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# First report on prevention and repression of piracy and armed robbery at sea, by Yacouba Cissé, Special Rapporteur*

## Contents



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# I. Introduction

## A. Some historical facts about piracy

1. The word “pirate” comes from the Latin *pirata*, which in turn comes from the Greek word *peirates*, whose root is the Greek verb *peiran*,[1] meaning “to attack or attempt to attack”. A pirate thus scans the coastline and the horizon, attacks ships under way and seizes goods or takes hostage persons on board in order to demand ransoms. The pirates of old even flew their own flag, called the “black flag”.[2] They were known by turns as brigands, sea robbers, filibusters, freebooters, mercenaries, sea bandits, savages, corsairs, barbarians, ruffians, buccaneers, barbaresques, sea-wolves, sea dogs, outlaws and, from a more humane perspective, sea princes and so on. They have been present throughout the history of humanity, from antiquity, through the Middle Ages, and right up until the modern era. The great cities of ancient and medieval times, and the major maritime Powers of the modern period, developed military strategies to prevent and suppress acts of maritime piracy. Paradoxically, in the golden age of piracy, which is considered to be the seventeenth century, States used piracy to establish or consolidate their economic and military power, sometimes suppressing it but at other times taking advantage of it. In the “fifth century B.C., Athens … planted settlers who consolidated its maritime empire and protected its trade”[3] against pirates. This situation gave rise to the well-known dichotomy between, on the one hand, the type of piracy that was reviled and outlawed and, on the other, the type legalized as “privateering” or “commerce raiding” and carried out on the basis of a contract under a letter of marque, which is a form of piracy authorized by States to retaliate against enemy States.

2. Depending on the era and the region, piracy could be a profession, either because of the prevalent poverty or because an individual came from a family of pirates. For example, the history of piracy in Somalia is linked to the poverty generated by the near total disappearance of the fishing activities that Somali fishermen used to undertake, causing them to return home with empty nets. The history of piracy also shows that “when … there is a shortage of fish ... fishers become pirates”.[4] Nonetheless, the expansion of both ancient cities and some modern States was driven by maritime piracy, a crime that is likely to have benefited both merchant cities[5] and slave countries.[6] With regard to the repression of piracy, those who are victims of this crime wage war against pirates without any prior declaration of war, as is customary under the laws of war. Cicero said about pirates that “the laws of war do not apply to them”.[7] As early as 1400, “a joint operation of the Bremen and Hamburg fleets had successfully eliminated piracy from the island of Gotland”.[8]

3. Maritime piracy is regarded as the first international crime, being designated as a crime against the law of nations, that is, a crime under public international law. The pirate is considered as the enemy of humankind and piracy as one of the world’s oldest

[1] J. Ayto, *Word Origins: The Hidden Histories of English Words from A to Z*, 2nd ed., London, A&C Black, 2005, p. 379.
[2] See P. Jacquin, *Sous le pavillon noir: pirates et flibustiers*, Paris, Gallimard, 1988.
[3] Ibid., p. 15.
[4] Ibid., p.96.
[5] Ibid., pp. 26, 36 and 37.
[6] Ibid. p. 26.
[7] D. Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations*, New York, Zone Books, 2009, p.107.
[8] Jacquin, *Sous le pavillon noir: pirates et flibustiers* (see footnote 2 above), p.35.

professions. It could be said that it is a phenomenon as old as seafaring itself.[9] Between the fourth and fourteenth centuries, there existed what has been described as the Byzantine "law of the sea", under which privateering and piracy, considered equivalent to acts of banditry, were strongly condemned.[10] The punishment reserved for pirates at that time was to meet their "end on a ship's deck or at the end of a rope facing the sea",[11] in other words, by hanging or beheading. Pirates were therefore punished by States, individually or collectively. The first instances of the application of universal jurisdiction can be traced back to the major Roman offensive against pirates in the first century before Christ. In 67 B.C., the law granting General Pompey absolute power over the Mediterranean was adopted, thereby giving him the authority to purge the Mediterranean of all pirates.[12] Moreover, the Greek State of Corinth and the Corinthians were the first to suppress piracy in order to assist merchants, and it has been shown that piracy was brought under control thanks to the international coalition established by Alexander the Great. At certain periods in history, pirates were subject to punishment; for example, pirates were crucified under Julius Caesar, the anti-piracy law known as Lex Gabinia passed by Aulus Gabinius declared pirates to be *hostes gentium* (common enemy of humanity as a whole) and the ordinance of the King of France dated 5 September 1718 imposed the death penalty on pirates.

4. Both in the past and today, shipping has always been key to the wealth of nations and peoples, with around 90 per cent of goods carried by sea.[13] However, it suffers from the worst types of insecurity, of which maritime piracy is the most violent and deadly. Piracy has been, and remains, rife in all seas throughout the world. In the words of Philippe Jacquin, "fortune sails the seas and pirates follow her".[14] Recent decades have shown that, whether off the coast of Somalia, in South-East Asia or in the Gulf of Guinea, piracy transcends time and a period of calm or the apparent suppression of this crime is followed by a period of resurgence. Maritime piracy can no longer be regarded as a relic of the past. While it certainly dates back to ancient times, it continues to re-emerge in new forms that are also more violent, given that modern-day pirates are better organized and are far from being adventurers of the seas. They are better equipped and more heavily armed,[15] operating as true bands of professionals with a knowledge of the geography of the seas and oceans and certainly also of the international law that provides for the repression of their activity. In the light of the statistical data on acts of piracy and armed robbery at sea over the past 10 years, Patricia W. Birnie was absolutely correct to remind us that piracy "has adapted to modern technological, political, economic and social developments and still exists, albeit in new forms which require new means for suppression".[16]

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[9] J. G. Dalton, J. A. Roach and J. Daley, "Introductory note to United Nations Security Council: piracy and armed robbery at sea – resolutions 1816, 1846 & 1851" (2009), *International Legal Materials*, vol. 48 (2009), pp. 129–132, at p. 129; and A. P. Rubin, "The law of piracy", *Denver Journal of International Law & Policy*, vol. 15, No. 2 (1987), pp. 173–233.

[10] Jacquin, *Sous le pavillon noir: pirates et flibustiers* (see footnote 2 above), p.26.

[11] Ibid., p. 48.

[12] *Histoire & civilisations,* No. 84, (June 2022), p.41.

[13] Maritime Knowledge Centre of the International Maritime Organization, "International shipping facts and figures – information resources on trade, safety, security, environment", 6 March 2012, p. 7.

[14] Jacquin, *Sous le pavillon noir: pirates et flibustiers* (see footnote 2 above), p. 37.

[15] J. C. Bulkeley, "Regional cooperation on maritime piracy: A prelude to greater multilateralism in Asia?", *Journal of Public and International Affairs*, vol. 14, (2003), p. 3; M. Okano, "Is international law effective in the fight against piracy? Lessons from Somalia", *Japanese Yearbook of International Law,* vol. 53, pp. 178–201, at pp. 179–181; and Y. M. Dutton, "Maritime piracy and the impunity gap: insufficient national laws or a lack of political will", *Tulane Law Review,* vol. 86 (2012), pp. 1111–1162, at pp. 1127–1130.

[16] Cited in Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (see footnote 7 above), p. 27.

## B. Statistics concerning acts of piracy and armed robbery at sea by region

5. According to the Maritime Information Cooperation and Awareness Center (MICA Center), no incidents of piracy have been detected in Europe. Acts of piracy and armed robbery at sea have taken place in all other regions. In general, these are not minor offences at sea but grave crimes resulting in death and serious bodily injury. The statistical data by period are those that have been recorded, it being understood that not all acts of piracy or armed robbery are reported.

6. The new geopolitics of seas and oceans have caused piracy to move from one region to another according to the volume of maritime traffic and the ease with which pirates can operate, both at sea and on land. It has also been observed that "modern pirates have abandoned the Caribbean as their favoured area of operation and now prefer other seas at the centre of major contemporary geopolitical challenges. *At present*, the main risk areas are concentrated around the Gulf of Guinea, the Gulf of Aden, the Indian Ocean, the Straits of Malacca and the southern part of the South China Sea".[17]

7. Crimes of maritime piracy and armed robbery at sea continue to be committed in several regions worldwide, although a steep decline in the number of incidents has been noted. For example, while there were 366 incidents of piracy and robbery in 2016 and 2017, and 380 such incidents in 2018, according to the MICA Center, the number of incidents subsequently fell, with 375 acts of piracy and armed robbery at sea[18] recorded in 2020, and just 317 incidents in 2021, which represents a 15 per cent decrease compared with 2020 and is the lowest recorded for 13 years.[19] However, these statistics need to be analysed against the backdrop of the coronavirus disease (COVID-19) global pandemic, one consequence of which has been a long-term disruption of the supply chain and international maritime transport.

8. It is worth recalling that, on a global scale, acts of piracy peaked between 2008 and 2012, when a kind of *piraticum bellum,* or war against pirates, took place. The unprecedented military deployment undertaken by an international coalition of States, in particular the major naval Powers, is likely to have contributed to the significant decrease in worldwide cases of maritime piracy. This decrease is largely attributable to the fact that wherever nations have mobilized against pirates, the scourge of piracy has significantly declined in terms of the number of incidents and their severity, albeit without completely disappearing. The 10 maritime approaches most affected by piracy in 2021, according to data from the MICA Center, were those of the Caribbean, the Strait of Singapore, Peru, the Philippines, Yemen, Sao Tome and Principe, Nigeria, Ecuador, Panama and Ghana. The data collected by the MICA Center also show a significant reduction in incidents of piracy in Oceania, Latin America and the Caribbean. The same downward trend can be observed in West Africa,[20] where incidents of piracy declined from 80 in 2016 to 41 in 2021. In East Africa, on the other hand, the trend has been upward, with the number of incidents of piracy rising from 2 in 2016 to 18 in 2021. Angola, Benin, Cameroon, the Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Liberia, Nigeria and Sao Tome and Principe are the coastal States of the Gulf of Guinea where incidents of maritime piracy or acts of robbery at anchor were reported in 2021. According to statistics from the Baltic and International Maritime Council, of the 135

[17] See "La piraterie moderne, d'une mer à l'autre", *Carto*, *Le monde en cartes,* No. 41 (May-June 2017), *Géopolitique et mondialisation: le retour des frontières*, p. 41 (emphasis added).

[18] See MICA Center, *Annual report 2020: Worldwide maritime piracy and robbery*.

[19] See MICA Center, *Annual report 2021: Maritime security*.

[20] Ibid., p. 14.

crew members kidnapped worldwide in 2020, 95 per cent were attacked in the Gulf of Guinea, especially the Niger Delta in Nigeria, which was the main focus of piracy and armed robbery at sea in the Gulf of Guinea.

9. Asia, while it remains a hotspot for piracy, has seen a significant drop in the number of attacks, down from 54 incidents in 2016 to 11 in 2021. According to the 2022 report of the Information Sharing Centre of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia,[21] no incidents of piracy were reported in the period from January to June 2022. However, 42 incidents of armed robbery against ships were reported, of which 40 were successful and 2 were failed attempts. While no incident of piracy or armed robbery at sea was recorded in Europe in 2021, other forms of maritime crime were recorded in that region, namely trafficking in human beings, illegal immigration via maritime routes and the trafficking of drugs and weapons via maritime routes, specifically through the Mediterranean Sea.

10. In America and the Caribbean,[22] 131 incidents of piracy and robbery were reported in 2021, mostly thefts of anchored yachts or related to drug trafficking. Several States were affected by these incidents, namely Brazil, Chile, Colombia, Ecuador, Guatemala, Haiti, Honduras, Mexico, Panama and Peru.

11. In the Indian Ocean,[23] 30 incidents related to acts of maritime piracy and robbery in anchorage areas were reported. India, Mozambique, Oman and Yemen were the coastal States most affected.

12. In South-East Asia,[24] 86 incidents were reported in 2021, 51 of them in the Strait of Singapore, reflecting a rise in robbery in that area. In the Strait of Malacca, bordered by Indonesia, the Philippines and Malaysia, incidents of piracy and robbery fell sharply. The incidents reported were mainly thefts in anchorage areas or from ships at berth.

13. The downward trend in modern piracy should not mask the other phenomena that stem directly from piracy, such as “narco-piracy”, mostly seen in the Americas and the Caribbean region. In 2021, the MICA Center recorded 131 incidents of piracy and armed robbery at sea[25] in that region.

14. The Indian Ocean region, meanwhile, saw 30 incidents of piracy and armed robbery at sea.[26] Despite the small number of incidents in that region, the MICA Center continues to warn against irregular approaches at sea, which are still reported, and the risk of acts of armed robbery at sea, which remains high.[27]

15. A remarkable decline has also been seen in the Gulf of Guinea, a region particularly badly affected by piracy over the last decade. This improvement is attributable, in particular, to the various anti-piracy measures taken in the region. The downtrend continued in 2021, when only 52 piracy- or robbery-related incidents were recorded.[28]

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[21] Information Sharing Centre of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, *Annual report 2022: Piracy and armed robbery against ships in Asia*, p. 4.

[22] MICA Center, *Annual report 2021* (see footnote 19 above), p. 35.

[23] Ibid., p. 50.

[24] Ibid., pp. 62–64. [ “there was a 32% increase in incidents involving confrontations with crew and perpetrators carrying weapons, particularly in the Eastbound Lane of the Traffic Separation Scheme, within the Singapore Strait”].

[25] Ibid., p. 36.

[26] Ibid., p. 50.

[27] Ibid., p. 52.

[28] Ibid., p. 21.

16. As for Asia, the highest number of attacks since 2015 was recorded in 2021. The number of incidents reported in South-East Asia shows that some parts of the region remain highly attractive to robbers and pirates. Out of the 96 incidents recorded in 2020, more than half – 50 of them – were reported in the Straits of Malacca and Singapore, where pirates took advantage of the geographical situation to board ships and steal equipment[29] on board.

17. In that region and elsewhere, acts of piracy and armed robbery at sea have given rise to significant socioeconomic costs for both States and the shipping industry as a whole.

## C. Socioeconomic costs of piracy and armed robbery at sea

18. The statistics showing the economic and social costs of maritime piracy and armed robbery at sea are all the more alarming when we bear in mind the importance of the shipping economy for the development of countries. Ninety per cent of worldwide trade is carried via maritime routes, many of which are threatened by pirates. Acts of piracy and armed robbery at sea are often accompanied by a plethora of other illegal acts, such as marine terrorism,[30] corruption, money-laundering, violations of international human rights law, illegal fishing and the illegal dumping of waste and toxic substances in the seas and oceans, as well as such acts as human trafficking and drugs trafficking.[31]

19. Maritime piracy generally targets private ships and government ships operated for commercial purposes; it causes major harm to private actors in the maritime industry.[32] Furthermore, the crew members of an attacked vessel are at risk of being held captive for a prolonged period.[33] They may be seriously injured, or violently killed and thrown overboard. Ship owners may be forced to pay large ransoms[34] to obtain the release of their crew, cargo and ship. Marine insurance companies, which are generally protection and indemnity clubs, have to take into account the risks of acts of piracy and armed robbery at sea before entering into marine insurance contracts with shipping operators and freight carriers. The assessment of these risks is reflected in the introduction of specific clauses in their marine insurance contracts and a subsequent increase in the total cost of maritime transport.[35] One of the solutions found to address this issue has been to involve private companies in combating piracy, despite the controversy surrounding this approach and its legal basis in international law.

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[29] MICA Center, *Annual report 2020* (see footnote 18 above), p. 52.

[30] M. Pathak, "Maritime violence: piracy at sea & marine terrorism today", *Windsor Review of Legal and Social Issues*, vol. 20 (2005), pp. 65–79.

[31] H. R. Williamson, "New thinking in the fight against marine piracy: financing and plunder pre-empting piracy before prevention becomes necessary", *Case Western Reserve Journal of International Law*, vol. 46 (2013), pp. 335–354; and S. Whitman and C. Suarez, "Dalhousie Marine Piracy Project: The root causes and true costs of marine piracy", *Marine Affairs Program Technical Report*, No. 1 (2012).

[32] S.-A. Mildner and F. Groß, "Piracy and world trade: the economic costs" in Stefan Mair, ed., *Piracy and Maritime Security: Regional Characteristics and Political, Military, Legal and Economic Implications*, Berlin, Stiftung Wissenschaft und Politik, 2011, pp. 20–33, at pp. 26–28.

[33] Ibid., p. 12.

[34] C. P. Hallwood and T. J. Miceli, *Maritime Piracy and Its Control: An Economic Analysis,* New York, Palgrave Macmillan, 2015, pp. 5–6.

[35] See R. Wright, "Piracy set to escalate shipping costs", Financial Times, 20 November 2008; and C. M. Douse, "Combating risk on the high sea: an analysis of the effects of modern piratical acts on the marine insurance industry", *Tulane Maritime Law Journal*, vol. 35 (2010), pp. 267–292, at pp. 278–281.

20. The human and economic repercussions of piracy and armed robbery at sea are far from negligible. In 2010, 26 per cent of piracy victims were taken hostage – representing 1,181 out of a total of 4,185 victims – and 59 per cent of hostages faced high levels of violence.[36] The economic costs of acts of piracy committed in Somalia alone are estimated at between US$ 1 billion and US$ 16 billion; they include additional fuel costs as a result of rerouting, an increase in insurance cost of US$ 20,000 per trip, reduced availability of tankers and increased charter rates.[37] Added to that are the large ransoms paid by shipowners to pirates, ranging from US$ 500,000 to US$ 5.5 million. For example, the acts of piracy committed in the Gulf of Aden alone have resulted in ransom payments totalling US$ 160 million.[38] Furthermore, it has been estimated that 10 hijackings of ships decreased export between Asia and Europe by 11 per cent, resulting in a loss of US$ 28 billion.[39] Fishing vessels are frequently attacked by pirates, who generally seek to steal valuable catches and equipment, costing thousands of dollars per vessel and millions of dollars for each affected region.[40]Lastly, the annual estimated cost of the security measures implemented by the navies of the countries of the European Union and North Atlantic Treaty Organization (NATO) is US$ 1.15 billion, while the anti-piracy measures taken by private actors cost US$ 4.7 billion per year.[41] The preventive and repressive measures taken by States at the national, regional and multilateral levels are such a strong deterrent that pirates have developed the capacity to adapt their modus operandi in line with the strategies aimed at capturing and punishing them.

## D. Modus operandi of crimes of piracy and armed robbery at sea

21. Captain Henry Keppel, the great nineteenth-century pirate hunter in the East, summed up the modus operandi of acts of piracy and armed robbery at sea two centuries ago when he said: “so have pirates sprung up wherever there is a nest of islands offering creeks and shallows, headlands, rocks, and reefs – facilities, in short, for lurking, for surprise, for attack, and for escape,”[42] always seeking hiding places to evade prosecution and punishment. In other words, the seasoned pirate is familiar with the geography of the oceans and seas, knows how to use nautical charts and doubtless understands how to take advantage of the shortcomings of international maritime law to operate and to prosper from the spoils obtained from the seas and oceans. Pirates generally operate at night, attacking large ships that move slowly and are difficult to manoeuvre, particularly when they are sailing in insular areas, archipelagos, enclosed or semi-enclosed seas, or straits. If they attack on the high seas, it is because the crime scene is vast enough for them to operate in complete tranquillity and impunity, far from the prying eyes of ships, and to escape any pursuit. Speed and quickness of movement are among the qualities of seasoned pirates. Time, preferably at night, is their main ally.

22. Given the severity of the acts of maritime piracy being committed, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted a

[36] T. C. Skaanild, “Piracy: armed robbery, kidnapping, torture and murder at sea”, in M. Q. Mejia, C. Kojima and M. Sawyer, eds., *Piracy at Sea*, New York, Springer, 2013, pp. 23–30, at p. 24; Hallwood and Miceli, *Maritime Piracy and Its Control* (see footnote 34 above), p. 4; and Whitman and Suarez, “Dalhousie Marine Piracy Project” (see footnote 31 above), p. 70.

[37] Hallwood and Miceli, *Maritime Piracy and Its Control* (see footnote 34 above), p. 5.

[38] Ibid., p. 5 and 6; see also Whitman and Suarez, “Dalhousie Marine Piracy Project” (see footnote 31 above), p. 57.

[39] Hallwood and Miceli, *Maritime Piracy and Its Control* (see footnote 34 above), p. 58.

[40] Whitman and Suarez, “Dalhousie Marine Piracy Project” (see footnote 31 above), pp. 59–61.

[41] Hallwood and Miceli, *Maritime Piracy and Its Control* (see footnote 34 above), p. 6.

[42] P. Gosse, *History of Piracy*, Paris, Payot, 1978, p. 13.

series of resolutions,[43] concerning in particular the acts of piracy committed off the coast of Somalia and in the Gulf of Guinea. Other regions such as the Gulf of Aden, the Straits of Malacca and Singapore, and the Caribbean were also not immune from acts of maritime piracy and armed robbery at sea. In its resolutions adopted from 2008 onwards, for example, the Security Council authorized States cooperating with the Government of Somalia to legitimately use all necessary means to prevent and repress acts of piracy and armed robbery off the coast of Somalia. Those resolutions allowed States to intervene in Somali territorial waters to pursue, intercept, seize and arrest pirates[44] in order to prosecute and punish them. Piracy off the coast of Somalia has highlighted the opportunism of the military interventions authorized by the Security Council, in that "international efforts are only made when the situation reaches a dramatic level because it is being reported by the print and broadcast media".[45]

23. From 2008 until March 2022, almost all the Security Council resolutions on the issue were systematically renewed each year. Since March 2022, the Security Council has not renewed the authorization granted to foreign ships cooperating with the Government of Somalia to fight piracy since, as at that date, no pirate attacks had been reported for four years.[46] However, the expiry of the Security Council authorizations does not mean the total and definitive withdrawal of the international counter-piracy forces, since "these ships and aircraft may continue to fight piracy in international waters, but without entering the air space or national waters of Somalia".[47] In 2019 and 2020[48] the Security Council renewed the authorizations granted to States and regional organizations cooperating with Somali authorities in the fight against piracy and armed robbery at sea off the coast of Somalia. The Security Council considered it appropriate to adopt a technical rollover resolution in December 2021, renewing the authorizations for three months in order to allow a transition towards a bilateral maritime cooperation framework that would help Somalia preserve the gains made over the last 15 years.[49]

24. On 3 November 2021, the Secretary-General of the United Nations, in implementation of Security Council resolution 2554 (2020), presented a report on the situation with respect to piracy and armed robbery at sea off the coast of Somalia. In the report, he underscored the continued absence of piracy attacks, demonstrating the effectiveness of the measures applied by the Federal Government of Somalia, the shipping industry and the international community, including through the Security Council and the naval forces[50] of the international coalition. As well as the Security

[43] Resolutions 1814 (2008) of 15 May 2008, 1816 (2008) of 2 June 2008, 1838 (2008) of 7 October 2008, 1844 (2008) of 20 November 2008, 1846 (2008) of 2 December 2008, 1851 (2008) of 16 December 2008, 1897 (2009) of 30 November 2009, 1918 (2010) of 27 April 2010, 1950 (2010) of 23 November 2010, 1976 (2011) of 11 April 2011, 2015 (2011) of 24 October 2011, 2018 (2011) of 31 October 2011, 2020 (2011) of 22 November 2011, 2039 (2012) of 29 February 2012, 2077 (2012) of 21 November 2012, 2125 (2013) of 18 November 2013, 2184 (2014) of 12 November 2014, 2246 (2015) of 10 November 2015, 2316 (2016) of 9 November 2016, 2383 (2017) of 7 November 2017, 2442 (2018) of 6 November 2018, 2500 (2019) of 4 December 2019, 2554 (2020) of 4 December 2020, and 2608 (2021) of 3 December 2021.

[44] T. Walker and D. Reva, "Is Somali piracy finally under control?", Institute for Security Studies, 21 April 2022.

[45] A.-A. Flagel, "Le renouveau de la piraterie internationale", doctoral thesis, University of New Caledonia, 2013, p. 30.

[46] Le Figaro, "Fin de l'autorisation de l'ONU de lutter contre la piraterie dans les eaux somaliennes", 11 March 2022.

[47] Ibid.

[48] Resolutions 2500 (2019) of 4 December 2019 and 2554 (2020) of 4 December 2020.

[49] United Nations, "Unanimously Adopting Resolution 2608 (2021), Security Council Renews Authorization for International Naval Forces Fighting Piracy off Coast of Somalia", 3 December 2021.

[50] S/2021/920, para. 65.

Council resolutions, which will be analysed in depth in the second report of the Special Rapporteur, there are numerous treaties and international instruments at the regional, subregional and multilateral levels, including the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia,[51] which was concluded in 2004 and to which 16 Asian countries were originally parties.[52] Five European States, namely Denmark, Germany, Netherlands (Kingdom of the), Norway and the United Kingdom of Great Britain and Northern Ireland, and two non-European States, namely Australia and the United States of America, later acceded to the Agreement. Many of them have adopted laws[53] to address maritime piracy, thereby giving rise to abundant jurisprudence and strengthening the means of preventing and suppressing acts of piracy in certain regions.[54]Other subregional counter-piracy cooperation instruments were also subsequently adopted, such as the Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden[55] (Djibouti Code of Conduct), which was inspired to a large extent by the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia and adopted in 2009 under the auspices of the International Maritime Organization, originally with nine States parties, namely Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen. A second Code of Conduct, the Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa[56] (Yaoundé Code of Conduct), applicable to the countries of the Economic Community of West African States and the Economic Community of Central African States, was adopted in Cameroon in 2013. These regional and subregional cooperation agreements will be further examined in the Special Rapporteur's second report.

25. Maritime piracy is now a major concern for the international community as a whole, as acts of piracy are committed in all maritime zones and affect, to varying degrees, the interests of all States, whether coastal or landlocked, as well as those of private shipping companies. The very significant global reduction in incidents of maritime piracy and armed robbery at sea calls for vigilance, given that piracy has proven to be a cyclical crisis, liable to re-emerge at any moment under the right conditions for its commission. It is therefore far from being a relic of the past, contrary to what Philippe Gosse so eloquently suggested in the following terms: "the modern age seems to have done away with piracy ... It is likely that the disappearance is permanent. It is hard to conceive that, even if our civilization is overturned and

[51] United Nations, *Treaty Series*, vol. 2398, No. 43302, p. 199. See also Information Sharing Centre of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, *Annual report 2022* (see footnote 21 above) and *Regional Guide 2 to Counter Piracy and Armed Robbery against Ships in Asia*, March 2022.

[52] See B. Martin-Castex and G. Loonis-Quélen, "L'Organisation maritime internationale et la piraterie ou le vol à main armée en mer: le cas de la Somalie", *Annuaire français de droit international*, vol. 54 (2008), pp. 77–117, at p. 86. The following States are the original parties to the Agreement, which was adopted at the initiative of Japan: Bangladesh, Brunei Darussalam; Cambodia, China, India, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Republic of Korea, Singapore, Sri Lanka, Thailand and Viet Nam.

[53] See Division for Ocean Affairs and the Law of the Sea, "Piracy Under International Law", 24 May 2012.

[54] *International Piracy on the High Seas: Hearing before the Subcommittee on Coast Guard and Maritime Transportation of the Committee on Transportation and Infrastructure House of Representatives – One Hundred Eleventh Congress, First Session, 4 February 2009*, Washington, U.S. Government Printing Office, 2009, statement by Giles Noakes. Available at: https://www.govinfo.gov/content/pkg/CHRG-111hhrg47259/html/CHRG-111hhrg47259.htm.

[55] Done at Djibouti on 29 January 2009. See International Maritime Organization Council, document C 102/14, annex, attachment 1, annex to resolution 1.

[56] Done at Yaoundé on 25 June 2013. Available at: https://au.int/sites/default/files/newsevents/workingdocuments/27463-wd-code_de_conduite.pdf.

lawlessness again becomes law, the pirate will emerge again".[57] This prediction turned out to be wrong, given that piracy and maritime crime continue to pose challenges, especially in the Gulf of Guinea where, according to one study, over 40 per cent of all acts of piracy reported globally in the first half of 2018 were committed.[58]

26. An unprecedented upsurge in maritime piracy is currently taking place, as evidenced by the acts committed in the Indian Ocean off the coast of Somalia and in the Gulf of Guinea, in the Straits of Malacca and Singapore, the Arabian Peninsula, the Caribbean Sea, Celebes Sea, Java Sea, Yellow Sea and South China Sea, and the Bay of Bengal,[59] thereby confirming the idea that "space combines with the vicissitudes of navigation to become the pirate's greatest ally".[60] This explains why the aforementioned regions are conducive to the commission of acts of maritime piracy.

## E. Law applicable to piracy and armed robbery at sea

27. "Ancient pirates, medieval corsairs and privateers, modern sea dogs, filibusters and buccaneers, and doubtless many others still",[61] such are the images of the pirate across time and space. Looking back over time, the law applicable to piracy before the current era was customary international law. Piracy as a crime against the law of nations was for centuries subject to the laws and customs of the sea, including the customary rule of universal jurisdiction, which recognizes that all nations have jurisdiction to pursue, arrest, try and punish pirates found on the high seas. Depending on the period, such a criminal was legally characterized as being an "enemy of humanity", "enemy of all", "common enemy to all" (*communis hostis omnium*), "enemy of humankind" (*hostis humani generis*) or "criminal against humanity", in order to justify the exercise of universal jurisdiction by all States with regard to the repression of piracy. The philosophical basis for these characterizations is expressed thus by Daniel Heller-Roazen: "On account of all they share, citizens owe much to each other",[62] which presupposes that they will mount an individual and collective defence in the event that collective interests are threatened. Since the sea is shared property or common property (*res communis*), all are responsible for protecting it, particularly because pirates jeopardize the security of all by attacking the free trade by sea that brings goods and wealth to all nations, including those that are landlocked.

28. Freedom of the high seas is one of the customary rules that applied to the oceans; the high seas have always been the exclusive place of commission of maritime piracy. Piracy on the high seas emerged in the second half of the seventeenth century.[63] It could even be said that, between the high seas and piracy, there is a kind of symbiotic relationship that all efforts at codification have not been able to break. Indeed, despite the development of the law of the sea and the division of the oceans and seas into various maritime zones, piracy seems destined to continue to be closely associated with the high seas and the high seas alone. In these efforts aimed at the progressive development of the law of the sea, all acts of piracy committed in territorial waters, inland waters and archipelagic waters are characterized as armed robbery at sea rather

[57] Gosse, *History of Piracy* (see footnote 42 above), p. 358.
[58] Denmark, Ministry of Foreign Affairs and others, "Priority paper for the Danish efforts to combat piracy and other types of maritime crime 2019–2022", p. 6.
[59] Hallwood and Miceli, *Maritime Piracy and Its Control* (see footnote 34 above), pp. 3–4; and International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Report for the period 1 January–31 December 2018*, London, January 2019.
[60] P. Jacquin, *Sous le pavillon noir: pirates et flibustiers* (see footnote 2 above), p. 50.
[61] Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (see footnote 7 above), p. 9.
[62] Ibid., p. 14.
[63] P. Jacquin, *Sous le pavillon noir: pirates et flibustiers* (see footnote 2 above), p. 81.

than piracy. This recharacterization of the acts reflects a need to add to or clarify the relevant positive law.

29. Furthermore, the customs of the sea have long protected this international space from any private appropriation by States. No sovereign or territorial claims may be made in respect thereof since it is accepted that "claims to possess the open seas, whether from titles of 'discovery', papal bulls, the law of war and conquest, or occupation and prescription, are all ... equally invalid".[64] These same customs of the sea authorized warships to pursue pirates. Thus, the Mediterranean became the Roman *mare nostrum* after General Pompey and his army managed to deliver Rome from piracy in 67 B.C.[65] Warships confronted the pirates in Venice in the fifteenth century.[66] In 1400, it was "a joint operation of the Bremen and Hamburg fleets [that] eliminated piracy from the island of Gotland" in the Baltic Sea.[67] Between 1608 and 1614, the English Royal Navy managed to drive pirates into other waters,[68] while the Spanish systematically armed their ships against pirates.[69] As Philippe Jacquin recalls, "in the eighteenth century, the significant expansion of navies, in particular the Royal Navy, brought a rapid end to piracy".[70] In Asia, in the China Sea, around 1550, soldiers took up positions on warships and garrisons were fortified,[71] in order to fight against pirates. Later, "the military campaign of Governor Nayancheng ... escorted by heavy junks armed with canons … sank the pirate ships".[72]

30. The modern international law applicable to the prevention and repression of piracy consists of both customary international law and conventional law, in particular the 1958 Convention on the High Seas[73] and the 1982 United Nations Convention on the Law of the Sea.[74] However, it should be recalled that, before the adoption of those two major conventions, Harvard University had already undertaken work on piracy, in 1932. It was on the basis of that work that the Commission prepared its draft articles on piracy, and those draft articles were largely retained in the Convention on the High Seas, in articles 14 to 23 thereof. Article 15 of the Convention on the High Seas defines piracy as follows:

> Piracy consists of any of the following acts:
>
> (1) Any illegal acts of violence, 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:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (2) 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;

[64] Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (see footnote 7 above), p. 121.
[65] P. Jacquin, *Sous le pavillon noir: pirates et flibustiers* (see footnote 2 above), pp. 22–23.
[66] Ibid., p. 29.
[67] Ibid., p. 35.
[68] Ibid., p. 54.
[69] Ibid., p. 73.
[70] Ibid., p. 93.
[71] Ibid., p. 100.
[72] Ibid., p. 102.
[73] Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.
[74] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 3.

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

31. Those same provisions of the Convention on the High Seas were also retained to a very large extent in the United Nations Convention on the Law of the Sea. It is therefore those codified provisions that are applicable and will be the point of departure for the topic. Aspects of the topic that are not directly governed by them will be examined on the basis of other instruments and State practice, with a view to proposing, if appropriate, either the codification of emerging customary rules, or an approach aimed at the progressive development of international law on piracy in a manner that might be useful for States, or the consideration of both codification and progressive development in a single legal instrument.

32. The legal regime for piracy is governed by certain provisions of the United Nations Convention on the Law of the Sea, in particular, articles 100 to 111, i.e., 12 articles. In addition, other cross-referenced articles that, although specific in focus, refer to the Part of the Convention relating to the legal regime of the high seas are also relevant. For example, in article 58 (Rights and duties of other States in the exclusive economic zone), paragraph 2 refers to the provisions on the high seas in the following terms: "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part". To the extent that measures taken by States to prevent and repress piracy are not incompatible with the legal regime of the exclusive economic zone, those measures should apply both on the high seas and in the exclusive economic zone. In other words, piracy occurs principally on the high seas and by extension in the exclusive economic zone of 200 nautical miles from the coastline, where the coastal State exercises its sovereign rights on the basis of the non-incompatibility clause contained in article 58, paragraph 2, of the United Nations Convention on the Law of the Sea.

33. Insofar as piracy, from a legal standpoint, can be committed only on the high seas, where no jurisdiction or authority may be exercised other than that of the flag State, international law has not only established the duty to cooperate in the repression of piracy[75] to the fullest possible extent but has also contemplated the application of universal jurisdiction, providing that:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft... The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.[76]

It is evident that article 105 of the United Nations Convention on the Law of the Sea, while it provides for universal jurisdiction, is in reality merely an optional clause that does not impose on States any obligation to prosecute or exercise jurisdiction over acts of piracy committed on the high seas or in a place outside the jurisdiction of any State. If hot pursuit must be undertaken against a pirate ship, the act of pursuit is governed by procedures clearly established by the Convention.

34. Indeed, the hot pursuit of a ship may be undertaken only by a warship, a military ship or a ship on government service. In general, such a ship must be a government ship or a ship authorized by a State to perform certain missions at sea. The United Nations Convention on the Law of the Sea specifies that only "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on

[75] Ibid., art. 100.
[76] Ibid., art. 105.

government service and authorized to that effect"[77] may exercise the right of visit, undertake hot pursuit or seize a ship on account of piracy.

35. A warship is not justified in boarding a foreign ship, in exercise of the "right of visit",[78] unless there is reasonable ground for suspecting that the foreign ship is engaged in piracy, among other crimes.[79] The provision stipulating that only warships may exercise the right of visit has its basis in the immunity from legal process that such ships enjoy under international law. The right of visit can be seen as a right to approach and inspect a ship suspected of having violated the laws and regulations of the coastal State and the rules of general or conventional international law. In article 110, paragraph 1 (a), of the United Nations Convention on the Law of the Sea, it is specified that:

> Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
>
> (a) the ship is engaged in piracy;
>
> […]

The "right of hot pursuit",[80] meanwhile, may be exercised in cases where the competent authorities of the coastal State have good reason to believe that a foreign ship has violated the laws and regulations of that State. However, in order to exercise that right, the pursuing State must follow the procedures established to that effect.[81] The Convention provides that "the right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."[82] That said, the immunity enjoyed by warships and government ships more generally may not be invoked if these ships operate outside of, or in breach of, the missions of sovereignty or government service to which they are assigned. This is, for example, the case with a warship, government ship or government aircraft whose crew has mutinied and committed the acts referred to in article 101 of the Convention.[83] Depending on the domestic law of States, such a ship may retain or lose the nationality or flag of the State from which it was derived.[84] With regard to the seizure of the pirate ship or aircraft, it is a matter for each State[85] whether to undertake hot pursuit on the basis of universal jurisdiction, or not to do so. States have a right and not an obligation to pursue the pirate ship. The arrest and seizure of a ship on suspicion of piracy may be effected only if the pursuing State has reasonable grounds for suspecting that the ship is engaged in piracy; otherwise the State making the seizure shall be liable for seizure without adequate grounds having caused loss or damage to the ship seized.[86]

36. While many provisions regarding piracy have led to questions and controversies, those relating to its definition have been subject to the most intensive debate and have given rise to contradictory interpretations regarding the legislative and judicial practice of States.

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[77] Ibid., art. 107.
[78] Ibid., art. 110.
[79] Ibid., art. 110 (a).
[80] Ibid., art. 111.
[81] Ibid.
[82] Ibid., para. 5.
[83] Ibid., art. 102.
[84] Ibid., art. 104.
[85] Ibid., art. 105.
[86] Ibid., art. 106.

37. The United Nations Convention on the Law of the Sea defined the crime of maritime piracy by codifying the applicable customary rules. According to article 101 of the Convention,

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

38. This definition shows that, under applicable law, the commission of the crime of piracy is territorially or geographically limited to the high seas, which are governed by the principle of freedom of navigation. On the high seas, the only authority with jurisdiction over a ship is the flag State, that is, the State whose flag the ship flies, or, in other words, the State from which the ship derived its nationality. However, the principle of freedom of the high seas entails certain exceptions to the law of the flag. For example, in the case of piracy committed on the high seas, the law of the flag no longer applies, since it is recognized that all States have the power to prosecute and punish acts of piracy on the basis of universal jurisdiction. In legal terms, criminal acts of piracy can be committed only on the high seas or in a place outside the jurisdiction of any State. However, it is clear that piracy can no longer be confined to defined geographical limits of the sea, since pirates are moving from the high seas to the coasts and are operating in the internal waters and in the territorial seas of coastal States, committing criminal acts that are in all respects similar to acts of maritime piracy as defined in article 101 of the United Nations Convention on the Law of the Sea. It is therefore essential to clarify the definition of maritime piracy and draw a necessary distinction between that concept and the crime of armed robbery at sea. This clarification exercise will be based on the practice of States, which will be examined from the legislative and judicial perspectives, according to a regional approach.

39. Under international law, and more specifically the provisions of the United Nations Convention on the Law of the Sea, maritime piracy is defined as any acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship and directed, on the high seas, against another ship, including persons or property on board such ship.[87] Of the world's 194 States, 93 of them (in other words, 40 per cent) do not provide a definition of maritime piracy, while 101 States (52 per cent) do provide such a definition.

40. The applicable law is both general or conventional international law and the domestic law of States that have adopted legislation on the prevention and repression of piracy and armed robbery at sea. Although international law sets forth the principles for the prosecution and repression of acts of piracy, it has left it to States to exercise their jurisdiction in terms of criminalization and repression. For the moment, it is the domestic law of States that is mostly applied with regard to piracy

[87] Ibid., art. 101.

since there are currently no international judicial mechanisms to rule on crimes of maritime piracy and armed robbery at sea. While piracy has been defined under international law, neither the nature nor the content of the penalties applicable to pirates has been specified thereunder. It is therefore national judges, in all regions affected by these forms of crime, who have had the task of applying either national statutes, where they exist, or article 101 of the United Nations Convention on the Law of the Sea, which defines the concept of piracy, and article 105, which sets forth the responsibility of States with regard to the prosecution and repression of acts of piracy.

