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*The Crime of Maritime Piracy in the 2010 Reform of the Spanish Penal Code**

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RESUMEN

España ha reformado su Código Penal, en 2010, para volver a incluir en él el delito de piratería, ante el rebrote de este ancestral fenómeno que se está dando en los últimos años, especialmente en las aguas que bañan el Cuerno de África. En efecto, siendo nuestro país eminentemente marítimo, la persecución interna de la piratería marítima goza en él de una rica y antigua tradición: se menciona ya en las Partidas del Rey Alfonso X y es perseguida, al menos, desde 1801, en virtud de una Ordenanza del Rey Carlos IV dedicada a reglamentar la práctica del corso. Posteriormente, en la época de

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la codificación, empieza a ser incluida habitualmente en los Códigos Penales, aunque no fue ese el caso en el código actual de 1995, ya que la piratería había dejado de ser frecuente. El análisis histórico de toda esa normativa demuestra que nuestro ordenamiento jurídico ha reconocido siempre la naturaleza de delito contra el derecho de gentes de la piratería y, a la hora de tipificarlo y punirlo, ha transpuesto la competencia universal de jurisdicción que le brindaba el derecho internacional. La reforma de 2010 se concreta en la introducción de dos artículos en el Código Penal: en primer lugar, el 616 ter, que posee un alcance material, espacial y personal muy amplio, permitiendo perseguir todo tipo de actos de violencia o depredación en el mar contra los buques y plataformas, personas o bienes a bordo, con independencia de la nacionalidad de los autores y de las víctimas, del espacio marítimo y nacionalidad de la embarcación o plataforma donde se hayan cometido, o de la motivación que haya impulsado a sus autores. Con ese alcance tan amplio, la reciente regulación responde también de manera adecuada a la nueva realidad de la piratería, que frecuentemente se lleva a cabo en las aguas territoriales de Estados fallidos, o que es difícil distinguir del terrorismo marítimo cuando los piratas no son más que un eslabón de una cadena criminal formada con fines políticos. En segundo lugar, se ha incluido otro artículo, el 616 quáter, que no tiene mucho sentido, si se piensa que tipifica y penaliza como piratería conductas que deberían ser consideradas más bien como constitutivas de los delitos de resistencia, desobediencia o atentado contra la autoridad o sus agentes, tipificados en otros capítulos del Código Penal.

Palabras clave

Piratería marítima, Código Penal español, derecho interno español, derecho histórico español, competencia universal, competencia de policía, mar territorial, alta mar, Estado ribereño, Estado del pabellón, terrorismo marítimo.

SUMMARY

In 2010, the Spanish Criminal Code has been reformed in order to include again the crime of maritime piracy after the recrudescence of this phenomenon in the waters of the Horn of Africa. Due to the fact that Spain is a maritime country, the internal regulation against piracy is ancient and rich. This crime was already described in the *Siete Partidas* (Seven-Part Code), the Castilian statutory code compiled during the reign of Alfonso X of Castile (1252–1284), and has been punish at least from 1801, by an Order of the King Carlos IV consecrated to the regulation of Privateering. Later, in the epoch of the codification, it starts being included usually in the Criminal Codes, but this trend broke with the absence of Piracy in the Criminal Code of 1995, because it had stopped being frequent in practice. The historical analysis of all this regulation demonstrates that Spanish Law has always recognized the nature of crime against the law of nations of Piracy and, at the moment of typifying and punishing it, has transposed the universal competence of jurisdiction that was conferred by Public International Law. The 2010 reform consists in the introduction of two new articles in the Criminal Code: in the first place, Article 616 ter, which possesses a very wide material, spatial and personal scope, allowing to chase all kinds of acts of violence or depredation in the sea against the ships

and platforms, persons or goods on board, with independence of the nationality of the authors and of the victims, of the maritime space and nationality of the craft or platform where they have been committed, or of the motivation that has stimulated the authors. With such a wide scope, the recent regulation answers correctly to the new reality of the piracy, which frequently is carried out in the territorial waters of failed States, or that is difficult to distinguish of the maritime terrorism when the pirates are nothing more than a link of a criminal chain formed with political purposes. In the second place, another article has been included, 616 quáter, which does not have very much sense regarding to the fact that it typifies and penalizes as piracy conducts that should be considered to be rather like constitutive of the crimes of resistance, disobedience or attempt on the authority or its agents typified in other chapters of the Criminal Code.

Keywords

Maritime Piracy, Spanish Criminal Code, Spanish Internal Law, Spanish Historical Law, Universal Jurisdiction, Competence of Police, Territorial Sea, High Seas, Coastal State, Flag State, Maritime Terrorism.

RÉSUMÉ

L'Espagne a réformé son Code Pénal, en 2010, pour y réinclure le délit de piraterie, devant la nouvelle pousse de ce phénomène ancestral qui a lieu dans ces dernières années, spécialement dans les eaux qui baignent la Corne de l'Afrique. En effet, en étant notre pays éminemment maritime, la persécution interne de la piraterie jouit d'une ancienne et riche tradition: il est déjà mentionné dans les *Partidas* du Roi Alphonse X et est poursuivi, au moins, dès 1801, en vertu d'une Ordonnance du Roi Charles IV dédiée à réglementer la pratique de la guerre de course. Par la suite, dans l'époque de la codification, la piraterie commence à être généralement incluse dans les Codes Pénaux. Elle était cependant absente du celui de 1995, au regard de ce que la piraterie avait cessé d'être fréquente. L'analyse historique de toute cette réglementation démontre que notre droit interne a toujours reconnu la nature de délit contre le droit des gens de la piraterie et, à l'heure de l'incriminer et le punir, a transposé la compétence universelle de juridiction qui lui offrait le droit international. En ce qui concerne la piraterie maritime, la réforme de 2010 se limite donc à introduire deux articles dans le Code Pénal: en premier lieu, l'article 616 ter, qui possède une portée matérielle, spatiale et personnelle très ample en permettant de poursuivre toute espèce d'actes de violence ou de déprédation dans la mer contre les bateaux et les plates-formes, des personnes ou des biens à bord, avec indépendance de la nationalité des auteurs et des victimes, de l'espace maritime et de la nationalité de l'embarcation ou de la plate-forme où ils ont été commis, ou de la motivation qui a poussé ses auteurs. Avec cette si ample portée, la régulation récente répond aussi de manière appropriée à la nouvelle réalité de la piraterie, qui est fréquemment réalisée dans les eaux territoriales d'États faillis, ou qu'est difficile de distinguer du terrorisme maritime quand les pirates ne sont plus qu'un chaînon d'une chaîne criminelle formée aux fins politiques. En deuxième lieu, un autre article a été inclus, le 616 quater, qui ne semble pas avoir trop de sens si l'on pense qu'il incrimine et pénalise comme piraterie des conduites qui devraient être considérées plutôt

comme constitutives des délits de résistance, de désobéissance ou d'attentat contre l'autorité ou ses agents, spécifiés dans d'autres chapitres du Code Pénal.

Mots clés

Piraterie maritime, Code pénal espagnol, droit interne espagnol, droit historique espagnol, juridiction universelle, compétence de police, mer territoriale, haute mer, État côtier, État du pavillon, terrorisme maritime.

I. INTRODUCTION

Piracy[1] has been with humanity practically since the origins of navigation. There are references to pirates in ancient inscriptions, for instance from the ancient Hellenistic civilisation of Crete,[2] or in some of the oldest literary narratives such as Homer's Odyssey.[3] They had their heyday between the 15th century – with the discovery of new trade routes – and the 18th century, at which time the great powers were beginning to acquire powerful navies and there was a general trend towards the monopolisation of violence by the State. Thereafter, the phenomenon of piracy declined significantly in geographical scope and intensity, remaining more or less latent for centuries without completely disappearing.[4]

As to the definition of piracy, it is worth noting that the practice of States suggested the existence of a broad-based notion that encompassed any act of violence committed at sea by persons not subject to any authority. This customary concept – and the legal regime accompanying it – remained long unaltered,[5] but at the time of codification at

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1 In this article we refer exclusively to maritime piracy. Therefore, wherever the term "piracy" appears alone, the reader may assume that it means maritime piracy.

2 See, BRULE, P., La piraterie crétoise hellénistique, *Annales littéraires de l'Université de Besançon, Centre de recherches d'histoire ancienne, vol. 27*, Les belles lettres, Paris, 1978.

3 In Book IX, when Ulysses and his men reach the island of the Cyclops and enter the cave of the one-eyed giant Polyphemus, the latter asks them "Strangers, who are you? Where do you sail from? Are you traders, or do you sail the sea as rovers, with your hands against every man, and every man's hand against you?", HOMER, *Odyssey*, Book IX, The Internet Classics Archive, http://classics.mit.edu/Homer/odyssey.html. On piracy in ancient times, we recommend: GREEN, L.C., "Terrorism and the Law of the Sea", Ed. DINSTEIN, Y., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Martinus Nijhoff, Dordrecht, 1989, pp. 251–252; PELLA, V., "La répression de la piraterie", *Recueil des Cours de l'Académie de Droit International*, vol. 15, 1926, pp. 151–164.

4 As Luís García Arias explained, when in the era of the League of Nations it was debated whether piracy was significant enough to warrant inclusion in the agenda of the Hague Codification Conference in 1930, a report submitted to the Council of the League of Nations asserted that this was undoubtedly "an issue that was not of interest to the generality of States, examination of which could by no means be considered urgent" (see, GARCÍA ARIAS, L., "La piratería como delito del Derecho de Gentes", *Estudios de historia y doctrina del derecho internacional*, Instituto de Estudios Políticos, Madrid, 1964, p. 309.

5 On the historical evolution of the definition of piracy in international law, we recommend: RODRÍGUEZ NÚÑEZ, A., "El delito de piratería", *Anuario de Derecho Penal y Ciencias Penales*, Tomo L, MCMXCVII, 2000, pp. 218–223.

the United Nations Conferences on the law of the sea, when it came to its inclusion in conventions, it came up against the expansion of the sovereignty of States and a lack of interest due to the fact that at that time acts of piracy were not topical.[6] For that reason the current conventional definition, which is set out in Article 15 of the Geneva Convention of 29 April 1958 on the High Seas[7] (GCHS) and Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS)[8] respectively, is somewhat remote from the notion that had formed in earlier practice. For its part, Article 103 includes a definition of a pirate ship or aircraft.[9] Article 102 of the UNCLOS[10] in turn extends the *ratione personae* scope of piracy by including in its definition acts committed by ships or craft of a State whose crews have mutinied and taken control of the ship or aircraft. Thus, the current conventional notion of piracy may be summed up as follows: any illegal act of violence or detention or any act of depredation carried out by the crew or passengers of a private vessel – or also by a warship or vessel of State whose crew has mutinied – against another vessel or against the persons or property on board it, for private ends on the high seas or in a place outside the jurisdiction of any State.[11] Similarly, any act of voluntary participation in the use of a vessel for the

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6 See on this point: SOBRINO HEREDIA, J.M., "Piratería y terrorismo en el mar", *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz 2008*, Servicio editorial de la Universidad del País Vasco, 2009, pp. 98–99.

7 The drafters of this provision took their inspiration from some earlier drafts, either private or drawn up within the framework of the League of Nations.

8 "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)."

9 According to this provision, "A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act." As we can see, from Article 103, piracy constitutes a case of transference of the crime committed by the crew to the ship, as any ship intended by the persons in control of it to be used to commit acts of piracy is considered a pirate ship. In the same way, ships retain that consideration following the commission of such acts. Article 103 of the UNCLOS corresponds to Article 17 of the GCHS.

10 Article 102 of the UNCLOS corresponds to Article 16 of the GCHS.

11 In this connection see, inter alia, JORGE URBINA, J., "La cooperación internacional en la prevención y control de los actos de piratería en el actual Derecho del Mar", in PUEYO LOSA, J., y JORGE URBINA, J., (Coordinadores), *La cooperación internacional en la ordenación de los mares y océanos*, Iustel, Madrid, 2009, pp. 326–327. As essential elements of piracy for conventional purposes, Professor Julio Jorge Urbina distinguishes "the existence of an illegal act of violence that is committed against the ship, against its passengers or crew, or against their property. It may consist in attacking and boarding the vessel, theft of the cargo or personal belongings of passengers and crew, or plundering or hijacking of the ship and holding the crew or passengers to ransom" (Ibid., p. 327).

purposes of piracy, or any act whose purpose is to incite the commission of such acts, is also considered piracy.

In recent years, however, piracy has once more become a plague at several points on the globe. According to the data furnished by the International Maritime Organisation (IMO), from the number of incidents registered most recently, the most dangerous areas are the East and West coasts of Africa the South China Sea, South America and the Caribbean, and also the Indian Ocean.[12] But of all these areas, the most dangerous are the waters off the Somali coast and the Gulf of Aden.[13]

In fact, following long years of internecine wars among the different clans that inhabit it, Somalia is an authentic failed State,[14] where the absence of authority is manifest throughout the territory, either on land or at sea. The Somali authorities have actually admitted their present inability to keep order in their waters[15] and have gone so far as to ask for outside help to ensure the protection of ships sailing off their coast, including vessels bringing humanitarian aid for the population. It is worth noting in this respect that the current pirates belong to highly sophisticated criminal networks which have turned hijacking into a very profitable business in this part of Africa. Moreover, according to the Spanish Ministry of Defence there are signs that piracy could become a major source of finance for the radical Islamic organisations present in the region,[16] which makes these new outbreaks of piracy look like something very much akin to seaborne terrorism.

Thus, piracy in Somali waters is not only a serious menace to international maritime security in general, but also to the activity of the Spanish tuna fishing fleet in the Indian Ocean in particular, where it has been highly active for some twenty-five years.

As regards our own country, we would cite the lamentable hijacking of two tuna boats sailing under the Spanish flag: the *Playa de Bakio and the Alakrana.* As readers will recall, the *Playa de Bakio* was seized by a band of pirates on 20 April 2008 on the high seas, about 230 miles from the Somali coast. The vessel and its crew were forcibly taken to the Somali coast, where they were held until their release on 27 April 2008.[17] Months later, on 2 October 2009, the tuna boat *Alakrana* was hijacked by a band

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[12] See IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships, Quarterly and Monthly Reports*, MSC.4/Circ.152, of 29 March 2010, par. 6.

