

[Submission by the Kingdom of the Netherlands to the International Law Commission on the topic “Prevention and repression of Piracy and armed robbery at sea” – 2 June 2023]

Annex - Prevention and repression of piracy and armed robbery at sea

a. Legislation, case law and practice of States relevant to the topic, including in relation to articles 100 to 107 of the United Nations Convention on the Law of the Sea

Source	Page/ Parag raph	Citation (in English where available)	English translation of Dutch citations (non-official)	Reference (in Dutch unless otherwise indicated)
<i>Legislation:</i> Articles 381-385 Penal Code, establishing universal jurisdiction		Article 381 1. Als schuldig aan zeeroof wordt gestraft: 1°. met gevangenisstraf van ten hoogste twaalf jaren of geldboete van de vijfde categorie, hij die als schipper dienst neemt of dienst doet op een vaartuig, wetende dat het bestemd is of het gebruikende om in open zee daden van geweld te plegen tegen andere vaartuigen of tegen zich daarop bevindende personen of goederen, zonder door een oorlogvoerende mogendheid daartoe te zijn gemachtigd of tot de oorlogsmarine van een erkende mogendheid te behoren; 2°. met gevangenisstraf van ten hoogste negen jaren of geldboete van de vijfde categorie, hij die, bekend met deze bestemming of dit gebruik, als schepeling dienst neemt op zodanig vaartuig of vrijwillig in dienst blijft na daarmee bekend te zijn geworden.	If guilty of piracy is punished: 1°. with a term of imprisonment not exceeding twelve years or a fine of the fifth category, anyone who takes or serves as skipper on a vessel, knowing that it is intended or uses it to commit acts of violence on the high seas against other vessels or against persons or property thereon, without being authorized to do so by a belligerent power or belonging to the naval navy of a recognized power; 2°. a term of imprisonment not exceeding nine years or a fine of the fifth category, who, knowing of this purpose or use, takes service as a seaman on such vessel or voluntarily remains in service after having become aware of it.	wetten.nl - Regeling - Wetboek van Strafrecht - BWBR0001854 (overheid.nl)
<i>Legislation:</i> - Merchant Shipping Protection Act - Merchant Shipping Protection Regulation		Summary: Since March 2011: possibility of deployment of Vessel Protection Detachment (VPD) of the Ministry of Defence in the Gulf of Aden. Since February 2022: possibility of deployment of armed private security guards in the Gulf of Aden.		Merchant Shipping Protection Act: wetten.nl - Regeling - Wet ter Bescherming Koopvaardij - BWBR0042278 (overheid.nl) Merchant Shipping Protection Regulation: wetten.nl - Regeling - Regeling bescherming koopvaardij - BWBR0046257 (overheid.nl)

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				Merchant Shipping Protection Regulation and Explanatory Notes (in English): Merchant Shipping Protection Regulation and Explanatory Notes Regulation Government.nl
<p><i>Case law:</i> District Court, Rotterdam, 17 June 2010, ECLI:NL:RBROT:2010:BM8116</p>	p. 2	[...] van belang is dat de Nederlandse wetgever voor de vervolging van zeeroof (artikel 381 van het Wetboek van Strafrecht) universele rechtsmacht heeft gevestigd.	[...] of importance is that the Dutch legislator established universal jurisdiction for the prosecution of piracy (Article 381 of the Penal Code).	ECLI:NL:RBROT:2010:BM8116 - Rb. Rotterdam, 17-06-2010, nr. 10/600012-09 Uitspraak 17-06-2010 Navigator
	P. 3	[...] artikel 105 UNCLOS voorziet aldus in een universele rechtsmacht voor de staat die tot aanhouding van piraterijverdachten overgaat. Dat deze rechtsmacht exclusief is in die zin dat deze in de weg staat aan de uitoefening van universele rechtsmacht die gebaseerd is op de nationale wetgeving van andere staten valt uit de bewoordingen van de bepaling niet af te leiden. In artikel 6 lid 5 SUA [...] is uitdrukkelijk bepaald dat het verdrag geen enkele in overeenstemming met de nationale wetgeving uitgeoefende rechtsmacht in strafrechtelijke aangelegenheden uitsluit. Uit een en ander volgt dat de universele rechtsmachtregeling van artikel 4, aanhef en onderdeel 5 Sr niet in strijd is met genoemde verdragen.	[...] article 105 UNCLOS thus provides for a universal jurisdiction for the State apprehending piracy suspects. The fact that this jurisdiction is exclusive in the sense that it precludes the exercise of universal jurisdiction based on the domestic laws of other States is not apparent from the wording of the provision. Article 6(5) SUA [...] expressly provides that the Convention does not exclude any jurisdiction in criminal matters exercised in accordance with national law. It follows that the universal jurisdiction regime of article 4, introductory paragraph and section 5 of the Penal Code does not conflict with the said conventions.	
	p. 3	Er zullen zich gevallen van piraterij kunnen voordoen waarbij Nederland op geen enkele wijze concreet betrokken is en waarin berechting van betrokken verdachten om die reden volstrekt niet voor de hand ligt en ongewenst lijkt. In die gevallen is echter niet de rechtsmacht van Nederland in geding, maar is denkbaar dat vervolging hier te lande	There may be cases of piracy in which the Netherlands is in no way concretely involved and in which prosecution of the suspects involved is for that reason not at all obvious and seems undesirable. In those cases, however, the jurisdiction of the Netherlands is not at stake, but it is conceivable that prosecution here in the country should not be	

