

**MARITIME PIRACY AND ARMED ROBBERY  
AGAINST SHIPS: EXPLORING THE LEGAL AND THE  
OPERATIONAL SOLUTIONS. THE CASE OF  
MADAGASCAR**

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## Abstract

Maritime piracy and armed robbery against ship are one of the contemporary challenges of the maritime industry. These two phenomena have a global impact on maritime trade and security. Nowadays, the Gulf of Aden and the Indian Ocean are considered high risk areas in terms of piracy and armed robbery against ships activities. In this regard, both the international community and the coastal States of the region have deployed every effort to try to find ways to address the problem. Being part of the region, Madagascar faces the same challenges like the coastal States of the Eastern Africa and the Western Indian Ocean region in terms of maritime piracy and armed robbery against ships threat level, and the organization as well as the response capacity to tackle these crimes. The following research paper proposes a piracy response model for Madagascar by analyzing the manifestation of the modern maritime piracy and armed robbery against ships, the existing international and national legal framework on the matter, the experiences of the international community and regional coastal States in addressing the Somalia case and the current operational arrangement Madagascar in addressing the issue. Considered to be at the basis of any solutions to maritime piracy and armed robbery against ships, the legal and the operational aspects are thoroughly discussed. The first part of the research paper analyzes the international legal framework on maritime piracy and armed robbery against ships, the national legislation models of Madagascar's neighboring countries on the matter, and the existing Malagasy legal framework. Recommendations are proposed to reform the legislation and the necessity of improving the judicial capacity. The second part of the research paper focuses on how to improve the operational arrangement to combat maritime piracy and armed robbery against ships in Madagascar by looking at the international and regional operational initiatives in the Eastern Africa and Indian Ocean Region, assessing the current operational response of Madagascar and suggesting solutions for the improvement. It is acknowledged that without political will and support the legal and operational solutions will not be efficient and achieved. Throughout the research paper, the intricacy of addressing maritime piracy and armed robbery against ships and the necessity of federating and integrating several components are highlighted, moreover the value of coordination and cooperation at the national, regional and international levels is underlined.

**Keywords:** *Maritime piracy, armed robbery against ships, legal framework, operational response, politics, regional cooperation, international cooperation.*

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## Acronyms

AIS	Automatic Identification System
AMISOM	African Union's Military Mission in Somalia
APMF	Agence Portuaire, Maritime et Fluviale (Port, Maritime and Waterways Agency)
BMP	Best Management Practices for Protection against Somalia Based Piracy
CC-Mar	Allied Maritime Component Command
CCTV	Closed Circuit Television
CGPCS	Contact Group on Piracy off the Coast of Somalia
CHS	The 1958 Convention of the High Seas
CMF	Combined Maritime Task Force
COMESA	Common Market for Eastern and Southern Africa
CPC	Criminal Procedure Code
CRSR	The 1951 Convention Relating to the Status of Refugee
CRC	The Convention on the Rights of the Child
CSO	Company Security Officer
CTF	Combined Task Force
DCCTF	Djibouti Code of Conduct Trust Fund
DCoC	Djibouti Code of Conduct
EAC	East African Community
EEZ	Exclusive Economic Zone
ESA-IO	Eastern and Southern Africa-Indian Ocean Regional meeting on Piracy and Maritime Security
EUNAVFOR	European Naval Forces
FSC	Fisheries Surveillance Centre
GMDSS	Global Maritime Distress Satellite System
HC	International Convention against the Taking of Hostages known as the Hostage Convention
HRA	High Risk Area
IAMSAR	International Aeronautical and Maritime Search and Rescue Manual

ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
ICCPR	International Covenant on Civil and Political Rights
IGAD	Inter Governmental Authority on Development
ILC	International Law Commission
ILO	International Labor Organization
IMB	International Maritime Bureau
IMB PRC	International Maritime Bureau Piracy Reporting Centre
IMO	International Maritime Organization
INTERPOL	International Police and Crime Organization
IRCC	Inter-Regional Coordination Committee
IRTC	International Recommended Transit Corridor
ISAN	International Seafarers Assistance Network
ISC	Information Sharing Centre
ISPS	The International Code for the Security of Ships and of Port Facilities known as the ISPS Code
Km	Kilometer
LRIT	Long Range Identification and Tracking
LOSC	Law of the Sea Convention, 1982 known as the United Nations Convention on the Law of the Sea, 1982
MARLO	United States Navy Maritime Liaison Office
MOC	Maritime Operating Centre
MOU	Memorandum Of Understanding
MPRA	Maritime Patrol and Reconnaissance Aircraft
MPRH	Maritime Piracy Humanitarian Response
MRCC	Maritime Rescue Coordination Centre
MRSC	Maritime Rescue Sub-Centre
MSA	Maritime Situational Awareness
MSC-HOA	Maritime Security Centre –Horn of Africa
NATO	North Atlantic Treaty Organization
NSC	NATO Shipping Centre

OCC	United Nations Convention on Transitional Organized Crime known as the Organized Crime Convention
OHQ	Operation Headquarters
PCASP	Privately Contracted Armed Security Personnel
PFSO	Port Facilities Security Officer
PFSP	Port Facilities Security Plan
PIU	Project Implementation Unit
PMSC	Private Maritime Security Company
RAPICC	Regional Anti-Piracy Prosecutions Intelligence Coordination Centre
RECAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
RMP	Recognized Maritime Picture
ROE	Rules of Engagement
SADC	Southern African Development Community
SAR	Search and Rescue
SHADE	SHared Awarness and Deconfliction
SOLAS	International Convention for Safety of life at Sea, 1974, as amended known as the SOLAS Convention
SOS	Save Our Seafarers
SPM	Ship Protection Measures
Sq	Square
SRR	Search and Rescue Region
SSA	Ship Security Assessment
SSAS	Ship Security Alert System
SSO	Ship Security Officer
SSP	Ship Security Plan
SUA	The 1988 International Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation known as the SUA Convention
UAV	Unmanned Aerial Vehicle
UDHR	Universal Declaration of Human Rights

UK	United Kingdom
UKMTO	United Kingdom Maritime Trade Operation Centre
UN	United Nations
UNGAR	United Nations General Assembly Resolution
UNODC	United Nations Office on Drugs and Crime
UNODC CPP	UNODC Counter-Piracy Programme
UNSCR	United Nations Security Council Resolution
USA	United States of America
VPD	Vessel Protection Detachment
VDR	Voyage Data Recorder
WFP	World Food Programme
WG	Working Group

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## Introduction

### 1. Background and context:

In the actual globalized world, the security of the oceans is paramount for the humanity. Indeed, Oceans are not only the platform on which is performed the transport of 90% of goods<sup>1</sup> that sustains the world economy but they provide resources of various sorts (Living and non-living) that supports the livelihood of people on land today and for the future generation. Several activities that guarantee life on land are performed at sea. Hence, order and security at sea, considered as indirect wealth generator and enabler, is one of the core pillars for oceans sustainable wealth generation<sup>2</sup>. Unfortunately, order and security at sea have been threatened by illegal and criminal activities among which have belonged to for centuries maritime piracy and armed robbery against ships. In fact, maritime piracy and armed robbery against ships can be considered as a plague that has affected the maritime domain since seaborne trade occurred in the history of mankind. Their occurrence has been up and down in switchback depending on the era and the region.

Considered not existing anymore or at least occurring at a reasonable level, maritime piracy and armed robbery against ships have thrived and regained its status as amongst the number one threats and contemporary challenges of the international community and coastal States since few decades. Their occurrence varies slightly from a region to another but their impacts are national, regional and global. At some stage, each and everyone bears the consequences of their outbreak in a close or remote manner if they are not prevented or combated. According to Hirsi, ‘pirates are not fish; they don’t live in the sea, they live in the cities.....’<sup>3</sup>. This statement seems to indicate that maritime piracy and armed robbery against ships problems are primarily a land problem and should be solved on land before solving it at sea. Being a land problem, it should be then solved firstly by the State to which the land and the perpetrators belong to. In other words, it is first and foremost a national problem before being an international one. Therefore it is important to strengthen national capacity to prevent and address maritime piracy and armed robbery against ships to sustain the reduced

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<sup>1</sup> International Maritime Organisation, *International shipping facts and figures-Information resources on trade, safety, security, environment*, London: Maritime Knowledge Centre, 2012, at p.7

<sup>2</sup> Bailet, F.N., Crickard, F.W, & Herbert, G.J, *Integrated maritime enforcement : A handbook*, Halifax: Dalhousie University, 1999, at p.6

<sup>3</sup> Hirsi, A., *Somali Sea-Piracy : Business model or resource conflict?*, Wardheer News, 2011, at p.22.

occurrence or the eradication of these crimes. Nevertheless, the effort of coastal States should be supported by the regional and the international community to be effective on a global basis. Stressing on prevention and capacity building on a national level will diminish the regional and the international community forefront active role which should be the last resort when things go wrong and are out of hand at State level. The main goal is to fix things before it breaks to avoid a new Somalia case. It is always wise to prevent rather than cure.

### **1.1 Definition of terms:**

The word “*pirate*” has its root from the Latin word “*pīrāta*” where the notion of ‘*sea robber*’ originated and from the Greek word “*peirātés*” which means ‘attacker’ or ‘marauder’ as a noun originating from the verb “*peiran*” signifying ‘attempt’ or ‘attack’<sup>4</sup>. Therefore, a pirate is etymologically a person who undertakes an attempt of attack or an actual attack on someone<sup>5</sup>. From its origin, the notion of attempt and actually perpetrating the act have been already embedded into the notion of pirate. The definition of the word “Piracy”, which is the acts committed by pirates, has evolved throughout the history depending on the occurrence of the act itself and the modus operandi of the perpetrator as well as the era. If for a long time the notion of piracy has only been related to the sea transportation and maritime activities, the usage of this word has extended to the air transportation sector, to the domain of intellectual property and other fields such as broadcasting. Indeed, nowadays, we talk a lot about air piracy, software piracy, pirate radios and televisions, etc. Hence, the word ‘piracy’ is generally used to refer to illegal acts and unauthorized activity. Nevertheless, despite today’s random use of the word “piracy” in various fields, it has retained its original reference to the maritime arena depicting acts of hostility, depredation, robbery, or violence perpetrated at sea against a ship, property carried on-board, or persons travelling with the ship either they are crew member or passenger. With the codification of customary international law of piracy through the 1958 Convention on the High Seas (CHS) and the 1982 United Nations Conventions on the Law of the Sea known as the Law of the Sea Convention (LOSC), an internationally recognized definition of maritime piracy was introduced. Later on, following the awareness of the issues related to the definition of maritime piracy to be defined as a crime on the high seas

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<sup>4</sup> Ayto J., *Word origins : the hidden histories of English words from A to Z*, London: A&C Black Publishers Ltd, 2005, at p.379

<sup>5</sup> *Id.*

or outside the jurisdiction of any State, it was necessary to find another notion to describe similar acts but that are perpetrated within the territorial sea, archipelagic and internal waters or simply within the jurisdiction of a State. It was then that the International Maritime Organization (IMO) initiated the usage of the notion defined as “armed robbery against ships” through its resolutions related to maritime piracy.

For the purpose of this research paper, *maritime piracy* is defined as stated in the LOSC in its article 101 and consisting of the following acts:

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

*Armed robbery against ships* or *Armed robbery at sea* is defined as provided in the IMO resolution A.1025(26) related to the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships and covers the following acts:

- (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and direct against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;
- (b) any act or inciting or of intentionally facilitating an act described above.

## **1.2 Maritime piracy and armed robbery against ships: A global phenomenon.**

As previously stated, maritime piracy and armed robbery against ships have been present around the world since ancient time. It has flourished mainly in regions where social and economic problems, lack or weakness of land and maritime law enforcement and political turmoil occur and subsist. Their occurrence or manifestation varies somewhat from one region

to another. Once the level of the threat in one region for a particular type of maritime piracy and armed robbery against ships is reduced at an acceptable level, other outbreaks occur in other areas presenting the symptomatic criteria that enable the crime to thrive.

Twenty first century prone areas of maritime piracy and armed robbery against ships are identified to be in 10 different regions of the world namely (1) East Africa, (2) Indian Ocean, (3) West Africa, (4) Arabian Sea, (5) Malacca Strait, (6) South China Sea, (7) Latin America and the Caribbean, (8) Mediterranean Sea, (9) North Atlantic, and (10) regions that are classified “Others” where the occurrence of the two crimes are at a very low rate or even rare<sup>6</sup>. Surprisingly, even the supposed to be the most secure maritime space in the world can be affected by maritime piracy and armed robbery against ships as demonstrated by the ‘M/V Arctic Sea’ case that took place in the Baltic Sea in 2009<sup>7</sup>. From the identified prone areas, it appears that acts of maritime piracy and armed robbery against ships happen in different parts of the globe and that tends to attribute them as a worldwide phenomena. Between 1984 to 2011, it was reported 6,260 attempted and actual attacks worldwide<sup>8</sup>. As of 2011 alone, there were 544 occurred and attempted attacks which was of 55 increase (11.3%) compared to the 2010 statistics<sup>9</sup>.

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<sup>6</sup> International Maritime Organization, *MSC.4/Circ.180, Reports on acts of piracy and armed robbery against ships, annual report-2011*, March 1, 2012, at annex 4.

<sup>7</sup> Walker, P., Mystery of the Arctic Sea: ship feared seized by pirates in European waters , *The Guardian*, August 11, 2009, at <http://www.guardian.co.uk/world/2009/aug/11/arctic-sea-missing-ship-pirates>

<sup>8</sup> International Maritime Organization, *MSC.4/Circ.180, Reports on acts of piracy and armed robbery against ships, annual report-2011*, March 1, 2012, at p.3.

<sup>9</sup> *Ibid* at p. 3.

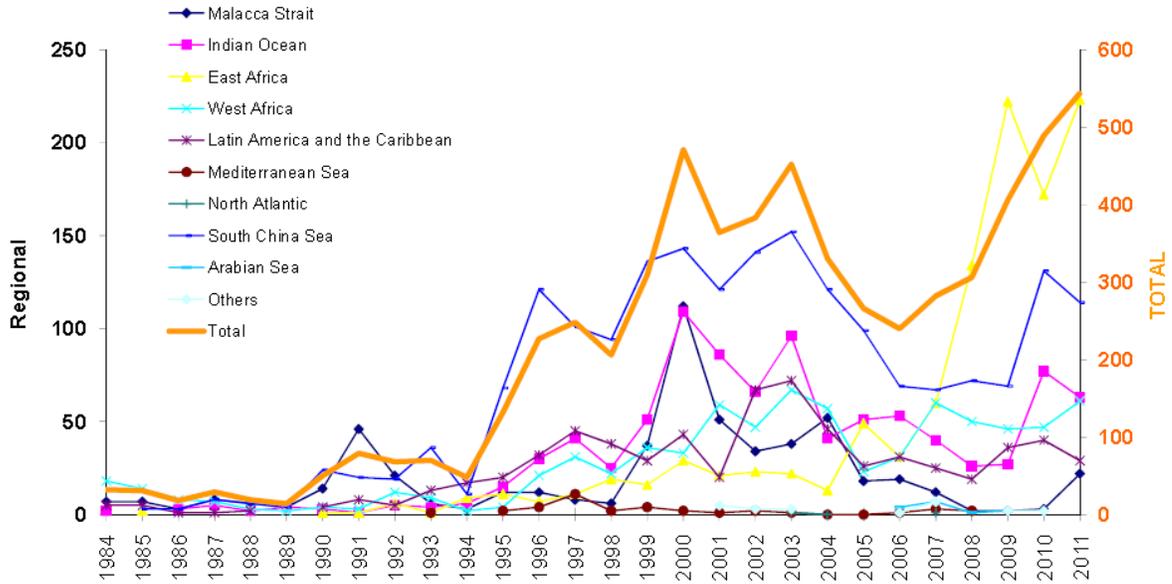


Fig.1 Worldwide yearly statistics of maritime piracy and armed robbery against ships incidents since 1984 (Source: IMO 2011 annual report, Annex 4)

Maritime piracy and armed robbery against ships differ in intensity, *modus operandi*, targets and motives in each prone region. In some case, ships are boarded with the minimum force for cash and valuables from the ship’s safe (Asian case). In some instances, they are attacked with more violent actions for the purpose of stealing the cargo (West African case is an example) and/or the ship itself (as realized in the “M/V Alondra Rainbow case”). The last category is the kidnapping for ransom by taking the crew, the ship and the cargo hostage and ask for ransom (the Somalian case).

### 1.3 Madagascar and maritime piracy and armed robbery against ships:

Madagascar is an island located between 11° 57’S and 25° 30’S of latitudes and 043° 14’E and 050° 27’E of the longitudes. It is separated to southeastern African countries (South Africa, Mozambique and Tanzania) by the Mozambique channel and it has as island neighboring States the Islamic Republic of Comoros (in the northwest), the Republic of Seychelles (in the north) and the Republic of Mauritius (in the east). There are two French overseas territories that are near Madagascar. They are the island of Mayotte (in the northwest close to Comoros) and the island of Reunion (in the east next to Mauritius). As such, the island

is situated in between the East African region and the Western Indian Ocean region which happen to be at present the areas of operation of the Somali pirates.

### **1.3.1 In the past:**

In the history of maritime piracy and armed robbery against ships, Madagascar was known to be a pirates' notorious haven even before the golden age of piracy because of its location close to two trading routes which are the Red Sea and the Indian Ocean<sup>10</sup>. It offered to pirates some other advantages too (Sheltered coves, supplies of food and fresh water, protected natural bays, etc.)<sup>11</sup>. Additionally, the island attracted pirates due to yet non occupation of the land by Europeans and the hospitality of some local population willing to trade and interact with them. Indian Ocean pirates known as the "Red Sea Men" preying on Moorish treasure fleets used Madagascar and its surrounding islands as a base of operations at the end of the seventeenth century<sup>12</sup>. Afterwards, the island drew more pirates partly due to the intensity of suppression of piracy and the downfall of the piracy business elsewhere such as Europe and the Carribean<sup>13</sup>. Several pirate bases were established around the island. They were mainly located in naturally protected areas such as Ranta Be's Bay and Sainte-Marie Island on the east coast, Saint Augustine's Bay in the south west, Fort Dauphin in the south east, and Diego-Suarez or Antsiranana's Bay in the north. Sainte-Marie Island hosted around 1, 500 pirates with seventeen vessels by 1700 and still have up to present time the vestige of their presence. Diego-Suarez or Antsiranana's bay was known to be the place where Misson established his *Libertalia* Republic. He founded an autonomous pirate's haven there where the pirates' community members called themselves as *Liberi*, abandoned their former nationality and declared their loyalty only to "God and freedom" and nothing else<sup>14</sup>. Eventually, *Libertalia* collapsed after being attacked by the local kingdom by the end of the seventeenth century. Apart from Misson, Madagascar hosted well known pirates such as Thomas Tew, Henry Every, William Kidd, Christopher Condent, Edward England and Thomas White<sup>15</sup>.

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<sup>10</sup> Vallar, C., *Notorious pirate havens part 3: Madagascar*, 2002, at <http://www.cindyvallar.com/havens3.html>

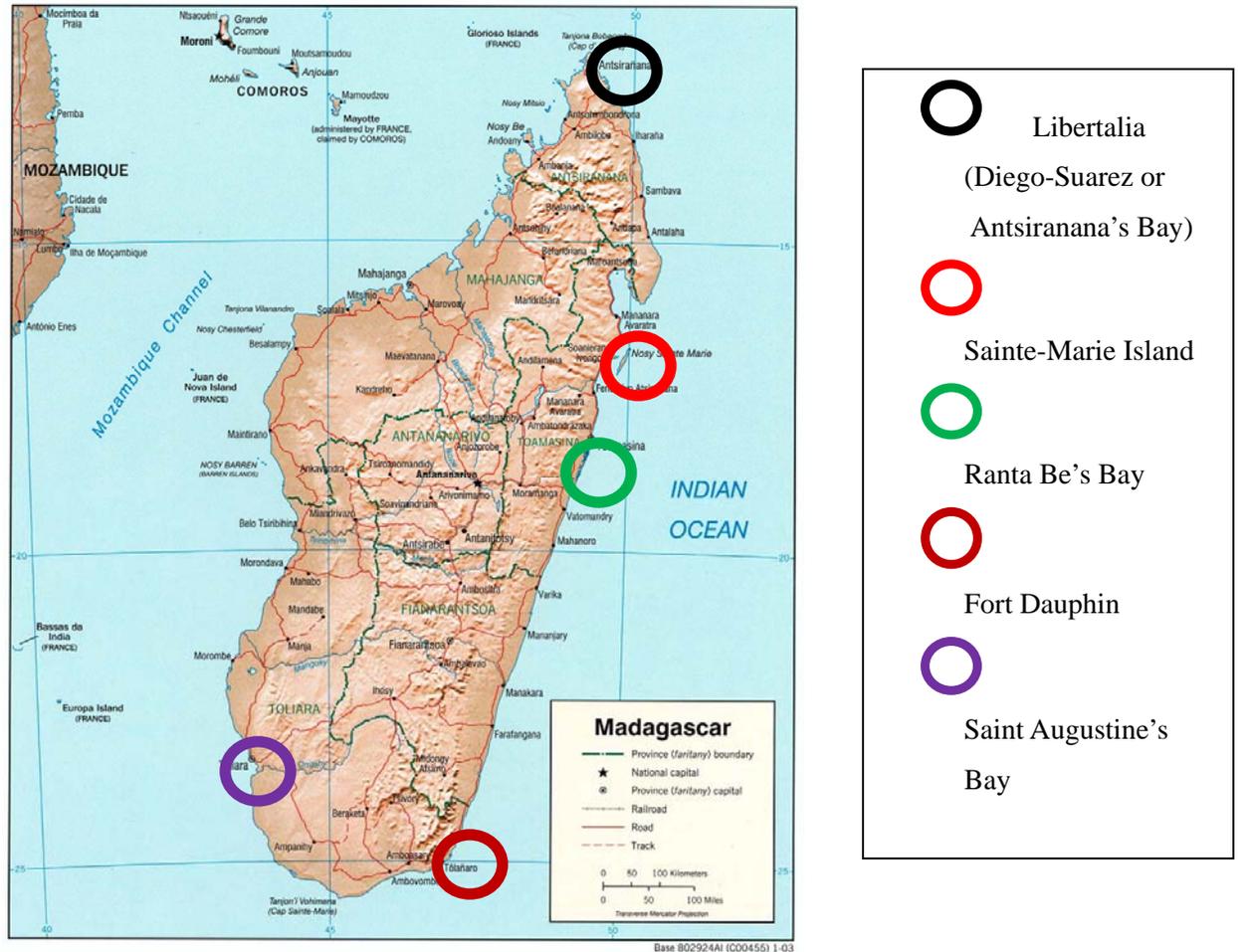
<sup>11</sup> *Id.*

<sup>12</sup> Leeson, P.T., *The invisible hook: the hidden economics of pirates*, New Jersey: Princeton University Press, 2009, at p.8

<sup>13</sup> *Ibid* 10

<sup>14</sup> Keucheyan, R., *Spectralité pirate*, at <http://www.scribd.com/doc/27065741/6881-Pirate-Spectrality>

<sup>15</sup> *Ibid* 10



Map. 1 Bases of pirates in Madagascar in seventeenth and eighteenth century

The presence of pirates in Madagascar diminished by the time and especially when Madagascar became a French colony by 1896 due probably to the French Naval presence.

### 1.3.2 Modern time:

Madagascar began to be threatened by maritime piracy and armed robbery against ships in the modern time when the Somali piracy started to outbreak and especially when the mother ship system was adopted by the pirates as part of their tactics. Indeed, sea areas around Madagascar (East Africa and West Indian Ocean regions) are infected by the Somali piracy and starting 2010 they have reached the territorial sea under Madagascar's jurisdiction.

1.3.2.1 *Outbreak of maritime piracy and armed robbery against ships in the sea areas around Madagascar:*

East African and West Indian Ocean regions, where Madagascar is located, are considered high risk areas in term of maritime piracy and armed robbery against ships activities due to the outbreak of the Somali based piracy. For the last five years, despite the presence of the international naval forces in the area, the average number of piracy incidents has remained around 170 per year<sup>16</sup> which is one of the highest numbers of incidents compared to other regions in the world.

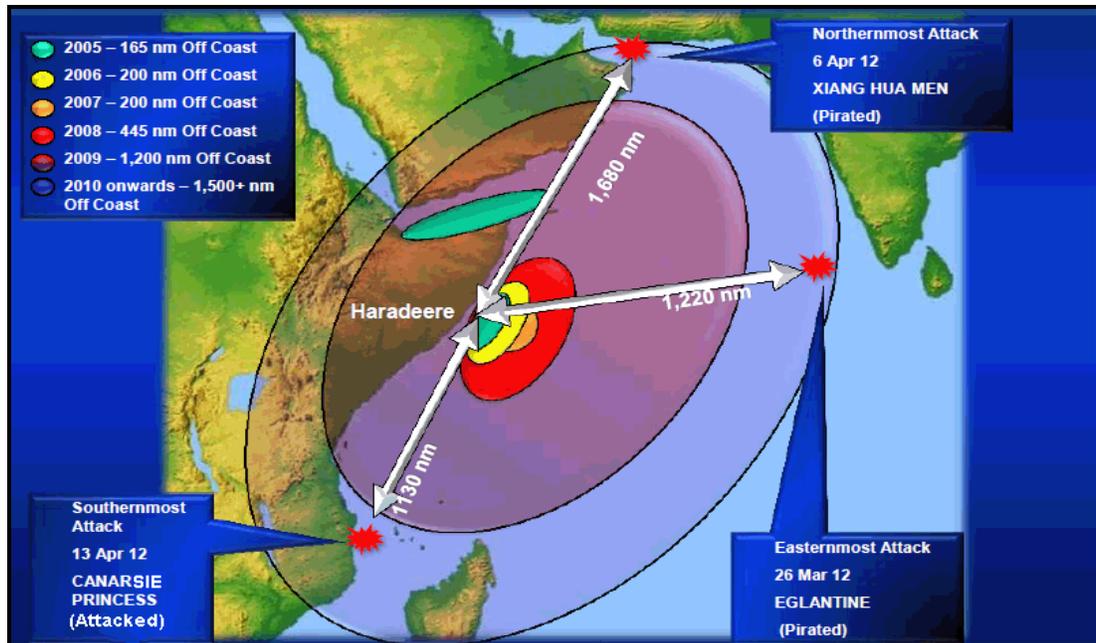
EU Naval Force Somalia - Operation Atalanta				
	STATISTICS			
	UPDATED: 25/06/2012			
Currently held by pirates	Vessels <sup>1</sup>		Hostages <sup>2</sup>	
	7		211	
Since 2009				
WFP Escorts	160			
AMISOM Escorts	126			
Tonnes of food delivered	925 451			
Pirates transferred to competent authorities with a view to their prosecution	128 (68 prosecuted)			
	2009	2010	2011	2012
Attacks <sup>3</sup>	117	127	151	27
Pirated <sup>4</sup>	46	47	25	5
Total incidents	163	174	176	32
Disruptions <sup>5</sup>	14	65	28	11
Pirate Success Rate	28%	27%	14%	

1 Plus an unknown number of unconfirmed Dhows and smaller vessels including their crew  
2 Estimated  
3 An event where suspected pirates have located and closed on a vessel in a positive attempt to gain control of it.  
4 A ship successfully boarded by pirates who subsequently take full control of propulsion and steering.  
5 An action that renders a pirate group incapable of further pirate operations.

Table 1 Gulf of Aden, East Africa and Indian Ocean region Piracy statistics  
(Source: EUNAVFOR\_ <http://www.eunavfor.eu/press-2/downloads/>)

Having adapted their way of conducting attacks to the constraints on land and at sea, Somali pirates continue to dominate the sea area of the region and have become more and better organized as well as more violent in their attack. During the last few years, the trend is the usage of mother ships along with small units in order to expand the area of action and provide flexibility during attacks.

<sup>16</sup> Based on EUNAVFOR statistics



Map. 2: Expansion of pirate operations in East Africa and Indian Ocean regions

(Source: EUNAVFOR-[http://www.eunavfor.eu/wp-content/uploads/2011/08/2-Informationbroschure\\_english\\_25.06.2012.pdf](http://www.eunavfor.eu/wp-content/uploads/2011/08/2-Informationbroschure_english_25.06.2012.pdf))

Consequently, as depicted in Map 2, Somali pirates have been able to operate almost 1,680 nautical miles far from their Somalia home base thanks to the mother ship concept. The Somali based piracy has a regional and a global impact. Globally, it cost on its own between \$ 6.6 and \$ 6.9 billion for the year 2011 with 1,118 seafarers held hostage among whom 24 lost their lives<sup>17</sup>. Similarly, regional coastal States economy has been severely hit by the outbreak of piracy. In fact, in 2011, Kenya faced grave consequences of Somali piracy on its trade as a result of high maritime transport cost, a loss of between \$129 and \$795 million in the tourism sector and had to face a huge problem of Somali refugee at its border<sup>18</sup>. Seychelles had its tourism and fisheries industry recession too<sup>19</sup>. Therefore, these two countries have taken steps to combat maritime piracy by improving their national legislation, the judicial and the incarcerating system, the operational and information management system.

Due to the global impact of Somali Piracy, international naval forces are present in the Gulf of Aden, off the coast of Somalia and the Indian Ocean down to the limit of latitude 15°

<sup>17</sup> Oceans beyond Piracy, The economic costs of Somali piracy 2011, *One Earth Foundation*, at p.1

<sup>18</sup> *Ibid.* at pp.32-33

<sup>19</sup> Lang, J., *Report of the Special Adviser to the Secretary-General on Legal Issues related to Piracy off the Coast of Somalia*, January 18, 2011, at p.13

00'S. The international naval forces are composed essentially by the EU NAVFOR, the NATO, the Combined Task Force and other navies from countries like China, South Korea, Russia, Japan, Pakistan and India. The presence of the said international naval forces in the area has diminished the success rate of the pirates' attacks and has had, at some extent, a dissuasive effect. Nevertheless, it has not changed too much the number of piracy incidents but it tends to move the piracy activity further south in the Mozambique Chanel and the southern part of the Indian Ocean. In other words, the Somali piracy has been pushed toward Madagascar's maritime zones and has begun to pose lots of challenges to the country.

#### *1.3.2.2 Maritime piracy and armed robbery against ships occurs off the coast of Madagascar:*

. Between 1991 and 2008, there were around 08 piracy attacks in the vicinity and within the maritime space off the coast of Madagascar<sup>20</sup>. However, the number of piracy acts increased in the following years especially in 2010 where Madagascar knew around 13 piratical acts with a majority occurring close to the coastline within the territorial sea<sup>21</sup>. The attacks are perpetrated by Somali pirates who arrived off the coast of Madagascar using mother ships.

