LJN [National Case-Law Number]: BY6940, Court of Appeal of The Hague, 22-004017-11

Judgment

Cause list number: 22-004017-11
Public Prosecutor's Office number: 10-960269-10
Date judgment: 20 December 2012

DEFENDED ACTION

Court of Appeal in The Hague
Three-Judge Criminal Division

Judgment

pronounced in the matter of the appeal against the judgment of the three-judge Criminal Division of the Rotterdam District Court - dated 12 Augustus 2011 - in the criminal proceedings against accused

[T21],
born in a rural area in Somalia in 1994,
currently detained in preventive custody in Amsterdam penitentiary *Huis van Bewaring Demersluis* in Amsterdam.

1. Court hearings

This judgment has been passed following the court hearings in the court of first instance and the court hearings on appeal at this Court of Appeal on 22 February 2012, 23 April 2012, 18 June 2012, 8 August 2012, 15 August 2012, 8 October 2012, 9 October 2012, 10 October 2012, 17 October 2012, 31 October 2012, 7 November 2012, 12 November 2012, 14 November 2012, 28 November 2012 and 12 December 2012.

The Court of Appeal has taken cognizance of the demands of the Advocates General.

2. Indictment

After the changes in the indictment at first instance on 16 May 2011 and on 12 July 2011, the Accused has been charged with the following:

that he, on a certain time or various times, in or around the period of 1 November 2009 up to and including 23 November 2010 from/on the mainland of Somalia and/or from/on the coast of Koyaama Island (Somalia) and/or in the territorial waters of Somalia and/or on the high seas, in the Gulf of Aden, and/or in the Indian Ocean, jointly and in conjunction with one other person or various others, at any rate alone - every time - entered into service as skipper and/or served on a vessel as skipper of a vessel whereas he was aware that this vessel was intended for the commission of acts of violence and/or – every time – using it to commit acts of violence on the high

seas against other vessels and/or against the persons and/or property on board those vessels (the acts of violence that were committed consisted of shooting with weapons or firearms or automatic weapons or firearms and/or a rocket launcher at, at any rate into the direction of vessels SV Choizil and/or French naval vessel Floréal, at any rate into the direction of one or more vessels or merchant vessels on the high seas and/or the persons and/or property on board those vessels , at any rate threateningly showing weapons or firearms or automatic weapons or firearms and/or rocket launcher to those persons and/or holding them at gun point), without being authorised hereto by the war navy of a recognised power, or belonging to the war navy of a recognised power;

and/or

that he, on a certain time or various times, in or around the period of 1 November 2009 up to and including 23 November 20010 from/on the mainland of Somalia and/or from/on the coast of Koyaama Island (Somalia) and/or in the territorial waters of Somalia and/or on the high seas, in the Gulf of Aden, and/or in the Indian Ocean, jointly and in conjunction with one other person or various others, at any rate alone - every time - entered into service as a crew member and/or served on a vessel as a crew member that – every time – was intended to and/or used to commit acts of violence on the open seas against other vessels and/or the persons and/or property on board those vessels, whereas he was aware of this intention and/or this use and voluntarily continued to serve on such a vessel after having become aware of this intention and/or this use (the acts of violence that were committed consisted of shooting with weapons or firearms or automatic weapons or firearms and/or a rocket launcher at, at any rate into the direction of vessels SV Choizil and/or French naval vessel Floréal - at any rate into the direction of one or more vessels or merchant vessels on the high seas and/or the persons and/or property on board those vessels and/or threateningly showing the weapons or firearms or automatic weapons or firearms and/or rocket launcher to persons on board - and/or holding them at gun point), without being authorised hereto by the war navy of a recognised power, or belonging to the war navy of a recognised power;

3. Course of the proceedings

With regard to the second, cumulative/alternative count in the indictment, the Court of first instance convicted the Accused and sentenced him to a term of imprisonment of six years with credit for time on remand.

4. Appeal

On behalf of the Accused, an appeal was lodged against this judgment on 24 August 2011.

On 24 August 2011, the Public Prosecutor lodged an appeal against this judgment.

5. Application for a declaration of voidness with regard to the examination in court in the first instance and referral.

At the pro forma proceedings of 8 August 2012 and during the court hearing of 8 October 2012, Counsel for the defence – in accordance with the pleading notes that she submitted and that were attached to the case file – applied to the Court of Appeal for a declaration of voidness with respect

to the examination in court in the first instance and requested the Court of Appeal to refer the case back to the District Court. To this end, Counsel for the defence put forward with good reason that – succinctly put – the Accused was a minor at the time of the charges. Since the Accused had wrongly been considered to be an adult by the Court, the case in the first instance should – also – have been heard by a juvenile court judge and this hearing should have met the procedural requirements of juvenile criminal law. This has not been the case. Due to these faults at the hearing in the first instance – according to the Defence – the fundamental rights of the Accused as a minor have been violated unacceptably.

The Public Prosecution has adopted the position – summarized and succinctly put – that there is no reason to pronounce a lack of competence of the court of first instance, nor is there any reason for referral.
The Public Prosecution argued that the most important requirement of Section 423 of the Code of Criminal Procedure [*Wetboek van Strafvordering*] for referral to the first instance has not been met, since there is no question of the circumstance that 'the main case has not been judged by the Court'. In addition, this defence is unfounded since it has been established – during the court hearing in the first instance – that one of the judges of the three-judge criminal division was a juvenile court judge. Furthermore, the Public Prosecution adopted the alternative position that the Court of Appeal should not declare itself incompetent if it would become apparent that the District Court should have done so, since there is no separate three-judge criminal division for juvenile affairs for appeal proceedings and, consequently, this three-judge criminal division of the Court of Appeal is competent to take cognizance of the case under consideration.

The Court of Appeal finds as follows in this respect.

The Court of Appeal finds that the age of the Accused cannot be established exactly because documents to that effect are missing. The Accused himself does not know his date of birth and as far as we are aware there are no witnesses who can give a definite answer in this respect. Nevertheless, the Court of Appeal considers it has become sufficiently plausible,
- as was already held at the court hearing of 9 October 2012 – that at the time of his arrest on 23 November 2010, the Accused was at least 16 years old, and thus a minor at the time and presently, as he stated in court during the appeal proceedings on 9 October 2012, he is at least 18 years old. The Court of Appeal also takes into consideration the Child Care and Protection Board [*Raad voor de Kinderbescherming*]'s Report on the Accused, issued on 24 October 2012, which demonstrates that the Accused stated he left his native region to move to the city prior to the offences he has been charged with, when he had reached the age of sixteen.
However, there is no evidence of facts or circumstances that could lead to the conclusion that the Accused – as argued by the Public Prosecution – had already at that time reached the age of 18 and should thus be considered an adult at the time of the offences he has been charged with.
All this brings the Court of Appeal to the conclusion that at the time of the charges and at any rate on 23 October 2010, the Accused should be considered to be a minor. Hence in principle juvenile criminal law applies to the accused T21 and the hearing of the case in the first instance should have met the procedural requirements of juvenile criminal law.

In accordance with Section 423, subsection 1, of the Code of Criminal Procedure [*Wetboek van Strafvordering*] there is a another opportunity on appeal and the new judgment by the Court of Appeal may remedy any possible errors and faults that occurred in the first instance. The Court of Appeal does not see any exception to the provisions of Section 423, subsection 2, of the Code of

Criminal Procedure [*Wetboek van Strafvordering*] concerning the submissions by Counsel for the defence - on which grounds referral of the case to the District Court would be appropriate - so the Court of Appeal will handle the case on appeal itself.

The Court of Appeal's position is based on the following.
Counsel for the defence's submission that a person who plays a key role in the hearing in the court of first instance - according to Counsel for the defence the juvenile court judge in this case - did not appear there, is therefore unfounded since by the instruction of 17 March 2006, J H Janssen, LL M – one of the judges of the court of first instance hearing the case in question – had been appointed as juvenile court judge in accordance with Sections 46 and 48 up to and including 53 of the Judiciary (Organisation) Act [*Wet op de rechterlijke organisatie*].
Moreover, the Court of Appeal takes into consideration that Counsel for the defence did not argue in favour of applying juvenile criminal law in the first instance, while such defence – as mentioned – may be addressed on appeal.
Since no other circumstances have arisen that might lead to voidness of the court hearing in the first instance have become plausible, Defence Counsel's application is rejected.

6. Jurisdiction and powers under treaty law

Jurisdiction

The Court of Appeal finds on its own motion that in these proceedings, concerning the charge of piracy under Section 381 of the Criminal Code [*Wetboek van Strafrecht*], the Netherlands has jurisdiction by virtue of the provisions of Section 4, preamble, and part 5 of the Criminal Code. It has not become evident to the Court of Appeal that there are facts or circumstances that would or could constitute a reason not to prosecute the Accused in the Netherlands.
Consequently, the Public Prosecution is allowed to prosecute the Accused in the Netherlands.

Powers under treaty law

The Court of Appeal subsequently examined whether – despite the express statutory basis for jurisdiction and in view of Section 94 of the Dutch Constitution – any rules of international law would bar prosecution of the Accused in the Netherlands.

