West African piracy, the ability of West African authorities to readily and effectively counter this criminal phenomenon and to bring its perpetrators to justice would seem essential.

However, the unfavourable geopolitical conditions surrounding the local authorities in the region might negatively impact their efforts to counter maritime piracy. Such conditions include the neighbouring countries’ porous borders, which allow pirates to move in the Gulf of Guinea region virtually undetected; the limited operational capacities available to some West African states, including in the field of maritime law enforcement; the presence of other, on-shore, compelling threats such as terrorism (e.g. Boko Haram in Nigeria) or widespread organised crime, which may result in a general reluctance to invest resources in the investigation and prosecution of piracy incidents; and the endemic official corruption that has long plagued the area, creating an area of contiguity between law enforcement officials and criminals, including pirates.⁶⁹

We have already seen, in one of the cases analysed in this Report (see Poland – *MDPL Continental One*, Section 3.6), how the difficult geopolitical situation in the foreign country in which the hijacking of the vessel took place, Nigeria, resulted in the discontinuation of the proceedings initiated in Poland.

From land-based operations to capacity-building: the new dimension of the international intervention in the fight against West African piracy

The international community seems to have chosen a different approach towards the type of intervention against West African pirates, compared to the one deployed in the Somali context. This new approach favours a more comprehensive vision designed to promote the maintenance of peace and stability in general in the Gulf of Guinea region, and to encourage non-West African states to enhance the counter-piracy capabilities of West African states and organisations in order to enable *them* – the local authorities – to prevent and counter piracy effectively.

This new approach appears to place less emphasis on the kind of ‘hands-on’, operational role directly played in recent years by foreign countries against Somalia-based piracy attacks. Instead, it is designed to build on the existing counter-piracy efforts and institutions operating in the region of the Gulf of Guinea.

Both UN SC Resolutions recently passed on this matter, SC Resolutions 2018 (2011) and 2039 (2012), as well as the EU Strategy, appear to follow this governance and capacity-building-based approach.

SC Resolutions 2018 (2011) and 2039 (2012)

Under the initiative of Benin and Togo, the SC passed two resolutions on Piracy and Armed Robbery in the Gulf of Guinea in recent years, SC Resolutions 2018 (2011) and 2039 (2012). SC Resolution 2039 (2012) stresses the importance of adopting ‘a comprehensive approach led by the countries of the region to counter the threat of piracy and armed robbery at sea in the Gulf of Guinea and their underlying causes’⁷⁰. SC Resolutions 2018 (2011) and 2039 (2012) emphasize the importance of supporting states and organisations in the region, through providing training, advice, equipment and resources where appropriate, so that they can increasingly prevent or manage crises by themselves.

EU Strategy

In the EU Strategy, the Member States undertook to help governments of that region to ‘strengthen their

⁶⁹United Nations Office on Drugs and Crime, *Transnational Organized Crime in West Africa: A Threat Assessment*, 2013, p. 50, available at: http://www.unodc.org/documents/data-and-analysis/tocta/West_Africa_TOCTA_2013_EN.pdf (last visited: 8 April 2015).

⁷⁰SC Resolution 2039 (2012), UN Doc. S/RES/2039 (2012), p. 2.

maritime capabilities, the rule of law and effective governance across the region, including improvements in maritime administration and law enforcement through multiagency cooperation by police, navy, military, coast guard, customs and immigration services', as well as to 'build robust institutions, maritime administrations and multiagency capabilities to ensure maritime awareness, security and the rule of law along the coast'.⁷¹ The EU Strategy further states that the European Union 'has the experience and resources to help build local capacity, and should encourage the necessary political support through political dialogue'⁷², and proposed as a possible action 'to improve the rule of law through strengthening national law enforcement agencies and the judiciary [and] improving sea and land capacity [...]'.⁷³

5.4. Conclusions

In the same fluid fashion that pirates move, the threat they pose to the international community appears to be moving as well. Picking up on the declining piracy activity off the coast of Somalia, the emerging predominance of attacks in the Gulf of Guinea suggests that the threat is moving west.

Somalia-based and West African piracies have distinctive sets of features.

Somali pirates focus on the hijacked ship's crew – better yet if made of foreign nationals – for the ransom. West African pirates focus on the hijacked ship's cargo. The crew members are somehow collateral damage – they are not the pirates' primary target, and yet they may suffer the consequences of being in the wrong place (the ship carrying the cargo sought by the pirates), at a wrong time (i.e. in between the pirates boarding the ship and attempting to seize its cargo). In addition, Somalia-based pirates have been operating in the vacuum left by the troubled Somali central government authorities – a vacuum successfully filled, in the end, by the international community. West African pirates operate within local territory (and waters) falling under the full authority of the local legitimate governments in the region, and are primarily subject to the latter's jurisdictions.