[13] For example, in 2009 there were a total of 222 incidents off the east coast of Africa, out of a total of 406 worldwide (Ibid.).

[14] On this point we recommend: TANCREDI, A., "Di pirati e Stati "falliti": Il Consiglio di Sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia", *Rivista di diritto internazionale*, nº4, 2008, pp. 937–966.

[15] *See Letter dated 12 May 2008 from the Permanent Representative of Somalia to the United Nations, addressed to the President of the Security Council*, Document S/2008/323*. In his own words, "the Transitional Federal Government does not have the capacity to interdict the pirates or patrol and secure the waters off the coast of Somalia".

[16] See the appearance of the Minister of Defence to defend the Request for the authorisation of the Congress of Deputies for Spanish military personnel to take part in the European Union mission to train the Somali security forces in Uganda (Diario de Sesiones del Congreso de los Diputados, año 2010, IX Legislatura, 22 de abril de 2010, núm. 157, p. 15).

[17] In this connection see the Letters of 23 April 2008 and 1 May 2008 addressed to the President of the Security Council by the Permanent Representative of Spain to the United Nations (United Nations Documents S/2008/271 and S/2008/292, respectively).

of Somali pirates with 36 people aboard, 16 of them Spanish, who were released on 17 November the same year. In the course of the rescue operation, on 3 October 2009 two of the alleged pirates, Somali nationals, were arrested by the crew of the frigate *Canarias* and transferred to Spain for trial by the Spanish courts. In this connection, on 5 October 2009 judge Baltasar Garzón Real, as acting substitute at Central Court of Instruction No 1 of the Audiencia Nacional, issued an order in which he asserted that in any case jurisdiction lay with the Spanish courts, and in particular the Audiencia Nacional, according to the Judiciary Act (LOPJ). On 2 November 2009 that decision was confirmed by the full bench of the Criminal Chamber of the Audiencia Nacional.[18]

For the last two decades the International Community, particularly through the United Nations Organisation (UN), has sought to alleviate the effects of the Somali crisis, taking numerous initiatives to achieve political and social stabilisation, in addition to providing humanitarian assistance for the population.

As the problem has become more acute, in recent years action has also been taken to deal with the problem of piracy, especially by the IMO and the UN Security Council, which has adopted increasingly vigorous resolutions on matters of security. It will be well to explain in this connection that the present rules on maritime piracy – the essence of which is encapsulated in Articles 14 to 21 of the 1958 GCHS and in Articles 100 to 107 of the UNCLOS, which reproduce those of the Convention practically word for word – empower all States to prosecute and punish acts of piracy committed on the high seas, within the exclusive economic zone and in other zones not subject to national jurisdiction. Within their territorial waters, however, according to current international law only the coastal State may discharge police functions and combat acts of depredation committed against shipping. Therefore, the general legal rules currently in force are not suitable for combating the new forms of piracy that are emerging, particularly in territorial waters of States which, like Somalia, cannot guarantee the security of navigation. For those reasons the Security Council has adopted several resolutions – 1816 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010) – authorising ships of third States to carry out policing functions in Somali territorial waters, as a strictly temporary and absolutely exceptional measure, in view of the present situation in that African State. Thus, since the adoption of Resolution 1816 (2008) of 2 June 2008, a considerable number of vessels from various States have been patrolling the waters around the Horn of Africa, escorting vessels belonging to the World Food Programme – which supply humanitarian aid to the population of Somalia – and helping to deter, prevent and repress acts of piracy and armed robbery. In this universal effort, we should stress the role of the European Union (EU), which in application of the Security Council resolutions launched the first naval operation in its history, code-named *Atalanta*, under Council Joint Action 2008/851/CFSP

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[18] On the hijacking of the vessel and its release, see the Appearance, at her own request, of the first Deputy Prime Minister and Minister of the Presidency before the House in full session, to report on the action taken by the Government to secure the release of the vessel *Alakrana* (Dossier number 210/000056) (Diario de Sesiones del Congreso de los Diputados, año 2009, IX Legislatura, 25 de noviembre de 2009, núm. 126). Also, regarding the handling of the *Alakrana* case by the Spanish courts, see FERNÁNDEZ LIESA, C.R.; TRINIDAD NÚÑEZ, P., "El asunto *Alakrana* y la inadecuación del derecho español al derecho internacional", *Revista Española de Derecho Internacional*, vol. LXI (2009), 2, pp. 533–540.

of 10 November 2008. In addition, the EU is helping notably to implement other more general measures adopted by the Security Council to improve the economic, political and social situation in Somalia.

As far as Spain is concerned, we should note that it is playing an outstanding role in the universal effort of the International Community and the EU cited above to combat maritime piracy. From the outset, Spain has worked shoulder-to-shoulder with France to promote adoption of the relevant resolutions by the UN Security Council and the Council of the EU.[19]

Alongside that leading role internationally, internally Spain has also taken several very important steps to combat maritime piracy. On the military side, in 2009 the Government approved a Royal Decree allowing personnel of private security companies to sail on Spanish tuna boats to enhance their security.[20]

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[19] In this connection, see the appearance of the Minister of Defence to defend the request for authorisation of the Congress of Deputies for Spanish military personnel to take part in the European Union mission to train Somali security forces in Uganda (Diario de Sesiones del Congreso de los Diputados, año 2010, IX Legislatura, 22 de abril de 2010, núm. 157, p. 15). It is also interesting in this connection that since September 2009 the Spanish and French shipowners' associations have had a liaison in the Operational Command of Operation Atalanta (see the Appearance, at her own request, of the first Deputy Prime Minister and Minister of the Presidency before the House in full session, to report on the action taken by the Government to secure the release of the vessel *Alakrana*, Diario de Sesiones del Congreso de los Diputados, año 2010, IX Legislatura, 25 de noviembre de 2009, núm. 126, p. 32).

[20] Royal Decree 1628/2009 of 30 October 2009 (*B.O.E.* no 263 of 31 October 2009). This Royal Decree was implemented by Order PRE/2914/2009 of 30 October 2009 (*B.O.E.* no 264 of 2 November 2009). Although a measure adopted by several comparable countries in recent times, this decision is open to criticism in that it is a step further in the process of erosion of the State's monopoly on the use of force as accepted by modern States. Moreover, the statute as adopted is rather sketchy and leaves major gaps unresolved. For instance, there is no regulation as to whether or not the personnel of private companies are authorised to detain alleged pirates and hand them over to the judicial authorities of Spain or other States. There is also no guidance as to who will be legally accountable for the actions of on-board guards, or what the rules of engagement for contractors will be. The terms of the regulations adopted by the Spanish government suggest that its main concern has been to regulate the type of weaponry that companies may use, and the rules governing their acquisition, safekeeping and transport. Thus, the only aspect of the exercise of police functions pertaining to the vessel's flag State that devolve on private security companies is the deterrent capacity inherent in the possession of weapons and the capacity to repel pirate attacks. There is therefore no definition of other capacities that international law vouchsafes to the flag State in attributing police powers, such as the right of visit, the power to chase and the authority to detain a pirate vessel and its crew. On the problems that the engagement of private military companies and mercenaries generally entails in international law, see: Espaliú Berdud, C., *El estatuto jurídico de los mercenarios y de las compañías militares privadas en el derecho internacional*, Thomson-Aranzadi, Pamplona, 2007, pp. 137–181.

This measure was welcomed by the Spanish fisheries sector because it has undoubtedly helped to improve on-board security; nonetheless, the sector has insistently asked the Spanish government to implement a public security system whereby the protection of vessels is assured not by private but by Spanish Navy personnel. The shipowners argue, in the line noted above, firstly that when private military companies are used it is not possible to determine the liability arising from the actions of contract personnel, and secondly that it is not clear

Then, on the strictly legal side we should highlight the criminal classification of maritime piracy recently introduced with Organic Law 5/2010 of 22 June 2010 amending the Penal Code Act, Organic Law 10/1995 of 23 November 1995,[21] an event that this article will look at in depth. This major reform assigns the crime of maritime piracy a chapter of its own in the title dealing with crimes against the International Community.

The purpose of the present research is to analyse the meaning and the scope of the new provisions concerning piracy in the 2010 reform of the Penal Code. To that end we shall begin by examining the normative context of the reform, in the light of both internal law and comparative law, while also situating it in the framework of international law. Thereafter we shall look at the material, spatial and personnel scope of the provisions concerned.[22]

II. PURPOSE OF THE REFORM AND CLASSIFICATION OF THE CRIME OF MARITIME PIRACY

The Penal Code reform introducing the offence concerning of maritime piracy essentially pursues two ends, as explained by the Board of Prosecutors in a report issued on the occasion of the bill for the Organic Law reforming the Penal Code.[23] Firstly, to address the public alarm caused in Spain by the recent attacks on shipping in waters off the

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cont.

whether or not contract personnel are authorised to arrest pirates or what is to be done with arrestees. In this respect the shipowners say that they are prepared to shoulder the existing financial costs of a military operation undertaken by the Spanish government. Moreover, with regard to Spanish tuna boats they note, quite rightly, that marines belonging to the EU's Operation Atalanta could be placed on board in accordance with point 2 a) of the Mandate of Council Joint Action 2008/851/CFSP of 10 November 2008 on vessels belonging to the World Food Programme (see the report *La pesca de túnidos tropicales en el océano Índico*, Cepesca, 2009, pp. 9–10, on-line at: http://www.pesca2.com/encuentro/documentos/informe_atuneros_cepesca2009.pdf). Unlike Spain, starting in June 2009 France has opted to place teams of French Navy fusiliers on its tuna boats (see press note of 10 October 2009: Piraterie: attaque de deux thoniers repoussée par des EPE on the website of the French Defence Ministry: http://www.defense.gouv.fr/operations/piraterie/actualites/10-10-09-piraterie-attaque-de-deux-thoniers-repoussee-par-des-epe).

[21] See *B.O.E.* no 152 of 23 June 2010.

[22] As regards the temporal scope, we should note that according to the seventh final provision of Organic Law 5/2010 of 22 June 2010 amending the Penal Code Act, Organic Law 10/1995 of 23 November 1995, the new Law would come into force six months after complete publication in the Official State Gazette (BOE) (23 June 2010), i.e. on 23 December 2010. As we all know, in our legal system the principle of non-retroactivity of punitive provisions unfavourable to or restrictive of individual freedoms enshrined in Article 9(3) of the Spanish Constitution holds, and therefore the new Penal Code provisions cannot be applied retroactively to events that occurred at a prior date. This does not mean that acts of piracy committed before the new Penal Code reform came into force cannot be prosecuted by the Spanish courts. On this point we refer the reader to what we have to say in the following section, entitled "Purpose of the reform and classification of the offence of maritime piracy".

[23] Report by the Board of Prosecutors on the bill for the Organic Law amending the Penal Code Act, Organic Law 10/1995 of 23 November 1995.

coast of Somalia, particularly the two hijackings of Spanish vessels mentioned above. Secondly, to honour certain international undertakings made by Spain with regard to maritime security.

Having explained the events that provoked public concern in Spain, suffice it here to add that the scale of this alarm reflects the vital importance of the tuna fishing sector in this country and the importance of the Indian Ocean fishing grounds for that sector.[24]

As regards the obligation to honour international undertakings made in connection with maritime security, the internal Spanish regulations did not conform adequately or coherently to certain provisions laid down in international treaties to which Spain is a party. For instance Article 100 of the UNCLOS provides that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."[25] This very general provision is undoubtedly a preamble to the rules laid down for combating piracy in the articles following it.[26] Article 105 of the UNCLOS is more specific:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under

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[24] This is a fishery that targets the two main tropical tuna species, yellowfin (*Thunnus albacares*) and skipjack (*Katsuwonus pelamis*), which are regulated in this area by the Indian Ocean Tuna Commission and by the fishery authorities of the EU, Spain and the Seychelles government. According to the data furnished by the Spanish Fisheries Confederation (Cepesca), the organisation of fishery undertakings, the fleet with Spanish interests that operates in the Indian Ocean comprises approximately 22 tuna boats; 13 flying the Spanish flag – registered in the Basque Country, Andalusia and Galicia – and 9 Spanish-owned tuna boats flying the flag of the Seychelles. On average, the Spanish tuna freezer boats carry around 30 persons, half of whom are Spanish, while the rest are normally nationals of coastal countries, who must be employed under fishery agreements. In all it is estimated that the activity of the Spanish fleet in the Indian Ocean generates around 1500 jobs, between ships' crews and workers in canning industries in Spain or in countries on the Indian Ocean. In the Seychelles for example, the activity generated by the tuna fishing fleet in ports, tuna processing factories, ships' crews and port activity is the country's principal source of income, accounting for approximately 60% of the gross domestic product. At the same time, it is important to note that the area fished by the Spanish and associated fleet in the Indian Ocean is immense, covering more than 3200 nautical miles of international waters and jurisdictional waters of several countries – Comoros, Kenya, Madagascar, Mauritius, Mozambique, Seychelles, Tanzania, etc. – where fleets operate with licences under Community agreements. Finally, we should note that the Spanish fleet currently catches around 200,000 tonnes of tropical tuna every year, which is 40% of the demand of the Spanish canning industry. At all events, in recent years it appears that up to a total of 11 boats (35% of the tuna fleet) that habitually fish in the Indian Ocean have transferred to the Atlantic and Pacific Oceans to escape the pirates, making up the fishing quotas that the EU has in those grounds (See Press note: *La pesca de túnidos tropicales en el océano Índico*, of 4 March 2010. This document can be found at: http://www.cepesca.es/ptr/vista/vptr002/post.html?D.k=853070 and report *La pesca de túnidos tropicales en el océano Índico*, Cepesca, 2009).

[25] The UNCLOS came into force generally on 16 November 1994, and for Spain on 14 February 1997 (B.O.E. no 39 of 14 February 1997).

[26] The wording appears to oblige *all States*, and not only States party, and may be seen as recognising the existence of a universally-applicable customary rule having the same substance. This article reaffirms the terms of Article 14 of the GCHS.