41. In general, national judges to whom cases of piracy and armed robbery at sea are submitted for determination apply the main principles of general criminal law, observing both the rules of criminal procedure and the provisions of the penal code, and ruling on, inter alia, arguments of lack of jurisdiction and of inadmissibility, application or non-application of the principle of universal jurisdiction, adduction and admissibility of evidence, burden of proof, existence or non-existence of the elements of piracy, and recognition of piracy as a crime against the law of nations, having a *jus cogens* character. During court proceedings, consideration has been given to matters concerning investigations, adduction of evidence, testimonies, admissibility of confessions, pirates' right of access to justice and a fair trial, the punishment of the guilty intent (*mens rea*), the imprescriptibility of the crime of piracy, the commutability of sentences, multiple offences relating to the principal offence of piracy, acts of preparation, direct or indirect participation, and complicity. Attempt is considered to be a punishable act. In some cases, judges have taken aggravating or extenuating circumstances into account. Lastly, various proceedings have given rise to issues relating, inter alia, to extradition, the transfer of proceedings to third-party States, the application of the principle of *aut dedere aut judicare,* and mutual legal assistance.

42. In addition to questions of criminal procedure under domestic law, other questions of a substantive nature have been raised, both by judges and in academic writings. In particular, judges have reaffirmed the principle whereby the right of hot pursuit against pirates may be exercised only by the naval forces of States. More controversial, however, is the question of the legality under international law of the presence of private security personnel on board merchant ships for the purpose of escorting said ships to their destination port. Furthermore, when faced with a scenario in which the two crimes of piracy and armed robbery at sea are both committed, on the high seas or in territorial waters, it is hard to determine which crime will prevail, given that State practice offers examples of laws that criminalize both crimes.

43. Judges also take into account aggravating or extenuating circumstances. In the case of extenuating circumstances, they allow themselves the necessary latitude to adjust the prescribed penalty, taking into account the humanitarian, intellectual and cultural circumstances of the individuals accused of the crime of piracy. Accordingly, judges have been able to contemplate in certain cases the commutation of the death penalty to a penalty of imprisonment for life, no doubt in keeping with the principle that "there is a limit to revenge and to punishment".[88] That principle is the exact opposite of the approach to the punishment of pirates in antiquity, as expressed by Cicero when he said about pirates that "the laws of war do not apply to them"[89] since they can be legally characterized neither as war criminals nor as enemies under ordinary law, both of whom may benefit from certain rights, unlike pirates, who deserve only the worst punishments, including the death penalty, without respect for any due process. In ancient and medieval times, the fate reserved for pirates was hanging or beheading. Modern pirates, on the other hand, despite the severity of the

[88] Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (see footnote 7 above), p. 14.
[89] Ibid., p. 107.

crime committed, remain subjects of law who enjoy fundamental human rights, in particular the principles of the right to a defence and to a fair trial. Respect for these principles has been exemplified in several trials of pirates, as will be shown in the analysis of judicial practice.

## F. Shortcomings of the applicable international legal framework

44. The first shortcoming in the law applicable to piracy is the partitioning of the marine environment into several maritime spaces, which have distinct legal regimes governed by equally distinct principles, namely those of sovereignty, sovereign rights, exclusive sovereign rights, jurisdiction and freedom, depending on whether one is in internal waters, in the 12-nautical-mile territorial sea, in the contiguous zone extending 24 nautical miles from the baselines, in the 200-nautical-mile exclusive economic zone, on the continental shelf which extends to at least 200 miles but does not exceed 350 nautical miles from the baselines, or on the high seas. This legal partitioning does not always facilitate the repression of acts of piracy in circumstances where a pursuing ship cannot enter the territorial sea or internal waters of a coastal State without having first obtained authorization from that State. It may take some time to obtain such authorization, depending on States' administrative and criminal procedures, giving the pirates time to escape and avoid hot pursuit once they are in territorial waters. In order to remove that restriction in the context of the regulation of piracy in Somalia, the Security Council, acting under Chapter VII of the Charter of the United Nations, had to adopt several resolutions authorizing foreign naval forces to enter into the territorial waters of Somalia for the purpose of criminalizing acts of piracy and armed robbery at sea.[90]

45. This partitioning of the marine environment somewhat complicates any attempt to define the crime of maritime piracy based on the place of commission of the crime. Defining piracy based on a geographical criterion by linking it exclusively to the high seas is restrictive, particularly given the cross-border nature of piracy and the fact that it is committed in a homogenous and integrated physical environment. Once the elements of piracy are found to be present, the crime scene should have no consequences for the legal characterization of the acts.[91] The same illegal acts should lead to the same characterization of the crime, regardless of whether the perpetrators passed from one maritime zone to another. The fact is that restricting the characterization of acts of piracy to those that take place on the high seas is now out of step with modern forms of piracy, which defy borders and boundaries at sea. Modern piracy no longer takes place exclusively on the high seas but is increasingly seen along coastlines, being committed in ports and their approaches, given the dynamic and mobile nature of piracy across large maritime expanses.

46. Based on the aforementioned territorial subdivision of the oceans and seas, an act characterized as armed robbery at sea can, from a legal standpoint, only be committed in maritime spaces under State sovereignty. However, in the statutes of certain countries, armed robbery at sea is defined as a crime committed on the high seas. Conversely, the statutes of other countries have limited the crime of piracy to maritime spaces under national jurisdiction. Some statutes consider the crimes of armed robbery at sea and piracy to be two separate forms of crime committed on the high seas and in waters under national jurisdiction, while the statutes of other countries simplify the issue by considering that piracy is in itself armed robbery at

[90] Security Council resolution 1846 (2008), para. 10.

[91] During the Commission's consideration of the topic "Régime of the high seas", Georges Scelle stated that he would be unable to support a provision defining piracy by reference to jurisdiction and not the nature of the act. *Yearbook of the International Law Commission 1955*, vol. I, 290th meeting, p. 43, para. 70.

sea. In view of the above, it is very tempting to assert that State practice tends to cast doubt on the classic definition linking the crime of piracy to the high seas. Indeed, piracy committed in the territorial waters or the internal waters of a State, even if it is characterized as armed robbery at sea, is still piracy once it has been defined as such by domestic law. This piracy under domestic law would not however give rise to the application of universal jurisdiction, unlike piracy under the law of nations, which does involve the exercise of universal jurisdiction by all States. Lastly, it is important not to lose sight of the continental or land-based dimension of piracy, in that pirate attacks are generally planned on land before they are carried out at sea, as studies have shown.[92]

47. The second shortcoming concerns the motive for the crime, which is described as being for "private ends" in both the United Nations Convention on the Law of the Sea[93] and the Convention on the High Seas.[94] In both cases, the motive is to seek financial gain by making ransom demands or stealing goods on board a ship; in other words, it is the lure of booty. The formulations can differ from one statute to another. Various terms, such as "material or non-material gain", "selfish ends", "personal ends" or "material benefits", can be used to describe the motive of "private ends". The variety of terms reflects the difficulty of interpreting that concept in a situation where a government ship is used to commit acts of piracy for private ends. The motive for the crime of piracy and the status of the ship or aircraft (private or public) have often been left rather unclear in modern definitions of piracy that take account of developments in the law of the sea and the technical and tactical capabilities of modern-day pirates.

48. A distinction is therefore made between the private ends that characterize acts of piracy and the political or ideological ends that generally characterize terrorist acts aimed at destabilizing Governments or committed for religious or ethnic reasons.[95] This was relevant, for example, when acts of maritime piracy perpetrated in the Sulu archipelago in the Philippines became a source of revenue for groups affiliated with Islamic State.[96] While in theory the distinction is tenable, in practice it may be problematic given that it is not always easy to distinguish between the two motives: the political motive, which might provide the justification for a terrorist act at sea, could be coupled with the private motive, in other words the pursuit of spoils enabling the group's continued existence. Furthermore, "a political movement *may* profit from piracy to enrich its party and give it greater power in its struggle, while a pirate may find that a political motive provides justification for earning a living in a somewhat unorthodox way".[97] When these two motives coexist in relation to the same criminal act, the question then is how to separate the two and whether to characterize the act as maritime piracy or maritime terrorism. These are in reality two separate forms of maritime crime that can feed into one another, since piracy remains a form of terror that can be driven exclusively by private ends, without the existence of any political or ideological demands. It would not therefore be too extreme to maintain that marine terrorism could be considered as "a form of piracy".[98] Finally it is necessary to consider the usefulness of including the motive of the crime as one of the elements of maritime piracy. An assessment of State practice has shown the relevance of this question. It has in fact become clear that the national legislation of many countries

[92] *National Geographic*, special edition No. 49: *Pirates*, June-July 2021, p. 23.
[93] United Nations Convention on the Law of the Sea, art. 101.
[94] Convention on the High Seas, art. 15.
[95] A. Rajput, "Maritime security and threat of a terrorist attack", *Pace International Law Review*, vol. 34, No. 2, (2022), pp. 1–62, at p. 38.
[96] *Le Monde*, special edition, *Géopolitique des îles en 40 cartes*, July-August 2019, p. 22.
[97] Flagel, "Le renouveau de la piraterie internationale" (see footnote 45 above), p. 110 (emphasis added).
[98] Rajput, "Maritime security and threat of a terrorist attack" (see footnote 95 above), p. 39.

does not define piracy with reference to the term “private ends” and that some States even equate terrorism with maritime piracy and vice versa.

49. The third shortcoming is the element of the definition of piracy under article 101 of the United Nations Convention on the Law of the Sea that requires the presence of two ships. In that regard, for piracy to exist, there must be an attack by one ship against another ship. However, the Convention does not provide a precise and objective definition of what is meant by a ship, merely describing its status. In fact, the very concept of a ship is somewhat imprecise or ambiguous, since, under maritime law, all watercraft that are capable of moving at sea tend to be considered as ships. According to the *Dictionnaire de droit international public*, “ship” is an “essentially technical term designating any floating structure designed to sail on the sea and, when fitted out and crewed as appropriate, to perform the service to which it is assigned”.[99] When all is said and done, this definition could include barges and floating structures that could be used to attack other ships or aircraft. Furthermore, any moving watercraft other than a ship could be used to commit an act of piracy against another ship, even though, in legal terms, only a ship can illegally attack another ship. The definition of a ship is therefore still variable and remains difficult to determine based on the relevant international conventions, national legislation and domestic courts.[100] The United Nations Convention on the Law of the Sea does not define the term “ship”. Instead, it simply describes the status of ships[101] and provides that every State shall fix the conditions for the grant of their nationality, for the right to fly their flag and for the registration of ships.[102] Under the 1973 International Convention for the Prevention of Pollution from Ships, the term “ship” means “a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.”[103] The national statutes of some countries mention “seagoing ships” or “river-going ships”. Somali piracy has shown that small motorized boats that do not traditionally have the status of ships can be used to attack more imposing ships. One could well ask why it is not called piracy when such craft attack ships or any other watercraft, more specifically floating or fixed offshore oil and gas platforms on the continental shelf or in the exclusive economic zone. In fact, in the definitions of piracy included in the legislation of some countries, attacks against such maritime structures are considered to be acts of piracy. Moreover, the two-ship requirement is not always appropriate since it is possible for an act of piracy to take place when the crew of a ship has mutinied and violently taken control of it, committing the illegal acts defined in article 101 of the United Nations Convention on the Law of the Sea. In such a scenario, it is not two ships that are involved, but a single ship that has been attacked by mutineers or passengers on board.

50. The fourth shortcoming is to be found in the very notion of a private ship, to which article 102 of the United Nations Convention on the Law of the Sea refers as follows: “The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.” The conclusion to be drawn from this provision should not concern just the change of status from a government ship to a private ship, without any other inferences being made therefrom. In fact, taking this line of reasoning to its logical conclusion, a

[99] J. Salmon, ed., *Dictionnaire de droit international public*, Brussels, Bruylant, 2001, p. 729.

[100] Ibid.

[101] United Nations Convention on the Law of the Sea, art. 92.

[102] Ibid., art. 91.

[103] International Convention for the Prevention of Pollution from Ships, 1973 (London, 2 November 1973), as modified by the 1978 Protocol (London, 17 February 1978), United Nations, *Treaty Series*, vol. 1341, No. 22484, p. 3, art. 2, para. 4.

government ship that loses its status as such because it has committed acts of piracy, or owing to acts of mutiny, becomes not only a private ship but also a pirate ship, because it has committed acts comparable to those defined in article 101. It is therefore hard to understand why the drafters of article 102 did not want to take that additional step. A government ship that has become a private ship owing to mutiny loses its status as a government ship because mutiny is comparable to the acts of piracy defined in article 101. The ship indeed becomes a private ship, but the Convention does not indicate the fate of a government ship turned private ship. The logical conclusion is that the government ship has become a pirate ship, because it has committed acts of piracy. It can therefore be affirmed that "the crew by becoming pirates render themselves 'the enemies of humankind' and the Courts of the captor State are competent to try them",[104] with the consequence for the ship that it loses its flag or nationality, as Alexander Müller observed in 1929.

51. Alexander Müller recalls in this regard that "the practice and science of the law of nations all agree in maintaining that the pirate ship is *ipso facto* denationalized."[105] Under international law, such a ship cannot therefore claim the immunity from legal process that a government ship normally enjoys provided that it remains within the scope of its sovereign functions. Furthermore, the mere fact that a ship is a private ship does not mean that it automatically becomes a pirate ship, since the term "private ship" denotes "any ship belonging to private persons and generally encompasses merchant ships, fishing vessels, drilling ships and pleasure craft."[106]

52. Given that piracy is thus defined as an illegal act committed for private ends by a private ship or aircraft against another ship or aircraft, it appears that government ships, political motives, and other watercraft that might be targeted by pirate attacks fall outside the ambit of the crime. International law does not explain why only government ships, namely warships, military ships or ships on government service, are entitled to take enforcement measures at sea, while private ships appear not to have a legal right to self-defence in the event of an attack against them or against other ships that fall victim to acts of piracy. However, if piracy is understood to involve reprisals, it should be easy to accept that the response of traders to the threat of piracy was in the first place to arm themselves in self-defence.[107] On the same issue, Raoul Genet clearly stated that "the pirate ... is beyond the pale of the *ius gentium*, is an outcast from mankind, an international criminal who may be pursued, destroyed or captured by any vessel, public or private."[108] It therefore seems obvious that, based on the circumstances at sea, enforcement should not be the monopoly of States, but that, in situations of piracy, any merchant ship should be able to respond immediately in self-defence.

53. The fifth shortcoming is to be found in the soft wording used, with no obligation imposed on States to prosecute and punish pirates. For example, article 105 of the United Nations Convention on the Law of the Sea, which provides that "every State may seize a ... ship" or that "the courts of the State which carried out the seizure may decide upon the penalties to be imposed" seems to reflect soft law. The use of "may" leaves it up to States to choose whether or not to prosecute the perpetrators of, or accomplices to, acts of piracy. We must ask whether the intention of prosecuting and criminalizing piracy on the basis of universal jurisdiction as set forth in article 105 is not thwarted by the weak normative value of the terms and concepts used therein. The question remains whether the provisions of article 105 might tend to weaken those of

[104] Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (see footnote 7 above), p. 130.
[105] Ibid.
[106] Salmon, *Dictionnaire de droit international public* (see footnote 99 above), p. 732.
[107] N. Tracy, *Attack on Maritime Trade*, Toronto, University of Toronto Press, 1991, p. 10.
[108] R. Genet, "The Charge of Piracy in the Spanish Civil War", cited in D. Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (see footnote 7 above), p. 141.

article 100, which make cooperation in the repression of maritime piracy a legal obligation of States.

54. The sixth shortcoming is the tendency to make the absence of national legislation a reason not to prosecute pirates after having arrested them. It is particularly regrettable that States then release these criminals, without any further proceedings. Article 100 of the United Nations Convention on the Law of the Sea seems to offer a solid legal basis for undertaking any physical pursuit of a pirate ship and any legal proceedings on the basis of universal jurisdiction, as established in customary international law and codified by article 105 of the Convention. While article 100 provides that all States shall cooperate to the fullest possible extent in the repression of piracy, it might be inferred that this provision merely consolidates the required legal basis for States to exercise universal jurisdiction in relation to the repression of piracy, which appears to be the only international crime to date for which such jurisdiction is recognized and "accepted in international law".[109] However, the Security Council, addressing piracy off the coast of Somalia, in 2008 gave article 100 a much broader and more binding interpretation in the French version of its resolution, referring to "*une coopération aussi totale que possible dans la répression de la piraterie*".[110] This wording suggests a legal obligation to cooperate with a view to pursuing a ship when there are reasonable grounds to believe that it is a pirate ship. The absence of legislation should not serve as grounds not to pursue and arrest a pirate, since the Security Council reminded States of their obligations by recalling that

> applicable international legal instruments provide for parties to create criminal offences, establish jurisdiction and prosecute or extradite for prosecution persons responsible for or suspected of seizing or exercising control over a ship or fixed platform by force or threat thereof or any other form of intimidation.[111]

In another resolution, the Security Council noted with concern that

> the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates … and in some cases has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution".[112]

55. The Commission, in its work on the codification of the law of the sea, was in line with the spirit of article 100 of the United Nations Convention on the Law of the Sea when it observed that "any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law".[113] Thus the absence of legislation seems to be unconvincing, both in law and in fact, as a reason not to repress piracy, bearing in mind the gravity of the crime for the entire international community, insofar as States have a double legal obligation: to adopt legislation and to cooperate in the prevention and repression of piracy and armed robbery at sea.

[109] S. Yee, "Universal jurisdiction: concept, logic, and reality", *Chinese Journal of International Law*, vol. 10, No. 3 (2011), pp. 503–530, at p. 530.
[110] Security Council resolution 1816 (2008), fifth preambular paragraph.
[111] Security Council resolution 2018 (2011), seventh preambular paragraph.
[112] Security Council resolution 2020 (2011), thirteenth preambular paragraph.
[113] *Yearbook… 1956*, vol. II, document A/3159, p. 282, paragraph 2 of the commentary to article 38.

## G. Reactions by States in the Sixth Committee

56. At the seventy-fourth session of the General Assembly in 2019, Member States largely welcomed the inclusion of the topic in the long-term programme of work of the International Law Commission. First of all, delegations from the African continent, which has suffered the effects of these two forms of crime mainly in its western and eastern regions, expressed their great interest in seeing this topic considered by the Commission. For example, Sierra Leone, on behalf of the 54 countries of the Group of African States, affirmed "the need to strengthen maritime security".[114] Austria supported the inclusion of the topic in the Commission's programme of work, underscoring that it was an issue "that had not yet been addressed by a specific, comprehensive international instrument that was in accordance with modern international criminal law."[115] Brazil took note with interest of the inclusion of the topic in the Commission's long-term programme of work, recalling that the objective was not to alter the provisions of the United Nations Convention on the Law of the Sea.[116] Cameroon said that it supported the inclusion of the topic, and would like to see greater coordination of anti-piracy operations and capacity-building between the affected States, as well as consideration of relevant developments in law and practice.[117] China appreciated the inclusion of the topic in the Commission's long-term programme of work, stressing the abundant State practice that existed and the need to coordinate operations by various States, increase the capacity of relevant countries, take into consideration existing applicable law and national legal systems and seek practical measures relating to the criminalization of relevant offences, extradition and mutual legal assistance.[118] Côte d'Ivoire was pleased that the Commission had decided to consider the topic, given the impact of piracy and armed robbery at sea on national, regional and international peace and security, and indicated that the legal, political, diplomatic, military and strategic dimensions of piracy must be examined in depth. Côte d'Ivoire recalled that the country's new Maritime Code adopted in 2017 was in line with the provisions of the United Nations Convention on the Law of the Sea and the strategy of the Economic Community of West African States concerning the prevention and repression of piracy.[119] Egypt said that it supported the consideration of the topic by the Commission,[120] and only two States, Belarus[121] and Japan, had reservations and an objection, respectively, regarding the appropriateness of the Commission's inclusion of the topic in its long-term programme of work, according to Japan because "many other topics had already been or were being considered by the Commission".[122] For El Salvador, the prevention and repression of piracy and armed robbery at sea was a topic which "reflected the needs of States and on which there was sufficient material for an analysis of State practice and for the progressive development of the law."[123] Estonia welcomed the inclusion of the topic in the long-term programme of work, given that it satisfied the conditions for the selection of new topics in the long-term programme of work.[124] France considered that the topic was "certainly of great interest for the progressive development of international law and its codification... and hoped that the methods of work proposed by the Commission would allow States sufficient time to comment

[114] A/C.6/74/SR.23, para. 40.
[115] Ibid., para. 67.
[116] A/C.6/74/SR.24, para. 95.
[117] A/C.6/74/SR.27, para. 58.
[118] A/C.6/74/SR.23, paras. 56–57.
[119] A/C.6/74/SR.26, paras. 121–122.
[120] Ibid., para. 6.
[121] A/C.6/74/SR.24, para. 87.
[122] A/C.6/74/SR.26, para. 41.
[123] A/C.6/74/SR.25, para. 33.
[124] A/C.6/74/SR.26, para. 85.

on its annual report".[125] Honduras welcomed the Commission's decision to include the topic in its long-term programme of work,[126] and the Islamic Republic of Iran recognized the importance of studying the topic, while avoiding any conflict with existing treaties.[127] Italy, meanwhile, believed that the topic satisfied "all the criteria for inclusion in the long-term programme of work" and that "a set of draft articles developed by the Commission with regard to piracy and armed robbery at sea would contribute to legal certainty and international cooperation in safeguarding trade and navigation at sea".[128]

57. The Kingdom of the Netherlands, though expressing its agreement with the inclusion of the topic in the long-term programme of work, said that, in view of the decline in the number of incidents of piracy on the high seas, it would seem "more useful to focus on armed robbery at sea and to provide guidance for the development of relevant domestic criminal law".[129] The Philippines said that it was inclined to support the consideration of the topic, provided that the direction taken was consistent with the United Nations Convention on the Law of the Sea and took into account regional arrangements and practices.[130] Poland made a similar point, indicating "that an appropriate international legal framework for combating piracy and armed robbery already existed"[131] though there might be differences between the national laws of different countries. Portugal supported the Commission's consideration of the topic, which would provide an opportunity to reflect on "relevant legal issues, including the law of the sea, international human rights law and international humanitarian law, and also the detention, prosecution, extradition and transfer of pirates and armed robbers".[132] The Republic of Korea supported the inclusion of the topic and hoped that the Commission's work would provide clarification on the notions of piracy and armed robbery at sea under the United Nations Convention on the Law of the Sea, as well as practical information on its implementation by States.[133] Romania noted with interest the addition of the topic to the Commission's long-term programme of work, recalling the existing international law, in particular the United Nations Convention on the Law of the Sea, and noting that "there remained issues that deserved closer attention".[134] Sierra Leone welcomed the inclusion of the topic,[135] while Slovakia requested the Commission to observe the criteria for the selection of new topics in deciding to include them in the long-term programme of work.[136] Spain considered that the topic was of great interest and warranted consideration by the Commission.[137] Togo supported the Commission's consideration of the topic, recalling that it was of concern for the international community, as "acts of piracy were committed in all maritime zones and affected, to varying degrees, the interests of all States, whether coastal or landlocked".[138] Türkiye supported the topic and stated that the work of the Commission "could be very beneficial".[139] The United Kingdom welcomed the inclusion of the topic, in view of the resurgence of piracy, and requested the Commission to "suggest ways in which States could improve arrangements and

[125] A/C.6/74/SR.31, para. 124.
[126] A/C.6/74/SR.26, para. 96.
[127] A/C.6/74/SR.27, para. 29.
[128] A/C.6/74/SR.24, para. 58.
[129] Ibid., para. 6.
[130] A/C.6/74/SR.27, para. 52.
[131] A/C.6/74/SR.23, para. 125.
[132] A/C.6/74/SR.25, para. 59.
[133] A/C.6/74/SR.26, para. 60.
[134] A/C.6/74/SR.23, para. 83.
[135] A/C.6/74/SR.27, para. 10.
[136] A/C.6/74/SR.23, para. 88.
[137] A/C.6/74/SR.26, para. 19.
[138] Ibid., para. 30.
[139] Ibid., para. 75.

cooperation for the prosecution of perpetrators".[140] The United States affirmed that, of the proposed new topics, "it would be most supportive of that of prevention and repression of piracy and armed robbery at sea"[141] and added that "while there was much existing codified and customary international law on the topic, further elucidation by the Commission might prove useful".[142] The Russian Federation, during the debates of the Sixth Committee at the seventy-sixth session of the General Assembly, in 2021, welcomed the inclusion of the topic in the Commission's programme of work, considering that it was "one of the most promising and relevant to States".[143] During the debates of the Sixth Committee at the seventy-seventh session of the General Assembly, in 2022, States expressed their views on the work of the International Law Commission at its seventy-third session. For example, Nigeria, on behalf of the Group of African States, noted the Commission's decision to include in its programme of work the topic "Prevention and repression of piracy and armed robbery at sea", with Yacouba Cissé as Special Rapporteur.[144] Norway, on behalf of the Nordic countries, welcomed the inclusion of the topic in the Commission's current programme of work. Armenia, Austria, Colombia, the Czech Republic, Estonia, Iran (Islamic Republic of), Lebanon, Romania, Sierra Leone, South Africa, Thailand, Uganda, the United Kingdom and the United States, during the debates of the Sixth Committee at the seventy-seventh session of the General Assembly, all expressed their interest in the inclusion of the topic in the Commission's programme of work. Australia welcomed the inclusion of the topic in the Commission's programme of work and believed that the Commission's consideration of State practice with regard to piracy and armed robbery at sea and its clarification of any areas of uncertainty would support international cooperation in that regard. India welcomed the Commission's consideration of the topic and hoped that its work would contribute to addressing the challenges that affected the safety and security of international navigation, including piracy and armed robbery at sea. France took note of the Commission's inclusion of the topic in its programme of work and said that it stood ready to cooperate with the Commission in providing it with any information on its national practice with regard to the topic. Malaysia welcomed the inclusion of the topic in the Commission's programme of work. It was of the view that the work would bring much needed clarity to the issue of piracy and armed robbery at sea from the perspective of the progressive development of international law and would help to address a number of issues, including the definition of piracy, the punishment of piracy, cooperation in the suppression of piracy, and States' exercise of jurisdiction in relation to the prosecution and repression of acts of piracy and armed robbery at sea. Malaysia also stated that the current international framework was insufficient to curb piracy, in view of the lack of a mechanism thereunder for the successful prosecution of pirates by States. Portugal, reiterating its support for the inclusion of the topic in the Commission's programme of work, advocated a holistic approach focused not only on repression but also and particularly on prevention.

## H. Methodological approach

58. If piracy is considered to be a "geographical" crime or a "geographically localized"[145] crime because it is committed in maritime zones or regions that are clearly defined by law, it could be inferred that regional maritime governance of the

[140] A/C.6/74/SR.23, para. 102.
[141] A/C.6/74/SR.24, para. 70.
[142] Ibid.
[143] A/C.6/76/SR.19, para. 38.
[144] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 239.
[145] Flagel, "Le renouveau de la piraterie internationale" (see footnote 45 above), p. 114.

seas and oceans might be one of the most appropriate solutions. A regional approach to the search for appropriate solutions for the prevention and repression of crimes of piracy and armed robbery at sea, and other related forms of crime, seems to the Special Rapporteur to be the most effective and pragmatic way forward.

59. In the present report, the Special Rapporteur reviews the status of the applicable law, in particular multilateral legal instruments, in other words, customary international law and conventional law (Convention on the High Seas and United Nations Convention on the Law of the Sea), as well as relevant international jurisprudence, where appropriate. The study of the topic will essentially be based on a regional approach taking account of State practice, which will be examined by studying national statutes, on the one hand, and the decisions of national judges regarding maritime piracy and armed robbery at sea, on the other. The practice analysed is that of all States with a real or potential interest in protecting the oceans against piracy and armed robbery. These include coastal States, flag States, port States, landlocked States and States that are likely to exercise national or universal jurisdiction, whether active or passive, in respect of nationals who are either victims or perpetrators of acts of piracy or armed robbery at sea. Information on the legislative practice of States comes from the website of the Division for Ocean Affairs and the Law of the Sea, and other sources.

60. The analysis of national jurisprudence will show how national judges interpret the definition of piracy under article 101 of the United Nations Convention on the Law of the Sea, as reflected in the legal framework of the State concerned. This analysis will also indicate how States are implementing the Convention, in particular with regard to the prevention and repression of maritime piracy and armed robbery at sea. It will, for example, enable us to determine whether States are in fact exercising universal jurisdiction and on what legal basis. Furthermore, the analysis of jurisprudence and legislative practice in Africa, Asia, Europe, the Americas and the Caribbean, and Oceania, will enable us to determine whether the concept of armed robbery at sea, as defined in the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships of the International Maritime Organization (IMO),[146] is used and, if so, how it is interpreted by the domestic courts of States. In other words, the aim is to see how national judges and domestic legislation distinguish piracy from armed robbery at sea, what are the criteria on which those distinctions – where they exist – are based, and what conclusions can be drawn.

61. In the second report, to be submitted in the second year of the quinquennium, the Special Rapporteur will give further consideration to the topic, with a focus on regional and subregional practices and initiatives for combating piracy and armed robbery at sea, as well as the resolutions of relevant international organizations, in particular IMO. The Special Rapporteur will then assess trends in academic writings and the views of learned societies on the topic, as well as the resolutions of the General Assembly and Security Council.

[146] IMO resolution A.1025(26) of 2 December 2009, annex.

# II. Piracy and armed robbery at sea in Africa

## A. Legislative and judicial practices

### 1. Legislative practice

*(a) Definition of maritime piracy and armed robbery at sea*

62. In Africa, 28 States[147] have adopted pieces of legislation defining maritime piracy in their domestic law. As the analysis will show, the pieces of legislation are either penal codes or specific statutes on piracy and armed robbery at sea. Some States reproduce the elements of the definition contained in article 101 of the United Nations Convention on the Law of the Sea fully, while others reproduce it only partially. For example, 27 States[148] use the terms "any act of violence", "detention" and "depredation", 19 States[149] consider that the act must be "committed by the crew or the passengers of a ship", 14 States[150] use the expression "for private ends", 24 States[151] use the term "against another ship", 24 States[152] use the expression "against property/persons on board a ship", and 14 States[153] use the expression "on the high seas or outside the jurisdiction of a State". In addition, 18 States[154] mention the element of "on board a ship knowing that it is used for piracy (complicity/voluntary participation)", and 16 States[155] mention the element of "incitement to piracy".

63. As the chapters below will show, legislative practice on the inclusion in the same legislation of two separate crimes, namely maritime piracy and armed robbery at sea, and the penalties related thereto, is disparate. For instance, of the 28 African States that have defined maritime piracy in their legislation, only 3 have defined armed robbery at sea. In addition, 12 States reproduce verbatim the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea. Only one State on the African continent reproduces fully the definition of armed robbery at sea contained in the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.

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[147] Algeria, Benin, Botswana, Congo, Côte d'Ivoire, Djibouti, Eritrea, Gabon, Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Nigeria, Sao Tome and Principe, Senegal, Seychelles, Somalia, South Africa, United Republic of Tanzania and Zimbabwe.

[148] Algeria, Benin, Botswana, Congo, Côte d'Ivoire, Djibouti, Eritrea, Gabon, Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Nigeria, Sao Tome and Principe, Senegal, Seychelles, Somalia, South Africa, United Republic of Tanzania and Zimbabwe.

[149] Benin, Botswana, Congo, Côte d'Ivoire, Djibouti, Gambia, Ghana, Guinea, Kenya, Liberia, Malawi, Mauritania, Nigeria, Sao Tome and Principe, Seychelles, Somalia, United Republic of Tanzania and Zimbabwe.

[150] Algeria, Botswana, Congo, Côte d'Ivoire, Ghana, Kenya, Liberia, Madagascar, Malawi, Morocco, Nigeria, Seychelles, Somalia and United Republic of Tanzania.

[151] Algeria, Benin, Burkina Faso, Chad, Congo, Côte d'Ivoire, Djibouti, Eritrea, Gabon, Gambia, Guinea, Kenya, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Mozambique, Nigeria, Seychelles, Somalia, South Africa, United Republic of Tanzania and Zimbabwe.

[152] Algeria, Botswana, Chad, Comoros, Côte d'Ivoire, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Kenya, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Mozambique, Nigeria, Sao Tome and Principe, Seychelles, Somalia, United Republic of Tanzania and Zimbabwe.

[153] Algeria, Côte d'Ivoire, Gabon, Gambia, Guinea, Liberia, Madagascar, Malawi, Mauritania, Mauritius, Seychelles, Somalia, Togo and United Republic of Tanzania.

[154] Benin, Congo, Côte d'Ivoire, Gabon, Gambia, Kenya, Liberia, Madagascar, Malawi, Morocco, Mauritius, Mozambique, Nigeria, Sao Tome and Principe, Seychelles, Somalia, South Africa and United Republic of Tanzania.

[155] Botswana, Cameroon, Côte d'Ivoire, Eritrea, Gambia, Ghana, Kenya, Liberia, Malawi, Madagascar, Mauritius, Mauritania, Nigeria, South Africa and United Republic of Tanzania.

64. The legislation of South Africa[156] reproduces all the elements of the definition of article 101 of the United Nations Convention on the Law of the Sea concerning piracy, namely commission of the crime for private ends, on the high seas, and involving two ships. Armed robbery at sea is not criminalized at all. The legislation of Algeria[157] reproduces the same elements of the article 101 definition, except that it makes no reference to the element concerning private ends, something that could be construed as expanding the scope of piracy to possibly encompass any other ends, including political ends. While the legislation of Algeria criminalizes piracy, which is supposed to be committed on the high seas, it does not criminalize armed robbery at sea. Nonetheless, it establishes universal jurisdiction, since the impugned act must be directed against any ship or against persons or property on board such ship, on the high seas. In the Maritime Code of Benin,[158] piracy is defined in very broad terms, without any express reference to the elements of the article 101 definition. Neither the place of commission of piracy nor the motive for the crime is specified in the Code. Universal jurisdiction seems to be established in the Code because, on the basis of its article 643, any individual belonging to the crew of a Benin-flagged or foreign ship, as well as the captain and the officers of any ship whatsoever may be prosecuted for the crime of piracy or for any other crime. Armed robbery at sea is not criminalized in the legislation of Benin. The Penal Code of Botswana[159] defines and criminalizes piracy without necessarily reproducing all the elements of the article 101 definition, notably the reference to the high seas as the place of commission of the crime, as well as the motives for the crime. A broad interpretation of article 62, paragraph 3, of the Penal Code seems to show that piracy can be committed anywhere in the marine environment, without distinction between the high seas and maritime zones under the jurisdiction or sovereignty of States. The article makes a general reference to the sea or the port as the places of commission of piracy. Armed robbery at sea is not criminalized.

65. The Maritime Code of Côte d'Ivoire defines maritime piracy as follows: "Maritime piracy refers to any illegal act of violence, threat, detention or depredation committed by the crew or the passengers of a ship or an aircraft against another ship or aircraft or against persons or property on board such ship or aircraft, beyond the territorial sea."[160] This definition reproduces some of the requirements of article 101 of the United Nations Convention on the Law of the Sea, omits others and adds new ones. The requirements for the existence of maritime piracy reproduced in the Maritime Code of Côte d'Ivoire are that of an illegal act of violence, threat, detention or depredation, and that of two ships. With regard to the latter requirement, the Maritime Code of Côte d'Ivoire does not reproduce the notion of a private ship or private aircraft acting for private ends. Yet, one of the features of maritime piracy is the notion of private ends, referring to the demand for ransom or other financial demands for the release of a crew or a ship that has been taken over by pirates. Moreover, this definition broadens the scope of maritime piracy by not making any distinction between a private ship and a government ship or a ship sailing under the flag of a State. In other words, a government ship or a ship on government service can commit acts of maritime piracy, just like a private ship.

[156] South Africa, Defence Act, No.42 of 2002 (12 February 2003), *Government Gazette*, vol. 452, No. 24576, art 24.

[157] Algeria, Act No. 98-05 of 25 June 1998 amending and complementing Order No. 76-80 of 23 October 1976 establishing the Maritime Code, *Official Gazette of the People's Democratic Republic of Algeria*, No. 47 (27 June 1998), art. 519.

[158] Benin, Act No. 2010-11 establishing the Maritime Code of the Republic of Benin (27 December 2010), art. 643.

[159] Botswana, Penal Code (1986), sect. 62.

[160] Côte d'Ivoire, Act No. 2017-442 of 30 June 2017 establishing the Maritime Code, *Official Gazette of the Republic of Côte d'Ivoire*, Special No. 12 (13 November 2018, art. 1008).

66. With regard to the place of commission of piracy, the fact that article 1008 of the Maritime Code of Côte d'Ivoire places the act of maritime piracy beyond the territorial sea has three legal implications: the first is that the crime of piracy is committed beyond the 12-nautical-mile limit of the territorial sea, in the superjacent waters of the 200-nautical-mile exclusive economic zone and on the high seas. The result, based on this definition, is that piracy cannot be linked exclusively to the high seas – judging by article 101 of the United Nations Convention on the Law of the Sea – but can be committed in the exclusive economic zone, up to the outer limit of the territorial sea. The second implication is that if the requirements for maritime piracy are present and the act of piracy occurs in the internal waters or territorial waters of Côte d'Ivoire, the impugned act cannot be characterized as maritime piracy, but rather as armed robbery at sea. However, the Maritime Code of Côte d'Ivoire does not contain specific and express provisions on such a crime. It can be deduced therefore that this will be an ordinary crime under the Penal Code, which criminalizes the crime of armed robbery, whether committed at sea or in the land territory. The third implication concerns the legal basis of universal jurisdiction. The Maritime Code of Côte d'Ivoire provides that "Ivorian courts have jurisdiction to try acts of piracy as provided for and criminalized by articles 1008 to 1016, even when they are committed on the high seas."[161] Universal jurisdiction is therefore well established in the absence of any link between Côte d'Ivoire and the act of maritime piracy, such as the link of nationality or the link of territoriality. Pirate ships can only be pursued by authorized organs, namely maritime affairs agents, petty officers and captains of government naval vessels, criminal investigation officers, and civil servants and agents empowered to serve as criminal investigation officers.[162] Reports signed by sworn officers are transmitted to the administrative maritime authorities, who transmit them in turn to prosecutors; however, prosecutors can still take the initiative to prosecute even without a referral from the administrative maritime authorities. Complicity in the commission of an act of piracy is itself defined as punishable and justiciable by Ivorian courts on the same basis as the act of piracy itself.

67. The result is that an act of armed robbery committed in the internal waters or territorial waters of Côte d'Ivoire cannot be characterized as an act of piracy, since the offence of armed robbery at sea is not defined in Ivorian law and the acts are committed within the 12-nautical-mile limit of the territorial sea of Côte d'Ivoire. Djibouti has adopted legislation[163] where piracy is defined using general terms distinct from those found in article 101 of the United Nations Convention on the Law of the Sea. However, the legislation establishes universal jurisdiction in that it recognizes that the State has jurisdiction to prosecute and try pirates characterized as such under the domestic law of Djibouti. Armed robbery at sea is not criminalized. The Penal Code of Eritrea,[164] in its article 229, reproduces some of the elements of piracy, but without necessarily and exclusively placing piracy on the high seas. Indeed, if the elements of the crime, namely an illegal act, two ships and private ends, are present, the Penal Code does not require the act to have been committed on the high seas for it to constitute piracy. Armed robbery at sea is not criminalized and there is no indication in the Penal Code as to who would establish the power of Eritrea to exercise universal jurisdiction for the repression of piracy. In the case of Ethiopia, it is interesting to note that although the country has not defined piracy, it has adopted repressive measures through its Criminal Code.[165] Armed robbery at sea is neither

[161] Ibid., art. 1018.

[162] Ibid., art. 987.

[163] Djibouti, Act No. 212/AN/82 of 18 January 1982 establishing the Maritime Affairs Code, *Official Gazette of the Republic of Djibouti* (15 March 1982), pp. 391–406, art. 208.

[164] Eritrea, Penal Code (2015), art. 229.