The multinational naval counterpiracy operations in the Gulf of Aden, in the Somali Basin and in the Western Indian Ocean have reduced the rate of successful maritime piracy and armed robbery against ship attacks in the area of operations of the multinational naval forces. Nevertheless, it has not stopped the Somali pirates and armed robbers at sea to cease their activity but instead they have tried to find other ways and tactics to adapt to the situation such as conducting attacks outside the multinational naval forces area of operations in introducing the mother ship system<sup>22</sup>. Indeed, in using a mother ship, they are able to expand their area of operation and sustain longer at sea. Hence, the Somali pirates are now operating hundreds or, even in some case, thousand of miles out in the ocean up to the Gulf of Oman, the

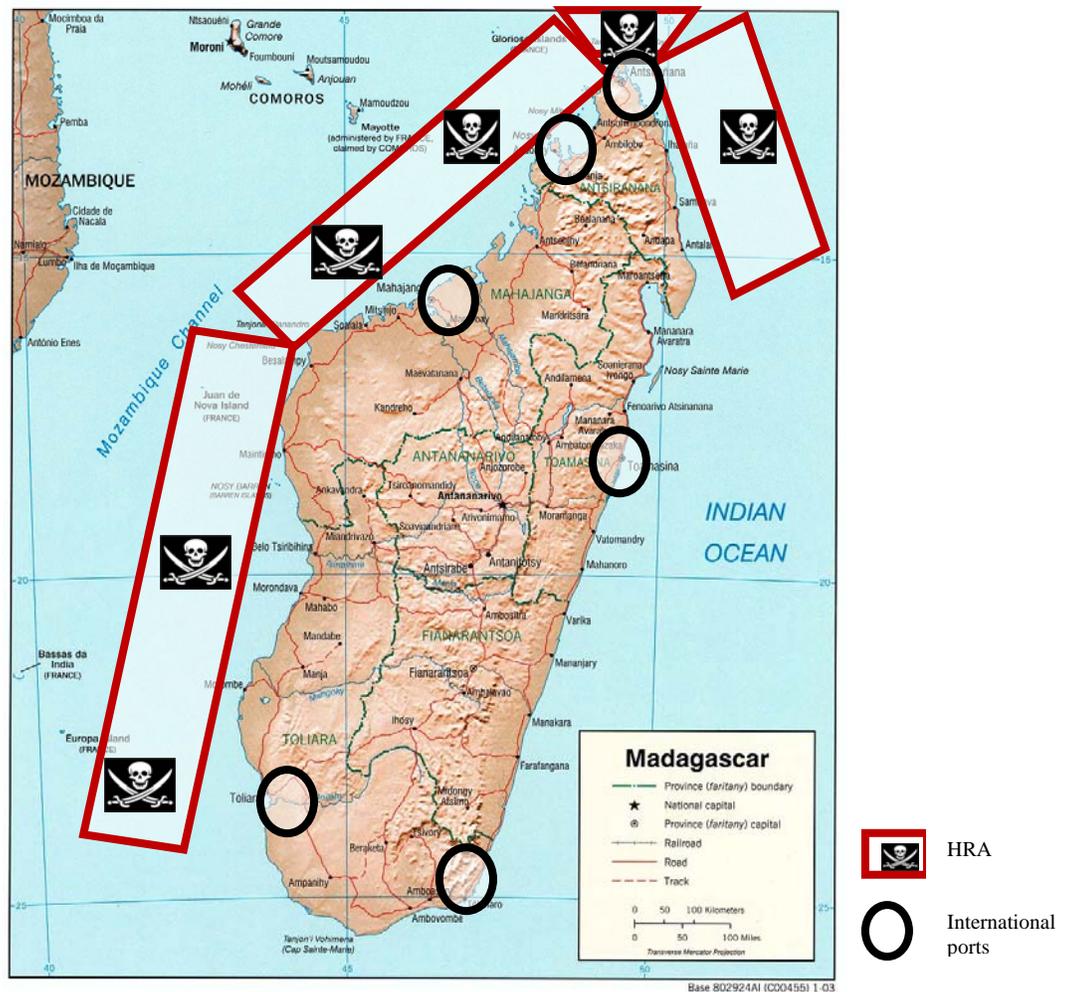
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<sup>20</sup>Amirel, S.E., Amirel, S.E., La piraterie maritime en Afrique contemporaine, ressort locaux et internationaux des activités de piraterie au Nigeria et en Somalie, *Politique Africaine*, 116, 97-120, 2009, at p. 99

<sup>21</sup>Rasolofonirina, R.H., *Mémoire sur la lutte contre la piraterie à Madagascar*, Conference presentation presented at the World Maritime Day conference, Antsiranana, Madagascar, 2011, slide 9-15

<sup>22</sup>Homan, K. & Kamerling, S., *Operational challenges to counterpiracy operations*, in Ginkel, B. & Putten, F.P.(Eds), *The International Response to Somali Piracy, Challenges and Opportunities*, 2010, The Netherlands: Martinus Nijhoff Publishers, at p. 89

west coast of India or looking for prey southward off the coast of Madagascar and the Mozambique channel. In referring to the IMO and IMB reports on maritime piracy and armed robbery in East Africa as well as the Felicity and Zoulficar cases, it appears that Madagascar is mainly exposed to Somali pirates and armed robbers in the northern part (North west and north east coasts) and in the west coast in the Mozambique channel.



Map 2 Somali piracy and armed robbery against ships HRA off the coast of Madagascar

The maritime regions that are threatened by Somali pirates and armed robbers at sea are areas where the most of the maritime activities (Shipping lanes to Madagascar international ports, fishing zone, maritime tourism area, and oil exploration zone) are concentrated. In addition, the Mozambique channel is known as the area of transit of tankers which plan to pass the cape of Good Hope to join the Atlantic Ocean. As illustrated in the Felicity and Zoulficar cases, the

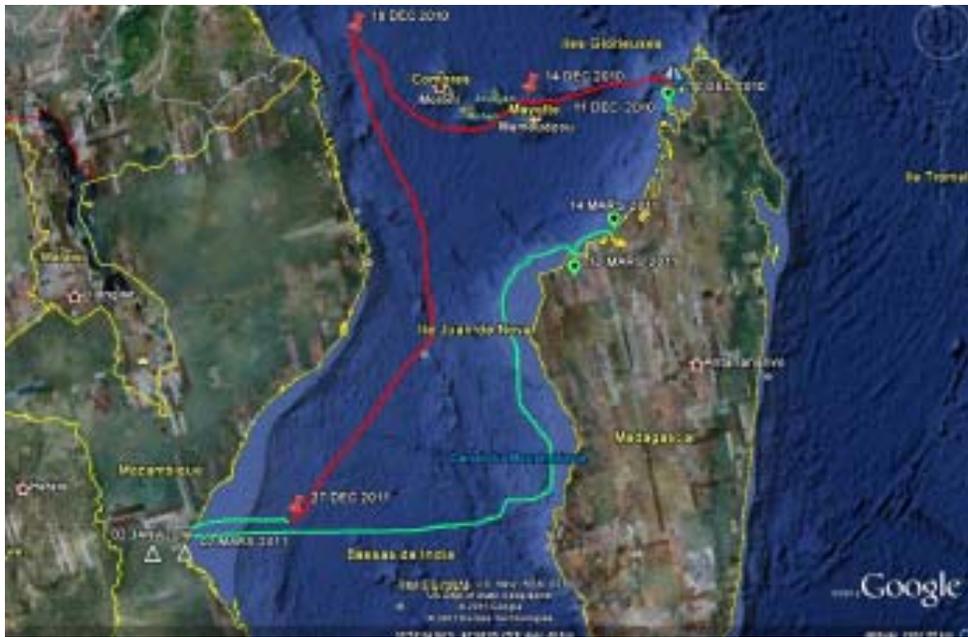
the Somali pirates and armed robbers use deadly weapons (AK 47 and RPG) and acting with brutality as well as high degree of violence towards the crew and eventual passengers. They can attack any type of vessel either for the purpose of the kidnap for ransom or at the same time using the captured vessel as a mother ship.

Two particular cases need to be highlighted to illustrate that Madagascar is really concerned about maritime piracy and armed robbery problems: The *Felicity* case and the *M/V Zoulficar* case.

*The Felicity case*<sup>23</sup>: The *Felicity* is a sailing vessel of Malagasy flag and belonging to a Malagasy national. On December 12, 2010, at 06.00 a.m. the sailing vessel, with 11 people on-board ( 9 Malagasy citizen among which 3 women, one Italian and the captain who is a Seychelles national), was attacked by 7 Somali pirates armed with AK47 and RPG on-board a skiff at approximately 7 nautical miles off the coast of the Mitsio Island, in the northwestern part of Madagascar. Once the pirates seized control of the *Felicity*, the crew was locked in one of the cabin on-board and they asked the captain to head to Somalia. After the seizure, a whaler that was used by the pirates as a mother ship approached the *Felicity* and transferred supplies such as rice, sugar, beans, Jerry cans of gasoline and an aluminum ladder of 4 meters. Afterwards, the captain was asked to sail to Tanzania and the Mozambique channel where the pirates attacked other ships in the area using *Felicity* as a mother ship. Two men would stay on board *Felicity* and the other 5 would go to undertake attacks with the skiff. During the hijacking, the Captain of the *Felicity* was all the time under constant threat and sometimes beaten by the Somali pirates. Personal effects of people on board the vessel were robbed. Eventually, the Somali pirates succeeded to board a fishing vessel after several failures and they left *Felicity* adrift in the middle of the Mozambique channel. Estimating the position of the vessel at about 100 nautical miles of Mozambique and far from Madagascar, the captain decided to sail to port of Beira, Mozambique and arrived there on January 02, 2011. The Mozambican authority contacted the Malagasy authority to inform about the situation and the *Felicity* were able to leave Beira port on March 07, 2011. They reached , Mahajanga, Madagascar on March 14, 2011 at 15.00.

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<sup>23</sup> Based on the *Felicity*'s Captain report and the National Focal Point on Piracy report



Map 3 The tracking of the journey of the *Felicity* while it was hijacked by Somali pirates (in Red) and while it was freed (in green)

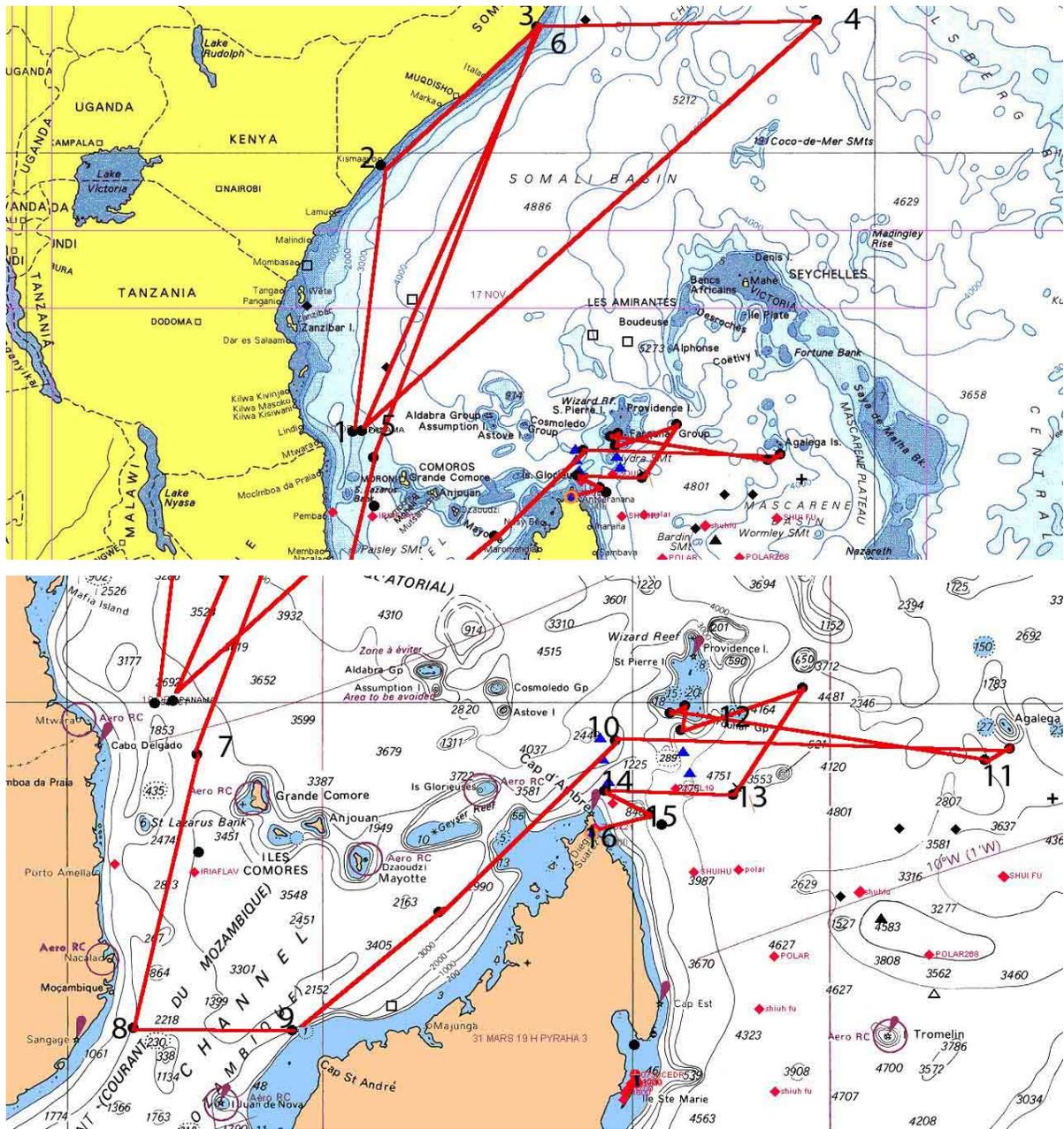
(Source: Maritime Operation Center, Ministry of Transports, Madagascar)

***The M/V ZOULFICAR Case***<sup>24</sup>: The M/V Zoulficar is a mixed vessel of Comoros flag. It operated between Moroni, Comoros and Dar-Es-Salam, Tanzania transporting conventional cargo and passenger. The vessel left Moroni to sail to Dar-Es-Salam on October 10, 2010 with 9 crew (4 Malagasy, 4 Comorians, 1 Tanzanian), 21 passengers (15 Tanzanians among whom 2 women and 6 Comorians among whom 1 woman) and a cargo less than 1 ton in the hold. On October 31, 2010, while underway, Somali pirates on board two skiffs attacked and fired upon the vessel. The chief engineer who was on watch at the bridge was killed during the attack. The Somali pirates managed to come on board and took control of the vessel. They ordered the captain to sail to Kismayo, Somalia. The pirates tried to ask ransom to the owner but they were convinced that he won't have the required ransom. Thus, during almost four months, the vessel was under the control of the Somali pirates and was used as a mother ship from which they launched attacks against other vessels they preyed while maintaining the crew and passengers hostage on-board. During that period, the M/V Zoulficar participated in various attacks with different pirate teams that alternated on-board. For logistics and supply, it had as

<sup>24</sup> Based on the *M/V ZOULFICAR*'s Captain report and the National Focal Point on Piracy report

base operation Rascobate where hijacked vessels are kept at anchor. The vessel was used for instance in hijacking the M/V Panama which was captured by the Somali pirates and held hostage. On January 26, 2011 the vessel left Rascobate after a replenishment for another piracy expedition with a new team of 12 Somali pirates on-board. Instructed by the pirates, the Captain was asked to sail off the coast of Comoros and then to East Africa off the Mozambican coast to look for preys. On February 08, 2011, the Captain was again ordered to sail to the northern part of Madagascar. After wandering around for several days to look for ships transiting nearby, the vessel ran out of fuel on February 20, 2011 and went adrift 37 nautical miles off the Madagascar. Reporting to the pirates' leader of the situation, the Captain of the M/V Zouficar proposed to him to ask for help on land in Madagascar but in that case he suggested that they needed to throw away all the weapons in the sea. On February 25, 2011, they decided to go to Antsiranana port with a skiff on board which were 6 persons (2 pirates, 3 crew and the captain). Once they arrived at the port of Antsiranana, they were arrested by the Malagasy authority and were questioned about their presence. A military operation was then organized by the Malagasy authority to capture the remaining pirates on-board and rescue the crew as well as the passenger. With the co-operation of a maritime patrol aircraft from the ATALANTA operation, the M/V Zouficar was located. Like a coincidence, the offshore patrol vessel of the Malagasy Navy was under reparation at the time so the Malagasy Navy was obliged to ask a civilian port tug to embark the Navy and military personnel to arrest the remaining pirates on-board on February 26, 2011. The M/V Zouficar was located 60 nautical miles off the coast of Madagascar. Eventually, the arrest operation went well. The 12 pirates were arrested and the crew with the passengers freed. When the vessel was missing and did not arrive at its final destination, the Comorian authority informed the neighboring countries. Thus, when it was located and rescued, the Malagasy authorities informed the government of Comoros which sent its Minister of Transports to Madagascar to take care about the administrative issues related to the ship and the Comoros nationals. Due to the presence on-board the vessel of Malagasy nationals amongst the crew and the fact that the arrest was performed by the Malagasy authority, the prosecutor advised to assert jurisdiction on the case and began the prosecution procedures of the 12 pirates. They were charged with the crime of piracy, arbitrary detention, involuntary manslaughter, violence, assault and battery, and attempted rape. The pirates were put in preventive custody waiting for their trial. One of the

pirates was 16 years old. During the first trial on July 24, 2012, the judge released the under aged pirates to be put under supervision of a third party, reported the trial for another date and put again the remaining of the pirates in preventive custody.



Map 4 Tracking of the M/V Zoulficar transit during the hijacking  
(Source: Maritime Operation Center, Ministry of Transports)

From the Felicity and M/V Zouflicar cases, it can be concluded that maritime piracy and armed robbery against ships are not anymore a myth in Madagascar. It is happening within the maritime zones under its jurisdiction and have to be addressed as soon as possible with determination and seriousness. Their occurrence raises several issues in relation to sovereignty, maritime security, ocean governance, coastal States' jurisdiction, legislation, operational response, policy and political commitment. It depicts as well the complexity of the task at hand in suppressing these crimes.

Due to the outbreak of piratical act in the region where Madagascar is located, many shipping lines that deliver goods to Malagasy ports have on board their vessel Private Contracted Armed Security Personnel (PCASP). For ships flying the French flag they usually have a military Vessel Protection Detachment (VPD). The PCASP and the VPD raise a certain number of issues such as credentials, the problem of innocent passage and coastal state sovereignty, introduction of weaponry and ammunitions on Madagascar's territory and national security issues.

#### **1.4 Maritime piracy and armed robbery against ships: A potential threat to Madagascar.**

Given the existence of maritime piracy and armed robbery against ships that occur in regional seas around Madagascar and within its maritime zones, it is important to look how vulnerable the country is to face such crimes and what are the threat posed in case of an outbreak ?

##### **1.4.1 Vulnerability of Madagascar in the maritime domain:**

Three areas can be identified in terms of vulnerability of Madagascar in the maritime domain if one refers to maritime piracy and armed robbery against ships: security of Madagascar waters and coasts, dependence to maritime activities, and problems on land.

##### **- Security of Madagascar's waters and coasts:**

Madagascar is an island. As such, the sea surrounding the territory is its border. The vulnerability of the country will then depend on the fact that sea spaces around Madagascar are secure and guarded to prevent an illegal or undesirable presence and unlawful activities

therein. At present, due to lack of maritime assets, surveillance of Madagascar waters is not fully ensured or ensured to a symbolic extent. In fact, the number of means of surveillance are not proportional to the area of responsibility. Indeed, for 5,000 Km of coastline, 111, 120 Sq Km of the territorial sea, and approximately 1,140, 000 Sq Km of EEZ, the country has at disposal one offshore patrol vessel and six motor life boats. Thus, it is obvious that the vastness of the area to be secured is disproportionate to the available means. Hence, one major vulnerability is the insufficient presence and the control coverage at sea which will allow the maritime pirates and armed robbers against ships to operate without being threatened or dissuaded. Additionally, there is a lack of means to ensure the maritime domain awareness.

- Dependence to maritime activities:

As an island State, maritime activities have a big role to play in the economy of the country. Maritime trade or transport is one of the sectors on which rely the economy. Indeed, Madagascar imports in one hand lots of strategic goods such as oil, gas, food, and manufactured items. In other hand, exportation of agricultural products and some of the extracted minerals is done by sea transportation too. Thus, any disruption in maritime transport will strike on the health of the economy of the country. Fisheries and maritime tourism are also very important sectors and they are very fragile when it comes to lack of security at sea.

- Problems on land:

Problems on land can extend at sea if not managed properly. The typical case is Somalia where due to political instability, extreme poverty and lack of properly functioning government, it opens a window of opportunity for crime like piracy and armed robbery against ships to thrive. In the case of Madagascar, the likelihood of piracy activity launched from the coast of Madagascar by Malagasy citizen is also possible in the long run if one considers the political crisis and the internal security arrangement at present ashore. Indeed, following the political crisis since 2009, many people have lost their job and are still unemployed. As a result, the level of poverty has considerably increased. This situation has severely changed the internal security environment and had led to the rise of illegal activities, smuggling, theft and organized crime either in cities or in rural areas. Due to the long political crisis, people begin to lose trust on the transitional government in place, starting to challenge the official authorities up to disregard the law. Thus, Madagascar begins to face challenges in restoring law and order within the country due to the longevity of the political crisis. Eventually, if this

situation persists, it will lead to a situation of a weak state which might be exploited by unscrupulous party who can copy the Somali piracy model. Therefore, the level piracy and armed robbery against ships threat level is very high from outside the country but it might be the same as well from inside the country if precaution is not taken to prevent it.

**1.4.2** The threat posed by maritime piracy and armed robbery against ships:

Based on the above mentioned vulnerability of Madagascar in the maritime domain, the threat posed by maritime piracy and armed robbery against ships are centered in three areas that are security, economy and environment.

<b>THREATS</b>	<b>DOMAIN</b>	<b>AFFECTED SUBJECT/DOMAIN</b>	<b>RISKS</b>
<b>Maritime piracy and armed robbery against ships</b>	<b>Security</b>	Human	Injury Loss of life
		Property	Partial or total destruction Loss
		Sovereignty	Chaos at sea Loss of control of the maritime space
	<b>Economy</b>	Maritime trade	Disruption Increase in cost Loss of profit Loss of income
		Maritime tourism	Disruption Loss of income
		Fisheries	Disruption Increase in cost Loss of income
		Offshore activities	Disruption Increase in cost Loss of income

THREATS	DOMAIN	AFFECTED SUBJECT/DOMAIN	RISKS
		Energy	Disruption of supply Increase in price Impact on dependent activities
	Environment	Sea and marine life	Pollution

Table 2 Threats posed by maritime piracy and armed robbery against ships

## 2. Scope and objectives:

### 2.1 Scope of the study:

Maritime piracy and armed robbery against ships are mainly threats from outside of Madagascar. Nevertheless, similar threats from the inside the country is not to be neglected if one considers the possible extension of internal security problem toward the sea as stated in the vulnerability of the country. For this reason, addressing the problem of maritime piracy and armed robbery against ships has to cover the maritime zones ranging from the internal waters up to the high seas. Consequently, the focus of this research paper is on how to detect, to prevent and to combat these crimes when it occurs in order to make sure that the maritime zones under the jurisdiction of the country are exempted from it but to consider also maritime piracy on the high seas in case of seizure of pirates by national Navy or the involvement of a national flagged vessel and national citizen as a victim of such incident or in the perspective of Madagascar's participation to the regional and the international effort to address the issue. The areas of focus are mainly on the detection, the prevention and the response to maritime piracy and armed robbery against ships. As a response to a maritime challenge, the issue will be addressed through legal and operational aspects<sup>25</sup>.

### 2.2 Objectives:

<sup>25</sup> Bailet, F.N., Crikard, F.W., & Herbert, G.J., *Intergrated Maritime Enforcement Handbook*, 1999, Halifax: Dalhousie University, at p.11

The main goal of this research paper is to propose a pro-active response model for Madagascar to address the issue of maritime piracy and armed robbery against ships. In doing so, it aims to reach the following:

1°) To provide a proposal of a legal framework for Madagascar to address effectively the crime of maritime piracy and armed robbery against ships. The said legal framework should be the basis on which the operational setting functions and should address the challenges the operational side faces.

2°) To provide a proposal of structure, mechanism and means to operationally tackle maritime piracy and armed robbery against ships. It should cover the prevention and the response aspect of these crimes.

### **3. Methodology:**

The methodology applied throughout the research paper is based on the analysis on the existing literatures on the subject through a desktop research method. The existing international, regional and States' practice in the area of legal and operational arrangements to address the problem of maritime piracy and armed robbery against ships will be analyzed in order to draw some positive conclusions and frameworks that will be compared to the current national arrangement in Madagascar to be able to provide solutions and improvements.

For the legal framework to deal with these problems, the achievement criteria is measured through the mechanism given by the legislation to successfully arrest, prosecute, try and convict the offender when it happens. In this regards, the following key legal elements which constitute the requirement for an effective legislative regime for the repression of maritime piracy and armed robbery against ships will be used to analyze the international law, five examples of State's practices and the Madagascar's current national legislation related to the issue : Definition of the offense, criminalization of the offense, jurisdiction, enforcement measures, judicial process, human rights matters (Fair trial, a minor involved in piracy case, incarceration conditions), and international cooperation.

Regarding the operational arrangements to tackle maritime piracy and armed robbery against ships, principle embedded in the emergency management concept – Preparedness,

prevention and mitigation, response and recovery<sup>26</sup> – are taken into consideration. Hence, the existing international, regional and national operational arrangements will be studied by looking at the occurrence and the manifestation of the threat of maritime piracy and armed robbery at sea (Type of attack, targets, means and tools used to conduct the attack), the awareness of the existence of the threat (Availability of information and means to obtain the information), the preparation (Planification, training), the response (Organization, capacity and on scene operation) and the case's treatment (Treatment of suspected pirates, treatment of evidence, handover to competent national authorities, treatment of the witnesses and the victims). The analysis of the international and the regional arrangements is done in order to know what are the operational elements of success. They will be used to assess and to improve the national operational arrangements in place. The success criteria for the operational arrangements is based on the percentage of monitoring and control coverage of the concerned maritime zones and the duration of response time in case of maritime piracy and armed robbery incident at sea.

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<sup>26</sup> Ministers Responsible for Emergency Management, *An emergency management framework for Canada*, January 2011, Ottawa: Public Safety Canada, at p. 4.

## **Part I: THE LEGAL ASPECT OF COMBATING MARITIME PIRACY AND ARMED ROBBERY AGAINST SHIPS: CHALLENGES AND PROPOSED SOLUTIONS**

In the realm of preventing and combating a crime, developing and establishing a legal framework related to that crime is the basis of all actions in addressing the issue. Indeed, following the well-known adage *nullum crimen nulla poena sine lege* (No offense, no sanction without law), it becomes a necessity to have a legislation in order to be able to address a given crime. An event is only a crime when defined as such by law<sup>27</sup>. In the process, a certain number of legal issues pertaining to crime need to be identified and a consistency with the international law and the domestic legal system have to be considered.

Considering the manifestation of maritime piracy and armed robbery against ships and addressing it from the legal perspective, it becomes necessary to look at the following issues to be able to see the legal mechanism that should be put in place in order to establish, to develop, or to improve any legislation pertaining to these crimes: Definition of the offense, criminalization, jurisdiction, enforcement measures, judicial process, human rights issues, international cooperation.

- Definition of the offense: It gives the description of the acts , the type of acts and the elements that constitutes the offense. In terms of maritime piracy and armed robbery against ships, the definitional aspect has its particular importance and it has retained particular debate of legal scholars since the contemporary outbreak of these two phenomena.

- Criminalization: It is to make the offense illegal or to ascertain it as a crime and to provide an adequate penalty. When an act is criminalized, that enables to bring charges against a potential offender. Thus, criminalization is a vital process in legally addressing maritime piracy and armed robbery against ships.

- Jurisdiction: It expresses the power and the authority to decide a particular case (subject matter jurisdiction) and to bring a person before the justice and to judge his or her

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<sup>27</sup> United Nations Office on Drugs and Crime, *Principles and framework for an international classification of crimes for statistical purposes*, Report of the UNODC/UNECE task force on crime classification to the conference of European statisticians, June 2012, at p.7

rights (In personam jurisdiction). Asserting the jurisdiction is another issue that is of capital importance in addressing maritime piracy and armed robbery against ships in the sense that it appears to be the first the matter that the court is likely to look at before deciding in any case.

- Enforcement measures: It comprises all the processes and actions enabling the application of the law and making sure that it is observed. Generally, it includes the arrest and search of suspected offender and the seizure of any means used to commit the offense or the proceed of the offense. When addressing the issue of enforcement measures, it should be clarified who has the power to enforce the law and how it should be conducted.

- Judicial process: It is related to court's procedures including the prosecution and the trial. It is important to examine the judicial process in addressing maritime piracy and armed robbery because apart from asserting the jurisdiction over the case, other matters such as rules of evidence and observance of particular procedures can affect the success of prosecuting and trying the suspected offender.

- Human rights issues: Human rights are quasi-universally recognized rights nowadays. Both the international community and a large number of individual States have expressed their commitment to observe human rights in all aspects. Hence, in the domain of combating maritime piracy and armed robbery against ships, it becomes crucial to look closely at these issues as an obligation to successfully arrest, prosecute and convict the offender. Indeed, the rights of the suspected offender should be observed and particularly for children involved in such crime like in the case of Somali piracy where it is noticed a large number of young minor that is involved in the piracy business.

- International cooperation: In many maritime piracy and armed robbery at sea cases, there is usually involvement of diverse nationalities. The suspected pirates or sea robbers might be from Somalia for example. The crew, who was the victim, might be multinational (For instance from the Philippines, India, Pakistan, etc.). The ship might be a panamean flagged ship. The arresting State might be the USA whereas the prosecuting State might be Kenya. Given this international nature of most of maritime piracy and armed robbery at sea cases, it becomes essential in looking at legislation to consider international cooperation.

Having set the various elements under which the analysis will be conducted, the international law and five States' national legislation on maritime piracy and armed robbery will be looked at firstly in the following chapters. Secondly, the existing Malagasy national

legislation on the matter will be analyzed in order to propose an improvement for an effective national legislation. The final goal is to have a legislation that is in line with international law but at the same time that integrates properly the national legal system and operates without any hindrance.

## **Chapter 1: Maritime piracy and armed robbery against ships under international law and States' national legislation**

It is important to look at international law and other States' practices in the process of developing or improving a national legislation. In fact, international law can be the source of domestic legislation. Consistency of the national legislation to international instruments is often a requirement not only due to the States' obligation as parties to them but for the sake of global impact and harmonization. Looking at national legislations of other States in the Eastern Africa and Western Indian Ocean region give the opportunity to find out the way they have adapted their national legislation to address the issue and to have a sense of regional legal harmonization.

### **Section A: Maritime piracy and armed robbery against ships under international law**

Under international law, maritime piracy and armed robbery at sea have been addressed through international treaties and recommendations. Some international instruments have specific provisions related to maritime piracy and armed robbery against ships whereas others can be adapted or taken into account in the treatment of these crimes because they pertain in one way or another to crimes that are close or similar to maritime piracy and armed robbery against ships or that are treating issues related to the definition of such crimes, the criminalization, the apprehension and the prosecution of pirates and armed robbers at sea as well as human rights issues. In the following, it is worthy to analyze through the established elements of analysis those international treaties and recommendations that brought some advancement in the struggle against these two crimes in order to identify legal elements for the development of a national legislation.

### **A.1 Definitions under international law:**

When looking at international treaties, agreements and recommendations related to maritime piracy and armed robbery against ships, it appears that there are two approaches which can be pursued in defining these terms. The first approach is the zonal approach and the second approach is the generalized approach.

#### **a) The zonal approach:**

The zonal approach consists of defining maritime piracy and armed robbery against ships by putting an emphasis on the location where the act was committed as a primary criteria of the definition apart from other elements constituting the acts. As a result, it differentiates the denomination of the act depending within which maritime zones it was perpetrated.

##### - Maritime piracy:

The act is defined as maritime piracy when it occurs on the High Seas, in the Exclusive Economic Zone (EEZ) or in a place outside the jurisdiction of any State pursuant to the 1982 Law of the Sea Convention (LOSC) and the 1958 Convention of the High Seas (CHS) which contain almost identical provisions on the matter<sup>28</sup>. In its article 101, the LOSC defines maritime piracy as consisting of any of the following acts:

- (a) any illegal acts of violence or detention, or any acts of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State<sup>29</sup>;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

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<sup>28</sup> Articles 14 to 23 of the CHS which are reproduced almost verbatim in the articles 100 to 107, 110 and 111 of the LOSC contain the provisions on maritime piracy.

<sup>29</sup> In the International Law Commission (ILC) commentary on the draft article, the meaning of “ a place outside the jurisdiction of any State” is an island of *terra nullis* or the shores of unoccupied territory.

Despite the fact that the definition doesn't specify the EEZ but only the high seas and a place outside the jurisdiction of any State, it applies to the EEZ in virtue of article 58(2) of the LOSC which indicates that articles 88 to 115 (Related to the high seas) are applicable to the EEZ as far as they are not contrary to the provisions regarding this maritime zone. As coastal States exercise only sovereign rights over non-living and living resources in the EEZ, it makes the provisions on piracy applicable to this maritime zone.