> the control of pirates, and arrest the persons and seize the property on board. 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".[27]

What this actually amounts to is universal police and jurisdictional competence. This last – the part germane to this article – means that the courts of the State that arrested the alleged pirates has jurisdiction in respect of these crimes irrespective of the nationality of the victims, the property, the pirates or any other consideration. From the terms of Articles 100 and 105 of the UNCLOS taken together it follows that the exercise of this universal jurisdiction in respect of piracy by any State is a species of right/obligation that should be enshrined in national criminal laws classifying crimes of piracy and establishing appropriate penalties, under the principle of no punishment without law.

As regards the *Spanish legal system*, we should note that the right/obligation of universal jurisdiction in matters of maritime piracy in the UNCLOS was incorporated in Article 23(4) of the Judiciary Act, Organic Law 6/1985 of 1 July 1985.[28] However, for a number of years this incorporation was incomplete and inconsistent, given the disappearance of maritime piracy as a crime classified in the Common Penal Code of 1995 and the Military Penal Code of 1985,[29] and the repeal of the Merchant Navy (Penal and Disciplinary) Act of 22 December 1955 by the current State Ports and Merchant Navy Act, Law 27/1992 of 24 November 1992.[30] Such a lacuna is striking if we consider that the other acts contemplated in Article 23(4) of the Judiciary Act, Law 6/1985 were classified in our internal law, at least the most representative types. This lacuna was filled by the 2010 reform of the Penal Code.

In any case, despite the fact that the Spanish courts have not been able to prosecute and punish acts of piracy given the lack of definition of the crime of piracy, as we understand it, they have been able to try and punish the perpetrators of such acts for their liability in respect of the consequences ensuing from the acts committed by the pirates on ships, goods and persons.[31] This is evidenced, for example, by judicial decisions that recognised the jurisdiction of Spanish courts in respect of the case of the pirates who hijacked the Spanish tuna-fishing vessel *Alakrana*, several months before the 2010 reform of the Penal Code. For example, in his Order of 5 October 2009, Judge Baltasar Garzón defined the acts as criminal conspiracy (Article 515 and 516 of the Penal Code),

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[27] In this connection see also Article 19 of the GCHS.

[28] "The Spanish courts shall also have jurisdiction in respect of acts committed by Spanish or foreign nationals outside Spanish territory which according to Spanish criminal law may be classified as: a) Genocide. b) Terrorism. c) Piracy and illegal seizure of aircraft. d) Forging of foreign currency. e) Crimes relating to prostitution and corruption of minors or handicapped persons. f) Illegal trafficking of psychotropic, toxic and narcotic drugs. g) And any other susceptible of prosecution in Spain under international treaties or conventions".

[29] Under article 6(9)(a) of the former Military Code of Justice of 17 July 1945, jurisdiction in respect of offences of piracy lay with the military courts "irrespective of the country to which the accused may belong".

[30] Article 9 of the Merchant Navy (Penal and Disciplinary) Act of 22 December 1955 classified piracy as a crime.

[31] In this respect see: RODRÍGUEZ NÚÑEZ, A., "El delito de pirateria"…, op. cit., pp. 259–260.

illegal detention (Articles 163 and 164 of the Penal Code) and the offence of robbery with violence and use of weapons. (Article 242 of the Penal Code).[32] For the Criminal Chamber of the Audiencia Nacional, as stated in its Order of 2 November 2009, the acts could constitute the offence of hijacking (article 164, in relation with 163, of the Penal Code) and of criminal association (Article 515 of the Penal Code).[33]

On the other hand, Spain is a party to other conventions that, with time, have been adopted to fight piracy and acts of violence and depredation against ships that the Montego Bay Convention did not consider piracy because they took place in sovereign waters, and are classified as armed robbery.[34] Of these, we may cite the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[35] – done at Rome on 10 March 1988 – which was adopted as a result of the 1985 hijacking of the Italian ship *Achille Lauro*.[36] The main purpose of the Convention is to assure that steps are taken against persons who have allegedly committed illegal acts against ships, and to oblige States Parties to prosecute or extradite them. Thus, article 5 of the Convention obliges States Parties to establish appropriate penalties for the offences listed in Article 3 of the Convention[37] taking into account the serious nature of these offences.

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[32] Alongside this, in the first legal ground of his Order of the 5 October Judge Garzón added: "The acts committed against the 36 people detained and the ship itself fall within the scope of Art. 23.4,c) e i) of the Judiciary Act, in relation to the Geneva Convention on the High Seas of 29 April 1958 (Art. 19) and Article 105 of the Montego Bay Convention of 10 October 1982, cited in the Order initiating these inquiries. This classification recognises the jurisdiction of Spain and hence of the National High Court pursuant to Art.65.1. e) and 88 of the Judiciary Act" (see Order of 5 October 2009, Central Court of First Instance No. 1 of the National High Court, p. 3).

[33] The Audiencia Nacional also stated that "According to international law this would be a case of piracy that entails the seizure of a ship or exercising control thereof through violence, threat of violence or any other form of intimidation, in Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988; Also any act of violence, detention or depredation committed against a ship, as stated in Article 101 of the Convention on the Law of the Sea of 10 December 1982 both instruments ratified by Spain" (See, Order of 2 November 2009, Criminal Chamber of the National High Court, Question of Jurisdiction, official dossier 24/2009, p. 6).

[34] For example, the IMO Maritime Safety Committee's Code of Practice for the Investigation of crimes of piracy and armed robbery committed against ships, adopted by the IMO Assembly on 29 November 2001, includes the following definition: " 'Armed robbery against ships' means 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 a ship, within a State's jurisdiction over such offences." See IMO, Resolution A.922 (22), adopted 29 November 2001).

[35] See instrument of ratification in B.O.E. No.99, 24 April 1992.

[36] At 31 July 2010, 156 States are parties to the Convention.

[37] "1. Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime

However, unlike the universal jurisdiction envisaged by UNCLOS for the suppression of acts of piracy on the high seas or maritime outside any State's sovereign waters, the 1988 Convention, only obliges States Parties to exercise their jurisdiction over unlawful acts against ships when there are territorial or national connections with the State of the forum,[38] which shows beyond doubt that there is no general and universal rule with the same content. Spain has fulfilled the obligation to classify and punish the offences listed in the Convention with the 2010 reform of the Penal Code.

Also, on 10 March 1988 the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf was adopted, an instrument closely linked to the previous one, to which Spain is likewise a Party.[39] *Mutatis mutandis*, it imposes the same obligations upon the States Parties as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigational, but in relation to unlawful acts committed against the safety of fixed platforms located on the Continental Shelf.[40] Therefore, it also obliges the sovereign States that have signed it to classify and punish within their respective legal systems the unlawful acts referred to in Article 2 thereof.[41] In the same way, our country has adjusted to this obligation by virtue of the recent reform of the Penal Code.

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navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in sub paragraphs (a) to (f). 2. Any person also commits an offence if that person: (a) attempts to commit any of the offences set forth in paragraph 1; or (b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or (c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, sub paragraphs (b), (c) and (e) of paragraph 1, if that threat is likely to endanger the safe navigation of the ship in question."

38 See, articles 6 & 10 of the Convention.

39 See instrument of ratification in B.O.E. No.99, 24 April 1992.

40 It should be stressed that these instruments are brought in to eradicate *all violence at sea without entering into the nature of the perpetrators*, which blurs the distinction between crimes of piracy and maritime terrorism. Therefore in my opinion, this fact can be seen as a correction of the system provided in UNCLOS for the fight against piracy which only applies to acts that are perpetrated for private ends in areas outside the jurisdiction of States.

41 This Article reads: "1. Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or (b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or (c) destroys a fixed platform or causes damage to it which is likely to endanger its safety; or (d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or (e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d). 2. Any person also commits an offence if that person: (a) attempts to commit any of the offences set forth in paragraph 1; or (b) abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person

In 2005 protocols were adopted to update the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf. Spain has ratified both.[42]

Finally, we should note that the inclusion of maritime piracy in the Penal Code works in favour of prosecution in Spain of suspects captured by the Spanish Navy as part of the EU Operation Atalanta, implemented in support of and under the aegis of several UN Security Council resolutions, as explained in the introduction. In fact Article 12 provides that persons arrested for such acts in the territorial waters of Somalia or on the High Seas are to be handed over for prosecution, as a matter of priority, to the authorities of the Member State whose ship arrested the suspect.[43]

III. HISTORY OF REGULATION OF THE CRIME OF PIRACY IN SPAIN

For many centuries piracy was an entirely accepted practice;[44] the process of proscription only began with the affirmation of the State's monopoly on violence. From then

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who commits such an offence; or (c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform."

42 See the instrument of Ratification of the 2005 Protocol to the Convention for the Suppression of Unlawful acts against the Safety of Maritime Navigation, done at London on 14 October 2005, in the Official State Bulletin. No. 170, 14 July 2010 See also the instrument of Ratification of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at London 14 October 2005, in the Official State Bulletin. No. 171, 15 July 2010.

43 "1. On the basis of Somalia´s acceptance of the exercise of jurisdiction by Member States or Third States, on the one hand, and of Article 105 of the United Nations Convention on the Law of the Sea, on the other hand, any persons that have committed or who are suspected of having committed acts of piracy or armed robbery, who are captured and detained for trial in territorial waters of Somalia or on the high seas, and likewise goods that have been used to commit unlawful acts, will be surrendered: – to the competent authorities of the Member State or Third State participating in the operation whose flag is flown by the vessel that made the capture, or if that State cannot or does not wish to exercise its jurisdiction, a Member State or Third State that does wish to exercise its jurisdiction over the aforementioned persons or goods. 2. None of the persons mentioned in section 1, may be surrendered to a Third State, if the conditions of such surrender have not been agreed with the Third State in accordance with the applicable International Law, especially International Human Rights Law, in particular to guarantee that no one is subjected to the death penalty, torture or any other cruel inhumane or degrading treatment".

44 For instance, Thomson maintains that "[t]here simply is no question that piracy was a legitimate practice in the early European state system. Pirates brought revenue to the sovereign, public officials, and private investors. They weakened enemies by attacking their shipping and settlements. They supplied European markets with scarce goods at affordable prices. They broke competing states' trade monopolies. The most successful of the British pirates were knighted and/or given important posts in the Royal Navy or the British Admiralty. By the

on, for various reasons piracy gradually came to be a prosecutable offence in internal legal systems[45] and, as one might expect, this progressively entered international law, eventually to be treated as a "crime de droit des gens".[46] In fact, as we know, there came to be a customary rule whereby any State could prosecute acts of piracy;[47] indeed, this was the first case of universal jurisdiction.

As regards the Spanish legal system[48] we may say, like Quintano Ripollés, that since Spain is an eminently seagoing nation, there is a long and abundant history of internal prosecution of piracy.[49] Indeed, maritime piracy is mentioned in the Partidas of King Alfonso X[50] and has been prosecuted at least since 1801, by virtue of an Ordinance of King Carlos IV regulating corsairing.[51]

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early eighteenth century, however, pirates were being hanged en masse in public executions" (see THOMSON, J.E., *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe*, Princeton University Press, Princeton, New Jersey, 1994, pp. 107–108).

45 In this connection see ibid., pp. 107–149.

46 See GIDEL, G., *Le droit international public de la mer. Le temps de paix*, Tome I, Librairie Edouard Duchemin, Paris, 1981, p. 307.

47 For example, in an individual opinion appended to the decision of the International Criminal Court for the Former Yugoslavia of 6 May 2003 on *Milutinovic* (*Prosecutor v. Milutinovic, Dragoljub Ojdanic and Nikola Sainovic*) Judge Robinson noted that "[t]he historical genesis of universal jurisdiction is *piracy jure gentium*. There is general agreement that every State has the right to prosecute persons for piracy (an offence committed on the high seas and, therefore, outside the jurisdiction of any State), even if the offence was not committed by one of its nationals. The prohibition of piracy has been codified in the Montego Bay Convention on the Law of the Sea, Article 105 of which provides that any State may seize, arrest and prosecute a pirate. Indubitably, there would also be a customary basis for such action." See for example the decision in http://www.un.org/icty/milutinovic/trialc/decision-e/030506.htm. In the *Lotus* case before the Permanent Court of International Justice, Judge Moore noted this, averring that at that time piracy constituted "an offence against the law of nations", and consequently a pirate was denied the protection of the State whose flag he was entitled to fly and was treated "as an outlaw, as the enemy of all mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish (*Judgment Nº 9, 1927, P.C.I.J., Series A Nº 10*, p. 70).

48 Owing to the age and the difficulty of finding the rules cited hereafter, we have included them in full to help the reader manage and read them.

49 QUINTANO RIPOLLÉS, A., *Tratado de derecho penal internacional e internacional penal*, Tomo I, Consejo Superior de Investigaciones Científicas, Instituto Francisco de Vitoria, Madrid, 1955, p. 326.

50 Partida VII, Título XIII, Ley 1ª: "Rapina in Latín means the same in Romance as robbery done by men upon property of others that is movable. And there are three manners of robbery[...] The third is when a house is suddenly burnt or thrown down or a ship is in danger and those who come as if to help steal or carry off whatever they find there" (See *Las Siete Partidas del Rey Don Alfonso el Sabio, cotejadas con varios códices antiguos por la Real Academia de Historia*, Tomo III, Imprenta Real, Madrid, 1807, p. 407.

51 See for example Article XXVII of the Ordinance of King Carlos IV, of 20 June 1801 on certain issues concerning corsairing: "XXVII. Which are to be deemed fair prey. Any vessels which are found sailing without a legitimate Patent from a Prince, Republic or State empowered so to issue shall be arrested, and likewise any that fight under a flag other than that of the Prince or State issuer of its Patent, and any that possess such from sundry Princes or States; any

Later on, in the age of codification, piracy began to be included in penal codes.[52] Thus, piracy is classified and penalised in the Penal Codes of 1822,[53] 1848,[54] 1870,[55] 1928,[56] 1932,[57] 1944[58] and 1973.[59]

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such shall be deemed fair prey, and if armed for war, their Petty Officers and Officers shall be treated as Pirates." (See *Novísima Recopilación de las Leyes de España*, Tomo III, Libro VI, Título VIII, p. 128).