[165] Ethiopia, Criminal Code (9 May 2005), sects. 270 and 273.

defined nor criminalized. In Gabon, the Penal Code[166] reproduces the elements of piracy as understood in international law, without characterizing the crime as such. Article 253 of the Penal Code provides that the illegality concerns "the seizing or taking of control by violence or threat of violence of an aircraft, a ship or any other means of transportation with people on board, or of a mobile or fixed platform located on the continental shelf […]". The Penal Code extends the geographical or territorial scope of the crime of piracy to all maritime spaces, comprising the high seas, maritime spaces outside the jurisdiction of any State, territorial waters if authorized under international law, and the continental shelf in the case of illegal acts against mobile or fixed platforms. In a nutshell, maritime piracy is not mentioned expressly, even if the elements of the crime are present; there is also no provision criminalizing armed robbery at sea; criminal intent as well as complicity are punishable. Coercive measures and use of force at sea are defined by regulation. Piracy and related offences are defined in the Criminal Offences Bill of the Gambia.[167] In its paragraph 7, section 61 of the Criminal Offences Bill reproduces the provisions of article 101 of the United Nations Convention on the Law of the Sea, namely an illegal act committed for private ends on the high seas against another ship or aircraft, or persons or property on board such ship or aircraft. Unlike article 101 of the Convention, paragraph 4 of the section extends the commission of piracy to internal waters and territorial waters. The Gambia establishes universal jurisdiction for acts of piracy committed on the high seas by a ship against another ship, by any person acting as the direct perpetrator or as an accomplice to the crime, or any person having had the intention of committing the crime of piracy. The penalty is 14 years' imprisonment. Ghana, for its part, has defined piracy in its Criminal Code,[168] but without reproducing the elements of piracy contained in article 101 of the Convention. The Code refers in general to the sea or the port as being the places of commission of the act of maritime piracy. This means that the impugned act can occur anywhere in the marine environment, without regard to the legal regimes applicable to the different maritime spaces recognized in international law, ranging from the high seas to internal waters and territorial waters. Armed robbery at sea is not criminalized in the legislation of Ghana.

68. The Maritime Code of Guinea[169] defines and criminalizes acts of piracy by reproducing the text of article 101 of the United Nations Convention on the Law of the Sea. The Maritime Code defines the acts that make up the crime of piracy and deprives pirate ships of the protection that they should have been afforded under the law of the flag State, with the implication that Guinea can exercise universal jurisdiction over such ships. Armed robbery at sea is not criminalized.

69. In Kenya, piracy and armed robbery at sea are defined and criminalized by the Merchant Shipping Act,[170] which refers explicitly to the provisions of the United Nations Convention on the Law of the Sea, to which Kenya is a party. Piracy is defined in the Act according to the provisions of the Convention but without explicit reference to its article 101. The elements of the article 101 definition are reproduced in the Kenyan legislation on piracy: the illegal act is committed in a place outside the jurisdiction of any State, by a ship against another private ship or private aircraft, for private ends. Universal jurisdiction is well established, particularly since the Kenyan

[166] Gabon, Act No. 006/2020 of 30 June 2020 amending Act No. 042/2018 of 5 July 2019 establishing the Penal Code of the Gabonese Republic, *Official Gazette of the Gabonese Republic*, No. 72 bis special (30 June 2020), art. 253.

[167] The Gambia, Criminal Offences Bill (2020), sect. 61.

[168] Ghana, Criminal Code (1960), sect. 193.

[169] Guinea, Ordinary Act L/2019/012/AN of 9 May 2019 establishing the Maritime Code of the Republic of Guinea, *Official Gazette of the Republic of Guinea*, special issue of June 2019, art. 658.

[170] Kenya, Merchant Shipping Act (2009), part XVI.

statute applies whether the pirate ship was in Kenya or elsewhere; whether the illegal act was committed in Kenya or elsewhere, and regardless of the nationality of the perpetrator or the victim of the act of piracy. The result is that universal jurisdiction is grounded in the country's legislation which, through the expression "shall apply", establishes the obligation to prosecute pirates and their accomplices and to punish them by imprisonment for life. The legislation makes a clear distinction *ratione loci* between piracy and armed robbery at sea. While piracy is supposed to be committed in a place outside the jurisdiction of any State,[171] including on the high seas, armed robbery at sea is supposed to be committed in the territorial waters or waters under the jurisdiction of Kenya.[172] A person who commits armed robbery in waters under the sovereignty of Kenya is punished by imprisonment for life.

70. The crimes of piracy and armed robbery have almost the same elements in common and what fundamentally distinguishes them is their place of commission.

71. In Liberia, the Code of Laws,[173] revised and published in 2008, defines piracy in its section 15.31, reproducing almost verbatim the provisions of article 101 of the United Nations Convention on the Law of the Sea, but without making any reference to the Convention. Piracy is thus defined as any illegal act of violence committed on the high seas, for private ends, by a ship against another private ship or private aircraft in a place outside the jurisdiction of any State.[174] The expression "high seas" is defined as relating to all parts of the sea that are not included in the territorial sea or in the internal waters of any nation or any Government. This means that piracy is committed not only on the high seas but also in the exclusive economic zone and on the continental shelf. The Code of Laws establishes the power of Liberia to exercise universal jurisdiction by stipulating that piracy is a crime against the law of nations and that any person charged with it must be tried in a court of competent jurisdiction in Liberia.[175] The possible penalties include seizure and sale of the ship following the procedures defined in the Code,[176] including the prior authorization of the President of the Republic. Armed robbery is defined in the general provisions of the Code of Laws,[177] which nonetheless does not specify whether its provisions are applicable and transposable to the marine environment in cases of armed robbery at sea.

72. The Maritime Code of Madagascar[178] and the Penal Code of Malawi[179] reproduce in their entirety the provisions of article 101 of the United Nations Convention on the Law of the Sea. Neither legislation criminalizes armed robbery at sea. Similarly, the legislation of Mauritius,[180] in addition to defining maritime piracy in accordance with article 101, contains a specific crime, referred to as "maritime attack", which may encompass all forms of violent crimes committed at sea, including armed robbery, even though the legislation does not expressly recognize such a crime at sea. A maritime attack is supposed to be committed in the territorial sea or the territorial waters, historical waters or archipelagic waters of Mauritius. Morocco has defined piracy in very broad terms. Its Merchant Marine Disciplinary and Penal

[171] Ibid., sect. 369, para. 1 (a)(ii).
[172] Ibid., sect. 371 (b).
[173] Liberia, *Liberian Code of Laws Revised*, vol. IV, title 26 on criminal law, adopted on 22 July 2008, sect. 15.31.
[174] Ibid.
[175] Ibid., para. 2.
[176] Ibid., para 4.
[177] Ibid., sect. 15.32.
[178] Madagascar, Act No. 99-028 of 3 February 2000 amending the Maritime Code, Official Gazette, No. 2625 (8 February 2000), pp. 526–661, art. 1.5.01.
[179] Malawi, Penal Code, sect. 63.
[180] Mauritius, Piracy and Maritime Violence Act (No. 39 of 2011), *Government Gazette of Mauritius*, No. 112 (17 December 2011).

Code[181] defines piracy as a crime committed by any individual on board a Moroccan ship or any ship sailing "without being or without having been equipped for the voyage with regular documents attesting to the nationality of the ship and the legitimacy of the voyage […]".[182] The legislation of Morocco does not reproduce as such the article 101 definition in all its provisions, since the elements of piracy, in the sense of that article – namely the high seas and private ends – do not feature in the definition of piracy under the legislation of Morocco. Nonetheless, it is acknowledged in the legislation that the country can exercise universal jurisdiction over maritime piracy regardless of the nationality of the ship (whether the ship is of Moroccan nationality or of a foreign nationality) and of the place of commission of the crime. Armed robbery at sea is neither defined nor criminalized.

73. The legislation of Mauritania[183] reproduces to a large extent the same terms found in article 101 of the United Nations Convention on the Law of the Sea by specifying that piracy exists once the law of the flag State ceases to apply in view of a number of illegal acts committed by a ship against another ship, persons or property, regardless of whether the ship in question is private or public. No reference is made to aircraft. The Mauritanian legislation provides for the exercise of universal jurisdiction over a pirate ship once "the ship is no longer subject to the law of the flag State". Mauritania does not have a text criminalizing armed robbery.

74. Mozambique[184] defines piracy as a crime, but in very broad terms and does not necessarily reflect the wording of article 101 of the United Nations Convention on the Law of the Sea. According to the Penal Code, the crime of piracy is committed by anyone who operates or takes control of a ship or aircraft by violent means for the purpose of committing theft, endangering the security of the State or of a foreign State, or usurping the command of a government ship or aircraft. The Penal Code nonetheless goes further than article 101 by stipulating that "the altering of signals coming from land, the sea or the air constituting fraudulent wrecking, landing, mooring or disembarking of a ship or aircraft for the purpose of attacking such ship or aircraft or attacking persons or property on board"[185] constitutes an act of piracy.

75. Despite being landlocked States, the Niger,[186] Chad[187] and Uganda[188] repress piracy, without defining it as such. In the case of Chad, there is, however, a very broad definition of piracy that does not fully reflect the elements of piracy as per article 101 of the United Nations Convention on the Law of the Sea. The Penal Code stipulates that all illegal acts that endanger the safety of maritime navigation directed against ports, ships, passengers, crew or property are acts of piracy; it does not, however, specify the place of commission of the acts of piracy, or the two-ship or private-ends requirements.

76. The legislation of Nigeria[189] generally reproduces the provisions of article 101, although it uses the expression "international waters" instead of "the high seas" to

[181] Morocco, Merchant Marine Disciplinary and Penal Code (31 March 1919), *Official Gazette*, No. 344 (26 May 1919), pp. 507–509, art. 23, para. 3.

[182] Ibid., para. (a).

[183] Mauritania, Act No. 2013-029 establishing the Merchant Marine Code (30 July 2013), *Official Gazette of the Islamic Republic of Mauritania*, No. 1297 (15 October 2013), pp. 673–770, art. 695.

[184] Mozambique, Penal Code (2014), *Official Gazette*, No. 105, supplement 14 (31 December 2014), art. 380.

[185] Ibid., para. 3.

[186] The Niger, Act No. 2003-025 of 13 June 2003 amending Act No. 61-27 of 15 July 1961 establishing the Penal Code, arts. 281, 399-1 and 399-7.

[187] Chad, Act No. 2017-01 of 8 May 2017 establishing the Penal Code, art. 281.

[188] Uganda, Penal Code (Amendment) Statute (18 August 1990), *The Uganda Gazette*, vol. 83, No. 40 (1990), pp. 43–51, sect. 55.

[189] Nigeria, Suppression of Piracy and Other Maritime Offences Act (2019), sect. 3.

refer to the place of commission of piracy. The private-ends requirement for the existence of an act of piracy and that of the involvement of two private ships or private aircraft are taken into consideration in the legislation. The Democratic Republic of the Congo[190] does not define piracy in its legislation, but criminalizes it. It does not define armed robbery at sea either. The Republic of the Congo has adopted legislation[191] that defines piracy without reproducing the basic terms of article 101. The legislation nevertheless provides for universal jurisdiction, since it states that persons who are part of a crew sailing without the requisite travel documents attesting to the legitimacy of the voyage,[192] those who are making the voyage with commissions delivered by different States,[193] those who commit acts of armed depredation against Congolese ships or foreign ships,[194] and those that commit hostile acts under any flag other than the one for which they have been granted a commission[195] shall be prosecuted and tried as pirates. It also provides that a pirate is any individual who, as a member of a crew, takes control of a Congolese ship by fraud or violence or who delivers such ship to pirates.[196] Sao Tome and Principe defines the crime of piracy in its Penal Code[197] as being the seizure by fraud or violence of a ship or aircraft, or the commission of illegal acts against another ship or aircraft for personal ends by a crew at sea or in the air or in the territorial sea, or the usurpation of the command of a government ship or aircraft. The Penal Code reproduces some of the elements of article 101, notably the two-ship requirement, the personal- or private-ends motive, and an act of violence or depredation. Piracy is not linked exclusively to the high seas, since the legislation of Sao Tome and Principe provides that the crime is committed "at sea or in the air or in the territorial sea".[198] Armed robbery at sea is not defined in the legislation.

77. Senegal has defined piracy through its legislation establishing the Merchant Marine Code, which states that piracy exists where "a ship sails without documents of nationality or has more than one nationality on a permanent basis, or where one of the following acts is committed: illegal act of violence or detention or any act of depredation committed by the crew or the passengers of a private ship, among others."[199] This shows that the legislation does not reproduce the terms of article 101 of the United Nations Convention on the Law of the Sea, notably the reference to the involvement of two ships in the commission of the act of piracy, the specification of the private-ends motive for the crime, and the place of commission of the crime. The fact that piracy is not linked to the high seas could be interpreted as if the legislation recognized that the crime of piracy can be committed anywhere in the marine environment, on the high seas or within territorial waters.

78. Seychelles defines piracy in accordance with article 101 of the United Nations Convention on the Law of the Sea by reproducing the elements of piracy, as described in its Penal Code.[200] While the Code's provisions on piracy remain generally in line with the Convention, the Code appears to expand the scope of piracy to maritime

[190] The Democratic Republic of the Congo, Order-Act No. 66-98 of 14 March 1966 establishing the Maritime Navigation Code, arts. 399 and 400.
[191] The Republic of the Congo, Act No. 30-63 of 4 July 1963 establishing the Merchant Marine Code, art. 270.
[192] Ibid., para. 1.
[193] Ibid., para. 2.
[194] Ibid., art. 271, para. 1.
[195] Ibid., para. 3.
[196] Ibid., art. 273.
[197] Sao Tome and Principe, Act No. 6/2012 establishing the Penal Code (5 July 2012), art. 386, para. 2.
[198] Ibid.
[199] Senegal, Act No. 2002-22 of 16 August 2002 establishing the Merchant Marine Code, art. 1.
[200] Seychelles, Act No. 5 of 2012 amending the Penal Code, sect. 65.

spaces under the jurisdiction of Seychelles, namely its internal waters, its territorial waters and its exclusive economic zone. In other words, piracy is committed anywhere in the marine environment, on the high seas and in maritime spaces under the sovereignty or jurisdiction of Seychelles. Somalia regulates piracy through its piracy legislation,[201] in accordance with the provisions of article 101 of the Convention, to the extent that the legislation reproduces the elements of the definition from the Convention. It is admitted in the legislation of Somalia, however, that an act of piracy can be committed both on the high seas and in the territorial waters of Somalia. No specific provision is made for the crime of armed robbery at sea. The legislation of Togo is broader, since it concerns not only piracy but also other illegal acts against the safety of maritime navigation at sea, as understood under the Convention. According to the legislation of Togo, piracy is committed in all maritime spaces and applies to private ships, foreign ships and flagless ships or ships without a nationality in maritime spaces under the sovereignty or jurisdiction of Togo, as well as on the high seas, in accordance with international law.[202]

79. The Merchant Shipping Act[203] of the United Republic of Tanzania defines piracy by referring to the provisions of article 101 of the United Nations Convention on the Law of the Sea, which means that the legislation reproduces the elements of the definition of piracy as described by the conventional regime of article 101 (two-ship requirement, violence or detention or depredation, private ends, and piracy on the high seas). Piracy can only be committed on the high seas or in areas located beyond the jurisdiction of any State. If the crime of piracy is committed anywhere other than on the high seas, it cannot be legally characterized as such. Indeed, the Tanzanian Merchant Shipping Act does not define the crime in the case where it is committed in other areas of the marine environment, such as in territorial waters. The Penal Code[204] to a large extent draws on the text and spirit of the Merchant Shipping Act by reproducing the basic provisions of the legislation. The Penal Code represses direct action and complicity in the commission of an act of piracy as punishable acts, and states that a pirate on conviction is liable to imprisonment for life.[205] Where the pirate ship is not registered in the United Republic of Tanzania, no prosecution shall be commenced unless there is a special arrangement between the State pursuing the ship or arresting the pirate and the United Republic of Tanzania.[206] Moreover, no prosecution can be commenced without the consent of the Director of Public Prosecutions.[207] The requirement of a special arrangement between the pursuing State and the United Republic of Tanzania could be interpreted as if the United Republic of Tanzania did not systematically apply the principle of universal jurisdiction, which remains subject to such arrangement. The crime of armed robbery at sea is not defined either in the Merchant Shipping Act or in the Penal Code.

80. The Criminal Law Code of Zimbabwe[208] defines piracy by making general references to the elements of the definition contained in article 101 of the United Nations Convention on the Law of the Sea, without reproducing the exact terms of the Convention. The Criminal Law Code links the commission of the crime of piracy to the sea as a single and integrated space, without any distinction between maritime

[201] Somalia, Act No. 52/2012 on combating piracy (2 March 2012), art. 2.

[202] Togo, Act No. 2016-004 on combating piracy, other illegal acts and the exercise by the State of its policing powers at sea (11 March 2016), art. 2.

[203] The United Republic of Tanzania, Merchant Shipping Act (12 November 2003), sect. 341, para. 1.

[204] The United Republic of Tanzania, Penal Code, sect. 66.

[205] Ibid., para. 2.

[206] Ibid., para. 3.

[207] Ibid., para. 4.

[208] Zimbabwe, Act No. 4 of 2014 amending the Criminal Law (Codification and Reform) Act), sect. 154A, para. 2.

spaces, such as between the high seas and areas under national jurisdiction. The geographical scope is thus expanded, since the act of piracy can be committed at sea, in the broad sense, including the high seas and the internal waters of Zimbabwe. The general reference to the sea includes the territorial sea, the exclusive economic zone and the continental shelf as places of commission of piracy. Depending on the situation, the applicable penalties are imprisonment for life or for a minimum period of 10 years, or the payment of a fine and imprisonment not exceeding 15 years.[209] The power of Zimbabwe to exercise universal jurisdiction is well established, since the country's judges have jurisdiction to prosecute and try the crime of piracy for any act committed in Zimbabwe or outside the national territory.[210]

*(b) Preventive and repressive measures*

81. The first form of prevention of piracy is deterrence through the adoption of legislative measures, because the absence of law serves as an incentive to commit acts of piracy and armed robbery at sea. Prevention may be undertaken unilaterally through domestic legislation or on a bilateral, regional or subregional basis.

82. In Africa, various measures have been taken at the national level to prevent piracy and armed robbery at sea. An analysis of the various pieces of legislation shows that some States establish universal jurisdiction on the basis of their domestic law. For instance, six States[211] establish universal jurisdiction by giving powers to their maritime authorities or their naval forces responsible for security at sea and at ports. Five States[212] do so through joint initiatives of their naval forces.

83. The Gambia[213] has participated together with Liberia in training on the handling of threats to maritime security, including piracy and armed robbery, and Liberia[214] has set up a navigation security and surveillance system. Benin is the only country that has authorized the use of private enterprises as a preventive measure.

84. No State has conferred powers of defence, arrest, investigation or seizure exclusively on the captain of a ship or on persons on board.

85. Several African States punish the crime of piracy. For instance, 31 States have established penalties for maritime piracy in their national legislation, while 23 have no such provision. Only 4 States have established penalties for armed robbery at sea, while 50 have established no penalty, as shown in the sections below.

86. Of the 107 States around the world that have established penalties for piracy, the most recurrent types of penalties are the payment of a fine, the death penalty, imprisonment, life imprisonment, reclusion and forced labour. In Africa, 20 States call for imprisonment,[215] 9 call for the payment of a fine,[216] 4 call for the death penalty,[217] 6 call for reclusion and 10 call for life imprisonment, while 3 punish acts of piracy by forced labour. For example, the courts have imposed a fine as the

[209] Ibid., paras. (g) and (h).
[210] Ibid., para. 5.
[211] Angola, Cabo Verde, Cameroon, Egypt, Guinea and Nigeria.
[212] Benin and Nigeria, Comoros and France, Mauritius and European Union, and Seychelles and European Union.
[213] The Gambia participated in the multinational maritime exercise known as "Obangame Express 2021", an initiative of United States Naval Forces Africa.
[214] Liberian Registry (https://www.liscr.com/).
[215] Algeria, Benin, Botswana, Chad, Côte d'Ivoire, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Liberia, Malawi, Mauritania, Mozambique, Niger, Sao Tome and Principe, Seychelles, Somalia, South Africa and United Republic of Tanzania.
[216] Algeria, Côte d'Ivoire, Niger, Nigeria, Sao Tomé et Principe, Senegal, Seychelles, Somalia and South Africa.
[217] Botswana, Congo, Eritrea and Ethiopia.

sentence for the crime of piracy in Liberia.[218] The Democratic Republic of the Congo and Mauritius have a penalty called “penal servitude”.

87. Imprisonment is the most used penalty for maritime piracy, whether in Africa or in other regions of the world. Penalties of reclusion vary depending on the State and on the specific circumstances of each case. The United States,[219] the Philippines[220] and the United Republic of Tanzania[221] are among the few States that impose a penalty of imprisonment for life as punishment for the crime of piracy.

88. Some African States also sentence the perpetrators of the crime of piracy to less severe but still fairly lengthy terms of imprisonment ranging from 10 years to 30 years. Such is the case in Kenya[222] (20 years) and Seychelles[223] (11 to 18 years). Some States have also imposed relatively minor terms of imprisonment of between two and eight years, such as Kenya[224] (four to seven years). In the latter cases, the lenient sentences are justified when the pirate attack is aborted[225] or when the perpetrators participate in rehabilitation programmes during their time in custody.[226]

89. The use of violence, murder and manslaughter are often held against pirates as aggravating factors. Eleven African countries[227] provide for penalties of varying severity, depending on the gravity of the offence. The practice of confiscating the ship exists in 2 countries[228] and no aggravating factor is contemplated in 14 countries.[229]

### 2. Judicial practice

90. Decisions delivered by African judges on piracy and armed robbery at sea have mostly been in the East Africa region, with the courts of Kenya, the United Republic of Tanzania, Seychelles and Mauritius having had to consider cases involving acts of piracy and armed robbery at sea.

91. However, in the Africa region in general, of the 44 decisions concerning acts of piracy or armed robbery at sea surveyed, 26 concerned cases of piracy at sea and 18 simply made reference to piracy without it being the principal subject of the decisions.

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[218] Supreme Court of Liberia, *Kra v. Republic of Liberia*, Judgment, 1 January 1905, [1905] LRSC 2, 1 LLR 440 (1905).

[219] United States District Court for the Eastern District of Virginia, *United States v. Hasan*, 29 October 2010, 747 F. Supp. 2d 599.

[220] Supreme Court of the Philippines, *People of the Philippines v. Roger P Tulin et al.,* No. 111709, Judgment, 30 August 2001.

[221] High Court of the United Republic of Tanzania, *Republic v. Mohamed Adam & 6 others*, Case No. 123 of 2015, Judgment, 18 April 2019.

[222] Chief Magistrate’s Court at Mombasa (Kenya), *Republic v. Aid Mohamed Ahmed and 7 others,* Case No. 3486 of 2008, Judgment, 10 March 2010.

[223] Supreme Court of Seychelles, *The Republic v. Mohamed Ahmed Ise & 4 others*, Case No. 75 of 2010, Judgment, 30 June 2011; and *The Republic v. Mohamed Aweys Sayid & 8 others*, Case No. 19 of 2010, Judgment, 15 December 2010.

[224] Chief Magistrate’s Court at Mombasa, *Republic v. Musa Abdullahi Said and 6 other*s, Case No. 1184 of 2009, Judgment, 6 September 2010; Chief Magistrate’s Court at Mombasa, *Republic v. Liban Ahmed Ali & 10 others*, Case No. 1374 of 2009, Judgment, 29 September 2010; High Court of Kenya, *Abdikadir Isey Ali & 8 others v. Republic*, Case No. 19 of 2015, Judgment, 10 March 2015; and High Court of Kenya, *Abdirahman Mohamed Roble & 10 others v. Republic*, Criminal Appeal No. 94 of 2012, Judgment, 30 August 2013.

[225] *Republic v. Musa Abdullahi Said and 6 others* (see footnote 224 above).

[226] Ibid.

[227] Algeria, Botswana, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Eritrea, Ethiopia, Liberia, Niger, Senegal and Somalia.

[228] Algeria and Benin.

[229] Benin, Chad, Djibouti, Ghana, Guinea, Kenya, Malawi, Mauritania, Mozambique, Nigeria, Sao Tome and Principe, Seychelles, South Africa and United Republic of Tanzania.

92. Most of the decisions concerning cases of piracy at sea have been rendered in countries that have concluded with the State arresting the pirates special arrangements for the transfer of jurisdiction to the prosecuting State, namely Kenya, Mauritius, Seychelles and the United Republic of Tanzania.

*(a) Jurisprudence of Kenya*

93. It is under special transfer of jurisdiction arrangements that the courts of Kenya have prosecuted and tried several pirates. The jurisprudence of Kenya, which is relatively abundant, has given rise to several decisions. The case of *Attorney General v. Mohamud Mohammed Hashi & 8 others*[230] concerned a group of individuals who, armed with offensive weapons, attacked a ship, MV *Courier,* and its crew on the high seas in the Indian Ocean, putting fear in the lives of the crew members. They were arrested by Kenyan authorities and charged with the offence of piracy under the Penal Code of Kenya before the Chief Magistrate's Court at Mombasa. The accused persons pleaded not guilty and challenged the jurisdiction of the Court, which ruled in their favour on 9 November 2010. In their defence, they contended that the concept of universal jurisdiction was not applicable, even though the crime of maritime piracy is defined in Kenyan criminal law, since, according to them, the Penal Code was silent on the jurisdiction of Kenyan courts to try piracy offences committed outside the country's territorial jurisdiction. The Court of Appeal at Nairobi rejected those arguments and, relying on the country's law and on the United Nations Convention on the Law of the Sea, to which Kenya is a party, ruled that under the concept of universal jurisdiction, which flows from the idea that the international community must ensure that there is no safe haven for those responsible for the most serious international crimes, all States have jurisdiction to bring pirates to justice. The Attorney General appealed the decision. The Court of Appeal overturned the decision of lack of jurisdiction of the trial judge, who had not wanted to apply the principle of universal jurisdiction to the dispute or conclude that Kenyan courts had jurisdiction to try cases of piracy, regardless of the place of commission of the crime, or of the nationality of the perpetrator or of the victims. In *Abdiaziz Ali Abdulahi & 23 others v. Republic,*[231] the issue that arose was that of the adduction of evidence of acts of piracy. On 12 May 2011, the appellants, armed with offensive weapons, attacked the ship FV *Ariya* on the high seas. The 24 accused persons were found guilty of piracy and sentenced to seven years' imprisonment under sections 369, paragraph 1 (b) and 371, paragraph (a) of the Merchant Shipping Act of 2009. According to the High Court of Kenya, there was overwhelming evidence that the appellants were found aboard FV *Ariya* and it was demonstrated that there had been an exchange of fire which had led to the death of four of the persons and the injury of six others. As the respondent had adduced evidence to the effect that the accused persons had indeed committed acts of piracy, the burden of proof was on the accused persons. However, the High Court was not satisfied with the appellants' attempt to reverse the evidence, since the explanation given by them as to their presence on FV *Ariya* appeared implausible. Even though the appellants contended that the sentence of seven years' imprisonment was excessive, the High Court held that it had the discretionary power to impose a sentence. It therefore upheld the trial judge's decision and disallowed the appeal.

94. The case of *Omar Shariff Abdalla v. Corporate Insurance Co. Ltd*[232] gave the High Court of Kenya an opportunity to examine the elements of piracy. According to

[230] Court of Appeal at Nairobi, *Attorney General v. Mohamud Mohammed Hashi & 8 others,* Civil Appeal No. 113 of 2011, 18 October 2012.

[231] High Court of Kenya, *Abdiaziz Ali Abdulahi & 23 others v. Republic,* Criminal Appeal No. 7 of 2014, Judgment, 17 November 2014.

[232] High Court of Kenya, *Omar Shariff Abdalla v. Corporate Insurance Co. Ltd,* Case No. 320 of 1998, Decision, 29 July 2005.

the particulars of the case, the plaintiff, while being insured against the perils of violent theft and piracy for a period of 12 months, had been the victim of theft. On 19 December 1996, 17 gunmen had highjacked a ship which, despite efforts made, was never recovered. The task in that case was to determine the motive for the crime. The main criterion for determining whether there had been piracy or not was the commission of an act for private ends. It was acknowledged that a pirate was above all a person who satisfied his or her personal greed or desire for personal vengeance by theft or murder in places located outside the jurisdiction of a State. However, a person acting for public ends could, to a certain extent, commit similar acts, but since the motive was different, that person could not be considered a pirate from a legal perspective. The absence of a competent authority was also an element of piracy. The act of piracy also had to be violent, something that had been absent in that case. The thieves had simply held the ship in the hope of obtaining a ransom. Although there had been no act of piracy, the insurer had to indemnify the plaintiff.

95. At issue in *Hassan M. Ahmed & 9 others v. Republic*[233] was the jurisdiction of Kenyan judges to try acts of piracy committed on the high seas by individuals who were not Kenyan nationals. From 16 to 21 January 2006, a group of individuals on board three high-speed boats and armed with rifles, grenades, revolvers and rocket launchers had attacked a ship flying the Indian flag called the *Safina Al Bisarat MNV-723* off the coast of Somalia, but on the high seas in the Indian Ocean, assaulting and detaining its crew members and making demands upon them for a ransom payment of $50,000. While detaining the ship and its crew, they had attempted to intercept other ships that were sailing in the vicinity. One of those ships had managed to make a distress call which was picked by officers aboard a United States Navy ship, who had placed the attackers in their custody. The attackers had been handed over to the Kenyan authorities and charged with the crime of piracy before the Principal Magistrate of Mombasa, who had found them guilty and sentenced each of them to seven years' imprisonment. The Principal Magistrate had been found to have jurisdiction on the grounds that piracy was a crime against humanity that could be tried by any State, and that the Penal Code of Kenya was in accord with international law. Dissatisfied with the judgment, the accused persons had appealed. According to the High Court of Kenya, the facts held against them had been established and fell under section 69, paragraphs 1 and 3, of the Penal Code of Kenya, which defined and punished piracy.

96. Even assuming that the Penal Code had been silent on this offence, article 101 of the United Nations Convention on the Law of the Sea, to which Kenya is a party, would have been applicable, because it contains a definition of piracy. The High Court of Kenya upheld the decision of the trial judge and disallowed the appeal. The defence invoked by the accused persons revolved around the lack of jurisdiction of Kenyan courts to try the case, on the grounds that the accused were not Kenyan nationals and that the offence prosecuted had not been committed in the territorial waters of Kenya and, above all, that the Penal Code of Kenya was not applicable to acts committed on the high seas, which fell outside Kenyan territory. However, the judge applied the law correctly on the basis of section 69 of the Penal Code, which provides that "any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy" (para. 1), and that "any person who is guilty of the offence of piracy is liable to imprisonment for life" (para. 3). On the basis of those provisions and of article 101 of the United Nations Convention on the Law of the Sea, the High Court of Kenya found the accused persons guilty of acts of piracy.

[233] High Court of Kenya, *Hassan M. Ahmed & 9 others v. Republic*, Criminal Appeal Nos. 198-207 of 2008.

97. The case of *Barre Ali Farah & 6 others v. Republic*[234] was brought on appeal before the High Court of Kenya. The issue to be resolved concerned the adduction and admissibility of evidence of acts of maritime piracy. In that case, the prosecution evidence was that the captain of the ship *St. Vincent* had been informed by his crew members that two vessels were approaching theirs, on the high seas. Upon checking the radar, he had seen the two boats approaching at a speed of 24 knots. The captain had increased his speed to 13 knots, then put on an alarm for piracy attack. While evaluating the evidence adduced before her, the trial magistrate had evaluated the definitions of the assault as argued before her by the State counsel and concluded that the two boats were moving at high speed, towards the complainants' ship, causing them to apprehend danger. When flares had been fired, the two boats had not stopped but had proceeded on their course towards the ship. Ammunition, knives and grappling hooks had been recovered from the boats in question. The prosecution witnesses had also seen other items being thrown overboard.

98. The accused persons were found guilty of piracy by the trial court and sentenced to 20 years' imprisonment under sections 369, paragraph 1, and 371, paragraph (a), of the Merchant Shipping Act of 2009. On appeal, the judge decided to reduce the sentence to six years' imprisonment. The trial judge had determined that pursuing a ship that was escaping, being armed and aiming objects in its direction, had definitely caused the crew to apprehend danger and to fear for their lives and hence that was an act of violence against a ship. Although the appellants had alleged that they were fishermen, the trial court had not been convinced with that defence, because no proper fishing gear, fish or fish storage facilities had been found in the boats.

99. It is worth noting that the expression "shall be liable" contained in section 371 of the Merchant Shipping Act of 2009 does not mean that it is mandatory to sentence to life imprisonment all those found guilty of the offence of piracy. It should further be noted that before their conviction, the accused persons had been in custody for a period of four years. Accordingly, the sentence of imprisonment for 20 years had been altered and reduced to 6 years.

100. The issues of evidence and testimony regarding piracy were at the heart of the proceedings in *Republic v. Abdirashid Jama Gas and 16 others*.[235] In that case 17 individuals had been charged with attacking the motor vessel MV *Amira* with firearms and a sword. The Chief Magistrate's Court at Mombasa concluded that since eight of the nine prosecution witnesses had not been at the scene at the time of the alleged incident, it could not use their testimonies to find the accused guilty. It had also been established that one witness who had been at the scene at the time of the alleged incident had never seen anyone attacking or firing at MV *Amira* from MV *Ishak* or disembarking from MV *Ishak* to the boat that had been used to launch an attack against MV *Amira*. Further, that witness had never identified any of the accused persons at the scene. Based on the discrepancy between the particulars of the charge and the evidence, the court had reiterated the key principle that guilt needs to be proved beyond a reasonable doubt.

101. During the hearing, the court had also found several inconsistencies with regard to the weapons that had allegedly been recovered from the accused persons. Similarly, the judge was concerned about the failure by the prosecution to produce in evidence the suspect skiff and boat or pictures (videos and photos taken from a helicopter flying over the scene). As a consequence, the court had found it difficult to link the accused persons to the offence with which they were being charged.

[234] High Court of Kenya, *Barre Ali Farah & 6 others v. Republic*, Criminal Appeal No. 166 of 2012, Judgment, 14 November 2013.

[235] Chief Magistrate's Court at Mombasa, *Republic v. Abdirashid Jama Gas and 16 others*, Case No. 1939 of 2009, Judgment, 5 November 2010.

102. From the foregoing, it is clear that the matter had not been properly investigated and prosecuted, as the circumstances required. In other words, very crucial evidence that would have been useful to the prosecution's case was never presented to court. The loopholes in the prosecution's case left the court with no option but to give the accused persons the benefit of the doubt. The offenders were therefore found not guilty of the offence and were acquitted.

103. In *Republic v. Jama Abdikadir Farah and 6 other*s,[236] the issue that arose in relation to acts of piracy was to determine whether Kenyan judges had jurisdiction to rule on acts of maritime piracy in the absence of a definition of such a crime in Kenyan law at the time of occurrence of the events. On 6 May 2009, the ship MV *Nepheli* had been sailing on the high seas in the Indian Ocean, along the recommended international corridor, when it had been attacked by gunfire from seven people in a boat, resulting in minor damage. The attacked ship had made a distress call. Through manoeuvres by MV *Nepheli*, the assailants had been exposed to the ship's propeller. The assailants had hit the propeller and had capsized. Responding to the distress call, a Spanish Navy vessel had sent a helicopter to the position of the attack. The helicopter had arrived finding seven people sitting on their capsized boat in approximately one to two nautical miles distance from MV *Nepheli*. Within thirty minutes, the Spanish Navy vessel had arrived and had instructed MV *Nepheli* to follow them back to the place of the attack. The seven people on the capsized boat had been rescued and arrested by the Spanish Navy. On 16 May 2009, the arrested persons and all photographs taken as evidence, as well as all evidence found on them, had been handed over to the Kenyan authorities.

104. It is important to point out that prior to the enactment of the Merchant Shipping Act of 2009, there was no statutory definition of the offence of piracy in Kenyan law. Therefore, the Chief Magistrate's Court at Mombasa made use, in that case, of the definition provided in article 101 of the United Nations Convention on the Law of the Sea, to which Kenya is a party.

105. In accordance with that instrument, it had to be determined whether the attack had taken place on the high seas and whether it had involved violence for private ends against another ship. The court held that the evidence collected, including weapons and a ladder with a special hook, the photographs reporting the inflicted damage, and the witness testimony describing the attack and subsequent arrest had confirmed the alleged facts of the charge. It was further argued that at no time between the attack and the arrest had the captain of MV *Nepheli* lost sight of the attacking vessel. Moreover, the sworn evidence given by the defendants that they had been transporting up to 45 people in their boat and thus were not pirates but human traffickers was not credible, considering the small size of the boat. The court therefore concluded that the prosecution had proved its case beyond a reasonable doubt and that the defendants had committed an act of piracy contrary to section 69, paragraphs 1 and 3, of the Penal Code. Each of the accused persons was found guilty of piracy and sentenced to four or five years' imprisonment.

106. In *Republic v. Liban Ahmed Ali & 10 others,*[237] as in the cases mentioned above, evidence of piracy was the issue before the judge. In that case, the merchant ship *Safmarine Asia* had been sailing on 14 April 2009 on the high seas, in the Indian Ocean, about 600 nautical miles off the coast of Somalia, when it had been attacked by 11 people on board two smaller boats and a mother ship. After three attempts, the assailants had abandoned their mission. The third attempt had involved the use of rocket launchers, causing minor damage to the *Safmarine Asia.* During the attack, the

[236] Chief Magistrate's Court at Mombasa, *Republic v. Jama Abdikadir Farah and 6 others,* Case No. 1695 of 2009.

[237] See footnote 224 above.

merchant ship had contacted its company's security officer, who had subsequently contacted the French Navy ship *Nivose,* which was patrolling the area. The *Nivose* had sent out a helicopter to track down the *Safmarine Asia*. By the time the helicopter arrived, the pirate ships were still on the merchant ship's radar. The helicopter had traced the pirate ships and had circled them until the *Nivose* was in position to pick them up on its radar and commence the pursuit. On the following day, the *Nivose* had been able to intercept the pirate ships and to arrest all 11 people on board. The recovered weapons and paraphernalia had included loaded firearms, knives and grappling hooks. The items had been confiscated and photographed. The firearms had been examined and their functionality had been determined. The mother ship had sunk when it had been towed to the port of Mombasa. On 22 April 2009, the 11 people arrested had been handed over to the Kenyan authorities and had subsequently been charged with the offence of piracy contrary to section 69, paragraphs 1 and 3, of the Penal Code. The accused persons had attempted to hijack the *Safmarine Asia*, thereby putting in fear the lives of the crew of the attacked vessel.

107. The Chief Magistrate's Court at Mombasa did not believe the claims of the accused persons that they had been attacked for no reason when they were going about their fishing activities. Referring to the consistent evidence and timeline, the fact that the assailants' ships had been constantly monitored from the time of the attack until the time of the arrest, and the plausible testimony of the witnesses, the court found it had been proved beyond a reasonable doubt that the accused persons had committed an act of piracy contrary to section 69, paragraphs 1 and 3, of the Penal Code. The court found the accused guilty of piracy and sentenced each to five years' imprisonment.

108. In *Republic v. Musa Abdullahi Said and 6 others,*[238] the central issue was the admission of evidence of acts of piracy. On 29 March 2009, a German Navy supply ship known as the *SPESSART* was in the Gulf of Aden. The ship was loaded with replenishments for the Navy ships attached to the Atlanta Mission. In its cargo were fuel, food and medical supplies, among other essentials. The crew aboard the ship was composed of marines who provided military security.

109. At about 14.50 hours, a signalman aboard said ship was on duty watch on the bridgeway when he observed a small boat which was in front of their ship about two to three nautical miles away, with about seven people aboard it. He informed the commanding officer, who was on the bridge. The boat was static, and the captain ordered that the ship change course for the sake of navigational safety. The skiff also started moving towards them. As the skiff approached the ship, a helicopter approached the skiff and fired a volley round at it, and that is when it stopped and its seven occupants raised their hands in surrender. The helicopter was at about one kilometre from the skiff and had flown over it.

110. In that case, the Chief Magistrate's Court at Mombasa admitted that from the evidence, it had no doubt that the offence of piracy as defined in section 69 of the Penal Code had been proved beyond a reasonable doubt, and that the evidence considered had shown clearly that the firing at the *SPESSART* had caused the crew to fear and return fire, and that it had sent a distress call to the other ships. Thwarted, the accused persons aboard the skiff had turned to sail off but the *SPESSART* had not let them, keeping them within its vicinity. The accused persons had clearly not reckoned with those on board the *SPESSART*, such that any firing at the *SPESSART* had been meant to attract the attention of its occupants. Yet, in their defence, the accused persons had all insisted that they had been involved in transporting people (illegal migrants) to different countries and they had never been at any point in the international traffic corridor. That lack of consistency had further buttressed the

[238] See footnote 224 above.

prosecution's case, and the only conclusion the court could reach was that the defence offered by all the accused persons had been an afterthought intended to exonerate them. The court also found no evidential value in that defence in the circumstances and dismissed the case. Finally, the court found that the prosecution had overwhelmingly proved the charge against each accused person in the case. Each of them was found guilty of piracy and sentenced accordingly to five years' imprisonment. The judge had reduced the sentence after taking into consideration the fact that the accused persons had followed rehabilitation programmes, including schooling up to university level.