In order to be able to asses this - in as far as relevant to these criminal proceedings - the following treaties to which the Netherlands is a signatory or a party, are important:
- the United Nations Convention on the Law of the Sea, (hereinafter UNCLOS), and
- the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter SUA).

Article 100 of UNCLOS contains the obligation of the signatories to the Convention to collaborate in order to suppress piracy and Article 105 of UNCLOS provides for the power to take action against piracy.

Article 105 of UNCLOS contains the powers of the signatory States. This Article – summarized and in as far as relevant in this case – provides that on the high seas or in any other places that are situated outside the jurisdiction of any State, every State may seize a pirate ship and arrest the

persons on board and seize the property on board the ship and that the courts of the State which carried out the seizure may decide upon the penalties to be imposed. Consequently, this treaty provision provides for universal jurisdiction for the State that proceeds to the arrest of piracy suspects.

However, the UNCLOS provisions are limited to States acting on the high seas and therefore do not apply automatically in Somali territorial waters.
Further powers to act, however, can be found in a number of Security Council resolutions, namely numbers 1816, 1838, 1846, 1851 and 1950.

The first and second paragraphs of Article 6 of SUA indicate in which cases States must or may confer jurisdiction over the criminal offences related to the Convention.
The fifth paragraph of this Article stipulates expressly that the Convention does not exclude any jurisdiction over criminal matters exercised in accordance with national legislation.

To support resolution 1816, the European Union Naval Coordination Cell (EU NAVCO) was established. In this connection the 'Council's Joint Action 2008/851/CFSP of 10 November 2008 concerning European Union military operations in order to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast' is important.

This regulation also includes Article 12, first paragraph, which confers the following powers on a Member State:

"On the basis of Somalia's acceptance of the exercise of jurisdiction by Member States or by third States, on the one hand, and Article 105 of the United Nations Convention on the Law of the Sea, on the other hand, persons suspected of intending, as referred to in Articles 101 and 103 of the United Nations Convention of the Law of the Sea, to commit, committing or having committed acts of piracy or armed robbery in Somalia's territorial or internal waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:
— to the competent authorities of the Member State or of the third State participating in the operation, of which the vessel which took them captive flies the flag, or
— if that State cannot, or does not wish to, exercise its jurisdiction, to a Member State or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property".

On the basis of the aforementioned legal framework, the Court of Appeal finds that the Dutch government has the power to act against piracy both inside and outside the Somali territorial waters.

Incidentally, the Court of Appeal notes that both the Dutch term "*zeeroof*" [seajacking] and the Dutch term "*piraterij*" [piracy] are used to describe the acts the accused in this case have been charged with. "*Zeeroof*" [seajacking] is expressly stated in Article 381 of the Criminal Code, whereas "*piraterij*" is the literal, Dutch translation of the English term "piracy" in UNCLOS, which acts are listed in Article 101 of this Convention. The Court of Appeal finds that the differences between these two Dutch terms are of minor importance for the legal assessment of this case and uses both terms.

7. Whether or not the Public Prosecution is to be barred

Counsel for the defence has adopted the position that the Public Prosecutor is to be barred from prosecution the Accused since – succinctly put -:
(a) there was insufficient suspicion to arrest the suspect, while
(b) the decision concerning further prosecution was inexpedient and, moreover,
(c) in violation of the principle of equality or in violation of the prohibition of arbitrariness.
Furthermore, according to Counsel for the defence, there would be
(d) a violation of the right to a fair trial, as well as
(e) breaches of procedural rules or serious breaches of procedural rules causing the rights of the Accused to be grossly disregarded.

The Public Prosecution has indicated with good reason that it deems to have a cause of action.

The facts and circumstances

On the basis of the case file and the hearing of the case in court – in as far as relevant here and succinctly put - the Court of Appeal finds the following facts and circumstances.

Against the backdrop of the international anti-piracy missions Atalanta and Ocean Shield, the Dutch Navy deploys HMS Amsterdam to patrol the Gulf of Aden, the Indian Ocean and the Somali Basin. The objective of these operations is to accompany World Food Programme (WFP) ships and to fight and prevent hijackings of merchant ships in the operational area of the Horn of Africa. 1

On 4 November 2010, during a surveillance operation, French navy frigate Floréal came upon sailing ship Choizil, anchored at Koyaama Island, off the Somali coast. The Floréal observed that the Choizil had at least 50 jerry cans on board, presumably containing petrol. The suspicion arose that the sailing yacht was going to be used for piracy purposes. After a few days, it became known that the sailing yacht concerned had been hijacked and that there were three hostages on board the Choizil. On 7 November 2010 the Choizil ran aground on the Somali coast, near the coastal town of Baraawe. There was a skiff beside the sailing ship, which skiff had sailed along with the Choizil. French Navy personnel subsequently carried out an investigation into the skiff and the sailing yacht. During this investigation the outboard engine of the skiff was dismantled and a Rocket Propelled Grenade (RPG) and ammunition for an AK47 were found on board the Choizil. Moreover, the skipper of the Choizil, [Witness 1] was found. He was taken on board HMS Amsterdam to be transferred to Mombasa (Kenya). 2

On 19 November 2010, the crew on board HMS Amsterdam observed a possible Pirate Action Group (PAG) that had already been observed off Koyaama Island on 18 November 2010. The PAG consisted of a whaler and two skiffs. The crew of the HMS Amsterdam helicopter observed that there were large numbers of fuel drums, ladders and other materials on board the whaler. It was also observed that the two skiffs were sailing close to the whaler.

Based on these observations, the crew was given permission by the commander of ‘Standard NATO Maritime Group 1’ (hereinafter CTF 508) to board the said vessels. The crew was also given permission to use non-disabling fire. When they saw the helicopter, both skiffs moved away from the whaler at high speed. When one of the skiffs (hereinafter Skiff 1) was chased, members of the helicopter crew observed how some property, including a weapon (AK47), was thrown overboard.

Despite warnings over VHF radio and warning shots, Skiff 1 continued to sail at high speed into the direction of the coast. The helicopter unit subsequently forced the skiff to stop by using non-disabling fire and hitting the front side of the skiff. In the meantime, an RHIB (fast boat) had been sent into the direction of the whaler and the six crew members in the whaler were secured by means of tie-wraps.
The helicopter unit then went off in pursuit of the second skiff (hereinafter Skiff 2). The helicopter crew observed four crew members and a large number of jerry cans on board the skiff. The helicopter unit forced Skiff 2 to stop by means of warning shots.
Both skiffs were brought under control and under national (Dutch) direction the thirteen crew members were taken on board HMS Amsterdam as 'detainees' at 12:35 hrs., where their personal details were recorded. The crew members were also informed of the reason why they had been stopped. Subsequently, the crew members were temporarily held in the Temporary Holding Facility (hereinafter THF) on board HMS Amsterdam for the purpose of making statements and - on the basis of these statements - awaiting consultations with and the decision by the Dutch Prosecution. 3
The crew members of the whaler included co-accused T09, the crew members of Skiff 2 included co-accused T17 and co-accused T14 and the crew members of Skiff 1 included co-accused T06. 4
An investigation instituted on board HMS Amsterdam revealed that Skiff 1 showed characteristic features to such an extent that the suspicion arose that this skiff could be connected to the skiff that was used on 7 November 2010 for the hijacking of the Choizil. 5
The data on the GPS equipment that was seized on board the whaler revealed that on 19 November 2010, at 12:06 hrs., the equipment was at coordinate S0 31.105 E42 48.279, which led to the suspicion that the interception of the group took place approximately 56 kilometres off Koyaama Island, on the high seas. 6

On 21 November 2010, on board HMS Amsterdam, the crew members of the skiffs and the whaler were subsequently arrested on suspicion of piracy and on 22 November 2010, a remand of custody for fourteen days was ordered. 7

On 22 November 2010 the HMS Amsterdam helicopter crew observed a skiff off the Somali coast. The skiff had two outboard engines and was equipped with a large quantity of fuel, a ladder and some packages. There were seven crew members on board the skiff. When the helicopter was observed, the skiff sailed at high speed to the Somali mainland. HMS Amsterdam subsequently stood off the coast during the night of 22 to 23 November 2010 to prevent the skiff from leaving unobserved.
In the afternoon of 23 November 2010, the HMS Amsterdam helicopter crew saw the skiff at the same place where it came ashore on 22 November 2010. The helicopter crew also observed that the skiff was being prepared for departure to sea. In view of the way the skiff was equipped, the suspicion arose that the skiff wanted to set sail in order to carry out a hijacking.
Just before sunset, the skiff was observed to set sail to sea. In two RHIBs, the HMS Amsterdam boarding team subsequently sailed into the direction of the skiff.
HMS Amsterdam was given permission by the CTF 508 commander to board the skiff. When they were near the skiff, the boarding team fired flares to induce its crew members to stop. The skiff, however, absconded and the boarding team set off in pursuit at high speed. The boarding team subsequently observed how the crew members threw things overboard, including a ladder and a large package. Despite several stop signals and warning shots, the skiff was not about to stop.
On the basis of these observations, the boarding team received permission from the CTF 508 commander to use non-disabling fire. The boarding team aimed non-disabling fire directly at the

front of the skiff. This did not make the skiff stop, which caused the boarding team to force the skiff to stop by aiming non-disabling fire at both engines, eliminating them. The skiff was subsequently brought under control at coordinate 01-37.4S 041-39.9E.8
The seven crew members were subsequently secured by means of the so-called tie-wraps. With the permission of the Chief of the Netherlands Defence Staff and the Dutch Public Prosecutor, the crew members were taken on board HMS Amsterdam as 'detainees'.
The personal details of the seven individuals were recorded. The group was informed of the reason why they had been stopped and were temporarily held in the THF for the purpose of making statements and – on the basis of these statements – awaiting consultations with and the decision of the Dutch The Prosecution. 9
The Accused was one of the crew members. 10
On 24 November 2010, the seven crew members, including the Accused, were arrested on suspicion of piracy. 11