52 As this paper examines the reform of the current penal code in respect of piracy, we do not offer a detailed study of other Spanish legislation on the subject, such as the 1955 Merchant Navy (Criminal and Disciplinary) Act, the 1985 Judiciary Act or the 1992 State Ports and Merchant Navy Act. To analyse statutes other than penal codes would excessively overload what is already a longer paper than normally appears in this journal. In other chapters, we have made reference to some of these statutes where necessary.

53 1822 Penal Code. See Articles 268 and 730. Article 268 [Chapter II (On offences against the rights of persons) Title II (Offences against the external security of the State) Part One (On offences against Society)] provided thus: "Pirates and persons who, at sea or in ports steal or carry off objects from a foreign vessel that has been wrecked or put in due to damage, shall be punished accordingly pursuant to chapter one title three of the second part." For its part, Article 730 [Chapter One (On robbery) of Title III (On offences against private property) of the Second Part (On offences against private individuals) provided for a life sentence of forced labour, inter alia for pirates (paragraph 3).

54 Articles 156 to 159 of the 1848 Penal Code, contained in Chapter III (Offences against the rights of persons), Title II (Offences against the external security of the State) Book Two (Offences and penalties). Article 156 provided: "The crime of piracy committed against Spaniards or subjects of another nation not at war with Spain shall be punished by the maximum term of imprisonment or by death.". Article 157 provided that "Persons guilty of the offence defined in the foregoing article shall be sentenced to life imprisonment until death: 1. if they have seized a vessel by boarding or by gunfire; 2. if the offence is compounded by homicide or any of the injuries listed in Articles 341 and 342; 3. if it is compounded by any of the dishonest acts listed in chapter II, title X of this book; 4. if the pirates have abandoned any persons without means of saving themselves; 5. in any case the pirate captain or master". Article 158 provided that. "The provisions of the two foregoing articles apply to persons delivering the vessel on board which they are to pirates". And Article 159 provided that: "Any person resident in Spanish dominions who has dealings with known pirates shall be punished as their accomplice".

55 1870 Penal Code, Articles 155 and 156, contained in Chapter IV (Offences of piracy) of Title One (Offences against the external security of the State) of Book Two (Offences and penalties), which practically reproduce the articles of the 1848 Code relating to piracy. Article 155 provided that: "The offence of piracy when committed against Spaniards or subjects of another nation not at war with Spain shall be punished by long-term imprisonment to life imprisonment. If the offence is committed against non-belligerent subjects of another nation which is at war with Spain, it shall carry the penalty of long-term imprisonment". Article 156 provided that: "Any persons committing the offence defined in the first paragraph of the foregoing article shall be sentenced to life imprisonment until death, and any person committing any of the offences defined in the second paragraph of the same article shall be sentenced to long-term to life imprisonment: 1. if they have seized a vessel by boarding or by gunfire; 2. if the offence is compounded by homicide or any of the injuries listed in Articles 429 and 430, and in Article 431 paragraphs 1 and 2; 3. if it is compounded by any of the dishonest acts listed in chapter II, title IX of this book; 4. if the pirates have abandoned any persons without means of saving themselves; 5. in any case the pirate captain or master".

56 1928 Penal Code, Articles 245 to 252. Contained in Chapter IV (Offences of piracy and the like) of Title One (Offences against the external security of the State) of Book Two (Offences

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and penalties). Article 245 defines piracy, for the first time, in the following way: "The offence of piracy is committed by anyone who, lacking authorisation or patent from a Government empowered to issue one, or in abuse of a legitimate patent or under patents issued by more than one State, shall direct, command or man one or more armed vessels, or vessels carrying an armed crew, which sail the seas and wreak robbery or violence thereon or on their coasts or on other vessels". Article 246 provides that: "The offence of piracy when committed against Spaniards or subjects of another nation not at war with Spain shall be punished by eighteen to thirty years' imprisonment. If the offence is committed against non-belligerent subjects of another nation which is at war with Spain, it shall be punished by four to twelve years' imprisonment." Article 247 provides that: "The penalty for the captain, master and crew of a vessel carrying war contraband to assist enemies of or rebels against Spain shall be eighteen years' imprisonment to death and a fine of 10,000 to 100,000 pesetas. The penalty for anyone committing any other act of war contraband to assist enemies of or rebels against Spain shall be from ten to thirty years' imprisonment". Annex 248 provides that: "The penalty for commission of the crime of piracy shall be twenty-four years' imprisonment: 1) if they have seized a vessel by boarding or by gunfire; 2) if the offence is accompanied by murder or homicide or by wounding such as to cause mutilation, deformity, inability to work or other effects deemed by this Code to be of equal seriousness; 3) if it is compounded by any of the dishonest acts penalised in chapter one, title X of this book; 4) if the pirates have abandoned any persons without means of saving themselves; 5) in any case the pirate captain or master". Article 249 provides that: "The penalty for anyone delivering up a Spanish vessel or a Spanish-chartered vessel to pirates shall be: 1) twenty-four years' imprisonment to death, if the perpetrator of the crime is the captain or master; 2) ten to twenty-four years' imprisonment if the vessel is delivered up by someone else. Article 250 provides as follows; "The penalty for anyone seizing control of a Spanish vessel by bribing the crew or by any other unlawful means shall be ten to twenty years' imprisonment. If in the course of the offence he should cause serious injury or should use means such as to prevent the captain or master from commanding the vessel, the penalty shall be from fourteen to twenty-four years' imprisonment". Article 251 provides thus: The penalty for anyone who from the air or from land shall, by means of false signals or any other malicious procedure, cause the wreck or grounding of a vessel for the purpose of robbing it or assaulting the persons on board shall be from six to ten years' imprisonment. If such robbery or assaults should come to be carried out, the guilty party shall receive the next penalty upwards on the scale, unless the acts committed merit a more severe penalty under this Code". Finally, Article 252 provides thus: "The terms laid down in the foregoing articles shall apply equally where the offences there cited are committed by means of or between aircraft".

[57] 1932 Penal Code, Articles 142 and 143, in Chapter IV (Offences of piracy) of Title One (Offences against the external security of the State) of Book Two (Offences and penalties). Article 142 provides that: "The offence of piracy when committed against Spaniards or subjects of another nation not at war with Spain shall be punished by 'reclusión menor' [imprisonment of six months and a day to six years] to the minimum category of 'reclusión mayor' [six years and a day or more]. If the offence is committed against non-belligerent subjects of another nation which is at war with Spain, it shall carry the penalty of long-term imprisonment". Article 143 provides that: "The penalty for anyone committing the offences defined in the first paragraph of the foregoing article shall be long-term imprisonment, and for anyone committing the offences defined in the second paragraph of the same article the penalty shall be from short-term imprisonment to the minimum category of long-term imprisonment: 1) if they have seized a vessel by boarding or by gunfire; 2) if the offence is accompanied by murder or homicide or by any of the injuries listed in Articles 421 and 422 and in paragraphs 1 and 2 of Article 423; 3) if it is compounded by any of the dishonest acts listed in chapter I, title X of this book; 4) if the pirates have abandoned any persons without means of saving themselves; 5) in any case the pirate captain or master".

As to how it was treated in the various different penal codes, we find that until the Code of 1870 piracy was traditionally included in the chapter on offences against the Rights of Persons. The 1870 Code separated them, in a specific chapter in the title devoted to classifying and penalising offences against the external security of the State. This was repeated in the Codes of 1928, 1932, 1944 and 1973.[60]

If we examine the features common to all the provisions classifying and penalising piracy in each penal code, we find firstly that the Spanish legislation has not been confined to prosecuting acts of piracy committed against persons holding Spanish nationality

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[58] 1944 Penal Code, Articles 138 and 139, in Chapter IV (Offences of piracy) of Title One (Offences against the external security of the State) of Book Two (Offences and penalties). Article 138 provides that: "The offence of piracy when committed against Spaniards or subjects of another nation not at war with Spain shall be punished by long-term imprisonment. If the offence is committed against non-belligerent subjects of another nation which is at war with Spain, it shall carry the penalty of long-term imprisonment." Article 139 in turn provides that: "The penalty for anyone committing the offences defined in the first paragraph of the foregoing article shall be long-term imprisonment until death, and for anyone committing the offences defined in the second paragraph of the same article the penalty shall be long-term imprisonment: 1) if they have seized a vessel by boarding or by gunfire; 2) if the offence is accompanied by murder or homicide or by any of the injuries listed in Articles 418 and 419 and in paragraphs 1 and 2 of Article 420; 3) if it is compounded by any of the dishonest acts listed in chapter one, title IX of this book; 4) if the pirates have abandoned any persons without means of saving themselves; 5) in any case the pirate captain or master". The penalties listed in this article and the foregoing apply to offences committed against aeroplanes, aircraft and the like, or using such means".

[59] The offence of piracy was classified in the repealed 1973 Penal Code in Articles 138 and 139 in chapter IV (Offences or piracy), Title One (Offences against the external security of the State) of Book Two (Offences and penalties). Article 138 provides as follows: "The offence of piracy when committed against Spaniards or subjects of another nation not at war with Spain shall be punished by long-term imprisonment. If the offence is committed against non-belligerent subjects of another nation which is at war with Spain, it shall carry the penalty of long-term imprisonment." For its part, Article 139 provides that: "The penalty for anyone committing the offences defined in the first paragraph of the foregoing article shall be long-term imprisonment until death, and for anyone committing the offences defined in the second paragraph of the same article the penalty shall be long-term imprisonment: 1) if they have seized a vessel by boarding or by gunfire; 2) if the offence is accompanied by murder or homicide or by any of the injuries listed in Articles 418 and 419 and in paragraphs 1 and 2 of Article 420; 3) if it is compounded by any of the dishonest acts listed in chapter I, title IX of this book; 4) if the pirates have abandoned any persons without means of saving themselves; 3) if it is compounded by any of the dishonest acts listed in chapter one, title IX of this book; The penalties listed in this article and the foregoing apply to offences committed against aeroplanes, aircraft and the like, or using such means". Articles 140 and 141 make provisions common to the four previous chapters, including those dealing with piracy. Article 140 provides that: "If any of the offences listed in the foregoing chapters is committed by a public employee taking undue advantage of the nature or functions of his office, he shall be barred from public employment in addition to the penalties set forth therein". Article 141 provides that: "Any foreigner naturalised in Spain who is found guilty of the offences penalised in this title may be sentenced to the loss of Spanish nationality in addition to the penalty provided therefor".

[60] For an analysis of the evolution of Spanish legislation on the crime of piracy, we recommend: RODRÍGUEZ NÚÑEZ, A., "El delito de piratería"…, op. cit., pp. 224–229; SOBRINO HEREDIA, J.M., "Piratería y terrorismo en el mar"…, op. cit., pp. 138–142.

or vessels flying the Spanish flag; it also prosecutes acts committed against citizens or vessels of third States – albeit the penalty varies depending on the relationship of the victims' State of nationality with Spain. Secondly, it does not specify in what maritime space acts of piracy must be committed to be prosecutable by the Spanish authorities; they may in theory be committed either in Spanish territorial waters or on the high seas, or even in territorial waters of other States. Thirdly, there is no single penalty for acts of piracy; the penalty will depend on the seriousness of the consequences of such acts for the property, integrity or lives of persons, and even on honesty.

All these elements show that since the first penal codes, our legal system has considered piracy to be an offence against the rights of persons, and when it comes to classifying and penalising it, it has applied the principle of universal jurisdiction enshrined in international law.

In contrast, other offences which today are treated as breaches of international law in many legal systems, and in respect of which international law also recognises universal jurisdiction, were not prosecuted in Spain until much later. For instance, in the case of slavery we find that although included in the code of 1822[61] in the same chapter as piracy – the one dealing with offences against the rights of persons – it ceased to be classified or penalised in later codes, until it was implicitly included in the 1995 code in Article 318 bis, by virtue of Organic Law 4/2000 of 11 January 2000 on rights and freedoms of aliens in Spain and their social integration. This by no means implies that slavery was lawful in this country until the year 2000. In fact, among other bilateral or multilateral agreements on the subject, Spain had ratified the Convention on Slavery, approved on 25 September 1926 and in force as from 9 March 1927, whereunder, as Quintano Ripollés noted, the States parties undertook to prevent and suppress slavery, "incorporating the agreed provisions into their internal laws by virtue of ratification".[62] However, like the earlier instruments dealing with the subject, this one contained no categories or penalties, so that to be prosecuted in this country the particular acts entailed in slavery had to be linked to vague provisions in the Code regarding other

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[61] In Article 273, which provides thus: "Any captains, masters or navigators of Spanish vessels who purchase negroes on the coasts of Africa and bring them into any port in Spanish possessions, or who are apprehended with such on board their vessel, shall forfeit the latter, and its value shall be charged as a fine, and they shall further be subject to the penalty of ten years of public works. The same penalties shall apply to any captains, masters or navigators of foreign vessels who bring such cargoes into any port of the Spanish Crown. In any of the events in this article, any negroes of that condition who may be found or brought in shall be declared freemen, and each one shall receive one hundred *duros*, if half the value of the vessel suffices to cover the sum; and if not, the said half shall be divided equally among them. Anyone purchasing *bozal* negroes brought in this way in breach of this article, knowing that the act is unlawful, shall also lose them; those negroes shall be freed and the purchasers shall pay a fine equal to the price they paid for them, half of which amount shall be given to the person purchased".

[62] See QUINTANO RIPOLLÉS, A., *Tratado de derecho penal internacional e internacional penal . . .*, op. cit., p. 341.

In addition to other bilateral and multilateral treaties on the subject, slave trading was also regulated internally in Spain in the criminal law on slave trading of 1845 and in the Law for the suppression and punishment of slave trading of 1867.

offences, such as coercion.[63] In the latest reform (2010) slavery is categorised as a form of the crime of trafficking in human beings defined in Article 117 bis, while the classic conception of slavery seems to have been consigned to history.