Apart from the criteria of *geographical location*, the above mentioned definition requires the fulfillment and the combination of three other imperative parameters to qualify the act as maritime piracy namely the *type of acts*, the *two ships/aircrafts rule* and the *private ends requirement*. The *type of acts* that are covered by the definition are illegal violence, or detention or depredation, aiding in the operation, and inciting or facilitating the commission of the act. The *two ships/aircrafts rule* calls for the presence of two ships or aircraft, that are one as a pirate ship/aircraft and the other as a victim ship/aircraft, in order to qualify the act as maritime piracy. Indeed, not only ships on the high seas, the EEZ or a place outside the jurisdiction of any State may be used to carry out the acts but also aircrafts as far as such acts are directed against ships on the high seas<sup>30</sup>, the EEZ or a place outside the jurisdiction of any State. Nevertheless, in following the maritime piracy definition wording, piratical acts can be directed also against an aircraft on the high seas. In this regard, the hypothesis of an attack against a hydroplane on the high seas can be envisaged<sup>31</sup> as well as in the EEZ and a place outside a jurisdiction of any State. A pirate ship or aircraft is defined as the one which is under the principal control of persons having the intention to commit acts of piracy as defined in the article 101 of the LOSC<sup>32</sup>. Not only private ships or aircraft can be considered as pirate ships/aircraft but a warship, a military aircraft or a government ship whose crew has mutinied and commits piracy can be considered as such<sup>33</sup>. Hence, in such a case, their act is deemed to be committed by private ship or aircraft. If the LOSC gives a definition of a pirate ship, it

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<sup>30</sup> United Nations, Yearbook of the International Law Commission 1956, *Volume II, Documents of the 8<sup>th</sup> Session including the report of the Commission to the General Assembly*, 1957, New York: United Nations, article 39 commentary, para 1(v) at p.282.

<sup>31</sup> Satay, N. , Nadan, C.B.E & Rosenne, S. (Eds.), *United Nations Convention on the Law of the Sea 1982: A commentary, Volume III, Articles 86 to 132 and documentary Annexes*, 1995, The Hague: Martinus Nijhoff Publishers, at p. 201

<sup>32</sup> See LOSC, article 103

<sup>33</sup> See LOSC, article 102

remains silent on what can be considered as a ship. Is a canoe, or a skiff<sup>34</sup> can be considered a ship or it has to be bigger in size and has it to have a powered means of propulsion? Nevertheless, the 1988 Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (hereinafter indicated as the SUA Convention), which is applicable in the context of maritime piracy and armed robbery at sea as discussed further below, gives this definition of a ship as a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles, or any other floating craft<sup>35</sup>. In virtue of the two ships/aircrafts rule, any act committed by the crew or passengers on board a ship against the ship itself, or against persons or property on the ship is excluded from the notion of maritime piracy<sup>36</sup>. Similarly, acts committed on the high seas by stowaways or someone that got on board clandestinely in port are not piracy in the meaning of the LOSC. The *private ends requirement* is the end goal of the commission of the act which has to be a private one to be qualified as piracy. It eliminates those acts for public benefits or having political purposes<sup>37</sup>. However, in the ILC commentary, it is highlighted that the aim of robbing (*animus furandi*) is not a prerequisite but maritime piracy can be committed for revulsion or revenge reason and not only for the pure aspiration of gain<sup>38</sup>. The fact that the piracy act has to be for private ends establishes the distinction of it from a terrorism act which is mainly intended to public and political goal. Despite the complexity and possible limitations embedded in the definition of maritime piracy, it is still the quasi-worldwide recognized definition due to the large number of States that are party to the LOSC<sup>39</sup>. By considering maritime piracy happening only on the high sea and the EEZ, it has become problematic to qualify those acts that similar to piracy but happening in the territorial sea, in the archipelagic waters and in the internal waters. This has been a great concern especially when 61.8 percent of identical acts as piracy took place in the territorial waters in 1990's according to Dubner's study whereas in 2000's attacks occurred even berthed pierside or at anchor<sup>40</sup>. It was then

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<sup>34</sup> A type of small boat used by Somali pirates in piracy attacks off the coast of Somalia and the Gulf of Aden

<sup>35</sup> See SUA Convention, article 1

<sup>36</sup> Supra note 33, article 39 commentary, para 1(vi) at p.282

<sup>37</sup> Supra note 34, at p.200

<sup>38</sup> Supra note 33, article 39 commentary, para 1(i), at p. 282

<sup>39</sup> As at 1 October 2012, 164 countries are party to the LOSC representing 83,67% of the countries in the world

<sup>40</sup> Mejia, M., Maritime Gerrymandering : Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence, *Journal of International Commercial Law* 2(2), 153-175, 2003, at p.161

that the notion of “armed robbery at sea” or “armed robbery against ships” has emerged to fill the gap of the definition of maritime piracy.

- Armed robbery against ships or armed robbery at sea:

The act is classified as “armed robbery against ships” or “armed robbery at sea” when it is committed in internal waters, territorial sea or archipelagic waters. Several international recommendations and agreements recognize the notion of “armed robbery against ships” or “armed robbery at sea” as complementing “maritime piracy”. In various documents, to cover the whole maritime zones when addressing the issue, the term “piracy and armed robbery against ships” are used together. The United Nations General Assembly Resolutions (UNGAR) and the United Nations Security Council Resolutions (UNSCR) related the issue of piracy utilize this terminology. Similarly, “armed robbery against ships” is mentioned in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (RECAAP) and the Djibouti Code of Conduct (DCoC). It is used along with the term “Piracy” as defined in the LOSC. The definition of “armed robbery against ships” is given in IMO documents and particularly in the resolution A.1025(26) related to the Code of practice for the investigation of crimes of piracy and armed robbery against ships. In paragraph 2.2 of the annex of this resolution, after mentioning “Piracy” as an act defined in article 101 of the LOSC, “Armed robbery against ships” is defined as :

- (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and direct against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;
- (b) any act of inciting or of intentionally facilitating an act described above.

The definition of “armed robbery against ships” contains all the ingredients of “maritime piracy” except that the act should be committed in internal waters, archipelagic waters or territorial sea and it excludes the two ships/aircrafts rule.

#### **b) The generalized approach:**

In the opposite stand as of the zonal approach, the generalized approach proposes to define maritime piracy and armed robbery against ships based not on the location of the commission of the act but to make an adaptation of the definition of the two terms to fall under the scope

of “unlawful acts against the safety of maritime navigation” provided in the the SUA Convention, or to fit in the notion of “organized crime” stipulated in the 2000 United Nations Convention against Transnational and Organized Crime (hereinafter designated as the OCC), or to be interpreted under the definition of “hostage taking” provided in the 1979 International Convention against the Taking of Hostages or Hostage Convention (HC).

- Maritime piracy and armed robbery against ships as unlawful acts against the safety of maritime navigation:

The SUA Convention provides as offense, in its article 3, a list of unlawful and intentional acts among which maritime piracy and armed robbery against ships can fit in. Indeed, based on the zonal approach definition and the manifestation of maritime piracy and armed robbery against ships, several acts indicated in the article 3 of the SUA Convention describe the acts in the context of maritime piracy and armed robbery at sea such as seizing or exercising control over a vessel by force or threat thereof or any other means of terrorization, destroying or causing damage to a ship or to its cargo, committing an act of violence against a person on board, injuring or causing death to any person pursuant to the commission or the attempted commission of any previously stated acts<sup>41</sup>. In addition, attempting or supporting of the commission of the above acts is viewed to be an offense as well as menacing an individual or a juridical person to perform or not to perform any act, to commit any of the mentioned offenses<sup>42</sup>. It is recognized that piracy and armed robbery at sea attacks can hamper the safety of maritime navigation. Despite the fact that the SUA Convention was established following the hijacking the Italian flagged vessel *Achille Lauro* in 1985<sup>43</sup> and therefore it was primarily designed to fight against maritime terrorism, it is important to note that only the preamble of this Convention mentions about terrorism but this word does not appear anywhere else in the provisions of the Convention. The SUA definition gives certain flexibility in the sense that it does pose any restriction with regard to the presence of two ships as well as the aim of any attack. Indeed, offenses perpetrated by anyone from inside the ship are still considered.

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<sup>41</sup> See SUA Convention, article 3 para. 1(a), 1(b), 1(c), 1(g)

<sup>42</sup> See SUA Convention, article 3 para. 2

<sup>43</sup> Mukherjee, P.K. & Mejjia, M. Jr. (2006). The SUA Convention 2005: acritical evaluation of its effectiveness in suppressing maritime criminal acts, 2006, 12 JIML, at p.173

However, the convention is not applicable to a warship or a government ship used as a naval auxiliary or for customs or police purposes or laid up vessel.<sup>44</sup>

- Maritime piracy and armed robbery against ships as an “organized crime”:

Pirates and armed robbers at sea usually prepare and commit their attack in groups of individuals. All actions are relatively coordinated and each group forming the different component of one network is acting in a sort of organized and structured way with the goal of getting the ship, the property on-board or kidnapping for ransom. For this reason, maritime piracy and armed robbery against ships can be viewed as an organized crime. Indeed, the OCC gives a definition of “*Organized criminal group*” as a structured group<sup>45</sup> of three or more people, active for a period of time and acting in collaboration with the goal of perpetrating one or several serious crimes<sup>46</sup> or offenses recognized by the convention in order to gain, directly or indirectly, a financial or other material benefit<sup>47</sup>. The offenses covered by the OCC are active or passive participation in an organized criminal group<sup>48</sup>, the laundering of proceeds of crime<sup>49</sup>, corruption<sup>50</sup> and obstruction of justice<sup>51</sup>. As a *requirement for the offense* to be considered under this convention, it has to be a transnational offense in nature i.e. committed in more than one State, or perpetrated in one State but has a link to one or several State(s) in terms of the management of the crime, area of operation of the organized criminal group, and its effects<sup>52</sup>.

- Maritime piracy and armed robbery against ships as “hostage taking”:

When maritime piracy and armed robbery against ships involve kidnapping for ransom like in the Somali case, it can be considered as hostage taking and can be treated under the HC. In fact, this Convention defines hostage-taking as direct participation or connivance in the capture or detention of, and intimidation to kill, injure, or continue to detain a hostage,

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<sup>44</sup> See SUA Convention, article 2, para (1)

<sup>45</sup> According of the OCC, “Structured group” means a group that is not randomly formed for the immediate commission of an offense and that does not need to have formally defined roles for its members, continuity of its membership or developed structure. See OCC, article 2, para (c)

<sup>46</sup> According the OCC, “serious crime” means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. See OCC, article 2, para (b)

<sup>47</sup> See OCC, article 2, para (a)

<sup>48</sup> See OCC, article 5

<sup>49</sup> See OCC, article 6, according to the OCC, ‘proceeds of crime’ means any property derived from or obtained, directly or indirectly, through the commission of an offence

<sup>50</sup> See OCC, article 8

<sup>51</sup> See OCC, article 23

<sup>52</sup> See OCC, article 3, para (2)

whether actual or attempted, in order to oblige a State, an international Intergovernmental organization, a person, or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage<sup>53</sup>. However, the HC is not applicable in hostage situation happening in a territory of a State where the victim and the perpetrator are nationals of that State and the suspected offender are found in that State<sup>54</sup>. Thus, the hostage-taking has to involve different nationalities.

### **A.2 Criminalization:**

The LOSC does not contain any explicit provision criminalizing maritime piracy. However, by interpreting article 105 which sets out that every State may arrest persons involved in piracy and may decide upon the sanctions to be applied, it can be inferred that in order to do so, maritime piracy as defined by article 101 has to be criminalized under domestic law. However, the SUA Convention, the OCC and the HC compel States Parties to make any offenses considered by respective the Convention punishable by appropriate penalties considering their gravity<sup>55</sup>. Therefore, act of attempting, committing, supporting, or facilitating maritime piracy and armed robbery against ships considered as unlawful acts against the safety of maritime navigation, organized crime, or hostage taking shall be criminalized under the domestic law of States Parties to the above mentioned three Conventions. Thus, it is necessary to criminalize maritime piracy and armed robbery against ships under national legislation according to international law in order to repress such crimes. In this regards, the UN Security Council called upon all States to criminalize these crimes under national law<sup>56</sup>.

### **A.3 Jurisdiction:**

- Universal jurisdiction over maritime piracy:

All nations may assert jurisdiction over maritime piracy according to the LOSC as its article 105 provides the possibility of every State to seize a pirate ship or aircraft on the high seas, (the EEZ) or in any other place outside the jurisdiction of any State, or a ship or aircraft taken and controlled by pirates, to apprehend the persons and to confiscate the property on board. Moreover, the arresting and seizing State may try the offender, impose sanctions in

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<sup>53</sup> See HC, article 1

<sup>54</sup> See HC, article 13

<sup>55</sup> See SUA Convention, article 5, OCC, article 5, 6, 8 & 23, HC, article 2

<sup>56</sup> See UNSCR 1950 (2010), paragraph 13

national courts, and may also decide on the action to be taken regarding the pirate ship or aircraft and the property, subject to the rights of third parties acting in good faith. Hence, article 105 gives the opportunity to States to exercise universal jurisdiction against an act of piracy on the high seas, in the EEZ or in any other place outside the jurisdiction of any State regardless of ship's or aircraft's nationality as well as the pirates and the victims' origin. On one hand, this is at some extent the result of the consideration of pirates as the enemy of mankind or *hostis humanis generis* in the sense that it interferes on the world shipping and maritime activities. On the other hand, the establishment of universal jurisdiction over piracy crime can be analyzed from the fact that since no State has exclusive jurisdiction on the high seas or in any other place outside the jurisdiction of any State, in order to combat the crime within, it was necessary to allocate universal jurisdiction for that particular crime when committed there. It can be interpreted also as to avoid the reticence of flag State to punish its own nationals or its incapacity to intervene in such a place at the moment of the commission of the piracy act.

- Coastal State's jurisdiction over armed robbery against ships:

The LOSC does not provide any specific clarification regarding the case of armed robbery against ships which are similar acts as maritime piracy but are committed in internal waters, territorial sea and archipelagic waters. However, it recognizes the extension of coastal State's sovereignty beyond its land territory up to these maritime zones<sup>57</sup>. The only exception is the innocent passage case but which is nonetheless subject to the fulfillment of certain conditions such as not hampering peace, good order or security of the coastal States<sup>58</sup>. When commenting on the provision on the maritime piracy definition, the ILC is of the view that when a piratical type attack occurs within the territory of a State, including its territorial sea, the general rule should be applied since it is a matter for the State affected to take the necessary measures for the repression of the acts committed within its territory<sup>59</sup>. Thus, it can be concluded that armed robbery against ships is a matter of coastal States jurisdiction.

- Quasi-universal jurisdiction over maritime piracy and armed robbery against ships as "unlawful acts against the safety of maritime navigation", "organized crime", or "hostage taking":

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<sup>57</sup> See LOSC, article 2

<sup>58</sup> See LOSC, article 19, para. 1 & 2 (1), article 21(a)

<sup>59</sup> Supra note 33, article 39 commentary, para (3), at p.282

As mentioned previously, maritime piracy and armed robbery against ships can be treated under the SUA Convention, the OCC and the HC. In terms of jurisdiction, these three Conventions oblige States parties to assert jurisdiction over the offenses covered by them as far as such offense is committed, against or on-board ship flying the flag of the State party at the time the offense is committed, or perpetrated in its territory including its territorial sea, or by its national, or by a stateless person residing regularly in that State, or when its citizen is the victim of the commission of the offense<sup>60</sup>. In other words, a link or a nexus of location in or affiliation to the State party is required in order to establish jurisdiction over the offense. Additionally, in case of presence of a suspected offender in a contracting State's territory, it is compelled to establish jurisdiction over the case or if not, to extradite the person to a competent State party<sup>61</sup>. This 'prosecute or extradite' principle is a way to make sure that any alleged offender is prosecuted as far as they are located in a contracting State's territory. To date, the SUA Convention, the OCC and the HC have respectively 160, 171 and 166 States parties which represent an average of 84,18% of the countries in the world. Based on this statistic, putting together the requirement of a link or nexus to a State Party in order to establish jurisdiction and by applying the principle of 'prosecute or extradite', there is a *quasi-universal jurisdiction* over maritime piracy and armed robbery at sea as an unlawful acts against the safety of maritime navigation, as an organized crime or as a hostage taking. Nevertheless, to have an operative mechanism regarding jurisdiction, the national implementation of these Conventions is important.

#### **A.4 Enforcement measures :**

Apart from conveying the essence of universal jurisdiction principle over maritime piracy, article 105 of the LOSC provides the enforcement actions that may be carried out by every State which consist of (1) seizing the pirate ship or aircraft, (2) arresting the suspected offenders, (3) confiscating the property on-board, (4) and bringing the case before national courts. These actions may be conducted regardless of alleged offender(s) and victim(s) 's nationality as well as pirate ship(s)/aircraft(s)'s flag<sup>62</sup>. In order to carry out enforcement measures, the power and authority are given to warships, military aircrafts, or other ships or

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<sup>60</sup> See SUA Convention, article 6(1) & (2), OCC, article 15 (1) & (2), HC, article 5 (1)

<sup>61</sup> See SUA Convention, article 6(3), OCC, article 15 (3) & (4), HC, article 5(2)

<sup>62</sup> IMO, LEG 98/8/3, Piracy: elements of national legislation pursuant to the United Nations Conventions on the Law of the Sea, 1982 , 18 February 2011, paragraph 5

aircraft clearly marked and identifiable as being on government service and authorized to that effect<sup>63</sup>. They are granted the “right of visit”<sup>64</sup> which consists of a boarding and an inspection of the suspected vessel<sup>65</sup>. The boarding involves in sending a boarding party to verify the ship’s right to fly its flag and if suspicion remains, an inspection which consists of thorough check on board is conducted<sup>66</sup>. It has to be noted that the right of visit as well as any seizure should be based on reasonable grounds and consideration otherwise exposes the State making the visit or the seizure to liability<sup>67</sup>. Additionally, a “right of hot pursuit” can be exercised<sup>68</sup> too.

With regard to armed robbery against ships, as it is a matter of coastal jurisdiction, enforcement measures have to be determined by national laws. Nevertheless, it can be envisaged that maritime piracy enforcement measures can be adopted by the coastal States for armed robbery against ships too.

Under the SUA Convention, the OCC and the HC, enforcement measures regarding maritime piracy and armed robbery against ships are envisaged under the principle of “prosecute or extradite” as already discussed above. Any alleged offender located in the territory of a State party is required to be taken into custody based on its national law and any criminal proceedings should be commenced or an extradition should be pursued<sup>69</sup>. The SUA Convention provides a possibility of an alleged offender delivery by a master of a ship of a State Party (The “flag State”) to the authorities of another State party (the “receiving State”).<sup>70</sup> This can be viewed as the basis of pirates and armed robbers at sea transfer mechanism<sup>71</sup>. In the same way, the receiving State is required to apply the “prosecute or extradite” principle. The three Conventions oblige States parties to make the offenses extraditable and provide for the extradition mechanism<sup>72</sup>. The OCC requires also States Party to adopt regulations and

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<sup>63</sup> See LOSC, article 107

<sup>64</sup> See LOSC, article 110

<sup>65</sup> Supra note 34, at p.244

<sup>66</sup> Supra note 34, at p.245

<sup>67</sup> See LOSC, article 106, article 110, para. 2 & 3

<sup>68</sup> See LOSC, article 111

<sup>69</sup> See SUA Convention, article 7

<sup>70</sup> See SUA Convention, article 8

<sup>71</sup> Guilfoyle, D., *The legal Challenges in Fighting Piracy*, in Van Ginkel, B. & Van der Putten, F.P. (Eds), *The International Response to Somali Piracy: Challenges and opportunities*, The Netherlands: Martinus Nijhoff Publishers, 2010, at p. 132. The SUA Convention provision regarding delivery of suspected offender is recognized by UNSCR S/RES/1851 preamble at p.2, UNSCR S/RES/1846, paragraph 15

<sup>72</sup> See SUA Convention, article 11, OCC, article 16, HC, article 9 &10

measures to allow confiscation and seizure of the proceeds of crime, property, equipment or other means used in committing the offenses and to enable for tracing and freezing them subject to the rights of bona fide third parties<sup>73</sup>. Disposal of such confiscated proceeds of crime or property needs also to be provided<sup>74</sup>.

#### **A.5 Judicial process and human rights issues :**

As previously discussed, international law provides for States to criminalize, to assert jurisdiction over maritime piracy and armed robbery against ships' cases. As such, in order to decide on the case, they have to be proceeded through a judicial process that is defined by a domestic legal system and procedure. Generally, it includes the arrest and investigation (usually done by law enforcement agencies), the prosecution, the trial, and the incarceration. Apart from the domestic procedural requirement that needs to be adapted to be able to treat maritime piracy and armed robbery cases, human rights issues during the judicial process need to be addressed too. Indeed, the United Nations Security Council Resolution (UNSCR) 2015 calls for consistency with international human rights law during the judicial process<sup>75</sup>. The basis of human rights law is laid down in the the universal declaration of human rights (UDHR) which provides for every individual equality of dignity and rights<sup>76</sup>, exemption from torture or brutal, inhuman or humiliating treatment<sup>77</sup>, equal justice<sup>78</sup> and non exposure to arbitrary arrest, detention or exile<sup>79</sup>.

Part III of the International Covenant on Civil and Political Rights (ICCPR) provides the standard of rights during the judicial process in line with the UDHR as follows :

- Arrest:

The ICCPR provides that no one should be subject to arbitrary arrest or detention<sup>80</sup>. At the moment of the arrest, the arrested person shall be informed of the reasons of the arrest, the charges against him<sup>81</sup>. He is entitled to be brought promptly before the court to assert the

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<sup>73</sup> See OCC, article 12

<sup>74</sup> Ibid., article 14

<sup>75</sup> See UNSCR S/RES/2015 (2011), paragraph 9

<sup>76</sup> See UDHR, article 1

<sup>77</sup> See UDHR, article 5

<sup>78</sup> See UDHR, article 7

<sup>79</sup> See UDHR, article 9 & 10

<sup>80</sup> See ICCPR, article 9(1)

<sup>81</sup> See ICCPR, article 9(2)

lawfulness of the arrest or detention subject to compensation if unlawful and to be tried in a reasonable time<sup>82</sup>.

- Prosecution and trial :

Article 14 poses as prerequisite the presumption of innocence, fair public hearing and minimum guarantees<sup>83</sup> in any determination of criminal charges against the offender, right of appeal for a convicted of a crime, no double punishment or guiltiness based on any act or omission recognized as criminal offenses under national law or international law at the time it was committed and similarly for the penalty. The procedure shall be such as will take account of their age for juvenile .

- Incarceration:

Article 10 of the ICCPR indicates the condition under which incarceration should be conducted. It is required that the prisoners should be treated with respect to dignity and humanity. The accused persons have to be segregated from the convicted persons. Similarly, the juvenile shall be separated from the adults and accorded treatment appropriate to their age and legal status. The penitentiary system shall comprise treatment of prisoners with an aim to reformation and social rehabilitation.

For juvenile involved in maritime piracy and armed robbery at sea, apart from those standards for juvenile suspects provided in the ICCPR, the Convention on the Rights of the Child (CRC) establishes additional standards such as the determination of the age limit to be considered as a child<sup>84</sup>, the requirement for the juvenile judicial process to take into account the child's age as well as to ensure minimum guarantees which are similar to those stated by the ICCPR<sup>85</sup>. Based on the CRC provisions on the protection of the child from economic exploitation and against all other forms of exploitation prejudicial to any aspects of the child's welfare<sup>86</sup>, States may criminalize the actions of adults recruiting children to commit piracy and armed robbery at sea.

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<sup>82</sup> See ICCPR, article 9(3), (4), (5)

<sup>83</sup> The minimum guarantees include (a) prompt information and in detail in a language that the accused understands, (b) time and facilities for the preparation of defence and communication with own chosen counsel (c) trial without undue delay; (d) trial in the presence of the accused, self defense or through legal assistance, be informed of rights, free legal assistance if no sufficient means to have on his own (e) right to examine the witnesses (f) free assistance of an interpreter, (g) no compelling to testify against oneself.

<sup>84</sup> Article 1 of the CRC gives the international reference of a child as to be every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

<sup>85</sup> See Supra note 85 and CRC, article 40

<sup>86</sup> See CRC, article 32, paragraph 1 & article 36

Asylum is also an issue that can be invoked by pirates and sea robbers during the judicial process. In this regard, the UDHR recognizes the right to demand asylum but it cannot be granted in the case of prosecutions for non-political crimes<sup>87</sup>. Similarly, article 1 F (b) of the 1951 Convention Relating to the Status of Refugee (CRSR) emphasizes that asylum can be denied when a serious non-political crime was committed outside the country of refuge prior to the admission to that country as a refugee and article 33 (2) provides that the benefit of non expulsion may not be claimed due to reasonable grounds of danger to national security.

#### **A.6 International cooperation:**

The various international instruments emphasize on the need for international cooperation in the prevention and repression of maritime piracy and armed robbery against ships. The LOSC, in its article 100 obliges all States to cooperate to the fullest possible extent in the repression of maritime piracy. Any State would fail to comply with international law if it neglects to take action against piracy while having the opportunity to do so<sup>88</sup>. By referring to the LOSC, the UNGAR and the UNSCR highlight the importance of international cooperation on a global, regional, subregional and bilateral basis in the prevention and suppression of maritime piracy and armed robbery against ships<sup>89</sup>. This includes calling for participation of States in the effort of combating the two crimes by means of providing naval forces<sup>90</sup>. The cooperation should aim to facilitate the apprehension and prosecution of suspected pirates<sup>91</sup> and those who are acting as facilitator and financier of maritime piracy and armed robbery at sea<sup>92</sup>. It is also fundamental for States to cooperate among themselves<sup>93</sup> and with IMO<sup>94</sup> in the field of reporting of acts of piracy, information sharing information and capacity-building<sup>95</sup>. Similarly, the SUA Convention, the OCC and the HC promote international cooperation almost in the same field but putting in emphasis on the cooperation with respect to the judicial

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<sup>87</sup> See UDHR, article 14

<sup>88</sup> Supra note 33, article 38 commentary, para (2), at p.282

<sup>89</sup> See UNGAR A/RES/59/24 paragraph 47, A/RES/60/30 paragraph 50, A/RES/ 64/71 paragraph 69 & 76, A/RES/65/37A paragraph 82 & 89, A/RES/66/231 paragraph 81.

<sup>90</sup> See UNSCR S/RES/1838, paragraph 2

<sup>91</sup> See UNGAR A/RES/54/31, paragraph 22, A/RES/ 55/7 paragraph 33, UNSCR 1846, at p.3

<sup>92</sup> See UNGAR A/RES/66/231, paragraph 85

<sup>93</sup> See UNGAR A/RES/ 64/71, paragraph 69 & 71, A/RES/65/37A paragraph 84; A/RES/66/231 paragraph 83, UNSCR S/RES/1846, paragraph 7

<sup>94</sup> See UNGAR A/RES/54/31, paragraph 20, A/RES/55/7 paragraph 34, A/RES/59/24 paragraph 47, UNSCR S/RES/1846, paragraph 7

<sup>95</sup> See UNGAR A/RES/59/24 paragraph 47, A/RES/60/30 paragraph 51, A/RES/64/71 paragraph 73 & 79, A/RES/65/37 paragraph 82, UNSCR S/RES/1846, paragraph 5

process such as the confiscation of proceeds of crime or property used in committing the crime<sup>96</sup> and their disposal<sup>97</sup>, extradition of offender<sup>98</sup>, law enforcement cooperation<sup>99</sup>, mutual legal assistance<sup>100</sup>, joint investigations<sup>101</sup>, transfer of sentenced persons<sup>102</sup>, collection, exchange and analysis of information<sup>103</sup>.

#### **A.7 Concluding framework:**

The international law provides a comprehensive legal framework to address maritime piracy and armed robbery against ships. Despite certain restrictions which can lead to gaps, the international treaties and recommendations can complement each other especially when it comes to domestic implementation. The primary source of international law on the issue is the LOSC as it has specific provisions on maritime piracy and can be used along with the IMO resolutions defining armed robbery against ships. However, other treaties such as the SUA Convention, the OCC and HC can be adapted to consider maritime piracy and armed robbery against ships under their provisions. The international law permits to define the offense, to criminalize it, to assert jurisdiction. Additionally, it gives the guidelines regarding the enforcement measures, the human rights issues during the judicial process, the international cooperation and the prevention. Two approaches can be pursued namely the zonal approach and the generalized approach. However, it relies heavily on national legislation to be operational and effective.

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<sup>96</sup> See OCC, article 13

<sup>97</sup> See OCC, article 14 para (2)

<sup>98</sup> See OCC, article 16, HC, article 10(1),

<sup>99</sup> See OCC, article 27

<sup>100</sup> See SUA, article 12, OCC, article 18, HC, article 11(1)

<sup>101</sup> See OCC, article 19

<sup>102</sup> See OCC, article 17

<sup>103</sup> See SUA, article 13 (1b), article 14, OCC, article 28

ISSUES	ZONAL APPROACH	GENERALIZED APPROACH
		LOSC and IMO Res. A 1025 (26)
<b>Definition</b>	<ul style="list-style-type: none"> <li>- Maritime piracy: High sea and EEZ (Criteria: geographical location, type of acts, two ships/aircrafts rule, private ends requirement) (Art. 101 of LOSC, Art. 58(2))</li> <li>- Armed robbery against ships or Armed robbery at sea: Internal waters, territorial sea, archipelagic waters. (Criteria: Location, type of acts, private ends) (IMO Resolution A.1026 (26) paragraph 2.2)</li> </ul>	<p>Maritime piracy and armed robbery as:</p> <ul style="list-style-type: none"> <li>- Unlawful acts against the safety of maritime navigation (Criteria: Type of acts) (SUA Convention, art. 3)</li> <li>- Organized crime (Criteria: Type of acts, Transnationality) (OCC, art. 2, para. a,b, c, art.5)</li> <li>- Hostage Taking (Criteria: Type of acts, multinationality) (HC, art. 1)</li> </ul>
<b>Other related definitions</b>	<ul style="list-style-type: none"> <li>- Pirate ship/Aircraft (LOSC, Art. 103)</li> <li>- Warship (LOSC, Art.29)</li> </ul>	<ul style="list-style-type: none"> <li>- Ship (SUA Convention, art. 1)</li> </ul>
<b>Criminalization</b>	To be done under domestic law: commission of the act, support and facilitation (LOSC, art. 105 & 101)	To be done under domestic Law: attempt, commission of the act, support and facilitation (SUA Convention, art.5 , OCC, art.5,6,8,23, HC, art. 2)
<b>Jurisdiction</b>	<ul style="list-style-type: none"> <li>- Universal jurisdiction for Maritime piracy: No jurisdictional link needed (LOSC, art. 105)</li> <li>- Coastal jurisdiction for Armed robbery against ships: Territorial link (LOSC, art. 2, art. 19, para.1 &amp; 2(1), art. 21(a))</li> </ul>	<ul style="list-style-type: none"> <li>- Quasi-universal jurisdiction for Maritime piracy and armed robbery: Jurisdictional nexus and ‘prosecute and extradite’ principle (SUA Convention, art. 6(1) &amp; (2), OCC, art.15(1) &amp; (2), HC, art. 5(1))</li> </ul>

<p style="text-align: center;"><b>Enforcement measures</b></p>	<ul style="list-style-type: none"> <li>- Arrest of suspected offender, seizure of pirate ship(s)/Aircraft(s) and property, prosecution in national courts (LOSC art.105)</li> <li>- Enforcement authority: Navy or Coast Guard or designated government agency (LOSC, art. 107)</li> <li>- Enforcement rights: Visit (LOSC,art.110), hot pursuit (LOSC, art. 111)</li> <li>- Safeguards: Liability for visit, arrest or seizure without adequate grounds (LOSC, Art. 106, art. 110 (2) &amp; (3))</li> </ul>	<ul style="list-style-type: none"> <li>- Flag State Master delivery to State party authorities (Receiving State) (SUA Convention, art.8, UNSCR S/RES/1851 preamble at p.2, UNSCR S/RES/1846, paragraph 15)</li> <li>- Arrest of suspected offender, prosecution or extradition (SUA Convention, art. 7, art. 6(1) &amp; (2), OCC, art.15(1) &amp; (2), HC, art. 5(1))</li> <li>- Seizure of property, equipment or means used to commit the act and proceeds of crime (OCC, art. 12 &amp; 14)</li> </ul>
<p style="text-align: center;"><b>Judicial process and human rights issues</b></p>	<ul style="list-style-type: none"> <li>- Basic principle: equality of dignity and rights, equal justice (UDHR, art. 1, 7)</li> <li>- Arrest: exemption to arbitrary arrest and detention (UDHR, art. 9 &amp; 10, ICCPR, art.9), right to be tried in reasonable time (ICCPR, art.9(3), (4), (5))</li> <li>- Prosecution and trial: presumption of innocence, fair public hearing (ICCPR, art. 14)</li> <li>- Incarceration: Respect of dignity and humanity, segregation of accused and convicted persons, separation of juvenile from the adults (ICCPR, art. 10)</li> <li>- Children involved in Piracy: Special treatment and consideration during the judicial process (CRC, art. 40, ICCPR, art. 10), criminalization of acts related to recruiting a child into piracy and armed robbery against ships possible (CRC, art. 32 (1), art. 36)</li> <li>- Asylum: Possible denial of asylum request due to participation in a serious non-political crime such as maritime piracy and armed robbery against ships or for national security reason (UDHR, art. 14, CRSR, art. 1 F(b), art. 33 (2))</li> </ul>	

<p style="text-align: center;"><b>International cooperation</b></p>	<p>International cooperation for the prevention and repression of maritime piracy and armed robbery against ships:</p> <ul style="list-style-type: none"> <li>- Type: Global, regional, subregional and bilateral cooperation (LOSC, art. 100, UNGAR &amp; UNSCR on maritime piracy and armed robbery against ships)</li> <li>- Domain: Information sharing, judicial process (Law enforcement cooperation, extradition, transfer or delivery of a suspected offender, joint investigation, mutual legal assistance, transfer of sentenced persons, capacity-building (UNGAR &amp; UNSR on maritime piracy and armed robbery against ships, SUA Convention, art.8, 11, 12, 13, 14, OCC, art. 13, 14 (2), 16, 17, 18, 19, 27, 28, HC, art. 10(1),11(1))</li> </ul>
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Table 3 International legal framework on maritime piracy and armed robbery against ships

## **Section B: States' practices in developing national legislation on maritime piracy and armed robbery against ships**

As discussed in the previous section, the international legal framework provides workable provisions to address maritime piracy and armed robbery against ships. However, the provided international legal framework will not be effective unless implemented in national legislation as yet national courts remain the usual venue to try suspected offender. For that reason, the national legislation should not only be in line with international law but also with the domestic legal system, especially the domestic criminal law and procedure in order to be operational .