Subsequently, further inquiries were conducted. These inquiries demonstrated that the skiff was equipped with practically new outboard engines and that the skiff had been 'modified': a double bottom had been installed, concealing a large quantity of fuel. 12 In addition, a business card of the skipper of the Choizil [Witness 1] was found on the skiff. Furthermore, the occupants of the skiff were interviewed. 13
One of them (T20) stated that there were weapons, ladders, food and petrol on board the skiff, that he was a member of a group of seven pirates and that the Choizil had been hijacked by co-accused T17, co-accused T06, the Accused and T22. 14 On the basis of these findings, the Accused and T22 were arrested on suspicion of piracy on 28 November 2010 and on 29 November 2010 their remand in custody for fourteen days was ordered. 15

The skipper of the Choizil, [Witness 1], was also interviewed. On 29 November 2010 he stated – on the basis of the photographs he was shown – that co-accused T09 was the leader of the pirates who had hijacked the Choizil and that co-accused T06 was also one of the members of the pirate group of the Choizil. 16
He also stated on 30 November 2010 – also on the basis of the photographs he was shown – that co-accused T17 and co-accused T14 belonged to the pirate group that hijacked the Choizil. 17
As a result of the foregoing, co-accused T06, co-accused T17, co-accused T09, co-accused T14 and the Accused were also considered to be suspects of piracy. The other suspects were released on 1 December 2010, with the exception of T20.
On 4 December 2010 an order was issued for the detention in custody for ninety days for the five suspects. 18

Assessment by the Court of Appeal

(a) Suspicion and the right to arrest

The Defence has adopted the position
– summarized and succinctly put - that the facts and circumstances as stated above offered insufficient grounds for suspicion of piracy to board the skiff holding the Accused and arrest the persons on board.

The Prosecution has adopted the position – summarized and succinctly put – that there were

sufficient grounds for suspicion in order to be able to proceed with the arrest of the suspects. The suspicion was initially based on the combination of the activities that had been observed on the beach in the preceding days, the equipment - large quantities of fuel and ladders -, the way the PAG moved and the crew's behaviour when they discovered the Navy – absconding and throwing weapons overboard - and this suspicion had been strengthened after receiving information that one of the skiffs of the PAG could be connected to sailing yacht Choizil which had been hijacked previously. After these findings, the Prosecution argues, arresting the suspects was a lawful procedure. According to the Prosecution, the subsequent coercive measures were also lawfully used, since the suspicions – succinctly put – were aggravated after their arrest. A few days after the arrest of the first group, for instance, seven more people were intercepted. In the clothing of one them a business card of the skipper of the Choizil was found.

With respect to his, the Court of Appeal finds as follows.

Contrary to what Counsel for the defence has argued, the Court of Appeal finds that on the basis of the abovementioned facts and circumstances that were identified, viewed together and in relation to each other, it has been sufficiently well established that on 23 November 2010 there was a suspicion of involvement in piracy with regard to the Accused to - following from this – proceed with the interception of the skiff and the subsequent arrests of the seven crew members on board the skiff, including the Accused.

What the Court of Appeal especially finds important in this respect - in the light of the piracy activities in the area - is the equipment that was observed by the HMS Amsterdam helicopter crew, namely two outboard engines, a large quantity of fuel, a ladder and some/packages. The Court of Appeal takes into consideration in this respect that the helicopter crew had also observed the skiff concerned off the coast the day before, when the helicopter crew saw the skiff sailing to the coast at high speed. On the day of the arrest on 23 November 2010, the helicopter crew observed the same skiff again when it wanted to set sail to sea. Subsequently, the boarding team of the Royal Netherlands Marine Corps [*Korps Mariniers*] set off in pursuit. Flares were fired to induce the suspects to stop. This did not lead to the desired effect, however, and the marines subsequently set off in pursuit. They observed how things were thrown overboard, including a ladder and a large package. Various stop signals, warning shots in front of, next to and behind the skiff were disregarded.

Against this backdrop, the Court of Appeal considers the fact to what extent the course of the boat - into the direction of the beach - might have been prompted by the presence of the helicopter unit, or to what extent the skiff was equipped or was also equipped for smuggling purposes, of lesser significance. The fact that the exact speed of the skiff when it sailed back to the coast on 22 November 2010 cannot be established, does not alter the observations made by the helicopter unit that the skiff was sailing at high speed, and the Court of Appeal does not consider this of decisive importance, either.

In view of the applicable treaty law and criminal procedure provisions as established above, the Court of Appeal finds that since there was sufficient suspicion of involvement in piracy or sea jacking against the Accused and his co-accused, the Dutch Navy and the Prosecution had the right to apprehend the skiff and its crew, including the Accused, and to deprive the Accused of his liberty.

(b) Discretion of the public prosecutor to decide whether to prosecute the Accused or not

The Defence has adopted the position, succinctly put, that – even if it has to be assumed that there was sufficient reason for the Navy to apprehend the Accused and his co-suspects – prosecution of the Accused was not expedient because of the lack of any prosecution interest, so that the Prosecution ought to be barred.

The Prosecution has adopted the position – summarized and succinctly put – that piracy is a an offence with regard to which the legislator stated already in the past that this was such a serious offence that the Dutch judicial authorities should be able to take action against it, notwithstanding where and by whom it was committed. Consequently, an explicit Dutch interest is not required. Moreover, the decision whether to prosecute or not is reserved to the Prosecution.

In this respect the Court of Appeal finds as follows.

The Court of Appeal would like to state first and foremost that the decision to prosecute a criminal offence or not has been vested in the Public Prosecutor and that the Public Prosecutor has ample discretionary power in this respect, pursuant to Section 167 of the Code of Criminal Procedure [*Wetboek van Strafvordering*]. In principle, the court exercises great caution when it reviews a decision to prosecute. Furthermore, the discretionary principle vested in the Prosecution implies a weighing of interests between prosecution being in the public interest on the one hand and on the other hand the individual interest of the accused to remain outside the criminal law system. Only if prosecution is contrary to any legal, statutory or treaty provisions, or contrary to the rule of due process, there may be a lapse of the right to prosecute and a bar to the Prosecution to be pronounced by a court for that reason. The only thing that is assessed is whether the Prosecution, after having weighed all the interests concerned, could reasonably arrive at the decision to prosecute.

The Court of Appeal does not share Counsel for the defence's position that in the case in question there would be a lack of any prosecution interest. Having regard to what was contemplated above, the Court of Appeal also takes the following into consideration.

It is a generally known fact that piracy constitutes a serious threat to the right to free passage in international waters. Piracy hinders the free transport of freight, raw materials and fuel, with threatening global economic consequences. Hence the Netherlands, just like any other seafaring nation, has an economic interest in undisturbed shipping in international waters. This interest is also reflected in the above-mentioned universal jurisdiction of the Dutch court with regard to piracy. In addition, it is important that the Netherlands participates actively in the international missions referred to above, especially also in the Gulf of Aden. With these missions, the Netherlands has committed itself in an international context to take action – also in the sense of criminal law procedures – in the waters concerned. In this connection, the Court of Appeal would also like to point to the European Union Joint Action discussed above, which also demonstrates the European interest concerned. Moreover, the Accused and his co-accused were arrested on suspicion of involvement in piracy.

In view of these facts and circumstances, it cannot reasonably be maintained that prosecution of the Accused in the Netherlands would not be expedient in the sense as referred to above.

(c) Principle of Equality

Furthermore, Counsel for the defence has adopted the position - succinctly put – that the decision to prosecute the Accused whereas other suspects were discharged or released from custody, constitutes such a serious violation of the principle of equality that this should lead to a bar to the Prosecution. Releasing one accused – T22 – after his arrest and prosecuting the Accused, whose position was not essentially different, shows arbitrariness, causing the Accused – who, moreover, was a minor at the time of his arrest – to be disproportionally heavily prejudiced, and harms his defence.

The Prosecution has adopted the position – summarized and succinctly put – that there is not any violation of the principle of equality, in view of the exclusive right to prosecution vested in the Prosecution that the court – in its discretionary power in this respect – should observe. The Prosecution has put forward in this respect that the decisions to prosecute concerned depended on the results of the further inquiries that were conducted, which results created a case for the suspects in question and not for the individuals that were released. In view of the fact that the case of the suspects in question could not be compared to those of the persons that were released, the Prosecution's opinion was that the cases were not comparable.
Furthermore, the Prosecution has adopted the position that the argument submitted by the Defence that action can exclusively be taken as a result of violation of an explicit Dutch interest, fails to recognise the statutory universal jurisdiction in the matter of piracy and, moreover, is not supported by the law.