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		<p>niet toelaatbaar moet worden geacht, als zijnde in strijd met beginselen van een goede procesorde wegens het ontbreken van enig redelijk belang daarbij. De mogelijkheid van vervolging is aldus niet een vraag van rechtsmacht, maar van opportuniteit.</p> <p>p. 6 [...] zowel (artikelen 100 en 105) UNCLOS als (artikelen 3 en 7) SUA hebben een juridische basis kunnen vormen voor de detentie voorafgaand aan de aanhouding door de Nederlandse autoriteiten. Van een schending van artikel 5, eerste lid, EVRM is dan ook geen sprake.</p> <p>p. 7 Uit het onderzoek op de terechtzitting is niet gebleken dat in deze zaak een snellere fysieke voorgeleiding aan een (Europese) rechter onmogelijk was. Evenmin is gebleken dat inspanningen zijn verricht om op een andere manier invulling te geven aan de verdragsverplichting van artikel 5, derde lid, EVRM toen een snelle fysieke voorgeleiding niet mogelijk bleek. Dit betekent dat in deze zaak een termijn van 40 dagen tussen de vastneming en de voorgeleiding een schending oplevert van dit verdragsartikel.</p> <p>p. 13 Artikel 381 Sr bevat de clausulering dat de zeerover niet door een oorlogvoerende mogendheid tot zijn daden is gemachtigd of tot de oorlogsmarine van een erkende mogendheid behoort. Naar het oordeel van de officier van justitie betreft voornoemde clausulering een bijzondere strafuitsluitingsgrond, die niet ten laste gelegd en bewezen hoeft te worden.</p> <p>[...] De clausulering [...] is opgenomen in de zin van de delictomschrijving die de strafbepaling zelf bevat. Doorgaans is dit het geval als sprake is van een</p>	<p>considered admissible, as being contrary to principles of due process due to the absence of any reasonable interest in doing so. The possibility of prosecution is thus not a question of jurisdiction but of expediency.</p> <p>[...] both (articles 100 and 105) UNCLOS and (articles 3 and 7) SUA were able to provide a legal basis for the detention prior to the arrest by the Dutch authorities. There is therefore no violation of article 5(1) ECHR.</p> <p>The investigation at the hearing did not show that in this case a faster physical arraignment before a (European) court was impossible. Nor did it appear that efforts were made to fulfil the treaty obligation under Article 5(3) ECHR in another way when a quick physical arraignment proved impossible. This means that in this case, a period of 40 days between capture and arraignment constitutes a violation of this article of the Convention.</p> <p>Article 381 of the Penal Code contains the clause that the pirate is not authorised to commit his acts by a belligerent power or belongs to the war navy of a recognised power. In the opinion of the public prosecutor, the aforementioned clause concerns a special ground of exclusion from punishment, which does not have to be charged and proven.</p> <p>[...] The clause [...] is included in the sentence of the offence description contained in the penal provision itself. Usually, this is the case when it refers to an element of the offence description.</p>	
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	p. 14	<p>bestanddeel van de delictomschrijving.</p> <p>[...]Gesteld noch gebleken is dat de verdachte en zijn medeverdachten door een oorlogvoerende mogendheid tot hun daden zijn gemachtigd of dat zij tot de oorlogsmarine van een erkende mogendheid behoren. Om die reden is gekomen tot de bewezenverklaring van dit onderdeel van de tenlastelegging.</p>	<p>[...]It has neither been stated nor shown that the accused and his co-accused were authorised for their acts by a belligerent power or that they belong to the war navy of a recognised power. For this reason, the proof of this part of the indictment was established.</p>	
<p><i>State practice:</i> European-led Maritime Awareness in the Strait of Hormuz (EMASOH)</p>		<p>Established by the Governments of Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands and Portugal in February 2020, the purpose of the mission is to protect the freedom of navigation, ensure coordination between parties in the area and contribute to the de-escalation by diplomatic and military presence.</p> <p>By participating in EMASOH, the Netherlands contributes to compliance with the international right of free passage and transit and the promotion of the international legal order.</p> <p>Currently, the Royal Netherlands Navy is making a permanent contribution to the EMASOH mission in the form of 2 staff officers who are involved in intelligence and strategic communication. In 2020 a frigate was deployed to the mission.</p>		<p>Political Declaration (in English) European Maritime Awareness in the SoH (EMASOH): political statement by the governments of Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, and Portugal (20 Jan. 20) - Ministry for Europe and Foreign Affairs (diplomatie.gouv.fr)</p>
<p>Letter to parliament regarding the deployment of a frigate</p>	p. 5	<p>Het juridisch kader voor inzet van het fregat, met boordhelikopter, is het internationale zeerecht, in het bijzonder het VN-Zeerechtverdrag. Er kan enkel sprake zijn van zelfverdediging. Het fregat met haar helikopter opereert te allen tijde onder de eigen, nationale geweldsinstructie (<i>rules of engagement</i>) die voldoende ruimte geeft voor zelfverdediging.</p>	<p>The legal framework for the deployment of the frigate, with on-board helicopter, is international maritime law, in particular the UN Convention on the Law of the Sea. It can only be self-defense. The frigate with its helicopter operates at all times under its own national rules of engagement, which provide sufficient scope for self-defense.</p>	<p>Current mission (in English): Current missions Missions abroad Defensie.nl</p> <p>Letter to parliament regarding the deployment of a frigate: Kamerstuk 29521, nr. 398 Overheid.nl > Officiële bekendmakingen</p>