Clearer still is the case of genocide, which was not first classified in the Penal Code until 1971,[64] where it was included in Article 137 bis,[65] by virtue of Law 44/1971 of 15 November 1971, again in the chapter dealing with crimes against the rights of persons, such as piracy.

It was later still that penal codes began to include offences against protected persons and property in the event of armed conflict or crimes against humanity. The former first appeared in the Code of 1995, in Book II Title XXIV (offences and penalties) dealing with crimes against the International Community,[66] and the latter were introduced by Organic Law 15/2003 of 25 November 2003, which was adopted, among other reasons, to coordinate our internal legislation with the competences of the International Criminal Court.

IV. EXAMINATION OF COMPARATIVE LAW

An analysis of comparative law shows that there are not many States whose internal legislation includes rules expressly aimed at the prosecution of acts of piracy or armed robbery against ships. Of the few that do, some classify and penalise such acts in their Penal Codes, some include them both in their Penal Codes and in special laws, and finally some only prosecute them by means of special laws.

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63 See QUINTANO RIPOLLÉS, A., *Tratado de derecho penal internacional e internacional penal…*, op. cit., p. 343.

64 Be it remembered that the Convention on Genocide was approved by the UN General Assembly on 9 December 1948 and that Spain acceded to it belatedly, on 13 September 1968. On the context and process of Spain's accession to the Convention see ESPALIÚ BERDUD, C., "The Spanish reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide", *Spanish Yearbook of International Law*, Volume X, 2006, pp. 67–95.

65 "Anyone who perpetrates any of the following acts for the purpose of totally or partially destroying am ethnic, social or religious national group shall be punished in the form of: 1) long-term imprisonment to death if they cause the death of any members thereof; 2) long-term imprisonment if they cause castration, sterilisation, mutilation or any serious injury; 3) short-term imprisonment if they subject the group or any individual members thereof to living conditions that endanger their lives or seriously affect their health. The same penalty shall apply to anyone carrying out forced displacements of the group or members thereof, taking any action that tends to impede their way of life or reproduction or forcibly transferring individuals from one group to another."

66 According to Professors Pérez González and Abad Castelos, this was a new departure, included in the new Penal Code in response to a proposal drawn up at the Spanish Red Cross's Centre for Studies in International Humanitarian Law (CEDIH. in response to the call from the International Committee of the Red Cross for the various States to introduce internal measures for implementation of the Geneva Conventions and their Additional Protocols in peacetime: See PÉREZ GONZÁLEZ, M.; ABAD CASTELOS, M., "Los delitos contra la comunidad internacional en el Código Penal Español", *Anuario da Facultade de Dereito da Universidade da Coruña*, nº 3, 1999, pp. 456–457.

The States whose Penal Codes deal expressly with maritime piracy include Australia, Estonia, Guatemala, Malta, Mexico, Oman, Poland, Romania, Tanzania and the Ukraine.

Part IV of Australia's 1914 *Criminal Act* de 1914 deals with piracy, which carries penalties ranging up to life imprisonment.[67]

Estonia's 2001 Penal Code includes an article – 110 – Division 5 of which, on offences against international safety, provides for penalties of up to 20 years' imprisonment depending on the seriousness of the offence.[68]

In Decree No 17 of 1973 Guatemala approved a Penal Code that includes provisions regarding the crime of piracy. It is striking the scope of the classification of acts of piracy in the initial paragraph of the first of the two articles dealing with the subject – 299 – particularly the scenarios where the offence can be committed. According to this article, an offence of piracy is committed by "anyone carrying out an act of depredation or violence, at sea or on lakes or navigable rivers, against a vessel or against the persons on board unless authorised by a belligerent State or unless the act is carried out by a vessel belonging to navy of a recognised State". Here then, acts of piracy are not confined to the high seas or to maritime areas outside the jurisdiction of any State; piracy may also be any act of maritime vandalism or terrorism committed on any body of water, inland or at sea, and not only in Guatemalan territory but anywhere in the world. However, this scope is limited to some extent by the terms of Article 5 of the Code, dealing with the extra-territorial application of criminal law.[69]

Following the piracy crisis in Somali waters Malta amended its *Criminal Code*, in a law of 2009 introducing provisions that classify and penalise maritime piracy in two articles drafted in accordance with the relevant provisions of the UNCLOS. The most serious acts of piracy carry a penalty of life imprisonment.[70]

Mexico's Federal Penal Code includes a chapter dealing with piracy in the Title devoted to crimes against international law. The two articles comprising this chapter – 146 and 147 – establish penalties of fifteen to thirty years' imprisonment and confiscation of the vessel for acts of piracy.[71]

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67 See *Crimes Act 1914.*

68 See §110, "Piracy", *Penal Code*, Passed 6 June 2001.

69 According to these provisions, unless provided otherwise in international treaties, the Code applies to anyone committing an offence or misdemeanour in the territory of the Republic of Guatemala or in places or vehicles subject to its jurisdiction (Article 4). In addition, it specifies that the Code shall apply to . . . "2) offences committed on a Guatemalan vessel, aircraft or any other means of transport if it has not been judged in the country where the offence was committed; 3) offences committed by Guatemalans abroad if extradition has been refused; 4) offences committed abroad against Guatemalans if not judged in the country where they were committed, provided that a complaint is brought by the victim or by the Public Prosecutor and the accused is in Guatemala; 5) offences which under a treaty or convention are punishable in Guatemala even if not committed in its territory" (Article 5).

70 See Verbal Note of 9 February 2010 from the Maltese Permanent Mission to the United Nations to the UN Secretariat.

71 See Verbal Note of 9 February 2010 from the Mexican Permanent Mission to the United Nations to the UN Secretariat.

Oman likewise possesses a Penal Code, dated 16 February 1974, containing an article – 285 – which deals with the question of piracy. This establishes a penalty of life imprisonment for anyone attacking a vessel at sea in order to seize its cargo or with intent to harm the passengers or crew. However, it establishes the death penalty for the perpetrator if his acts involve the sinking of the vessel or the death of any of the persons on board.[72]

The 1997 Polish Penal Code contains an article, 170, dealing specifically with piracy. This article imposes a penalty of imprisonment for anyone fitting out or adapting a vessel for the purpose of committing an act of piracy on the high seas or agreeing to serve on such a vessel. The penalties range up to 25 years' imprisonment depending on the seriousness of the consequences of such acts. The Penal Code further devotes a paragraph, Article 166(1), to the prosecution of persons who through trickery or violence, or the threat of violence, seize control of a vessel or aircraft and establishes penalties of imprisonment on a scale depending on the harm caused to the lives of persons.[73]

There are two articles in Romania's 2004 Penal Code devoted to piracy[74] (Title II, Crimes and offences against property), which provide for imprisonment for acts of pillage committed with violence, for private ends, by the crew or passengers of a vessel against persons or property on that vessel, or against another vessel, if the vessels are on the open sea or in a place outside the jurisdiction of any State. If the personal consequences of acts of piracy are serious, the perpetrators may be sentenced to up to 20 years' imprisonment.

Article 66 of Tanzania's Penal Code deals with piracy, as part of a chapter devoted to Offences Affecting Relations With Foreign States and External Tranquillity, prescribing up to life imprisonment for the most serious forms of piratical action.

In the *Criminal Code of Ukraine of 2001*, acts of piracy, along with war crimes, genocide and ecological crimes, are considered criminal offences against the peace and security of humanity and the international legal order. Article 446 includes a definition of piracy as "the use of a vessel, whether armed or not, for capturing any other sea or river vessel, and violence, robbery or any other hostile actions against the crew or passengers of such vessel, for the purpose of pecuniary compensation or any other personal benefits". Also, the penalty for such acts is from 5 to 12 years' imprisonment and the confiscation of property. However, if the same acts are repeated, or they should cause the death of persons on board or other serious consequences, the penalties shall be from 8 to 15 years' imprisonment and the confiscation of property. The *Criminal Code* also contains other jurisdictional provisions that apply to piracy.

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72 See Verbal Note of 20 January 2010 from the Permanent Mission of Oman to the United Nations to the UN Secretariat.

73 See Articles 166.§1 and 170, *Penal Code*, Act of 6 June 1997. More generally, armed robbery at sea is penalised in Articles 121 (Chapter XVI, "Offences Against Peace, Mankind, and War"), Articles 171, 183 and 184 (Chapter XX, "Offences Against Public Safety") and Article 263 (Chapter XXXII, "Offences Against Public Order").

74 See Article 254–255, *Criminal Code*, adopted in 2004 and entered into force in July 2005.

Belgium, the Philippines, Greece, Israel and Singapore are examples of States that prosecute piracy both in their Penal Codes and through special laws.

In 2009, following the piracy crisis in Somalia and the reaction of the international community to put an end to it, Belgium passed a *Loi relative à la piraterie maritime*,[75] which made changes to the *Code Pénal* and the *Code Judiciaire*, introducing provisions relating to piracy.

The Philippines has a long-standing Penal Code, the Revised Penal Code of the Philippines, of 8 December 1930, which includes provisions relating to piracy. Articles 122 and 123 in particular prescribe a penalty of life imprisonment for attacking or seizing a vessel on the high seas. On the other hand, the perpetrators may be punished, up to the death penalty, depending on the scale of the means employed and the seriousness of the consequences. At the same time, there is a special law, the Anti-Piracy and Anti-Highway Robbery Law of 1974, which also penalises acts of piracy, defined in the same way as in the Revised Penal Code, but with a special feature in that piracy is deemed to take place when committed in Philippines waters.[76] It is striking in this connection the extent to which both instruments find inspiration in the Spanish 1928 Penal Code, probably a token of our shared past.

In the case of Greece, Article 8 of the Penal Code treats maritime piracy as a crime *jure gentium*, while Article 215 of the Code on Public Maritime Law includes a definition of the crime of piracy and establishes penalties of up to twenty years' imprisonment for acts constituting piracy.[77]

Israel possesses quite abundant legislation to combat maritime piracy. Firstly, section 169 of the 1977 Israel Penal Law classifies the crime of piracy and establishes a penalty of 20 years' imprisonment. Alongside this, a Maritime Law was passed in 2008 to incorporate the provisions of the 1988 Convention for the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf. This law specifies and penalises attacks on ships, fixed platforms, and the persons or property on board them as criminal offences. At the same time it is interesting to note that the 2000 Prohibition on Money Laundering Law prohibits the laundering of money deriving from certain criminal offences listed in the act itself, among them piracy, defined in accordance with Israel's Penal Law.[78]

In Singapore's internal law we find various instruments expressly prosecuting acts of piracy. Its 1874 Penal Code includes two articles, 130 B and 130 C, which were introduced by a British law from the colonial period, the Admiralty Offences (Colonial) Act 1849. The age of these provisions is evident from the inclusion of penalties ranging from corporal punishment to the death penalty. The first reads as follows: "Whoever commits piracy shall be punished with imprisonment for life and with caning with not less than 12

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[75] See *Loi relative à la lutte contre la piraterie maritime*, du 30 décembre 2009.

[76] See Section 2, d), *Anti-Piracy and Anti-Highway Robbery Law of 1974.*

[77] See these in the Verbal Note from the Greek Permanent Mission to the United Nations of 12 February 2010 to the Division of Ocean Affairs and the Law of the Sea.

[78] See this statute in the Verbal Note from the Israeli Permanent Mission to the United Nations of 22 February 2010 to the Division of Ocean Affairs and the Law of the Sea.

strokes, but if while committing or attempting to commit piracy he murders or attempts to murder another person or does any act that is likely to endanger the life of another person he shall be punished with death". Singapore also has a Maritime Offences Act which classifies and penalises several acts of violence against ships, and hijacking.[79]

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Japan, Italy, Kenya, United Kingdom of Great Britain and Northern Ireland, Togo and South Africa are examples of States which include piracy in special laws.

Japan recently passed a 2009 Law on Punishment of and Measures against Acts of Piracy, doubtless in response to the upsurge of attacks on shipping in waters off the Somali coast. This law defines the offence of piracy and introduces measures both for its Coast Guard to combat piracy and for self-defence against pirate attacks.

Italy includes the crime of piracy in its *Codice Della Navigazione*, Articles 1135 and 1136 (Part Three: penal and disciplinary provisions; Book one: penal provisions; Title II: on particular offences; Chapter I: on offences against the persona of the State).[80] Article 1135 provides a penalty of 10 to 20 years' imprisonment for commanders or officers of any Italian or foreign vessel committing acts of piracy. The penalties for the rest of the crew are substantially lighter. Article 1136 provides for the prosecution of a commander or officer of any Italian or foreign vessel unduly armed and sailing without the requisite documentation as raising a suspicion of piracy.

Kenya, which is highly active in the fight against piracy, recently passed Merchant Shipping Act 4 of 2009, Article 371 of which classifies and penalises acts of piracy and armed robbery against shipping, with penalties ranging up to life imprisonment. In addition, it has concluded an agreement with the EU to establish conditions and modalities governing the surrender by EU armed forces of persons suspected of having committed acts of piracy, and their treatment following surrender.[81]

The United Kingdom of Great Britain and Northern Ireland has traditionally possessed special rules for combating piracy. As early as 1698, the Parliament passed a Piracy Act, which was later amended by other statutes of 1721 and 1744. These statutes provided up to the death penalty for crimes of piracy. However, the Piracy Act of 1837 abolished the death penalty for most offences, reserving it solely for cases of piracy with violence against persons. Today, since it was abolished in 1969, the death penalty cannot be applied in cases of violence against persons. The crime of piracy today is defined in the Merchant Shipping and Maritime Security Act 1997, Section 26, Schedule 5 of which reproduces the definition contained in Articles 101, 102 and 103 of the UNCLOS.

Togo has a *Code de la Marine Marchande Nationale (Ordonnance nº 129 du 12 Août 1971)* which contains provisions relating to maritime piracy – *Chapitre IX* – prescribing

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79 See this statute in the Verbal Note from the Singapore Permanent Mission to the United Nations of 17 February 2010 to the Division of Ocean Affairs and the Law of the Sea.