With regard to this aspect, the Court of Appeal finds as follows.

The Court would like to state first and foremost that the position of Counsel for the defence, in as far as the Defence argued that in the matter of the suspicion of piracy or sea-jacking the Dutch authorities or law enforcement authorities can only act if and in as far as there is a violation of an explicit Dutch interest, the Court of Appeal finds that the Defence does not only fail to recognise statutory universal jurisdiction in the matter of piracy – all this as contemplated before – but that this position is not supported by the law, either.

As contemplated above, the discretionary power of the Prosecution to proceed with the prosecution of a suspect, are limited by the operation of the principles of due process, the principle of equality included. There can only be a violation of the principle of equality when there is a deviation from a consistent pattern of decisions in a large number of comparable cases. 19

The Court of Appeal finds, contrary to the Defence, that with regard to piracy it cannot easily be established whether there were any other cases where the relevant factual circumstances equalled the ones in the case in question to such an extent that a consistent pattern can be deduced in the sense as mentioned above. For the case in question is only the second piracy case as far as the Court of Appeal is aware of that has been tried in the Netherlands in years, which means that there is no adequate frame of reference in this respect. In this connection it is also important – as may supposed to be generally known – that also in other cases related to piracy on the one hand suspects were released from custody as referred to by Counsel for the defence, yet on the other hand the Accused and his co-accused are not the only piracy suspects arrested in the Gulf of Aden and prosecuted in the Netherlands.

The single fact that in the case in question it has to be established that other suspects who were arrested, more in particular T22, were released and not prosecuted any further, does not impede the prosecution of the Accused in the light of the ample discretionary powers of the Public Prosecutor as referred to above. Moreover, it has become sufficiently plausible that the Public Prosecutor, on the basis of the assessment of the information she had at that moment, made a conscious choice which of the suspects that were arrested she would prosecute. The Court of Appeal has also taken into consideration in this respect that it concerned the apprehension – under special circumstances – of a large number of suspects with regard to whom – as far as could be grasped at that moment – a prosecution in the public interest would stand to reason, whereas it was not immediately sufficiently clear how serious the suspicions were against the different suspects, nor how the personal circumstances of the suspects should be assessed.

The Court of Appeal finds that on the basis of the arguments submitted by the Defence, it is not plausible or not sufficiently plausible that there can be such similarity in cases in the field of viability and expediency to lead to the conclusion that in the case in question the principle of equality has been violated. Facts or circumstances that should lead the Court of Appeal to another opinion have not become apparent.

The Court of Appeal finds that under those circumstances, it cannot be maintained that the Prosecution could not reasonably have arrived at the contested prosecution decision or decisions.

This opinion implies that the decision to prosecute by the Prosecution is not contrary to the general prohibition of arbitrariness to such an extent that as a result the Prosecution ought to be barred. The fact that another accused, namely T22, has not been prosecuted does not change this, since the Prosecution indicated with good reason and not unreasonably on which grounds some of the suspects that were arrested were prosecuted and other suspects, including the Accused, were not. It has not been made plausible that the Prosecution, at any rate the Public Prosecutor, has apparently acted unreasonably or arbitrarily with regard to the decision to prosecute.

At a later stage, the Court of Appeal will come back to Counsel for the defence's argument that the Accused was disproportionally prejudiced by the decision to prosecute – also because of the fact that he was a minor at the time – and that it harmed his defence.

(d) Violation of the right to a fair trial

Right to a fair trial

The Defence has also adopted the position that the right to a fair trial has been violated now that because of the release of various other persons, more specifically T22, the Accused has not been offered the possibility to examine those persons as witnesses in the scope of his criminal proceedings in order to obtain any possible exculpatory statements. By not including any statements by the witnesses concerned, at any rate a statement by witness T22, the Prosecution violated - with gross disregard - the right of the Accused to examine these defence witnesses and therefore seriously prejudiced his right to a fair defence. Since these circumstances constitute a fundamental limitation of the defence rights, this should also lead to a bar to the Prosecution, Counsel for the defence argued.

The Prosecution has adopted the position - summarized and succinctly put – that it was impossible – due to pressure of time and the limited means on board HMS Amsterdam – to examine all co-suspects as witnesses. Moreover, the Prosecution made additional efforts at a later stage to check whether the details of the suspects that were released were possibly known elsewhere.

On this subject, the Court of Appeal finds as follows.

The prime considerations are that in principle the defence should be given the opportunity to examine witnesses in order to demonstrate the reliability of the witness, or the correctness or incorrectness of witness statements. The right to examine defence witnesses ensues from the above-mentioned equality-of-arms principle. However, not every witness introduced by the defence must also be summoned to appear, but only in as far as is necessary to ensure equality of arms.

Not examining a witness and releasing from custody persons that were arrested together with the Accused, are in principle choices the Public Prosecutor is free to make within the scope of a criminal investigation. As contemplated before, the principle of expediency plays a role, but often also an assessment as to viability (the realistic estimate the Prosecution can make of the chance that the prosecution that has been instituted will actually lead to a conviction).

According to the record of questioning of 29 November 2010 concerning the remand of custody, the Accused was assisted –before the release of the other persons - by a lawyer who was aware of the circumstance that the persons concerned were not to be prosecuted. Hence she had the opportunity to submit a request for the examination of those persons as witnesses, but failed to do so. Partly since the Defence has not submitted a request for those persons to be examined as witnesses until the appeal proceedings, which request, moreover, was granted by the Court of Appeal, the circumstance that they have not been examined by the Defence, cannot be held against the Prosecution.

An intentional or gross disregard of the interests of the Defence causing a violation of the right of the Accused to a fair trial has not become evident to the Court of Appeal. Consequently, the defence is rejected.

(e) Serious breach of procedural rules

Counsel for the defence has also argued, succinctly put, that a serious breach of procedural rules occurred when the Royal Netherlands Military Constabulary [*Marechaussee*] took the statements from both the Accused and the witnesses. Contrary to the instructions from the Prosecution which ensued from the Instructions for audio and audiovisual recording of interviews of persons filing a report with the police, witnesses and suspects (hereinafter the Instructions for the recording of interviews), these statements were not audio recorded. The necessity of recording is all the more cogent given that the Accused was a minor and, besides, had no command of the Dutch language so that he had to be interviewed through the intermediary of an interpreter. The Accused has denied his previous statements made to the Royal Netherlands Military Constabulary [*Marechaussee*] and currently does not have the opportunity, or does not have the opportunity any longer to prove the incorrectness of the representation of those statements. This constitutes a gross disregard of

the rights of the Accused which should, or should also lead to the Prosecution being barred, or to the exclusion of the evidence with respect to his own statements to the Royal Netherlands Military Constabulary [*Marechaussee*], as well as the statements made by witness T20 and co-accused T17.

The Prosecution has adopted the position – summarized and succinctly put – that the single denial by the Accused that he would have recognised himself in a photograph, stated during his interview by the Royal Netherlands Military Constabulary [*Koninklijke Marechaussee*] is insufficient to constitute unlawfulness of the interviews, since the Accused stated in the court of first instance that he recognised himself in the photograph concerned. Alternatively, the Prosecution has adopted the position that the assertion that the Instructions for recording interviews were not complied with when the Accused and co-accused were interviewed suffices.

Counsel for the defence has also argued that the Accused was not provided with any assistance or legal assistance by a confidential advisor, whereas as a minor he had a right thereto under the Instructions legal representation during police interviews. Nor is there any evidence that the Accused was informed of his right to be represented during the interview. This too, has made it no longer possible to verify any expressly denied statements made, or made later. It has also caused such a breach of procedural rules – in combination with the breach of procedural rules concerning not recording, or not – that this should at least result in exclusion of the evidence.

The Prosecution has adopted het position – summarized and succinctly put – that it is clear from the case file that the Accused - in connection with his right to consultation - was not interviewed on board HMS Amsterdam but that the interviews took place in the Netherlands and that the Defence was duly invited and timely informed.

The facts and circumstances

From the case files and the hearing, the Court of Appeal infers the following in this connection:
On 23 November 2010, in accordance with Article 105 of UNCLOS, the skiff the Accused was sailing on was intercepted and the Accused was taken on board HMS Amsterdam with the permission of the Chief of the Netherlands Defence Staff and the Public Prosecutor. On the directions of the Public Prosecutor, the Accused was notified on 24 November 2010 of the arrest warrant in the matter of suspicion of piracy that had been drawn up (pursuant to Article 105 UNCLOS and Article 6 SUA) by the commander of HMS Amsterdam. 20
On 28 November 2010, the Public Prosecutor gave instructions to apprehend the Accused not caught in the act on suspicion of having violated Section 381 of the Criminal Code [*Wetboek van Strafrecht*]. The arrest was made on board HMS Amsterdam by the first lieutenant of the Royal Netherlands Military Constabulary [*Marechaussee*]. 21 On 29 November 2010 there was an interview concerning remand in custody and the Accused was assisted by Ms A M D Naarden, LL M, the lawyer who had been assigned to him. On 29 November 2010 the Examining Magistrate decided to allow the demand for a remand in custody concerning the Accused for fourteen days. 22 On 4 December 2010 the Accused was brought before the court sitting in chambers at the Rotterdam District Court and he was assisted by lawyer Mr R Heemskerk, LL M, and the court decided that the Accused was to be remanded in custody for a period of ninety days.