111. The question of the admission of evidence came up in the case of *Republic v. Aid Mohamed Ahmed and 7 others*.[239] On 11 November 2008, on the high seas, in the Indian Ocean, the accused persons, being armed with rifles and a rocket launcher, had attempted to hijack a ship, MV *Powerful*. The captain of MV *Powerful* had raised a distress call, which had been answered by the coalition forces. Their intervention had resulted in the persons abandoning their mission, and being arrested and handed over to the Kenyan authorities. The Chief Magistrate's Court at Mombasa said that section 69, paragraph 1, of the Penal Code gave it jurisdiction to try the case. The court acknowledged that piracy *jure gentium* could be defined as follows:

> Everyone commits piracy by the law of nations who without legal authority from any state and without any colour of right:
>
> (a) seizes or attempts to seize any ship on the high seas within the jurisdiction of the Lord High Admiral by violence or by putting those in possession of such ship in fear.[240]

112. The judge found that the prosecution had proved beyond a reasonable doubt that the accused persons had attempted to hijack a ship using weapons and they had in fact put the crew in fear of their lives. Despite the existence of mitigating circumstances, the judge refused to reduce the sentence and imposed an even harsher and deterrent sentence. The judge said that it was common knowledge that piracy within the region had become a menace and therefore called for a deterrent sentence. Each accused person was sentenced to 20 years' imprisonment.

113. Like the previous cases, *Abdirahman Mohamed Roble & 10 others v. Republic*[241] concerned the admission of evidence of piracy. The particulars are that on 3 May 2009, on the high seas, in the Indian Ocean, two individuals armed with offensive weapons, namely two rifles, rocket launchers and a knife, attacked FNS *Nivose* and, at the time of such act, put in fear the lives of the crew of said vessel. The High Court, considering that the accused persons were first offenders and that they had been in remand for three years before their conviction, reviewed their sentence and reduced it to five years' imprisonment.

114. The case of *Republic v. Hassan Jama Haleys & 5 others*[242] gave rise to a comment on a fundamental principle of law, namely the right to a fair trial, even for individuals accused of maritime piracy, and their right to financial assistance for their defence. The judge said that "piracy trials" presented a unique challenge to the Kenyan legal system. It was impossible to ignore the fact that these were suspects who, having been arrested by foreign naval forces on the high seas, were brought to Kenya for trial. They were strangers in the country, did not understand the legal

[239] See footnote 222 above.

[240] *Republic v. Aid Mohamed Ahmed and 7 others* (see footnote 222 above), p. 22, citing Archbold, *Pleading, Evidence and Practice in Criminal Cases*.

[241] *Abdirahman Mohamed Roble & 10 others v. Republic* (see footnote 224 above).

[242] High Court of Kenya, *Republic v. Hassan Jama Haleys & 5 others*, Case No. 105 of 2010, Judgment, 15 July 2010.

system, did not know what their rights were and did not understand the language. With such barriers, the judge took the view that it was crucial that the Government of Kenya and the international partners that were supporting these trials put in place a system to provide free legal representation for the suspects in these piracy trials. That was the only way that their rights to a fair trial could be guaranteed.

115. In *Abdikadir Isey Ali & 8 others v. Republic,*[243] the appellants were found guilty and sentenced to seven years' imprisonment for the offence of piracy contrary to section 69, paragraph 3, of the Penal Code. On 22 May 2009, in the internationally recommended transit corridor on the high seas, in the Central Gulf of Aden, two individuals carrying offensive weapons, namely one rifle and three knives, had attacked a motor vessel, the *MARIA K,* and at the time of such act had put fear in the lives of the crew of said vessel.

116. Despite the gravity of the crime of piracy, this case illustrates the discretionary power of judges to reduce sentences based on the circumstances and the facts. The following comment reflects the requirement of clemency to be satisfied by a judge ruling on piracy cases:

> I find no fault in the exercise of discretion by the trial magistrate in sentencing the appellants to seven years imprisonment. He had correctly observed that piracy was a serious offence with national and international ramifications on security and international trade (commerce). It carries a maximum sentence of life imprisonment. The sentence of seven years cannot by any stretch of the imagination be deemed as harsh and excessive. It is instructive to note that times have changed in Somalia. Life is near normal. The ongoing programme to return the convicts in piracy cases back to Somalia so as to serve their remaining terms there ought and should be expedited. This will enable them to be visited by their families and relatives. It will also help decongest our prisons.[244]

*(b) Jurisprudence of Seychelles*

117. In the case of *Republic v. Abdi Ali and others,*[245] the *Intertuna II*, a Spanish fishing vessel registered in Seychelles, was fishing on 5 March 2010 on the high seas, with two of its own smaller boats deployed to sea, when a skiff with two armed persons having a ladder with hooks initially approached at high speed and attempted to seize the *Intertuna II*. Later, a whaler, with seven rifles, ammunition and rocket launchers aboard, approached, accompanied by two skiffs. The ammunition and other explosive material were photographed and destroyed. The skiffs and the whaler were acting on a prearranged plan and in a concerted manner when they approached the *Intertuna II*.

118. The Supreme Court of Seychelles found the accused persons guilty, based on section 65 of the Penal Code, which stipulated that "any person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force." The legislation of Seychelles also provides for the repression of attempted piracy, as set forth in section 23 of the Penal Code, which reads as follows: "When two or more persons form a common intention to prosecute an illegal purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence." The Court found that an act

[243] High Court of Kenya, *Republic v. Abdikadir Isey Ali & 8 others*, Criminal Appeal No. 163 of 2013, Judgment, 10 March 2015.

[244] Ibid.

[245] Supreme Court of Seychelles, *Republic v. Abdi Ali and others*, Case No. CO 14 of 2010, Judgment, 3 November 2010.

of piracy had been committed and that the accused persons were guilty as charged. This was a pirate ship masquerading as a whaler.

119. In *The Republic v. Mohamed Ahmed Dahir & Ten (10) others,*[246] 11 individuals were charged with acts of maritime piracy on the high seas under the provisions of the Penal Code and the Prevention of Terrorism Act 2004. A French surveillance aircraft had first spotted the suspects on a mother ship pulling two skiffs in a row, and had relayed the information to the *Topaz*, a patrol vessel of the Seychelles Coast Guard. The *Topaz* intercepted the pirates in the vicinity of a Seychelles Navy boat. They were arrested and charged with both acts of piracy and terrorism. In their defence, the accused persons claimed that they were fishermen and that they were fishing at the time of the incident, adding that they were only defending themselves against attack from the *Topaz*. The Supreme Court relied inter alia on the definition of piracy in the United Nations Convention on the Law of the Sea and on the evidence adduced at trial. It convicted the 11 accused persons on the count of piracy, reaffirming that such a crime was justiciable by the courts of every nation, based on the principle of universal jurisdiction provided for in general international law. The arresting State was therefore free to prosecute the suspected pirates and punish them if found guilty of piracy. In its judgment of 25 July 2010, the Court convicted the accused persons on multiple counts, including acts of piracy and acts of terrorism, under the Penal Code.

120. In *The Republic v. Mohamed Aweys Sayid and 8 others,*[247] the Supreme Court ruled on acts of piracy committed on 26 March 2010, when the vessel *Galate* was fishing for sea cucumber on the Lazino Bank about 98 nautical miles from Mahé. At about 6.30 a.m., whilst the crew was getting breakfast ready, a member had heard the sound of an outboard engine. He had seen a boat with men armed with rifles on board that was approaching the *Galate.* The boat had approached the side of the *Galate* where there was a ladder and four men had climbed on board the *Galate*. At the sight of the pirates, the distress button had been pressed to send signals indicating the position of the ship to the Coast Guard. The armed men had not asked for permission to come on board *Galate.* They had guns and were pointing the guns at the crew. The crew members had been told to come out of the cabin and made to kneel down. The four armed men had then proceeded to search the cabin and took watches, mobile phones, some food and some clothes.

121. The accused persons were found guilty of acts of piracy on the high seas, contrary to section 65 of the Penal Code, read with section 23. They were sentenced to terms of imprisonment of ten or eleven years, depending on the count.

122. In *The Republic v. Nur Mohamed Aden & 9 others,*[248] the Supreme Court ruled on acts of piracy, specifically on the notion of participation by the accused persons in the offence. According to the particulars of the case, four intruders armed with rifles had boarded the vessel *Faith* and had started harassing the fishermen and asking for money and other items. They had pointed guns at them, most of the time at their heads, and threatened to kill them. They had ordered the witnesses to take them to Somalia and threatened to cut their necks if the Government of Seychelles did not pay them $3 billion for their release. The assailants spoke in broken English while others used sign language or gestures. The two small boats had gone back and fetched more men and another, bigger boat had later joined them. All 11 men present on the three vessels had boarded the *Faith* with rifles and rocket-propelled grenades. In finding

[246] Supreme Court of Seychelles, *The Republic v. Mohamed Ahmed Dahir & 10 others*, Case No. 51 of 2009, Judgment, 25 July 2010.

[247] See footnote 223 above.

[248] Supreme Court of Seychelles, *Republic v. Nur Mohamed Aden & 9 others*, Case No. CO 75 of 2010, Judgment, 28 February 2011.

them guilty, the judge said he was convinced that the attack was well planned and coordinated. All the accused persons were found to be willing participants in the whole enterprise and none of them had provided any evidence of involuntary participation. It was a concerted effort by all the accused persons, from which common intention could be positively inferred. Each one of the accused persons was thus found guilty and convicted on piracy counts.

123. The Supreme Court case of *The Republic v. Mohamed Ahmed Ise & 4 others*[249] concerned a French-registered fishing vessel, the *Talenduic.* On the morning of 17 November 2010, said vessel had been attacked by armed men aboard two speeding attack skiffs. At the time of the attack, the *Talenduic* was near another vessel, the *Cap. Ste. Marie*, incapacitated due to a broken propeller. A member of the French Navy on board the *Talenduic* had sighted the first attack skiffs at 4 a.m., while on the lookout from the observation post, and had alerted the other persons on board. During the chase, the skiffs had fired several times at the *Talenduic* with automatic rifles and rocket-propelled grenades. The accused persons were given prison sentences ranging from 10 to 18 years, depending on the count, for acts of piracy.

124. In the case of *The Republic v. Abdukar Ahmed & 5 others,*[250] the six accused persons, armed with rifles and rocket-propelled grenades, had on 19 April 2011 captured and roughed up four Seychelles fishermen before ordering them to direct their vessel, the *Gloria*, towards Somalia. When intercepted, the accused persons had fired their guns at the Seychelles Coast Guard vessels *Andromache* and *La Flèche*, although the crew of the two vessels had sustained no injuries and the vessels had not been damaged. The *Gloria,* on the other hand, had been damaged and its crew had suffered immensely at the hands of the pirates, who had kept intimidating and threatening them during their captivity. They ate their food and exposed them to high risk of death, and at times used them as human shields. The fishermen were unarmed yet placed right in front of the fire. This had resulted in loss of human life and severe injuries. The accused persons were found guilty of acts of piracy, under section 65 of the Penal Code, read with section 23.

125. The relationship between domestic law and international law in dealing with acts of piracy arose in the case of *The Republic v. Houssein Mohammed Osman & 10 others.*[251] In that case, the accused persons, Somali nationals, had been arrested and prosecuted for attempting to attack a Seychelles-flagged fishing vessel, on the high seas, on board small speed boats and while being armed, in some cases with rocket launchers. They had only turned around after the security team on the vessel fired at them. They were charged with the crime of piracy and attempted piracy provided for and punished under the Penal Code. In convicting the accused persons, the Supreme Court based its decision on the provisions of the Penal Code. It also relied, albeit indirectly, on international law. It indicated that, even assuming that there was a legal vacuum in the country's criminal law as to the criminalization of piracy, the acts held against the accused persons would have still been prosecuted and punished by Seychelles courts on the basis that the principle of universal jurisdiction is applicable to acts of piracy on the high seas, based on various customary sources. The Court found the accused persons guilty of acts of piracy and convicted them as charged.

[249] *The Republic v. Mohamed Ahmed Ise & 4 others* (see footnote 223 above).

[250] Supreme Court of Seychelles, *The Republic v. Abdukar Ahmed & 5 others*, Case No. 21 of 2011, Judgment, 14 July 2011.

[251] Supreme Court of Seychelles, *Republic v. Houssein Mohammed Osman & 10 others*, Case No. CO 19 of 2011, Judgment, 12 October 2011.

126. In another case, *The Republic v. Liban Mohamed Dahir & 12 others,*[252] the Supreme Court had to consider the question of the jurisdiction of Seychelles courts to try some twenty individuals charged with the offence of piracy, set forth in sections 23 and 65 of the Penal Code. The particulars alleged that the accused persons, on 12 and 13 January 2012, on the high seas whilst in private boats, had intentionally committed acts of violence and armed robbery against persons on board another ship, *The Happy Bird*. In response to contention of lack of jurisdiction made by the defence, the Court recalled, in paragraph 7 of its decision, that the principle of universal jurisdiction is applicable to acts of maritime piracy committed on the high seas, noting that "besides, pirates have long been declared as enemies of mankind who have placed themselves beyond the protection of any State and can therefore be arrested, tried and punished pursuant to the municipal law of any country."

127. The accused persons were charged with the offence of piracy, under section 65, paragraph 4(a) of the Penal Code, read with section 23. According to the Court, all the accused persons had, on 12 January 2012, whilst on the high seas in a private ship, with common intention, committed an act of violence or an act of depredation for private ends against persons on board another ship, *The Happy Bird,* by illegally discharging firearms at said ship. On 13 January 2012, the accused persons had, on the high seas and with common intention, committed a voluntary act of participation in the operation of a ship with knowledge of facts making it a pirate ship. All the accused persons were acquitted on the first count due to lack of proof beyond a reasonable doubt. All but Burhan Yasin Ahmed were found guilty of acts of piracy. According to the particulars, *The Happy Bird* had been attacked on 12 January 2012 at approximately 12.15. The captain testified that his vessel had been approached from behind on either side by two skiffs travelling at high speed. He had then issued several alerts, the net result of which had been that all personnel had taken cover and the onboard security team, consisting of three armed guards, had taken up a position to the rear of the bridge. Triggering the alarm had also automatically sent out a distress call communicating the position of the vessel to coalition forces and maritime traffic reporting agencies. Though located some distance away, the *Carney* and the *Fort Victoria*, an American and a British warship, respectively, had responded to the distress call.

128. The Supreme Court also ruled on acts of piracy in *Republic v. Farad Ahmed Jama & 14 others*.[253] According to the testimony of the captain of the vessel MV *Sunshine*, persons in a small white boat had approached his vessel at a very rapid speed. Although no damage was done to the vessel, those persons were armed and had given chase to MV *Sunshine*, an oil tanker which was travelling at a speed of 13 knots.

129. The witness had seen the accused persons directing rocket-propelled grenades at the bridge of his vessel, with the intention to attack it. One of the assailants had directed a lethal weapon, namely a grenade launcher, at MV *Sunshine*. The crew had radioed for help, and the timely arrival of a naval helicopter had stopped any further illegal act of violence and damage being committed on the vessel. The Court found that piracy was contrary to the provisions of section 65, paragraph 1, of the Penal Code, read with section 23, and punishable under section 65. The accused persons were convicted for acts of piracy.

130. That case dealt with the criminal prosecution of 15 individuals of Somali nationality for committing acts of piracy, on the high seas, contrary to the provisions

[252] Supreme Court of Seychelles, *The Republic v. Liban Mohamed Dahir & 12 others*, Case No. 7 of 2012, Judgment, 31 July 2012.

[253] Supreme Court of Seychelles, *Republic v. Farad Ahmed Jama & 14 others*, Case No. 16 of 2012, Judgment, 5 November 2012.

of the Penal Code of Seychelles, notably section 65, as amended in 2010 and in force at the time of the events, which provides as follows in its paragraph 2: "Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy, whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles."[254] It should be noted here that, by this amendment, the customary principle of universal jurisdiction with regard to acts of piracy on the high seas was incorporated, to a certain extent, into the domestic law of Seychelles.

*(c) Jurisprudence of the United Republic of Tanzania*

131. In the case of *Republic v. Mohamed Adam & 6 others*,[255] the High Court of the United Republic of Tanzania had to consider acts of piracy committed on 3 October 2011, within the exclusive economic zone of the country. The defendants had attacked the oil and gas exploration vessel *Sams-All good* using firearms. The ship had been attacked by at least seven individuals, all suspected of being pirates of Somali origin. The attack had been reported and units of the Tanzanian Navy present in the area had immediately deployed to intercept the pirates. After the pirates were approached, there had been an exchange of fire before the Navy personnel were able to take control of the ship. The accused persons had approached and had fired on the vessel before taking control of it. The captain of the ship had seen the accused persons preparing to board the ship and had ordered his crew to hide in the machine room. He had then made a distress call and, a few minutes later, Tanzanian security personnel had arrived at the site of the attack, where the pirates had surrendered to the authorities. They had then been arrested and taken to the ship *Frobisher*.

132. According to the Court,

> the direct and circumstantial evidence is very clear that all the accused persons had the intention of committing a piratical act. The presence of exhibits P1 and P2 collectively in the *Sams-All good* shows that these were suitable piratical implements used by all the accused persons, lack of legal travel documents to South Africa, the couched similar evidence clearly demonstrates that all the accused persons had common knowledge of the skiff being a vessel with a purpose of committing piratical act. All the accused persons voluntarily participated in the operation of the destroyed skiff and all the accused persons were aware from Raskamboni the vessel they boarded was a pirate ship. Further, all the accused persons' intention to commit the piratical act can be established through the fire exchange with the navy forces despite the warning shots fired by the *Frobisher*.[256]

Consequently, taking into consideration the testimonies of the accused persons together with those of the prosecution, the High Court found that the version of events presented by the accused persons was improbable and a lie. The case was thus proved beyond a reasonable doubt. The accused persons had therefore committed acts of piracy.

133. In *Republic v. Median Boastice Mwale & 3 others,*[257] the High Court of the United Republic of Tanzania established a non-exhaustive list of predicate offences, which included piracy and armed robbery, stating as follows:

[254] Ibid.

[255] See footnote 221 above.

[256] Ibid., p. 65.

[257] High Court of the United Republic of Tanzania, *Republic v. Median Boastice Mwale & 3 others*, Case No. 77 of 2017, Judgment, 9 May 2019.

> What amount to predicate offences are enumerated in section 2 as to include illicit trafficking under the law relating to narcotic drugs, terrorism, illicit arms trafficking, organized crimes, trafficking of human beings and smuggling migrants, sexual exploitation, corruption, counterfeiting, armed robbery, theft, forgery, piracy, hijacking, tax evasion, illegal mining, environmental crime and so on.[258]

*(d) Jurisprudence of Mauritius*

134. In the case of *Police v. M.A. Abeoulkader & others*,[259] individuals of Somali nationality were charged in the courts of Mauritius with the crime of piracy on the high seas, in violation of section 3, paragraphs 1 (a) and 3, and of section 7 of the Piracy and Maritime Violence Act of 2011. At first instance, they had pleaded not guilty and, by judgment of 6 November 2014, they had been released by the Intermediate Court, which found that the crime of piracy had not been proved. The Supreme Court upheld the Government's appeal. After recalling that the definition adopted by the law of Mauritius was an exact replica of the definition contained in the United Nations Convention on the Law of the Sea, the Supreme Court noted that the elements of the offence were identical in the two texts. It pointed out that the definition contained in article 101 of the Convention was recognized as a provision codifying customary international law and that States are bound by said instrument as customary international law, even if they have not ratified it. Accordingly, the Supreme Court recognized the value of the provisions of the United Nations Convention on the Law of the Sea as customary norms, even if the application of the Convention had not been directly decisive in its judgment.

*(e) Jurisprudence of other States*

135. In addition to these four countries, namely Kenya, the United Republic of Tanzania, Seychelles and Mauritius, other African States such as Botswana and Liberia have issued decisions concerning acts of piracy. In Botswana, there has been no decision on the merits in a case concerning piracy, since the Court of Appeal has simply enumerated serious crimes, including piracy. In the case *Ntesang v. The State*,[260] the judge said the following:

> At this juncture I would like to note that the major offences for which the death penalty is available in this country apart from murder are: treason under section 35; instigating foreigners to invade the country (which indeed is also a form of treason), under section 36 of the Penal Code; and piracy of an aggravated type, under section 63, paragraph 2 of the Code.[261]

136. In Liberia, there has been one decision on the merits in a case of piracy that dates back to the start of the twentieth century, namely *Kra v. Republic of Liberia*.[262] In that case, the Supreme Court found the accused person guilty of acts of piracy committed in 1903. The case involved a ship belonging to an ally that capsized off the coast of Liberia and had been attacked by a pirate who had stolen a significant sum of money. The accused person admitted to having committed acts of piracy on the wrecks at points far from the coast, and was found guilty of piracy and convicted to pay a fine of three thousand dollars. If he failed to pay the fine, he would be

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[258] Ibid., p. 26.

[259] Intermediate Court of Mauritius, *Police v. M. A. Abdeoulkader & others*, Case No. 850/2013, Judgment, 14 July 2016.

[260] Botswana Court of Appeal, *Ntesang v. The State*, Criminal Appeal No. 57 of 1994, Judgment, 30 January 1995, [1995] BWCA 12, [1995] BLR 151 (CA).

[261] Ibid.

[262] See footnote 218 above.

imprisoned for a term of five years. However, in the case where murder is involved, the term is imprisonment for life.[263]

137. It is clear that the majority of acts of piracy take place around the Horn of Africa, as well as in the Gulf of Guinea, and yet no jurisprudence has been recorded in these two regions. Most of the decisions have been issued in Seychelles, Mauritius, Kenya and the United Republic of Tanzania. African judges impose heavy penalties for the crime of piracy. The prohibition of piracy has been characterized as a *jus cogen*s norm, notably in Seychelles.[264] Most of the decisions were issued in the 2000s. The facts are often similar, generally involving armed Somali pirates who attack foreign ships to steal merchandise found on board or to kidnap crew members or other persons on board. Furthermore, it is difficult to talk about a general practice of African States, owing to the dearth of jurisprudence. Yet, it is in Africa that acts of piracy are most recurrent. As reported by the newspaper *Le Mond*e, "Southeast Asia and the Gulf of Guinea saw nearly the same number of incidents in 2020, but 623 out of the world's 631 seafarers affected by kidnapping in 2020 (99 per cent) were working in the Gulf of Guinea."[265] In those cases, questions of jurisdiction arose because several States were involved, owing inter alia to the nationality of the attacked ships, the victims or the perpetrators of the acts of piracy.

## B. Approach of judges in criminal cases with regard to the interpretation of article 101, sentencing and the interpretation of the principle of universal and/or national jurisdiction

### 1. Judges and the interpretation of article 101

138. Landlocked African States are indirectly affected by piracy, since, unlike coastal States, they do not have a coastline that can give them access to the sea. Research shows that there is little or no jurisprudence on piracy in those States. Indeed, only Kenya, Seychelles, Mauritius, Liberia and the United Republic of Tanzania have issued decisions that actually concern maritime piracy. These States have access to the sea and have a legislative framework pertaining to the crime of piracy, which is punishable under each of their criminal laws. Those laws also recognize the jurisdiction of these States to repress piracy on the basis of universal jurisdiction.

139. The jurisprudence available to date shows that African judges either use the definition of piracy contained in their penal codes, or refer to the definition contained in article 101 of the United Nations Convention on the Law of the Sea. As seen in the previous section dealing with legislative practice, most African States contemplate and criminalize maritime piracy and armed robbery at sea in their domestic law. While these are two very distinct forms of crime at sea, judicial practice tends to treat them as equivalents, which is not in accord with their respective realities. In factual situations involving armed robbery at sea, the impugned acts tend to be characterized as acts of maritime piracy even when they are committed in waters under State sovereignty, within which the majority of them take place, although they cannot legally be characterized as such. Under international law, even though such acts contain all the elements of maritime piracy, they can only be characterized as armed robbery.

[263] Liberia, *Compiled Statutes of Liberia*, sect. 11, p. 145.

[264] *Republic v. Nur Mohamed Aden & 9 others* (see footnote 248 above); and *The Republic v. Abdukar Ahmed & 5 others* (see footnote 250 above).

[265] P. Lepidi, "Face à la piraterie maritime dans le golfe de Guinée, la riposte s'organise", *Le Monde*, 8 December 2021, citing the report of Stable Seas entitled "Pirates of the Gulf of Guinea: A Cost Analysis for Coastal States", November 2021, p. 3.

140. Kenyan courts have issued decisions that explicitly refer to the definition contained in article 101 of the United Nations Convention on the Law of the Sea. In fact, the Chief Magistrate's Court at Mombasa has stated that the definition contained in the Convention was the model used in the drafting of the Merchant Shipping Act 2009, since there was no legal definition of the offence of piracy in Kenyan law.[266] The courts therefore clarify how the various provisions of article 101 of the Convention are interpreted in Kenyan law. According to the High Court of Kenya, the main criterion for piracy is the pursuit of private ends, as set out in paragraph (a) of article 101 of the Convention. The High Court has equated this to the pursuit of "personal greed" or "personal vengeance". Thus, a person who commits an illegal act of violence or detention or any depredation shall not be a pirate if the act is committed for public ends.[267]

### 2. Judges, sentencing and the interpretation of universal and/or national jurisdiction

141. In Seychelles, the Penal Code contemplates the offence of piracy in its section 65 and refers to the notion of "crime", stipulating that any person who commits an act of piracy shall be guilty of a crime punishable according to the law in force. In Kenya, section 69 of the Penal Code has been used to punish the crime of piracy.[268] At the continental level, in Seychelles[269] and Kenya,[270] imprisonment is the most common penalty, with sentences ranging from 5 years to 30 years. Kenya mostly imposes less severe sentences, ranging from 4 years to 10 years of imprisonment when, for example, the attack against a ship partially fails.[271] Only the United Republic of Tanzania imposes a penalty of imprisonment for life.[272] In addition, Liberian jurisprudence shows that an individual found guilty of the crime of piracy may be liable to a fine of only 500 dollars.[273]

142. Some African States contemplate the payment of a fine;[274] others contemplate a prison sentence,[275] while others contemplate the death penalty.[276] However, in the latter scenario, there is no case indicating that a judge has already issued a judgment to that effect. There is also a regional legislative framework concerning piracy, comprising the Yaoundé Code of Conduct, the Djibouti Code of Conduct and the African Charter on Maritime Security, Safety and Development in Africa (Lomé Charter). However, these different sources of law are not used by African judges in the judgments surveyed. National law is the preferred choice of Kenyan[277] and

[266] See *Republic v. Jama Abdikadir Farah and 6 others* (footnote 236 above).
[267] See *Omar Shariff Abdalla v. Corporate Insurance Co. Ltd* (footnote 232 above).
[268] Section 69 of the Penal Code of Kenya was repealed in 2009; it is now the Merchant Shipping Act, of the same year, that defines and criminalizes piracy.
[269] See *The Republic v. Mohamed Ahmed Ise & 4 others* (footnote 223 above); and *Republic v. Mohamed Aweys Sayid & 8 others* (footnote 223 above).
[270] See *Abdikadir Isey Ali & 8 others v. Republic* (footnote 243 above); and *Republic v. Aid Mohamed Ahmed and 7 others* (footnote 222 above).
[271] See *Republic v. Musa Abdullahi Said and 6 others* (footnote 224 above); and *Republic v. Liban Ahmed Ali & 10 others* (footnote 224 above).
[272] See *Republic v. Mohamed Adam & 6 others* (footnote 221 above).
[273] See *Kra v. Republic of Liberia* (footnote 218 above).
[274] Algeria, Côte d'Ivoire, Niger, Nigeria, Sao Tome and Principe, Senegal, Seychelles and South Africa.
[275] Algeria, Benin, Botswana, Chad, Côte d'Ivoire, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Liberia, Malawi, Mauritania, Mozambique, Niger, Sao Tome and Principe, Seychelles, Somalia, South Africa and United Republic of Tanzania.
[276] Botswana, Congo, Eritrea and Ethiopia.
[277] See *Republic v. Jama Abdikadir Farah and 6 others* (footnote 236 above); and *Republic v. Liban Ahmed Ali & 10 others* (footnote 224 above).

Seychelles[278] judges, who can invoke the provisions of their respective penal codes when trying pirates. For example, in Seychelles, section 65 of the Penal Code contains provisions that specifically deal with piracy and punish it with the penalties discussed above.

143. African judges have often referred to the principle of universal jurisdiction in their judgments in States where they have had to rule on cases of piracy. A pirate is considered an outlaw, the enemy of all humanity (*hostis humani generis)*. According to some judgments, when the crime is committed on the high seas, it is beyond the protection of any State. Thus, any nation can, in the interests of all, capture, prosecute and punish pirates. In Seychelles, for example, in several judgments, the courts use the expression *hostis humani generi*s to condemn piracy.

144. Finally, there are cases where judges briefly mention piracy or armed robbery at sea but without such acts being the main subject of their decision. For example, in Zimbabwe, murder in the context of piracy is considered an aggravating circumstance under section 47, paragraph 2, of the Criminal Law (Codification and Reform) Act. Murder is also an aggravating circumstance of piracy.[279] In Botswana, piracy is one of the serious offences carrying the death penalty. Section 63, paragraph 2, of the Penal Code stipulates that aggravated piracy is punishable by the death penalty.[280] In Liberia, a person is guilty of murder if he or she causes the death of another human being in circumstances manifesting extreme indifference for the value of human life. A rebuttable presumption that such indifference exists arises if the defendant is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, treason, offenses defined in the Code of Laws, including piracy, or any other felony involving force or danger to human life.[281] Moreover, "a law that characterizes as piracy theft committed 'by any person or persons' on the high seas has been held not to include the subjects of a foreign power who, in a foreign ship, committed theft on the high seas."[282] In Sierra Leone, piracy is punished in the same way as the sale of women and children, as well as slavery.[283]

[278] See *Republic v. Farad Ahmed Jama &14 others* (footnote 253 above).

[279] See High Court of Zimbabwe at Harare, *S v. Jambura,* Case No. HH 407 of 2020 and CRB 122 of 2019, Decision, 10 June 2020, [2020] ZWHHC 407); High Court of Zimbabwe at Harare, *Mugwadi v. Dube & others,* Case No. HC 6913 of 2011, Decision, 17 June 2014, [2014] ZWHHC 314; High Court of Zimbabwe at Bulawayo, *S v. Moyo,* Case No. HB 240 of 2020 and HC CRB 64 of 2020, Decision, 16 October 2020, [2020] ZWBHC 240; and High Court of Zimbabwe at Bulawayo, *S v. Mathe*, Case No. HB 26 of 2017, HC CRB 90 of 2014 and XREF GOKWE CR 163 of 2008, Decision, 25 June 2017, [2017] ZWBHC 26.

[280] See *Ntesang v. The State* (footnote 260 above).

[281] Supreme Court of Liberia, *Melton v. RL,* Decision, 10 February 1909, [1909] LRSC 6, 2 LLR 25 (1909).

[282] Supreme Court of Liberia, *Buchanan v. Arrivet*s, Decision, 4 May 1945, [1945] LRSC 2, 9 LLR 15 (1945); and Supreme Court of Liberia, *Johns v. Pelham et al.*, Decision, 4 May 1944, [1944] LRSC 15, 8 LLR 296 (1944).

[283] Special Court for Sierra Leone, *Prosecutor v. Moinina Fofana & Allieu Kondewa,* Case No. SCSL-04-14-A, Appeal Chamber, Decision, 28 May 2008, para. 563, citing *Prosecutor v. Taylor*, decided by the same court.

# III. Piracy and armed robbery at sea in Asia

145. The countries in Asia that are not mentioned in this report have no definition of piracy and armed robbery at sea.

## A. Legislative and judicial practices

### 1. Legislative practice

*(a) Definition of maritime piracy and armed robbery at sea*

146. Although many States in Asia have direct access to the ocean, only 16 States[284] have defined maritime piracy in their national laws. Of these, two States[285] have reproduced the definition of piracy as set out in the United Nations Convention on the Law of the Sea. Of the two, India also included a clarification in the text of a draft law stating that the definition of piracy applies to any act deemed piratical under customary international law. Only two States have a definition of armed robbery at sea, but it is not the one set forth in the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships. Of the 16 States that have a definition of maritime piracy, some have reproduced one or more elements of the definition given in article 101 of the Convention.

147. The definitions used by Singapore, Malaysia and the Philippines have some interesting features. First, the Supreme Court of the Straits Settlements, which had jurisdiction over Singapore and Malacca when they were territories administered by the United Kingdom, applied the common law definition of piracy: "Piracy by the law of nations is taking a ship in the high seas or within the jurisdiction of the Lord High Admiral from the possession or control of those who are lawfully entitled to it, and carrying away the ship itself, or any of its goods, tackle, apparel, or furniture, under circumstances which would have amounted to robbery if the act had been done within the body of an English county".[286]

148. Second, despite the United Nations Convention on the Law of the Sea being in force, the Supreme Court of the Philippines has used the definition of maritime piracy given in section 2 (d) of Presidential Decree No. 532.[287] Given that this definition applies only to acts committed in the territorial waters of the Philippines, it is, according to a *stricto sensu* interpretation of the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, a definition of armed robbery at sea, not piracy, which, from a legal standpoint, is perpetrated in international waters, namely on the high seas, in the exclusive economic zone or in the contiguous zone. Consequently, under Philippine law, piracy is equated to armed robbery at sea, without regard to the place of commission of the crimes. The Decree states:

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[284] Armenia, Bangladesh, India, Japan, Kazakhstan, Lao People's Democratic Republic, Oman, Philippines, Republic of Korea, Singapore, Sri Lanka, Syrian Arab Republic, Tajikistan, Thailand, Viet Nam and State of Palestine.

[285] Bangladesh and India.

[286] Supreme Court of the Straits Settlements, *Regina v. Nya Abu & others*, decision, 15 June 1886, cited in J. W. N. Kyshe, eds., *Cases Heard and Determined in Her Majesty's Supreme Court of the Straits Settlements 1808-1890*, vol. 4 (1885-1890), Singapore, Singapore and Straits Printing Office, 1890, p. 169; see also *Rex v. Dawson et al.* (1696), reproduced in T.B. Howell, ed., *A Complete Collection of State Trials and Proceedings…*, vol. 13, London, T. C. Hansard, 1812, pp. 451–484.

[287] The Philippines, Presidential Decree No. 532 (8 August 1974), sect. 2, para. (d). See also Supreme Court of the Philippines, *People of the Philippines v. Emiliano Catantan y Tayong*, Case No. 118075, Decision, 5 September 1997.

> Any attack upon or seizure of any vessel, or the taking away of the whole or part thereof or its cargo, equipment, or the personal belongings of its complement or passengers, irrespective of the value thereof, by means of violence against or intimidation of persons or force upon things, committed by any person, including a passenger or member of the complement of said vessel, in Philippine waters, shall be considered as piracy.[288]

149. States in this region have reproduced in their national laws, in whole or in part, the elements of piracy included in the United Nations Convention on the Law of the Sea. Ten States[289] use the expressions "any act of violence", "detention" and "depredation"; ten States[290] use the element "against another ship" and the terms "against property/persons on board a ship"; three States use the expressions "committed by the crew or the passengers of a ship", "for private ends", "on board a ship knowing that it is used for piracy (complicity/voluntary participation)" and "incitement to piracy"; and five States[291] specify that piracy is committed "on the high seas or outside the jurisdiction of any State".

150. Piracy is defined in general terms in the Criminal Code of Armenia,[292] which does not reproduce all the elements of the definition in article 101 of the United Nations Convention on the Law of the Sea, in particular, the two-ship requirement, the private-ends requirement and the high seas or maritime spaces outside the jurisdiction of any State as the place of commission of piracy. In fact, the word "piracy" does not appear in the text of the relevant article of the Code, which includes only general references to some elements of the definition of piracy contained in article 101 of the Convention. The Code uses the expression "attack on a sea ship or a river ship",[293] but it does not specify where at sea the attack might take place. This could be interpreted as a general reference to all maritime zones whatever their legal status or regime. Piracy can thus be committed on the high seas or in territorial waters. The penalties range from 5 to 10 years' imprisonment. The Code does not provide for imprisonment for life even in cases involving loss of life or other serious consequences. Armed robbery at sea is not criminalized.

151. Azerbaijan, by contrast, has defined armed robbery at sea in its Criminal Code,[294] but not piracy. Armed robbery at sea is defined as an attack on a sea ship or a river ship for the purpose of seizing another person's property with the use or threat of violence. A broad interpretation of article 219-1-1 of the Criminal Code might indicate that armed robbery at sea includes piracy, which, like armed robbery, can be committed both on the high seas and in territorial waters. For its part, Kazakhstan has defined piracy, but not armed robbery at sea. Under its Criminal Code,[295] piracy is defined as an attack directed against a sea vessel or a river vessel for the purpose of seizing another person's property with the use or threat of violence.

152. The Territorial Waters and Maritime Zones Act[296] of Bangladesh contains definitions of both piracy and armed robbery at sea. The Act reproduces all the elements of the definition of piracy set out in article 101 of the United Nations Convention on the Law of the Sea and stipulates that this crime is committed in the

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[288] The Philippines, Presidential Decree No. 532 (8 August 1974), sect. 2, para. (d).

[289] Armenia, Bangladesh, India, Japan, Kazakhstan, Lao People's Democratic Republic, Philippines, Republic of Korea, Sri Lanka and Tajikistan.

[290] Armenia, Bangladesh, India, Japan, Kazakhstan, Lao People's Democratic Republic, Philippines, Republic of Korea, Sri Lanka and State of Palestine.

[291] Bangladesh, India, Japan, Philippines and Thailand.

[292] Armenia, Penal Code (2003), art. 220.

[293] Ibid. (emphasis added).

[294] Azerbaijan, Penal Code, art. 219-1-1.

[295] Kazakhstan, Penal Code, art. 271.

[296] Bangladesh, Territorial Waters and Maritime Zones Act (1974), sect. 9.

exclusive economic zone and on the high seas.[297] With regard to armed robbery at sea, the Act indicates that it is committed in internal waters and the territorial sea.[298] The Islamic Republic of Iran, by virtue of the general provisions contained in articles 653 and 683 of its Penal Code, criminalizes acts of piracy as being punishable under the Sharia laws of Islam. Article 185 of the Code concerns armed robbery and highway robbery. It provides that any person who, in committing such crimes, puts public safety in danger with the use of weapons that instil fear and terror is considered a "mohareb" under Islamic law and is subject to the death penalty. The overbroad provisions of the Code, which do not expressly link maritime piracy to the high seas, would indicate that the crime can be committed anywhere in the marine environment. Armed robbery at sea is criminalized under article 185 of the Penal Code, although it is not defined earlier in the Code. In India, an anti-piracy bill[299] introduced in 2019 reproduces the definition contained in article 101 of the Convention. India does not, however, have a law that criminalizes armed robbery at sea. The penalties are set out in articles 3 to 7, but it would appear that the anti-piracy bill has not yet been adopted. Indonesia,[300] Israel,[301] Lebanon[302] and Oman[303] have no laws that contain a definition of piracy, which is nonetheless criminalized in their respective penal codes.