80 See *Codice della navigazione*, Approvato con R.D. 30 marzo 1942, n. 327.

81 See Council Decision 2009/293/CFSP of 26 February 2009.

very severe penalties for the most serious acts, ranging from forced labour for life to the death penalty.[82]

In 2002 South Africa passed its Defence Act, containing express provisions for combating piracy, in a chapter dealing with the powers applicable under the Defence Force at Sea Act. This Act reproduces the anti-piracy provisions contained in Article 100 and following of the UNCLOS.

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Before closing this section, a word on the relative importance of fact that so few States include express provisions against piracy in their criminal legislation, as in our opinion this does not necessarily mean that piracy cannot be prosecuted in other States. We believe that this goal may be achieved by individually penalising piratical acts that are classified and penalised in their legal systems,[83] as was the case in Spain prior to the

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[82] Verbal Note from the Togo Permanent Mission to the United Nations of 10 March 2010 to the Division of Ocean Affairs and the Law of the Sea.

[83] For instance, Germany's Penal Code does not expressly include piracy as an offence, but Section 316c deals with attacks on air and sea traffic. Although this Section does not refer to "private ends" as required by Article 101 of the UNCLOS as a constituent element of piracy, acts of piracy or armed robbery against ships can probably be prosecuted under that Section. Severe penalties are prescribed if the attacks result in deaths (see Section 316c, "Assaults on Air and Sea Traffic", *Criminal Code*, as promulgated on 13 November 1998).

As for France, we find that Law No 1825-04-10 of 10 April 1825 on safety of navigation and maritime trade contained a Title 1 devoted to the crime of piracy, which penalised several broad-ranging types of maritime piracy. This law established severe penalties for perpetrators, including the death penalty for the commanders of pirate ships or sailors in cases of particularly grievous conduct. However, that law was recently abrogated by Law No 2007-1787 of 20 December 2007, on simplification of the law. Thus, France has finally come to penalise piracy in its Penal Code. It does so specifically in Article 224–6 (Book II "On crimes and offences against persons", Title II, "On assaults on persons", Chapter IV "On attacks on the freedom of persons", Section II, "On the hijacking of aircraft, ships or any other means of transport"). This article provides that the seizing or taking control of an aircraft, ship or any other means of transport carrying persons on board by violence or threat thereof shall carry a penalty of 20 years' imprisonment. In addition, according to Article 224–7, the penalty shall be life imprisonment when the offences listed in Article 224–6 are accompanied by torture or acts of barbarity, or if they result in the death of one or more persons. Although the Penal Code does not refer explicitly to piracy, there is no doubt that the actions entailed therein would come within the meaning of these provisions. In this respect it is worth noting the severity with which this law treats the acts penalised in these provisions.

Portugal's Penal Code does not directly penalise piracy but does include an article, no 287, "Capture or diversion of aircraft, ships, trains or passenger transport vehicles", the first paragraph of which provides for a penalty of 5 to 10 years for anyone seizing control of or diverting from its route an aircraft in flight or a vessel in its course with persons on board (see *Artigo 287º, Código Penal, Redacção resultante das alterações introducidas pela Lei 59/2007 de 04/09 Lei nº 61/2008 de 31 de Outubro*).

Sweden's Penal Code likewise makes no specific reference to piracy but contains a provision that would apply to cases of piracy or armed robbery against ships. This is in Section 5 of Chapter 13 "Crimes involving public danger", whereby anyone seizing control or interfering in the operation of an aircraft or merchant ship through coercion shall be liable to imprisonment for hijacking. The same penalty applies to cases of maritime sabotage, meaning any action that

2010 reform of the Penal Code. Also, regardless of that, or at the same time, it may be argued that if a country is a party to international treaties on piracy or armed robbery which authorise prosecution for attacks against ships or fixed platforms, it is thereby empowered to prosecute such international crimes internally.[84]

V. THE SCOPE OF THE PROVISIONS ON PIRACY IN THE 2010 REFORM OF THE SPANISH PENAL CODE

As we know, the 2010 reform as it related to maritime piracy consisted in the introduction of a new chapter – V – in Title XXIV (offences against the international community), in Book II (offences and penalties) of the Penal Code. This new chapter, devoted exclusively to the crime of piracy, comprises two provisions; Articles 616 ter and 616 quater. The first provides as follows:

> "Anyone using violence, intimidation or trickery to seize, damage or destroy an aircraft, ship or other type of craft or platform at sea, or who attacks persons, cargoes or property on board them, shall be punished as guilty of the offence of piracy, with a penalty of ten to fifteen years' imprisonment.

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cont.

endangers, destroys or severely damages ships; the severest penalties are reserved for cases in which lives were endangered (see Section 5, Chapter 13, "On Crimes Involving Public Danger", *Penal Code*, adopted in 1962 and entered into force on 1 January 1965).

84 A note dated 16 February 2010 from the Permanent Mission of the Republic of Bulgaria to the United Nations to the Division of Ocean Affairs and the Law of the Sea stated that: "The legislation of the Republic of Bulgaria does not contain specific provisions on piracy. Nevertheless, Article 6, para. 2 of the Penal Code recognizes the concept of universal jurisdiction, stating that 'The Penal Code shall also apply to other crimes committed by foreign nationals abroad, where this is stipulated in an international agreement to which the Republic of Bulgaria is a party. In this regard it should be mentioned that Bulgaria is a party to the United Nations Convention on the Law of the Sea. Consequently, the provisions on piracy in the high seas contained in the UNCLOS are applicable. In addition, Article 5, para. 4 of the Constitution stipulates that international agreements which have been ratified and have entered into force for the Republic of Bulgaria shall prevail over the provisions of the national legislation". Along the same lines, a verbal note dated 19 February 2010 from the Permanent Mission of Finland to the Division of Ocean Affairs and the Law of the Sea at the United Nations advised the UN Secretariat that: "The Finnish Criminal Code does not provide for 'acts of piracy' as specific offences, but such acts would be assessed in the light of the essential elements of other offences punishable under the Criminal Code, corresponding to the elements of piracy." Latvia also advised in a Verbal Note to the UN Secretariat dated 16 February 2010, that although its internal legislation did not contain any specific provision regarding piracy, acts of piracy could be punished inasmuch as they constitute offences against the property, freedom or lives of persons, as penalised in its Criminal Law of 17th June, 1998. Similarly, Turkey's Permanent Mission to the United Nations advised the latter that the Turkish Penal Code contains various jurisdictional and substantive clauses relating to acts of piracy and armed robbery at sea (albeit none refers explicitly to piracy) such as the seizing of ships or fixed platforms located on the continental shelf (Verbal Note of 8 March 2010 from the Turkish Permanent Mission to the United States to the UN Secretariat).

In any case, the penalty provided in this Article shall be applied without prejudice to any penalties that are applicable for the actual acts committed."

The second reads as follows:

"1. Anyone who, during the prevention or suppression of any of the acts referred to in this Article, resists or disobeys a warship or military aircraft or any other ship or aircraft that is clearly marked and is identifiable as a ship or aircraft in the service of the Spanish State and is duly authorised therefor, shall be liable to a penalty of one to three years' imprisonment.
2. If force or violence should be used in the course of the foregoing conduct, the penalty shall be from ten to fifteen years' imprisonment.
3. In any case the penalties set out in this Article shall be applied without prejudice to any penalties that are applicable for the actual acts committed."

Let us now look at the material, spatial and personal scope of these provisions.

VI. MATERIAL SCOPE

Article 616 ter classifies the commission of certain acts as an offence of piracy irrespective of the outcome of such conduct. The types of conduct classified are seizing, damaging or destroying a ship or other type of vessel or platform, or attacking persons, cargoes or property on board. These must involve violence, intimidation or trickery.

We note that there is no express reference in the article to either instigation or conspiracy, a point that was highlighted by the *Consejo Fiscal* in a report that it issued on the Bill for an Organic Law reforming the Penal Code.[85] And indeed, that report specifically recommended that in its passage through parliament the chapter in the bill dealing with piracy (the last in the Title in the pre-reform version) be moved from its original location – Chapter V – in Title XXIV (offences against the international community) so that it would be applicable to the provisions set out in Chapter IV of the same Title. These common provisions expressly regulate the penalties laid down for instigation, conspiracy and proposing the commission of the offences referred to in that Title and the penalties prescribed in the event of involvement in any of these ways of public officials or civil or military authorities. However, the proposal of the *Consejo Fiscal* was not taken up, and in its passage through parliament the chapter devoted to piracy was kept at the end of Title XXIV, following the chapter dealing with common provisions. It is therefore not clear whether these provisions apply to the offence of piracy. Although the Consejo Fiscal's proposal to locate the common provisions immediately after the chapter on piracy was not accepted, we concur with the Consejo Fiscal that the provisions of Article 615[86] may be considered to apply to this offence, while those

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[85] Report of the Consejo Fiscal on the Bill for an Organic Law amending Organic Law 10/1995 of 23 November 1995 on the Penal Code, p. 227.

[86] "Instigation, conspiracy and proposing the commission of the offences referred to in the foregoing chapters of this Title shall carry penalties one or two degrees lighter than those applied to the offences themselves."

regulated in Articles 615 bis[87] and 616 bis,[88] which contain express references, only apply to genocide, crimes against humanity and crimes committed against protected persons and property in case of armed conflict.[89] As to the circumstances referred to in Article 616,[90] these do not seem likely to arise in connection with piracy. For the rest, criminal liability of other persons directly or indirectly involved in acts of piracy is determined in the common rules regarding perpetratorship or complicity laid down in Articles 28[91] and 29[92] of the Penal Code.

Then again, the definition differs in several ways considerably from the conventionally current one, contained in Articles 101 to 103 of the UNCLOS: firstly, it does not include detaining a vessel among the classified acts. Secondly, we find that the perpetrators need not evince any particular motivation for an action to be deemed an offence of piracy. This makes it possible to punish the actions identified in the Penal Code as acts of piracy when committed for other than "private" ends as the UNCLOS requires. Thus

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87 "1. Any authority or military commander or anyone effectively acting as such who fails to take all steps at his disposal to prevent the commission of any of the offences listed in chapters II, II bis and III of this title shall be liable to the same penalty as their perpetrators. 2. If the foregoing conduct is the result of grave imprudence, the penalty shall be reduced by one or two degrees. 3. Any authority or military commander or anyone effectively acting as such who fails to take all steps at his disposal to prevent the commission of any of the offences listed in chapters II, II bis and III of this title committed by persons under their command or effective control shall be liable to a penalty two degrees lighter than their perpetrators. 4. Any person in authority not included in the foregoing paragraphs who within his purview fails to take all steps at his disposal to prevent his subordinates from committing any of the offences listed in chapters II, II bis and III of this title shall be liable to the same penalty as the perpetrators. 5. Any person in authority who fails to take all steps at his disposal to prosecute the offences listed in chapters II, II bis and III of this title committed by his subordinates shall be liable to a penalty two degrees lighter than their perpetrator. 6. Any public servant or authority who, although not engaging in the types of conduct referred to in the foregoing paragraphs but in dereliction of the duties incumbent on him fails to seek to prosecute any of the offences referred to in chapters II, II bis and III of this title of which he is apprised shall be liable to a penalty of disbarment from any public employment or office for a term of two to six years."

88 "Under no circumstance shall the provisions of Article 20(7) of this Code [exemption from liability due to performance of a duty or in legitimate exercise of a right, office or position] be applicable to anyone obeying orders to commit or participate in acts included in chapters II and II bis of this title."

89 See *Report of the Consejo Fiscal on the Bill for an Organic Law amending Organic Law 10/1995 of 23 November 1995 on the Penal Code*, p. 227.

90 "Any authority or public official committing any of the offences listed in the foregoing chapters of this Title, other than those referred to in Article 614 and in paragraphs 2 and 6 of Article 615 bis and in the foregoing Title, in addition to the penalties set out therein, shall be liable to total disbarment for ten to twenty years; in the case of a private individual, the courts may order disbarment from public employment or office for one to ten years".

91 "Perpetrators means persons committing the acts by themselves, with others or instrumentally through another. Perpetrators shall also mean: a. Anyone directly inducing another or others to act. b. Anyone cooperating in the commission of the offence without whose action the offence could not have been committed."

92 "Accomplices means anyone not included in the foregoing article who cooperates in the commission of the offence through prior or simultaneous acts."

for example, as we see it there is nothing to prevent what are actually acts of maritime terrorism being punished as acts of piracy, considering that the difference between the two crimes is essentially that the former are committed for political motives. This we see as a positive development in view of the realities of the new piracy we are seeing, particularly off the coast of Somalia, where it is very hard to separate purely economic motives from political ones. Also, the definition contained in the first paragraph of Article 616 ter of the Penal Code is better adapted to the trend established by more recent conventions, such as the 1988 IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its various protocols, which do not require any specific motivation for such acts to be prosecuted.

The article's second paragraph allows for the possibility of adding the penalties prescribed for commission of the crime of piracy on to those prescribed for other offences that may be committed in the course of the same action or other actions perpetrated in the same attack. We should bear in mind that a pirate attack may consist simply in a single action, for example shooting a member of a ship's crew dead, which would constitute an offence of piracy along with one of homicide; or else the attack may involve several actions – seizing the vessel, robbing the passengers, killing one or more of the persons on board, etc. – in which case these other offences would be added to that of piracy. What penalty is finally applied to the pirates must be determined in accordance with the rules laid down in Articles 73 and following of the Penal Code.

As regards Article ***616 quater***, we should note that the legislator penalises conduct consisting in resistance or disobedience to orders issued by the crew of a military or government vessel or aircraft in the course of preventing or suppressing acts referred to in the foregoing provision. We are not clear as to the legislator's rationale in including a new provision to this effect in the Penal Code, considering – like Rodríguez-Villasante – that such actions ought to be defined as resistance, disobedience or assault on the authority or its agents, which are classified in other chapters of the Penal Code.[93] In fact the legislator prescribes a much more severe penalty if resistance or disobedience to warships or government vessels is accompanied by acts of force or violence; such acts carry penalties of ten to fifteen years' imprisonment, exactly the same as the acts of piracy defined in the first paragraph of Article 616 ter.