In this section, the national legislations on maritime piracy and armed robbery against ships of Madagascar's neighboring countries which face similar challenges will be examined in order to see how their national law on the matter is structured and how it enables to address the issue. In this regard, maritime piracy and armed robbery at sea domestic law of France, Mauritius, Seychelles, Tanzania and Kenya will be analyzed successively.

### **B.1: The French legislation**

France is present in the Western Indian Ocean Region due to the location in the area of two of its overseas departments namely the Reunion Island and the Island of Mayotte. As being part of the region, they also face the problem of Somali maritime piracy and armed robbery against ships. In addition, France's active participation in the international operational effort in tackling maritime piracy and armed robbery at sea off the coast of Somalia has led to the reform of its national law on the matter.

The French legal system is based on civil law system. In terms of maritime piracy and armed robbery at sea, the backbone of the law is provided in the Act n° 2011-13 of January 2011 concerning measures against piracy and the exercise of national police powers at sea amending certain provisions of Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police powers at sea, the Criminal Code, the Criminal Procedure Code and the Defense Code.

- Definition and criminalization:

The French legislation applies the LOSC definition of maritime piracy when it occurs (1) on the high seas (2) in maritime areas that do not fall under the jurisdiction of any State (3) in the territorial waters of a State when considered under international law<sup>104</sup>. In the French legislator interpretation, the EEZ is considered as a place outside a jurisdiction of any State for the purpose of piracy<sup>105</sup> as founded on article 58 (2) of the LOSC. Piracy in territorial waters as provided under international law is like the Somalia case in applying UNSCR 1816<sup>106</sup>. However, in terms of criminalization in connection with maritime piracy, the following offenses may be investigated, established and prosecuted: hijacking of ships (or aircrafts) respecting the two ships/aircrafts rule<sup>107</sup>, illegal detention prior, during or after the hijacking<sup>108</sup>, participation in the preparation of the act<sup>109</sup> and hijacking of ship (or aircraft) in organized criminal group<sup>110</sup>. These offenses and the corresponding penalties are provided in the Criminal Code, as amended. When they occur in internal waters and territorial sea, the provisions of the Criminal Code apply, as this latter is applicable in those maritime areas<sup>111</sup>.

- Jurisdiction:

The French legislation follows the principle provided in article 105 of the LOSC which gives an optional universal jurisdiction. Hence, it is up to the French authorities to decide whether or not to hold the trial in France. The general rule is that France will exercise its jurisdiction only when necessary and in a subsidiary way<sup>112</sup>. The priority of asserting jurisdiction is given

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<sup>104</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police powers at sea, as amended, Article 1. I, Act n° 2011-13 of January 2011 concerning measures against piracy and the exercise of national police powers, article 1

<sup>105</sup> Ministère de la Justice et des Libertés, Circulaire du 13 juillet 2011 relative à la lutte contre la piraterie maritime et à l'exercice des pouvoirs de police de l'Etat en mer, *Bulletin Officiel du Ministère de la Justice et des Libertés*, 2011-10, 31 october 2011, at p. 5

<sup>106</sup> Id.

<sup>107</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police at sea, as amended, Article 1. II (1), Criminal Code, as amended, articles 224-6, 224-7 and 224-8

<sup>108</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police at sea, as amended, Article 1. II (2), Criminal Code, as amended, articles 224-1 to 224-5-2 and 224-8

<sup>109</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police at sea, as amended, Article 1. II (3), Criminal Code, as amended, articles 450-1 & 450-5

<sup>110</sup> Criminal Code, as amended, article 224-6-1, Act n° 2011-13 of January 2011 concerning measures against piracy and the exercise of national police powers, article 4

<sup>111</sup> Criminal Code, as amended, article 113-1

<sup>112</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of national police at sea, as amended, Article 5

particularly to the ship's flag State or the State from which the victims or the offenders are nationals<sup>113</sup>.

- Enforcement measures and prejudicial process:

Power and authority are given to commanders of Government vessels or aircraft in charge of maritime surveillance to conduct or give order to visit (Board and inspect) and to apply coercion measures on suspected vessel in conformity to article 110 of the LOSC. In doing so, they shall act under the supervision of their respective hierarchical superior<sup>114</sup>. They can exercise the right of visit and coercion measures against French flag ships in any maritime zones, foreign ships and ships without nationality in maritime zones under French jurisdiction and on the high seas, ships located in maritime zones under the jurisdiction of a foreign State having an agreement with France and ships flying the flag of a State having requested France intervention or having agreed to its inquiry<sup>115</sup>. During boarding, provisional measures regarding objects or documents in relation to the commission of the offenses can be taken as well as diverting the ship to an appropriate location or port<sup>116</sup>. Commanders of Government vessels or aircraft and naval officers on-board such vessels, or authorized law enforcement personnel are required to establish the offenses, pursue and search the perpetrators and accomplices<sup>117</sup>. It is important to note that the law authorizes to destroy vessels without nationality engaged in piracy when approved by the prosecutor to prevent future use to repeat the offense<sup>118</sup>. The suspected offender(s) may be detained either on-board the suspected vessel, or on-board the Government arresting vessel or aircraft. However, the conditions of detention on board are closely monitored by different authorities including civilian or military authorities and a custodial judge referred by the competent public prosecutor to ensure the

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<sup>113</sup> Supranote 116, at p.8

<sup>114</sup> Defence Code Act, article L1521-2, Act n°94-589 of 15 July 1994 concerning modalities for the exercise of State policing powers at sea, as amended, Article 2, Act n° 2011-13 of January 2011 concerning measures against piracy and the exercise of national police powers, article 1. The hierarchical superiors are either the Maritime Prefect, or the Government official in charge of State action at sea when overseas, or nominated civilian or military command in an international context.

<sup>115</sup> Defence Code Act, article L1521-1

<sup>116</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of State policing powers at sea, as amended, Article 3

<sup>117</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of State policing powers at sea, as amended, Article 4, Decree n° 2011-1213 of 29 September 2011 on the application of article 4 of Act n°94-589 of 15 July 1994

<sup>118</sup> Id.

appropriateness of restriction or deprivation of liberty<sup>119</sup>. The detained persons undergo a health and a medical examination. After 48 hours of detention on board, an extended period may be requested from the custodial judge who has the power to cease or extend the detention for an additional 120 hours from the prior expiration deadline<sup>120</sup> depending on the health conditions of the detainee(s), the conditions of detention on-board and operational constraints. The monitoring of judge continues until the suspects arrive in port. It is important to underline that the arrest and the detention on-board of the suspected offender(s) does not constitute yet the beginning of the judicial process.

- The judicial process:

The judicial process begins only when the suspected offenders arrive on French soil i.e. in port, and law enforcement officers (Police or Gendarmerie) have been instructed by the public prosecutor to take charge of the case to start the investigation. The suspected offenders along with the seized objects or documents pertaining to the case are handed over to the responsible law enforcement officers. The competent courts for the prosecution and the judgment are the regional or the first instance courts in whose jurisdiction the headquarter of maritime prefectorate<sup>121</sup> or the headquarter of the Government official in charge of the State action at sea<sup>122</sup> or the port to which the suspected vessel has been diverted is located<sup>123</sup>. The judicial process is based on the Criminal Code and the criminal procedure code which have been cited as references and amended by the Act n° 2011-13 of January 2011 concerning measures against piracy and the exercise of national police powers at sea.

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<sup>119</sup> Defence Code Act, as amended, articles L.1521-11 to L.1521-18

<sup>120</sup> Defense Code Act, as amended, article L.1521-14

<sup>121</sup> France is divided in 3 maritime prefectorates: Atlantic maritime prefectorate (The Headquarter is in Brest), Manche and North sea maritime prefectorate (The headquarter is in Cherbourg) and the Mediteranean maritime prefectorate (The headquarter is in Toulon). A maritime prefectorate is under the responsibility of a maritime prefect (A Navy admiral) who is in charge of the State action at sea and acting also as maritime zone operational command. In French overseas territories, the State action at Sea is under the responsibility of a Government official.

<sup>122</sup> The State action at sea is a French maritime concept which encompasses the defense of maritime sovereignty in the maritime zones under France's jurisdiction, public order at sea, maritime safety and search and rescue, environmental protection, and repression of illegal activities at sea (Piracy, illegal fishing, drug trafficking, etc.). The Prime Minister is in charge of the State action at sea. He delegates his power and authority to a General Secretary of State action at sea on the national level, to the maritime prefectorates on regional level and to a Government Official in French overseas territories.

<sup>123</sup> Act n°94-589 of 15 July 1994 concerning modalities for the exercise of State policing powers at sea, as amended, Article 6.

- International cooperation:

The French legislation on the repression of maritime piracy and armed robbery at sea includes provisions related to international cooperation in terms of asserting jurisdiction over the offenses as it gives priority to the flag State or the State from which the victims and the offenders are nationals. The legislation provides also that France may enter into an agreement with any foreign State to enforce piracy and armed robbery at sea law toward ships' flying a foreign State's flag or to conduct such activities in maritime zones under the jurisdiction of a foreign State<sup>124</sup>.

In summary, the French legislation on maritime piracy and armed robbery against ships integrates the principle included in the LOSC provisions on the issue. At some extent, it incorporates also the philosophy embedded in the SUA Convention, the HC and the OCC when criminalizing the offenses. It seems however, to have a gap in terms of criminalizing depredation related acts but focalizes instead on hijacking and kidnapping for ransom like in the Somalia case. Nevertheless, the provisions on enforcement measures and jurisdiction are well established as the power of the enforcement authorities, their rights and the actions to be conducted are clearly stated for each actor. The monitoring by a custodial judge of the suspected pirates detention on-board after their capture at sea appears to be a novelty and a plus in the domain of repression of maritime piracy and armed robbery against ships as it legitimates the action during the operational phase and protects the detainees against any abuse of human rights. As of July 2012, France has handled piracy 15 cases and convicted 5 pirates<sup>125</sup>.

## **B.2: The Mauritius legislation:**

Being affected by the scourge of maritime piracy and armed robbery at sea in the Western Indian Ocean region, Mauritius enacted a relatively new legislation on the matter by the end of 2011. The Mauritius legal system is a combination of common law and a civil law system. Its national legislation on maritime piracy and armed robbery at sea is contained in the Piracy and Maritime Violence Act 2011.

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<sup>124</sup> Defense Code Act, article L.1521-1(3) & (4)

<sup>125</sup>United Nations Office of Drug and Crime, Counter Piracy Programme, Support to the trial and related treatment of Piracy suspects, *UNODC Brochure, Issue 9*, July 2012, Nairobi: UNON Publishing Services Section, at p.16

- Definition and criminalization:

The Mauritius legislation adopts the zonal approach. It incorporates the definition of piracy on the high seas and EEZ similar to the provisions laid down in the article 101 of the LOSC read in combination with article 58(2). It admits as “maritime attack”, acts defined as “armed robbery against ships” in the IMO resolution A 1025 (26)<sup>126</sup>. Thus, the legislation used the terminology of “piracy” and “maritime attack”. Additionally, it also introduces the definition of “hijacking and destroying ships”<sup>127</sup> and “endangering safe navigation”<sup>128</sup> to deal with maritime violence in the spirit of the SUA Convention. The legislation gives a definition of “ship”. “Warship” as well as “pirate ship/aircraft” are defined with reference to the LOSC. The criminalized offenses are attempt, commission, participation, incitement and facilitation of piracy and maritime attack with a maximum penalty of 60 years penal servitude<sup>129</sup>.

- Enforcement measures:

The law authorizes police officers in general and particularly Coast Guard Officers to stop and board suspected vessel, to search, to detain and to arrest suspected offenders, and to seize a pirate ship or aircraft, property on board and mother ships<sup>130</sup>. The use of force is authorized by law if necessary.

Master’s power of delivery of the suspected offender in line with the SUA Convention mechanism is also recognized for any foreign ship master and Mauritius national ship master for piracy and maritime attack, hijacking of ships and endangering maritime navigation<sup>131</sup>. The delivery is made to the Police Commissioner in Mauritius. A notification and an information of the delivery and the evidence related to the alleged offense are required before the ship has entered the EEZ or not later than 72 hours in advance before entering the territorial sea of Mauritius.

- Jurisdiction & Judicial process

The legislation allows Mauritius to exercise jurisdiction as reflected in article 105 of the LOSC over maritime piracy and a jurisdiction over the maritime attack. The prosecution is under the supervision of the Director of Public Prosecutions and the competent courts are

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<sup>126</sup> Piracy and Maritime Violence Act 2011, section 3, subsection 3, read with Section 2 definition of “high seas”

<sup>127</sup> Piracy and Maritime Violence Act 2011, Section 4

<sup>128</sup> Piracy and Maritime Violence Act 2011, Section 5

<sup>129</sup> Piracy and Maritime Violence Act 2011, Section 3, Subsection 1 & 3, Section 6, Subsection 1

<sup>130</sup> Piracy and Maritime Violence Act 2011, Section 3, Subsection 2

<sup>131</sup> Piracy and Maritime Violence Act 2011, Section 6

either the intermediate court or the supreme court<sup>132</sup>. The judicial process is conducted based on national legislation related to the judicial system and the criminal procedure. In this regard, amendments to Courts act, Criminal Procedure Act, the deportation Act, mutual assistance in criminal and related matters Act, National Coast Guard Act, and the Police Act were made to take into account the treatment of piracy and armed robbery at sea case<sup>133</sup>. In terms of admissible evidence in court proceedings, out of court statement when the individual is unavailable can be considered by the court<sup>134</sup>. Upon conviction of the suspected offender, a forfeiture order can be issued against the ship, property or any means used in committing the offenses taking in consideration the rights of a third party acting in bona fide<sup>135</sup>.

- International cooperation:

The Mauritius legislation on maritime piracy and armed robbery against ships provides arrangements for handing over and transfer of suspected persons<sup>136</sup>. In this regards, the Minister of home affairs is authorized by law to enter into an agreement or arrangement with a foreign State or an international organization regarding transfer of suspected offender for investigation and trial in Mauritius, repatriating non convicted person, post-trial transfer of convicted persons, etc. The agreement has effect automatically on the pre-trial or post-trial transfer and trial arrangement. Moreover, the Minister may make regulations to give effect to the agreement or the arrangement<sup>137</sup>. In this regard, Mauritius has established a transfer of suspected pirates agreement with the United Kingdom and the European union.

The Mauritius legislation on maritime piracy and armed robbery against ships incorporates provisions of the LOSC on the issue but also takes in consideration those embedded in the SUA Convention. Criminalization and enforcement measures are clearly defined. To be operable on the national judicial system, the law provides reference and amendments to the relevant national law related to courts and criminal proceedings. Transfer of suspected offenders from foreign State is possible and authorized by the law. Mauritius authority may establish an agreement or arrangement with such State. The national legal

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<sup>132</sup> United Nations, Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, United Nations Security Council S/2012/50, 20 January 2012, paragrah 87

<sup>133</sup> Piracy and Maritime Violence Act 2011, Section 11

<sup>134</sup> Court Act, as amended, section 188C

<sup>135</sup> Piracy and Maritime Violence Act 2011, Section 9

<sup>136</sup> Piracy and Maritime Violence Act 2011, Section 8

<sup>137</sup> Piracy and Maritime Violence Act 2011, Section 10

mechanism takes automatically into consideration the agreement. Despite the fact that Mauritius did not handle yet piracy cases, from the legal mechanism provided in the existing law, it can be concluded that it contains the necessary suite of legal ingredients to successfully arrest, prosecute and convict pirates and armed robbers at sea.

### **B.3 - The Seychelles legislation**

The Seychelles legal system is a common law system. The Penal Code (Amendment) Act, 2010 constitutes the primary law on piracy and armed robbery against ships. Not only it amends section 65 of the Criminal Code but it modifies also section 60 of the criminal procedure code.

- Definition and criminalization

Section 65 (4) considers under the denomination of piracy, acts as defined by article 101 of the LOSC either they are committed on the high seas or in maritime zones under Seychelles jurisdiction. The legislation incorporates the definition of a pirate ship or aircraft as stated in article 103 of the LOSC<sup>138</sup> and relies on the flag State decision to retain or to dismiss its nationality as per article 104 of the same Convention<sup>139</sup>. Attempt, conspiracy, incitement, facilitation and commission are criminalized<sup>140</sup> and result in the same penalty of 30 years of imprisonment and a fine of one million Seychellois Rupee<sup>141</sup>.

- Jurisdiction:

Section 65 (1) of the Penal Code, as amended, authorizes all courts in the Seychelles to assert jurisdiction and to try an offense of piracy committed within the territory of Seychelles or outside the territory of Seychelles. It is emphasized that Seychelles courts are required to hear and determine the case against suspected pirates and to render a decision with regard to the seized pirate ship or aircraft and the property on-board according to the law of the Seychelles<sup>142</sup>.

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<sup>138</sup> Penal Code, as amended, section 65, subsection 5

<sup>139</sup> Penal Code, as amended, section 65, subsection 6

<sup>140</sup> Penal Code, as amended, section 65, subsection 3

<sup>141</sup> Penal Code, as amended, section 65, subsection 1

<sup>142</sup> Penal Code, as amended, section 65, subsection 7

- Enforcement measures:

The legislation requires the police and the members of the defense forces to arrest the suspected offenders and to seize pirate ships or aircrafts and property on board<sup>143</sup>.

- Judicial process:

While the investigations are carried out by the Seychelles police force and Coast Guard, the prosecution is handled by the Seychelles attorney General's offices<sup>144</sup>. It is the Supreme Court which handles the piracy trials and the appeal can be heard by the court of appeal if necessary<sup>145</sup>. Overall, the Seychelles criminal procedure code provisions permit to carry out piracy prosecutions appropriately. However, contested evidence should normally be delivered in person to permit cross-examination before the judge<sup>146</sup>. Nevertheless, as a matter of practice video link evidence is permitted at the discretion of the judge<sup>147</sup>.

- International cooperation:

The Seychelles by its law on piracy, in applying in a literal sense the concept of universal jurisdiction, accepts to try in its courts any case either presented by the Seychelles Law Enforcement authorities (Police or Coast Guard) or by foreign States navies. The country has entered into an agreement for the transfer of suspected pirates for prosecution the European Union, the United States, Denmark and the United Kingdom<sup>148</sup>. Additionally, it has an agreement with Puntland and Somaliland regarding transfer of convicted pirates to allow them to finish their sentence in Somalia<sup>149</sup>. It is important to note that piracy is an extraditable offense under Seychelles' law<sup>150</sup>.

The Seychelles legislation on piracy is mainly a pure implementation of the LOSC provisions. The only difference resides in the consideration of piracy as not only acts committed on the high seas, the EEZ or in a place under the jurisdiction of any State but also those perpetrated within maritime zones under Seychelles' jurisdiction. The judicial process is

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<sup>143</sup> Id.

<sup>144</sup> Criminal Procedure Code, as amended, section 60. United Nations, Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, United Nations Security Council S/2012/50, 20 January 2012, paragrah 43 &44

<sup>145</sup> United Nations, Report of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region, United Nations Security Council S/2012/50, 20 January 2012, paragrah 42.

<sup>146</sup> United Nations, Report of the Secretary-General on modalities for the establishment of specialized Somali anti-piracy courts, United Nations Security Council S/2011/360, 15 June 2011, paragrah 37.

<sup>147</sup> Id.

<sup>148</sup> Ibid., paragraph 55

<sup>149</sup> United Nations, Report of the Secretary-General on modalities for the establishment of specialized Somali anti-piracy courts, United Nations Security Council S/2011/360, 15 June 2011, paragrah 33.

<sup>150</sup> Extradition Act, First Schedule, Section 26

conducted with reference to the penal code and the criminal procedure code which received both amendments to take in consideration more explicit piracy legal arrangement. As to date, the existing piracy law has permitted the Seychelles to prosecute 101 pirates and to convict 47<sup>151</sup>.

#### **B.4: The Tanzanian legislation**

Tanzania has a also a common law legal system. The main bulk of the law on maritime piracy and armed robbery against ships is provided in the Merchant Shipping Act 2003 and the Penal Code 1945, as amended in 2010.

- Definition and criminalization:

The Merchant Shipping Act 2003, section 341 and the Penal Code Act 1945, as amended, Section 66 provides the piracy definition which in line with article 101 of the LOSC definition. However, it ignores the geographical location requirement similar to the Seychelles legislation. Indeed, it considers as piracy, acts committed either within the territorial sea, the EEZ, the high seas or in a place outside the jurisdiction of any State. The Tanzanian legislation includes also a definition of “a pirate ship or aircraft” consistent with the article 102 and 103 of the LOSC as well as the meaning of “private ship” and “private aircraft”<sup>152</sup>. In addition, hijacking a ship is considered too as a person who unlawfully and intentionally, by use of force or by threats of any kind, seizes a ships or exercises control of it<sup>153</sup>. The Tanzanian legislation considers the offender liable for life imprisonment for the commission, the participation, the incitement or facilitation of piracy act<sup>154</sup>. However, the legislation does not cover attempt.

- Jurisdiction:

Tanzania can assert jurisdiction over piracy case occurring anywhere in the maritime zones as defined by the LOSC. However, for non Tanzanian registered pirate ship, Tanzania does not assert jurisdiction over the case unless a special arrangement with the arresting State or agency exists<sup>155</sup>. For the time being, Tanzania prosecutes only those pirates that were arrested by the Tanzanian naval authorities<sup>156</sup>.

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<sup>151</sup> United Nations Office of Drug and Crime, Counter Piracy Programme, Support to the trial and related treatment of Piracy suspects, *UNODC Brochure, Issue 9*, July 2012, Nairobi: UNON Publishing Services Section, at p.16

<sup>152</sup> Penal Code Act 1945, as amended, Section 66, Subsection 5

<sup>153</sup> Merchant Shipping Act 2003, Section 341, Subsection 1

<sup>154</sup> Penal Code Act 1945, as amended, Section 66, Subsection 1 & 2

<sup>155</sup> Penal Code Act 1945, as amended, Section 66, Subsection 3

<sup>156</sup> Roger, L. P. , Mauritius officially on board to prosecute as other options dwindle, *Communis Hostis*

- Enforcement measures

The Tanzanian Navy and Police are the enforcement agencies having the authority with regard to arrest pirates and to seize pirate ships or aircraft and property on-board.

- Judicial process

The investigation is done by the Tanzanian police. For the prosecution, any piracy case is subjected to the consent of the Director of Public Prosecutions<sup>157</sup>. The High Court is the court that can hear and determine piracy case as it is the court that have jurisdiction over proceedings related to the Merchant Shipping Act<sup>158</sup>. The Tanzanian Criminal Procedure Code and the Evidence Act include a suitable mechanism for court proceedings including admission of evidence. Nevertheless, witness' cross-examination before the judge remains required due to the common law system tradition.

- International cooperation:

The legislation provides that Tanzania may enter into a special agreement with a foreign State or an agency for a transfer of suspected pirates for prosecution as already stated above. In this regard, the negotiation between the European Union with the Tanzanian authority is still ongoing at the time of writing for the establishment of an agreement for the transfer of pirate suspects captured by the EUNAVFOR to be tried. Piracy is recognized as an extraditable offense under the Tanzanian law<sup>159</sup>.

The Tanzanian legislation on piracy and armed robbery against ships incorporates the piracy provisions embedded in the LOSC. It is similar to the Seychelles legislation in the sense that it considers as piracy, piratical acts committed in any maritime zones under the jurisdiction of the country as well as those perpetrated on the high seas and outside the jurisdiction of any State. Jurisdiction can be asserted based on the optional universal jurisdiction principle of the LOSC. As a matter of international cooperation, the Tanzanian legislation provides the possibility for the country to enter into an agreement with a foreign

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*Omnium website*, 20, May 2012, at <http://piracy-law.com/2012/05/20/mauritius-officially-on-board-to-prosecute-as-other-options-dwindle/>

<sup>157</sup> Penal Code Act 1945, as amended, Section 66, Subsection 4

<sup>158</sup> The Judicature and Application of laws Act, Section 3

<sup>159</sup> Extradition Act, Section 27, Subsection 1 read with the shedule

State or an agency for the transfer of suspected pirates for trial. As of July,2012, Tanzania has prosecuted 12 pirates and realized 6 convictions<sup>160</sup>.

## **B.5 - The Kenyan legislation**

Kenya has a common law legal system. Before 2009, the legislation on piracy and armed robbery against ships was based on the section 69 of the Penal Code 1963. This section of the Penal Code was repealed by the Merchant Shipping Act 2009. Thus, piracy cases prior to 2009 was treated under the Penal Code whereas those after have been based on the Merchant Shipping Act.

### **- Definition and criminalization:**

The Merchant Shipping Act 2009 introduces the definition of “armed robbery against ships” as reflected in the IMO Resolution A 1025(26) for the acts that are committed within Kenya’s territorial sea or waters under its jurisdiction<sup>161</sup>. The piracy is defined for the acts perpetrated in a place outside the jurisdiction of any State<sup>162</sup>. The term “ high seas” was omitted as it may be already considered as a place outside the jurisdiction of any State. Hijacking of ship as defined in the SUA Convention is also considered as an offense. Attempt, commission, incitement, facilitation of piracy and armed robbery against ships are criminalized and a penalty of imprisonment for life is provided for such offense.

### **- Jurisdiction:**

The Merchant Shipping Act 2009 reflects the universal jurisdiction principle as stated in article 105 of the LOSC. Kenya’s jurisdiction over piracy offenses extends to acts committed anywhere on the high seas and the EEZ and does not require a connection to Kenya, such as the nationality of the victim/pirate ship, the offenders or the human victim. Armed robbery against ships falls automatically under Kenya’s jurisdiction as it happens in the territorial sea or body of waters under its jurisdiction.

### **- Enforcement measures:**

The Kenyan Navy and Police forces are the enforcement authorities with respect to piracy and armed robbery against ships.

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<sup>160</sup> United Nations Office of Drug and Crime, Counter Piracy Programme, Support to the trial and related treatment of Piracy suspects, *UNODC Brochure, Issue 9*, July 2012, Nairobi: UNON Publishing Services Section, at p.16

<sup>161</sup> Merchant Shipping Act 2009, section 369

<sup>162</sup> Id.

- Judicial process:

The investigations are carried out by the Kenya police<sup>163</sup> and the prosecution process is under the supervision of the Director of the Public Prosecutions of Kenya<sup>164</sup>. The judicial process is conducted on the basis of the Kenyan Criminal Procedure Code and the Kenyan Evidence Act which seem to be well established and suitable for the prosecution and trial of any piracy and armed robbery against ships case. Having a common law tradition, the deliverance in person of contested evidence to permit cross-examination before the judge is required. However, witnesses have been allowed to provide evidence through video link following recent court's decision<sup>165</sup>. Piracy and armed robbery against ship cases are heard and determined by courts of first instance in Mombassa whereas appeals are heard by the High Court in Mombassa and the Court of Appeal in Nairobi as the last resort<sup>166</sup>.

- International cooperation

The Kenyan Extradition law makes piracy and extraditable offense<sup>167</sup>. In 2009, Kenya has entered into agreements with the European Union, the United States, the United Kingdom, Canada, China and Denmark for the transfer of suspected pirates for prosecution and trial<sup>168</sup>.

Similar to the other countries in the region, the Kenya law on maritime piracy and armed robbery against ships embraces the principle that is incorporated in the LOSC provisions on the matter. The only difference resides on the differentiation between piracy and armed robbery against ships. In operating its legislation, Kenya has prosecuted 147 pirates and 67 convicted as of July 2012.

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<sup>163</sup> United Nations, Report of the Secretary-General on modalities for the establishment of specialized Somali anti-piracy courts, United Nations Security Council S/2011/360, 15 June 2011, paragrah 63.

<sup>164</sup> United Nations, Report of the Secretary-General on modalities for the establishment of specialized Somali anti-piracy courts, United Nations Security Council S/2011/360, 15 June 2011, paragrah 64.

<sup>165</sup> Id., paragraph 60

<sup>166</sup> Id., paragraph 66

<sup>167</sup> Extradition (Commonwealth countries) Act, section 4 read together with the Schedule, section 26 & Extradition (Contiguous and foreign countries) Act, Schedule

<sup>168</sup> United Nations, Report of the Secretary-General on modalities for the establishment of specialized Somali anti-piracy courts, United Nations Security Council S/2011/360, 15 June 2011, paragrah 78.

**Conclusion:**

The analysis and the examination of the Eastern African and the Western Indian Ocean region coastal States national legislation on maritime piracy and armed robbery at sea has permitted to realize the following conclusions:

- The recognized international legal references for maritime piracy and armed robbery against ships seem to be the LOSC (articles 100 to 107 and 110), followed by the SUA Convention and sometimes combined with the IMO resolution A 1025 (26).

- The definition adopted in national legislation retakes almost verbatim the definition of piracy in the LOSC and it considers piracy as occurring anywhere in the maritime zones under jurisdiction of a State and beyond. Sometimes a distinction is made for maritime piracy on the high seas or in a place outside the jurisdiction of any State to similar acts committed in the internal waters or the territorial sea by introducing the definition of piracy on the one hand and armed robbery against ships on the other hand.

- The criminalization of the offense concerns mainly attempt, commission, incitement, facilitation of piracy and armed robbery at sea acts. The provisions on criminalization make often a link and reference to the Criminal Code and impose deterrent penalties ( for example 30 years or 60 years or life imprisonment)

- In terms of jurisdiction, the optional universal jurisdiction as embedded in the article 105 of the LOSC is the main trend.

- The enforcement measures adopted in national legislation are mainly the reflection of the articles 105, 107 and 110 of the LOSC by specifying in the legislation the respective agencies that are given the authority and power to act as well as their rights and obligations.