153. In Japan, the Anti-Piracy Measures Act[304] reproduces the definition of piracy as set out in article 101 of the United Nations Convention on the Law of the Sea. Under the Act, the elements of the crime of piracy are that it must be committed for private ends, on the high seas and involving two ships. The place of commission of piracy is not limited exclusively to the high seas, as the Act allows for the crime to be committed in the territorial sea and the internal waters of Japan. Armed robbery at sea is not criminalized. There are no provisions in the Act indicating that Japan intends to exercise the principle of universal jurisdiction for the repression of piracy. Kuwait has criminalized piracy on the basis of its Penal Code,[305] without having defined it first, and has not criminalized armed robbery at sea. The State of Palestine has both defined and criminalized piracy in its Penal Code.[306] However, the definition appears to be rather broad, as it also criminalizes any crime that may be associated with piracy or be considered an act of piracy, which is itself treated as being equivalent to robbery punishable by a term of imprisonment for life. As the Penal Code does not specify the place of commission of piracy, the territorial element of the definition of piracy can be understood in the broad sense as encompassing all maritime spaces as places of commission of piracy, without necessarily distinguishing between the high seas and other maritime spaces. The Penal Code establishes the right of Palestine to exercise universal jurisdiction to the extent that the State considers itself to have the power to prosecute any person who commits an act of piracy or any other related crime and to apply the penalty of imprisonment for life. Although the Syrian Arab Republic defines and criminalizes piracy,[307] it has no statutes concerning armed robbery at sea. The Republic of Korea has a legal definition of piracy, but it does not reproduce all the elements of the definition of piracy set out in article 101 of the Convention. Under its Penal Code,[308] piracy is a threat at sea directed by one ship against another ship for

[297] Ibid., para. (a) (i).
[298] Ibid., para. (b) (i).
[299] India, Anti-Maritime Piracy Bill (2019), art. 2 (f).
[300] Indonesia, Penal Code, art. 439.
[301] Israel, Penal Law, Act No. 5737-1977, chap. 8, art. 6.
[302] Lebanon, Penal Code, art. 641 (1943).
[303] Oman, Royal Decree No. 7/2018 promulgating the penal law, arts. 160–161.
[304] Japan, Anti-Piracy Measures Act, art. 2.
[305] Kuwait, Act No. 16 of 1960 promulgating the Penal Code, art. 74.
[306] State of Palestine, Penal Code Act (1936), art. 78.
[307] The Syrian Arab Republic, Law No. 35 of 2018, amending some provisions of Law of the Sea No. 28 of 2003, art. 41.
[308] The Republic of Korea, Penal Code (1953), art. 340.

the purpose of seizing property after forcibly boarding the ship. The use of the threat of collective force is an element of the crime of piracy, regardless of where at sea the crime is committed, as the Penal Code does not specify whether an act of piracy takes place on the high seas or elsewhere at sea. The applicable penalty is imprisonment for life or for a minimum term of seven years. There is no statute that defines and sets a penalty for armed robbery at sea.

154. The act of piracy is defined in the Penal Code of the Lao People's Democratic Republic[309] as an attack by any person directed against a sea ship in a place outside the jurisdiction of any State. The penalty is imprisonment for life and fines commensurate with the gravity of the attack. Preparing or attempting to carry out an act of piracy are punishable offences. The Code appears to provide for the exercise of universal jurisdiction, as any person committing the impugned act in an area outside the jurisdiction of any State may be prosecuted. Armed robbery at sea is not criminalized. In Singapore, an Act that dates from the nineteenth century[310] contains a very concise definition of piracy that reads: "A person commits piracy who does any act that, by the law of nations, is piracy." This general formulation can be interpreted broadly as reflecting the provisions of article 101 of the United Nations Convention on the Law of the Sea and as expanding the geographical scope of the crime scene to include all maritime spaces without differentiating between the high seas and maritime zones within national jurisdiction. Armed robbery at sea is not criminalized. Sri Lanka has passed the Piracy Act,[311] in which piracy is defined as an act committed by any person who appropriates a ship by means of theft and illegal force, intimidation or fraud. The penalty is a term of imprisonment ranging from 5 to 10 years, according to the case, and the payment of fines. Armed robbery at sea is not criminalized.

155. Tajikistan defines piracy as an attack, a threat or an act of violence directed against a watercraft and gives no further detail. The word "ship" is not used in the country's Penal Code,[312] which contains no direct references to the maritime zones where piracy may be committed. The Code does not reproduce the terms used in article 101 of the United Nations Convention on the Law of the Sea. The penalty is a term of imprisonment ranging from 5 to 20 years. Armed robbery at sea is not criminalized.

156. In Thailand, the Prevention and Suppression of Piracy Act[313] defines piracy as any act of robbery committed on the high seas or in the exclusive economic zone of any State by a person on board a private ship or aircraft and directed against another private ship or aircraft. Under the Act, the term "piracy" appears to include or encompass the crime of armed robbery at sea. The crime must be committed on the high seas or in the exclusive economic zone.[314] The legislation of Türkiye criminalizes piracy and armed robbery at sea.[315] The country's Penal Code includes procedural and substantive provisions on the repression of these two forms of crime committed at sea. Under article 8, paragraph 2, of the Code, Turkish courts can exercise territorial jurisdiction over crimes committed in the territorial sea and also beyond it on the open sea when ships flying the Turkish flag are used to commit the illegal act of piracy or

[309] The Lao People's Democratic Republic, Penal Code No. 13/2017, art. 159.
[310] Singapore Penal Code, chap. VIA [with reference to the Admiralty Offences (Colonial) Act of 1849], art. 130B.
[311] Sri Lanka, Act No. 9 of 2001 on piracy, art. 3.
[312] Tajikistan, Penal Code (1998), art. 183.
[313] Thailand, Prevention and Suppression of Piracy Act, B.E. 2534 (1991), sect. 4.
[314] Ibid., para. (d).
[315] See https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_penal_criminal_procedure.pdf (with reference to the Penal Code of Türkiye, art. 8, para. 2; art. 12; and art. 13, para. 1).

are the targets of criminal activity. In the case of persons who have committed or are suspected of having committed acts of piracy and armed robbery at sea, article 12 of the Penal Code provides that particularly serious crimes can be prosecuted by Turkish courts regardless of the nationality of the accused. Article 13, paragraph 1, of the Code establishes the power of Türkiye to exercise universal jurisdiction for the prosecution of crimes committed abroad, regardless of the nationality of the accused. The Code specifically mentions the crimes of piracy and armed robbery at sea, without explicitly defining them and without reproducing all the elements of the definition contained in article 101 of the United Nations Convention on the Law of the Sea, a convention to which Türkiye is not party. Türkiye intends to prosecute pirates under its domestic law in exercise of universal jurisdiction on the basis of article 13, paragraph 1, of its Penal Code.

157. Viet Nam defines maritime piracy in its Criminal Code[316] as an attack directed against a ship, an aircraft or any other maritime vessel at sea or in an area that is outside the jurisdiction of any nation. Other elements of the crime of piracy are the act of attacking people on a ship, aircraft or another maritime vehicle or capturing them at sea or in an area outside national jurisdiction and that of robbing property on board the ship in the same area, namely at sea. The penalties consist of terms of imprisonment ranging between 5 and 20 years, depending on the gravity of the consequences, with the highest penalty being imprisonment for life in the most serious cases. Although armed robbery at sea is not expressly defined, it could be subsumed under the general term "piracy". Having set out the penalties in this manner, Viet Nam has asserted its power to exercise universal jurisdiction over maritime piracy crimes. The law of the Philippines defines piracy in general and mutiny as two crimes that can be committed on the high seas or in Philippine waters[317] and that are also considered acts of terrorism under Presidential Decree No. 532 of 1974.

*(b) Preventive and repressive measures*

158. Many States in Asia have taken preventive measures at the national level. Seventeen States have maritime authorities or naval forces responsible for security at sea and at ports.[318] At the bilateral and regional levels, there are 18 joint initiatives involving the naval forces of two or more States.[319] Eight States have also taken part in activities relating to the handling of threats to maritime security, including piracy and armed robbery at sea.[320] In addition, five States in Asia have implemented

[316] Viet Nam, Penal Code (2015), art. 302.

[317] Philippines, Act No. 3815 of 8 December 1930 revising the Penal Code, art. 122. See also https://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/PHL.htm#piracy.

[318] Brunei Darussalam, China, India, Iran (Islamic Republic of), Jordan, Kazakhstan, Malaysia, Maldives, Mongolia, Pakistan, Republic of Korea, Singapore, Timor-Leste, Turkmenistan, Türkiye, Viet Nam and Yemen.

[319] Azerbaijan-Iran (Islamic Republic of), Brunei Darussalam-Australia, Brunei Darussalam-United States, Cambodia-Thailand-Viet Nam, China-Malaysia, China-Viet Nam, Indonesia-Malaysia-Philippines, Maldives-India-Sri Lanka, Mongolia-Viet Nam, Oman-India, Oman-Iran (Islamic Republic of), Oman-Pakistan, Oman-United States, Qatar-India, Qatar-Türkiye, Singapore-Malaysia-Thailand-Indonesia, Timor-Leste-Australia and Viet Nam-Cambodia.

[320] China (delegation sent to a maritime security conference on the Strait of Malacca), India (implementation of guidelines on recommended piracy repression measures), Iran (Islamic Republic of) (participation in the Regional Seapower Symposium in Venice), Israel (participation in a meeting organized by the United States on combating maritime security threats along maritime routes in the Persian Gulf), Japan (participation, with India and Malaysia, in simulations of rescue operations in situations involving piracy, designed by the Coast Guard of Japan, and organization, by the Coast Guard of Japan and the Nippon Foundation, of meetings of experts on combating piracy and armed robbery at sea), Singapore (distribution of circulars on piracy and armed robbery against ships and on adapting best management practices to discourage

navigation security and surveillance systems.[321] Israel has gone a step further, becoming the only State in Asia to have granted captains of ships exclusive powers under its national law with respect to defence, arrest, investigation and seizure.[322]

159. With regard to penalties for crimes of piracy, only 20 States[323] in Asia have penalties specifically for maritime piracy and only 2 States[324] have penalties specifically for armed robbery at sea, while 43 States[325] have no penalties for armed robbery at sea. The existing penalties vary from State to State. Sixteen States call for imprisonment,[326] of which seven States call for life imprisonment,[327] four States call for the death penalty,[328] four States call for penalties in the form of fines[329] and one State, Japan, calls for penalties involving forced labour.

160. The use of violence, murder and manslaughter have often been cited as aggravating factors. Three States have not specified any aggravating factors in their laws,[330] while 14 States provide for penalties of varying severity according to the gravity of the offence.[331] Three States provide for the confiscation of the ship.[332]

161. Regional agreements in Asia contemplate the application of penalties for acts of piracy and armed robbery at sea. In article 3 on general obligations of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, the contracting parties are encouraged to take the necessary measures to repress acts of piracy and armed robbery, including by arresting pirates and the seizing ships used to commit piracy or armed robbery. There are, however, no articles in which specific penalties are recommended for inclusion in national laws. Based on article 3

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piracy in high risk areas and strengthen maritime security in the Red Sea, the Gulf of Aden, the Indian Ocean and the Arabian Sea), Sri Lanka (hosting of the Galle Dialogue international maritime conference and requirement that employees in the commercial shipping industry complete training on the crime of piracy) and Turkmenistan (participation in five-day training course on piracy organized by the Organization for Security and Cooperation in Europe).

[321] Indonesia (implementation of a vessel traffic system to monitor ship navigation at sea and at ports), Oman (establishment of a maritime security centre), Qatar (Qatar Maritime Security Coastal and Border Surveillance Conference), Thailand (Maritime Enforcement Command Center (ThaiMECC)) and Timor-Leste (Maritime Authority System).

[322] Israel, Maritime Law (Offences Against the Safety of International Maritime Navigation and Maritime Installations) (2008); see also communication from the Permanent Representative of Israel to the United Nations dated 22 February 2010. Available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ISR_anti_piracy.pdf.

[323] Armenia, Bangladesh, India, Indonesia, Israel, Japan, Kazakhstan, Kuwait, Lao People's Democratic Republic, Lebanon, Oman, Philippines, Republic of Korea, Singapore, Sri Lanka, Syrian Arab Republic, Tajikistan, Thailand, Viet Nam and State of Palestine.

[324] Azerbaijan and Bangladesh.

[325] Armenia, Bahrain, Bhutan, Brunei Darussalam, Cambodia, China, Democratic People's Republic of Korea, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Japan, Jordan, Kazakhstan, Kyrgyzstan, Kuwait, Lao People's Democratic Republic, Lebanon, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Oman, Pakistan, Philippines, Qatar, Republic of Korea, Saudi Arabia, Singapore, Sri Lanka, Syrian Arab Republic, Tajikistan, Thailand, Timor-Leste, Türkiye, Turkmenistan, United Arab Emirates, Uzbekistan, Viet Nam, Yemen and State of Palestine.

[326] Armenia, India, Indonesia, Israel, Japan, Kazakhstan, Kuwait, Lao People's Democratic Republic, Oman, Republic of Korea, Singapore, Sri Lanka, Tajikistan, Thailand, Viet Nam and State of Palestine.

[327] India, Japan, Lao People's Democratic Republic, Republic of Korea, Singapore, Viet Nam and State of Palestine.

[328] Democratic People's Republic of Korea, India, Philippines and Singapore.

[329] Lao People's Democratic Republic (70 million to 300 million kip), India (1 million to 10 billion rupees), Thailand (50,000 to 200,000 baht) and Viet Nam (several levels of fines).

[330] Israel, Kuwait and State of Palestine.

[331] Armenia, India, Indonesia, Japan, Kazakhstan, Lao People's Democratic Republic, Oman, Philippines, Republic of Korea, Singapore, Sri Lanka, Tajikistan, Thailand and Viet Nam.

[332] Armenia, India and Kazakhstan.

of the Agreement, it can be concluded that the matter of penalties is left to the discretion of the States in the region.

### 2. Judicial practice

162. A judge asked to rule in a case involving piracy and armed robbery at sea must consider the question of universal jurisdiction, namely whether the State bringing and prosecuting the case has the jurisdiction to try a pirate arrested elsewhere at sea or in the oceans. Very few States in Asia have brought to justice persons accused of crimes of piracy or armed robbery at sea.

163. In fact, a review of jurisprudence confirmed that courts in just 6 of the 46 countries in the Asia region have issued decisions that dealt primarily with maritime piracy, namely China, India, Malaysia, the Philippines, Singapore and Sri Lanka. Of these, the Philippines[333] has the most extensive jurisprudence on the topic. Although the Philippines and India have jurisprudence for the period from 1980 to 2010, this is not the case for the other States in the region.

164. Jurisprudence in China (Hong Kong), Malaysia, Singapore and Sri Lanka appears to date from a brief period in the late nineteenth and early twentieth centuries, from the 1870s to the 1920s.[334] That period coincides with the time when China, Malaysia, Singapore and Sri Lanka were under British imperial rule.

#### *(a) Jurisprudence in China*

165. The decision in an appeal of a ruling of the Supreme Court of Hong Kong[335] concerned an individual, described as a "subject of China", who was accused of committing certain criminal acts that were offences under Chinese law, namely by taking possession of a ship flying the French flag. The judge decided that the murder of the captain of the French ship and the act of running away with the vessel constituted piracy and were crimes and offences under Chinese law within the meaning of section 1 of Ordinance No. 2 of 1850, then in force in China. The evidence established the guilt of the accused for the crime of piracy and the decision specified that the magistrate of Hong Kong should have ordered the accused to be brought before a court for the crime of piracy in Hong Kong.

#### *(b) Jurisprudence of India*

166. Relatively recently, the Supreme Court of India heard a case involving maritime piracy in *Gaurav Kumar Bansal v. Union of India & other*s.[336] The petitioner had asked for the Government of India to be directed to intervene and expedite the release of Indian seamen taken hostage by Somali pirates in international waters in March

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[333] *People of the Philippines v. Emiliano Catantan y Tayon*g (see footnote 287 above); Supreme Court of the Philippines, *The People of the Philippines v. Mauricio Petalcorin alias Junio Budlat and Bertoldo Abais alias Toldon*g, Case No. 65376, Decision, 29 December 1989; Supreme Court of the Philippines, *People of the Philippines v. James Rodriguez alias Jimmy alias Wilfred de Lara y Medrano and Rico Lopez*, Case No. L-60100, Decision, 20 March 1985; Supreme Court of the Philippines, *The People of the Philippine Islands v. Lol-Lo and Sara*w, Case No. 17958, Decision, 27 February 1922; and *People of the Philippines v. Roger P. Tulin et al.* (see footnote 220 above).

[334] For China, see United Kingdom, *The Attorney General for Hong Kong v. Kwok-a-Sin*g, decision of the Judicial Committee of the Privy Council, highest court of appeal in the United Kingdom, 19 June 1873, [L.R.], 5 P.C. 179. For Malaysia and Singapore, see *Regina v. Nya Abu & others* (footnote 286 above). For Sri Lanka, see *Sinnappu v. Silva*, Decision, 12 March 1918.

[335] *The Attorney General for Hong Kong v. Kwok-a-Sin*g (see footnote 334 above).

[336] Supreme Court of India, *Gaurav Kumar Bansal v. Union of India & other*s, Judgment, 9 September 2014.

2010, March 2012 and May 2012. The petition also sought to frame the national anti-piracy guidelines. No hearing was held on the merits of this case.

167. The petition was rejected by the judge, who ruled that the evidence presented in support of the claims of the parties clearly showed that concerted efforts had been made at various levels by the Government of India in order to remedy the situation, although without complete success. The case was neither brought nor prosecuted by India. However, since the pirates had kidnapped the seamen, who were Indian nationals, India could have exercised jurisdiction not only on the basis of the principle of universal jurisdiction but also that of passive personality jurisdiction.

*(c) Jurisprudence of Malaysia*

168. In *Regina v. Nya Abu & other*s, three individuals having Dutch nationality, identified as "prisoners", had committed acts of piracy on board a ship flying the Dutch flag on the high seas and within the jurisdiction of the British Admiralty, having attacked and kidnapped the ship's captain.[337] The prisoners had transferred stolen property to the ship of an accomplice. They were found guilty of piracy in the first degree.

*(d) Jurisprudence of the Philippines*

169. In *People of the Philippines v. Titing Aranas et al.*,[338] the Supreme Court of the Philippines ruled on the thorny question of the adduction of evidence applicable to maritime piracy committed in international waters. On 15 December 1992, in the waters of the Municipality of Ubay, Province of Bohol, which are part of Philippine waters and within the jurisdiction of the Supreme Court, the accused, conspiring, confederating and mutually helping one another, with intent of financial gain, and by means of violence against or intimidation of persons, wilfully and unlawfully seized the passenger sea vessel MV *J & N Princess* by boarding it. While on board this vessel, they seized its radio and demanded cash from its passengers. The accused then inflicted physical injuries on the quartermaster, and caused damage to other parties. The trial court found that the witnesses for the prosecution had identified the appellant as one of the pirates. In its decision, the Supreme Court stated:

> The prosecution has the burden of proof in establishing the guilt of the accused. When the prosecution fails to discharge its burden, an accused need not even offer evidence in his behalf. In every criminal prosecution, the identity of the offender or offenders must be established by proof beyond reasonable doubt. There must be moral certainty in an unprejudiced mind that it was accused-appellant who committed the crime. Absent this required quantum of evidence would mean exoneration for accused-appellant. It is our view, therefore, and we hold that the prosecution failed to prove beyond reasonable doubt that appellant was one of the pirates who committed the crime charged.

The accused was therefore acquitted.

170. In *People of the Philippines v. Eduardo Bandojo and Mamerto Artu*z, the appellants had fatally shot the victim on 15 June 1983 and taken her money in the amount of 5,000 Philippine pesos.[339] They had then thrown the dead body into the sea and forced the other passengers to jump overboard. The accused had admitted the charges in extrajudicial confessions taken from them without observance of their

[337] See footnote 286 above.

[338] Supreme Court of the Philippines, *People of the Philippines v. Titing Aranas et al.*, Case No. 123101, Decision, 22 November 2000.

[339] Supreme Court of the Philippines, *People of the Philippines v. Eduardo Bandojo and Mamerto Artuz*, Case No. L-66945, Decision, 9 July 1986.

rights under article IV, section 20, of the Constitution of the Philippines, and the Supreme Court flatly rejected the documents submitted as evidence. Later, at their formal arraignment, the accused had entered separate guilty pleas. Only after the judge had assured himself that the defendants knew what they were doing had he found them guilty and sentenced them to death. Their guilt, which they had repeatedly confessed to in court, had been established beyond the shadow of a doubt. In conclusion, the Supreme Court found that the judge of the trial court had not erred in finding them guilty, despite the absence of the usual reception of evidence in cases involving capital offences. In view of that judge's earnest questioning of the accused, one of whom was a college student, the Supreme Court held that their guilty pleas had been knowingly made and had not been improvidently accepted.

171. *The People of the Philippines v. Julaide Siyoh et al.*[340] concerned persons accused of qualified piracy with triple murder and attempted murder. An order of arrest had been issued against all the accused, but only two had been apprehended and they had later appealed the decision of the lower court.

172. The court of first instance found the accused guilty beyond reasonable doubt of the crime of qualified piracy with triple murder and attempted murder as defined and penalized under Presidential Decree No. 532 and sentenced each of them to the death penalty. However, taking into consideration section 106 of the Administrative Code of the Department of Mindanao and Sulu, the illiteracy, ignorance and extreme poverty of the accused, who were members of cultural minorities, and in view of the imperatives of the so-called compassionate society, the sentence was commuted to life imprisonment.

173. *People of the Philippines v. Roger P. Tulin et al.*[341] concerned a ship with a 21-person crew. Seven fully armed pirates, led by Emilio Changco, the older brother of the accused Cecilio Changco, had suddenly boarded the vessel using an aluminium ladder. In view of the facts, the trial court had issued a decision in the case, finding the accused Roger Tulin, Virgilio Loyola, Andres Infante, Jr. and Cecilio Changco guilty beyond reasonable doubt of being principals of the crime of piracy in Philippine waters as defined in section 2, paragraph (d), of Presidential Decree No. 532, and finding the accused Cheong San Hiong guilty of being an accomplice to said crime. Under section 3, paragraph (a), of the Decree, the penalty for the principals of said crime was death.

174. However, since the court was prohibited from imposing the death penalty under the 1987 Constitution, the accused Roger Tulin, Virgilio Loyola, Andres Infante, Jr. and Cecilio Changco were ultimately sentenced to the penalty of *reclusion perpetua*. Regardless of the inadmissibility of the confessions of the accused, there had been sufficient evidence to convict the accused with moral certainty. According to the trial court, Emilio Changco and accused Roger Tulin, Virgilio Loyola and Andres Infante, Jr. had conspired and confederated to commit the crime charged in light of the exhibits.

175. *The People of the Philippine Islands v. Lol-Lo and Saraw*[342] involved two ships that had left Matuta, a Dutch possession, on 30 June 1920, for Peta, another Dutch possession. One of the two ships had been surrounded by six boats with 24 armed men on board. They had first asked for food, but once on the ship, they had taken the food for themselves. They had then seized all the cargo, attacked some men and brutally violated two women. The two accused, who were among the assailants, had then returned home to South Ubian, a municipality in the Province of Tawi-Tawi in

[340] Supreme Court of the Philippines, *The People of the Philippines v. Julaide Siyoh et al.*, Case No. L-57292, Decision, 18 February 1986.

[341] See footnote 220 above.

[342] See footnote 333 above.

the Philippines, where they had been arrested and charged with the crime of piracy before the Court of First Instance of Sulu. The accused claimed that the offence charged was not within the jurisdiction of the Court, nor of any other court, and the facts did not constitute a public offence under the laws in force in the Philippines. Nonetheless, the trial had been held, and a judgment had been rendered, finding the two defendants guilty and sentencing them to life imprisonment. The Supreme Court found that the proven facts had not been disputed and that all the elements of the crime of piracy were present. Piracy was robbery or depredation on the high seas, without lawful authority, committed with *animo furandi*, with the spirit and intention of universal hostility. The Supreme Court also ruled that the crime of piracy committed against citizens of the United States and citizens of the Philippines, or the subjects of another nation not at war with the United States, was punishable by imprisonment for a fixed term (*cadena temporal*) or imprisonment for life (*cadena perpetua)*.

176. In *People of the Philippines v. Emiliano Catantan y Tayong*,[343] the Regional Trial Court of Cebu had found both of the accused, Emiliano Catantan y Tayong and Jose Macven Ursal, guilty of the crime charged and had sentenced them to *reclusion perpetua*. Of the two, only Emiliano Catantan appealed the decision of the trial court. The evidence for the prosecution was that at 3 o'clock in the morning, on 27 June 1993, the brothers Eugene and Juan Pilapil had been fishing in the sea some 3 kilometres off the shore of Tabogon, in the Province of Cebu, when suddenly, another boat had caught up with them. A man later identified as the accused Emiliano Catantan, had boarded the Pilapil brothers' boat and had levelled his gun at Eugene. The accused were considered pirates and punished as such based on Presidential Decree No. 532, section 2, paragraph (d), which defines piracy.

177. *People of the Philippines v. Victor Timon y Casas et al.*[344] involved the fishing boat MB *Kali*, which had left Navotas at about noon on 20 September 1989, with its owner and crew, to buy fresh fish in Palawan. The boat had been intercepted by eight armed pirates, who had ordered the crew to lie face down and had taken their money and other personal effects, before killing the captain. That same afternoon, the incident had been reported to the Navotas police, which had immediately sent a team to conduct an investigation. The trial court found the accused guilty of piracy on the high seas with homicide. The claim of the appellants Victor Timon, Jose Sampiton and Claro Raya that they had been the victims of mistaken identity was not found to be convincing.

178. In *People of the Philippines v. Jaime Rodriguez alias Jimmy alias Wilfred de Lara y Medrano and Rico Lopez*,[345] the appellants were members of the crew of MV *Noria 767*. On 31 August 1981, armed with bladed weapons and high calibre firearms, they had stolen and carried away by force the property, equipment and personal effects of the passengers and other crew members of MV *Noria 767*. They had been arrested by the Malaysian authorities and turned over to the Philippine authorities, and then charged with the crime of piracy before the Court of First Instance of Sulu and Tawi-Tawi. The accused were found guilty by the Court of First Instance and sentenced to the death penalty.

[343] See footnote 287 above.

[344] Supreme Court of the Philippines, *People of the Philippines v. Victor Timon y Casas et al.*, Case No. 97841-42, Decision, 12 November 1997.

[345] See footnote 333 above.

## B. Approach of judges in criminal cases with regard to the interpretation of article 101, sentencing and the interpretation of the principle of universal and/or national jurisdiction

### 1. Judges and the interpretation of article 101

179. With regard to judicial practice in Asia in relation to the definition of piracy as set out in article 101 of the United Nations Convention on the Law of the Sea, the courts of each State define piracy essentially as a form of robbery at sea.[346] The courts of the Philippines are the only ones to invoke a more nuanced definition. In their view, the crime of piracy is characterized by, inter alia, hostile intentions, violence and intimidation. These descriptors have always been used to describe piracy through the centuries and are still relevant at the start of the twenty-first century.[347]

180. Courts in the Asia region disagree as to whether the geographical element is part of the definition of the crime of piracy. In the period from the end of the nineteenth century to the mid twentieth century, courts in Asia unanimously viewed piracy as a crime that took place on the high seas or within the jurisdiction of the British Admiralty; however by the early twenty-first century this view was no longer unanimously held.[348] In several decisions issued in 1997 and 2001, Philippine courts indicated that robbery committed in the territorial sea could constitute an act of piracy, thus equating the crime of piracy to armed robbery at sea.[349]

181. A review of court rulings has revealed that no decision of an Asian court mentions or reproduces the definition of piracy as set out in article 101 of the United Nations Convention on the Law of the Sea. In the case of China, Malaysia and Singapore, all the decisions date back to the nineteenth or early twentieth centuries, when these States were British colonies, whereas the Convention was signed in the 1980s. As regards the more recent jurisprudence of Asian courts, in particular that of Philippine courts, the most recent decisions, dating from the 1980s, do not formally reproduce the definition contained in the Convention. This is largely because the Philippines has its own definition of the crime of piracy, in Presidential Decree No. 532 of 1974, which, moreover, has been reaffirmed repeatedly by Philippine courts.[350]

### 2. Judges, sentencing and the interpretation of universal and/or national jurisdiction

182. The Philippines is the only State in Asia to have addressed penalties in its jurisprudence, which is also more abundant than that of other countries. In several decisions issued up until 1987, persons found guilty of the crime of piracy were near-systematically sentenced to death, with the exception of persons with mental disorders or those facing various socioeconomic challenges. The latter were sentenced to life

[346] For China, see *The Attorney General of Hong Kong v. Kwok-a-Sing* (see footnote 334 above). For Malaysia and Singapore, see *Regina v. Nya Abu & others* (footnote 286 above). For the Philippines, see *People of the Philippines v. Titing Aranas et al.* (footnote 338 above).

[347] *People of the Philippines v. Roger P. Tulin et al.* (see footnote 220 above).

[348] *Regina v. Nya Abu & others* (see footnote 286 above); and *The Attorney General of Hong Kong v. Kwok-a-Sing* (see footnote 334 above).

[349] *The People of the Philippines v. Julaide Siyoh et al.* (see footnote 340 above); *People of the Philippines v. Emiliano Catantan y Tayong* (see footnote 287 above); and *People of the Philippines v. Roger P. Tulin et al.* (see footnote 220 above).

[350] *Idem*.

imprisonment.[351] The death penalty was commuted to a term of life imprisonment. Since 1987, with the entry into force of a new Constitution, life imprisonment has been the standard penalty for acts of piracy in the Philippines.[352]

183. In Asia, most piracy cases involve the boarding of a ship by the perpetrators followed by acts that include hostage-taking, ransom demands, murder, the theft of valuables or the theft of the ship itself. There does not appear to be a clear trend at the subregional level, aside from the fact that acts of piracy in the Philippines tend to be especially violent (murder, rape, etc.).[353] There is a fundamental need to distinguish between piracy and armed robbery at sea in order to clarify the difference between these two forms of crime. This may prove difficult, in particular because acts of piracy are increasingly carried out in the approaches to territorial waters and in internal waters.

184. With regard to how acts of piracy are characterized in the context of broader legal concepts, in particular in international law and maritime law, two main trends can be observed in the jurisprudence of Asian courts. First, in the jurisprudence of China (Hong Kong), Malaysia and Singapore from the time of British rule, piracy was considered a crime *jure gentium*, meaning that it was seen as a violation of the ordinary law applicable to human beings regardless of their nation of origin.[354] Second, Philippine jurisprudence, closely reflecting the law of the sea, indicates that perpetrators of acts of piracy are considered from the legal standpoint as international criminals and *hostis humani generis*.[355] In other words, pirates are considered to be the enemies of all humankind.

185. With regard to the exercise of universal jurisdiction and national jurisdiction, one view espoused by courts in Asian States is that piracy is a crime *jure gentium*, that those who engage in such illegal activities are *hostis humani generi*s and that the crime of piracy is punishable everywhere, including when it is committed outside national territorial jurisdiction.[356] The perpetrators of acts of piracy may be prosecuted regardless of the place of the crime and the nationalities of the perpetrators or the victims.

186. Just over a quarter of States in Asia have a legal framework that addresses the crime of piracy. Of those States that have jurisprudence pertaining to the repression of the crime of piracy, the vast majority have a legal framework that specifically addresses piracy in recognition of the principle *nullum crimen, nulla poena sine lege*. China, India, the Philippines, Singapore and Sri Lanka all have statutes specifically prohibiting acts of piracy. In most cases, the statutes are in either the national penal code or various maritime laws. Some States, such as India, the Philippines and Sri Lanka, have separate legal instruments that specifically address the crime of piracy.[357]

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[351] *People of the Philippines v. Jaime Rodriguez alias Jimmy alias Wilfred de Lara y Medrano and Rico Lopez* (see footnote 333 above); *The People of the Philippines v. Julaide Siyoh et al.* (see footnote 340 above); *People of the Philippines v. Eduardo Bandojo and Mamerto Artuz* (see footnote 339 above); and *The People of the Philippine Islands v. Lol-Lo and Sara*w (see footnote 333 above).

[352] *People of the Philippines v. Roger P. Tulin et al.* (see footnote 220 above).

[353] *People of the Philippines v. Victor Timon y Casas et al.* (see footnote 344 above); *The People of the Philippines v. Julaide Siyoh et al.* (see footnote 340 above); and *People of the Philippines v. Eduardo Bandojo and Mamerto Artuz* (see footnote 339 above).

[354] *The Attorney General of Hong Kong v. Kwok-a-Sing* (see footnote 334 above); and *Regina v. Nya Abu & others* (see footnote 286 above).

[355] *The People of the Philippine Islands v. Lol-Lo and Sara*w (see footnote 333 above).

[356] *The Attorney General of Hong Kong v. Kwok-a-Sing* (see footnote 334 above); and *The People of the Philippine Islands v. Lol-Lo and Saraw* (see footnote 333 above).

[357] India, Anti-Maritime Piracy Bill of 2019; the Philippines, Presidential Decree No. 532 of 1974; and Sri Lanka, Act No. 9 of 2001 on piracy.

187. With regard to the use that a judge makes of the legal framework, it is one thing for there to be legislation on maritime piracy, but quite another to implement it when circumstances so require. India, for example, has a statute on maritime piracy – and piracy does occur in its territorial waters – but its courts have issued just one decision, in which the judge could not examine the case on the merits because the decision concerned a straightforward petition asking the Government to honour its political and legal obligations by making greater efforts to free Indian nationals who had been taken hostage in the context of crimes linked to piracy. The Supreme Court of India conducted only a cursory factual analysis relating to the actions of the Government of India in respect of its political obligations, concluding that India had upheld its obligations towards its nationals.[358] In general, the measures used in Asia to repress piracy remain extremely severe. In the Philippines, for example, the Supreme Court has, in a number of cases, invoked statutes that specifically address piracy, in particular Presidential Decree No. 532 of 1974, section 2, paragraph (d). This provision has been used to convict individuals accused of committing acts of piracy and to sentence them to life imprisonment or, in certain cases, to the death penalty.[359]

188. Geographically speaking, apart from Kazakhstan and Turkmenistan, which are coastal States, most of the States in Central Asia are landlocked. For this reason, there are few decisions concerning crimes of piracy and armed robbery at sea issued by Asian courts.

189. In South-East Asia, in particular in the Straits of Malacca and Singapore, as well as the Gulf of Aden, where incidents of maritime piracy and armed robbery at sea are especially common and numerous when compared with other regions of the world, not a single court decision addressing these two forms of crime has been identified in the research conducted by the Special Rapporteur.

# IV. Piracy and armed robbery at sea in the Americas and the Caribbean

## A. Legislative and judicial practices

### 1. Legislative practice

*(a) Definition of maritime piracy and armed robbery at sea*

190. In the Americas, 19 States[360] have a definition of maritime piracy, and 2 States[361] have adopted legislation defining armed robbery at sea. Six States[362] reproduce the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea. One of those States is Guyana, which, within its legal framework, extends the territoriality aspect of the definition set out in the Convention to include its territorial waters.[363] Only one State, Antigua and Barbuda, specifically reproduces

[358] *Gaurav Kumar Bansal v. Union of India & others* (see footnote 336 above).

[359] *People of the Philippines v. Jaime Rodriguez Rodriguez alias Jimmy alias Wilfred de Lara y Medrano and Rico Lopez* (see footnote 333 above); *People of the Philippines v. Emiliano Catantan y Tayong* (see footnote 287 above); and *People of the Philippines v. Roger P. Tulin et al.* (see footnote 220 above).

[360] Antigua and Barbuda, Argentina, Bahamas, Bolivia (Plurinational State of), Canada, Costa Rica, Cuba, Dominica, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Suriname, United States and Venezuela (Bolivarian Republic of).

[361] Antigua and Barbuda and Guyana.

[362] Antigua and Barbuda, Bahamas, Dominica, Guyana, Saint Vincent and the Grenadines and Uruguay.

[363] Guyana, Act No. 8 of 2008 on hijacking and piracy, *The Official Gazette [Legal Supplement] A* (31 July 2008), art. 5.

the definition of armed robbery at sea contained in the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.[364]

191. Some States, although they do not reproduce the definition set out in article 101 of the United Nations Convention on the Law of the Sea in its entirety, include some of its elements in their definitions. Nineteen States[365] use the terms "any act of violence", "detention", "depredation", "against property/persons on board a ship" and "against another ship"; 18 States[366] use the element "on board a ship knowing that the ship in question is used for the purposes of maritime piracy (complicity/voluntary participation)"; 10 States[367] refer to the elements "committed by the crew or the passengers of a ship" and "incitement to piracy"; 8 States[368] have enacted statutes stipulating that an act of piracy must be committed "on the high seas or outside the jurisdiction of a State"; and 7 States[369] specify that piracy must be committed "for private ends".

192. Domestic courts issuing judgments before the entry into force of the United Nations Convention on the Law of the Sea invoked other definitions of piracy that comprised elements similar to those of the definition contained in article 101 of the Convention. For example, the Supreme Court of the United States defined piracy as robbery on the high seas in its 1820 decision in *United States v. Smith*.[370]

193. The legislation of Antigua and Barbuda defines maritime piracy and armed robbery at sea and draws a distinction between the two forms of crime. Armed robbery at sea is defined as any act other than piracy. The legislation incorporates the provisions of article 101 of the United Nations Convention on the Law of the Sea and provides that it must be interpreted in line with the Convention.[371] On that basis, piracy is understood to be committed on the high seas and in the exclusive economic zone. Armed robbery at sea, which is any act other than piracy, has the same motive and target as piracy, in other words, it is committed for private ends and involves an attack directed by a ship against another ship. The two types of crime thus differ only in terms of the place of commission of the crimes. Under the legislation, armed robbery is limited to internal waters, archipelagic waters and the territorial sea, while the crime of piracy is committed on the high seas. The term "armed robbery against ships" is used in the legislation,[372] rather than the standard term "armed robbery at sea". Article 3 of the Maritime Piracy Act establishes penalties for the act of piracy, but there are no repressive provisions for armed robbery against ships.

194. The Penal Code of Argentina reproduces to a large extent the elements of the definition contained in article 101 of the United Nations Convention on the Law of

[364] Antigua and Barbuda, "MLC 2018 Amendments (Piracy and Armed Robbery) Directive 2020", art. 2.

[365] Antigua and Barbuda, Argentina, Bahamas, Bolivia (Plurinational State of), Canada, Costa Rica, Cuba, Dominica, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Suriname, United States and Venezuela (Bolivarian Republic of).

[366] Antigua and Barbuda, Argentina, Bahamas, Costa Rica, Cuba, Dominica, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Suriname, United States, Uruguay and Venezuela (Bolivarian Republic of).

[367] Antigua and Barbuda, Bahamas, Dominica, Guatemala, Guyana, Mexico, Saint Vincent and the Grenadines, Suriname, Uruguay and Venezuela (Bolivarian Republic of).

[368] Antigua and Barbuda, Bahamas, Dominica, El Salvador, Guyana, Honduras, Saint Vincent and the Grenadines and Uruguay.

[369] Antigua and Barbuda, Bahamas, Dominica, Guyana, Honduras, Saint Vincent and the Grenadines and Uruguay.

[370] Supreme Court of the United States, *United States v. Smith*, Decision, 25 February 1820, 18 U.S. 153.

[371] Antigua and Barbuda, Maritime Piracy Act No. 17 of 2013, *Official Journal*, vol. 34, No. 8 (23 January 2014), art. 2, para. 2.

[372] Antigua and Barbuda, "MLC 2018 Amendments (Piracy and Armed Robbery) Directive 2020", art. 2.

the Sea. However, unlike article 101, the Penal Code does not require piracy to have been committed on the high seas or in maritime spaces that are outside the jurisdiction of any State. A pirate is defined as being, among other considerations,[373] "anyone who carries out at sea or in navigable rivers, any act of depredation or violence against a ship or against persons or property located on the ship, without being authorized by any warring power or going beyond the limits of legitimately granted authorization."[374] The general references to the "sea" and "navigable rivers" can be interpreted to mean that piracy can be perpetrated in the different areas of the marine environment, including on the high seas and in internal and territorial waters. A pirate is also "anyone who, based in the territory of the Republic, knowingly deals with pirates or provides them with assistance".[375] The penalties for piracy are set out in articles 198 and 199 of the Penal Code. No penalty is indicated for armed robbery at sea.