The judicial responses provided to each type of piracy differ as well.

The more 'outward' nature of East African piracy makes it more susceptible to being responded to at international level. Piracy attacks off the coasts of Somalia have an inherent international character. For one, the ransom-based piracy attacks in the Gulf of Aden are such that most of the ransom payments are negotiated by or otherwise connected to a non-Somali third party (such as the country of nationality of the kidnapped crew member). Perhaps more significantly, international authorities (most notably the UN and the European Union) have *de facto* deputised, if not altogether replaced, the Somali transitional government in the business of countering pirates and bringing them to justice, as evidenced by the many judicial proceedings successfully concluded against hundreds of Somali pirates in Member States and the USA, or in countries such as Seychelles or Mauritius, by virtue of transfer agreements.

Piracy in the Gulf of Guinea is inward'-oriented. The attacks generate within a 'closed circuit' environment in which the commodity sought by the pirates – typically oil or chemical products – is seized, offloaded and remarketed within the same West African state or one of its neighbours. Here, piracy unfolds as a mainly local criminal enterprise, centred on the commodity unlawfully seized from the hijacked vessel. Mostly relying on the efforts of local investigative and judicial authorities, the judicial response to West African piracy may not currently appear to be as effective as the response against Somali pirates. This response may be the result of the difficult geopolitical conditions affecting some of the concerned West African states, as well as the limited operational role played by the international community.

⁷¹ EU Strategy on the Gulf of Guinea, 17 March 2014, p. 3.

⁷² *Ibid.*, p. 9.

⁷³ *Ibid.*, p. 10.

6. Concluding remarks

Eurojust's involvement in the field of maritime piracy dates back to 2009, when, in response to a request from the Dutch authorities, it initiated the process of identifying the legal obstacles related to the investigation and prosecution of piracy cases in the Member States. Since then, Eurojust has held several coordination meetings dedicated to the phenomenon of maritime piracy and supported the first-ever European JIT on maritime piracy, JIT Nemesis. Eurojust's operational *fora* offered a unique platform for practitioners involved in ongoing investigations and prosecutions of piracy cases. One finding has emerged clearly and consistently: the need to exchange information and best practice on investigations and prosecutions in this area.

Against this background, in 2012, the College of Eurojust decided to launch a maritime piracy project, with the objective of monitoring – in a more systematic and comprehensive way – the challenges faced in piracy prosecutions and the solutions found. To that end, it created the MPJM as an additional tool designed to support judicial authorities by fostering the exchange of information between prosecutors dealing with maritime piracy cases. Following the publication of the MPJM 2013, this Report has further developed its dual operational and strategic nature, while reaffirming its goal to offer a tool to assist practitioners in the resolution of problems arising in the investigation and prosecution of piracy-related offences.

Thus, the overview of international and domestic legislations provided in Chapter 2 is meant to complement and update the information that appeared in the MPJM 2013. Accordingly, practitioners found here the relevant legislation of the nineteen Member States, as well as Norway and the USA, that were not included in the MPJM 2013, in addition to a summary of the various transfer agreements adopted in the area of maritime piracy. In this chapter, the readers also were informed that the jurisdictional requirements and legal definitions of piracy provided at national level vary significantly, and that references to the notion of piracy and universal jurisdiction with respect to acts of piracy are not provided in the domestic legislation of the majority of the states reviewed in this Report.

Similarly, Chapter 3 contained an analysis of the newest judicial developments in piracy cases already reported in the MPJM 2013, such as the Dutch *Choizil* and *Dhow* and the Italian *Montecristo*, as well as new cases, such as the Spanish *Izurdia*. In these cases, the practitioners were confronted with several critical recurring issues arising in piracy cases: the remote location of the attacks; the verification of minor age claims made by the accused; and the challenges encountered in the collection of evidence and in crime scene management. Readers were informed of the growing emphasis on the importance of human rights considerations in piracy cases, with particular regard to the accused persons' rights to a fair trial and to be brought promptly before a judge.

Finally, Chapter 4 provided an inside look at JIT Nemesis. The chapter accompanied the readers through the JIT's successful experience. JIT Nemesis benefitted from the early involvement of prosecutors and Eurojust, as well as the regular and direct exchange of information between prosecutors and investigators.

On a more strategic level, Chapter 5 offered a bird's-eye view of the evolution of the maritime piracy criminal phenomenon and emerging trends. This part of the Report described the successful efforts to counter piracy off the coast of Somalia. It further looked at the legal and judicial implications of the unfolding of the emerging threat in the Gulf of Guinea. In this regard, in addition to the input provided by national authorities, Eurojust relied on its continuing interactions with many relevant regional and international bodies active in countering maritime piracy. These bodies included the EEAS, the European Security and Defence College (ESDC), the UN, INTERPOL, as well as the Contact Group on Piracy off the Coast of Somalia (CGPCS), which was chaired by the European Union in 2014, and the Law Enforcement Task Force (LETF) established within the CGPCS.