- A prejudicial process can be included in the legislation to cover the period from the arrest of the suspected offender(s) and the seizure of the pirate ship at sea to their transfer in the port to the judicial authorities. The prejudicial process provisions may include the modalities of monitoring by the judiciary authorities of the suspected offender detention on-board vessel at sea. It is important not only to preserve the human rights of the suspected offender(s) but also to legitimate the action of the enforcement authorities to avoid defects in the procedure.

- The judicial process has to be clearly defined with regards to the investigation, prosecution and the trial. In this regard, consideration of the treatment of piracy and armed

robbery case should be incorporated and be in line with the Criminal Procedure Code as well as an eventual legislation pertaining to the judicial legal system. In addition, rules of evidence should be revised or adapted for the case of piracy and armed robbery as witnesses are most of the time unavailable to appear in courts in person due to various reasons such as health reason (Post trauma of the victims, etc.), professional reason (Retention on duty for Navy personnel, new contract elsewhere for seafarers, etc.), or financial reason (The travel cost of the witnesses to the location where the trial is held is expensive). In this regard, a video link released evidence should be considered for instance. Hence, amendments of the provisions related to the competent court and to the rules of evidence are often necessary in the national legislation such as the Criminal Procedure Code, Evidence Act, etc.

- In terms of provision related to international cooperation, the possibility of the Government to enter into an agreement regarding the repression of maritime piracy and armed robbery against ships is advised to be included. That will allow the State to cooperate with foreign State or international organization in various domains. The fact of including such provision in the legislation will give the government officials the right to act and to decide on the type of cooperation that the country needs to enter or to pursue.

- Looking at the statistics related to the maritime piracy and armed robbery against ships' prosecution established by the UNODC, it appears that Tanzania (50%) and the Seychelles (46, 53%) have the highest success rate in terms of conviction amongst the States whose national legislation have been examined above. Consequently, it can be concluded that their respective national legislation seems to be the most effective to address the problem.

<b>COUNTRY</b>	<b>PROSECUTION</b>	<b>CONVICTION</b>	<b>SUCCESS RATE</b>
France	15	5	33,33%
Mauritius	0	0	0 %
Seychelles	101	47	46,53%
Tanzania	12	6	50%
Kenya	147	67	45, 57 %

Table 4 Success rate of Madagascar's neighboring States in prosecuting pirates and armed robbers at Sea (Based on data provided in the UNDOC brochure, Issue 9, July 2012, at p.16)

In considering the international legal framework on maritime piracy and armed robbery against ships and the examination of the regional State's national legislation, the framework of a national legislation on the matter should consider the elements that are shown in the following table:

<p><b>International legal reference</b></p>	<ul style="list-style-type: none"> <li>- The LOSC, SUA Convention, international human rights law (UDHR, ICCPR, CRC, CRSR)</li> </ul>
<p><b>Definition</b></p>	<p>To avoid ambiguity, the zonal approach seems to be more appropriate:</p> <ul style="list-style-type: none"> <li>- Maritime piracy: Acts as defined by article 101 of the LOSC and committed in the EEZ, the high seas and a place outside the jurisdiction of any State.</li> <li>- Armed robbery against ships: Acts as defined in the IMO Resolution A 1025 (26) and committed in internal waters and territorial sea/Archipelagic waters.</li> </ul>
<p><b>Other elements to be defined</b></p>	<ul style="list-style-type: none"> <li>- Ship (SUA Convention, article1), pirate ship/aircraft (LOSC, article 103), Warship (LOSC, art.29), private ship/aircraft</li> </ul>
<p><b>Criminalization</b></p>	<ul style="list-style-type: none"> <li>- The criminalization should relate to attempt, commission, incitement and facilitation of maritime piracy and armed robbery against ships.</li> <li>- The criminalization is usually done in conjunction with the amendments to the Criminal Code in order to insert the offenses related to piracy and armed robbery against ships as well as to set the appropriate penalties. In fact, the Criminal Code is generally the source of offenses and the respective penalties.</li> <li>- A deterrent penalty should be provided with regards to maritime piracy and armed robbery against ships alike. (Ex: 60 years of imprisonment or life imprisonment)</li> </ul>
<p><b>Jurisdiction</b></p>	<ul style="list-style-type: none"> <li>- The majority of national legislation recognizes the exercise of universal jurisdiction as reflected in the article 105 of the LOSC over maritime piracy. In this regard, an option is open to States either to privilege the flag State jurisdiction or the State of the victim's or offender's origin jurisdiction firstly and assert jurisdiction only when necessary or to exercise jurisdiction</li> </ul>

	<p>without considering the ship's or aircraft's, the victim's or offender's nationality.</p> <ul style="list-style-type: none"> <li>- Armed robbery against ships is usually a matter of national jurisdiction.</li> <li>- The competent court should be indicated by amending the law pertaining to the court system and/or the criminal procedure code.</li> </ul>
<p><b>Competent authority for the arrest and seizure</b></p>	<ul style="list-style-type: none"> <li>- The designation of the competent authority should be specific : Navy, Coast Guard, Police, etc. (LOSC, Art. 107)</li> <li>- The rights and duties of the competent authority need to be clarified: Right of visit (LOSC, art. 110), right of hot pursuit (LOSC, art. 111), right of arrest and seizure (LOSC, art. 105), right to take coercive measures, right to divert to an appropriate port or position for further examination, action based on adequate grounds.</li> </ul>
<p><b>Prejudicial process</b></p>	<ul style="list-style-type: none"> <li>- The provisions may include the modalities of monitoring of the suspected offender detention on-board vessel at sea by the judiciary authorities from the moment of arrest up to the arrival in port (The French legislation can be used as reference)</li> </ul>
<p><b>Judicial process and human rights issues</b></p>	<ul style="list-style-type: none"> <li>- If necessary, amendments should be done with regard to the Criminal Procedure Code or any other national legislation pertaining to the judicial process (Judicature Act, Evidence Act, Extradition Act, etc. ) to consider treatment of maritime piracy and armed robbery at sea cases particularly in the following topic area: consistency with the required international human rights standards during the investigation, prosecution and trial phases, and adaptation of the rules of evidence considering the constraints in the maritime piracy and armed robbery at sea case context such as issues related to witness physical presence in court (Acceptance of a video link evidence, out of court statement, etc.).</li> </ul>
<p><b>International Cooperation</b></p>	<ul style="list-style-type: none"> <li>- The national legislation should contain provisions on international cooperation allowing the State through its Government Officials to enter into an agreement with foreign States and international organizations in the repression of maritime piracy and armed robbery against ships.</li> <li>- The field of cooperation can be indicated in the provisions:</li> </ul>

	Information sharing, law enforcement cooperation, extradition, transfer of suspected offender, joint investigation, mutual legal assistance, transfer of convicted offenders, capacity-building.
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Table 4 National legislation framework type on maritime piracy and armed robbery against ships

## **Chapter 2: Madagascar legal arrangements to address maritime piracy and armed robbery against ships: Analysis of current legislation and proposed areas of Improvement**

From the previous chapter, it has been realized that the international law on maritime piracy and armed robbery at sea offers an acceptable general framework to address the issue. It is when implementing the international legal framework within the national legislation where the integration to the national legal system should be ensured by merging the international legal standards into the national legal norms. The experience of the Eastern African and Western Indian Ocean region States demonstrated clearly this process when they developed their respective national legislation on maritime piracy and armed robbery against ships.

In the following sections, Madagascar national legislation on the issue will be examined in considering the established national legal framework type<sup>169</sup> that seems to present the ideal framework. At first, the current Malagasy legislation will be analyzed to identify where the gaps are and secondly a discussion about its improvement will follow.

### **Section A: The current Malagasy legislation on maritime piracy and armed robbery against ships: Critical analysis**

Madagascar has a civil law system. Its national law on maritime piracy and armed robbery against ships is based on three legal references namely the Maritime Code of 2000, the Criminal Code, and the Criminal Procedure Code. The Maritime Code of 2000 contains specific provisions on maritime piracy. The Criminal Code is another source of a variety of offenses that could be used in maritime piracy and armed robbery at sea context when a Malagasy citizen, or a Malagasy flagged vessel are involved as offender or victims, or it happens within Madagascar territory. The Criminal Procedure Code describes the judicial process to be followed.

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<sup>169</sup> See Table 4, at p. 59

## **A.1 - The Maritime Code of 2000**

The Maritime Code of 2000 contains provisions on maritime piracy. These provisions are related to the definition, the criminalization, the jurisdiction, and the designation of the competent authority for arrest and seizure but not on international cooperation.

### **A.1.1 - Definitions:**

The article 1.5.01 of the Maritime Code of 2000 gives the definition of maritime piracy and reproduces word by word the definition provided in article 101 of the LOSC. Only piracy act on the high seas and in a place outside the jurisdiction of any State is considered. There is no precision or definition provided regarding acts that are similar to piracy happening in the EEZ, the territorial sea, and the internal waters. Despite the fact that maritime piracy is also considered in the EEZ based on the interpretation of the article 58(2) of the LOSC, it should be literally specified in the national legislation in order for the interpretation to be fully implemented. The fact of not specifying piracy as an act that can be also committed in the EEZ within the national legislation leaves a legal uncertainty or a gap in treating an act that occurs in that maritime zone by the national courts. As a concrete example, the M/V Zoulficar was arrested 60 nautical miles from Madagascar coast. As such, it was arrested in the EEZ not on the high seas which is defined as the sea not forming part of the internal waters, the territorial sea and the EEZ according to the Maritime Code of 2000<sup>170</sup>. Hence, in referring at the maritime piracy definition stated in the Maritime Code of 2000 the M/V Zoulficar case is not a piracy case because nowhere in the definition, the term EEZ is mentioned. Similarly, as already discussed in the previous chapter, acts that resemble to maritime piracy perpetrated in internal waters and territorial sea defined under the denomination of armed robbery against ships are very frequent. The fact of not considering such act in the national legislation leaves a big gap as instead of treating the offense under one denomination, it becomes necessary to treat it under multiple criminal offenses as provided in the criminal code.

In articles 1.5.02 and 1.5.04 of the Malagasy Maritime Code, articles 102 and 103 of the LOSC are replicated to define pirate ship or aircraft and piracy by a warship, government

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<sup>170</sup> Maritime Code of 2000, article 1.2.04

ship or government aircraft due to crew mutiny. Other specific definitions such as the definition of a ship is given<sup>171</sup> as well as the notion of what is considered as a warship<sup>172</sup>. However, what is considered as a private ship or aircraft is not clarified. As “private ship or aircraft” forms one of the key terms of the maritime piracy definition, providing a clarification related to that term is not to be neglected in a national legislation where clarity and precision are required in order to have legal certainty and to avoid ambiguity that may end up in error during the legislation interpretation.

The maritime piracy definition provided in the Maritime Code of 2000 has a gap in the sense that act of piracy in the EEZ is not expressly stated and similar act perpetrated in the internal waters and in the territorial sea as defined as “armed robbery against ships” is not considered. Additionally, the definition of a private ship or aircraft is missing to complete the interpretation terms such as ship, pirate ship or aircraft, and warships.

#### A.1.2 – Criminalization:

The Maritime Code of 2000 criminalizes the following offenses and establishes the respective penalty regarding maritime piracy:

- A ship without nationality is considered as a pirate ship and its crew as pirates:

Article 7.13.01 of the Maritime Code provides that a ship navigating without the necessary document that proves its nationality and the legitimacy of its expedition (A ship without nationality) is considered as a pirate ship and its crew as pirates. The officers on-board such ship are liable of life force labor whereas the ratings are liable for limited time forced labor<sup>173</sup>. In this case, the basis of considering the offense is only the absence of nationality not the fact that the ship itself has been used by the crew in a piracy attack. Indeed, the fact of not having a nationality is an indication of suspicion but it seems not enough to prove that the ship is a pirate ship and the crew is pirates unless other additional elements that are found on-board (Weaponry, small boats, Jerry can, ladder, hostage, etc. ) or the ship’s activity prior the boarding (Attacking another ship, preparing an attack, etc.) shows that there was actually intent or actually a commitment to piracy. Moreover, in its comments on the article of the

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<sup>171</sup> Maritime Code of 2000, article 2.1.01

<sup>172</sup> Maritime Code of 2000, article 1.8.01. The provided definition replicates verbatim the definition given in article 29 of the LOSC

<sup>173</sup> Maritime Code of 2000, article 7.13.01

Law of Sea related to the definition of a pirate ship or aircraft, the ILC stated that the simple fact that a ship sails without a flag is not satisfactory to consider it as a pirate ship<sup>174</sup>. Consequently, this provision of the Maritime Code of 2000 criminalizing a ship without nationality on the high seas as a pirate ship represents a deficiency and should be revised or omitted.

- A ship captain holding several commissions issued by various flag States is also considered as a pirate pursuant to article 7.13.02 of the maritime code and he is liable for life forced labor. In the same way as explained previously, the mere fact that a ship captain holds suspicious documents regarding his position and his title on-board is not sufficient to consider him as a pirate unless other substantial evidence demonstrates that he uses the ship as well as the crew into piracy activity. Thus, this provision needs also a revision or should be omitted from the Maritime Code criminalization provision on maritime piracy.

- Committing a hostile act under a forged flag exposes the ship Captain and the officers to life forced labor pursuant to article 7.13.04 of the Maritime Code. Here, the hostile act is not clarified even though the provision is treated under the chapeau of piracy. In fact, a hostile act may cover a range of possibilities such as attacking a ship in order to destroy it or to commit other maritime terrorism act which is outside the scope of maritime piracy. Hence, hostile act is not only piracy.

- When committed with depredation or violence, by Malagasy nationals or foreigners and against a Malagasy flagged ship or against a ship flying the flag of a foreign State with which Madagascar is not at war, the offenders will be charged as pirates. Whether the depredation or violence was committed without homicide or physical harm, the penalty is limited time forced labor but if it was committed followed by such acts, the perpetrators are liable of life forced labor<sup>175</sup>. This provision seems to consider some of the key elements of the definition of maritime piracy related to the type of acts that needs to be criminalized. Indeed, here illegal depredation and illegal violence are set as offenses and correspondent penalties are given. However, illegal detention is not covered and leaves a gap on this criminalization provision.

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<sup>174</sup> United Nations, Yearbook of the International Law Commission 1956, *Volume II, Documents of the 8<sup>th</sup> Session including the report of the Commission to the General Assembly*, 1957, New York: United Nations, article 41 commentary, at p. 283

<sup>175</sup> Maritime Code of 2000, article 7.13.03

- Any Malagasy nationals who are crew members of a ship and acting with violence toward the Captain in order to take control of the ship are liable for life forced labor<sup>176</sup>. In this case, the purpose of taking control is also not clarified whether the ship will be used to commit piracy or to be utilized for other purpose. First of all, the fact that a ship is taken in control by the crew does not mean that it becomes a pirate ship right away unless it is used to commit piracy. Secondly, in referring to the definition of piracy that has been used (A replicate of the LOSC, article 101), an act perpetrated from the inside of the same ship is not considered as piracy. Consequently, this criminalization provision calls for a revision.

- Finally, any Malagasy nationals who are crew members of a ship who handed over the ship to pirates are liable for life forced labor<sup>177</sup>. In this case, the underlying concept of a pirate ship and a pirate seems to be well founded. Indeed, by handing over a ship to pirates, the crew fulfills the condition of voluntary participation in the operation and being placed under the control of pirates the ship becomes a pirate ship. However, it is important to note that nowhere in the criminalization provisions embedded in the Maritime Code of 2000, attempt, or facilitation, or incitement to the commission of maritime piracy is considered as an offense.

In summary, the criminalization provisions of the Maritime code of 2000 on maritime piracy present several anomalies that need to be corrected and revised. It appears that situations that do not constitute a complete evidence of a piracy act are considered as piracy. Additionally, not all the types of acts stated in the definition are criminalized under the criminalization provision. Indeed, illegal detention, attempt, facilitation, and incitement to the commission of maritime piracy are not considered.

#### A.1.3 – Jurisdiction:

Pursuant to article 1.5.05 which is a replicate of the LOSC, article 105, the jurisdiction of Madagascar over maritime piracy extends to the high seas or in a place outside the jurisdiction of any State. In this regard, when Madagascar is the arresting State, it may assert jurisdiction without distinction of nationality of the suspected offenders, the pirate ships/aircrafts, the victims, and the victims ships/aircrafts. The second paragraph of the

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<sup>176</sup> Maritime Code of 2000, article 7.13.06

<sup>177</sup> Maritime Code of 2000, article 7.13.07

article 1.5.05 states that “the competent courts may decide upon the penalties to be imposed, and may also determine the action to be taken with regards to the ships, aircraft or property, subject to the rights of third parties acting in good faith” without specifying which courts are the competent courts that are able to hear and determine a piracy case especially when a foreign ship is the principal object of the case. The examination of the Criminal Code and Criminal Procedure in the following section will permit to have some indication on the issue of the competent court which should have been specified under the provisions on maritime piracy in the Maritime Code of 2000. Nevertheless, the Code indicates in its article 7.3.01 that felonies or misdemeanors perpetrated on-board Malagasy flagged ship fall under the Malagasy penal jurisdiction. It may then be concluded that the same jurisdiction would be competent to treat a piracy case perpetrated by on-board a foreign ship despite the fact that the law is not specific on the issue and a grey area seems to exist. During the M/V Zoulficar case which involved a foreign ship, the competent court was identified as the ordinary criminal court.

As previously explained, the Maritime Code of 2000 does not define acts that are similar to piracy but are perpetrated in the territorial sea and in the internal waters and remains silent. Nevertheless, it states that Madagascar can exercise its penal jurisdiction over a foreign ship in the territorial sea in case where the consequences of any committed offense extends to the territory of Madagascar, or the offense itself disturbs the peace of the country or the order in the territorial sea, or the assistance of the Malagasy authorities has been required either by the Captain or a diplomatic representative of the flag State, or such measures are necessary in the repression of illicit traffic in narcotic drugs or psychotropic substances<sup>178</sup>. Additionally, it is stated that in the internal waters, Madagascar has the right to exercise all the prerogatives pertaining to the enforcement of its national law<sup>179</sup>. As a consequence of these provisions, any act similar to piracy committed in the territorial sea, if proved to fulfil one of the above mentioned conditions, or perpetrated in internal waters, would be treated under the Malagasy criminal law and it would be heard and determined by the penal jurisdiction in Madagascar. Once again, the provision of Maritime Code of 2000 does not permit to identify directly the competent court that can hear and determine maritime piracy case by or on-board a foreign

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<sup>178</sup> Maritime Code of 2000, article 1.7.02

<sup>179</sup> Maritime Code of 2000, article 1.7.03

ship. Without particularly mentioning maritime piracy, the provision states the Malagasy penal jurisdiction to be competent for felonies and misdemeanors committed on-board Malagasy flagged ship. This grey area needs to be clarified to have precision on the issue.

#### A.1.4 – The competent authorities for the arrest and seizure:

In terms of competent authorities for pirate arrest and seizure of pirate ships or aircrafts, the Maritime Code of 2000, article 1.5.06, repeats the provisions of the LOSC, article 107. It is therefore stated that warships or military aircraft, or other government ships or aircraft clearly marked and authorized to that effect, are entitled to effectuate the arrest and the seizure. However, no further explanation or indication is given in the legislation to identify the name of the agencies that are given such enforcement power. Nevertheless, the use of the term “warships” would refer to the Malgasy Navy and military aircraft would suggest that the Air Force would be also competent since they are the only agency having military aircraft in Madagascar. There are other government ships such as those belonging to the Fisheries Surveillance Centre or the National Gendarmerie but despite the fact that they are clearly marked and identifiable, their mandate does not include a piracy mandate.

The rights and duties of the enforcement authorities are included in article 1.4.05 which repeats verbatim article 110 of the LOSC. It gives only the right of visit on the high seas to warships based on reasonable grounds of suspicion. Similarly, the provision of this article indicates that when exercising its right of visit, the warship can proceed to the verification of the document related to the right of the ship to fly its flag and if suspicion remains, a further examination can be conducted. Nevertheless, the right to take coercive measures and the right to divert to an appropriate port or position for further examination are not mentioned. For penal offense on-board Malagasy flagged ship in any maritime zones by referring to article 7.3.02 of the Maritime Code of 2000, Navy Officers and Petty Officers acting as commanding officer of a Malagasy Navy ship are authorized to conduct any inquiry and to ascertain the commission of such offense on-board.

Here two issues pertaining to the exercise of the right to arrest a suspected person and to seize a property need to be pointed out. The first issue is related to the right to arrest and to seize which is a prerogative of a judicial police officer or law enforcement officer and not to the military i.e. the Navy. Therefore, to be able to arrest pirates and armed robbers at sea, the

Navy personnel should be consecrated by the law as judicial police officers or law enforcement officers for piracy and armed robbery at sea case. The second issue that forms a gap in the provision related to the enforcement measures conducted by the Navy is that the arrest and detention of person at sea needs to be legalized or set under certain legal framework otherwise it will form an irregularity during the judicial process. Not only the irregularity will make the case to be null and void but it will jeopardize all the effort performed at sea from the arrest to the arrival in port. Indeed, on land, the rule is that after any arrest, the judicial police officer is only allowed to detain a suspected offender for 48 hours and if the arrest was performed outside the city or location of the place of the investigation, additional 24 hours per 25 kilometers<sup>180</sup> are provided. Similar provision should be adapted for the arrest and detention of pirates and armed robbers at sea in order to render legal such arrest and detention.

In summary, despite the fact that the provision of the Maritime Code related to the enforcement measures sets a general legal basis to identify the competent authority to perform the arrest and seizure for the account of piracy and to address certain rights and duties of such competent authority, a certain number of details and clarification are still missing with regard to the use of force or the right to take coercive measures, the consecration of the Navy personnel engaged in the repression of piracy and armed robbery against ships to the judicial police officer or law enforcement officer status and the regularity of the arrest and detention at sea.

- International cooperation:

One of the major gaps of the maritime piracy provisions in the Maritime Code of 2000 is the fact that it does not provide any provision related to international cooperation in the repression of maritime piracy and armed robbery at sea. International cooperation provision is of capital importance in a piracy and armed robbery legislation.

As realized during this first critical analysis, it appears that the Malagasy Maritime Code of 2000 contains the basis of the legal framework on maritime piracy in Madagascar but does not consider armed robbery against ships per se. It replicates mainly the articles 101 to 107 and article 110 of the LOSC without any further modification, adaptation or addition. Therefore, despite the fact that the LOSC provisions on maritime piracy was transformed into

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<sup>180</sup> Criminal Procedure Code, articles 136 & 137

a national legislation, it still bears the deficiencies embedded in the original LOSC that should have been corrected and adapted to the national context during the implementation phase. Several gaps are still tangible in the various provisions related to the definition, the criminalization, the jurisdiction, enforcement measures and international cooperation.

## **A.2 - The Malagasy criminal law and the repression of maritime piracy and armed robbery against ships:**

The principal legislations pertaining to the Malagasy criminal law are the Criminal Code and the Criminal Procedure Code. The Criminal Code defines the offenses and sets the appropriate penalties. The Criminal Procedure Code describes the procedure that needs to be followed in handling any criminal case during the judicial process.

### **A.2.1 – Criminalization under the Malagasy Criminal Code:**

Apart from other specific legislations, the Malagasy Criminal Code is the main source of criminal offenses and their respective penalties applicable in Madagascar. It is the general legal reference for the criminalization of any offense. However, for criminal offenses related to the merchant shipping, it is the Maritime Code of 2000 which creates and criminalizes such offense. It is for this reason that maritime piracy is criminalized and treated under the said Maritime Code. Nevertheless, when a criminal offense occurred in the maritime domain and it is not covered by the Maritime Code of 2000, it is then where the Criminal Code becomes the legal reference to treat such offense if a Malagasy national or a Malagasy flagged ship is involved as a victim or an offender, or the offense was committed in the internal waters or in the territorial sea by a foreign ship as explained in the previous section. Hence, in case of a similar act as piracy but committed in the internal waters or the territorial sea (armed robbery against ships), it would be treated under the Criminal Code by referring to several offenses such as theft<sup>181</sup>, assaults<sup>182</sup>, kidnapping<sup>183</sup>, murder<sup>184</sup>, attempt to murder<sup>185</sup>, attempt to rape<sup>186</sup>,

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<sup>181</sup> Criminal Code Act, article 379 and following

<sup>182</sup> Criminal Code Act, article 309 & 310 and following

<sup>183</sup> Criminal Code Act, article 341 & 342 and following

<sup>184</sup> Criminal Code Act, article 295 & 296 and following

<sup>185</sup> Criminal Code Act, article 295 & 296 read in conjunction with article 2

<sup>186</sup> Criminal Code Act, article 332 read in conjunction with article 2

and so on, depending on the acts committed and the circumstances during the commission of the offense. For example, the Felicity case would have been treated under the provisions of the Criminal Code if the suspected offenders were arrested since it occurred in the territorial sea of Madagascar and additionally it is a Malagasy flagged ship. The Criminal Code offenses constitute aggravating circumstances if committed along with maritime piracy and they would be included in the charge in addition to the offense of maritime piracy. This was the case during the M/V Zouflicar case where the 12 Somali pirates were charged with piracy and kidnapping, assault and attempted rape as additional charge.

The Criminal Code classifies the offense into three categories namely felony, misdemeanor and petty offense<sup>187</sup>. The classification depends on the penalty applicable to the perpetrator on the basis of the committed offense. It is classified as a felony, an offense that is penalized by death penalty, life and time forced labor<sup>188</sup>, deportation<sup>189</sup>, detention<sup>190</sup>, reclusion<sup>191</sup> and the degradation of civil rights<sup>192</sup>. Misdemeanor<sup>193</sup> concerns the offense that has a penalty of limited time imprisonment in a regular prison, or limited time interdiction of political, civil and family rights, or fine whereas petty offense<sup>194</sup> has a penalty of very limited time imprisonment, or fine, or confiscation of seized object. Being penalized of life or time forced labor, maritime piracy would then fall under the category of felony. Based on the Criminal Code, attempt of felony is considered as a felony itself when it has been proved that there was a beginning of committing the felony and if it was not interrupted by circumstances independent of the perpetrator's will, it would have produced the same effect as when it was committed<sup>195</sup>. In the same way, those who are inciting and facilitating a felony are considered

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<sup>187</sup> Criminal Code Act, article 2

<sup>188</sup> Time forced labor penalty is pronounced for at least 5 years and for a maximum of 20 years. Criminal Code, article 19

<sup>189</sup> Deportation consists of moving the convicted person to a place determined by the law where he will stay for the rest of his life.

<sup>190</sup> A detention is an imprisonment in a high security prison for not less than 5 years and for not more than 25 years. Criminal Code, article 20

<sup>191</sup> A reclusion is an imprisonment in a medium security prison for not less than 5 years and for a maximum of 10 years. Criminal Code, article 21.

<sup>192</sup> The degradation of civil rights consists of discharge from public position, privation of civil and political rights, interdiction of the right to detain a weapon, interdiction to part of a jury and to be part of the armed forces. It is often pronounced with an imprisonment penalty less than 5 years.

<sup>193</sup> In a misdemeanour case, imprisonment is pronounced between 1 month to 10 years, or a fine superior to 100.000 MGA

<sup>194</sup> In a petty offense case, imprisonment is pronounced between 1 to 29 days or a fine between 400 MGA and 100.000 MGA

<sup>195</sup> Criminal Code Act, article 2

as accomplices and receive the same penalty as the perpetrators<sup>196</sup>. Thus, it would be under these provisions of the Criminal Code that the attempt, incitement and facilitation of maritime piracy can be criminalized.

From the above analysis, in spite of the absence of specific provisions on maritime piracy and armed robbery against ships, the Malagasy Criminal Code proposes some provisions that can be adapted to such criminal offenses. It provides for instance, under its general provisions related to attempt and accomplice in a felony case, a venue to criminalize attempt, incitement and facilitation of maritime piracy in conjunction with the Maritime Code of 2000. Armed robbery against ships type acts would be also criminalized under several general criminal offenses in the Criminal Code. Nevertheless, for the sake of legal certainty and due to the fact that maritime piracy and armed robbery against ships are pure maritime offenses which should be treated under the Maritime Code as specific legislation of the maritime domain, it is always necessary to improve and rectify the deficiencies in the provisions related to the repression of these two crimes in the Maritime Code in making reference to the Criminal Code. It is important to note that articles 1 to 4 of the Criminal Code recognize the power given to any law to criminalize any offenses.

#### A.2.2 – The Judicial process, human rights issues and the Malagasy Criminal Procedure Code:

The Criminal Procedure Code (CPC) provides the description of the judicial process that has to be followed for treatment of any penal offense from the arrest of the suspected offender up to the trial. In addition, it gives the information regarding the competent court and competent judicial authorities that are involved in the criminal proceedings. It is on the basis of the category or classification of the penal offense as provided in the Criminal Code or other legal source that the CPC indicates the competent court and the judicial authorities to be involved in the treatment of the case as well as the procedure to be followed. Thus, based on the fact that maritime piracy and those acts assimilated to armed robbery against ships are felonies, they have to follow a judicial process which is different from if they would be considered as a misdemeanor or a petty offense. Indeed, in case of a felony, it requires the

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<sup>196</sup> Criminal Code Act, article 60

intervention of an instructional judge, the general prosecutor and the accusation chamber for the prosecution and the competent court is the Ordinary Criminal Court which is generally affiliated to the Court of Appeal or created within the first instance court when there is no Court of Appeal in the region. The CPC states that the competent Ordinary Criminal Court is the one located in the place where the criminal offense was committed or the one where the suspected offender's arrest was performed or the one situated in the place of residence of this latter<sup>197</sup>. However, the jurisdiction of the Ordinary Criminal Court or any other court in Madagascar is only a territorial jurisdiction. It means that, it can hear and determine only a case that is related to the offenses committed within the Madagascar's territory or by interpretation of the Maritime Code of 2000 regarding the maritime zones<sup>198</sup>, related to the offenses perpetrated in the internal waters or in the territorial sea. Hence, only the acts that are considered as armed robbery against ships can be treated by the Ordinary Criminal Court but not maritime piracy since this latter happens on the high seas. In other words, despite the fact that the Malagasy Maritime Code authorizes any Malagasy competent Court to assert jurisdiction over maritime piracy, in reality, no courts in Madagascar are competent because by referring to the CPC courts have only a territorial jurisdiction.

- The steps during the judicial process:

Due to the fact that the Malagasy courts have only territorial jurisdiction based on the CPC, the arrest at sea (Step I) does not form part of the judicial process as the Criminal Procedure Code itself do not have provisions regarding an arrest at sea. This state of fact appears to be a big gap since the legal status of the arrested persons and their conditions are not taken in consideration in the law from the moment of their arrest at sea up to they are taken in charge by the judicial authorities. Indeed, in applying the provisions of the CPC, the judicial process begins only when the judicial police officers, who are the only authorized personnel of the judicial system to make an arrest, take under their responsibility the suspected offenders. As described in table 5 below, a judicial arrest followed by an investigation (Step II) is normally performed by the judicial police officer who is either the National Gendarmerie or the National Police after the transfer of the suspected pirates or armed robbers at sea. The judicial

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<sup>197</sup> Criminal Procedure Code, article 34

<sup>198</sup> The Maritime Code of 2000 replicates the provisions of the LOSC on internal waters, territorial sea, EEZ and high seas.

police officer's investigation is conducted under the supervision of the public prosecutor of the first instance court which has territorial jurisdiction in the region where the port of disembarkment of the suspected offender took place (Location of the arrest) <sup>199</sup>. After the investigation, the public prosecutor then submits the case to the instructional judge of the first instance court to enable him to proceed for the first degree prosecution (Step III). Having established that the suspected offender can be charged of the offenses, the instructional judge processes the case to the general prosecutor at the Court of Appeal in order for this latter to proceed for a second degree prosecution in collaboration with the accusation chamber. When it is assessed by the accusation chamber that the prosecution is valid, it then submits the case for trial to the Ordinary Criminal Court of the Court of Appeal (Step IV).