195. The Bahamas, although it is a State party to the United Nations Convention on the Law of the Sea, acknowledges that it has not defined the crime of piracy in its national law. In a statement addressed to the Secretary-General, it affirmed:

> The Act does not provide a definition for piracy in our domestic laws. However, international law in the United Nations Convention on the Law of the Sea of 10 December 1982 sets out the legal framework in articles 100, 101 and 105. Possibly, article 101 lends a constructive definition of piracy for our purposes.[376]

196. Several States in the region, namely Barbados, Belize, Brazil, Colombia, the Dominican Republic, Ecuador, Grenada, Haiti, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Trinidad and Tobago and Uruguay, have neither defined piracy nor established penalties aimed at its repression. These States have no statutes that address either armed robbery or armed robbery at sea. Other States have adopted laws that define maritime piracy, but in very general terms and without necessarily reproducing the elements of the definition contained in article 101 of the United Nations Convention on the Law of the Sea. These States are: Bolivia (Plurinational State of), Canada, Chile, Costa Rica, Cuba, Dominica, El Salvador, Guatemala, Panama, Saint Vincent and the Grenadines, Suriname, the United States and Venezuela (Bolivarian Republic of). For example, under the legislation of the Plurinational State of Bolivia, the diversion of a ship is in itself an act of maritime piracy. The legislation of the Plurinational State of Bolivia also considers that any acts of depredation directed against the ship, the seizure, destruction or capture of a ship, or the killing or wounding of its crew or passengers constitute piracy. The penalty is imprisonment for a term ranging from two to eight years.[377] The Criminal Code of Canada defines piracy as a violation of the law of nations without express reference to the elements of the definition of piracy as they appear in article 101 of the United Nations Convention on the Law of the Sea, to which Canada is party. The Criminal Code states that: "Every one commits piracy who does any act that, by the law of nations, is piracy."[378] The penalties for piracy are set out in articles 74 and 75 of the Code. The Penal Code of Chile uses rather generic wording, defining piracy by stating simply that it involves "those who commit acts of piracy",[379] without giving

[373] Argentina, Penal Code, art. 198, paras. 3–6.
[374] Ibid., para. 1.
[375] Ibid., para 7.
[376] Compilation of information received from Member States on measures they have taken to criminalize piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates (S/2012/177, annex), p. 7.
[377] The Plurinational State of Bolivia, Penal Code, art. 139.
[378] Canada, Criminal Code (R.S.C.,1985, c. C-46), sect. 74, para. 1.
[379] Chile, Penal Code, art. 434.

further detail or specifying the acts that constitute maritime piracy. Suriname reproduces certain elements of the article 101 definition of piracy in article 444 of its Penal Code, on shipping and aviation crimes, including that the act of piracy must involve two ships and be committed on the high seas (open sea).[380]

197. Although the Penal Code of Costa Rica[381] reproduces some elements of the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea, it does not link the commission of this crime exclusively to the high seas or to maritime spaces outside the jurisdiction of any State; moreover, the Code contains no direct references to maritime spaces. Piracy is thus characterized as such whether it is committed in navigable rivers, in the territorial sea or on the continental shelf, and even when it is committed in the land territory of Costa Rica. The Penal Code does not stipulate that piracy must involve an attack by a ship against another ship. The Code also defines the illegal exploitation of national fishing resources and acts of violence and depredation against fixed off-shore platforms as acts of piracy. The penalty is set out in article 258 of the Penal Code.

198. The Penal Code[382] of Cuba reproduces some elements of the definition contained in article 101, in the chapter entitled "Other acts against aviation and maritime security", but does not link the commission of piracy to the high seas or to other maritime spaces. For an act of piracy to be recognized as such, the act need not be motivated by personal ends, as this requirement is not expressly mentioned in the Penal Code. It is notable that the elements of piracy set out in the Cuban Penal Code include attacks by ships or aircraft against land, air or maritime targets.[383] Another element of piracy is the entry by any armed persons into Cuban maritime territory or air space on board unarmed ships or aircraft for the purpose of accomplishing one of the acts[384] described in article 162, paragraphs (a) to (d), of the Penal Code. The applicable penalties are a term of imprisonment ranging from 10 to 30 years or the death penalty. The term of imprisonment may be reduced by a third if the purpose of the acts is not related to terrorism.[385] Armed robbery at sea is not criminalized.

199. Dominica,[386] Guyana[387] and Saint Vincent and the Grenadines[388] reproduce the article 101 definition of piracy in its entirety. Saint Vincent and the Grenadines views piracy as a violation of the law of nations punishable by imprisonment for life. The penalties for piracy are set out in articles 49 and 50 of its Criminal Code. Armed robbery at sea is not criminalized. By contrast, Guyana has defined not only piracy[389] but also armed robbery at sea,[390] which it defines as a crime committed in internal waters and in the territorial sea.

200. Under the Penal Code of El Salvador, "any person who commits, on the high seas, in the adjacent sea or on the continental shelf, acts of depredation or violence against a ship or against persons and property on board"[391] is considered a pirate engaging in acts of piracy. Under the Penal Code, piracy can therefore be committed on the high seas and in areas within the jurisdiction of the State, whereas article 101

[380] Suriname, Penal Code, art. 444.
[381] Costa Rica, Penal Code, art. 258, as amended by Act No. 8719 of 4 March 2009 on strengthening counter-terrorism legislation.
[382] Cuba, Act No. 151/2022 on the Penal Code (15 May 2022), art. 162.
[383] Ibid., para. (b).
[384] Ibid., para. (e).
[385] Ibid., art. 165.
[386] Dominica, Piracy Act (Act No.11 of 2010), [2010], art. 2, paras. (a) and (b).
[387] Guyana, Act No. 8 of 2008 on hijacking and piracy, art. 5.
[388] Saint Vincent and the Grenadines, Criminal Code, art. 49, para. 2
[389] Guyana, Act No. 8 of 2008 on hijacking and piracy, art. 5.
[390] Ibid., art. 2.
[391] El Salvador, Penal Code, article 368, para. 1.

of the United Nations Convention on the Law of the Sea links piracy to the high seas or the exclusive economic zone. Armed robbery at sea is not criminalized.

201. The legislation of the United States defines piracy in very general terms, describing piracy as violence against maritime navigation[392] and setting out a list of illegal acts at sea, which include assault against the commander of a ship.[393] The penalty is imprisonment for life and, in certain conditions, the death penalty. The main legislative provision on piracy is section 1651 of title 18 of the United States Code, which states: "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." The fact that the United States statute defines piracy by means of a reference to the law of nations indicates that everything that is defined as constituting an act of piracy under international law constitutes piracy under the statute as well. Furthermore, the statute refers to piracy as being committed "on the high seas", but without defining what is meant by "high seas", which was considered in *United States v. Dire*.[394] In addition to section 1651, the main provision that criminalizes piracy, there are other provisions relating to this crime, including sections on aliens as pirates,[395] arming or serving on privateers,[396] assault on commander as piracy,[397] conversion or surrender of vessel,[398] corruption of seamen and confederating with pirates,[399] plunder of distressed vessel,[400] attack to plunder vessel,[401] receipt of pirate property[402] and robbery ashore.[403]

202. Under the Penal Code of Guatemala,[404] piracy is a crime that is committed "at sea, on lakes or in navigable rivers", with no particular distinction made between maritime jurisdictions. The general reference to the sea indicates that piracy can be committed anywhere in the marine environment, namely on the high seas, in the exclusive economic zone, in the territorial sea and in internal waters, such as lakes and rivers. Armed robbery at sea is not criminalized. Haiti does not have a law that defines maritime piracy and armed robbery at sea. The draft law containing the new Penal Code[405] does provide penalties for acts of piracy, but leaves them undefined. The penalties for piracy in the draft new Penal Code are set out in articles 355 to 359. For its part, Honduras has defined piracy in its legislation[406] by referring to certain elements of the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea. However, in addition to indicating that piracy can be committed on the high seas, in line with the Convention, the legislation extends the geographical scope of the crime to include the exclusive economic zone, the contiguous zone and all other maritime spaces. The penalty is a term of imprisonment of 15 to 20 years. There is no law criminalizing armed robbery at sea. Jamaica currently has no law concerning piracy and armed robbery at sea.

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[392] The United States, United States Code, title 18 (Crimes and Criminal Procedure), sect. 2280.
[393] Ibid., sect. 1655.
[394] The United States Court of Appeals for the Fourth Circuit, *United States v. Dire*, 23 May 2012, 680 F.3d 446.
[395] The United States, United States Code, title 18 (Crimes and Criminal Procedure), sect. 1653.
[396] Ibid., sect. 1654.
[397] Ibid., sect. 1655.
[398] Ibid., sect. 1656.
[399] Ibid., sect. 1657.
[400] Ibid., sect. 1658.
[401] Ibid., sect. 1659.
[402] Ibid., sect. 1660.
[403] Ibid., sect. 1661.
[404] Guatemala, Penal Code, art. 299.
[405] Haiti, decree establishing the Penal Code (11 March 2020), *Le Moniteur*, special edition No. 10 (24 June 2020).
[406] Honduras, Penal Code, art. 161.

203. Under the Federal Penal Code of Mexico, pirates are "persons who, as members of the crew of a Mexican merchant ship, or that of another nation, or of a ship without nationality, use armed force to take possession of a ship or commit acts of depredation against it or acts of violence against persons on board" and "persons who, having boarded a ship, take possession of it and deliver it voluntarily to a pirate".[407] The penalties for piracy are set out in article 147 of the Federal Penal Code. Armed robbery at sea is not criminalized. In Nicaragua, pirates are "those who take armed possession of a ship at sea, in the air or on the nation's lakes or rivers, or commit acts of depredation or acts of violence against persons on board".[408] The penalty is a term of imprisonment of between 2 and 10 years. Armed robbery at sea is not criminalized.

204. The Penal Code of Panama does not link piracy to any particular maritime space. This could be interpreted as indicating that piracy can be committed anywhere in the marine environment, whether on the high seas or in the waters within the jurisdiction of Panama. Thus, a pirate is "any person who causes damage to a ship or aircraft, or to the persons or property on board", "any person who seizes, takes control of or diverts a ship from its route by means of fraud, violence or intimidation committed against its commander, crew or any one of its passengers" and "any person who destroys a ship or an aircraft in service or causes damage rendering such a ship or aircraft inoperable".[409] The penalty is a term of imprisonment ranging from 4 to 20 years. There is no definition of armed robbery at sea.

205. Saint Lucia does not have a law defining piracy, but piracy is punishable under article 306 of its Criminal Code. It has not defined or criminalized armed robbery at sea. Suriname has reproduced certain elements of the definition of piracy as set out in article 101 of the United Nations Convention on the Law of the Sea in its Penal Code,[410] but has not retained others, in particular the link between the crime of piracy and the high seas. The penalties are terms of imprisonment ranging from 9 to 12 years.[411] Armed robbery at sea is not criminalized. Although Uruguay has not defined piracy, it approved the provisions of the United Nations Convention on the Law of the Sea, including those relating to the prevention and repression of piracy, by means of its Act No. 16287. Uruguay has no statutes stipulating repressive measures against piracy. It has not criminalized armed robbery at sea.

206. The Penal Code of the Bolivarian Republic of Venezuela[412] includes a definition of piracy, but does not incorporate all the elements of the definition contained in article 101 of the United Nations Convention on the Law of the Sea. The principle of universal jurisdiction is well established in the sense that Venezuelan judges have the jurisdiction to rule on acts of piracy regardless of the nationalities of the perpetrators or the victims of such acts committed "wherever they may be", that is to say, in any place at sea or on land. The penalties are terms of imprisonment ranging from 10 to 15 years. Armed robbery at sea is not criminalized.

*(b) Preventive and repressive measures*

207. Several States have also implemented various preventive measures at the national level. The Bahamas and Mexico have a maritime authority or naval forces responsible for security at sea and at ports. The Bahamas, Panama and the United States offer training on the handling of threats to maritime security, including piracy

[407] Mexico, Federal Penal Code, art. 146.
[408] Nicaragua, Penal Code, art. 524, para. 1.
[409] Panama, Penal Code, arts. 325–326.
[410] Suriname, Penal Code, art. 444.
[411] Ibid., arts. 445–446.
[412] Bolivarian Republic of Venezuela, Penal Code, art. 153.

and armed robbery at sea.[413] For its part, Antigua and Barbuda has implemented a navigation security and surveillance system.[414] Palau allows the use of private companies to fight maritime piracy. Ecuador is the only State in the Americas to confer powers of defence, arrest, investigation or seizure exclusively on ship captains as a means of preventing crimes of piracy.

208. At the regional level, the Operative Network of Regional Cooperation of Maritime Authorities of the Americas did not specify penalties in its maritime strategy for the period 2005–2010. At the local level, 24 States in the Americas have specified penalties for maritime piracy in their national legislation, but no penalties for armed robbery at sea. The penalties vary significantly. Acts of maritime piracy are subject to fines in 3 States,[415] penalties of imprisonment in 19 States,[416] the penalty of life imprisonment in 6 States[417] and the death penalty in 1 State, namely Cuba.

209. With regard to aggravating factors, such as the use of violence, murder or manslaughter, five States[418] provide for penalties of varying severity depending on the gravity of the offence. Mexico is the only State to call for the confiscation of the ship, and no aggravating factor is contemplated in 15 other States.[419]

### 2. Judicial practice

210. In the United States, the majority of court decisions on piracy were issued in the nineteenth century, in the 1810s and 1820s, or in the first half of the 2010s.

211. Of the 803 decisions issued in the Americas that were surveyed for this report, just 10 concerned cases of piracy at sea. The majority, comprising 728 decisions, were issued in the United States, but only 9 of those involved piracy cases. The only other case involving maritime piracy was decided in Ecuador. Piracy is mentioned in decisions issued in other countries, namely Canada (10 decisions), Colombia (15 decisions), Costa Rica (16 decisions), Panama (3 decisions), Peru (1 decision) and Venezuela (Bolivarian Republic of) (9 decisions). The remaining 719 decisions were issued by United States courts.

212. In general, the court decisions concern prison sentences, which are the most common penalties used to repress maritime piracy, not only in the Americas, but in other regions of the world. Prison penalties vary greatly depending on the State and the specific circumstances of each case. Few States use life imprisonment as a penalty for the crime of piracy. The United States[420] is one of only three States to have done so. Some States also sentence the perpetrators of the crime of piracy to less severe but still fairly lengthy terms of imprisonment ranging from 10 to 30 years. Such is the case in the United States,[421] where prison sentences can be 30 years or longer. Lastly,

[413] The Bahamas: information bulletins issued by the Maritime Authority on how to properly prepare ship captains and managers for piracy or armed robbery at sea attacks; United States: funding for Project AGWE of Interpol; and Panama: document on combating piracy in emergency situations.

[414] The Department of Marine Services and Merchant Shipping of Antigua and Barbuda allows the transportation of armed security teams on board vessels flying the national flag.

[415] Antigua and Barbuda (500,000 East Caribbean dollars), Colombia and Guyana (200,000 to 1,000,000 Guyana dollars).

[416] Antigua and Barbuda, Argentina, Bahamas, Bolivia (Plurinational State of), Canada, Costa Rica, Cuba, Dominica, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Suriname, United States and Venezuela (Bolivarian Republic of).

[417] Canada, Chile, Guyana, Saint Lucia, Saint Vincent and the Grenadines and United States.

[418] Argentina, Nicaragua, Panama, Saint Vincent and the Grenadines and Suriname.

[419] Antigua and Barbuda, Bolivia (Plurinational State of), Canada, Chile, Costa Rica, Cuba, Dominica, El Salvador, Guatemala, Honduras, Panama, Saint Vincent and the Grenadines, Saint Lucia, United States and Venezuela (Bolivarian Republic of).

[420] *United States v. Hasan* (see footnote 219 above).

[421] See BBC, "Somali pirate sentenced to 33 years in US prison", 16 February 2011.

there are other types of penalties used by States to punish the crime of piracy, but they are less common. For example, in the United States,[422] property used to carry out acts of piracy has been subject to confiscation.

## B. Approach of judges in criminal cases with regard to the interpretation of article 101, sentencing and the interpretation of the principle of universal and/or national jurisdiction

### 1. Judges and the interpretation of article 101

213. For a time, United States judges defined maritime piracy as robbery on the high seas.[423] They have, however, expanded their rulings on the topic by invoking customary international law,[424] which recognizes maritime piracy as occurring not only on the high seas. According to the United States Court of Appeals for the Fourth Circuit, article 101 of the United Nations Convention on the Law of the Sea accurately articulates the definition of piracy under customary international law.

214. For an act to be considered an act of piracy, the United States court, in *United States v. Ali*,[425] had to invoke certain concepts such aiding and abetting piracy. An accomplice to an act of maritime piracy is considered as a principal perpetrator, namely as a pirate, under the United States Code.[426] Article 101 (c) of the United Nations Convention on the Law of the Sea, unlike paragraph (a) of the same article, does not explicitly mention the high seas in the context of "aiding and abetting piracy". This could be interpreted to mean that piracy can be committed anywhere in the marine environment, without distinction between the legal regimes governing the different maritime spaces.

215. Thus, even if the accomplices to an act of piracy committed on the high seas remain in the territory of a State, they may be considered guilty of maritime piracy, even though their actions did not take place on the high seas.[427]

216. Judges in the United States have established a clear distinction between pirates and privateers, reasoning that individuals who act on behalf of a Government are not pirates but privateers, since, under United States law, pirates act for private ends, whereas privateers do so on the basis of a letter of marque from a State, under which, however, they are to be considered pirates if they overstep their mandate.[428] This definition appears to match article 101 (a) of the United Nations Convention on the Law of the Sea, which states that pirates act for private ends.

### 2. Judges, sentencing and the interpretation of universal and/or national jurisdiction

217. In the nineteenth century, maritime piracy was punishable by death in the United States.[429] A shift in judicial practice occurred in 2010, when it was considered that

[422] United States Court of Appeals for the Fourth Circuit, *United States v. Said*, 13 August 2015, 798 F.3d 182.
[423] *United States v. Smith* (see footnote 370 above).
[424] United States Court of Appeals for the Fourth Circuit, *United States v.* Shibin, 12 July 2013, 722 F.3d 233.
[425] The United States Court of Appeals for the District of Columbia Circuit, *United States v. Ali*, 21 August 2013, 718 F.3d 929.
[426] The United States, United States Code, title 18 (Crimes and Criminal Procedure), sect. 2, para. (a).
[427] United States District Court, Eastern District of Virginia, *United States v. Salad*, 30 November 2012, 908 F.Supp.2d 730.
[428] The United States, United States Code, title 18 (Crimes and Criminal Procedure), sect. 1651.
[429] See *United States v. Smith* (footnote 370 above).

piracy deserved life imprisonment in place of the death penalty.[430] In some cases, defendants accused of maritime piracy have even been offered lighter sentences in exchange for a guilty plea before trial, as was the case with Abdulwali Muse, the pirate who inspired the film *Captain Phillips*. In that case, the acts committed were not equated to acts of piracy, but rather to the related crimes of hostage-taking, hijacking and kidnapping. The pirate was therefore sentenced to a lighter penalty of 33 years and 9 months of imprisonment.[431] In addition, the property used to commit acts of maritime piracy is subject to *actio in rem*, where legal action is brought against the property in question or the ship itself. Property that was used to commit piracy may therefore be confiscated, whether it is a ship or other property used to commit the offence.[432] In *United States v. Said*,[433] it is mentioned that the pirates' weapons were confiscated upon arrest.

218. Most of the more recent rulings dealt with attacks in international waters in the Gulf of Aden area. The attacks were generally carried out by small vessels against larger cargo ships[434] and most took place around 2009 and in the first half of the 2010s. The remaining cases took place in the 1820s.[435] Only one other decision was identified, in Ecuador, which concerned the theft of fish.

219. In terms of drawing a distinction between piracy and armed robbery at sea, the United States has no jurisprudence that mentions the latter. The majority of cases deal with maritime piracy on the high seas, and acts of piracy are very often linked to related crimes, such as illicit drugs, narcotics and arms trafficking in international waters.

220. Judges in the United States have been able to exercise universal jurisdiction, having characterized pirates as enemies of humanity[436] and piracy as an "act against all nations and all humankind".[437] In *United States v. Ali*, the judge used the expression "*hostis humani generis*",[438] in other words, "an enemy of the human race".[439]

221. With regard to the application or the implementation of national legislation concerning maritime piracy in the Americas, only courts in the United States and Ecuador have issued rulings on the basis of their respective legal statutes in cases involving the crime of maritime piracy. In the United States, title 18, section 1651, of the United States Code, which prohibits piracy as defined by the law of nations is applied in the majority of court decisions.[440] As section 1651 does not expressly set out a definition of piracy, United States courts, when basing their decisions on this statute, explicitly invoke one of the definitions recognized under international law,[441] such as those contained in Security Council resolutions 1976 (2011) and 2020 (2011), in which States are called on to address the need to "investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who

[430] See *United States v. Hasan* (footnote 227 above).
[431] See BBC, "Somali pirate sentenced to 33 years in US prison", 16 February 2011.
[432] United States District Court for the Southern District of New York, *United States v. The Ambrose Light*, 30 September 1885, 25 F. 408.
[433] See footnote 422 above.
[434] *United States v. Shibin* (see footnote 424 above).
[435] See *United States v. Smith* (footnote 370 above) for the 1820s; and *United States v. Shibin* (footnote 424 above) for the 2010s.
[436] *United States v. Smith* (see footnote 370 above).
[437] *United States v. Shibin* (see footnote 424 above).
[438] *United States v. Ali* (see footnote 425 above); see also Supreme Court of the United States, *United States v. The Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844).
[439] *United States v. Smith* (see footnote 370 above).
[440] See *United States v. Hasan* (footnote 219 above); and *United States v. Shibin* (footnote 424 above).
[441] *United States v. Shibin* (see footnote 424 above).

illicitly plan, organize, facilitate, or finance and profit from such attacks".[442] Consequently, not only persons suspected of having committed acts of piracy at sea, but also their accomplices, wherever they may be, including on the continent or elsewhere on land, can be investigated and prosecuted. The resolutions reflect the Council's intention to authorize the prosecution of alleged perpetrators and accomplices wherever they may be, whether at sea or on land. Based on these resolutions, the United States Court of Appeals for the Fourth Circuit decided that being part of a pirate network and aiding in the commission of an act of piracy made an accused individual a pirate.[443]

222. In the only decision addressing piracy that was identified in the jurisprudence of Ecuador, the court invoked article 423 of that country's Penal Code. For Ecuador, piracy is committed on the high seas, in internal waters or in territorial waters.[444]

223. There are several explanations for the small number of substantive court decisions in the Americas, not counting those of United States courts. First, the dearth of recent decisions has to do with the fact that the heyday of piracy on the American continent was in the eighteenth century.[445] Most court decisions of those days are kept in the national archives of the United Kingdom and cannot be accessed. Second, the fact that the United States is the main State to have prosecuted piracy is the result of it being one of the main participants in the anti-piracy operations conducted in the Gulf of Aden and the Indian Ocean, in particular Operation Ocean Shield led by NATO.

224. With regard to procedural matters, the United States courts have applied the Ker-Frisbie doctrine, mentioned in *United States v. Shibin,*[446] according to which the manner in which a pirate was captured and brought to court may not be invoked before a United States court even if it involved deception or forcible abduction.

225. Canadian courts mentioned piracy in the 1868 decision in *In re Trueman B. Smith,*[447] in the context of an extradition treaty in place at that time, and also in the 2006 decision in *R. v. Zelitt.*[448] In the latter case, and in *R. v. Finta,*[449] the question of universal jurisdiction was raised in connection with acts of maritime piracy. In *R. v. Ryan*,[450] *R. v. Carker*[451] and *R. v. McKillop*,[452] it was also stated that the common law defence of duress cannot be invoked in the context of piracy.

226. Colombian courts frequently cite the extradition treaty of 1911, the so-called Acuerdo Bolivariano, concluded between Bolivia (Plurinational State of), Colombia, Ecuador, Peru and Venezuela (Bolivarian Republic of). Based on this regional treaty, the Constitutional Court of Colombia recognizes the right of States to exercise universal jurisdiction in cases involving piracy[453] and considers the commission of acts of piracy a violation of a *jus cogens* norm.[454]

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[442] Security Council resolution 2020 (2011), fifth preambular paragraph.
[443] *United States v. Shibin* (see footnote 424 above).
[444] National Court of Justice of Ecuador, Decision No. 0495-2016, 15 March 2016.
[445] E. Lucie-Smith, *Outcasts of the Sea: Pirates and Piracy*, New York, Paddington Press, 1978.
[446] *United States v. Shibin* (see footnote 424 above), citing *Ker v. Illinois* (Supreme Court of the United States, Decision, 6 December 1886, 119 U.S. 436) and *Frisbie v. Collins* (Supreme Court of the United States, Decision, 10 March 1952, 342 U.S. 519).
[447] *In re Trueman B. Smith* [1868] O.J. No. 409.
[448] Alberta Court of Queen's Bench (Canada), *R. v. Zelitt*, 26 October 2006, 2006 ABQB 678.
[449] Supreme Court of Canada, *R. v. Finta*, Judgment, 24 March 1994, [1994] 1 SCR 701.
[450] Supreme Court of Canada, *R. v. Ryan*, Judgment, 18 January 2013, [2013] 1 SCR 14.
[451] Supreme Court of Canada, *R. v. Carker*, Judgment, 19 December 1966, [1967] SCR 114.
[452] Court of Appeal for Ontario (Canada), *Rex v. McKillop*, 17 February 1948, [1948] OJ No. 46.
[453] Constitutional Court of Colombia, Decision, 13 June 2001, C-621/01.
[454] Constitutional Court of Colombia, Decision, 25 April 2007, C-291/01.

227. The Supreme Court of Justice of Costa Rica has referred frequently to the functions of the Coast Guard, one of which is to monitor piracy.[455] The Court has not defined piracy; the term is also not defined in Costa Rican legislation. The Court applies article 101 of the United Nations Convention on the Law of the Sea directly[456] and may exercise universal jurisdiction[457] as defined in article 105 of the Convention.

228. In the United States, piracy is often addressed in extradition treaties,[458] and the prohibition against piracy has also been elevated to the level of a *jus cogens* norm.[459] In Mexico, the Supreme Court of Justice of the Nation referred to piracy in one decision as an imprescriptible crime.[460] In El Salvador, piracy is mentioned in various cases in reference to an extradition treaty with the United States.[461] In the Bolivarian Republic of Venezuela, some decisions of the Supreme Court make reference to a 1911 extradition treaty that mentions piracy.[462]

# V. Piracy and armed robbery at sea in Europe

## A. Legislative and judicial practices

### 1. Legislative practice

*(a) Definition of maritime piracy and armed robbery at sea*

229. In their legislation, European States have, on the whole, reproduced the definition of piracy set out in article 101 of the United Nations Convention on the Law of the Sea. A total of 32 States[463] have adopted legislation defining maritime piracy and, in some cases, armed robbery at sea. A number of these States use elements of the definition in article 101 of the Convention. As indicated in the paragraphs that follow, legislative practice in Europe varies with regard to the definition of maritime piracy. Accordingly, 32 States[464] use the terms “any act of

[455] Supreme Court of Justice of Costa Rica, Constitutional Chamber, Decision No. 01250, 31 January 2007.

[456] Supreme Court of Justice of Costa Rica, Constitutional Chamber, Decision No. 2021006318, 25 March 2021.

[457] Supreme Court of Justice of Costa Rica, Constitutional Chamber, Decision No. 2020018995, 2 October 2020.

[458] United States District Court for the Northern District of Florida, *United States v. Matta-Ballesteros*, 4 August 1988, 700 F.Supp.528; Supreme Court of the State of Washington, *State v. Pang*, 31 July 1997, 132 Wn.2d 852; United States Court of Appeals for the Ninth Circuit, *Quinn v. Robinson*, 18 February 1986, 783 F.2d 776; and Supreme Court of the United States, *United States v. Rauscher*, 6 December 1886, 119 U.S. 407.

[459] United States Court of Appeals for the Eleventh Circuit, *United States v. Bellaizac-Hurtado*, 6 November 2012, 700 F.3d 1245.

[460] Supreme Court of Mexico, First Chamber, Case No. 23/2005, Decision, 15 June 2005.

[461] Extradition Treaty between the United States of America and El Salvador (San Salvador, 18 April 1911).

[462] Supreme Court of Justice of the Bolivarian Republic of Venezuela, Criminal Cassation Chamber, decisions No. 285 (22 July 2016), No. 500 (6 December 2016) and No. 501 (6 December 2016).

[463] Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Georgia, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands (Kingdom of the), North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovenia, Spain, Ukraine, United Kingdom and Holy See.

[464] Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Georgia, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands (Kingdom of the), North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovenia, Spain, Ukraine, United Kingdom and Holy See.

violence", "detention" and "depredation"; 27 States[465] consider that the act must be "committed by the crew or the passengers of a ship"; 21 States[466] provide that piracy is committed "for private ends"; 32 States[467] provide that the impugned act is committed by a ship "against another ship"; 30 States[468] consider that an act of piracy is directed "against property/persons on board a ship"; 23 States[469] specify that piracy is committed "on the high seas or outside the jurisdiction of a State"; 13 States[470] use the terms "on board a ship knowing that it is used for piracy (complicity/voluntary participation)"; and 10 States[471] mention "incitement to piracy". This shows that the tendency in legislative practice is to reproduce the elements of the definition of piracy as set out in article 101 of the Convention. However, the question is whether, in view of the variations in the definition of piracy, the elements of the definition in article 101 of the Convention are cumulative or alternative elements. In other words, would all the conditions have to exist cumulatively for the crime of piracy to exist beyond any doubt, or is it sufficient for one or two elements of the definition to be established in order for the crime to be deemed to have been committed?

230. Research conducted to date shows that only 4 States[472] in Europe have established a definition of armed robbery at sea, while 42 have not. Six States[473] have reproduced specifically the definition of piracy from article 101 of the United Nations Convention on the Law of the Sea. No State has reproduced the definition of armed robbery at sea contained in the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships. Lastly, 21 States[474] have penalties for maritime piracy without, however, defining it in their national laws, and 6 States[475] have defined it but do not impose penalties.

231. The European countries that are not mentioned in this study are those that have not defined piracy or armed robbery at sea in their laws.

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[465] Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Finland, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands (Kingdom of the), North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovenia, Ukraine, United Kingdom of Great Britain and Northern Ireland, and Holy See.

[466] Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Latvia, Lithuania, Malta, Monaco, Montenegro, Netherlands (Kingdom of the), North Macedonia, Norway, Portugal, Republic of Moldova, Russian Federation, San Marino, Serbia, Ukraine, United Kingdom and Holy See.

[467] Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Georgia, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands (Kingdom of the), North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovenia, Spain, Ukraine, United Kingdom and Holy See.

[468] Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Georgia, Greece, Italy, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands (Kingdom of the), North Macedonia, Norway, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovenia, Spain, Ukraine, United Kingdom and Holy See.

[469] Belgium, Croatia, Cyprus, Estonia, Finland, France, Greece, Latvia, Lithuania, Luxembourg, Monaco, Montenegro, Netherlands (Kingdom of the), Norway, Portugal, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovenia, Spain and United Kingdom.

[470] Bosnia and Herzegovina, Cyprus, Estonia, Finland, France, Georgia, Greece, Italy, Malta, Monaco, Russian Federation, San Marino and United Kingdom.

[471] Belgium, Cyprus, Finland, France, Greece, Lithuania, Malta, Monaco, Romania and United Kingdom.

[472] Croatia, Latvia, Lithuania and Poland.

[473] Belgium, Bulgaria, Croatia, Latvia, Norway and United Kingdom.

[474] Austria, Belgium, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Greece, Ireland, Lithuania, Luxembourg, Malta, Monaco, Netherlands (Kingdom of the), North Macedonia, Russian Federation, San Marino, Serbia, Slovenia, Spain, Ukraine and Holy See.

[475] Bulgaria, Croatia, Finland, France, Portugal and United Kingdom.

232. Sections 45 and 46 of the Maritime Navigation Act of Austria deal with the criminalization and repression of armed robbery at sea and piracy.[476] These provisions define piracy as the threat or use of force against persons for the purpose of seizing a ship, its cargo or persons on board the ship. The expression "the threat or use of force" is not directly defined in section 45 of the Act, but there is a cross-reference to the relevant legal definition in section 74, paragraph 5, of the Criminal Code of Austria.[477] Consequently, piracy is defined as "the use or threat of force" (a crime that in itself is said to be punishable) when it is committed in specific circumstances. In comparison with "mere" use of force,[478] the range of sentences is broader (for example, 1–10 years compared with 1–3 years). The element of piracy – the threat or use of force for the purpose of seizing a ship – therefore serves as an aggravating factor, increasing the penalty.

233. The structure of the Austrian provisions is different from the definition of piracy in article 101 of the United Nations Convention on the Law of the Sea, and not all the elements are included. More importantly, Austria punishes crimes against persons (also for the purpose of economic gain) but does not punish mere "depredation" of ships or cargoes. With regard to crimes against persons, it seems that all the variations set out in article 101 of the Convention are reflected in the provisions of criminal law.

234. Sections 45 and 46 of the Maritime Navigation Act of Austria are substantive provisions that do not refer to the place of commission of the crime. Clarification can be found in section 1 of the Act, which limits the scope to Austrian yachts. Given that there are no jurisdictional provisions in the Act, jurisdictional links are to be drawn from the general part of the Criminal Code, and more specifically from the flag principle.[479] Austria has not provided for the exercise of universal jurisdiction in respect of (maritime) piracy. Given that article 105 of the United Nations Convention on the Law of the Sea authorizes but does not oblige States to provide for universal jurisdiction, the jurisdictional clause in Austrian law of the Criminal Code, which provides for the jurisdiction of Austrian courts on the basis of an obligation under international law to exercise such jurisdiction,[480] is not applicable. Lastly, the crime of piracy is criminalized in Austria through the following provision: "Anyone who equips or commands or serves on a seagoing vessel that is intended for piracy shall be punished by imprisonment for a term of six months to five years."[481]

235. Belgium, in its Maritime Code,[482] has largely reproduced the provisions of article 101 of the United Nations Convention on the Law of the Sea relating to the definition of maritime piracy. Elements of piracy within the meaning of article 101 are listed in the Code: there is a two-ship requirement; the ships must be private ships acting for private ends; and the act of piracy must be committed on the high seas or in a place outside the jurisdiction of any State. The Code does not cover private aircraft, which may, however, be the target of pirate attacks and which are referred to in article 101 of the Convention. Furthermore, paragraph 3 of article 4.5.2.2. of the Code seems to extend the geographical scope of acts of piracy beyond the high seas to other maritime spaces, including those under Belgian national jurisdiction and sovereignty. The paragraph provides that "the acts referred to in paragraphs 1 and 2,

[476] Austria, Maritime Navigation Act, arts. 45 and 46.
[477] Austria, Criminal Code, art. 74, para. 5.
[478] Ibid., art. 84.
[479] Ibid., art. 63. See also S. Glaser, *Strafanwendungsrecht in Österreich und Europa,* Vienna, MANZ, 2018, p. 275 ff.
[480] Austria, Criminal Code, sect. 64, par. 1 (6).
[481] Austria, Maritime Navigation Act, sect. 46.
[482] Belgium, Act introducing the Maritime Code of Belgium (8 May 2019), art. 4.5.2.2. See also excerpts from the response of Belgium to IMO circular letter No. 2933 of 23 December 2008, available at the following address: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BEL_legislation.pdf.

if committed in a maritime space other than the high seas, shall be assimilated to acts of piracy as defined in paragraphs 1 and 2, to the extent provided for by international law". In other words, piracy occurs both on the high seas and in the internal waters and territorial sea of Belgium. In addition, paragraph 2 provides that a warship or government ship whose crew has mutinied is assimilated to a private ship. Consequently, such a ship under international law loses its immunity from legal process and thus remains subject to the courts of any State that has arrested the pirate or the pirate ship. Penalties for piracy are provided for in article 4.5.2.3. of the Maritime Code. Armed robbery at sea is not criminalized.

236. The State of Bosnia and Herzegovina, in the definition of piracy in its Criminal Code,[483] has reproduced the elements of the definition in article 101 of the United Nations Convention on the Law of the Sea. Under the Code, piracy occurs when

> a crew member or a passenger on board a ship or an aircraft, with the exception of a military or government ship or aircraft, who for the purpose of obtaining an economic or non-economic benefit for himself or herself or for another person or of causing any other damage, on the high seas or in a territory that is not under the control of any State, perpetrates illegal violence or any other type of coercion against another ship or aircraft or against persons or objects on board such ship or aircraft.[484]

237. Bulgaria, a monist State, is in the process of directly transposing article 101 of the United Nations Convention on the Law of the Sea into its domestic legal system, thus establishing the primacy of international law over Bulgarian domestic law. The State of Bulgaria does not yet have legislation on maritime piracy. However, in the absence of such legislation, and given that Bulgaria is a State party to the United Nations Convention on the Law of the Sea, article 101 is to be applied in Bulgaria under the Constitution itself, which provides, in article 5, paragraph 4, that "international agreements that have been ratified in accordance with the Constitution and promulgated, and that have entered into force for the Republic of Bulgaria, shall form part of the national law of the State. They shall prevail over provisions of national law that are in conflict with them."[485] In the absence of specific legislation on piracy, article 6, paragraph 2, of the Penal Code applies; it establishes that Bulgaria may exercise universal jurisdiction over crimes committed abroad by foreign citizens. No penalties have been established for piracy, and there is no definition of armed robbery at sea.

238. Cyprus has adopted two legal instruments that define maritime piracy: the Criminal Code[486] and the Protection of Cypriot Ships against Acts of Piracy and Other Illegal Acts Act of 2012.[487] These two texts reproduce the provisions of article 101 of the United Nations Convention on the Law of the Sea. Although armed robbery at sea is not specifically criminalized in the legislation of Cyprus, the expression "other illegal acts" is so general that it could cover other forms of crime at sea, in particular armed robbery. The expression "in a place within or outside the jurisdiction of the

[483] Bosnia and Herzegovina, Criminal Code, art. 196.

[484] Ibid., para. 1.

[485] See also note No. 507 of the Permanent Mission of the Republic of Bulgaria to the United Nations addressed to the Division for Ocean Affairs and the Law of the Sea of 16 February 2010, available at the following address: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGR_penal_code.pdf.

[486] Cyprus, Criminal Code, art. 69.

[487] Cyprus, Protection of Cypriot Ships against Acts of Piracy and Other Illegal Acts Act (Act No. 77 (I) of 2012), art. 2. See also the information submitted by Cyprus in response to IMO circular letter No. 2933 of 23 December 2008, available at the following address: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CYP_piracy.pdf.

Republic"[488] could mean all maritime spaces under national sovereignty and jurisdiction and those on the high seas and in waters outside the jurisdiction of a State. The implication is that piracy is committed on the high seas as well as in the internal waters and the territorial sea of Cyprus.

239. Croatia has defined piracy and armed robbery at sea by including the following express reference to article 101 in its legislation: "Piracy is piracy within the meaning of article 101 of the United Nations Convention on the Law of the Sea."[489] Armed robbery at sea is defined as follows: "Armed robbery is one of the acts covered by the definition of piracy if it is committed in internal waters, the territorial sea of a coastal State or archipelagic waters."[490] No penalties have been established.

240. The Criminal Code of Spain contains a definition of piracy under which the object or targets of pirate attacks are not limited to ships, aircraft, persons and property; attacks on platforms and any other kind of vessel are included.[491] Piracy is committed "outside the jurisdiction of a State".[492] However, the undifferentiated use of the expression "at sea" could cover acts of piracy committed anywhere in the marine environment, including on the high seas, in internal waters and in the territorial sea of Spain. Armed robbery at sea is neither defined nor criminalized.

241. Estonia, in its Penal Code,[493] has defined piracy by providing that it consists of "an attack on or the seizure or destruction of a ship on the high seas or in an area outside the jurisdiction of any State, or an attack on or the detention of persons on board such ship, or the seizure or destruction of property on board such ship, with the use of violence". The two-ship requirement and the private-ends requirement are not reproduced in the Code. Under article 110 of the Code, acts of piracy are punishable by imprisonment for a term of 2 to 10 years. In the event of death, serious damage or danger to life and health, the penalty is imprisonment for a term of 6 to 20 years.

242. The Criminal Code[494] of the Russian Federation provides a somewhat brief definition of piracy that does not reproduce the elements of the definition as they appear in article 101 of the United Nations Convention on the Law of the Sea. Indeed, article 227 of the Criminal Code does not specify whether the attack has to take place on the high seas or in an area outside the jurisdiction of any State, or in a maritime zone under national sovereignty or jurisdiction. It also does not specify the motive for the attack, namely that it is committed for private ends by one ship against another ship or aircraft. Given that the place of commission of the impugned act is not established by law, it might be assumed that piracy may be committed anywhere in the marine environment, without distinction between different maritime spaces. The penalties for piracy, as defined in article 227 of the Criminal Code, are imprisonment for a term of 5 to 15 years, and fines. Armed robbery at sea is neither defined nor criminalized.

243. Finland, in its Decree on the application of chapter 1, section 7, of the Penal Code,[495] has defined piracy by providing that "for the purposes of chapter 1, section 7,

[488] Cyprus, Criminal Code, art. 69, para. (a) (ii)

[489] Croatia, Protection of the Security of Ships and Ports Act, art. 3.

[490] Ibid.

[491] Spain, Criminal Code, art. 616 *ter*. See also the note of 30 March 2009 from the Ministry of Justice of Spain submitted in response to a request from IMO, available at the following address: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_piracy_summary.pdf.