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b. Agreements entered into by States under which persons accused of piracy or armed robbery at sea are transferred with a view to prosecution

As a member state of the European Union, the Kingdom of the Netherlands is bound by the ‘Agreement between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer’. Under this Agreement Kenya agrees to accept, upon the request of the EUNAVFOR, the transfer of persons detained by EUNAVFOR in connection with piracy and will submit such persons and property to its competent authorities for the purpose of investigation and prosecution.

Reference : [EUR-Lex - 22009A0325\(01\) - EN - EUR-Lex \(europa.eu\)](#)

c. The role of international, regional and subregional organizations regarding the prevention and repression of acts of piracy and armed robbery at sea.

As a member state of the European Union (EU) and the North Atlantic Treaty Organization (NATO) the Kingdom of the Netherlands participates or has participated in the following operations:

1. European Union Naval Force Operation Atalanta (EUNAVFOR Atalanta)

EUNAVFOR Atalanta is, among others, mandated to deter, prevent, and repress piracy and armed robbery at sea in the Area of Operation.

References:

- [Mission | EUNAVFOR](#)
- Council Decision (CFSP) 2022/2441 of 12 December 2022 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast: [EUR-Lex - 32022D2441 - EN - EUR-Lex \(europa.eu\)](#)

2. NATO Operation Ocean Shield

Between 17 August 2009 and 15 December 2016 NATO provided naval escorts and deterrence posture while increasing cooperation with other counter-piracy operations, which was carried out in full compliance with the relevant UN Security Council resolutions. The area of operation was off the Horn of Africa, including the Gulf of Aden and the Western Indian Ocean up to the Strait of Hormuz. With the consent of Somali authorities, NATO vessels were able to also enter the territorial waters of Somalia.

Reference: [Allied Maritime Command - Operation OCEAN SHIELD \(nato.int\)](#)