However, while the nature, underlying structure and objectives of this Report and the MPJM 2013 have not changed, the circumstances surrounding their publication have. Indeed, this Report comes at a time in which the significant decrease in piracy attacks carried out in East Africa and the related lower number of investigated and prosecuted cases may be seen as signs that piracy off the coast of Somalia is a criminal phenomenon on the wane. The conditions that triggered Eurojust's initial involvement in the field of maritime piracy – to assist the judicial authorities of the Member States directly affected by piracy attacks originating in the Gulf of Aden – may also be less urgent. Moreover, whether the growing alarm caused by the increase in the number of piracy activities in the Gulf of Guinea will lead to a level of judicial response in the Member States comparable to that seen against Somali pirates remains uncertain.

What is certain, though, is that – whether in the form of a report or through other suitable tools – Eurojust will continue to provide its expertise, capacity and commitment to assist Member States in their fight against maritime piracy, and is ready to provide support in any operational cases in this area.

7. List of abbreviations

ACSS	Africa Center for Strategic Studies
BMP	Best Management Practice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECHR	European Convention on Human Rights, Council of Europe
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EU	European Union
EUNAVCO	European Union Naval Coordination Cell
EUNAVFOR	European Union Naval Force Somalia – Operation Atalanta
Europol	European Police Office
FP Maritime Piracy	Europol’s Focal Point Maritime Piracy
ICC	International Chamber of Commerce
IMB	International Maritime Bureau
INTERPOL	International Criminal Police Organization
IRT	Incident Response Team
JIT	Joint Investigation Team
MLA	Mutual Legal Assistance
MPJM	Maritime Piracy Judicial Monitor
MoU	Memorandum of Understanding
MTS	Maritime Security Sub-Directorate
National PPO	National Public Prosecutor’s Office, the Netherlands
NATO	North Atlantic Treaty Organisation
NCB	National Central Bureau
NCIS	Naval Criminal Investigative Service
PCASP	Privately Contracted Armed Security Personnel
PPO Osnabrück	Office of the Public Prosecutor of Osnabrück, Germany
RHIB	Rigid Hull Inflatable Boat
RPG	Rocket Propelled Grenade
SC	Security Council
SNA	Social Network Analysis

SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
TFEU	Treaty on the Functioning of the European Union
TFG	Transitional Federal Government
UAE	United Arab Emirates
UKMTO	UK Maritime Trade Operations
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNODC	United Nations Office on Drugs and Crime

8. Methodology and acknowledgements

Methodology

The information compiled and analysed in this Report has been collected from the competent national authorities of the Member States, Norway and the USA through the responses to the questionnaires circulated within the Eurojust General Cases (Topics) 920/NMNL-2012 and 1026/COLL-2014.

The questionnaire in the case 920/NMNL-2012 (July 2012) was addressed to all Member States and focused on domestic jurisdiction to prosecute maritime piracy. The questionnaire in the case 1026/COLL-2014 (July 2014) was again addressed to all Member States and extended to Norway and the USA. The objective of this second questionnaire was the collection of information on substantive national law definitions of piracy, and the updating and supplementation of the information available since the previous questionnaire on national jurisdiction to prosecute piracy. In addition, this latest questionnaire allowed the drafters to obtain texts of judgments rendered by national courts in piracy cases, and to ascertain views of the practitioners dealing with piracy cases on the current trends in this area of criminality.

The texts of national legislation quoted in Chapter 2, as well as the texts of the judgments analysed in Chapter 3, are unofficial English translations, with the exception of those concerning Ireland and the USA.

The information presented in Chapter 4 regarding JIT Nemesis was collected through interviews conducted by the drafters with the national prosecutors involved in the JIT, and by a written contribution provided by a representative of Europol's FP Maritime Piracy. Finally, comprehensive open source research has been performed by the drafters to complement this Report with relevant publicly available information. Open source information was used in the preparation of Chapter 5 dealing with current piracy trends, in addition to information provided by the representatives of INTERPOL's MTS, Europol's FP Maritime Piracy and the IMB's Piracy Reporting Centre.

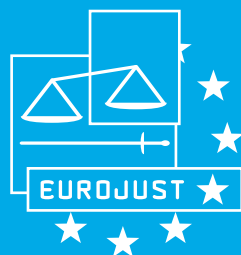
After liaising with relevant authorities of concerned Member States, third States and international organisations during the drafting phase, this Report was sent to the National Desks and Liaison Prosecutors at Eurojust for written consultation, and was approved by the College of Eurojust on 21 April 2015.

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