[492] Spain, Criminal Code, art. 9.

[493] Estonia, Penal Code, art. 110.

[494] The Russian Federation, Criminal Code, art. 227. See also the note transmitted by the Russian Federation in response to a request from IMO (J/10059), available at the following address: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_national_legislation_piracy.pdf.

[495] Finland, Decree on the application of chapter 1, section 7, of the Penal Code. See also the note

of the Penal Code, the following offences shall be considered international crimes: … seizure or theft of or damage to a ship or an aircraft, or property on board a ship or an aircraft, that is to be regarded as piracy within the meaning of the United Nations Convention on the Law of the Sea … ".[496] The reference to article 101 of the Convention presupposes that the legislation reproduces all the elements of the definition of piracy as contained in the article. However, there is no specific offence of piracy, since acts of piracy are assessed in the light of and by analogy with other offences that are punishable under the Penal Code and over which Finland has established universal jurisdiction. No penalty is established for piracy, and armed robbery at sea is not criminalized. The definition of piracy in the legislation of France[497] refers explicitly to the United Nations Convention on the Law of the Sea and contains elements of the definition in article 101 of the Convention. Acts "committed on the high seas, in a place outside the jurisdiction of any State or, where international law so provides, in the territorial sea of a State"[498] constitute acts of piracy within the meaning of the Convention. Armed robbery at sea is neither defined nor criminalized.

244. The Criminal Code of Georgia defines piracy without reproducing all the elements of the definition of the crime as they appear in article 101 of the United Nations Convention on the Law of the Sea. The Code provides:

> 1. Piracy, that is, an attack on a boat or other ship for the purpose of seizing another person's property or appropriating it illegally, with the use of violence or the threat of violence, shall be punished by imprisonment for a term of 7 to 10 years.
>
> 2. The same act: (a) committed repeatedly; (b) causing death or other serious consequences, shall be punished by imprisonment for a term of 10 to 15 years.[499]

The Criminal Code of Georgia does not criminalize armed robbery at sea. The Code on Public Maritime Law[500] of Greece defines piracy by reproducing some elements of the definition in article 101 of the United Nations Convention on the Law of the Sea. For example, the Code mentions piracy on the high seas without referring to the private-ends requirement for pirate attacks. The Code provides that "piracy is committed by anyone on board a ship who, using physical violence or a threat against persons, commits acts of robbery against another ship on the high seas with the intention of appropriating the property thus obtained."[501] Piracy is recognized under the Penal Code as a crime *jure gentium*[502] over which Greece may exercise universal jurisdiction: the country's courts have jurisdiction to prosecute and try any person suspected of having committed acts of maritime piracy. The captain of a Greek commercial ship has the power to apply the law to any person committing any illegal act on board and to detain pirates.[503] Lastly, although armed robbery at sea has not been criminalized, the definition of piracy in the Code on Public Maritime Law

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verbale from the Permanent Mission of Finland to the United Nations addressed to the Division for Ocean Affairs and the Law of the Sea dated 19 February 2010, available at the following address: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/FIN_criminal_code.pdf.

[496] Finland, Decree on the application of chapter 1, section 7, of the Criminal Code, sect. 1, para. 1.

[497] France, Exercise by the State of its Police Powers at Sea to Combat Certain Crimes under International Agreements Act (Act No. 94-589) of 15 July 1994.

[498] Ibid., art. 1, para. 1.

[499] Georgia, Criminal Code, art. 228.

[500] See https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GRC_penal_code.pdf (referring in particular to the Code on Public Maritime Law, art. 215).

[501] Greece, Code on Public Maritime Law, art. 215.

[502] Greece, Penal Code, art. 8.

[503] Greece, Code on Public Maritime Law, art. 242.

largely reflects the elements of the crime of armed robbery. Although Ireland has not adopted legislation defining piracy, it established provisions to repress the crime in a nineteenth-century Act.[504] Armed robbery at sea is neither defined nor criminalized.

245. Italy, in its Maritime Code, has defined the terms "piracy" and "ship suspected of piracy".[505] Under the Code, piracy occurs when "a captain or officer of a national or foreign ship … commits acts of depredation against a national or foreign ship or its cargo or …, for the purpose of depredation, commits violence against a person on board a national or foreign ship".[506] On the other hand, under the Code, a ship is suspected of piracy when "a captain or officer of a national or foreign ship illegally supplied with weapons … sails without nautical charts", in which case the captain or officer is "liable to imprisonment of 5 to 10 years".[507] There is Italian legislation establishing the jurisdiction of the Court of Rome, on the basis of the Code of Criminal Procedure, to try cases of piracy committed both on the high seas and in the territorial sea, on the basis of the principle of universal jurisdiction, since article 7 of the Penal Code refers to the concept of "unconditional punishability" for crimes committed abroad by foreigners or by Italian citizens. Under the Maritime Code, universal jurisdiction is applicable whether the ship is a national ship or a foreign ship. Italy has no specific legislation relating to armed robbery at sea.

246. The Maritime Code of Latvia defines both piracy and armed robbery at sea. With regard to piracy, the Code expressly refers to the definition in the United Nations Convention on the Law of the Sea.[508] Armed robbery at sea is defined as follows:

> Armed robbery against a ship means any illegal act of violence or detention, or robbery or threat of robbery, other than piracy, committed for private ends and directed against a ship or persons or property on board such ship in the internal waters, archipelagic waters or territorial sea of the State, or any act of inciting or of intentionally facilitating the aforementioned acts."[509]

Under the Code, armed robbery at sea is an illegal act other than piracy that is committed not on the high seas but in waters subject to the sovereignty of Latvia, that is, internal waters, archipelagic waters and the territorial sea. No penalties are established for either of the two criminal offences. The Criminal Code[510] of Lithuania defines both piracy and armed robbery at sea. It defines piracy in terms that are slightly different from those used in article 101 of the United Nations Convention on the Law of the Sea, which is referred to in the Merchant Shipping Act[511] of Lithuania. Examples of differing terms are those related to detaining a ship "at sea" or "in another territory excluded from the jurisdiction of a State". The reference to the sea may be understood to mean that an act of piracy is committed anywhere in the marine environment, including on the high seas, in internal waters and in the territorial sea. The expression "another territory" may include both land territory and maritime spaces beyond national jurisdiction. Armed robbery at sea is defined in the Merchant Shipping Act, which largely reproduces the IMO definition, as follows:

> "Armed robbery against ships means illegal acts of violence, detention or destruction, or the threat thereof, other than piracy, committed for personal ends and directed against a ship or against persons or property on board such a ship, while the ship is in a State's internal waters, archipelagic waters and territorial

[504] Ireland, Piracy Act (1837), sect. 2.
[505] Italy, Maritime Code, art. 1135 (Piracy) and art. 1136 (Ship suspected of piracy).
[506] Ibid., art. 1135.
[507] Ibid., art. 1136.
[508] Latvia, Maritime Code, art. 288.1, para. 3.
[509] Ibid., para. 4.
[510] Lithuania, Criminal Code, art. 251.1.
[511] Lithuania, Merchant Shipping Act, art. 2, para. 29.

sea, or any act of inciting or of intentionally facilitating one of the aforementioned acts."[512]

The definition thus clearly distinguishes armed robbery at sea from piracy, on the basis of the place of commission of the crime. Luxembourg has reproduced in brief form the essential elements of article 101 of the Convention. Its Maritime Disciplinary and Penal Code defines piracy as "any illegal act of violence committed against another ship or persons on board such ship on the high seas, or against a ship, persons or property in a place outside the jurisdiction of any State".[513] The Code does not include the private-ends requirement as an element of the definition of piracy. The penalties for piracy are set out in articles 64 and 65 of the Code. Armed robbery at sea is neither defined nor criminalized. In its Criminal Code,[514] North Macedonia has reproduced in substance all the elements of the definition in article 101 of the Convention. The crime of piracy is linked to a place that is outside the authority of any State. The penalty is imprisonment for a term of one to five years. Armed robbery at sea is neither defined nor criminalized. Malta defines and represses[515] piracy through its Criminal Code, in which the provisions of article 101 of the Convention are reproduced. The penalties for piracy are imprisonment for terms ranging from eight years to life, depending on the gravity of the crime. Armed robbery at sea is neither defined nor criminalized.

247. In its Maritime Code,[516] Monaco has defined piracy by reproducing the provisions of article 101 of the United Nations Convention on the Law of the Sea. However, the place of commission of piracy remains undefined, since the Code makes a general reference to an attack by a ship on another ship "at sea", a space that encompasses all maritime zones from the high seas to waters under the jurisdiction and sovereignty of States. In other words, under the Maritime Code, piracy may be committed in the internal waters and territorial waters of Monaco. Armed robbery at sea is neither defined nor criminalized.

248. Under the Criminal Code of Montenegro, piracy occurs when "a member of the crew or a passenger on a private ship or a private aircraft ... commits acts of violence or robbery against persons on board another ship or aircraft on the high seas or in a place not under the authority of any State or ... detains, seizes, damages or destroys another ship or aircraft or property found on them".[517] The penalties are imprisonment for terms ranging from 3 to 15 years, depending on the gravity of the crime.[518] Armed robbery at sea is neither defined nor criminalized. Norway simply refers to the United Nations Convention on the Law of the Sea, defining piracy as "acts covered by the definition of piracy in article 101 of the United Nations Convention on the Law of the Sea of 10 December 1982."[519] Piracy and armed robbery at sea are punishable under the provisions of the Civil Penal Code, sections 267 and 268 of which give no definition of the two offences but merely determine the applicable penalties. Section 151 (a), on the other hand, without reproducing the elements of the definition in article 101 of the Convention, criminalizes the acts of any individual who, on board a ship, illegally takes control of the ship through violence or threats. The legislation does not seem to establish a distinction between piracy and armed robbery at sea,

[512] Ibid., para. 8.
[513] Luxembourg, Act of 14 April 1992 promulgating the Maritime Disciplinary and Penal Code, art. 64.
[514] North Macedonia, Criminal Code, art. 422.
[515] Malta, Criminal Code, art. 328N.
[516] Monaco, Act No. 1.198 of 27 March 1998 on the Maritime Code, art. L.633-25.
[517] Montenegro, Criminal Code, art. 345, para. 1.
[518] Ibid., paras. 1 and 2.
[519] Norway, regulations on the processing of criminal cases concerning persons suspected of piracy in the Indian Ocean (FOR-2013-06-14-622), 14 June 2013, art. 2.

crimes over which Norway asserts its right to exercise universal jurisdiction irrespective of the place at sea where the crimes were committed and of the nationality of the perpetrators. Indeed, the jurisdiction clause of the Civil Penal Code establishes that Norwegian criminal law applies to all acts punishable under sections 266, 267 and 269, irrespective of the place where the act was committed and of the nationality of both the perpetrator and the victim of the crime.[520]

249. The Penal Code of the Kingdom of the Netherlands provides a definition of piracy that, albeit brief, reproduces the elements of the definition of piracy set out in article 101 of the United Nations Convention on the Law of the Sea. Under the legislation of the Kingdom of the Netherlands, piracy consists of "any illegal act of violence or detention and any act of looting committed for personal ends by the crew or passengers of a private ship against another ship outside the territorial sea of a State, or any attempt at such an act".[521] The penalties for piracy are set out in article 381 of the Penal Code. Armed robbery at sea is neither criminalized nor penalized. Poland, in its Penal Code, has defined piracy and armed robbery,[522] which are regarded as two forms of crime belonging to the category of crimes against peace, crimes against humanity and war crimes. Although the Code does not seem to reproduce all the elements of the definition of piracy as set out in the United Nations Convention on the Law of the Sea, it provides for the exercise of universal jurisdiction by the State, since the Polish authorities may prosecute anyone, irrespective of his or her nationality and of the place of commission of the two crimes. The penalties are imprisonment for terms ranging from 2 to 25 years, depending on the gravity of the acts. The Penal Code defines armed robbery at sea as follows: "Anyone who arms a seagoing ship intended for robbery at sea or agrees to serve on such a ship shall be subject to a penalty of imprisonment for a term of 1 to 10 years."[523] Armed robbery is therefore not linked to a specific place at sea; the Code provides only that it must involve an armed seagoing ship "intended for robbery at sea".

250. Portugal has defined piracy in a decree-law[524] referring to article 101 of the United Nations Convention on the Law of the Sea, without other details or specifications. Armed robbery at sea is neither criminalized nor penalized. The definition of piracy in the Criminal Code of the Republic of Moldova is brief but reproduces the elements of the definition in article 101 of the Convention. Piracy is defined as "robbery committed for personal ends by the crew or passengers of a ship against persons or property on board such ship or against another ship, if the ships are on the high seas or in a place outside the jurisdiction of a State".[525] Armed robbery at sea is neither defined nor criminalized. The Criminal Code of Romania provides a definition of piracy that does not depart from the main provisions of the Convention. Thus, piracy is considered to be "robbery, using violence or threat, by a person who is a crew member or passenger on a ship on the high seas, directed against property on board such ship or on board another ship".[526] Armed robbery at sea is neither defined nor criminalized in the Code. The United Kingdom, in the Merchant Shipping and Maritime Security Act,[527] has defined piracy simply by referring to the definition

[520] Norway, Ministry of Trade and Industry, note verbale dated 25 September 2009, in response to IMO circular letter No. 2933.

[521] The Kingdom of the Netherlands, Act of 15 May 2019 on Merchant Shipping Protection Act, 15 May 2019, sect. 1 (n).

[522] Poland, Act of 6 June 1997 on the Penal Code, arts. 166 (Piracy) and 170 (Armed robbery). See also https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/POL_penal_code.pdf.

[523] Poland, Act of 6 June 1997 on the Penal Code, art. 170.

[524] Portugal, Decree-Law No. 159/2019 of 24 October 2019, art. 3, para. 1.

[525] The Republic of Moldova, Criminal Code, CP985/2002, art. 289, para. 1.

[526] Romania, Act No. 286/2009 on the Criminal Code, art. 235, para. 1.

[527] The United Kingdom, Merchant Shipping and Maritime Security Act, 1997, sect. 26, para. 1.

of piracy set out in article 101 of the United Nations Convention on the Law of the Sea. Although piracy is defined, it is not criminalized. Armed robbery at sea is neither defined nor criminalized.

251. San Marino, in its Penal Code,[528] has defined piracy by reproducing the elements of the definition of the crime set out in article 101 of the United Nations Convention on the Law of the Sea. The penalties are imprisonment, prohibition on working and payment of a fine. Armed robbery at sea is neither defined nor criminalized. The Holy See defines piracy as "kidnapping, robbery or any illegal act of violence committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed against another ship or aircraft, or against persons or property transported by them."[529] Armed robbery at sea is neither defined nor criminalized. For Serbia, piracy occurs, according to the Criminal Code, when "a member of the crew or a passenger of a ship who commits acts of violence or robbery against persons on board another ship on the high seas or in a place outside the authority of any State detains, seizes, damages or destroys another ship or merchandise on board such ship or causes serious damage".[530] Armed robbery at sea is not criminalized. The Criminal Code of Slovenia defines piracy by reproducing the elements of the definition contained in article 101 of the Convention. Under the Code, piracy occurs when

> a member of the crew or a passenger of a ship or aircraft, other than military ship or aircraft or a government ship or aircraft, who, in violation of the rules of international law, for the purpose of obtaining a material or non-material gain for himself or herself or for another person, or for the purpose of causing grave harm to another person, on the high seas or in a place outside the authority of any State, commits an illegal act of violence, detention or pillage against another ship or aircraft or persons or property on board.[531]

Armed robbery at sea is neither defined nor criminalized.

252. For Ukraine, piracy occurs in the event of "the use, for the purposes of material gain or other personal gain, of an armed or unarmed ship for the seizure of another sea or river ship, or in the event of violence, robbery or other hostile acts against the crew or passengers of such ship".[532] Armed robbery at sea is neither defined nor criminalized.

*(b) Preventive and repressive measures*

253. Various preventive measures have been implemented at the national level in European countries. The first means of preventing piracy is the adoption of legislation, if it is accepted that the fear of the gendarme is the beginning of wisdom. The adoption of legislation seems to be a means of deterring the commission or attempted commission of the crimes of piracy and armed robbery at sea. Some States establish universal jurisdiction on the basis of their domestic law. Six States[533] do so through the maritime authority or naval forces responsible for security at sea and at ports. Germany[534] has introduced training on the handling of threats to maritime

[528] San Marino, Act No. 17 of 25 February 1974 on the Penal Code, art. 195 bis.
[529] The Holy See, Act No. VIII on the supplementary rules on criminal matters (11 July 2013), art. 36.
[530] Serbia, Criminal Code, art. 294.
[531] Slovenia, Criminal Code (KZ-1-UPB2), art. 374.
[532] Ukraine, Criminal Code, art. 446, para. 1. See also https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/UKR_criminal_code.pdf.
[533] Albania, Croatia, Denmark, France, Russian Federation and Ukraine.
[534] Centre for the prevention of piracy established by the German federal police.

security, including piracy and armed robbery at sea. Denmark and Slovakia[535] have established a navigation security and surveillance system. In addition to legislative frameworks for prevention, there are national regulations. For example, in Europe, eight States[536] have authorized the use of private enterprises as a preventive measure. Three States[537] confer powers of defence, arrest, investigation or seizure exclusively on the captain of the ship. Lastly, two States[538] confer a power of defence both on the captain and on the persons on board.

254. In Europe, 26 States have established penalties specifically for maritime piracy in their national regulations. Only 4 States have established penalties specifically for armed robbery at sea, compared with 50 that have none.

255. The most frequently imposed penalties are the payment of a fine, the death penalty, imprisonment for a fixed term, life imprisonment, reclusion and forced labour. A total of 22 States[539] call for imprisonment, 5 States[540] call only for the payment of a fine, no State calls for the death penalty, 3 call for reclusion[541] and 6 call for life imprisonment, while only 1 State, Luxembourg, punishes acts of piracy with forced labour.

256. Furthermore, some States have sentenced the perpetrators of the crime of piracy to less severe but still fairly lengthy terms of imprisonment ranging from 10 years to 30 years. Such is the case, for example, in Germany[542] (12 years). Other States have also imposed relatively minor terms of imprisonment of between two and eight years, such as the Kingdom of the Netherlands[543] (two to seven years). In the latter cases, the less severe sentences[544] were justified either because the attack was aborted[545] or because the defendants agreed to participate in rehabilitation programmes during their time in custody.[546]

257. The use of violence, murder and manslaughter are often cited as aggravating factors. Twenty States[547] provide for penalties of varying severity, depending on the gravity of the offence. The practice of confiscating the ship is contemplated only by Ukraine, and in seven States there are no aggravating factors.[548]

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[535] In Denmark, a security management system under the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code) and a security plan under the International Code for the Security of Ships and of Port Facilities (ISPS Code); in Slovakia, the owner of a seagoing ship is obliged to prevent the ship from violating the prohibition of the transport of slaves and to cooperate in the repression of piracy.

[536] Belgium, Croatia, Estonia, Germany, Greece, Italy, Netherlands (Kingdom of the) and Portugal.

[537] Georgia, Norway and Republic of Moldova.

[538] Croatia and Cyprus.

[539] Austria, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Greece, Ireland, Italy, Kosovo, Lithuania, Malta, Montenegro, Netherlands (Kingdom of the), North Macedonia, Poland, Republic of Moldova, San Marino, Serbia, Slovenia, Spain, Ukraine and Holy See.

[540] Lithuania, Montenegro, Netherlands (Kingdom of the), Russian Federation and San Marino.

[541] Belgium, France and Monaco.

[542] Federal Court of Justice of Germany, "Verurteilung wegen 'Piraterie' an deutschem Chemietanker vor Somalia rechtskräftig", press release No. 54/2015, 13 April 2015.

[543] Court of Rotterdam, Case No. 10/600012-09, Judgment, 17 June 2010; Court of Rotterdam, Case No. 10/960248–10, Judgment, 12 August 2011; Court of Rotterdam, Case No. 10/960227-12, Judgment, 10 January 2014; and Court of Appeal of The Hague, Case No. 22-004046-11, Judgment, 20 December 2012.

[544] Court of Rotterdam, Case No. 10/960248-10 (see footnote 543 above).

[545] *Republic v. Musa Abdullahi Said and 6 others* (see footnote 224 above).

[546] Ibid.

[547] Belgium, Bosnia and Herzegovina, Estonia, Georgia, Italy, Lithuania, Luxembourg, Malta, Montenegro, Netherlands (Kingdom of the), North Macedonia, Poland, Republic of Moldova, Romania, Russian Federation, San Marino, Serbia, Slovenia, Spain and Ukraine.

[548] Austria, Cyprus, Greece, Ireland, Malta, Monaco and Holy See.

### 2. Judicial practice

258. In the Europe region, 57 decisions have been rendered, 21 of which relate to cases of piracy at sea and 27 merely contain references to piracy, without the crime of piracy being the main subject of the cases. In general, these decisions contain references to piracy for the purposes of comparison with other forms of crime giving rise to universal jurisdiction. The 21 decisions relating to cases of piracy at sea were rendered in the Kingdom of the Netherlands and other countries, and under European Community law.

#### *(a) Jurisprudence of the Kingdom of the Netherlands*

259. The Netherlands judge in one case[549] had to consider the following facts. The accused was a citizen of Somalia. The indictment was based on the fact that, from 1 November 2009 to 10 November 2010, the accused served as a sailor on a ship, knowing that it was being used to commit acts of violence against other ships, in particular the South African yacht *Choizil*. On the basis of articles 47 and 381, paragraph 1.1, of the Penal Code, the Court of Rotterdam sentenced the accused to seven years' imprisonment and ordered that the time spent in custody be deducted from the term of imprisonment imposed, provided that the time had not already been deducted from another sentence of imprisonment. According to the Court, when the accused joined the crew while onshore or in the territorial waters of Somalia between 15 October and 19 November 2010, he knew that the ship had always been used "to commit acts of violence on the high seas against other ships and/or against persons and/or property on board". In this case, the violence on the high seas against the *Choizil* took the form of a threat to use automatic firearms and a rocket launcher against the crew of the *Choizil* without the prior authorization of a "belligerent Power" or evidence that the persons concerned were members of "the navy of a recognized Power".

260. Furthermore, according to the judge, the increase in the number of cases of piracy and/or hijacking against ships in the waters off the coast of Somalia constituted a serious threat to the internationally recognized right of free passage in international waters. The affected waters off the coast of Somalia were one of the most frequented maritime routes in the world. The transport of freight, raw materials and fuels was increasingly under threat. The global economic consequences were close at hand. That is why, according to the judge, the imposition of a long prison sentence was justified in the case.

261. In another case,[550] the issue was whether the suspect had committed acts of piracy alone or with accomplices in the Gulf of Aden, as captain and/or sailor. The Court of Rotterdam rejected the defence that the Kingdom of the Netherlands lacked jurisdiction to prosecute the perpetrators of acts of piracy. It sentenced the accused to five years' imprisonment and ordered that the time spent in custody and the time spent in detention from 2 January 2009 up to the day of transfer to the Kingdom of the Netherlands be deducted from the term of imprisonment, provided that the time had not already been deducted from another term of imprisonment. On the question of the exercise of universal jurisdiction by the Kingdom of the Netherlands, it was recalled that article 105 of the United Nations Convention on the Law of the Sea provided that, on the high seas, any State was entitled to seize a pirate ship and to arrest the persons on board, and the courts of that State could decide whether or not to impose penalties. This provision of the Convention thus contemplated the exercise of universal jurisdiction by a State that arrested piracy suspects. The Court added that article 6, paragraphs 1 and 2, of the Convention for the Suppression of Unlawful Acts

[549] Court of Rotterdam, No. 10/960248-10 (see footnote 543 above).
[550] Court of Rotterdam, No. 10/600012-09 (see footnote 543 above).

against the Safety of Maritime Navigation[551] specified the cases in which States must or might establish their jurisdiction over the offences to which the treaty related. Paragraph 5 of the article expressly stipulates that "the … Convention does not exclude any criminal jurisdiction exercised in accordance with national law". It therefore followed that the universal jurisdiction regime contemplated in article 4, the preamble, and title V of the Netherlands Penal Code was not in conflict with the aforementioned Conventions, nor had any conflict been found with written international law.

262. The question of the exercise of universal jurisdiction by the Kingdom of the Netherlands was also raised in another case.[552] The Court of Appeal of The Hague rejected the defence that the Kingdom of the Netherlands lacked jurisdiction to prosecute the perpetrators of acts of piracy. It upheld the trial court's sentence of imprisonment for four years and six months, in accordance with the provisions of article 381 of the Penal Code defining and criminalizing acts of piracy. Following these cases, the courts of the Kingdom of the Netherlands had to consider the same issue of universal jurisdiction, which those accused of acts of piracy claimed that the same courts did not have the power to exercise. This was the case in two other cases adjudicated by the Court of Appeal of The Hague.[553] In one case adjudicated by the Court of Rotterdam,[554] on the other hand, it was not the question of universal jurisdiction that was at issue but rather the question of distinguishing in the case between the intention to commit the act of piracy and the execution of the act of piracy. Sixteen Somalis were arrested during the investigation and all were accused of co-perpetration of piracy under article 381 of the Penal Code and co-perpetration of attempted murder and/or attempted manslaughter or acts of violence against Netherlands naval personnel. One of the suspects was located in the waters off the coast of Somalia on 24 October 2012, on the *Mohsen*, where he was serving as an armed guard. When HNLMS *Rotterdam*, which was in the region as part of an international anti-piracy operation, approached the *Mohsen* to make enquiries, they were bombarded from the *Mohsen*. The suspect, with others, endangered the safety of navigation and the lives of the Netherlands naval personnel by his actions. The Court held that the suspect had committed the impugned acts and, in view of the gravity of the offence, decided to impose a long prison sentence.

*(b) Jurisprudence of France*

263. In France, the Criminal Division of the Court of Cassation ruled on a case.[555] On 8 September 2011, Ms. Z, a crew member on the French yacht *Tribalkat*, on which she was sailing in the Gulf of Aden with her husband, issued a distress call following a pirate attack. Ms. Z was taken hostage; her husband Christian Z was shot dead and his body thrown into the sea. A Spanish ship participating in Operation Atalanta arrested the seven pirates. Ms. Z was rescued but her husband's body was never recovered. On 12 September 2011, the pirates were handed over to French forces, then transferred by air to France where they were placed in custody on 16 September 2011. The accused were charged with counts of hijacking of a ship causing death; arrest, kidnapping, detention and unlawful confinement as part of a gang; armed robbery as part of a gang; and criminal conspiracy. The appeal was rejected on the grounds that Act No. 2011-13 of 5 January 2011 on combating maritime piracy and

[551] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201.

[552] Court of Appeal of The Hague, Case No. 22-004046-11 (see footnote 543 above).

[553] Court of Appeal of The Hague, Case No. 22-004046-11 (Judgment, 20 December 2012) and Case No. 22-004016 (Judgment, 20 December 2012).

[554] Court of Rotterdam, Case No. 10/960227-12 (see footnote 543 above).

[555] Court of Cassation of France, Criminal Division, Appeal No. 15-81.351, Judgment, 19 May 2015.

exercise of State police powers at sea established a *sui generis* regime that was different from both custody and administrative detention and that, partially subject to review by the judge, provided a solid framework for the detention of the apprehended individuals between the time of their capture and the time of their handover to the national or foreign judicial authorities.

264. In the *Carré d'As* case,[556] the Court of Cassation ruled on whether the mere presence of an unarmed person on a ship where acts of piracy had occurred constituted that person's direct participation in the impugned acts. On 2 September 2008, the yacht *Carré d'As*, crewed by the married couple Z, had been boarded by a group of three pirates off the coast of the State of Puntland in Somalia. The pirates demanded US$ 2 million. On 16 September 2008, a military operation conducted in the territorial waters of Somalia, near the port of Xaafuun, had led to the release of the two hostages. According to the charge sheet, the suspect had indirect knowledge of the plan and the logistics because he associated with the group. He had been recruited during the operation and had spent less time on the yacht than the other members of the group. He had no weapons. The central question in the case concerned the submission of evidence of acts constituting piracy. The judge had to consider whether the fact of being present on a ship on which pirates were unlawfully confining two persons and of providing logistical support to the pirates was sufficient to establish direct and material participation in the unlawful confinement; and whether, by merely noting that the accused had provided logistical support to the pirates and that his presence on the boat had contributed to the unlawful confinement of the victims, without characterizing him as having played an active role in preventing them from moving freely, the investigations appeal chamber had not stripped its decision of any legal basis, in the light of all the other evidence presented, which showed that the accused, who had been cleared by the protagonists in the case and the hostages themselves, had not participated in the operation. The Court of Cassation dismissed the appeal and remanded the case to the assize court.

265. In another case,[557] the Criminal Division of the Court of Cassation ruled on acts of piracy in connection with the resolutions of the United Nations Security Council on the subject of piracy in Somalia, specifically on the question of universal jurisdiction and the transfer of accused persons from one country to another. The French military authorities had apprehended persons suspected of engaging in acts of piracy and had seized property in their possession on the basis of resolution 1816 (2008), adopted by the Security Council on 2 June 2008, authorizing States, in the territorial waters of Somalia, to use the powers conferred on them, on the high seas or in any other place outside the jurisdiction of any State, by article 105 of the United Nations Convention on the Law of the Sea, on the basis of which France exercises universal jurisdiction. The apprehended persons had been transferred to France to appear before a judge, with the prior agreement of the Somali authorities on 21 September 2008; once the suspects had arrived on French soil, at 1700 hours on 23 September 2008, they had been placed in custody and had then appeared before an examining judge on 25 September 2008.

### *(c) Jurisprudence of the United Kingdom of Great Britain and Northern Ireland*

266. In the United Kingdom, in the case *Re Piracy Jure Gentium*,[558] on 4 January 1931, a number of armed Chinese nationals on board a ship on the high seas had attacked another Chinese ship. The master of the ship had attempted to escape and a

[556] Court of Cassation of France, Criminal Division, Appeal Nos. 09-87.606 and 11-80.893, Judgment, 11 May 2011.

[557] Court of Cassation, Criminal Division, Appeal No. 09-87.254, Judgment, 17 February 2010.

[558] His Majesty's Right Honourable Privy Council, *Re Piracy Jure Gentium*, 26 July 1934, [1934] A.C. 586.

chase had ensued, during which shots were fired by the attacking party. Thanks to some merchant vessels that were nearby, the attackers had been taken as prisoners to Hong Kong and indicted for the crime of piracy. The decision of the Hong Kong Court was final but the Privy Council considered the question posed by the jury: whether robbery was necessary to support a conviction of piracy. The Privy Council concluded that robbery was not an essential element of the crime of piracy *jure gentium* and that an attempt to commit a robbery in the context of a piratical act was equally piracy *jure gentium*.

267. According to the Privy Council, the crimes defined by international law were neither tried nor punished under that law. They were in fact tried and punished under the criminal jurisdiction of States because, whereas, according to international law, the criminal jurisdiction of municipal law was ordinarily restricted to crimes committed on a State's terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, foreign criminal jurisdiction was also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy was beyond the protection of any State. Such a person was no longer a national, but *hostis humani generis* and as such was justiciable by any State anywhere. Contrary to the position of the British judge, robbery has long been considered an essential element of piracy. That was the position taken by the Supreme Court of the United States in its decision in *United States v. Smith* (1820).[559] However, international law is constantly evolving because, without limiting themselves to a precise definition, authors and representatives from certain States agree that piracy generally involves acts of violence committed on the high seas against a ship for private ends, without the prior authorization of a State or an organ of government. In *China Navigation Company Ltd v. Attorney-General*,[560] the plaintiff, an English shipping company trading in the China seas, had requested the British Crown to provide armed guards to be placed on board its ships as a protection against "internal piracy", which was a serious threat at the time. The Crown had indeed provided them with guards, on the condition that they would be paid by the plaintiff. According to the Court, measures taken to protect against piracy were a matter for the owners of commercial ships rather than deriving from any legal duty imposed on the Crown, irrespective of whether such measures were to protect against internal piracy (meaning armed robbery at sea) or to protect against maritime piracy on the high seas. The Crown had no legal obligation to provide military protection to British subjects or their property abroad. The decision whether or not to offer protection against an anticipated danger was a discretionary power of the Crown as head of the armed forces. The Crown therefore had the freedom to determine whether it was appropriate in the circumstances to offer protection and to determine the terms of such protection.

*(d) Jurisprudence of Germany*

268. In Germany, one case[561] involved a ship, the *H. H.*, which on 19 March 2010, off the southern coast of Somalia, had been used by Somali pirates, with the forced cooperation of the crew, as a mother ship for raids on other ships. The assailants located civilian ships, captured them at gunpoint and subdued the crews. They then took the ships to the coast of Somalia in order to extort a ransom for the release of the ships and the crews. MV *T.* was a container ship belonging to the Israeli shipping company Z-Line. There were 15 sailors on board, 2 of whom were German. They had been prepared for pirate attacks. On 4 April 2010, MV *T.* had been captured by the

[559] *United States v. Smith* (see footnote 370 above).
[560] England and Wales Court of Appeal, *China Navigation Company Ltd v. Attorney-General* [1932] 2 KB 197.
[561] Hamburg Regional Court, Case No. 603 KLs 17/10, 19 October 2012.

*H. H.* in the south of the Gulf of Aden. The assailants had boarded MV *T.* with firearms and knives, searched the ship and the crew and taken items of value and food. On 5 April 2010, a Netherlands frigate had been given the task of locating the *H. H.* A German military aircraft had been used to conduct aerial surveillance and to liberate MV *T*. The accused had been arrested by Netherlands navy personnel on the high seas in the Indian Ocean and taken to Djibouti. They had been questioned on 8 April 2010, taken by air to the Kingdom of the Netherlands and extradited from there to Germany on 10 June 2010. For those defendants who were still minors at the time of the events, the minimum penalty was imposed. The adults were sentenced to terms of 5 to 15 years of imprisonment, in accordance with section 316c, paragraph 1, of the Criminal Code.

269. Another case heard by a German judge[562] involved a chemical tanker that had been hijacked by six Somali pirates on 8 May 2010 in the Gulf of Aden while en route from India to Belgium. The tanker was worth $25 million, had 22 crew members and belonged to a German shipping company. The crew had been forced at gunpoint to sail the ship towards the coast of Somalia, where other heavily armed pirates had boarded, so that a total of 20 to 50 pirates were on board. The pirates had begun ransom negotiations with the German shipping company that had lasted eight months. The crew members had been subjected to physical abuse, deprived of food and forced to live in abject conditions. They had been freed on 28 December 2010, and the shipping company had agreed to pay $5 million. On 29 April 2013, the accused had been arrested in Germany on suspicion of illegal residence while trying to travel to Norway. His fingerprints matched those found on a notepad left on the ship. On 17 April 2014 he was sentenced to 12 years' imprisonment for kidnapping for the purposes of blackmail, use of force and death threats or threats of bodily harm. His subsequent appeal to the Federal Court of Justice of Germany was dismissed.[563]

*(e) Jurisprudence of Spain*

270. Spanish judges have tried cases of maritime piracy. The Supreme Court of Spain adjudicated a case[564] involving six accused, all adults of Somali nationality without a criminal record, who on 10 October 2012 had executed a preconceived plan, as members of a pirate gang, to attack the *Izurdia*, a tuna-fishing freezer vessel sailing under the flag of Spain, which was fishing in the Indian Ocean. They had opened fire on it using assault rifles, and they were in possession of grenade launchers. On 11 October 2012, the pirate ship had been located by a warship of the Netherlands Royal Navy, HNLMS *Rotterdam*, acting as part of Operation Atalanta under the mandate of the European Union Naval Force to carry out arrests and prevent and suppress acts of piracy off the coast of Somalia. A chase had ensued with two military helicopters; after firing some warning shots, the special intervention team from the Netherlands warship had boarded the pirate ship without encountering resistance.

271. In the case, the Supreme Court concluded that the crime of piracy established in article 616 ter of the Penal Code took different forms: first, destruction of, damage to or seizure of a ship or other type of vessel or platform at sea; and, second, an attack on the persons, cargo or property on board. In the second scenario, whether the attack on persons or property was incidental to the act of destruction or seizure, or the purpose of the act, the crime was nonetheless committed. The Court added that neither article 616 ter of the Penal Code nor article 101 of the United Nations Convention on the Law of the Sea made the commission of the crime of piracy conditional on the commission of an act of depredation that stripped the owner of his or her ship, or on

[562] Osnabrück Regional Court, Case No. 10 KLs 31/13, 17 April 2014.

[563] See Federal Court of Justice of Germany, "Verurteilung wegen 'Piraterie' an deutschem Chemietanker vor Somalia rechtskräftig" (see footnote 542 above).

[564] Supreme Court of Spain, Criminal Division, Judgment No. 134/2016, 24 February 2016.

the ship being rendered unfit for navigation, for which it was habitually used. The attack on the ship with assault rifles in itself constituted the crime established in article 616 ter of the Penal Code. There was, therefore, no error in the trial court's understanding of the criminal organization: it was an armed group that earned its living by piracy, that carried out its criminal activity in a very specific geographical area – off the coast of Somalia –, that selected its targets using the same methodology on every occasion, and that used highly destructive weapons, advanced telecommunications, the latest information and communications technologies and other advanced technologies, boarding ladders and outboard motors. In addition, there was a clear distribution of functions among the different members of the group.

272. In another case,[565] a Spanish judge heard a case involving piracy against a Spanish ship. On 2 October 2009, the tuna-fishing vessel *Dirección* was fishing on the high seas, 120 nautical miles from the coast of Somalia in the Indian Ocean, a location within the area of operations designated by the European Union for Operation Atalanta, an anti-piracy operation. The crew consisted of 36 men. The vessel had been boarded by a group of 12 pirates, armed with machine guns, rocket launchers and rifles, who intended to kidnap the crew in order to obtain a ransom. The vessel had been searched, every item of value had been seized, and the crew had been held captive in the vessel's dining room. The pirates had forced the captain to sail the vessel to the place where their largest boat was located, along with the accused. On 3 October 2009, the accused had returned to their boat with some of the valuables and some money. The Maritime Operations and Surveillance Centre had been notified of the hijacking and had located the suspects using a helicopter. Shots had been fired, hitting one of the accused. The two accused had been arrested, had received medical attention, and had been detained until they were taken to Djibouti and then transferred to Spain by a Spanish Air Force aircraft. The crew members had been tortured and intimidated. As the accused were under European jurisdiction, they could not be handed over. The ransom had been paid. The trial court found the two accused guilty of the crimes of unlawful association, illegal detention, robbery and crimes against mental integrity.

273. The jurisdiction of Spain was established by article 23, paragraph 1, of the Judiciary Organic Act No. 6/1985, according to which Spain has jurisdiction over crimes and offences committed in Spanish territory or on board Spanish ships, without prejudice to the international treaties to which it is a party.

274. The Supreme Court concluded that the application of the new provision to the accused would amount to their being punished for crimes for which they had already been punished under the impugned judgment. The establishment of the new criminal offence of piracy, a crime against the international community, would protect the safety of maritime and aerial navigation and constitute a supra-individual legal right distinct from the individual rights that were at play in respect of the criminal offences of which the appellants had been convicted in the trial court judgment.

[565] Supreme Court of Spain, Criminal Division, Judgment No. 1387/2011, 12 December 2011.

*(f) Judgments containing mere references to piracy*

275. As a partial conclusion, of the 26 other decisions that merely contain references to maritime piracy, 7 are from the United Kingdom,[566] 2 from Cyprus,[567] 3 from Spain,[568] 3 from Italy[569] and 3 from the Kingdom of the Netherlands.[570] Lastly, Belgium,[571] Estonia,[572] Greece,[573] Latvia,[574] Norway,[575] Poland,[576] Romania[577] and Switzerland[578] have each adopted one decision referring to piracy. In Europe, we have seen that only in Germany, France, the Kingdom of the Netherlands and Spain did the courts deliver decisions on the crime of maritime piracy in the years 2010 to 2016. The decisions of the United Kingdom courts date from the twentieth century. However, although several decisions have centred on piracy, none has referred to armed robbery at sea.