VII. SPATIAL SCOPE

As regards the spatial scope of Article ***616 ter***, it is striking that the legislator should have departed from the definition contained in Article 101 of the UNCLOS on several points: firstly, regarding the maritime area in which the crime is committed, the Spanish bill does not require – as does the UNCLOS – that it take place on the high seas or in areas outside the jurisdiction of any State but simply provides for the punishment of criminal acts committed "at sea". This means that Spanish law may include in the

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[93] See RODRÍGUEZ-VILLASANTE Y PRIETO, J.L., "La represión del crimen internacional de piratería: una laguna imperdonable de nuestro Código Penal y, ¿por qué no?, un crimen de la competencia de la Corte Penal Internacional", *ARI* nº 73/2009, Real Instituto Elcano, p. 5.

category of piracy actions which in the most recent conventions, such as the 1988 IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its various protocols, were treated as armed robbery if they were perpetrated in the jurisdictional waters of any State. At the same time, the reform of the Penal Code facilitates the trial in Spain of persons accused of offences who may be arrested in the course of some international operation, such as the one currently being conducted by the EU in waters around the Horn of Africa in implementation of UN Security Council resolutions – Operation Atalanta.

It seems that piracy does not encompass acts of violence or depredation committed on vessels situated on rivers or other inland or fresh-water areas,[94] which are included, for example in the Penal Code of Guatemala.

For the rest, Article 616 ter does not refer solely to ships, as the UNCLOS does, as the target artefacts or scenarios of acts constituting an offence of piracy, but broadens the field by adding any other kind of craft or platform in the sea. What this wording achieves is firstly to avoid the thorny issue of defining a ship, an extremely troublesome subject in both international law[95] and internal law.[96] Secondly, with such a loose list

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[94] On this point García Arias notes that there can be no question of piracy on rivers since these are subject to the jurisdiction of the particular riparian State. As a practical example of the application of this theory, he cites the case of the vessel *Labrea*, which was arrested in 1900 by the revolutionary government of the Republic of Acre while sailing on the river Amazon to carry supplies to the Bolivian forces sent to quell the uprising. The insurer refused to pay the claim because although assuring against risk of capture, the policy excluded piracy. However, in 1909 the Appeal Court in London decided that this was not a case of piracy since, in its view, "Whatever the definition of piracy may be, in my opinion piracy is a maritime offence, and what took place on this river, running partly in Brazil and partly in Bolivia, far up country, did not take place on the ocean at all" (see GARCÍA ARIAS, L., "La piratería como delito del Derecho de Gentes"…, op. cit., pp. 326–327).

[95] There is no general definition of a ship under international law, in the UNCLOS or in any of the 1958 Geneva Conventions. There are of course particular definitions in some specific conventions, but these vary depending on its purpose. For instance, the term 'ship' is defined in the International Convention for the Prevention of Pollution from Ships (Marpol) or in the International Regulations for Preventing Collisions at Sea (Colreg). According to the first of these, "'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" (Article 2.4). For its part, according to rule 3(a) of the Convention on Regulations for Preventing Collisions at Sea, the word 'vessel' "includes every description of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water". For more on this point, we recommend: LUCCHINI, L.; VOELCKEL, M., *Droit de la mer*, Tome 2, Volume 2, Pedone, Paris, 1996, pp. 18–42.

[96] Spanish internal law likewise has no single definition for a ship or vessel but offers manifold possibilities depending on the context of the legal relationship. A very important definition in the context of public law is the one contained in the National Ports and Merchant Navy Act, Article 8(2) of which provides that "the term 'civil vessel' means any seaworthy ship, platform or floating artefact, moving or otherwise, not in the service of the National Defence". As to the notion of a platform, according to Article 8.4 of the same National Ports and Merchant Navy Act a fixed platform means "any artefact or installation suitable for use in prospecting or exploitation of marine resources or any other activity, at a fixed position anchored or standing on the sea bed". For more on this point, we recommend: GABALDÓN GARCÍA, J.L.; RUIZ SOROA, J.M., *Manual de derecho de la navegación marítima, Marcial Pons, Madrid, 2006*, pp. 240–243.

of artefacts on which acts of piracy can take place, the legislator is – as was clearly the intention in reforming the Penal Code – making allowances for international obligations, in particular the obligations acquired by virtue of the UNCLOS, and at the same time the obligations accepted under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

Finally, there is nothing in theory to prevent warships or State vessels from suffering pirate attacks, nor to prevent the perpetrators of such attacks from being punished. However, it is obviously hard to imagine pirates attacking warships, for various reasons, above all given the difference in warlike potential, but also considering the economic motivation behind pirate attacks. In fact it is very rare for groups of pirates to attack warships in recent times, and where such attacks have occurred it has been because the pirates confused their prey with civilian vessels.[97] If pirate ships should attack warships with political intent this would rather be a case of maritime terrorism; however, as we know, since the 2010 reform these could be prosecuted in Spain for piracy, since this does not require any particular motivation on the part of the perpetrators of attacks or predatory acts against vessels or platforms in the sea.

For its part, ***616 quater*** does not appear to add – or subtract – anything to or from Article 616 ter regarding maritime areas where acts of piracy can take place. The spatial scope of this provision, then, is as discussed above in the case of Article 616 ter.

VIII. PERSONAL SCOPE

As regards Article ***616 ter***, we should note that the reform of the Penal Code does not identify the active subject of the offence as in the UNCLOS, according to which crew members or passengers on a private vessel, or mutineers on a warship could be considered pirates. This means that the putative offenders may operate from any aircraft, flying apparatus or vessel, including submarines.[98] Nor does it have anything to

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[97] In this connection we should mention that the French warship *La Somme*, a unit taking part in the EU's Operation Atalanta, has been attacked twice by pirate ships, once in October 2009 and a second time in April 2010. Be it said, as stated by representatives of the French Navy, this was due to the fact that the warship looked like a civilian vessel (see "Des pirates somaliens attaquent par erreur un navire de guerre français", *LeMonde.Fr, 21.4.2010*, http://www.lemonde.fr/afrique/article/2010/04/21/des-pirates-somaliens-attaquent-par-erreur-un-navire-de-guerre-francais_1340874_3212.html).

[98] Although not impossible, it is hard to imagine the crew of a warship who have not mutinied committing acts of piracy; but in such an event they would forfeit the protection of their flag State and, as Luchini & Voelckel note, the situation "conduirait, en plus, à des affrontements entre navires de guerre c'est-à-dire à l'emploi de la force dans les relations entre États qui ne relèveraint plus du droit de la mer mais des dispositions de la Charte réglementant le recours à la force" (see LUCCHINI, L.; VOELCKEL, M., *Droit de la mer*, Tome 2, Volume 2 . . . , op. cit., p. 167).

Such an attack could also conceivably be launched from land – a possibility not confined to science fiction given developments in modern weaponry. However, we believe that in the event of such an attack from land, even given all the other elements characterising the offence of maritime piracy, the essential scenario for piracy as an international crime and an internal offence – the sea – would be lacking.

say about the possible nationality of the perpetrators or participants, and it is thus in theory permissible to prosecute Spaniards and foreigners alike.

Similarly, there is no reference to the nationality of the vessel, boat or platform attacked, or to the nationality of the victims or the ownership of the property attacked as a basis for prosecution of offences of piracy in Spain. It follows then that the objects of pirate attacks could in theory be either Spanish or foreign.

From all the foregoing regarding the personal scope of Article 616 ter of the Penal Code and our earlier comments on its territorial scope, it follows that what our legislator has done is to introduce into our legal system the principle of universal jurisdiction under international law, which is customary law but is also reflected in the principal conventions dealing with piracy and armed robbery. Be it remembered that, as the *Institut de droit international* declared in a resolution adapted at Krakow on 26 August 2005,

> "Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law".[99]

However, the scope of the principle of universal jurisdiction and its application by our legal system, and likewise the scope of Spanish jurisdiction in respect of crimes of maritime piracy, now has to be interpreted in the light of Organic Law 1/2009 of 3 November 2009 supplementing the Law on reform of the procedural legislation for the introduction of the new Judicial Office, amending the Judiciary Act, Organic Law 6/1985 of 1 July 1985.[100] The 2009 reform amended paragraphs 4 and 5 of Article 23 of the Judiciary Act, the article that defines the scope and the limits of Spanish criminal jurisdiction, in accordance with the principles of territoriality, personality or universality. As regards the issue discussed here, the 2009 reform still includes – as did the 1985 version – the crime of piracy among those for which the Spanish courts have jurisdiction when they are committed by Spaniards or by foreign nationals outside the national territory (Article 23(4)(c). However, the reform added two further paragraphs to Article 23, providing as follows:

> "Without prejudice to the terms of any international treaties or conventions signed by Spain, the foregoing offences may only be tried by the Spanish courts if evidence is produced to show that the alleged perpetrators are in Spain or that there are Spanish victims, or if there is some demonstrable and substantial connection with Spain, and in any case only if it is shown that no procedures entailing an investigation, and effective prosecution if appropriate, of such punishable acts have been initiated in another competent country or by an international court.

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[99] *Institut de Droit International, Seventeenth Commission. Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes.* Rapporteur: M. Christian Tomuschat, Krakow, 2005.

[100] See *B.O.E.* no 266 of 4 November 2009.

> Criminal proceedings initiated in the Spanish courts shall be provisionally stayed upon presentation of evidence that other proceedings on the events in question have been initiated in a country or by a court as referred to in the foregoing paragraph".

The Preamble to Organic Law 1/2009 explains that the reform makes it possible to adapt and clarify the concept of universal jurisdiction "in accordance with the principle of subsidiarity and the doctrine handed down by the Constitutional Court and the jurisprudence of the Supreme Court".[101]

The wording of Organic Law 1/2009 is somewhat surprising in that, contrary to what is stated in the Preamble, it contradicts Constitutional Court Judgment 237/2005 of 26 September 2005 confirming the jurisdiction of the Spanish courts in respect of crimes of genocide, terrorism and torture committed. Be it remembered that what this Constitutional Court judgment does is annul the Supreme Court Judgment of 25 February 2003 – which does cite the broad outlines of Organic Law 1/2009 – for having violated the plaintiffs' right of effective judicial protection (Art. 24(1) of the Spanish Constitution) in respect of access to the courts.

Without wishing to cover the ground exhaustively, which would entail a detailed commentary on Organic Law 1/2009, confining ourselves strictly to the offence of piracy,[102] there are a number of points that need to be addressed.

As to the presence of the alleged perpetrator in Spain, this is admittedly a logical requirement given that for the present international law does not recognise an obligation to exercise universal jurisdiction *in absentia*,[103] nor is this recognised in any of the international treaties dealing specifically with piracy or armed robbery.

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[101] Inter alia, regarding the Constitutional Court we would cite judgment 237/2005 of 26 September 2005 confirming the jurisdiction of the Spanish courts in respect of crimes of genocide, terrorism and torture committed in Guatemala. On the jurisprudence of the Supreme Court note judgment 1362/2004 of 15 November 2004 confirming the jurisdiction of the Spanish courts in respect of crimes of genocide, terrorism and torture committed in Argentina; judgment 319/2004 of 8 March 2004 confirming the jurisdiction of the Spanish courts in respect of crimes of genocide, terrorism and torture committed in Chile; or judgment 327/2003 of 25 February 2003 denying the jurisdiction of the Spanish courts, given the circumstances of the case, in respect of crimes of genocide, terrorism and torture committed in Guatemala. The Audiencia Nacional has also delivered important decisions, for example a ruling of 5 November 1998 upholding the jurisdiction of the Spanish courts in respect of crimes of genocide, terrorism and torture committed in Chile; or a ruling of 4 November 1998 upholding the jurisdiction of the Spanish courts in respect of crimes of genocide, terrorism and torture committed in Argentina.

[102] Albeit some of these comments could, *mutatis mutandis*, be applied to others of the offences mentioned in Article 23(4) of the Judiciary Act.

[103] In this respect the seventh legal ground of Constitutional Court judgment 237/2005 notes: [...] "Undoubtedly the presence of the alleged perpetrator in Spanish territory is an essential requirement for prosecution and conviction, given that our legislation does not contemplate trial *in absentia* (except in cases not germane to the issue here). As a result, legal institutions such as extradition are essential for effective achievement of the purposes of universal jurisdiction: viz, the prosecution and punishment of crimes which by their nature affect the entire International Community. However, such a conclusion does not make that circumstance a requirement *sine qua non* for the exercise of jurisdiction and the initiation of proceedings,

Then again, we have no objection to the requirement included in Organic Law 1/2009 that the Spanish courts may only try the offences listed in Article 23(4) if no proceedings have been initiated entailing effective investigation, and prosecution as appropriate, of such punishable offences in another competent country or by an international court. This requirement is consistent with the principles of subsidiarity that in criminal matters are supposed to inform the solution of any conflicts of jurisdiction in favour of the courts of the State in whose territory the offence was committed, and the principle of complementarity of the jurisdiction of the International Criminal Court in respect of the national jurisdictions of the States parties in its Statute. The same applies to the reference in Article 23(4) to a provisional stay of criminal proceedings initiated in the Spanish courts where evidence is produced that other proceedings involving the alleged events have been initiated in the country or by the international court in question.

However, the requirement in Article 23(4) of Organic Law 1/2009 that there be Spanish victims or a substantial connection with Spain[104] would appear to conflict in spirit with the principle of universal jurisdiction and the rules on maritime piracy laid down in the UNCLOS. In fact Article 105 of the UNCLOS empowers any State to arrest pirates on the high seas or in any place outside the jurisdiction of any State, and it empowers their courts to decide what penalties to impose for acts of piracy. It establishes no requirement as to a connection with the State concerned, as to the nationality of the victims, as to the nationality of the perpetrators, as to territoriality, or of any other kind. We therefore take the view that the UNCLOS ought to take precedence over the

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especially given that access to universal jurisdiction would thus be seriously restricted in a manner not sanctioned by law – and which would furthermore fly in the face of the foundation and the purposes of that institution".