<b>Steps</b>	<b>In charge</b>	<b>Detention condition</b>	<b>Reference</b>
<b><u>Step I:</u></b> <b>Arrest and seizure at sea</b>	Navy	Not provided in the legislation	Maritime Code of 2000 (Art. 1.5.06)
<b><u>Step II:</u></b> <b>Arrest on land and investigation</b> (The right to have a counsel is provided by law, CPC, art. 53)	Judicial police officer under the supervision of the Public Prosecutor: Either National Gendarmerie or National Police	Maximum time of detention: 48 hours (CPC, art. 136). If the arrest was done outside the jurisdiction of the Judicial police officer an additional day per 25 km is added to the 48 hours (CPC, art. 136, 137)	CPC (Art. 31, 53, 123, 124, 126, 127, 128, 133, 136, 137, 138, 138 bis, 153)
<b><u>Step III:</u></b> <b>Prosecution</b> (The right to have a counsel is provided by law, CPC, art. 53 bis)	Public Prosecutor (First Instance court) <b>Instructional Judge</b> (First Instance court)	Preventive custody: Maximum time of detention is 8 months (CPC, art. 334 bis) If necessary for the	CPC (Art. 53 bis, 149, 151, 153, 154, 172, 179, 244 to 306, 309, 334,

<sup>199</sup> Criminal Procedure Code, article 31

<b>Steps</b>	<b>In charge</b>	<b>Detention condition</b>	<b>Reference</b>
	<b>General Prosecutor</b> (Court of Appeal) <b>Accusation Chamber</b> (Court of Appeal)	purpose of the prosecution, an extension of 6 months renewable once may be allowed	334 bis)
<b><u>Step IV:</u></b> <b>Trial</b> (The presence of a counsel with the accused person is mandatory during the trial. If the accused person did not yet choose his counsel, a court appointed lawyer will be designated to defend him, CPC, Art. 65 to 67)	<b>Ordinary Criminal Court</b> (Court of Appeal)	Conviction	CPC (Art. 18 to 22, art. 65 to 67, 373 to 394, 404 to 444)

Table 5 The steps during the judicial process of maritime piracy and armed robbery against ships case.

- Right to have a counselor and the presence of a translator during the judicial process:

The Criminal Procedure Code includes provisions giving the right for the suspected pirates or armed robbers at sea to have a counselor during the investigation and the prosecution phases<sup>200</sup>. Furthermore, during the trial, the presence of a counsel to defend the accused person is required<sup>201</sup>. If a counselor is not yet chosen by the accused person at the commencement of the trial, the court will appoint a lawyer to ensure his defense<sup>202</sup>.

- Preventive custody during the investigation and the prosecution :

<sup>200</sup> Criminal Procedure Code, article 53 & 273

<sup>201</sup> Criminal Procedure Code, articles 65 & 422

<sup>202</sup> Id.

During the investigation by the judicial police officer, a maximum time of 48 hours of preventive custody is given. It is extended by one day per 25 kilometers when the location of the arrest is outside the city where the investigation is supposed to be conducted<sup>203</sup>. Similarly, during the prosecution phase, the preventive custody should not exceed 8 months except for the express necessity for the correct accomplishment of the prosecution. It has to be noted that the suspected person can appeal the decision for a preventive custody during the prosecution phase through its counselor.

- The request for a translator and an expert :

During the judicial process the presence and request for a translator and an expert are allowed by the criminal procedure code<sup>204</sup>.

- Rules of evidence :

The general rule is that the judges cannot establish their decisions on evidence that is not provided in court and cross-examined before them<sup>205</sup>. The evidence can be given orally through witness, confession, written evidence and through expertise.

- Appeal :

The decision of the Ordinary Criminal Court can be appealed in the Cassation Court which is affiliated to the Supreme Court<sup>206</sup>.

- Case of children involved in maritime piracy and armed robbery against ships:

The legislation regarding the juvenile involved in a criminal case is provided in the Presidential Order n° 62-038 of September 19, 1962 concerning the protection of the child read in conjunction with the Criminal Procedure Code. When a child commits a felony, the Malagasy criminal law sets the age of 13 to be the minimum age for a person to be criminally liable<sup>207</sup>. Therefore, a child involved in piracy and armed robbery against ships above 13 years old is criminally responsible as an adult. However, the child between the age of 13 and 18 years old enjoys the excuse of the minority when defining the penalty. The treatment is also different during the judicial process in terms of detention and trial. Indeed, during the arrest, the investigation and the prosecution, the case will be treated by the same authorities as

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<sup>203</sup> Criminal Procedure Code, articles 136 & 422

<sup>204</sup> Criminal Procedure Code, article s265, 392 & 426

<sup>205</sup> Criminal Procedure Code, articles 373 to 394

<sup>206</sup> Criminal Procedure Code, articles 444, 539, 540, & 542

<sup>207</sup> Presidential Order n° 62-038 of September 19, 1962, article 24. Confirmed by the Public Prosecutor of the first instance court of Antsirana, Madagascar in his email on August 23, 2012.

depicted in the table 5 and the suspected minor offender is granted the same rights as the adults<sup>208</sup>. However, during the trial part, the Juvenile Criminal Court, which is a court belonging to the Court of Appeal, hears and determines the case<sup>209</sup>. When convicted, the juvenile criminal is granted a less harsh penalty due to the excuse of the minority. For example, if maritime piracy is penalized by a life forced labor for an adult, the juvenile pirate between the age of 13 and 18 is convicted for 20 years of imprisonment<sup>210</sup>. In terms of detention either as accused or convicted person, the minor should be separated from the adults in prison as provided by law.

The analysis of the Criminal Procedure Code has permitted to realize that its provisions allow the investigation, prosecution and the trial for the account of maritime piracy and armed robbery against ships without too much hindrance. The provisions related to the right for the suspected pirates and armed robbers at sea to have a counselor during the judicial process, the allowance for a translator and the rules pertaining to the preventive custody seem to respond to the requirement of the international law of human rights. Similarly, the provisions on the judicial process for juvenile criminals embedded in the Presidential Order of September 19, 1962 concerning the protection of the childhood are in conformity with the Convention of the Rights of the Child (CRC). However, as explained during the analysis of the Maritime Code of 2000 provisions on maritime piracy, the legal framework on the arrest and seizure at sea seems to be one gap to be treated in the provisions of the Criminal Procedure Code regarding the arrest and the preventive custody during the investigation phase. Additionally, another gap resides in the rules of evidence where the requirement of witness's presence in court for cross-examination with regards to evidence is costly and often very difficult in maritime piracy and armed robbery at sea context.

### **Conclusion to section A:**

To conclude in this section, Madagascar has already the basis of a legal framework to address maritime piracy and similar acts as armed robbery against ships as provided in the Maritime Code of 2000, the Criminal Code and the Criminal Procedure Code as well as the

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<sup>208</sup> Presidential Order n° 62-038 of September 19, 1962 concerning the protection of the childhood , articles 19 to 25

<sup>209</sup> Presidential Order n° 62-038 of September 19 concerning the protection of the childhood, 1962, article 26

<sup>210</sup> Presidential Order n° 62-038 of September 19 concerning the protection of the childhood, 1962, article 45, paragraph 1

Presidential Order of September 19, 1962 concerning the protection of the child. Nevertheless, gaps related to the definition of the offense, the criminalization, the jurisdiction and the judicial process, arrest and seizure at sea and international cooperation have been identified in some parts of these legislations especially in the Maritime Code of 2000 which is considered as the masterpiece of the legal framework. In order for Madagascar to ensure a successful arrest, prosecution and conviction of pirates and armed robbers at sea, these gaps need to be rectified in the above mentioned legislation.

## **Section B: Proposed solutions to improve national legislation on maritime piracy and armed robbery against ships**

### **B.1 – The basis of the improvement :**

Madagascar ratified most of the international treaties that are related to maritime piracy and armed robbery against ships. As such, it has the obligation to implement those treaties in its national legislation. Indeed, as a State Party to an international treaty, Madagascar should transpose in its domestic legislation the legal standards that are embedded in the provisions of the international treaty and take the necessary steps to put in place all the required arrangements for the implementation.

<b>CONVENTIONS</b>	<b>ENTRY INTO FORCE</b>	<b>MADAGASCAR'S RATIFICATION OR ACCESSION</b>
<b>The 1958 Convention on High Seas (CHS)</b>	30 September 1962	31 July 1962 (r)
<b>The 1951 Convention Relating to the Status of Refugee (CRSR)</b>	22 April 1954	18 December 1967(a)
<b>International Covenant on Civil and Political Rights (ICCPR)</b>	23 March 1976	21 June 1971(r)
<b>Convention on the Rights of the Child (CRC)</b>	02 September 1990	19 March 1991 (r)
<b>The 1982 Law of the Sea Convention &amp; Agreement on the implementation of Part XI (LOSC)</b>	16 November 1994	28 September 2001 (r)

<b>CONVENTIONS</b>	<b>ENTRY INTO FORCE</b>	<b>MADAGASCAR'S RATIFICATION OR ACCESSION</b>
<b>The 1979 International Convention against the Taking of Hostages (HC)</b>	3 June 1983	24 September 2003 (a)
<b>United Nations Convention against transnational Organized Crime Convention (OCC)</b>	29 September 2003	15 September 2005 (r)
<b>The 1988 International Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention)</b>	01 March 1992	15 September 2006 (a)

Table 6 Madagascar status vis-à-vis international Conventions related to maritime piracy and armed robbery against ships

(a): Accession

(r): Ratification

As seen in chapter 1 of this part, these treaties provide a general framework and the key legal elements (See table 3) which can be used as guidance in developing or improving the national legislation on maritime piracy and armed robbery against ships.

The study of the Madagascar's neighboring States legislation on maritime piracy and armed robbery identified the main component type of a national legislation as depicted in the table 4. This national legal framework type allowed to find the gaps that need to be rectified in the current Malagasy national legislation on the issue. Therefore, in improving the Malagasy national legislation, a double requirement has to be satisfied namely consistency with international law on maritime piracy and armed robbery against ships and regularity with the national legal standards that govern the prosecution of such offenses. The international law norms form an external constraint in the improvement of the legislation whereas the national legal standards are considered as an internal requirement. The approach then tries to integrate the two standards in order to have an effective legislation.

## **B.2 - Improving the legislation for the prevention and the repression of maritime piracy and armed robbery against ships:**

As identified from the previous section, the gaps that need to be rectified concern mainly the provisions on maritime piracy in the Maritime Code of 2000 related to the definition, criminalization, the jurisdiction, the arrest and seizure at sea, the judicial process and international cooperation. Therefore, the improvement of the national legislation consists to create a new legislation in the form of an Act related to the prevention and the repression of maritime piracy and armed robbery at sea. The new Act should make reference to the Malagasy Criminal Code and amend the provisions on maritime piracy in the Maritime Code of 2000 as well as some provisions of the Malagasy Criminal Procedure Code. It is important to note that the main international legal reference remains the LOSC as it is still so far the worldwide reference legislation in terms of maritime piracy and the international law on human rights. Few principles related to the criminalization and to the international cooperation can be nevertheless borrowed from the SUA Convention, the OCC and the HC.

### **B.2.1 - Definitions:**

Two categories of definitions should be included in the legislation namely the definitions of the offenses and the supporting definitions that should be included in the interpretation section.

- *Definition of the offenses: Introducing the notion of maritime piracy and armed robbery at sea.*

Since the LOSC remains the general international legal reference in terms of maritime piracy, its definition should be still included in the proposed legislation. It is important to always associate the word “maritime” with “piracy” to distinguish piracy in the maritime domain from another form of piracy that exists presently in other fields (Software piracy, copyright piracy, etc.). In defining “maritime piracy”, the definition of article 101 of the LOSC should be maintained but adapted to the context of the national arrangement. In this regard, it is of capital importance that the definition covers the high seas and the EEZ piracy. Thus, the word “EEZ” should be explicitly mentioned with “high seas” in the definition of “maritime

piracy” to avoid any gap and any ambiguity. As a result, the definition that should be included is as follows:

“ Maritime piracy consists of any the following acts:

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

After defining maritime piracy as those piracy acts on the high seas and in the EEZ, it remains to give a meaning to identical acts but that are perpetrated in the territorial sea and the internal waters. It is fundamental to treat those acts perpetrated in the territorial sea and the internal waters in one definition in order to avoid to refer to several offenses in the Criminal Code when it comes to prosecute the perpetrator. Since according to the LOSC, maritime piracy has been confined to be happening only in the high seas (or in the EEZ), it is necessary to find another name for the acts similar to piracy committed in the internal waters and the territorial sea to respect the piracy concept. The definition of “armed robbery against ships” defined in the IMO resolution A.1025 (26) can be then introduced in this regard to fill the gap and to enable to treat such act in the same way as maritime piracy since they are similar in nature but only the location of the commission of the act brings the difference. However, for the purpose of taking into account the case of a seaplane attacked in the territorial water or the internal waters, instead of using “armed robbery against ships”, the term “armed robbery at sea” should be used and the word “aircraft” is included in the definition in the same way as in the LOSC definition. The definition of “armed robbery at sea” should be then stated as follows:

“Armed robbery at sea” consists of any of the following acts:

- (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of maritime piracy, committed for private ends and direct against a ship or an aircraft, or against persons or property on board such a ship or an aircraft, within Madagascar’s internal waters and territorial sea;
- (b) any act of inciting or of intentionally facilitating an act described above.”

- *Interpretation definitions:*

In order to interpret the definitions of the offenses and the provisions of the new Act with certainty, a certain number of definitions should be provided as identified during the analysis of the current Malagasy Maritime Code. They include the following terms: ship, aircraft, internal waters, territorial sea, EEZ, high seas, pirate ship or aircraft, private ship or aircraft. For the purpose of the two ships rule, it is important to define what is considered as a ship in the context of maritime piracy and armed robbery at sea. Indeed, there are several variants of nautical means that can be used in perpetrating the offense or that can be the platform victim of the attack. It may range from simple canoe, skiff or dhow, to steel made vessel. Thus, the meaning of the word “ship” in the proposed legislation should consider all those various nautical means. In this regard, a reference can be made to the Maritime Code of 2000 which gives already a general definition of ship in its article 2.1.01<sup>211</sup> which covers almost the different types of vessel. It is also analogous to the ship’s definition provided in the SUA Convention, article 1<sup>212</sup> at some extent. Similarly, the word “aircraft” should be defined and a reference can be made in this regard to the Malagasy Code of Civil Aviation, article L.3.1.1-1<sup>213</sup>.

The reason for mentioning the definition of the different maritime zones is to give a better certainty in determining where the offense was committed and consequently to enable to classify it as maritime piracy or armed robbery at sea. The definitions related to the maritime zones in the Malagasy Maritime Code of 2000 which replicate those provided in the LOSC are

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<sup>211</sup> Maritime Code of 2000, article 2.1.01 states that a ship or vessel is a craft with an autonomous propulsion or not, designed to be used for a transit within the maritimes zones (internal waters, territorial sea, EEZ, high seas) as defined in the Code. It can navigate on the surface, under or above the water.

<sup>212</sup> SUA Convention, article 1, provides that “ship means a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles, or any other floating craft”.

<sup>213</sup> The Malagasy Code of Civil Aviation, article L.3.1.1-1 defines aircraft as all planes capable of sustaining in the atmosphere thanks to air reactions other than those on the surface of the earth.

the reference for defining internal waters, territorial sea, EEZ, and the high seas. Likewise, for the sake of a good interpretation, it is important to give the meaning of “pirate ship or aircraft” and to reproduce for this purpose articles 102 and 103 of the LOSC<sup>214</sup>. Finally, private ship or aircraft needs to be defined too in order to give a precision in the legislation by stating that “private ship or aircraft” means a ship or aircraft that is not owned by the government or that is owned by the government but it is used for commercial purposes. The reason of considering ships or aircrafts used for commercial purposes that are owned by the government as private ships or aircrafts is because they are often managed like in a private company and as used in the commercial domain, they are more or less utilized for private ends of the government and in addition, they are likely to be a target of maritime piracy and armed robbery at sea attacks too.

### **B.2.2 - Criminalization:**

The criminalization is crucial in the implementation of the international treaties related to the maritime piracy and armed robbery at sea into the national legislation. It is during this process where the integration of the international legal norms and the national legal standards is mainly operated. Indeed, it is the process through which the offenses that are defined in the legislation (inspired from the LOSC) are transformed into criminal offenses and given the respective appropriate penalties. In doing so, a reference to the national Criminal Code is often made, as it is the main legal source of criminal offenses that are considered at the national level. As discussed previously, the Malagasy Criminal Code provides the general criminal offenses applicable in Madagascar but it recognizes also that any law can establish offenses and provides the penalties which is the case of the Malagasy Maritime Code. The Malagasy Criminal Code defines also the notion of attempt and accomplice in a criminal case. Attempt and the fact to be an accomplice in the meaning of the Malagasy Criminal Code can be adapted to the maritime piracy and armed robbery at sea context. As we recall, the main issues in the criminalization provisions of the Maritime Code of 2000 are on the one hand the introduction of offenses that do not constitute a complete piracy acts and on the other hand,

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<sup>214</sup> LOSC, article 102 provides the definition of piracy by a warship, government ship or government aircraft whose crew has mutinied whereas article 103 defines a pirate ship or aircraft.

some offenses included in the provided definition of maritime piracy are not criminalized in the criminalization provisions. To avoid such deficiency, it should be the defined offense that should be criminalized as a whole in one package instead criminalizing each element of the definition. Thus, since participation, incitement and facilitation are already included in the definition of maritime piracy and armed robbery at sea, criminalizing the commission of both acts suffices to criminalize also participation, incitement and facilitation. However, the attempt should be included separately in addition as it is not inserted in the definition of the offenses. Additionally, as maritime piracy and armed robbery at sea are similar in nature, they should therefore be penalized by the same penalty which should be a deterrent one as indicated in the national legal framework type. Hence, the criminalization provision should be established as follows:

“Anyone who attempts to commit or commits maritime piracy or armed robbery at sea shall commit an offense and shall, on conviction, be liable for life forced labor”.

The penalty of life forced labor is chosen as it is the reference penalty given in the Maritime Code of 2000.

### **B.2. 3 – Jurisdiction :**

In terms of jurisdiction, it is important to specify which jurisdiction is competent to hear and determine maritime piracy and armed robbery at sea cases. As the offenses are committed either in the high seas, or in the EEZ, or in the territorial sea, or in the internal waters, it is fundamental to extend the jurisdiction of the competent courts, which is mainly a territorial jurisdiction according to the CPC, to those maritime zones. The competent courts should have jurisdiction also over any offenses committed by or against a Malagasy citizen as well as Malagasy flagged ship outside Madagascar. In addition, it should be clarified how the location of the competent court is determined. In this regard, the location of the port where the transfer of the suspected offenders will be conducted for the commencement of the judicial process should be the determining factor. Consequently, the provisions related to the jurisdiction should be written as the following:

“ (1) For the purposes of this Act, the jurisdiction of the Malagasy competent courts as provided in the Criminal Procedure Code extends to:

- (a) the internal waters and within the territorial sea of Madagascar for armed robbery at sea offenses
- (b) the EEZ and on the high seas for maritime piracy offenses;
- (c) any offense committed by or against a citizen of Madagascar outside Madagascar;
- (d) any offense committed by or against a ship flying the flag of Madagascar outside Madagascar.

(2) The competent courts exercising the jurisdiction are the competent courts which have jurisdiction within the region where the port of disembarkment of the suspected offenders for the purpose of their transfer to the judicial competent authorities is located.”

#### **B.2. 4 - Arrest and seizure on account of maritime piracy and armed robbery at sea:**

As noted during the analysis of the Maritime Code of 2000 and the Criminal Procedure Code, the following issues need to be clarified within the legislation: the appointment of the competent authorities, their legal status, their rights and duties. Being an implementation legislation, the national legislation should be specific when establishing the provisions related to the arrest and seizure on the account of maritime piracy and armed robbery at sea instead of repeating verbatim the provisions of the LOSC. The procedures related to the arrest and detention of persons embedded in the Criminal Procedure Code should be taken also into account and amended if necessary.

- *Appointment of the competent authorities:*

Based on the LOSC, article 107 related to the ships and aircraft entitled to seize on account of maritime piracy, the national legislation should appoint in a specific manner the government agencies that are authorized to do so at the national level. In this regard, in Madagascar context, it should be primarily the Navy as it is the government agency in charge of maritime security and due to the fact that it is the one referred by the LOSC. However, for the purpose of combining the effort, other agencies such as the National Police and Gendarmerie, fisheries surveillance administration may also be included.

- *The legal status of the competent authorities:*

In referring to the Criminal Procedure Code, to be legally capable to ascertain a criminal offense including to conduct an arrest and a seizure, it is necessary to be a judicial police officer or law enforcement officer. In this regard, as the Navy is appointed as the

competent authority that will be conducting an arrest and seizure at sea on account of maritime piracy and armed robbery against ships, its personnel should be given the status of judicial police officer for the purpose of repressing such act. The fact of giving the Navy personnel the status of judicial police officer for the account of maritime piracy and armed robbery at sea will render legal the arrest and seizure that they perform at sea in relation to the procedure and practice within the national judicial system. Only the National Police and Gendarmerie are stated specifically in the CPC as judicial police officers and they work mainly under the supervision of a public prosecutor or an instructional judge as the case may be and the general prosecutor of the court of appeal. However, article 124 and 128 of the CPC provide that the status of judicial police officer can be granted to some civil servants by the law. It is pursuant to the provisions of these two articles that the Navy personnel is granted the status of the judicial police officer on account of maritime piracy and armed robbery at sea. In terms of jurisdiction's limit, they should be given a national competency so that they can process a case anywhere in Madagascar at any competent court having a jurisdiction over the location of the port where the suspected offenders are brought for the judicial process.

- *The rights and duties of the competent authorities and the procedures during the arrest and seizure at sea:*

Pursuant to article 110 of the LOSC, the right of visit is granted to the competent authorities. Every element of this right should be detailed in the provisions in the national legislation to avoid ambiguity especially during the operational phase of the repression of maritime piracy and armed robbery at sea. The right should include stopping, boarding, inspecting, searching, detaining or seizing a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates. It should encompass also the right to arrest the suspected offenders, to seize the property on board and any means used to commit the offense and to divert the seized ship to a port or an appropriate location for the purpose of further examination or for the judicial process. Here, it is of capital importance to affirm that in pursuing the right of visit, the competent authorities may use force that may be necessary. In fact, as pirates and armed robbers at sea often use deadly weapons and may not compel to the arresting party instructions during the arresting phase, it is important to authorize by law the use of force.

Another important issue that forms a gap as stated during the analysis of the current Malagasy legal framework, is the procedure to be followed during the arrest and detention of the suspected offenders at sea as well as during the seizure of the pirate ship or aircraft. Indeed, for the purpose of respecting the human rights related to arbitrary arrest and detention, it is vital to establish a legal basis regulating the arrest and the detention of the suspected offenders at sea. When an arrest and a seizure have been realized at sea, it should be reported immediately to the judicial authorities intended to handle the case through the Navy command. The reason for referring immediately to the judicial authorities intended to handle the case is (1) to make them aware of the arrest, (2) to enable them to be informed and to monitor the detention at sea and (3) to enable them to be prepared to take the responsibility over the case when the suspected offenders arrive in port for the beginning of the judicial process. The condition of detention at sea needs to have some legal background similar to the detention after an arrest on land. Indeed, after any arrest on land, the CPC provides that the judicial police officer has only 48 hours to detain a suspect for the purpose of an investigation<sup>215</sup>. However, if the arrest was performed outside of the limit of the city of residence of the judicial police officer, the 48 hours are extended one day per 25 kilometers<sup>216</sup>. Similar standard should be applied for the arrest at sea by taking into account the operational requirements such as the distance of the location of the arrest at sea to the nearest port where is located a competent court, the technical condition of both the arresting ship and the seized ships as well as other factors such as the weather conditions during the transit. On this particular issue, the French system can be considered as an example. In fact, as explained earlier, after the expiration of the 48 hours of detention at sea, 120 hours extension can be requested to the custodial judge under the French law on maritime piracy. In the Malagasy context, such request for extension can be addressed to the public prosecutor who are supposed to supervise the investigation of the judicial police officer.

Based on the above mentioned proposed improvements, the provisions related to the arrest and seizure on account of maritime piracy and armed robbery at sea can be drafted as the following:

“(1) The Malagasy Navy and other government agencies authorized by the law may:

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<sup>215</sup> Criminal Procedure Code, article 136

<sup>216</sup> Criminal Procedure Code, article 137

(a) On the high seas or in the EEZ, or in the territorial sea, or in the internal waters of Madagascar; or

(b) in any other place outside the jurisdiction of as State,

stop, board, search, detain or seize a pirate ship or aircraft, or a ship or aircraft taken by and under the control of pirates or armed robbers at sea, arrest any person suspected of having committed an offense under this Act and seize any property on board which is suspected to have been used in connection with the commission of the offense, divert the pirate ship or aircraft to a port or an appropriate location for the purpose of further examination or to proceed for the judicial process, and may use force as may be necessary for that purpose.

(2) On account of maritime piracy and armed robbery at sea, the Navy personnel and other government agencies' personnel authorized by law are granted the status of judicial police officer in conformity of articles 124 and 128 of the Criminal Procedure Code. They are granted a national competency in jurisdiction matter.

(3) After an arrest and a seizure on account of piracy and armed robbery at sea have been realized, arresting Navy unit or other government agencies unit shall inform its chain of command about the information regarding the arrest and seizure, and the intended port or appropriate location to divert the seized pirate ship or aircraft for the purpose of the judicial process. Upon reception of such information, the respective chain of command shall inform the public prosecutor of the first instance court having jurisdiction in the region where the port of diversion is located. A means of communication shall be established between the competent public prosecutor and the arresting unit to enable him to monitor the detention of the suspected offender at sea and the seizure of the pirate ship or aircraft.

(4) The arresting unit has the right to detain the suspect offenders on-board either the seized pirate ship or on-board the unit itself during 48 hours. Before the expiration of the 48 hours, an extension of 120 hours renewable can be requested at the competent public prosecutor on the basis of operational constraints and the condition of detention on-board.”

### **B.2.5 – Improvement related to the judicial process on the rules of evidence:**

As it has been seen, the Malagasy CPC incorporates quite workable provisions when it comes to prosecute and to try maritime piracy and armed robbery at sea cases. Nevertheless, it has been identified that the provisions related to the rules of evidence need some amendment

to be more effective in the context of maritime piracy and armed robbery at sea cases. Indeed, the requirement of presence of witnesses in court to testify in a cross-examination on contested evidence can be difficult in some circumstances. Indeed, the witnesses in a maritime piracy and armed robbery at sea case are often the seafarers that were victims of the attack or the Navy personnel that conducts the arrest, or passengers who were on-board the victim ship. After such ordeal or hardship, the witnesses such as seafarers or passengers don't want to appear in person to face the accused, or they suffer from a post trauma, or the cost of making them attending the trial is expensive since they are from different countries around the world for example. Similarly, the Navy personnel who are witnesses may be already back and retained on duty at sea and cannot appear in person in court during the trial. To overcome these obstacles, as already practiced in the courts of Madagascar's neighboring countries such as the Seychelles and Kenya, a video link evidence is accepted. Hence, to be able to adopt similar arrangement, the provisions on rules of evidence of the CPC need to be amended by introducing a new provision accepting an out of court statement due to excusable unavailability during the trial.

#### **B.2.6 - Introducing provisions on international cooperation:**

The international legal framework on maritime piracy and armed robbery at sea promotes and even requires international cooperation for the repression of such crimes. Indeed, without interstate cooperation, it is practically impossible to address the problem. In fact, a maritime piracy and armed robbery at sea case may involve several people coming from different countries as suspected offenders, victims, arresting party or even as investigators, prosecutors and judges. Thus, it is obvious that international cooperation is vital. To be able to frame and to give a basis for such international cooperation, provisions in this regard should be incorporated in the national legislation in order to have the force of law. Hence, similar to the regional States' legislation on maritime piracy and armed robbery at sea, Madagascar legislation on the matter should include provisions on international cooperation. The advantage of having an international cooperation provision in the legislation is the authorization provided by the law to engage the country in the stated field of cooperation. As described in the national legal framework type provided in the table 4, the field of cooperation may include information sharing, law enforcement cooperation, extradition, transfer of

suspected pirates, joint investigation, mutual legal assistance, post trial transfer of convicted offenders and capacity-building. The choice of entering into an agreement with foreign States in any of the field proposed is a matter of public policy choice but in any case they should be already stated in the new Act related to maritime piracy and armed robbery at sea.

### **Conclusion of part I:**

To conclude in this part I, the international law related to maritime piracy and armed robbery against ships provides a comprehensible and workable legal framework to address the problem. The international legal framework indicates the key legal elements that can be used as guidance in the development or improvement of a national legislation on the issue to effectively arrest, prosecuted and convict pirates and armed robbers at sea. These key legal elements concern mainly the definition of these two offenses, their criminalization, the jurisdiction that can hear and determine the case, enforcement measures, judicial process and human rights issues, and international cooperation. It proposes two approaches namely the zonal approach which based on the location of the commission of the act in the maritime zones as provided by the LOSC and a generalized approach by considering maritime piracy and armed robbery against ships as unlawful acts against the safety of maritime navigation, organized crime or hostage taking as incorporated in the SUA Convention, the OCC and the HC. The examination of five national legislations of the Eastern African and the Western Indian Ocean countries that face similar challenges as Madagascar in terms of maritime piracy and armed robbery against ships permitted to realize that the zonal approach is the most used in the national legislation and the LOSC is the main international legal reference. Nevertheless some concept related to criminalization, enforcement measures and international cooperation embedded in the SUA Convention, the OCC and the HC are somehow borrowed and mixed with the LOSC concept. The analysis of these five national legislations allowed also to recognize the need to integrate the international legal standards on maritime piracy and armed robbery against ships and the national legal system when developing or improving the national legislation on the issue. In this regard, coherence and consistency with the national criminal law is necessary to have an effective national legislation. A national legal framework type on maritime piracy and armed robbery against ships was drawn from the analysis of the international law and the five regional countries national legislations. This national legal

framework type permitted to assess and to understand that the current legal framework of Madagascar on the issue contains few gaps in almost each key legal element and an improvement is needed. The required improvement concerns mainly the definition of the offense where the notion of armed robbery at sea should be introduced with maritime piracy as provided by the LOSC, the criminalization to consider maritime piracy and armed robbery at sea as offenses that are penalized by the same penalty, the territorial jurisdiction of the competent courts to be extended to the internal waters, the territorial seas, the EEZ, the high seas and to a place outside the jurisdiction of any State to be enable them to treat any case, the provisions related to the arrest and seizure on account of maritime piracy and armed robbery against ships needs to be adjusted to the requirement of the Criminal Procedure Code and to allow a better operational response, the rules of evidence needs to be amended and provisions related to international cooperation should be introduced. The proposed reform of the Malagasy legal framework of maritime piracy and armed robbery against ships should allow the country to hold accountable pirates and armed robbers at sea and it can be served as the basis for the operational response.

## **Part II: THE OPERATIONAL ASPECT OF COMBATING MARITIME PIRACY AND ARMED ROBBERY AGAINST SHIPS**

Having established a legal framework on maritime piracy and armed robbery against ships is not sufficient to address the problem. Indeed, the legislation forms only a basis on which all actions should be conducted but there is also the need to consider the means to enforce it. It is through the operational arrangement that the associated part of the prevention and the law enforcement are performed.