## B. Approach of judges in criminal cases with regard to the interpretation of article 101, sentencing and the interpretation of the principle of universal and/or national jurisdiction

### 1. Judges and the interpretation of article 101

276. The decisions rendered by European judges reflect to a great extent the provisions of article 101 of the United Nations Convention on the Law of the Sea defining maritime piracy. This is the case with the decisions rendered by the domestic courts of France, Germany, Netherlands (Kingdom of the) and Spain. Once the

[566] European Court of Human Rights, *Weeks v. United Kingdom*, 2 March 1987, series A No. 114; England and Wales High Court, *Suez Fortune Investments Ltd and Another v. Talbot Underwriting Ltd and others*, Judgment, 7 October 2019, [2019] EWHC 2599 (Comm); England and Wales Court of Appeal, *Masefield AG v. Amlin Corporate Member Ltd; the Bunga Melati Dua*, Judgment, 26 January 2011, [2011] EWCA Civ 24; *Rex v. Dawson et al.* (see footnote 286 above); Central Criminal Court of English and Wales, *The Queen v. McGregor and Lambert*, 7 March 1844, in E.W. Cox, ed., *Reports of Cases in Criminal Law Argued and Determined in All the Courts in England and Ireland*, vol. 1 (1843–1846), London, J. Crockford, 1846, pp. 346–347; Queen's Bench*, Re Ternan and others*, 25 May 1864, *The Law Journal Reports for the Year 1864*, vol. 33, p. 201; and *Rex v. Hastings and Meharg*, 8 February 1825, in W. Moody, *Crown Cases Reserved for Consideration and Decided by the Judges of England from the Year 1824 to the Year 1837*, vol. 1, Philadelphia, T. & J. W. Johnson, 1839, pp. 82–85.

[567] European Court of Human Rights, *Kafkaris v. Cyprus* [GC], No. 21906/04, ECHR 2008; and European Court of Human Rights, *Andronicou and Constantinou v. Cyprus*, 9 October 1997, *Reports of Judgments and Decisions* 1997-VI.

[568] Supreme Court of Spain, Criminal Division, Judgment No. 755/2014, 5 November 2014; Supreme Court of Spain, Military Division, Case No. 48/2014, Judgment, 19 January 2015; and National High Court of Spain, Criminal Division, Judgment No. 1/2015, 2 February 2015.

[569] Supreme Court of Cassation of Italy, Fourth Criminal Division, 31 July 2018, No. 36753; Supreme Court of Cassation of Italy, Sixth Civil Division, 17 May 2019, No. 13318; and Supreme Court of Cassation of Italy, Sixth Civil Division, Case No. 9370, Judgment, 21 May 2020.

[570] Court of Appeal of The Hague, Case No. 22-000250-14, Judgment, 2 April 2015; Court of Appeal of The Hague, Case No. 22-000248-14, Judgment, 2 April 2015; and Supreme Court of the Kingdom of the Netherlands, Case No. 13/00365, 10 December 2013.

[571] Constitutional Court of Belgium, Judgment No. 9/2015, 28 January 2015.

[572] Tartu Correctional Court (Estonia), Criminal Division, No. 1-19-1175/54, 8 May 2020.

[573] Court of second instance (Greece), No. 1057/2012, 2012.

[574] Administrative District Court, Riga Courthouse, No. A42-00190-16, 22 December 2016.

[575] Court of Appeal of Borgarting (Norway), LB-2011-161685, 13 March 2013.

[576] Supreme Court of Poland, Decision, 17 December 2008, I KZP 27/08.

[577] High Court of Cassation and Justice of Romania, Criminal Division, Decision No. 3567/2013, 15 November 2013.

[578] European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], No. 5809/08, 21 June 2016.

constituent elements have been established, courts generally specify the way in which they should be interpreted. For example, without mentioning article 101, the Court of Rotterdam has highlighted what could be characterized as "active piracy" and the "intent variant" of maritime piracy. In the case of "active piracy", the impugned act is an act of piracy within the meaning of article 101 (a). On the other hand, piracy is said to be "passive" when the impugned act relates to voluntary participation in the use of a ship, in the knowledge that it is a pirate ship within the meaning of paragraph 101 (b).[579]

277. The Court of Rotterdam has thus identified two principal modes of commission of the crime of maritime piracy. The first mode of participation, also called the "execution variant", involves the commission of acts amounting to piracy. The second mode involves a person's intent to remain voluntarily in service on board a ship when he or she knew at the time of boarding that the ship was being used to commit acts amounting to piracy. The Court once again made reference to the latter mode of participation, also called the "intent variant", in another decision.[580] Under this variant, the judge's interpretation is based on the *mens rea* of Anglo-Saxon law (common law), that is, the guilty intent to carry out an act of maritime piracy or to participate in its commission. Similarly, the Court of Cassation of France ruled[581] that the mere fact of being present on a boat where pirates were unlawfully confining two persons and providing the pirates with logistical support was not sufficient to establish direct and material participation in the unlawful confinement. This interpretation by the Court of Cassation is similar to that of the Court of Rotterdam, since it implicitly referred to what could be interpreted as passive piracy, that is, voluntary participation in the use of a ship in the knowledge that it is a pirate ship, when it specified the degree of participation that could be interpreted as constituting piracy within the meaning of the aforementioned article 101 (b) of the United Nations Convention on the Law of the Sea.

278. Courts also sometimes pronounce on definitions of maritime piracy other than that set forth in article 101 of the United Nations Convention on the Law of the Sea. For example, in the United Kingdom, the Privy Council established, in its decision in *Re Piracy Jure Gentium*, that robbery was not an essential element in the crime of piracy *jure gentium*. According to the Council, piracy was not limited to robbery; it designated any act of violence committed on the high seas against ships for private ends, and without the prior authorization of a State or an organ of government.[582] Similarly, the Supreme Court of Spain stated that an act did not necessarily have to render a ship unfit for navigation, for which it was habitually used, in order to be deemed to constitute an act of maritime piracy within the meaning of article 101.[583]

### 2. Judges, sentencing and the interpretation of universal and/or national jurisdiction

279. In Europe, only prison sentences are used as penalties for maritime piracy. However, there are clear differences among States. For example, in the Kingdom of the Netherlands, the terms of imprisonment range from a minimum of two years to a maximum of seven years for acts of maritime piracy. Thus, term of two years,[584] four

[579] See Court of Rotterdam, Case No. 10/960248-10 (footnote 543 above).
[580] Court of Rotterdam, Case No. 10/960227-12 (see footnote 543 above).
[581] See Court of Cassation of France, Appeals No. 09-87.606 and 11-80.893 (see footnote 556 above).
[582] *Re Piracy Jure Gentium* (see footnote 558 above).
[583] Supreme Court of Spain, Judgment No. 134/2016 (see footnote 564 above).
[584] Court of Rotterdam, case No. 10/960227-12 (see footnote 543 above).

years,[585] five years,[586] and seven years[587] have been imposed. In Germany, a sentence of twelve years' imprisonment was imposed.[588] It is noted that, in Europe, no country imposes life imprisonment or the death penalty.

280. The use of universal jurisdiction has been referred to by the courts of the States that have actually prosecuted pirates, namely France, Germany and the Kingdom of the Netherlands. Since the impugned acts had been committed by foreign nationals, or more specifically by nationals of Somalia, and not by nationals of the countries concerned, jurisdiction became a central issue. These States have based their prosecutions and their judgments on the exercise of universal jurisdiction. However, while the Hamburg Regional Court, in Germany, has referred to the general principle "of the application of international law for the protection of universal legal interests recognized by the international legal community, irrespective of the *lex loci delicti*",[589] no doubt on the basis of customary international law, the Court of Cassation of France, the Court of Rotterdam and the Court of Appeal of The Hague have established their right to exercise universal jurisdiction on the basis of article 105 of the United Nations Convention on the Law of the Sea. That article gives every State party to the Convention the option to exercise universal jurisdiction to seize a pirate ship or a ship taken by piracy and under the control of pirates on the high seas or in any other place outside the jurisdiction of any State. It allows States to arrest the persons and seize the property on board the pirate ship.

281. The aforementioned courts of Hamburg, Paris and Rotterdam have detailed the way in which they have applied article 105 of the United Nations Convention on the Law of the Sea. On the basis of Security Council resolution 1816 (2008), the Court of Cassation of France expanded the application of article 105 in the light of the cooperation between Somalia and several States, including France, to combat maritime piracy and armed robbery at sea off the coast of Somalia. Thus, the Government of France would be entitled "to exercise, in the territorial waters of Somalia, the powers conferred on it in respect of the high seas or any other place outside the jurisdiction of any State by article 105 of the United Nations Convention on the Law of the Sea".[590]

282. The Court of Rotterdam ruled in a case,[591] that the establishment of universal jurisdiction by article 105 of the United Nations Convention on the Law of the Sea did not have the effect of depriving States of the option to exercise jurisdiction under their own domestic law. The principle was also reaffirmed by the Court of Appeal of The Hague in several cases.[592]

283. Lastly, the European Union, through European Community law, also uses article 105 of the United Nations Convention on the Law of the Sea for the purpose of combating maritime piracy and armed robbery at sea. The article provided the basis

[585] Court of Appeal of The Hague, Case No. 22-004046-11 (see footnote 543 above); Court of Appeal of The Hague, Case No. 22-004047-11, Judgment, 20 December 2012; Court of Appeal of The Hague, Case No. 22-004016-11 (see footnote 553 above); and Court of Appeal of The Hague, Case No. 22-004015-11, Judgment, 20 December 2012.

[586] Court of Rotterdam, Case No. 10/960256-10, Judgment, 12 August 2011; Court of Appeal of The Hague, Case No. 22-004017-11 (see footnote 553 above); and Court of Rotterdam, Case No. 10/600012-09 (see footnote 543 above).

[587] Court of Rotterdam, Case No. 10/960248-10 (see footnote 543 above).

[588] Osnabrück Regional Court, Case No. KLs 31/13 (see footnote 562 above).

[589] Hamburg Regional Court, Case No. 603 KLs 17/10 (see footnote 561 above).

[590] Court of Cassation of France, Appeal No. 09-87.254 (see footnote 557 above).

[591] [Court of Rotterdam, Case No. 10/600012-09 (see footnote 543 above).

[592] Court of Appeal of The Hague, cases No. 22-004016-11 (see footnote 543 above), No. 22-004015-11 (see footnote 585 above), No. 22-004017-11 (see footnote 553 above), No. 22-004047-11 (see footnote 585 above) and No. 22-004016-11 (see footnote 553 above).

for the implementation of the joint action 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.[593]

284. Judges have relied not only on the exercise of universal jurisdiction but also on the application of domestic legislation for the repression of acts of piracy. The courts that have tried Somali pirates or pronounced on the interpretation of the definition of piracy are essentially those of States members of the European Union, namely France, Germany, Netherlands (Kingdom of the) and Spain. Furthermore, although the European Parliament resolution of 10 May 2012 on maritime piracy is not binding, the Parliament, in the resolution, calls for

> immediate and effective measures to prosecute and punish those suspected of acts of piracy and urges third counties and the EU Member States that have not yet done so to transpose into their national law all the provisions laid down by the UN Convention on the Law of the Sea and the UN Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, in order to tackle the impunity of pirates […].[594]

Thus, courts in Europe hearing cases of maritime piracy have relied in those cases on specific provisions of the domestic law of the States concerned. For example, the Supreme Court of Spain referred to article 616 ter of the Spanish Penal Code.[595] The Court of Cassation of France referred to the Combating Maritime Piracy and Exercise of State Police Powers at Sea Act (Act No. 2011-13 of 5 January 2011.[596] Likewise, the Court of Rotterdam and the Court of Appeal of The Hague, in their decisions concerning Somali pirates, relied on the provisions of article 381 of the Penal Code of the Kingdom of the Netherlands that are specific to maritime piracy and provide as follows:

> Any person who:
>
> 1. enlists as a captain or serves on a ship knowing that it is intended for or used for the commission of acts of violence on the high seas against other ships or against persons or property on board such ships, without being authorized to do so by a belligerent Power and without being a member of the navy of a recognized Power, shall be guilty of piracy and shall be punished with a term of imprisonment not exceeding 12 years or a fifth-category fine;
>
> 2. being aware of such purpose or use, enlists as a crew member on such a ship, or voluntarily remains in service after becoming aware of such purpose or use, shall be punished with a term of imprisonment not exceeding 9 years or a fifth-category fine [...].

285. The Hamburg Regional Court, in a case involving Somali pirates, relied on general provisions of the Criminal Code of Germany, particularly those concerning attacks on air and maritime transport (art. 316c) and kidnapping for the purpose of blackmail (art. 239a).[597] The Federal Court of Justice of Germany also relied, in a

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[593] Council of the European Union, joint action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *Official Journal of the European Union*, L301, 12 November 2008, p. 33. See also Court of Justice of the European Union, *European Parliament v. Council of the European Union*, Case No. C-263/14, Judgment, 14 June 2016.

[594] European Parliament, resolution of 10 May 2012 on maritime piracy (2011/2962(RSP)), *Official Journal of the European Union,* C 261E, 10 September 2013, p. 34, at p. 38, para. 11.

[595] Supreme Court of Spain, judgments No. 134/2016 (see footnote 564 above) and No. 1387/2011 (see footnote 565 above).

[596] Court of Cassation of France, Appeal No. 15-81.351 (see footnote 555 above).

[597] Hamburg Regional Court, Case No. 603 KLs 17/10 (see footnote 561 above).

case of maritime piracy, on provisions concerning kidnapping for the purpose of extortion (art. 239a), extortion (art. 253), extortion with use of force or threat of force (art. 255) or use of death threats or threats of bodily harm (art. 250, paras. 1 and 2).[598]

286. Lastly, regarding the application by European judges of national legislation in those States that have transposed article 105 of the United Nations Convention on the Law of the Sea into their domestic law, there are decisions in which piracy or armed robbery at sea is briefly mentioned but in which neither is the main subject of the decision. In Belgium, maritime piracy is considered a terrorist offence under article 137 of the Penal Code.[599] In Cyprus, article 7, paragraph 2, of the Constitution provides that piracy is one of the crimes in respect of which there is an exception to the right to life; in other words, a competent court may impose the death penalty on a person found guilty of piracy.[600] Spain exercises jurisdiction on two different bases with regard to the repression of maritime piracy. On the one hand, on the basis of the active personality principle, it exercises its domestic criminal jurisdiction over any Spanish national or any stateless person residing in Spanish territory if such person commits the crime of piracy.[601] On the other hand, it exercises universal jurisdiction on the basis of article 105 of the Convention,[602] which, as previously mentioned, does not establish an obligation to prosecute a pirate.

287. In Estonia, in the case of maritime piracy, the Penal Code punishes very severely the act of causing death, even if it is not intentional. The same logic applies to the act of causing major damage and the act of endangering the health or safety of a large number of people. The Penal Code establishes a penalty of imprisonment for a term of 6 to 20 years in these specific situations, while the basic crime of piracy is punished with imprisonment for a term of 2 to 10 years.[603]

288. In Greece, soldiers who have committed an act of piracy are tried by the ordinary courts rather than by the military courts.[604] Ordinary law applies, irrespective of the legal status of the defendants. In the Kingdom of the Netherlands, there is a distinction, in Dutch, between piracy as defined in article 381 of the Penal Code (*zeeroof*) and the literal translation of the English term "piracy" in the United Nations Convention on the Law of the Sea (*piraterij*). The Kingdom of the Netherlands has ratified the Convention, which therefore constitutes the basis for its exercise of universal jurisdiction with regard to the repression of maritime piracy.[605]

289. In Poland, at the time of drafting of article 166 of the Penal Code, a specific provision on maritime piracy was envisaged, although the legislature wanted to draw on the content of three international agreements to which Poland is a party, namely the Convention on the High Seas, the Convention for the Suppression of Unlawful Seizure of Aircraft[606] and the Convention for the Suppression of Unlawful Acts

[598] See Federal Court of Justice of Germany "Verurteilung wegen "Piraterie" an deutschem Chemietanker vor Somalia rechtskräftig" (footnote 542 above), in reference to Case No. 10 KLs 31/13 (footnote 562 above).

[599] Constitutional Court of Belgium, Judgment No. 9-2015 (see footnote 571 above).

[600] *Kafkaris v. Cyprus* (see footnote 567 above); and *Andronicou and Constantinou v. Cyprus* (see footnote 567 above).

[601] Supreme Court of Spain, Judgment No. 755/2014 (see footnote 568 above).

[602] High Court of Spain, Central Investigation Courts, Madrid, No. 197/2010, 10 June 2015; and High Court of Spain, Judgment No. 1/2015 (see footnote 568 above).

[603] Tartu Correctional Court, No. 1-19-1175/54 (see footnote 572 above).

[604] Court of second instance, No. 1057/2012 (see footnote 573 above).

[605] Court of Appeal of The Hague, cases No. 22-000248-14 and No. 22-000250-14 (see footnote 570 above).

[606] Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations *Treaty Series*, vol. 860, No. 12325, p. 105.

against the Safety of Maritime Navigation. The definition of piracy is not based on article 101 of the United Nations Convention on the Law of the Sea.[607]

290. In Romania, when a murder is committed at the same time as a crime of piracy, the rules on concurrence of offences apply in such a way that each crime is tried separately. Thus, murder will not be regarded as an aggravating circumstance in a case of piracy but as a separate crime. The same principle applies to attempted murder committed at the same time as attempted piracy.[608]

291. In the United Kingdom, there is a presumption in peacetime that any act of depredation by the crew of a ship against another ship is an act of piracy. However, this presumption falls away in wartime, so that depredation of a ship sailing under the flag of one State by the crew of a ship sailing under the flag of another State is considered a legitimate act of war.[609] Likewise, the payment of a ransom for the purpose of preserving the life and liberty of victims of acts of piracy, but also for the purpose of avoiding any depredation of property on board the ship, is not illegal. While it is true that the payment of a ransom may have the collateral effect of encouraging piracy, there is no evidence, according to one court, of such payments being considered illegal anywhere in the world.[610]

# VI. Piracy and armed robbery at sea in Oceania

## A. Legislative practice

### 1. Definition of maritime piracy and armed robbery at sea

292. In Oceania, only six States have established a definition of maritime piracy,[611] and three have established a definition of armed robbery at sea.[612] Five of these have reproduced specifically the definition of piracy set forth in article 101 of the United Nations Convention on the Law of the Sea.[613] Australia and Nauru, in their laws, have added the expression “coastal sea” to the definition taken from the Convention. Furthermore, two States, namely Australia and the Marshall Islands, have reproduced specifically the definition of armed robbery at sea set out in the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.

293. Notably, no State of the region has directly transposed universal jurisdiction, as provided for in article 105 of the Convention, into its domestic law.

294. Some States have put forward a definition of maritime piracy that does not reproduce the definition set forth in article 101 of the Convention in its entirety but contains elements of it. Five States have reproduced the terms “any act of violence, detention, depredation”, “committed by the crew or the passengers of a ship” and “private ends”.[614] Eight States use “against another ship” and “against property/persons on board a ship”.[615] Six States mention the element “on board a ship knowing that it is used for piracy (complicity/voluntary participation)” and/or

[607] Supreme Court of Poland, I KZP 27/08 (see footnote 576 above).
[608] High Court of Cassation and Justice of Romania, Decision No. 3567/2013 (see footnote 577 above).
[609] *Re Ternan and others* (see footnote 566 above).
[610] *Masefield AG v. Amlin Corporate Member Ltd*; *The Bunga Melati Dua* (see footnote 566 above).
[611] Australia, Kiribati, Marshall Islands, Nauru, New Zealand and Papua New Guinea.
[612] Australia, Kiribati and Marshall Islands.
[613] Australia, Kiribati, Marshall Islands, Nauru and Papua New Guinea.
[614] Australia, Kiribati, Marshall Islands, Nauru and Papua New Guinea.
[615] Australia, Kiribati, Marshall Islands, Nauru, New Zealand, Palau, Papua New Guinea and Samoa.

"incitement to piracy".[616] Lastly, seven States include the expression "on the high seas or outside the jurisdiction of a State" in their definition.[617]

295. In Australia, for example, article 51 of the Crimes Act[618] defines piracy by reproducing all the elements of the definition of piracy set forth in article 101 of the United Nations Convention on the Law of the Sea. The crime is criminalized under articles 52 to 54 of the Crimes Act. Armed robbery at sea is neither defined nor criminalized. Although armed robbery at sea is not defined in the Crimes Act or the Criminal Code, it is defined in the Australian Shipping Counter Piracy and Armed Robbery at Sea Advisory Guidelines.[619] The definition is based on that contained in the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships and reads as follows:

> Armed Robbery Against Ships in accordance with the IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships is defined as:
>
> 1. Any unlawful act of violence or detention, or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship, or against persons or property on board such ship, within a State's jurisdiction over such offences.[620]

Fiji, in its Marine Insurance Act, defines piracy in a very brief manner and in terms that are not taken from article 101 of the United Nations Convention on the Law of the Sea. The Act stipulates: "The term 'pirates' includes passengers who mutiny and rioters who attack the ship from the shore."[621] Piracy is criminalized under section 72 of the Penal Code. Armed robbery at sea is neither defined nor criminalized. The Marshall Islands has defined piracy and armed robbery in its legislation.[622] The definition of piracy reproduces in every respect the provisions of article 101 of the United Nations Convention on the Law of the Sea, and the definition of armed robbery is aligned with the IMO definition. However, although the two crimes are defined, there are no corresponding penalties.

296. Solomon Islands has no legislation defining piracy and armed robbery at sea. However, section 65 of the Penal Code establishes penalties for acts of piracy. Kiribati, in its Penal Code, defines piracy as an offence against the law of nations. With this definition, which is based on article 15 of the Convention on the High Seas, the Penal Code reproduces the elements of the definition of article 101 of the United Nations Convention on the Law of the Sea in their entirety, and also provides for the exercise of universal jurisdiction by Kiribati, since it states in its section 63A that: "any person, of whatever nationality, who does an act of piracy by the law of nations is guilty of the offence of piracy."[623] In addition, the scope of the definition of piracy in the legislation of Kiribati has been expanded to include other offences, in particular the act of conveying persons at sea as slaves. Article 63F of the Penal Code provides as follows:

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[616] Australia, Kiribati, Marshall Islands, Nauru, New Zealand and Papua New Guinea.
[617] Kiribati, Marshall Islands, Nauru, New Zealand, Palau, Papua New Guinea and Samoa.
[618] Australia, Crimes Act 1914 (Act No. 12 of 1914), sect. 51.
[619] Office of the Inspector of Transport Security of Australia, *Australian Shipping Counter Piracy and Armed Robbery at Sea Advisory Guidelines*, Canberra, Department of Infrastructure, Transport, Regional Development and Local Government, 2009, p. 4.
[620] Ibid.
[621] Fiji, Marine Insurance Act (Act No. 5), Schedule, Rules for construction of policy, sect. 8.
[622] Marshall Islands Maritime Administrator, "Piracy, armed robbery, and the use of armed security", Marine Notice No. 2-011-39 (April 2019), sect. 2.1 (armed robbery) and 2.8 (piracy).
[623] Kiribati, Criminal Law and Procedure (Patriation) Act 1991, sect. 7.

A citizen of Kiribati or any person resident in Kiribati who, in Kiribati waters or on the high seas, knowingly and wilfully:

(a) conveys any person as a slave or for the purpose of that person being imported into any place as a slave, or of his being sold as a slave or subjected to slavery; or

(b) ships or receives or confines on board any vessel any person for the purpose of that person being so conveyed, sold or subjected,

is guilty of the offence of piracy.[624]

The penalties for piracy are set out in the Penal Code. However, no penalty is established for armed robbery at sea. The crime of armed robbery at sea is covered by the acts of piracy referred to in section 63C of the Penal Code.

297. Nauru, through its Crimes Act,[625] defines piracy in practically the same terms as those of article 101 of the United Nations Convention on the Law of the Sea. The penalties are established in sections 217, paragraph 1, and 218 of the Act. Armed robbery at sea is neither defined nor criminalized.

298. In New Zealand, the Crimes Act defines piracy as any act amounting to piracy under the law of nations, whether that act is done within or outside New Zealand, or is committed on the high seas on board a ship.[626] New Zealand has established a basis for the exercise of universal jurisdiction in that it applies its legislation whether the piracy takes place on the high seas or within New Zealand or elsewhere. The penalties, set out in sections 92 and 97 of the Crimes Act, are imprisonment for life if murder or attempted murder has been committed, and in any other case, imprisonment for a term not exceeding 14 years. Armed robbery at sea is neither defined nor criminalized. Papua New Guinea, in its Criminal Code,[627] defines "piracy" and "pirate" largely by referring to the provisions of article 101 of the United Nations Convention on the Law of the Sea. It has provided for the exercise of universal jurisdiction in respect of piracy, whether it occurs on the high seas or in any other place under its jurisdiction. The penalties for piracy are set out in sections 81 to 83 of the Criminal Code. Armed robbery at sea is neither defined nor criminalized. While neither Tuvalu nor Vanuatu has adopted legislation defining piracy and armed robbery at sea, the two States have adopted provisions criminalizing piracy: section 63 of the Penal Code of Tuvalu and section 145 of the Penal Code of Vanuatu. Neither State has any provision defining or criminalizing armed robbery at sea.

### 2. Preventive and repressive measures

299. In Oceania, there are no regional agreements specifically dealing with the prevention and repression of piracy and armed robbery at sea. All the initiatives in this regard are national or bilateral initiatives.

300. For example, Australia has maritime authorities or naval forces responsible for security at sea and at ports with a view to preventing the commission of crimes at sea, including maritime piracy and armed robbery. In Palau, for example, anti-piracy measures have been adopted. Papua New Guinea has also put in place a navigation security and surveillance system: two Norwegian companies offer their expertise in maritime security. There are also joint initiatives between the naval forces of some States, namely those of Fiji and the United States and those of Vanuatu and the United

[624] Ibid.
[625] Nauru, Crimes Act 2016 (Act No. 18), sect. 217, para. 2.
[626] New Zealand, Crimes Act 1961 (Act No. 43), sects. 92–93.
[627] Papua New Guinea, Criminal Code, sect. 80.

States. Palau and the Federated States of Micronesia offer training on the handling of threats to maritime security, including piracy and armed robbery at sea.

301. With regard to repression, nine States in Oceania have established specific penalties for maritime piracy. However, none of them has established specific penalties for armed robbery at sea. The penalties are varied: 3 States provide for the death penalty, 10 States impose prison sentences, including life imprisonment, and 1 State has a penalty of reclusion.

302. With regard to aggravating factors, such as the use of violence and murder or manslaughter, seven States[628] have established penalties of varying severity depending on the gravity of the offence. Two States, Fiji and Vanuatu, have not made provision for any aggravating factors. Australia has provided for the confiscation of the ship in the event of aggravating factors.

## B. Judicial practice

303. In the region of Oceania, 23 decisions have been delivered, but none of the cases centred on piracy at sea. The decisions mentioned piracy but it was not the main subject of the cases in question. Of these decisions, 13 were delivered in Australia, 5 in New Zealand and 5 in Papua New Guinea.

304. In Australia, for example, piracy is evoked primarily as a reminder of the initial function of the admiralty courts or of admiralty jurisdiction.[629] In the decisions concerned, piracy is mentioned by way of comparison with, for example, war crimes[630] or other crimes among the gravest "international crimes", such as genocide.[631] Furthermore, piracy is a crime for which, in certain States, the death penalty is still in force.[632] Lastly, universal jurisdiction, which, under international law, can be exercised by States in cases of piracy, is also mentioned.[633]

305. In New Zealand, as in Australia, piracy is cited in reference to admiralty jurisdiction.[634] The Supreme Court of New Zealand has made a distinction between piracy *jure gentium* (law of nations) and "municipal piracy", meaning piracy under national laws.[635] Furthermore, the Supreme Court considers that coercion cannot be used as a defence to absolve from responsibility a person who has committed an act of piracy. In Papua New Guinea, piracy is considered to be "one of the most serious offences of violent crimes that carry the death penalty in this country".[636]

306. Traditionally, under international law, pirates can be punished by any country and in any place, as they are enemies of humankind (*hostis humani generis*) and are perpetrating a crime *jure gentium*. This idea exists on every continent: in

[628] Australia, Cook Islands, Kiribati, Nauru, New Zealand, Papua New Guinea and Tuvalu.

[629] High Court of Australia, *Commonwealth v. Yarmirr,* Decision, 11 October 2001 [2001] HCA 56; *South Australia & Tasmania v. Commonwealth*; and Supreme Court of South Australia, *Tsorvas v. Van Velsen*, 1984, 37 SASR 490.

[630] High Court of Australia, *Polyukhovich v. Commonwealth* ("War Crimes Act case"), Decision, 14 August 1991 [1991] HCA 32.

[631] Federal Court of Australia, *Nulyarimma and others v. Thompson*, Decision, 1 September 1999, [1991] FCA 1192.

[632] High Court of Australia, *Oates v. Attorney-General (Cth*), Decision, 10 April 2003, [2003] HCA 21; and *Parsons v. R*, Decision, 18 November 1957, [1957] HCA 75.

[633] *Polyukhovich v. Commonwealth* (see footnote 630 above).

[634] *Re Award of Wellington Cooks and Stewards' Union*, 1906, 26 NZLR 394.

[635] Supreme Court of New Zealand, *The "William Tapscott" Case*, 26 September 1873, in G. D. Branson, ed., *The New Zealand Jurist Reports*, vol. 1, Dunedin (New Zealand), MacKay, Fenwick and Co., 1874, 1970, p. 83–93.

[636] Papua New Guinea National Court, *State v. Kevin,* Judgment, 18 November 2011, [2011] PGNC 214.

Seychelles,[637] the United States,[638] Canada,[639] Germany,[640] France,[641] the Kingdom of the Netherlands,[642] the Philippines[643] and Australia.[644] This section contains analysis of decisions referring to maritime piracy, even if the case is not directly linked to an act of maritime piracy. The analysis shows that several jurisdictions, such as India,[645] the Philippines,[646] Singapore,[647] Australia and Papua New Guinea[648] consider maritime piracy to be one of the worst crimes.

307. The study also indicates that the gravity of the crime of maritime piracy entails serious penal consequences, in particular the maintenance of the death penalty, in most cases abolished, in Australia.[649] Moreover, in Canada, the United States and New Zealand, coercion cannot be used at the procedural level as a defence by a person accused of acts of maritime piracy.

308. Lastly, the courts of some States, including the Cook Islands, Fiji, Kiribati, the Marshall Islands, Micronesia (Federated States of), Nauru, Palau, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, have not, to date, rendered any decisions concerning maritime piracy.

# VII. Conclusion

309. The study of the legislative and judicial practices of States has enabled the Special Rapporteur to make a number of observations in the five regions affected to varying degrees by the scourge of the crimes of piracy and armed robbery at sea, namely Africa, Asia, the Americas and the Caribbean, Europe and Oceania. The Special Rapporteur's research has shown that there is indeed abundant State practice, with more than one hundred national statutes adopted by States on the criminalization and repression of these two forms of maritime crime. The first general observation is that the practice is not uniform or consistent, since the statutes in which piracy and armed robbery at sea are defined differ from one another, even though the States concerned are parties to the United Nations Convention on the Law of the Sea. It appears that some States reproduce without modification the provisions of article 101 of the Convention concerning the definition of piracy in their legislation, linking the crime exclusively to the high seas. Other States either refer to the article only partially or do not even mention it at all, preferring to define piracy using their own terms. In the light of the geographical area where piracy is supposed to be committed, the research showed that some statutes do not systematically link the crime to the high seas. Indeed, it appears that the traditional crime scene for piracy is shifting more and more from the high seas to the coast. High seas piracy is thus turning into coastal piracy. Rather than refer explicitly to the high seas, some statutes use the expression "international waters" as the place of commission of piracy, while others only retain

[637] *The Republic v. Mohamed Ahmed Ise & 4 others* (see footnote 223 above).
[638] *United States v. Hasan* (see footnote 219 above).
[639] *R v. Finta* (see footnote 449 above).
[640] Hamburg Regional Court, Case No. 603 KLs 17/10 (see footnote 561 above).
[641] Court of Cassation of France, Appeal No. 09-87.254 (see footnote 557 above).
[642] Court of Rotterdam, Case No. 10/960248-10 (see footnote 543 above).
[643] *The People of the Philippine Islands v. Lol-Lo and Saraw* (see footnote 333 above).
[644] *Polyukhovich v. Commonwealth* (see footnote 630 above).
[645] Supreme Court of India, *Rajendra Prasad v. State of Uttar Pradesh*, Judgment, 9 February 1979, [1979] SCC (3) 646.
[646] *The People of the Philippines v. Mauricio Petalcorin alias Junio Budlat and Bertoldo Abais alias Toldong* (see footnote 333 above).
[647] *The Attorney General v. Wong Yew*, 1908, *Straits Settlements Law Reports*, vol. 10.
[648] *State v. Kevin* (see footnote 636 above).
[649] High Court of Australia, *Dugan v. Mirror Newspapers Ltd,* Decision, 19 December 1978, [1978] HCA 54.

some of the elements of article 101 or add other elements thereto, such as the illegitimacy of a voyage for lack of travel or flag documents, the multiplicity of flags or the acquisition of flags for convenience.

310. Some statutes admit that piracy is committed in the territorial sea, without making any reference to the high seas or to other maritime zones. The research also showed that in some cases the penalty for piracy is not subject to the prior definition of the crime by the State and the State can declare that it has jurisdiction to criminalize piracy by applying the general provisions of its penal code or code of criminal procedure. Some States establish the power to exercise universal jurisdiction under their domestic law, whether the impugned act was committed in their territory or abroad, while other States establish the power to exercise universal jurisdiction without linking piracy to the high seas. The research also showed that universal jurisdiction could be based on either domestic law or the provisions of article 101 of the United Nations Convention on the Law of the Sea, or on both. Where prosecutions cannot be based on domestic law owing to the absence of relevant provisions, they would be based on the provisions of article 101 of the Convention, to which the prosecuting State is a party. In conclusion, while the Convention enshrines the technique of the optional clause on the subject of universal jurisdiction in its article 105, States have the option, depending on their domestic law, to transform the optional clause into a compulsory-jurisdiction clause for the purpose of prosecuting and trying pirates in their territory.

311. The absence of nationality or the fact of having more than one nationality may be among the elements constituting an act of piracy. Some statutes have expanded the crime scene for piracy by indicating that such a crime is committed in the internal waters and in the territorial sea of the State and on the high seas. The research also showed that some statutes reproduce the provisions of article 101 in their entirety, without adding other elements thereto. It also revealed the use of references that are too broad to define piracy, including references to the “sea” or the “port” as places of commission of piracy, to endangering the “safety of maritime navigation”, and to “maritime violence”. Some statutes define piracy without reproducing the provisions of article 101, but add new elements to the definition, namely the alteration of signals from land, the sea or the air for the purpose of attacking property or persons on board a ship, the fact of seizing by violence a mobile or fixed platform on the continental shelf and losing a flag owing to piracy, or cases where a ship is no longer subject to the law of the flag State.

312. Some statutes have made a clear distinction between piracy and armed robbery at sea. Others consider that piracy is in itself armed robbery at sea, or include the latter crime in the definition of piracy. The new elements of the definition not contained in article 101 include broader concepts such as “maritime violence”, “watercraft” and “any other maritime vehicle”, acts of preparation or participation committed from a land territory, deviation of a ship, illegal exploitation of fishery resources, dissemination of false information on a ship or aircraft that endangers maritime safety, violation of people’s rights, attack against a land territory from a ship or aircraft, hostage-taking and kidnapping, which are all illegal acts that can be considered crimes connected to or associated with piracy, or crimes constituting maritime piracy.

313. In some statutes, piracy exists only when the impugned act is committed outside the 12-nautical-mile limit of the territorial sea. Some statutes admit that the power of States to exercise universal jurisdiction is based on the domestic law of States, regardless of whether the act was committed in the national territory or abroad. Practice reveals the following situations: application of the penal code in the absence of specific legislation on piracy, and broader definition of piracy not linking the commission of the crime to a specific place at sea.

314. With regard to armed robbery at sea, practice has provided examples where the offence is well defined as one that can be committed both on the high seas and in maritime spaces under national jurisdiction. To a large extent, the crime of armed robbery at sea remains undefined, considering the practice of States, and in the rare instances where it is defined, the statute reproduces verbatim the provisions of the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships. The statutes that do not reproduce the IMO definition are not particularly clear either, because they define armed robbery at sea as being any act other than piracy, or stipulate that piracy itself is nothing but theft on the high seas.

315. Judicial practice has allowed judges of the different regions of the world to rule on the issue of maritime piracy in general and, in some rare cases, on the issue of armed robbery at sea. According to the Special Rapporteur's research, judges have applied either the penal code of the prosecuting State, or rules and principles of general or conventional international law, and have referred to both domestic law and international law applicable to piracy. In the different regions studied, we found that the prevention and repression of piracy are effectuated in accordance with the penal code and the code of criminal procedure of each State because, on this topic, international law sets out the principle of prosecutions and penalties without defining them, even though it refers back to the obligation of States concerning criminalization and repression in keeping with the general legal principle of *nullum crimen, nulla poena sine lege,* which means no crime and no penalty without a law in place.

316. Whether it is in Africa, Asia, the Americas and the Caribbean, Europe or Oceania, national courts considering the crimes of piracy and armed robbery at sea have had to deal with a variety of legal issues concerning procedural law and substantive law. These issues have generally revolved around arguments of lack of jurisdiction of the judges involved, and of inadmissibility generally relating to the application or non-application of the principle of universal jurisdiction in matters of maritime piracy. Questions on the merits have generally concerned the adduction and admissibility of evidence before the courts, the existence or non-existence of the elements of piracy and the affirmation of the principle whereby piracy is a crime against the law of nations, i.e., a crime against humanity. As the burden of proof is on the prosecution, matters concerning investigations, evidence, testimonies, confessions and the legality of prosecutions are considered by the courts with a view to establishing the guilt of the accused persons beyond any doubt. Because defence arguments revolve around a pirate's right of access to justice and a fair trial, the punishment of the guilty intent (*mens rea*), and the possibility of multiple offences relating to the principal offence of piracy, acts of preparation, participation, complicity and attempt in the commission of the impugned acts are punishable. Judges considering cases of piracy take into account the intervention of naval forces in the pursuit of pirates and the regularity or irregularity of the presence of private security personnel on board merchant ships for the purpose of escorting said ships to their destination port. When faced with a situation involving two crimes – piracy and armed robbery at sea – committed on the high seas, judges tend to punish the crime of piracy, which is criminalized under the penal code. They also tend to consider aggravating circumstances and the possibility of reducing the penalty in the light of the humanitarian, intellectual or cultural circumstances of persons accused of piracy. Accordingly, judges have been able to contemplate in certain cases the commutation of the death penalty to a penalty of imprisonment for life, no doubt in keeping with the principle that "there is a limit to revenge and to punishment."[650]

317. The point concerning universal jurisdiction has often been raised during the trial of pirates. On said point, judicial practice shows that the relevant provisions of the

[650] D. Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (see footnote 7 above), p. 14.

United Nations Convention on the Law of the Sea may be the basis of the jurisdiction of national judges even in the absence of legislation in domestic law, provided that the prosecuting State is a party to the Convention.

318. Some national judges have characterized piracy as a violation of a *jus cogens* norm (Colombia, Seychelles and the United States) and as an imprescriptible crime. They have interpreted the notion of piracy broadly by criminalizing, in addition to piracy as such, any other crime related to or associated with piracy. In such case, the judges have applied either article 101 of the United Nations Convention on the Law of the Sea, or the penal code of the prosecuting State.

319. Lastly, the analysis of the general practice of States from a regional perspective in Africa, Asia, the Americas and the Caribbean, Europe and Oceania has led the Special Rapporteur to the following conclusion: article 101 of the United Nations Convention on the Law of the Sea, which defines piracy, reflects to a large extent customary international law, to which several States parties to the Convention refer when defining the crime. However, the Special Rapporteur has also found that on certain aspects, this definitional practice remains disparate, although he found that States have a common desire when it comes to the prevention and repression of maritime piracy and armed robbery at sea. Lastly, Security Council resolutions on the regulation of piracy in Somalia appear to be one-time solutions that are not intended to resolve the crimes of maritime piracy and armed robbery at sea over the long haul. The three draft articles proposed in the present report deal with the scope of the topic, the definition of piracy, and the definition of armed robbery at sea.

# VIII. Draft articles

**Article 1**
**Scope**

The present draft articles apply to the prevention and repression of piracy and armed robbery at sea in view of international law, the legislative, judicial and executive practices of States, and regional and subregional practices.

**Article 2**
**Definition of piracy**

Piracy consists of any of the following acts:

(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 aircraft, or against persons or property on board such ship or aircraft;

(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

(d) Any other illegal act committed at sea or from land that is defined as an act of piracy in domestic law or in international law.

**Article 3**
**Definition of armed robbery at sea**

Armed robbery at sea committed against ships consists of any of the following acts:

(a) Any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;

(b) Any act of inciting or of intentionally facilitating an act described above.

(c) Any other illegal act committed at sea or from land that is defined as armed robbery at sea in domestic law or in international law.