The first interview of the Accused took place on 23 December 2010; the later interviews were conducted on 30 January 2011. According to the official record that was made, no audio or video

recordings were made of the interviews. The record that was made, dated 30 January 2011 (second and third interviews of the Accused), demonstrates that - in addition to the caution – the Accused was informed of the fact that he could be assisted by a lawyer and that the lawyer had been informed of the interview. The lawyer, however, could not attend the interview.

The Instructions for legal representation during police interviews

In as far as the Defence adopts the position that parties would have acted contrary to the Instructions for legal representation during police interviews, this position is unfounded, since it appears from the above-mentioned course of the proceedings that already on 29 November 2010 (long before the interviews) the Accused was provided with legal assistance and that on the same date the Examining Magistrate issued an order for a lawyer to be assigned to the Accused.
The actual interviews took place after that date and then, too, the Accused was provided with legal representation and the lawyer was at any rate invited for the interview of 30 January 2011; in doing so, the Court of Appeal finds that the Instructions for legal representation during police interviews were executed sufficiently well and therefore, Counsel for the defence's argument is rejected.

Instructions for audio and audiovisual recordings of the interviews of persons filing reports with the police, witnesses and suspects

In as far as Counsel for the defence has adopted the position that parties would have acted contrary to the Instructions for recording interviews, this position is unfounded since , no audio or audiovisual recordings were made of the interviews of the Accused, whereas the case in question does come within the scope of the Instructions for the recording of interviews. Due to this breach of the procedural rules, verifying the statement that was expressly denied is not possible and exclusion of evidence should follow, according to Counsel for the defence.

The Court of Appeal finds that - in as far this is a matter of a breach of procedural rules within the meaning of Section 359(a) of the Act of Criminal Procedure [*Wetboek van Strafvordering*] which cannot be remedied - when the Accused was interviewed, the relevant parties did not act in accordance with the Instructions for the recording of interviews, in as far as no audio or visual recordings were made of the interviews of 23 December 2010 and 30 January 2011.

In order to answer the question to what extent this breach of procedural rules should result in either a bar to the Prosecution or exclusion of the evidence, the Court of Appeal has taken the following facts and circumstances into consideration.

The case file demonstrates that the lawyer at the time had been allowed to be present during the interview concerned and that he had been invited, but had decided not to attend. The Accused was aware of this and nonetheless made a statement with the assistance of an interpreter in the Somali language. The official report was drawn up in a Question and Answer format and was signed by the Accused and by the interpreter.
The Instructions for recording interviews – which entered into force on 1 September 2010 – purport to contribute to the opportunity also for the court - if required at a later stage of the criminal proceedings - to verify the procedure adopted during interviews. Both in the first instance proceedings and during the appeal proceedings, the Defence has been able to exercise their verifying duties with regard to the procedure adopted during interviews.

The Court of Appeal has not found any indications in the case file that the police or the Prosecution would intentionally have acted contrary to the instructions in order to harm the interests of the Defence, nor was this the case when the circumstance that the interviews had to take place with the assistance of an interpreter and the early age of he Accused are taken into consideration.

Also in view of the special circumstances under which the arrest and the – first – interviews had to took place, it is sufficient for the Court of Appeal to establish that, true, there was a breach of procedural rules or an irredeemable breach of procedural rules, but there was insufficient reason to proceed to one of the sanctions within the meaning of Section 359(a) of the Code of Criminal Procedure [*Wetboek van Strafvordering*]. Consequently, the Court of Appeal does not find any reason - based on the breach of procedural rules - to arrive at mitigation, nor exclusion of the evidence concerning the statements the Accused made on 23 December 2010 and 30 January 2011, nor a bar to the Prosecution.

Opinion with regard to the Prosecution being barred or not

All things considered, the Court of Appeal finds that the Prosecution had sufficient reason to proceed with the prosecution of the Accused and had an interest in prosecuting the Accused to a reasonably sufficient extent. On the basis of what the Defence has submitted, it has not become plausible, or not sufficiently plausible, that there is such a similarity of cases - related to the different suspects that were arrested - with regard to viability and expediency, that this could lead to the conclusion that in the case in question the principle of equality was violated, or otherwise that prosecution based on violations or breaches of procedural rules would be contrary to the principles of due process to such extent that the fact whether the Prosecution should be barred is at issue. Nor have any facts or circumstances that should cause the Court of Appeal to arrive at another opinion become plausible. Nor do the actual circumstances provide the Court of Appeal with a reason to exclude the statements the Accused himself made to the Royal Netherlands Military Constabulary [*Marechaussee*], or the statements made by witnesses T20 and T17 that Counsel for the defence mentioned, from the evidence.

Based on the foregoing and all things considered, the Court of Appeal therefore finds that the Prosecution is allowed to prosecute the Accused and Counsel for the defence's arguments against this are consequently rejected.

8. The judgment against which the appeal was lodged

The judgment against which the appeal was lodged cannot be upheld because the Court of Appeal cannot fully concur with it.

9. Meritorious defences

Reliability of the statements made by the Accused himself

The Court of Appeal finds that the statements the Accused made himself to the Royal Netherlands Military Constabulary [*Marechaussee*] are largely consistent and are generally speaking not in conflict

with the contents of the other documents. In addition, the Court of Appeal finds that the Accused did not retract those statements at the hearing in the first instance, or at the appeal proceedings, with the exception of his own recognition of himself in the photograph, as represented on page VT21 09 of the case file.
Only at the appeal proceedings did the Accused deny explicitly and unambiguously that he was the person depicted in photograph 4, despite the fact that during the proceedings of the first instance he had been able several times to retract that recognition.
Therefore, the Court of Appeal holds the Accused to his previous statements as far as his recognition concerns, also in view of the Court of Appeal's own observation at the appeal proceedings and that of the District Court hearing the case in the first instance in relation to the resemblance between the photograph of the Accused made at his arrest and photograph 4, in respect of which the Accused initially stated that he was depicted in it.
Furthermore, the contents of the facial recognition report of 25 September 2012, drawn up by the Netherlands Forensic Institute [*Nederlands Forensisch Instituut*], supports the submission that it is the Accused that is depicted in photograph 4.

Consequently, the Court of Appeal, having considered everything, finds the statement made by the Accused Royal Netherlands Military Constabulary [*Marechaussee*] not only credible, but also usable evidence.

Lawfulness and reliability of the statements to the Royal Netherlands Military Constabulary [*Koninklijke Marechaussee*] made by T20

Based on the case file (page G04 001 ff.), the Court of Appeal finds that of the first two interviews of T20 on 27 November 2010, audio and audiovisual recordings were made. At the end of the second interview T20 indicated with regard to questions by the Royal Netherlands Military Constabulary [*Marechaussee*] that he wanted to continue if the camera was switched off. After consultations with the Public Prosecutor, the third and fourth interviews took place without audiovisual recordings. On 4 December 2010, T20 was examined by the Examining Magistrate in the presence of the Public Prosecutor and the lawyer of the Accused.

First and foremost, Counsel for the defence has adopted the position that the last two interviews of T20 cannot be used in evidence since parties acted contrary to the Instructions for the recording of interviews and because the statements are unreliable in view of the promises that would have been made by the Royal Netherlands Military Constabulary [*Marechaussee*].

In view of the above-mentioned account of the facts, the Court of Appeal finds that the parties concerned acted contrary to the Instructions for recordings of interviews and that, consequently, there is an irredeemable breach of procedural rules. In this case, too, the Court of Appeal needs to answer the question whether any legal consequences should be attached to this breach of procedural rules and if so, which legal consequences would be eligible. In order to be able to assess this, the Court of Appeal takes the following factors into consideration.
First of all, it concerns a witness who wished to be interviewed without an audio or audiovisual recording at his own request. Moreover, this occurred with the permission of the Public Prosecutor. The record of the interview is in a Question and Answer format and was signed by the interpreter and the witness. Furthermore, the Defence has been given the opportunity to exercise their verifying duties both in the first instance and on appeal as far as the procedure around the interview is concerned, including the examination of the witness by the Examining Magistrate. In

this case, too, the Court of Appeal notes that audio and audiovisual recordings constitute only one of the tools that can be used for the verification of interviews at a later stage of the criminal proceedings. Finally, the Court of Appeal finds there are no facts or circumstances that indicate that the Royal Netherlands Military Constabulary [*Marechaussee*] or the Prosecution intentionally wished to harm the interests of the Defence.

Taking everything into consideration, it is sufficient for the Court of Appeal to establish that there was a breach of the procedural rules in the sense that the parties concerned acted contrary to the Instructions for the recording interviews.

In addition, Counsel for the defence argues that the statements made by T20 should be excluded from the evidence as they are unreliable because promises would have been made to the witness and in view of the many generalities, inaccuracies and contractions the statements contain.

In this respect, the Court of Appeal finds the following.