The United States Coast Guard suggested that operations comprise activities to prevent and to respond to threats<sup>217</sup>. In the same line of ideas, Bailet, Crickard and Herbert indicated that operational responses to maritime challenges consist of using the operational resources (technical platforms, equipment and personnel) to ensure surveillance, monitoring and control or enforcement measures within the maritime zones under the jurisdiction of a coastal State<sup>218</sup>. Considering these notions of operational responses and recognizing the nature of the threat of maritime piracy and armed robbery against ships as human-induced hazards, the four components of the emergency management (Preparedness, prevention and mitigation, response and recovery)<sup>219</sup> appear also to be valid and can be adapted to the operational response to these crimes. Hence, the following four components, inspired from the emergency management concept, would constitute the main pillars of the operational response to maritime piracy and armed robbery against ships:

- Preparedness or Readiness: It is to be ready to respond to a maritime piracy and armed robbery against ships' event through measures taken prior to the occurrence of any incident. These measures may be related to the operational organizational mechanism in which cooperation and coordination are ensured, to the availability of means and capabilities (Technical platforms, equipment and manpower) to ensure the detection, the monitoring and

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<sup>217</sup>United States Coast Guard, Operations, *Coast Guard Publication 3-0, February 2012*, at p.11

<sup>218</sup> Bailet, F.N, Crickard & Herbert, G.J, *Integrated Maritime Enforcement, A handbook*, Center for Foreign Policy Studies, Dalhousie University at p.11. These authors defined the notion of surveillance, monitoring and control as follows: (1) Surveillance consists of detecting and notifying a State of conditions, activities, or events of interest within its area of jurisdiction; (2) monitoring is the systematic observation of specific conditions, activities, or events of interest within a State's maritime jurisdiction; (3) control is the execution and rendering effective of international and national rules and regulations.

<sup>219</sup> Ministers Responsible for Emergency Management, *An emergency management framework for Canada*, January 2011, Ottawa: Public Safety Canada, at p. 4. The definition of preparedness, prevention and mitigation, response and recovery in the emergency management context can be adapted to the context of maritime piracy and armed robbery against ships.

the control of such crimes, and to the human resources skills to be prepared to overcome the operational challenges.

- Prevention and mitigation: It consists of eliminating or reducing the risk of maritime piracy and armed robbery against ships' occurrence within the maritime zones under the coastal State jurisdiction and on the high seas and diminishing the ships' vulnerability . Measures are taken in advance to deter and to discourage acts of piracy and armed robbery at sea.

- Incident response: It is to act during or immediately prior or after a maritime piracy or an armed robbery against ships' incident has occurred, to rescue the victim ship and its crew, to arrest the perpetrators, and to bring them ashore to face justice.

- Post incident response: It embraces the similar concept as recovery<sup>220</sup> in an emergency management and consists of restoring conditions to an acceptable level after a maritime piracy and armed robbery against ships' incident through measures related to the transfer of the suspected offenders to the judicial authorities and those related to the post incident management of the victim ship and its crew, and their return respectively to the owner and their country of origin.

Overall, the ultimate aim of an operational response to maritime piracy and armed robbery against ships is to put in place, the necessary arrangement to enable the awareness and the detection of such crimes, to be prepared in terms of resources to address them, to prevent and reduce their happening, and to respond when they occur.

In looking at how Madagascar can operationally respond to maritime piracy and armed robbery against ships, the international and regional operational initiatives on the matter in the Eastern Africa and the Western Indian Ocean regions will be looked at firstly in order to find some positive recommendations and to identify the initiatives from which Madagascar can benefit. Secondly, the current maritime operational arrangement in Madagascar will be analyzed by assessing the above mentioned four components (Preparedness or readiness, prevention and mitigation, incident response, and post incident response) in order to recognize the potential deficiency that should be considered and to allow the proposition of the

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<sup>220</sup> "Recovery" is to repair or restore conditions to an acceptable level through measures taken after a disaster. See *An emergency management framework for Canada*, Ministers Responsible for Emergency Management , January 2011, Ottawa: Public Safety Canada, at p. 4

necessary improvement in the operational aspect of addressing maritime piracy and armed robbery against ships.

## **Chapter 1: International and regional operational initiatives to combat maritime piracy and armed robbery against ships in the Eastern Africa and the Western Indian Ocean region :**

Following the outbreak of maritime piracy and armed against ships in various parts of the world, the international community and regional States have tried to bring some solutions to operationally tackle the problem. However, if the root causes of these two crimes are somehow similar wherever there is an outbreak in any region in the world, there are differences in their manifestation in each prone area. Indeed, each prone area has its specificities especially in terms of the pirates and armed robbers at sea modus operandi as well as the local conditions. For example, in the Malacca Strait case, petty thefts, cargo and ship theft are the trend and they mostly happen within the strait which is relatively near the coast of coastal States<sup>221</sup>, whereas in the Somalia case, kidnap for ransom is the tendency. The acts are committed in a very wide sea area, and Somalia itself is a failed State. Consequently, the response to the problem in each region would differ slightly from one to another depending on the manifestation of the phenomenon and the local circumstances. In this perspective, as Madagascar is located in the Eastern Africa and the Western Indian Ocean region, it becomes interesting to look at what is happening in this region in terms of the operational response to the threat of maritime piracy and armed robbery against ships. Thus, the international and regional operational initiatives to address the issue in that particular region will be analyzed in order to identify good practices and to see the advantages that Madagascar may gain from them in the operational aspect.

### **Section A: International operational initiatives to address maritime piracy and armed robbery against ships off the coast of Somalia**

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<sup>221</sup> Raymond, C.Z., Piracy and armed robbery in the Malacca strait: A problem Solved, *Naval War College Review, Summer 2009, Vol.62, No.3*, at pp 33-34

On the international level, the United Nations (UN), through its General Assembly, its Security Council and its specialized agencies such as the International Maritime Organization (IMO) and the United Nations Office on Drugs and Crime (UNODC); and several international organizations in or outside the maritime industry have been very active in promoting an international operational response to maritime piracy and armed robbery against ships occurring worldwide but particularly off the coast of Somalia. The IMO and the shipping industry introduced some preventive responses whereas the UN through its Security Council has called for a multinational naval response to tackle maritime piracy and armed robbery at sea outbreak in the Gulf of Aden, the Somali basin and the Western Indian Ocean. It is important to look at these international initiatives as they depict operational and tactical measures that appear to have some positive effects in dealing with the problem but they also portray the successes that can be reached in cooperating.

#### **A.1 – The IMO and the shipping industry operational response:**

The IMO has been always instrumental in developing rules and recommendations for the shipping industry and for its member States. In the context of maritime piracy and armed robbery against ships, it has developed instruments and recommendations that can be used in the operational response in the realm of information acquisition and reduction of the risk of being a victim or to counter maritime piracy and armed robbery at sea attack by taking anticipatory measures that will provide some protection of the ship in ports or during a transit in high risk areas. In this perspective, the implementation of some of the technical arrangements embedded in the Search and Rescue (SAR) and the Safety of Life at Sea (SOLAS) Conventions' provisions as well as the ISPS Code can contribute to prevent and to respond to maritime piracy and armed robbery against ships in any case but not only for the Somali one. Similarly, from the shipping industry perspective, the implementation of the “Best Management Practices for Protection against Somalia Based Piracy” known as the BMP provides a comparable preventive effect as well as the use of a Privately Contracted Armed Security Personnel (PCASP) or a Vessel Protection Detachment (VPD). In addition, the shipping industry informational response, through the International Maritime Bureau Piracy

Reporting Centre (IMB PRC) has also played an important role in addressing maritime piracy and armed robbery against ships.

#### **A.1.1 - The use of SAR and SOLAS Conventions arrangements in the context of maritime piracy and armed robbery against ships:**

In line with articles 94(3) and 98(2) of the LOSC, the IMO developed the SAR and SOLAS Conventions to clarify the technical duties of the flag State towards ships flying its flag and the duty of the coastal State to establish, to operate and to maintain an appropriate and effective search and rescue service. In fact, a coastal State has the duty to render assistance to ships and persons in distress at sea round its coasts and by extension this includes maritime piracy and armed robbery against ship incident.

The 1979 SAR Convention emphasizes on the obligation of coastal States to provide assistance to any person in distress at sea, regardless of nationality and status<sup>222</sup> and it lays down the main principle guiding the search and rescue organization and coordination. This Convention requires the States Parties to put in place a national mechanism to coordinate such services<sup>223</sup>, to establish rescue coordination centres and rescue sub-centres round the coast of States Parties<sup>224</sup> and to designate rescue units<sup>225</sup>. Each centre is required to have adequate means for the receipt of distress communications via a coastal radio station or otherwise and similar means to communicate with rescue units and with other centre in adjacent areas<sup>226</sup>. In addition, it is required for each centre to have at its disposal up-to-date information relevant to SAR operations in its area<sup>227</sup>, operating plans or instructions<sup>228</sup> and operating procedures<sup>229</sup>. The Convention advises also the establishment of a ship reporting system in the SAR region. It should provide up-to-date information on the vessel movements including its sailing plan on departure, regular position report at sea, and a final report on arrival at destination or when leaving the area covered by the system<sup>230</sup>. Pursuant to the section 2.1.4 of the SAR Convention annex, a SAR region (or SRR) was delimited and allocated to each coastal State in

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<sup>222</sup> Annex of the SAR Convention, section 2.1.10

<sup>223</sup> Annex of the SAR Convention, section 2.2.2

<sup>224</sup> Annex of the SAR Convention, section 2.3

<sup>225</sup> Annex of the SAR Convention, section 2.4

<sup>226</sup> Annex of the SAR Convention, section 2.3.3

<sup>227</sup> Annex of the SAR Convention, section 4.1

<sup>228</sup> Annex of the SAR Convention, section 4.2

<sup>229</sup> Annex of the SAR Convention, Chapter 5

<sup>230</sup> Annex of the SAR Convention, Chapter 6

the world. An International Aeronautical and Maritime SAR Manual (IAMSAR) was developed to harmonize the worldwide SAR organization and system. In implementing the SAR Convention, States parties have developed their respective SAR organization, infrastructure and means of response. Hence, in many countries in the world, the SAR organization, infrastructure, and operating procedures are well established and exist already. Consequently, by giving them additional mandate, those coastal States' SAR facilities can be used as the platform where the maritime piracy and armed robbery against ships' information is collected or exchanged and from where the operational response actions may be coordinated. Indeed, it is in this perspective that several Maritime Rescue Coordination Centres (MRCC) and Maritime Rescue Sub-Centres (MRSC) are also used to handle maritime piracy and armed robbery against ships' case management. In the Eastern Africa region, we can cite as examples MRCC Mombassa and MRSC Dar-Es-Salam that are linked and used for exchange of information and in charge of handling piracy and armed robbery at sea case in their respective SAR area of responsibility. Therefore, there is no more need to create other infrastructure to receive information and to manage maritime piracy and armed robbery against ships incident response for a country that has already an existing SAR organization and infrastructure but it can use, adapt and build on the existing the SAR response arrangement to do so by adding piracy and armed robbery at sea to the SAR mandate.

The SOLAS Convention requires also the installation of communication equipments and alerting systems that permit the information exchange and management on board ships engaged in international voyage and the land, such as the ship security alert system (SSAS)<sup>231</sup>, the Long Range Identification and Tracking or LRIT<sup>232</sup>, the Global Maritime Distress Satellite System or GMDSS<sup>233</sup>, the Automatic Identification System or AIS<sup>234</sup>, and the Voyage Data

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<sup>231</sup> SOLAS, Chap. XI-2, Regulation 6 (1) & (2). The ship security alert system, when activated, initiates and transmits a ships-to-shore security alert to a competent authority and provides information on the Company, the ship's name, its location and the security status.

<sup>232</sup> SOLAS, Chap. V, Regulation 19-1. The LRIT system provides for the global identification and tracking of ships. The LRIT system consists of the shipborne LRIT information transmitting equipment, the communication service providers, the application service provider, the LRIT Data Centre, including any related vessel monitoring system.

<sup>233</sup> SOLAS, Chap. IV, Regulation 5-1 (1) & (2). The GMDSS is an integrated communications system using satellite and terrestrial radiocommunication systems for sending and receiving distress alerts and maritime safety information.

<sup>234</sup> SOLAS, Chap. V, Regulation 19(5). The AIS systems aim to provide information about a ship to other ships and to coastal authorities automatically. The information transmitted includes ship's identity, type, position, course, speed, navigational status and other safety-related information.

Recorder or VDR<sup>235</sup>. Those various operational tools provide tremendous help in detecting, reporting, responding and investigating on maritime piracy and armed robbery at sea cases. The fact of having those communication equipments and alerting systems on-board ships and the information reception means on land allow a better awareness of maritime piracy and armed robbery against ships incident, and enable to plan response actions as well as taking action more efficiently. Overall, an existing SAR organization and infrastructure along with the compliance to SOLAS radiocommunication safety and security arrangement have an important impact and facilitate the information exchange and management as well as the operational response action in addressing maritime piracy and armed robbery against ships. Nevertheless, compliance with the SAR and SOLAS conventions' arrangement would require investment of installing on-board ships the necessary radiocommunication equipments and the existence on the land of the required land-based infrastructure for the reception and exploitation of the information.

**A.1.2. - Compliance with ISPS Code in ports and on-board ships as a preventive response:**

In its chapter XI-2 related to measures to enhance maritime security, the SOLAS convention makes mandatory for shipping companies<sup>236</sup>, ships<sup>237</sup> and port facilities<sup>238</sup> of States Parties the conformity to the International Code for security of Ships and Port Facilities or ISPS Code. It provides a normalized and reliable international framework for recognizing and assessing security threats to ships and port facilities used in international trade, and a means of taking suitable precautionary measures against such threats. Its primary principle is that each ship or port facility faces different types of threats, and these threats must be well understood and an assessment made so that appropriate security measures can be taken to protect life, property, and the environment<sup>239</sup>. Hence, it is applicable in the prevention and mitigation of maritime piracy and armed robbery against ships. Indeed, the ISPS code

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<sup>235</sup> SOLAS, Chap. V, Regulation 20(1). The VDR is similar to the black box carried on aircraft, it allows accident investigators to review procedures and instructions in the moments prior an incident and helps to identify the cause of any accident.

<sup>236</sup> SOLAS, Chap XI-2, Regulation 4(1)

<sup>237</sup> SOLAS, Chap XI-2, Regulation 4(2)

<sup>238</sup> SOLAS, Chap XI-2, Regulation 10(1)

<sup>239</sup> Hogan, J.P. & Chapman, L., International Ship and Port Facility Security (ISPS) Code –What does it mean for fishing vessel security ?, *SPC Fisheries Newsletter #113 – April/June 2005*, at p.24

functional requirements allow the gathering, the assessment and the exchange of information regarding the threat, the maintenance of communication protocols for ships and ports facilities, the prevention of unauthorized access to ships, ports facilities and their restricted areas, the prevention of the introduction of unauthorized weapons, incendiary devices or explosives to ships or port facilities, the provisions for means of alert, the requirement of ship and port facility security plans and training, drills and exercises to ensure familiarity with the established security plans and procedures<sup>240</sup>.

The application and implementation of ISPS Code security measures in port allow the control of access and the movement of people as well as the goods in the port perimeter and to react in case of risk. In this regard, in the context of armed robbery against ships, it helps in preventing attacks against ships alongside or at anchor. Indeed, under the ISPS Code regime, security activities encompass ensuring that all port facility security requirements are applied<sup>241</sup>; controlling access to port facilities<sup>242</sup>; monitoring port facilities, including anchorage and berthing areas; supervising the handling of cargo and ship's stores; and ensuring that secure communication is readily available<sup>243</sup>. The ISPS Code compliant port is required to have a Port Facility Security Plan (PFSP) and a Port Facility Security Officer (PFSO).

For ships, it is the shipping company responsibilities to ensure that every ship has a security plan and to appoint a Company Security Officer (CSO) to monitor the security activities of the ships operated by the company. In the context of maritime piracy and armed robbery against ships, it is the role of the CSO for instance to prepare the company and the crew for the contingency of a hijack when the ship is scheduled to transit in high risk areas<sup>244</sup>. The ISPS Code contains requirements and guidance for ships ensuring that all ship security duties are performed and provide for provisions regarding the control of access to the ship, the control of embarkation of persons and their effects, and the monitoring of restricted areas, deck areas and surrounding the ship, supervising cargo handling and ship's stores and ensuring

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<sup>240</sup> ISPS Code, part A, paragraph 1.3

<sup>241</sup> For example, the port perimeter should be protected by a particular fence having a certain height to avoid intrusion, a communication system has to be put in place to ensure accurate communication for giving alert and for coordinating the response to incident.

<sup>242</sup> Only the people that are identified for having a business to do in the port area can enter into and a stringent control regarding weapons or explosive devices should be in place at the port entrance and exit.

<sup>243</sup> Supranote 253, at p.25

<sup>244</sup> The IMO circular MSC.1/Circ.1390 provides guidance for CSOs regarding preparation of a company and crew for the contingency of hijack by pirates in the Western Indian Ocean and Gulf of Aden

the availability of secure communication. In addition, it indicates recommendations for the flag State to provide advice related to protection measures and to the action to be taken to reduce security risk for ships when they are at sea<sup>245</sup>, to coordinate the implementation of the security measures<sup>246</sup>, to give specific measures to avoid high risk areas<sup>247</sup> and to ensure adequate manning with respect to ship security<sup>248</sup>. Consequently, if a ship applies properly the ISPS Code requirements and recommendations in a strict manner by taking the necessary ship protection measures either in ports, at anchor, or underway while transiting high risk areas, it can be ensured that the risk of being a victim of maritime piracy and armed robbery at sea attack will be reduced or minimized. Nevertheless, the implementation of the ISPS Code requires additional cost for ports and shipping companies and a cooperation between the flag States, shipping companies and port States is necessary to ensure effective implementation of the code so that it goes beyond a mere administrative compliance, and port and ship protection measures are really in place.

#### **A.1.3 – The International Maritime Bureau Piracy Reporting Centre (IMB PRC) :**

The International Maritime Bureau (IMB) is a specialized branch of the International Chamber of Commerce (ICC). Created in 1981, the IMB is a non-profit making organization dealing with the fight against maritime fraud and maritime crimes. In the realm of maritime piracy and armed robbery against ships, the IMB established in 1992 the IMB Piracy Reporting Centre (IMB PRC) based in Kuala Lumpur, Malaysia. The IMB PRC conducts 24 hours a day watch on the world's shipping lanes and has the following two principal mandates:

- (1) Acting as point of contact for ship Masters anywhere in the world who are under piratical or armed robbery attack and relays the received information to the local law enforcement agencies requesting assistance.
- (2) Broadcast the received information from ship Masters to all vessels in the Ocean region to warn them about the maritime piracy and armed robbery against ships risk in the area.

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<sup>245</sup> ISPS Code, part B, paragraph 4.21

<sup>246</sup> ISPS Code, part B, paragraph 4.22

<sup>247</sup> ISPS Code, part B, paragraph 4.23

<sup>248</sup> ISPS Code, part B, paragraph 4.28

The IMB PRC goal is to increase awareness within the shipping industry (Ship Masters, ship owners, ship operators, insurance companies, brokers, etc.) of the maritime piracy high risk areas or specific ports and anchorages prone for armed robbery against ships. In this regard, it is involved in information sharing with the shipping community, law enforcement and government agencies, and flag States in order to prevent and to reduce these two crimes.

**A.1.4 - Implementation of the Best Management Practices (BMP) as a preventive response:**

Since the outbreak of the Somalia based piracy, the shipping industry under the auspices of the International Chamber of Shipping (ICS) has developed updated documents known as the “Best Management Practices for Protection against Somalia Based Piracy” or BMP. The current version is the BMP4. The BMP contains recommendations for planning and operational practices for ship operators and masters of ships transiting the maritime piracy and armed robbery against ships High Risk Area (HRA)<sup>249</sup>. The aim of the BMP is to assist ships to avoid, deter or delay maritime piracy and armed robbery at sea attacks<sup>250</sup>. It relies on three fundamental requirements namely registration at the Maritime Security Centre Horn of Africa (MSC-HOA)<sup>251</sup>, sending reports to the United Kingdom Maritime Trade Operations (UKMTO)<sup>252</sup> in Dubai and implement the Ship Protective Measures (SPMs). It points out six actions to be avoided by vessels in order to keep away from being a victim of maritime piracy and armed robbery at sea. They include the following:

Action to be avoided	Action to be taken
<b>Be ALONE</b>	<ul style="list-style-type: none"> <li>- Report to UKMTO (email or call) and register transit with MSCHOA.</li> <li>- Use the Internationally Recommended Transit Corridor (IRTC) and Group Transit Scheme or Independent Convoy.</li> <li>- It is recommended to keep AIS turned on.</li> </ul>
<b>Be DETECTED</b>	<ul style="list-style-type: none"> <li>- Keep track of Navigation Warnings (NAVWARNS) and visit</li> </ul>

<sup>249</sup> The BMP4 defines High Risk Area as the area by where pirate activity and/or attacks have taken place. In the context of the Somalia based piracy, the High Risk Area is an area bounded by Suez and the Strait of Hormuz to the North, 10° S and 78°E

<sup>250</sup> BMP4, section 1.1

<sup>251</sup> The MSC-HOA is the information and coordination centre for EU Naval Forces and commercial ships transiting in the area.

<sup>252</sup> The UKMTO is the interface between Masters and Naval/Military forces and liaise directly with MSC-HOA and Naval Commanders at sea and ashore.

Action to be avoided	Action to be taken
	relevant websites (MSCHOA and NATO Shipping Centre) for known pirate operating locations. - Use navigation lights only.
<b>Be SURPRISED</b>	- Increase vigilance – lookouts, CCTV <sup>253</sup> and Radar
<b>Be VULNERABLE</b>	- Use Visible (deterrent) and Physical (preventative) Ship Protection Measures (SPM). - These could include: razor wire, use of water/foam, etc. - Provide additional personal protection to bridge teams.
<b>Be BOARDED</b>	- Increase to maximum speed - Maneuver vessel
<b>Be CONTROLLED</b>	- Follow well practiced procedures and drills - Use of Citadels <sup>254</sup> (Only with prior agreement Master/Ship Operator & fully prepared and drilled- Noting Naval/Military response is not guaranteed) - Deny use of tools, equipment, access routes

Table 7 Aide Memoire of actions to be avoided to escape from being a victim of maritime piracy and armed robbery against ships (Source: BMP4)

In terms of planning, the BMP recommends a company planning and a ship master planning prior to and upon entering the HRA. The company planning consists generally to obtain and monitor piracy and armed robbery at sea information, to review the Ship Security Assessment (SSA) and put in place the Ship Security Plan (SSP) as required by the ISPS Code, to prepare the crew through briefing and drills, to prepare the ship by installing the SPMs and to provide guidance to the master. The ship master planning covers the preparation of the crew through briefings and drills related to the appropriate responses, the establishment of an emergency communication plan, the definition of ship's AIS policy, constant review of

<sup>253</sup> Closed Circuit Television

<sup>254</sup> A Citadel is a designated pre-planned area purposely built into the ship where, in the event of imminent boarding by pirates, all crew will seek protection. It is designed and constructed to resist a determined pirate trying to gain entry for a fixed period of time.

piracy warning information, and the submission of registration and report to MSCHOA and UKMTO.

The BMP proposes the usage of a variety of SPMs. They include watch keeping and enhanced vigilance, improved bridge protection, control of access to bridge, secured accommodation and machinery spaces, physical barriers (razor wire, fixed metal grills topped with metal spikes, electrified barriers with warning signs, etc.), sonic deterrent equipment, water spray and foam monitors, alarms, maneuvering, CCTV, upper deck lighting, storage in a secure location of ship's tools and equipment that may help pirates to access on board, and safe muster points or citadels.



Figure 3 BMP types of SPMs against piracy and armed robbery against ships

(Source: Allianz - Piracy: An ancient risk with modern faces, an insurer's perspective from Allianz Global Corporate & Specialty)

The BMP provides also recommendations for the action to be taken during attacks and during naval or military forces intervention and rescue. It explains the cooperation that the crew of the attacked ship and the ship operator can offer with respect to the collect of evidence by the naval or military forces or law enforcement units for the prosecution of the pirates and armed robbers at sea after the incident.

The BMP guidance appears to be a useful tool to deter, to prevent and to mitigate maritime piracy and armed robbery against ships. It helps in delaying attacks while waiting for naval or military forces intervention and rescue. It is recognized that implementing BMP have largely diminished successful pirate attacks<sup>255</sup>. Its implementation is supported by international organizations such as the UN<sup>256</sup> and the IMO which recommends its application under the responsibility of the flag State. Furthermore, the insurance industry promote the use of SPMs and the compliance with the BMP by making them as an obligation of underwriting or by providing a reduction in insurance premiums<sup>257</sup>. Nevertheless, BMP measures put additional expense for shipping companies and do not ensure full security due to the possible delay of naval or military forces intervention and that's why another layer of security measures are taken by the shipping industry in hiring a PCASP<sup>258</sup> or by using a VPD<sup>259</sup>.

#### **A.1.5 - The use of Privately Contracted Security Personnel (PCASP) and Vessel Protection Detachment (VDP) by the shipping industry as a preventive response:**

With the scourge of maritime piracy and armed robbery against ships, the PCASP has been used also as a preventive response by the shipping industry. The offer of maritime security services has been noticed during the outbreak of piracy in the strait of Malacca. With the outbreak of piracy and armed robbery attacks off the coast of Somalia and its consequences leading to massive financial losses for the shipping industry and the insurance companies, the business of Private Maritime Security Companies (PMSC) has known a tremendous growth. At present, there are more than 140 Private Maritime Security Companies (PMSC) working in anti-piracy operations off the coast of Somalia<sup>260</sup>. It is estimated that they employ at least 2700 armed guards on board ships, 18 floating armors<sup>261</sup> and 40 private armed

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<sup>255</sup> IMO, Resolution MSC. 324 (89) related to the implementation of Best Management Practice Guidance, 20 May 2011, annex 29, at p.2

<sup>256</sup> UNSCR S/RES/1976 (2011), paragraph 12

<sup>257</sup> Oceans Beyond Piracy, *The economic cost of Somali piracy*, 2011, at p.14

<sup>258</sup> The Atlantic Council, *Managing the Global Response to Maritime Piracy, Report of the Atlantic Council Counter-Piracy Task Force*, 2012, at p.6

<sup>259</sup> A VPD is a team of military personnel of a State that accompanies a merchant ship to protect it against piracy attacks. Generally, a VPD embark on board a merchant ship that flies the flag of their nation of origin.

<sup>260</sup> Supranote 270, at p.6

<sup>261</sup> These are private ships that are hired by contractors to be used in escorting merchant ships

patrol boats<sup>262</sup>. These PMSCs provide mainly four categories of services depending on their area of expertise:

- Undertaking security audits to recognize and remedy particular weaknesses and deficiencies in a vessel security organization and preparedness. This type of service is offered prior to a transit or operation in an HRA.

- Providing training courses related to maritime piracy and armed robbery at sea attacks response for the crew. This type of service is also provided during the preparation for the transit or operation in an HRA.

- Deploying guards (Armed or unarmed) and occasionally escort boats to accompany the vessel when transiting HRAs. The offer may include putting on board the security guards and/or providing an escort vessel to ensure the security around the ship during the transit.

- Aiding with recovery of hijacked ships and/or the negotiation of ransoms. This service is offered by companies that have experience in the hostage taking. It covers the period from which the hijacking starts, to the delivery of the ransom money and when the vessel with the crew is released safely.

The most demanded service by the shipping industry is the deployment of security guards in order to ensure a safer transit through the HRA in addition to the SPMs. The help of a hostage negotiator is also often requested by ship owners or operators or proposed by insurance companies when the ship is hijacked. The use of PSCAP has been recognized as effective by countries such as the United States and the United Kingdom. It was also asserted that the presence of PSCAP on-board has prevented 81 ships (43%) to fall under pirate's control out of 189 attempted hijackings in 2011 in the Somalia case<sup>263</sup>. In addition, some maritime insurance companies promote the use of PSCAP by providing a premium reduction for ships accepting to hire their own security<sup>264</sup>. Apart from its deterrent value, the use of PSCAP presents also some advantages as it provides one-on-one security protection which is beyond the scope of naval deployments and it has involved the shipping industry to take also its responsibility in mitigating maritime piracy and armed robbery against ships instead of relying only on naval task forces' presence which is costly at some extend. However, despite

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<sup>262</sup> Brown, J., *Pirates and Privateers : Managing The Indian Ocean's Private Security Boom*, *Lowy Institute For International Policy Analysis*, 12 September 2012, at p.3, 5 & 8

<sup>263</sup> Oceans Beyond Piracy, *Human cost of Somali piracy* 2011, June 2012, at p. 12

<sup>264</sup> Chalk, P., *Private Maritime Security Companies (PMSCs) and Counter-Piracy*, Paper presented at the second United Arab Emirates Counter Piracy Conference, Dubai, June 2012, at p.2

these benefits related to the use of PCASP, there are some limitations that need to be pointed out. One of them is the lack of clear rules of engagement (ROEs) on the use of force at sea by PSCAP. Indeed, an international code of conduct related to land-based private security companies exists but there is no similar document regulating the conduct of PMSCs in the maritime field. Hence, the absence of international standards leads to conflicting understanding of the right to use force, and differing comprehension of the powers and legal accountability of the security guards at sea<sup>265</sup>. The consequences of firing against suspected pirates which found to be innocent fishermen are colossal and require a greater awareness from the PMSCs along with a development of clear ROEs as accidental death or injury of innocent people, for instance, could expose them and their employer to onerous liability claims as well as criminal charges<sup>266</sup>. The second concern about the use of PCASP is the fear of escalation of violence as security guards firing at the pirates and armed robbers may incite these latter to respond in a more robust manner. In this regard, it is recognized that a race for mini-arms between pirates and PMSCs is valid and probable<sup>267</sup>. The third problem related to the presence on board of PCASP is the conflicting chain of command. In fact, the master is the overall in charge of the expedition, the safety and the security of the ship, crew, and cargo. He is the one who should hold at all time the control and the authority on board including any use of force. However, since the status of the PCASP as crew member remains obscure, it leads to doubt whether they should obey to master's command or whether they should operate in an autonomous manner. The second option would likely be the most adopted and this situation may lead to conflicting decisions. The fourth issue related to the PMSCs is the lack of public registry which can monitor and oversight the activities of the different companies. Hence, it poses the problem of doubt and credibility over some PMSCs and it renders difficult the choice of shipping companies in hiring a PMSC unless a proper vetting is performed in advance. The fifth problem raised by the use of PCASP concerns the movement, licensing and storage of weapons on board merchant ships transiting territorial waters of third coastal States. Indeed, pursuant to the right of innocent passage conditions as established by the LOSC,

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<sup>265</sup> The Atlantic Council, *Managing the Global Response to Maritime Piracy, Report of the Atlantic Council Counter-Piracy Task Force, 2012*, at p.7.

<sup>266</sup> Chalk, P., *Private Maritime Security Companies (PMSCs) and Counter-Piracy*, Paper presented at the second United Arab Emirates Counter Piracy Conference, Dubai, June 2012, at p.3

<sup>267</sup> Brown, J., *Pirates and Privateers : Managing The Indian Ocean's Private Security Boom*, *Lowy Institute For International Policy Analysis*, 12 September 2012, at p.3

armed vessels are not likely to be allowed by coastal States to enter their territorial sea. In the event of authorization, it is often required that the use of weapons are forbidden during the transit in the territorial sea and they have to be handed over to or secured by competent port authorities upon arrival in port. The final issue regarding the use of PCASP is the expensive price of maritime security services. Indeed, the cost of hiring an escort boat ranges between \$10,000 and \$ 100,000 depending on the duration of the transit whereas the request of a PCASP costs between \$ 21,000 and \$ 50,000 per transit<sup>268</sup>.

Some national defense forces provide also the shipping industry on board security armed guards upon request. They are known as Vessel Protection Detachments (VPD) and act more or less similar to the PCASP. However, their specificity resides in the fact that they are military personnel. In this regard, they are supposed to be more reliable than the PCASP as they are familiar with the use of weapons and use of force. Nevertheless, the recent incident involving Italian VPD security guards who opened fire to innocent Indian fishermen have raised concerns regarding the reliability of the VPD<sup>269</sup>. Hence, the use of VPDs encounters equal problems as the use of PCASP.

The IMO developed recommendations related to the use of PCASP for PMSCs<sup>270</sup>, shipping companies, ship owners or operators, shipmasters<sup>271</sup>, flag States<sup>272</sup>, port States and coastal States<sup>273</sup>. It is recognized by IMO that the use of PCASP remains a choice of shipping companies or ship owners/operators, and it is up to the flag States to regulate and authorize such use. In addition, IMO indicated that coastal and port States are responsible for putting in place the necessary regulations with regard to the transit of ships having on board PCASP in their territorial sea, internal waters and during port calls. As of December 7, 2011, there are 11 flag States which authorize officially the use of armed security guards on board ships flying their flag<sup>274</sup>.