104 As regards these requirements, Constitutional Court judgment 237/2005 notes as follows (legal ground eight and nine): Eight. "Along with the presence of the alleged perpetrator in the national territory the Judgment here challenged [Supreme Court judgment of 25 February 2003] introduces another two points of connection: passive personality, whereby universal jurisdiction requires that the victims possess Spanish nationality, and a connection linking the offences committed to other substantial Spanish interests, which is simply a generalised reformulation of the so-called real principle, that of protection or defence. Such restrictions would appear to again be derived from international custom, on the basis – with no further elaboration – that "much of the doctrine and many national courts" have tended to recognise the importance of certain points of connection.

Be it said in that respect, however, that such an interpretation, which is radically restrictive of the principle of universal jurisdiction recognised in Art. 23(4) of the Judiciary Act and has more of the nature of a teleological reduction (inasmuch as it goes beyond the grammatical meaning of the precept), oversteps constitutionally admissible bounds as regards the right of effective judicial protection enshrined in Art. 24(1) of the Spanish Constitution, in that it entails a reduction contra legem based on corrective criteria which cannot be argued as being even implicitly present in the Act and which moreover are clearly in contradiction with the end purposes of the institution, which is thereby so distorted as to render unrecognisable the principle of universal jurisdiction as conceived in international law and effectively reduces the scope of the precept almost to the point of a de facto derogation of Art. 23(4) of the Judiciary Act" [...].

provisions of the Judiciary Act as regards persons accused of acts of piracy *arrested on the high seas or in any other place outside the jurisdiction of any State* – not only because international law outranks internal law, as reflected in the 1969 Vienna Convention on the Law of Treaties, but also in the light of Article 23(4) of the Judiciary Act, which provides that its terms are to be applied "without prejudice to the terms of any international treaties or conventions signed by Spain".

The interpretation given here was adopted, inter alia, by the Audiencia Nacional in the case of the fishing vessel *Nepheli.* On 6 May 2009 on the high seas, the Spanish naval vessel *Marqués de la Ensenada* picked up seven alleged pirates who had unsuccessfully attacked the fishing vessel *Nepheli*, flying the Panamanian flag and with no Spanish nationals on board, as part of the campaign to combat piracy in Somalia. When called upon to decide on the jurisdiction of the Audiencia Nacional, in a decision of 7 May 2009 the Central Court of Instruction of the Audiencia Nacional ruled that the alleged pirates should be tried by the Audiencia Nacional despite the fact that the vessel attacked was Panamanian and there were no Spanish citizens on board, citing the former Article 23(4) of the Judiciary Act – in the pre-2009 version – and the principle of universal jurisdiction espoused by the UNCLOS for cases of piracy.[105]

However, the Judiciary Act does comply with the provisions of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which does include the nationality of the victims and other points of connection with the State of the forum, such as the principle of territoriality, entitling their courts to

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Nine [...] "And the same applies to the criterion of the national interest. Leaving aside the fact, stressed by the Public Prosecution Service, that the reference thereto in the challenged decision is virtually nominal, lacking any detail as to its substance, the fact is that as set out in paragraph 4 of Art. 23 of the Judiciary Act is practically meaningless given that it refers back to the jurisdiction rule set out in the previous paragraph. As noted earlier, the decisive issue is that the subjection of jurisdiction in respect of international crimes such as genocide or terrorism to national interests, in the terms set out in the Judgment sits ill with the basic concept of universal jurisdiction.

International and cross-border prosecution as pursued by the principle of universal justice is founded exclusively on the particular characteristics of the offences subject to it, which are so grievous (the prime example is genocide) as to affect the International Community as a whole in addition to the actual victims. Consequently the prosecution and punishment of such crimes constitute not merely a commitment, but also an interest shared by all States (as we had occasion to state in Constitutional Court Decision 87/2000 of 27 March [RTC 2000\87], Ground 4), the lawfulness of which does not therefore depend on the particular ulterior interests of each one". Similarly, universal jurisdiction as currently conceived in International Law is not based on points of connection hinging on the national interests of States, as evidenced precisely by Art. 23(4) of the Judiciary Act, the German Law of 2002 cited above or, to cite more examples, the Resolution adopted by the Institute for International at Krakow on 26 August 2005" [...].

105 On this point see JUANES PECES, Á., "Competencia de la Audiencia Nacional en los delitos de piratería", *Actualidad Jurídica Aranzadi*, No 799, of 27 May 2010, p. 3.

accept jurisdiction in respect of persons accused of armed robbery.[106] And the same goes for the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf.[107] This state of affairs has not changed in the two 2005 protocols relating to respective instruments.

Finally, we should note as regards the personal scope of Article ***616 quater***, that it is clear from the wording that the passive subject of the acts referred to there are Spanish-registered warships[108] or government vessels doing coastguard duty. Be it said in this regard that in Spain, other than in the case of a specific service, police or coastguard functions on inland waters and in territorial waters are performed by the Civil Guard.[109]

Our comments about Article 616 ter apply, *mutatis mutandis*, to the active subject of the acts referred to in this article.

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Professor Sobrino Heredia appears to adopt a position contrary to that of the Audiencia Nacional, arguing that at that time the Audiencia Nacional did not have jurisdiction, firstly because the Spanish legislation did not recognise the crime of piracy, and secondly because Article 242 of the Penal Code dealing with robbery with violence or intimidation, which the court sought to apply, is not in his opinion an adequate basis for the exercise of universal jurisdiction since robbery, when committed outside the national territory, may only be prosecuted in Spain as long as the culprits are Spaniards or foreigners who have subsequently acquired Spanish nationality (see SOBRINO HEREDIA, J.M., "La piratería marítima: un crimen internacional y un galimatías nacional", *REEI*, nº 17, 2009, p. 4).

From the proceedings in the *Alakrana* case in the Audiencia Nacional it is not absolutely clear whether or not the court declined jurisdiction solely under the principle of universal jurisdiction, since the hijacked vessel flew the Spanish flag and there were Spanish nationals on board. In this connection, in its decision of 2 November 2009, in addition to citing the former Article 23(4) of the Judiciary Act, the UNCLOS, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and 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, adopted in support and under the aegis of UN Security Council Resolutions 1814, 1816 and 1838 (2008), the Audiencia observed that: "The Spanish courts have jurisdiction since the acts have been and are being committed on board a Spanish vessel (principle of sovereignty as set out in Art. 23(1) of the Judiciary Act)" (see Decision of 2 November 2009, Criminal Chamber, Audiencia Nacional, Issue of Jurisdiction, administrative file 24/2009, pp. 6–7).

106 See, articles 6 to 10 of the Convention.

107 See Article 3 of the Protocol.

108 On the definition of a warship, we may accept the one offered in Article 29 of the UNCLOS – something of a tautology – according to which a warship means "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline".

109 According to Article 11 of the Security Forces and Corps Act, Organic Law 2/1986 of 13 March 1986 (see *B.O.E.* no 63 of 14 March 1986), in territorial waters the Civil Guard is responsible inter alia for [...] "Preventing the commission of criminal acts; investigating offences in order to discover and apprehend the presumed culprits, securing the instruments, effects and evidence

IX. CONCLUSIONS

Organic Law 5/2010 of 22 June 2010 reformed the Spanish Penal Code and included a chapter devoted to maritime piracy, comprising two articles, 616 ter and 616 quater. The Spanish legislator was attempting to address society-wide concern at the resurgence of piracy in waters off the Horn of Africa, which strongly affects our interests given the importance of the tuna fleet that operates in the area. At the same time, with this reform Spain sought to comply with the international obligations that it had acquired prior to giving its consent to instruments aimed at suppressing piracy or armed robbery, particularly the UNCLOS or the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and protocols. Moreover, the classification of this offence in our legal system facilitates the delivery of persons apprehended by the Spanish Navy as part of the EU's Operation *Atalanta* for acts of piracy in the territorial waters of Somalia or on the high seas to the courts of this country, as stipulated in the Joint Action which set it in motion.

At the same time we should note that with the inclusion of the crime of piracy in the 2010 reform of the Penal Code, Spain has resumed a tendency that had been constant ever since the Penal Code of 1822 but was interrupted by the Penal Code of 1995. The gap in the original version of the current Penal Code was inconsistent with the fact that piracy was included in the 1985 Judiciary Act as one of the offences over which the Spanish courts were considered to have jurisdiction by virtue of the principle of universal jurisdiction recognised by international law. The legislator in 1995 probably did not consider it necessary to include this offence in the Penal Code as it had fallen into disuse.

A survey of comparative law shows that there are not many States which expressly cite piracy among the punishable offences in their internal law, albeit the list of countries has lengthened considerably at the recommendation of the UN Security Council in response to the piracy crisis in Somalia. This does not necessarily mean that maritime piracy cannot be prosecuted in any of the other countries. In our view, as occurred in the case of Spain prior to the latest reform of the Penal Code in 2010, States which

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of the offence and placing them at the disposal of the competent judge or court, and compiling the requisite technical and expert reports".

Also, according to Article 12, in addition to the functions listed in the previous article, the Civil Guard are responsible for: "The custody of overland communication routes, coasts, frontiers, ports, airports and centres and facilities whose importance so requires".

The functions assigned by the Act to the Civil Guard are detailed in the implementing Royal Decree 246/1991 of 22 February 1991 regulating the Civil Guard Maritime Service (see *B.O.E.* no 52 of 1 March 1991). Article 1 of this Royal Decree provides that the functions assigned to the Civil Guard by the Security Forces and Corps Act, Organic Law 2/1986 of 13 March 1986, "shall be performed in Spanish maritime waters as far as the outer limit of the territorial waters as determined in the current legislation, and exceptionally outside territorial waters under the terms of international treaties currently in force".

Article 3 of Royal Decree 246/1991 provides that "it is up to the Government, or the Minister of Defence as the case may be, to determine any military missions that the Civil Guard may be required to perform in Spanish maritime waters".

do not explicitly include rules on piracy can punish acts of piracy in the light of the essential elements of other offences that are classified and penalised in their law codes. Similarly, it could be argued that the fact of being a party to international treaties on piracy or armed robbery that authorise prosecution for attacks against ships or fixed platforms implies the capacity to prosecute this international crime internally. Both interpretations were put forward by several States when the UN Secretariat's Division of Ocean Affairs and the Law of the Sea asked United Nations members, in a Verbal Note of 8 January 2010, to send copies of their national legislation on maritime piracy. In any case we believe that express classification of piracy as an offence in internal law codes, while not strictly necessary under these conditions, is very useful in upholding the principles of legal security and legality in criminal matters.

The material, spatial and personal scope of the new provisions in the Penal Code concerning piracy is very broad, making it possible to prosecute all kinds of acts of violence or depredation at sea against ships and platforms or against persons or goods on board, regardless of the nationality of the perpetrators or the victims, of the maritime area or the nationality of the vessel or platform where the acts were committed, or again of the ends pursued by the perpetrators. Thus, the legislator in 2010 followed the path marked out by its predecessors throughout the history of regulation of the offence of piracy in Spain. In fact in previous Penal Codes Spain did not only prosecute acts of piracy committed against persons or ships of Spanish nationality but also prosecuted acts committed against citizens or vessels of third States, and it did not specify a maritime area in which acts of piracy had to take place – they could in theory be committed in Spanish territorial waters, on the high seas or even in territorial waters of other States. In short, our legislation has always recognised the principle of universal jurisdiction in respect of maritime piracy.

With so broad a scope, this recent regulation also adequately addresses the new reality of piracy, which is frequently carried on in the territorial waters of failed States, or which is difficult to distinguish from maritime terrorism when the pirates are mere links in a criminal chain formed for political ends.

However, the broad scope apparently offered by the two articles of the Penal Code as regards the possibility of Spanish jurisdiction in cases of piracy, which undoubtedly gives the impression that in these matters the principle of universal jurisdiction reflected in the UNCLOS is upheld, appears to be contradicted by Organic Law 1/2009 amending the Judiciary Act. In fact, in its new form the Judiciary Act still includes – as did the 1985 version – piracy as one of the offences over which the Spanish courts are to have jurisdiction when they are committed by Spaniards or foreign nationals outside the national territory. Nonetheless, for Spanish courts to be able to try these offences, the 2009 Act requires that the accused be on Spanish soil or that there be victims having Spanish nationality, or that some other point of connection with Spain can be shown. In our opinion, leaving aside the requirement that the accused be on Spanish soil, this provision is contrary to universal police jurisdiction and universal jurisdiction as recognised in the GCHS and the UNCLOS, which apply the pre-existing rules of customary international law to combating piracy on the high seas or in maritime areas outside the jurisdiction of any State. Thus, we feel compelled to take the view that Spanish courts ought to accept jurisdiction in respect of persons suspected of having commit-

ted acts of piracy as defined in the new provisions of the Penal Code, on the high seas or in maritime areas outside the jurisdiction of any State, when captured by Spanish warships, without the need of there being any connection with Spain. Other than that, the new provisions of the Judiciary Act do not appear to collide with the obligations acquired by Spain under other conventional instruments on piracy or armed robbery, under Security Council resolutions in the case of Somalia or under European Council resolutions on Operation Atalanta.

One would have welcomed some more precise indication in the text of the reform as to the determination of penalties to be imposed for instigating or conspiring to commit maritime piracy. The lack of such is due to the location of the chapter on piracy, immediately following the one on common provisions at Title XXIV, which deals with these matters. In our opinion, to make this point clearer it would have been better to have placed the chapter on piracy before the one on common provisions in Title XXIV of the Penal Code. Nevertheless, we take the view that most of these common provisions are applicable to the offence of maritime piracy.

We also consider that the provisions contained in Article 616 quater make little sense in that they classify and punish as piracy acts which ought rather to be considered offences of resistance, disobedience or assault on the authority or its agents, which are classified in other chapters of the Penal Code. No such provisions had ever before been included in any of the preceding Spanish Penal Codes, and they have no basis whatsoever in the international instruments that define piracy or armed robbery. They may be the result of an intent to legitimise the use of force by Spanish ships when capturing pirates in Somali waters, but even so they would still not be justified given that the legitimacy to perform policing functions in Somali territorial waters derives from an express request by the Somali Transitional Federal Government, which asked the Security Council for help from third States to combat piracy and armed robbery on its coasts, and from Security Council resolutions authorising such collaboration adopted under Chapter VII of the UN Charter.