First of all, the Court of Appeal does not rule out that T20 assumed that if he talked, he would be released, something he has explained when he was examined by the Examining Magistrate. In view of the contents of this hearing before the Examining Magistrate, T20 referred to his previous statements concerning a number of members of the so-called group of thirteen that would have been involved in the hijacking of the Choizil. It was before the Examining Magistrate that witness T20 stated that in his opinion, none of the people of the group of thirteen had been involved in the hijacking of the sailing yacht. The Court of Appeal finds that the statements T20 had made previously to the Royal Netherlands Military Constabulary [*Marechaussee*] about the role the Accused played in the hijacking of Choizil consisted of hearsay of the Accused, whereas the Accused explicitly denies this. The statements made by T20 are dubious in that respect and the Court of Appeal finds they cannot be used to prove that the Accused was in any way involved in the hijacking of the Choizil.
However, the Court of Appeal does consider the statements made by T20 reliable where they concern the group of seven people that was arrested at sea on 23 November 2010. Witness T20 then made a statement from his own knowledge not only about his own role, but also about that of the Accused. The Court of Appeal especially considers the above-mentioned statement by T20 - made to the Examining Magistrate - credible and reliable when he stated the following about the role of the Accused, “I am being shown a photograph of T21.
I know him. He was with us. He belonged to the group of seven. He was the driver of the boat. When he needed something, he asked me, `Will you get it for me’.” Consequently, the Court of Appeal considers this part of the statement made by T20 can be used as evidence and rejects Defence Counsel’s position.

10. The Prosecution’s demand and the position of Counsel for the defence

Choizil

The Prosecution has demanded - succinctly put – that the Court of Appeal shall find it legally and convincingly proved that the Accused was aware of the fact that the vessel he was serving on was intended for and also actually used for the commission of acts of violence against the Choizil, its

crew and the property on board the ship (hereinafter violence against the Choizil) and that this demonstrates the involvement of the Accused in that hijacking.
The Prosecution – according to the Prosecution's written closing speech demanding the sentence – has based this on the statements made by the witnesses [Witness 1], [Witness 2] and [Witness 3], who were all victims of the incident, as well as the statements made by witness T20 and the photograph that was found, picturing the Accused on board the Choizil.

Counsel for the defence has argued that the Accused should be acquitted of the acts of violence committed against the Choizil. To that end the following – summarized and succinctly put – was put forward.
According to the Defence, it cannot be concluded from the photograph that was found on the SD card that the person who is depicted is accused T21. Even the expert investigation that was carried out did not manage to offer any absolute certainty about this, also in view of the fact that one of the experts initially was of the opinion that it was more probable that the person who was depicted was not accused T21, as well as the fact that with regard to this investigation problems related to 'the other race bias' were insufficiently acknowledged.
The statements accused T21 made to the Royal Netherlands Military Constabulary [*Koninklijke Marechaussee*] stating he recognised himself in the photograph, as well as the statement made by co-accused T17 that accused T21 was depicted in the photograph on the SD card, are – according to Counsel for the defence's opinion - to be considered to be unreliable. In addition, Counsel for the defence is of the opinion that the statements made by accused T21 at the court hearing in the first instance, should be seen in the light of his statement at the appeal proceedings, where he explained that his recognition in the first instance was not related to the photograph on the SD card, but to the photograph that had been taken when he was arrested.
According to Counsel for the defence the statement made by [Witness 1] that the person depicted in the photograph on the SD card is the cook, constitutes a contraindication for the submission that the depicted person was accused T21, since the cook was older than accused T21 and accused T21 was not recognised by any victim as the cook.
Moreover, it is important that [Witness 1] initially did not recognise accused T21 as one of the pirates on board the Choizil, whereas his later recognition – also in view of the inaccurate way this recognition came about - is not convincing. Nor have the other victims, [Witness 2] and [Witness 3], been able to identify accused T21 convincingly as one of pirates on board the Choizil. [Witness 3] has not recognised accused T21 at all.
According to Counsel for the defence, the statements made by witness T20 and co-accused T17 are also unreliable. The fact is, that Counsel for the defence thinks there is no logic in accused T21 telling everyone he was involved in the violence against the Choizil. Nor would there be any logic, according to Counsel for the defence, in both witness T20 and co-accused T17 identifying witness T22 as the discussion partner of accused T21, whereas he has not been identified by any victim. Co-accused T17 has possibly incriminated accused T21 and witness T22, because co-accused T17 did not make any statements before witness T20 had done so.
Finally, Counsel for the defence believes finding the business card of [Witness 1) on board the skiff carries insufficient weight to be able to conclude that accused T21 was involved in the violence against the Choizil.

The Prosecution demanded - succinctly put – that the Accused be acquitted of the part of the charge to the effect that the vessel the Accused served on was actually used to commit acts of violence against the Floréal, its crew and the property on board the vessel.

Counsel for the defence has also argued that the Accused should be acquitted of this part of the charge. To this end it has been put forward – summarized and succinctly put – that any evidence for the involvement of the Accused in the piracy with regard to the Floréal is missing from the case file.

Other (merchant) vessels

The Prosecution demanded - succinctly put – that the Court of Appeal shall find it has been legally and convincingly proved that the Accused was at least aware of the fact that the vessel he was serving on was intended and also actually used for the commission of acts of violence against other (merchant) vessels, their crews and the property on board those vessels.
The Prosecution has based – in accordance with the Prosecution's written closing speech demanding the sentence – its demand on the statements made by the co-accused and witnesses [Witness 1] and T22.

Counsel for the defence has argued that the Accused should be acquitted of the acts of violence committed against other (merchant) vessels. To that end, it has been put forward – summarized and succinctly put – that the circumstances under which the skiff was found on 23 November 2010 constitute insufficient reason to assume involvement in piracy and the statement made by witness T20 is unreliable. Furthermore, the skiff was not on the open seas on 22 and 23 November 2010, so that for that reason alone piracy is out of the question. According to Counsel for the defence the life jacket that has been found cannot be attributed to accused T21 either, or at any rate the possible obtaining of this life jacket by accused T21 constitutes insufficient cause for the evidence, whereas any other evidence for the involvement of the Accused in piracy with regard to the Maido or other vessels is also missing from the case file.

Interception

The Prosecution has demanded – succinctly put – that the Court of Appeal shall find it has been legally and convincingly proved that the Accused was at least aware of the fact that the vessel he was serving on was – at the moment of his arrest – intended for the commission of acts of violence against (merchant) vessels, their crews and the property on board those vessels.
The Prosecution has based its demand – in accordance with the Prosecution's written closing speech demanding the sentence – on the statements made by witness T20 and the information and findings of the Royal Netherlands Navy [*Koninklijke Marine*].

Counsel for the defence has argued that the Accused should be acquitted of this part as well. To this end, it has been put forward – summarized and succinctly put – that accused T21 worked as a paid security guard on the boat and assumed that the boat was used to carry khat.

11. The facts and circumstances identified by the Court of Appeal and the Court of Appeal's assessment of the same.

On the basis of the content of articles of evidence, viewed together and in relation to each other,

the Court of Appeal finds the following facts and circumstances.

Choizil

Actual course of events

On 22 October 2010, sailing yacht Choizil left Dar El Salam in Tanzania, destination South Africa. On board the sailing yacht were [Witness 1], [Witness 2] and [Witness 3]. A few days after its departure, the Choizil was attacked by a group of hijackers. They came alongside in two skiffs, threatened the crew with machine guns and a rocket launcher by aiming these at the Choizil and its crew and subsequently boarded the Choizil.
Sailing in the two skiffs and a mother ship that arrived later, by positioning in a way that could be observed by [Witness 1], [Witness 2] and [Witness 3], the hijackers formed a group that overpowered the Choizil. Later, the mother ship was also used for supplies for the hijackers. Some hijackers changed ships and after a while the mother ship left the Choizil. The Choizil and its crew were subsequently in the sphere of power of a changing number of hijackers for approximately two weeks.
At some point in time, when another ship was observed on the horizon, a group of hijackers got into a skiff, took their weapons with them, and were gone for some time. Later that night the group returned to the Choizil; one of the hijackers had injured his hand. The injured hijacker was attended to by [Witness 1]; later he fell ill and left the ship on Koyaama Island, together with three other hijackers.

Assessment by the Court of Appeal

At some point in time, the Accused was on board the Choizil during the hijacking. This has appeared from the report of findings related to the micro SD card found on co-accused T15. There are four photographs on the SD card, the file names of which are practically consecutively numbered. All these photographs were made within a time frame of twelve hours and with the same mobile telephone, namely a Sony Ericsson G900. [Witness 1] recognised his ship by various specific aspects on two photographs. In the third and fourth photographs of the series [Witness 1] recognised a bag of rice and a blanket in the background as his property and concluded from this that these photographs, too, must have been taken on board his ship. Both the District Court and the Court of Appeal understand this statement to mean that these photographs were apparently taken below decks. The Court of Appeal sees no reason to doubt the correctness and reliability of the statements [Witness 1] made in this respect.
The Accused recognised himself in the fourth photograph (page B08 015) when he was interviewed by the Royal Netherlands Military Constabulary [*Koninklijke Marechaussee*]. As contemplated before, the Court of Appeal sees no reason to doubt this statement, despite its later “retraction”.

During the appeal proceedings on 10 October 2012, the Court of Appeal observed themselves that the person depicted in the fourth photograph (page B08 015) bears a close resemblance to the Accused - who was present in court - and the photograph taken of the Accused on board HMS Amsterdam, shown on page VT21 018 of the case file. The District Court, too, made a similar observation, as is demonstrated by the record of the court hearing in the first instance. Furthermore, the contents of the face recognition report of 25 September 2012 drawn up by the Netherlands Forensic Institute [*Nederlands Forensisch Instituut*] corroborate the position that the Accused bears a close resemblance to the person depicted in the fourth photograph (page B08

015). The researchers compared a photograph of the Accused made on 24 August 2012 with the photographs shown on page B08 015 of the case file and they have concluded that the hypothesis that the person depicted in photograph B08 015 is the same person as the Accused is more probable than the hypothesis that this is not the case. In what Counsel for the defence puts forward with regard to the so-called 'other race bias', the Court of Appeal sees no reason to doubt the conclusion of the report, since the examination of the expert witness [Expert Witness] at the court hearing of 17 October 2012 demonstrated that the characteristics that were used to compare the photographs apply – largely – internationally and that researchers will always have to be aware that 'the other race' effect may occur. The circumstance that one of the researchers was initially of the opinion that it was more probable that the person who was depicted was not the Accused is considered to be of minor importance by the Court of Appeal, since this researcher withdrew this opinion and joined in with the abovementioned final conclusion of the report.
Taking everything into consideration, the Court of Appeal finds that it can be concluded with a sufficient degree of certainty that the person who is depicted in the fourth photograph (page B08 015) is the Accused.
Contrary to what Counsel for the defence argues, the Court of Appeal is of the opinion that the fact that the witnesses [Witness 1], [Witness 2] and [Witness 3] did not recognise the Accused, or not consistently, does not preclude this.

As the Court of Appeal does not use the statements made by co-accused T17 and witness T20 as evidence in this aspect, the arguments Counsel for the defence put forward on this subject, need no further discussion.

As has been contemplated above, it is an established fact that the Accused was on board the Choizil at the time of the hijacking. This was prior to arrival at Koyaama Island, which is demonstrated by the inured hijacker depicted in the first photograph, and the statements made by [Witness 1], [Witness 2] and [Witness 3] that this hijacker left the ship before Koyaama Island. [Witness 1], [Witness 2] and [Witness 3] stated that there was one group of hijackers, divided over two skiffs, who attacked his ship and that there was a mother ship which arrived a little later; this mother ship was also used for supplies. It does not appear from the statements made by [Witness 1], [Witness 2] and [Witness 3], nor does the case file offer any evidence for the fact that new hijackers - any persons that were not already on board of one of the skiffs or the mother ship - came on board the Choizil between the attack on the Choizil and the arrival at Koyaama Island. It follows from this, in the opinion of the Court of Appeal, that the Accused was present during the attack on the Choizil. There is no indication that the Accused was carried along against his will, nor is there any indication that the Accused was not aware what his destination was when he boarded the ship that took him to the Choizil. At any rate, the moment he came on board the Choizil, the Accused must have known that he was serving or continued to serve on a ship that – together with other ships - was intended for or was used for the commission of violent acts against other vessels and the persons or property on board these vessels.
From the actual course of events it has also become evident that people worked methodically, that there was a deliberate and close cooperation between the persons on board the skiffs and the mother ship, so that the question which of these ships the Accused was on at the time of the attack, can be left aside.

Acts of violence

Both the Court of Appeal and the District Court find that the actual acts that were found to be

proved do not constitute violence in the narrow sense of the word: showing weapons and holding people at gunpoint are - scrutinized closely - only threats of violence. However, these threatening acts cannot be considered separately from the context in which they were committed and the accusation against the Accused in this respect. The acts took place within the scope of the Accused and/or his co-accused boarding the Choizil, when they climbed over the railing of the small ship, physically overpowered the three passengers and took possession of the ship. In that context all the acts, viewed together, were carried out with such force, that the free passage of vessel Choizil and the safety of its crew and the property that were on board the ship were endangered. Viewed in this way, the acts may be considered to be acts of violence within the meaning of Article 381 of the Criminal Code [Wetboek van Strafrecht].

Floréal

The part of the charge to the effect that the vessel the Accused served on was actually used to commit acts of violence against French naval vessel Floréal has not been legally and convincingly proved, which means that the Accused – in accordance with the demand by the Advocates General and arguments submitted by the Defence – is to be acquitted of this.

Other (merchant) vessels

The part of the charge to the effect that the vessel the Accused served on was actually used to commit acts of violence against other (merchant) vessels and the persons and/or property on board those vessels has not been legally and convincingly proved either, so that the Accused is also acquitted of this part.
On this aspect, the file – as it was discussed at the court hearing – contains a number of potential articles of evidence that have also been described and cited by the Advocates General in their closing speech demanding the sentence. However, these articles of evidence are so general in nature and as corroboration for the alleged use of violence so little concrete and specific, that at most what can be concluded is that there are suspicions that the Accused had previously been involved in acts of violence against other (merchant) vessels.

Interception

Actual course of events

As has already been stated under 7, the following – summarized – has become evident.

On 22 November 2010, a helicopter unit belonging to HMS Amsterdam discovered a large skiff off the Somali coast. The skiff was equipped with two outboard engines, a large quantity of fuel, a ladder and some packages. There were seven crew members on the skiff. It was also observed that the skiff was sailing into the direction of the beach at high speed. HMS Amsterdam subsequently stood off the coast during the night of 22 to 23 November 2010 to prevent the skiff from leaving unobserved. In the afternoon of 23 November 2010, the HMS Amsterdam helicopter crew saw the skiff at the same place where it came ashore on 22 November 2010. The helicopter crew also observed that the skiff was being prepared for departure to sea. In view of the way the skiff was equipped, the suspicion arose that the skiff wanted to set sail in order to carry out a hijacking.
Just before sunset, the skiff was observed to set sail to sea. The Royal Netherlands Marine Corps [*Korps Mariniers*] boarding team subsequently sailed into the direction of the skiff in two fast boats.

After having obtained permission of the commander of 'Standard NATO Maritime Group 1' (hereinafter CTF 508) to board the skiff, the boarding team fired flares to induce the crew to stop. However, the skiff absconded and the boarding team set off in pursuit at high speed. The boarding team observed how the crew threw all kinds of items overboard, including a ladder and a large package. Only after various stop signals, warning shots and non-disabling fire did the boarding crew manage to stop the skiff, eliminating both engines by aiming non-disabling fire at them. On 23 November 2010, the skiff – with accused T21 on board the skiff – was intercepted. Subsequently, on 24 November 2010, all crew members – seven persons in total – were arrested on suspicion of the commission of piracy.

Assessment

On the basis of the evidence that has been used, the Court of Appeal finds that accused T21 was involved in the hijacking of the Choizil between 30 October 2010 and 7 November 2010. Also in view of this circumstance, the Court of Appeal finds his statement that on 22 and 23 November 2010 he was on his way to get khat, implausible. Nor does the case file or the hearing in court offer any evidence for this position adopted by the Accused. In addition, the Court of Appeal takes into consideration the statements made by witness T20, who stated that he and the other six crew members, hence including accused T21, had set sail with the intention to hijack a ship and that accused T21 was the skiff's driver.

Opinion

Based on the above-mentioned facts and circumstances that have been established – also considered in together – the Court of Appeal finds that it has been established beyond reasonable doubt that the Accused belonged to a group of persons who intended to hijack ships in the open seas together. Consequently, the Court of Appeal finds that the Accused, contrary to what he stated, had been aware of the fact that the vessel he entered into service on and served on, was intended for the commission of acts of violence, as has been found proved.

Skipper

The part of the charge relating to participation in piracy as the skipper, has not been legally and convincingly proved, so that the Accused – in accordance with the demand by the Advocates General - is to be acquitted of this.

Period of time

In view of what was contemplated above, the Court of Appeal finds that it cannot be proved that - long before his arrest – the Accused had already been involved in concrete acts of violence against vessels and the persons and/or property on board those vessels. Since both the Court of Appeal and the District Court find that the case file does not contain any specific and convincing evidence either that the Accused entered into service on a vessel or served on a vessel that was intended for the commission of acts of violence against vessels and the persons and/or property on board those vessel, the Accused is acquitted of a large part of the period of time stated in the charges, in so far as this related to the period of time prior to 22 October 2010. For 22 October 2010 is the day – according to the statements made by [Witness 1], [Witness 2] and [Witness 3], the Choizil set sail to

South Africa.

12. Judicial finding of fact

The Court of Appeal deems it legally and convincingly proved that the Accused committed the offence with which he was charged concerning the second cumulative/alternative charge filed, with the proviso that:

he, at various times in the period of 23 October 2010 up to and including 23 November 2010, from the mainland of Somalia and/or from the coast of Koyaama Island (Somalia) and/or the territorial waters of Somalia and/or in the Indian Ocean, jointly and in conjunction with other persons - every time - entered into service as a crew member and/or served as a crew member on a vessel that was intended for the commission of acts of violence and/or used to commit acts of violence on the high seas against other vessels and/or against the persons and/or property on board those vessels whereas he was aware of this intention and/or this use (the acts of violence that were committed consisted of threateningly showing weapons or firearms or automatic weapons or firearms and/or a rocket launcher to persons on board the SV Choizil and/or holding them at gun point with these weapons), without being authorised hereto by the war navy of a recognised power, or belonging to the war navy of a recognised power;

Any other or different charges have not been proved. Consequently, the Accused is to be acquitted of those.

In as far as any linguistic or writing errors occur in the indictment, they have been corrected in the judicial finding of fact. As is evident from the hearing, there was no prejudice to the defence of the Accused.

13. Argumentation

The Court of Appeal bases its opinion that the Accused committed the facts that have been proved on the facts and circumstances contained in the articles of evidence and that give cause to the judicial finding of fact.

In those cases where the law requires an addendum to the ruling with articles of evidence or – in as far as Section 359, subsection 3, second sentence, of the Code of Criminal Procedure [*Wetboek van Strafvordering]* is applied, with a specification, this will be done in an addendum that is to be attached to this ruling.

14. Explanation of the assessment of the evidence

Explanation of ‘entering into service’

The legislator must have intended to also include those cases within the scope of the penalization provided in Section 381 of the Criminal Code [*Wetboek van Strafrecht*] where a crew member serves on a pirate ship. A reasonable interpretation of the notion of ‘entering into service’ within the

penalization of piracy committed by a crew member, would then mean that this also includes 'serving' on a pirate ship. Consequently, the proven facts may be qualified as stated below. 23

No 'authorisation' or 'war navy'

It has not been put forward nor has it become apparent, that the Accused and his co-accused had been authorised by a belligerent power to act as they did or that they belonged to the war navy of a recognised power.
For that reason, the court found that this part of the charges has been proved.

15. Punishability of the proven facts

The proven facts constitute:

Complicity in piracy, committed several times.

16. Criminal liability of the Accused

No circumstance has become plausible that would exclude the criminal liability of the Accused. The Accused is punishable.

17. Grounds for the punishment

The demand

The Advocates General – applying the criminal law for adults - demanded that the Accused be sentenced to a term of imprisonment of eight years, with credit for time on remand.

Defence

Counsel for the defence argued – succinctly put – in favour of the application of juvenile criminal law because the Accused was not yet 18 years old at the time of the commission of the offences. Counsel for the defence pointed out that the Accused cannot be held responsible for any act of violence that was committed. Furthermore, Counsel for the defence requested that in a mitigating sense the special personal circumstances of the Accused should be taken into account: the disadvantaged living conditions in Somalia, the especially difficult detention conditions in country that is a strange country for the Accused, the lack of any right to release on parole and the serious consequences of a prison sentence of 18 months or more for his possible residence status in the Netherlands.

The punishment

The punishment imposed on the Accused is based on the serious nature of the offence, the circumstances under which it has been committed and the personal circumstances of the Accused.

Especially the following has been taken into consideration.

The serious nature of the offence

The past few years there have many cases of piracy off the Somali coastal regions and the international waters nearby. Because of the risks of piracy against ships and armed robberies, the safety of sea trading routes and international shipping has come under pressure and consequently also humanitarian aid to Somalia.
Great – also international and military – efforts are made to call a halt to piracy.
Pirates are clearly after the extortion of large amounts of ransom money for the crew members they take hostage and the vessels they hijack. Apparently, the proceeds are also invested in professional means in order to expand piracy.

Against this background, the serious nature of the offences that have been proved demands that stiff prison sentences are imposed and – to give a clear signal - the trial and the sentence should have an aggravating effect, also internationally speaking, on punishments.

Together with other persons, the Accused is guilty of piracy and he was involved in the hijacking of the Choizil where violence was used: the relatively small sailing ship was boarded by the Accused and a large group of co-accused who threatened the three crew members with firearms and a rocket launcher.
The piracy deteriorated into hijacking the ship and crew and in extortion. For the crew the events meant uncertainty about how it would all end and real agony.
These circumstances concerning the offences that were committed, contribute to a large degree to the severity of the sentence that is to be imposed.

It has become plausible that the Accused himself does not belong to the group of pirate leaders, nor does he belong to the group that - presumably - makes considerable financial gain from piracy, something the Court of Appeal took into consideration in a somewhat moderating sense on the determination of the punishment.

Personal circumstances of the Accused

In addition, the Court of Appeal has also taken into consideration the following.

The Accused is from Somalia. It is a generally known fact that Somalia is not a safe country and has no effective central authority. Warring parties fight their conflicts in an atmosphere of impunity and there have been many civilian casualties of these conflicts. These warring parties fly in the face of human rights in Somalia, and the country is also drought and famine stricken.

The Court of Appeal has not been able to obtain sufficient clarity about the personal circumstances put forward by the Accused, but these will undoubtedly be distressing and in that sense – when viewed in respect of the serious nature of the offences - marginally important.

Age of the Accused

The Court of Appeal has not been able to obtain any verifiable clarity with regard to the age of the

Accused. He himself has made varying statements about it.
The especially serious nature of the proven offences and the circumstances under which the Accused participated in the commission of them, at any rate require the application of adult criminal law. The Court of Appeal is of the opinion that the fact that the Accused was between 16 and 18 years old at the time of committing the offence and consequently, in principle, he would be eligible for juvenile criminal law affects this insufficiently. For it must not be deduced that an application of the special regime of juvenile criminal law would be suitable, not from the statements the Accused made himself, nor from the assessment of those statements by the Child Care and Protection Board [*Raad voor de Kinderbescherming*].
Consequently, the Court of Appeal will apply adult criminal law and will take the early age of the Accused into consideration in a mitigating sense.

Comparable cases

On the determination of the sentence, the Court of Appeal has attempted – in a general sense – to find a link with more or less comparable criminal cases. In this respect one should remember that - in view of the small number of comparable cases tried in the Netherlands, but also in other countries - only a limited reference point can be found.

Opinion

All things considered the Court of Appeal has arrived at the decision to impose a nonsuspended prison sentence for a period of five years, with credit for remand.

Needless to say, the Court of Appeal notes that against the background of the sentence deliberations, the argument submitted by the Counsel for the defence to limit the punishment to a maximum of 17 months and 29 days was found to be significantly wanting.

18. Applicable statutory provisions

The Court of Appeal took into consideration Sections 47, 57, 77(b) and 381, preamble and subsection 1 under 2, of the Criminal Code [*Wetboek van Strafrecht*] as they applied at the time of the proven facts.

19. DECISION

The Court of Appeal:

Sets aside the judgment against which the appeal was lodged and pronounces a new judgment:

As contemplated above, the Court of Appeal finds it proven that the Accused committed the offence charged.

Declares that any more or other offences than those the Accused has been charged with have not been proved, and acquits the Accused of these;

Declares the proven facts punishable and declares that the Accused is subject to punishment.

Sentences the Accused to a term of imprisonment of 5 (five) years.

Orders that the time the Accused spent in any form of pre-trial detention – as referred to in Section 27, subsection 1, of the Criminal Code [*Wetboek van Strafrecht*] - prior to the enforcement of this judgment , will be deducted from the imposed prison sentence in so far as that period of time has not already been deduced from another punishment.

This judgment has been pronounced by R A Th M Dekkers, LL M, S van Dissel, LL M and T E van der Spoel, LL M, in the presence of clerks of the court N R Achterberg, LL M and A Vasak, LL M.

The judgment has been pronounced by the Court of Appeal at the public hearing of 20 December 2012.

1 Report 27-280857, case file page 002.
2 Report 27-280857 A 004, case file page A006.
3 Report of the interception of group of pirates on 19 November 2010, case file page B02 015-017.
4 Report 27-280857 A 004, case file page A 005-006.
5 Report 27-280857 B05 001, case file page B05 001-006.
6 Report of findings 060320120900BEV148 of 7 March 2012.
7 Report of notice of arrest, case file page A001 and detention order of 22 November 2010, separately in the case file.
8 Report of findings 060320120900BEV148 of 7 March 2012.
9 Report of the interception of group of pirates on 23 November 2010, case file page B03 019.
10 Report 27-280857 A 004, case file page A 007.
11 Report of notice of arrest, case file page A002.
12 Report of interview witness A, case file page G01 002.
13 Report of interview witness 0232684, case file page B06 001.
14 Report of interview witness T20, case file page G04 010 ff.
15 Report of notice of arrest, case file page A003 + detention order of 22 November 2010, separately in the case file.
15 Report of interview [Witness 1] case file page G03 002.
17 Report of interview [Witness 1] case file page G03 027.
18 Report 27-280857 A 004, case file page A004.
19 Court of Appeal of The Hague, 12 April 2002, National Case-Law Number [*LJN, Landelijk Jurisprudentie Nummer*] AE4747[0].
20 Report of the interception of group of pirates on 23 November 2010, case file page B03 019.
21 Report of notice of arrest, case file page A003.
22 Report of interview IBS of 29 November 2010, separately in the case file.
23 Rotterdam District Court 17 June 2010, National Case-Law Number [*LJN, Landelijk Jurisprudentie Nummer*] BM8116[0]