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<sup>268</sup> Chalk, P., *Private Maritime Security Companies (PMSCs) and Counter-Piracy*, Paper presented at the second United Arab Emirates Counter Piracy Conference, Dubai, June 2012, at p.3.

<sup>269</sup> Rider, D., Military Protection 'Put together at Speed' is no solution to piracy, *3rg Excellence In Security*, 10 October 2012, available at <http://www.3rg.co.uk/maritime-security/military-protection-put-together-at-speed-is-no-solution-to-piracy>

<sup>270</sup> IMO Circular, MSC.1/Circ. 1443.

<sup>271</sup> IMO Circular, MSC.1/Circ. 1405/Rev.2.

<sup>272</sup> IMO Circular, MSC.1/Circ. 1406/Rev.2.

<sup>273</sup> IMO Circular, MSC.1/Circ. 1408/Rev.1.

<sup>274</sup> Oceans Beyond Piracy, Introduction to Private Maritime Security Companies (PMSCs), *One Earth foundation*, 2012, at p.8 available at [http://oceansbeyondpiracy.org/sites/default/files/pm\\_sc\\_map\\_final\\_6.pdf](http://oceansbeyondpiracy.org/sites/default/files/pm_sc_map_final_6.pdf). The 11 flag States authorizing the use of PCASP are Cyprus, Finland, Germany, Greece, Hong Kong, India,

The use of PCASP and VDP offers indeed a greater preventive response to the shipping industry against maritime piracy and armed robbery against ships. It provides not only additional layer of protection on top of the physical SPMs and gives a one-on-one personalized security. Nevertheless, despite such benefits, the use of PCASP remains subject to several administrative, legal, operational and cost limitations.

## **A.2 – Multinational naval operation response: The Somalia Case.**

With the rise of maritime piracy and armed robbery against ships off the coast of Somalia, the UN Security Council, acting under Chapter VII of the UN Charter, has adopted several resolutions to address the problem since 2008. Among the proposition embedded in the resolutions is the call for naval forces deployment in the region of the Gulf of Aden, the Somali Basin and the Western Indian Ocean. With the consent of the Transitional Federal Government (TFG) of Somalia, the UN Security Council Resolution (UNSCR) 1816, adopted on June 2008, authorized UN member States to cooperate with the TFG to take action against pirates and armed robbers at sea, including in Somalia's territorial sea for a period of six months. This authorization has been subsequently extended for twelve months every year since 2008 by UNSCRs 1846(2008)<sup>275</sup>, 1851(2008)<sup>276</sup>, 1897(2009)<sup>277</sup>, 1950 (2010)<sup>278</sup>, and 2020(2011)<sup>279</sup>. In addition, the authorization of the military force intervention was broadened to include land-based operations on the Somali mainland<sup>280</sup>.

### **A.2.1 – The participants in multinational operational response:**

Since 2008, following the request of the UN, the maritime counterpiracy response off the coast of Somalia has seen the participation of warships and maritime surveillance aircraft provided by international maritime task forces and individual States' naval forces. The participants in the counterpiracy effort in the region are the following:

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Italy, Norway, Spain, UK, USA.

<sup>275</sup> UNSCR S/RES/1846 (2008), paragraph 6

<sup>276</sup> UNSCR S/RES/1851(2008), paragraph 6

<sup>277</sup> UNSCR S/RES/1897 (2009), paragraph 7

<sup>278</sup> UNSCR S/RES/1950 (2010), paragraph 7

<sup>279</sup> UNSCR S/RES/2020 (2011), paragraph 9

<sup>280</sup> UNSCR S/RES/1897 (2009), paragraph 11

- The European Union Naval Force (EU NAVFOR) Somalia Operation ATALANTA: It was established in December 2008 under the framework of the Common Security and Defense Policy (CSDP) of Europe and in accordance with the UNSCRs. The EU NAVFOR has been tasked to protect the vessels of the World Food Programme (WFP) and the African Union's Military Mission in Somalia (AMISOM); to deter, to prevent, and to repress piracy and armed robbery act off the Somali coast; to protect vulnerable shipping on a case by case basis and to contribute to the monitoring of fishing activities off the coast of Somalia. Its mandate has been extended until December 2014 and the area of operations covers the southern Red sea, the Gulf of Aden, a large part of the Indian Ocean above latitude 15° S and includes the Somali coastal territory, its territorial sea and internal waters. The surface of the area of operation is estimated at 2 million square nautical miles which corresponds to 1.5 times the size of Europe mainland. The EUNAVFOR task force is under the responsibility of an Operation Commander, who directs the operation from the Operation Headquarters (OHQ) at North wood, United Kingdom, and has a Force Commander exercising command and control over all military forces in the operation area.

- The North Atlantic Treaty Organization (NATO) Naval forces participating in the NATO Operation Ocean Shield: Its mandate has been extended until December 2014. The Operation Ocean Shield has a primary mission to deter and respond to piracy but it participates also in the escort of African Union-chartered vessels transporting logistical supplies for the AMISOM and regional States' capacity-building. It is under the responsibility of Joint Command Lisbon, Portugal, and the daily operational command and control is under the Allied Maritime Component Command (CC-Mar), Northwood, United Kingdom.

- The Combined Maritime Task Force (CMF) represented by the Combined Task Force (CTF) 151: The CTF 151 was established in January 2009 under the CMF which is an international naval coalition led by the USA and consisting of 25 participating nations. The CTF 151 mission is to conduct counterpiracy operations in the Gulf of Aden and off the coast of Somalia to protect global maritime security and ensure freedom of navigation for worldwide benefit. It has its OHQ in Bahrain.

- Other independent naval actors: In addition to the international maritime task forces, other countries have autonomously participated in the international efforts to combat piracy and armed robbery at sea off the coast of Somalia. Among other States, we can cite Russia,

China, India, Japan, Malaysia, and Iran. They act mainly to protect their national merchant ships transiting the region but have also contributed in the monitoring of area of operation.

In total, on a daily basis the waters off the Horn of Africa are patrolled approximately by up to 40 warships and maritime surveillance aircraft<sup>281</sup>.

### **A.2.2 - Modus operandi in the operational response:**

The maritime counterpiracy efforts conducted by the multinational naval forces off the coast of Somalia has been mainly based on preventive and repressive responses. It consists in the establishment of information and vessel monitoring centres, putting in place an Internationally Recommended Transit Corridor (IRTC) and escorted convoy system, and conducting maritime patrols and surveillance off the coast of Somalia.

- Establishment of information and vessel monitoring centres :

There are four information and vessel monitoring centres that was established to provide updated piracy and armed robbery attack informations, to receive reports and requests for assistance from merchant ships transiting in the area, to monitor their transit and to liaise with the multinational naval forces in case of an attack. The EU NAVFOR established an online centre known as the Maritime Security Centre – Horn of Africa (MSC-HOA), which is manned by military and merchant navy personnel. It offers a 24 hour monitoring of vessels transiting the Gulf of Aden, provides an updated web-based information and guidance regarding piracy activities to the shipping industry, and for shipping companies and operators to register the vessel movements through the region<sup>282</sup>. Similar services are offered by the UK Maritime Trade Operations (UKMTO) in Dubai, the NATO Shipping Centre (NSC) in Northwood and the US Navy's Maritime Liaison Office (MARLO) in Bahrain. The four information centres work together and exchange information but the bulk of the applications is passed on to the MSC-HOA. It is important to note that the BMP recommends ships transiting in the Gulf Aden to register to MSC-HOA and to submit reports regularly to UKMTO. It has

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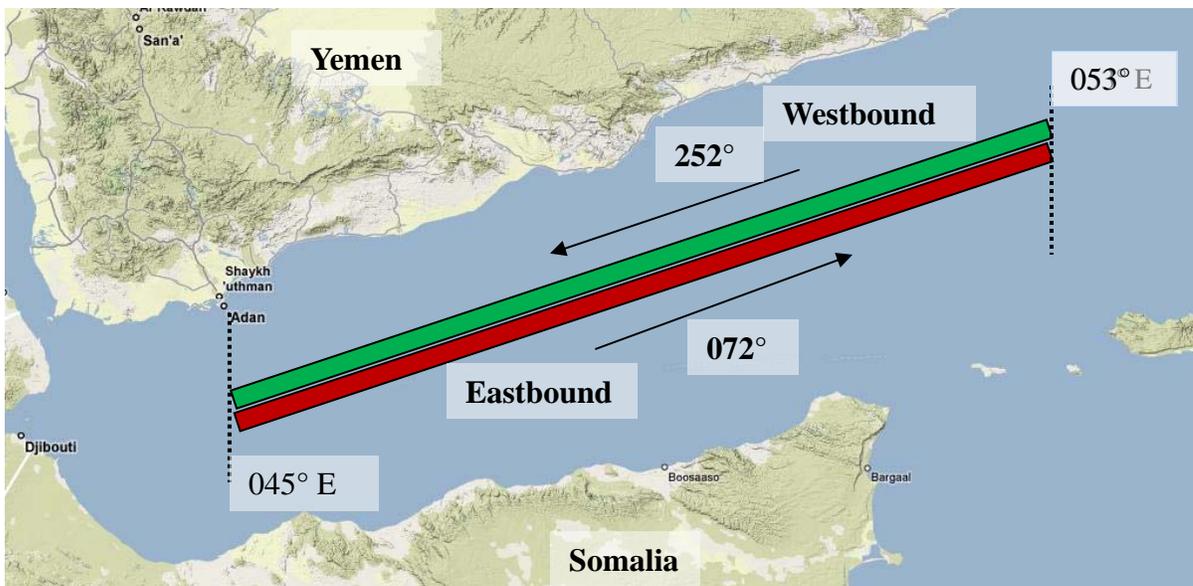
<sup>281</sup> The Atlantic Council, *Managing the Global Response to Maritime Piracy, Report of the Atlantic Council Counter-Piracy Task Force, 2012*, at p.4

<sup>282</sup> European Union Naval Force Somalia, *EU NAVFOR Operation Atalanta*, June 2012, at p.8

been recognized that ships following the advice of the information centres face less risk to be attacked<sup>283</sup>.

- The IRTC and escorted convoys :

When transiting toward or from the Red Sea and Suez Canal, merchant ships have to pass through the Gulf of Aden which is a prone area for maritime piracy and armed robbery against ships. To overcome this challenge, a transit corridor has been put in place running parallel to the south coast of Yemen. The purpose of the IRTC is to improve the security of ships transiting through it and to optimize the use of available naval resources present in the region.



Map The Internationally Recommended Transit Corridor in the Gulf of Aden  
(Source: EU NAVFOR Somalia\_MSC-HOA presentation on Gulf of Aden IRTC & Group  
Transit explanation<sup>284</sup>)

The IRTC is 492 miles long and is divided into an eastbound and a westbound transit lane of 5 miles wide each, separated by 2 miles median zone. It is divided into several blocks that are allocated to the EUNAVFOR Atalanta, the CTF-151, and NATO based on the unit operational capability, planning, and the availability of other units and threat information. Six

<sup>283</sup> Homan, K. & Kamerling, S., *Operational challenges to counterpiracy operations*, in Ginkel, B. & Putten, F.P. (Eds), *The International Response to Somali Piracy, Challenges and Opportunities*, 2010, The Netherlands: Martinus Nijhoff Publishers, at p.74

<sup>284</sup> Available at

[http://www.intertanko.com/upload/IRTC%20GT%20Explanation%20March%202009%20\(2\).pdf](http://www.intertanko.com/upload/IRTC%20GT%20Explanation%20March%202009%20(2).pdf)

to eight warships including military aircraft ensure permanently the maritime patrol in each block and hand over the group of merchant ships to the group of naval units patrolling the next block<sup>285</sup>. In the IRTC, ships can benefit from three possibilities of assistance namely one-on-one escorts (for vulnerable vessels), night time group transit, and supported transit (for vessels having missed a group transit)<sup>286</sup>. Prior transiting into the corridor, merchant ships are asked to register to MSC-HOA and they can apply for particular assistance which is provided based on criteria related to the vulnerability of the vessel (Speed, type of cargo, freeboard, etc.)<sup>287</sup>. Independent naval forces from countries like Japan, South Korea, India, Russia and China ensure also escorted convoys of ships flying their respective national flag in or nearby the transit corridor. It has been recognized that the IRTC and escorted convoys have provided improved security for ships transiting the Gulf of Aden despite the rare occurrence of piracy and armed robbery incidents within the corridor since its establishment<sup>288</sup>.

- Maritime patrol and repression of maritime piracy and armed robbery against ships:

Apart ensuring the security of transit in the IRTC, other units of the multinational naval forces conduct maritime patrol operations in the vicinity of the Gulf of Aden, the Somali basin and part of the Indian Ocean. The purpose of these operations is mainly to conduct baseline and focused operations. Baseline operations consist of patrolling the area to assist merchant ships and to reassure the local actors such as local fishermen by explaining to them the purpose of the naval operations in the area and to provide them the contact information of the naval authorities<sup>289</sup>. The focused operations have a primary goal to collect intelligence information and to deter piracy and armed robbery at sea attacks in areas where incidents are suspected to occur in order to disrupt the intention of pirates to act<sup>290</sup>. The multinational naval task forces have also proceeded to the boarding and seizure of suspected pirate ships as well as the arrest of suspected pirates. The naval units faced challenges with regard to what to do with the captured pirates and their prosecution due to legal obstacles and logistical concerns related to the transfer of the arrested individuals to be tried in the arresting naval unit country of

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<sup>285</sup> Homan, K. & Kamerling, S., *Operational challenges to counterpiracy operations*, in Ginkel, B. & Putten, F.P.(Eds), *The International Response to Somali Piracy, Challenges and Opportunities*, 2010, The Netherlands: Martinus Nijhoff Publishers, at p.83.

<sup>286</sup> *Ibid.*, at p.84.

<sup>287</sup> *Id.*

<sup>288</sup> *Ibid.*, at p.74

<sup>289</sup> *Ibid.*, at p.87

<sup>290</sup> *Id.*

origin. Indeed, some countries such as France, USA, Germany, among others brought to trial suspected pirates at home. However, transferring Somali suspected pirates to Europe or the USA have been recognized as logistically complicated, and there is a reluctance of several countries to prosecute pirates due to the expenditure associated with a long post-conviction imprisonment, the fear of pirates asylum request in their country, and, sometimes limited penitentiary capacity<sup>291</sup>. Hence, it resulted in the catch and release of the pirates and sea armed robbers. Nevertheless, an alternative solution has been put in place to address the pirates' prosecution problems by entering into a transfer agreement with the coastal States in the region willing to prosecute the pirates and sea armed robbers arrested by the multinational naval forces. As a result, the EU entered into a transfer agreement with Kenya and the Seychelles for the prosecution of suspected pirates. The CMF and the NATO do not have such transfer agreement but some of the individual States participating in the international maritime counterpiracy effort have entered into a bilateral transfer agreement of suspected pirates and sea armed robbers to coastal States in the region too. In this regard, the UK has for instance established transfer agreements with Kenya, Seychelles and Mauritius whereas the USA has established a similar agreement with Kenya and Seychelles.

In terms of equipments and assets used to conduct the naval operations, the multinational naval forces dispose well-equipped and well-trained personnel as well as modern warships with aircraft support. The naval assets comprise frigates, destroyers, auxiliary warships and Maritime Patrol and Reconnaissance Aircraft (MPRA)<sup>292</sup>. Unmanned aerial vehicles (UAVs) have been also used during the counter-piracy operations<sup>293</sup>. At sea, ships of different navies both within and outside the EU, NATO and CMF have collaborated with success at some extend. Despite differences in the approach, each and everyone seems to have clear rules of engagement in conducting counterpiracy operations and is familiar with international rules such as the LOSC and those conventions or recommendations established under the auspices of the IMO. Nevertheless, the international naval operation faces challenges due to the vastness of the area of operations compared to the available assets, the difficulty in detection of pirates small boats, the adaptation of pirates modus operandi to the

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<sup>291</sup>The Atlantic Council, Managing the Global Response to Maritime Piracy, *Report of the Atlantic Council Counter-Piracy Task Force, 2012*, at p. 5

<sup>292</sup> Oceans Beyond Piracy, *The Economic Cost of Somali Piracy 2011*, One Earth Future Foundation, 2012, at p. 27

<sup>293</sup> *Id.*

local conditions, and the political, economical and security situation on land in Somalia which remains unchanged and still enable piracy and armed robbery at sea to thrive. Indeed, it appears that the pirates and armed robbers operate outside the scope of modern weapon systems as they adopt asymmetric warfare tactics and it is hard to identify at a distance the pirate skiffs on radars from ships, aircraft and satellites as well as to distinguish them and the mother ships that are used by pirates from the local innocent fishing and merchant vessels<sup>294</sup>.

- Information sharing and Maritime Situational Awareness (MSA) :

MSC-HOA and UKMTO in particular as well as NSC and MARLO act as interfaces between the multinational naval forces and the commercial ships transiting the area. Apart their interface role, they provide advice to the shipping industry and updated informations on maritime piracy and armed robbery at sea situation in the region as explained earlier.

The communication between merchant ships and the naval authorities go through civilian and military systems. The civilian systems that are generally used are the Automatic Identification System (AIS) and the Global Maritime Distress System (GMDSS). These systems provide data on merchant ships, including identification, position, course and speed and are also utilized as communication tools between ships as well as to receive and to react to emergency calls and alerts. A Recognized Maritime Picture (RMP) is established by the naval forces from the civilian information provided by the AIS and the GMDSS to increase the MSA<sup>295</sup>. The dissemination of the overall operational picture is done through classified military systems (MCCIS, Link 11, NSAWAN, and CENTRIXS) with an access reserved only to the countries forming part of the CMF, the NATO, or EUNAVFOR and the USA allied countries including Japan and South Korea<sup>296</sup>. An EU-web-based system known as the Mercury, which allows exchange of unclassified information and chatting, is used to communicate with all naval forces present in the region and shore organizations that do not have access to the RMP (For example Russia, China, India and the UKMTO) but they are required to apply to be able to join the forum<sup>297</sup>. There is an acceptable interoperability amongst the countries participating in the CMF, NATO, EU naval task forces, but it remains a

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<sup>294</sup> Homan, K. & Kamerling, S., *Operational challenges to counterpiracy operations*, in Ginkel, B. & Putten, F.P. (Eds), *The International Response to Somali Piracy, Challenges and Opportunities*, 2010, The Netherlands: Martinus Nijhoff Publishers, at p.90

<sup>295</sup> *Ibid.*, at p.88

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

challenge with third forces such as Russia, China, India, Pakistan and Iran. If the MSA in the Gulf of Aden is somehow well-established due to the relatively permanent presence of the naval forces in the IRTC and the escorted convoys, creating an MSA in the Somali basin and the Western Indian Ocean continues to be a challenge due to the magnitude of the area and the limited coverage by warships and aircraft. Hence, technical, operational and political obstacles still hinder the advancement of cooperation in information sharing and the establishment of the MSA.

- Coordination through the Shared Awareness and Deconfliction (SHADE) and the Contact Group on Piracy off the Coast of Somalia (CGPCS):

In 2008, the SHADE initiative was established as a meeting mechanism with the purpose of coordinating and de-conflicting activities between countries and multinational naval forces involved in counter-piracy operations off the coast of Somalia. It consists of meetings that are held in Bahrain at regular period, and are co-chaired on a rotational basis by the CMF, NATO, and EUNAVFOR. Military and civilian representatives from 27 countries and 14 international organizations, the shipping industry and several governments have participated in the meetings since 2008<sup>298</sup>. The main aspect of SHADE meetings is information sharing and exchange of views between stakeholders from force-providing nations, regional countries, international organizations and the shipping industry. The meetings look for circumventing redundancies within the naval task forces coalitions and independent navies, and have been used to discuss improvement in tactical and operational coordination and cooperation<sup>299</sup>. As an example, through SHADE, China, India, and Japan agreed to share data and to coordinate their merchant ship escort convoys through the IRTC in early 2012<sup>300</sup>. Pursuant to the UNSCR 1851, the CGPCS was established in 2009 with the aim to facilitate the discussion and coordination of actions among States and organizations in addressing the piracy and armed robbery problem off the coast of Somalia. The CGPCS has more than 60 countries and international organizations participating in the forum. It identified six areas of focus: Operational and information support, coordination mechanism, judicial frameworks for

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<sup>298</sup> Wizardias, India, Japan and China entered into a Pact called Shade, *Current Affairs, January 2012*, at p.12 available at <http://wizardias.com/Download/January%202012.pdf>

<sup>299</sup> Homan, K. & Kamerling, S., *Operational challenges to counterpiracy operations*, in Ginkel, B. & Putten, F.P.(Eds), *The International Response to Somali Piracy, Challenges and Opportunities*, 2010, The Netherlands: Martinus Nijhoff Publishers, at p.85

<sup>300</sup> Wizardias, India, Japan and China entered into a Pact called Shade, *Current Affairs, January 2012*, at pp.11-12 available at <http://wizardias.com/Download/January%202012.pdf>

arrest, prosecution, and detention, commercial shipping self-awareness and other capabilities, diplomatic and public information efforts and piracy financial flows<sup>301</sup>. Five working groups have been established to treat each area. The working group 1 (WG1) is in charge of effective naval operational coordination and regional capacity development. With regards to naval operations coordination, the WG1 endorses the idea of coordinated patrols and convoys in the IRTC and the improvement of international coordination of the maritime effort in order to optimize effective use of the limited naval resources deployed in the region.

The multinational naval response to the Somali piracy have been at some extend successful in deterring maritime piracy and armed robbery against ships in the Gulf of Aden, the Somali Basin and the Western Indian Ocean. Nevertheless, it has made the area of operations of pirates expanding far away from the coast of Somalia particularly southward in the Mozambique channel and off the coast of Western Indian ocean island States such as Comoros, Seychelles, Madagascar and Mauritius due to the use of mother ships by the Somali pirates. While continuous efforts are still needed, the organizational structure and coordination supporting the operational international counterpiracy endeavors in the region appears to be effective through the CGPCS and the SHADE mechanism, the information and coordination centres (MSC-HOA, UKMTO, NSC and MARLO), and the RMP as well as the Mercury information sharing platforms. However, it has to be noted that such multinational naval piracy response is very expensive<sup>302</sup> and does not constitute a long term solution of the problem. It appears that a response on land not only in terms of security issues but mainly on political and socio-economical capacity building has to be envisaged to have a long term solution.

### **A.3 – Seafarers facing piracy and armed robbery against ships off the coast of Somalia: The international response.**

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<sup>301</sup> See CGPCS Website, Mission of the CGPCS, at <http://www.thecgpcs.org/about.do?action=mission>

<sup>302</sup> In 2011, it has been estimated that the cost of counter-piracy military efforts amounted around \$1,273,266,011. See Oceans Beyond Piracy, *The Economic Cost of Somali Piracy 2011*, One Earth Future Foundation, 2012, at p. 27

Seafarers are considered one of the primary victims of maritime piracy and armed robbery against ships. In 2011, it is estimated that 3,863 seafarers were subjected to assaults by Somali pirates and armed robbers at sea during preliminary stages of attacks, 968 came in close contact with the attackers and 1, 206 individuals were held as hostages among whom 35 died<sup>303</sup>. For those held hostages, they faced physical and psychological mistreatment during the captivity. For this reason, the UN, in the UNSCRs, expressed its concern regarding the threat posed by maritime piracy and armed robbery against ships to the safety of the seafarers, the inhuman conditions during captivity and the impact on their families<sup>304</sup>. In view of the seafarers' conditions in connection with piracy and armed robbery against ships, a certain number of initiatives have been initiated at the international level and that includes the Maritime Piracy Humanitarian Response (MPRH), the International Seafarers Assistance Network (ISAN) Seafarer help, and the Save Our Seafarers (SOS) campaign initiatives.

#### **A.3.1 – The Maritime Piracy Humanitarian Response (MPRH):**

The MPRH is a program that has been established by a pan industry alliance of ship owners, unions, managers, manning agents, insurers and welfare associations (maritime, labor, faith or secular)<sup>305</sup> to respond to seafarer's concerns related to maritime piracy and armed robbery against ships. The purpose of the program is to address the three phases of “pre-, during and post incident” assistance to seafarers and their families with humanitarian aspects of traumatic incident caused by a piracy and armed robbery attack or hostage taking. It includes (1) the development of good practice for companies and seafarer welfare organizations on supporting seafarers and their family members, (2) the development of relevant training modules for seafarers, (3) the development of an international network of trained first-responders with appropriate skills within partner and associated organizations, (4) access to a network of professional aftercare, (5) the establishment of a seafarers' Helpline, (6) availability of adequate research/information database accessible when needed<sup>306</sup>. The

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<sup>303</sup> Oceans Beyond Piracy, *The Human Cost of Somali Piracy 2011*, One Earth Future Foundation, 2012, at p. 4

<sup>304</sup> UNSCR S/RES/1976 (2011), S/RES/2015 (2011) & S/RES/2020 (2011), preambles

<sup>305</sup> The MPRH partners include BIMCO, ICMA, ICSW, ISF, IFSMA, IGP & I, IMB, IMEC, IMHA, InterCargo, InterManager, INTERTANKO, IPTA, ITF, SIGTTO, IMO, NATO Shipping Center, The Honourable Company of Master Mariners, TK Foundation, ISAN and OCIMF

<sup>306</sup> See MPRH Website at [http://www.mphrp.org/about\\_us.php](http://www.mphrp.org/about_us.php)

following is recommended by the Good Practice Guide for Shipping Companies and Manning Agents for the Humanitarian Support of Seafarers and their Families:

Concerned	Phases	Action to be taken
<b>Seafarers</b>	Pre-crisis period	Seafarer preparation and training including psychological and physical preparation
	Under attack	Compliance with pirates' instructions once they are on-board In case of unsuccessful attack: Experience sharing and debriefing conducted by the master.
	Captured and held hostage	Compliant behavior as a survival technique Maintain high morale and peer support Maintain vigilance and on guard status Maintain chain of command The company should not delay the negotiation proceedings
	When released	The seafarers need to resume their normal on-board routines and duties Communication with families as soon as possible Company logistical supports Crew members medical examination Upon arrival at a safe port, the company should make available trained personnel providing practical and emotional support and medical care, prepare crew members for the criminal investigations if required, explain repatriation and payment arrangements, provide logistical support to the seafarers prior and during its travel back home.
	When arriving in their own country	Immigration and customs assistance Full medical examination Introduction to support personnel

Concerned	Phases	Action to be taken
		Company update on payments Dignified and private reunion with family members On-going seafarers psychological care after the release
<b>Families</b>	Pre-crisis period	The company should establish a family liaison team composed of family liaison representatives
	Pre-Deployment stage	Communicate the family support plan in case of piracy incident Establish a contact list of seafarers' next of kin and/or the preferred point of contact Communicate the family liaison team plans within the company Encourage the family contact to get in touch with the family liaison representative in case of rumors or contacted by the media
	In the event of Attack	Activate the family liaison representative service to the family as soon as possible Inform the family of the attack before they hear from another source Ensure regular contact and provide updated information
	When released	Notify the family contact before the media Ensure communication between the seafarers and their families as soon as possible Provide information about the repatriation plan Provide a link to the family with arrangements for a medical examination and other support.

Table 8 Summary of humanitarian supports of seafarers and their families in the context of maritime piracy and armed robbery against ships incident

(Established by the author based on the Good Practice Guide for Shipping Companies and Manning Agents for the Humanitarian Support of Seafarers and their Families of the MPHRP)

### **A.3.2 - The International Seafarers Assistance Network (ISAN) or SeafarerHelp:**

The ISAN or SeafarerHelp is a 24/7 helpdesk and call-centre based in London designed to give a gratis and confidential service to seafarers who need support or assistance. It employs qualified personnel who speak the 27 main languages of the shipping industry and works with maritime agencies to address the challenges or difficulties facing the seafarer. The MPHR suggests the ISAN as a practical programme for seafarers as it can offer help in connecting families to seafarers, listening to seafarers and assisting resolve issues from mistreatment or lost wallet in a port to sickness and serious cases such as post-piracy abandonment and personal harm.

### **A.3.3 - The Save Our Seafarers (SOS) campaign initiatives:**

The SOS is an international non profit anti-piracy campaign initiated since 2011 and supported by 33 maritime associations, trade unions and P&I insurers. The aim of the campaign is to stop piracy by introducing the issue to the vanguard of the public and political agenda in the several maritime nations. It serves to raise public awareness of the economic and human cost of piracy and to influence policy makers to take action to suppress piracy through naval operations, arrest and prosecution of pirates, capacity building in the Indian Ocean region, addressing the problems in Somalia, and developing criminal database. The counter-piracy messaging campaign puts forward the human cost of piracy through videos of individual hostage stories, in which former hostages describe extreme abuse inflicted on seafarers by pirates. It gives also access to information on the cost of piracy and the location of pirate attacks.

Addressing seafarer's issues in context of maritime piracy and armed robbery against ships involves several stakeholders including the shipping companies, the manning agents, the flag States, the seafarers unions and the welfare associations. The humanitarian support of seafarers extends to their families and covers the period of pre-crisis, during and post crisis of a piracy and armed robbery incidents.

## **Section B: Regional operational initiatives in the Gulf of Aden, East Africa and the Western Indian Ocean**

Following the scourge of maritime piracy and armed robbery against ships off the coast of Somalia, regional operational initiatives have also been initiated to address the problem. The idea behind these regional initiatives is to establish a regional maritime security infrastructure and capacity building in order to establish a sustainable solution. In the Gulf of Aden, East Africa and the Western Indian Ocean, the regional initiatives include the Djibouti Code of Conduct (DCoC), the Eastern and Southern Africa-Indian Ocean (ESA-IO) Regional Strategy and Regional Plan of Action, the International Criminal Police Organization (INTERPOL) and the United Nations Office on Drugs and Crime (UNODC) regional programme, and the Regional Anti-Piracy Prosecutions Intelligence Co-ordination Centre (RAPPICC).

### **B.1 - The Djibouti Code of Conduct (DCoC):**

Following the success of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), it was thought to replicate similar initiative for the case of maritime piracy and armed robbery against ships off the coast of Somalia. It was then that the IMO initiated, in January 2009, the establishment of the Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden and the Red Sea areas process known as the “Djibouti Code of Conduct”(DCoC). It was signed in Djibouti on 29 January 2009 by representatives of Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen. Currently, there are 20 countries that are parties to the DCoC out of 21 nations eligible to sign.



Map States Parties to the Djibouti Code of Conduct

(Source: IMO at <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx>)

The Code entered into force from the date it was signed (29 January 2009) and considers the implementation of the UNSCRs 1816 (2008), 1838 (2008), 1846 (2008) and 1851(2008) and of the UNGAR 63/111 aspects falling within IMO mandate<sup>307</sup>. Four resolutions were adopted under the Code concerning respectively the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden, technical cooperation and assistance, regional training improvement and expression of appreciation<sup>308</sup>. States Parties agreed to cooperate in the following areas:

- Investigation, arrest and prosecution of suspected pirates and armed robbers at sea, including inciter or facilitator of such acts;
- interdiction of suspect ships and seizure of property on board such ships;

<sup>307</sup> IMO Council Note C102/14, *Protection of vital shipping lanes, Sub-regional meeting to conclude agreements on maritime security, piracy and armed robbery against ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea areas*, 3 April 2009, paragraph 8

<sup>308</sup> *Ibid.*, paragraph 6

- rescue of ships, persons and property subject to piracy and armed robbery at sea and facilitation of proper care, treatment and repatriation of seafarers, fishermen, other shipboard personnel and passengers victims of such acts;
- conduct of shared operations both among States parties and with navies from countries outside the region such as the embarkation of law enforcement officials or shipriders;
- information sharing through a number of centres and national focal points;
- revision of national legislation related to maritime piracy and armed robbery against ships to allow adequate criminalization, the exercise of jurisdiction, investigations and prosecution;
- request for assistance from States, regional and international organizations to support the implementation of the DCoC and recommendation for the establishment a regional training centre in Djibouti<sup>309</sup>.

For the purpose of implementing the DCoC, the Djibouti Code of Conduct Trust Fund (DCCTF) was created in 2009 and a Project Implementation Unit (PIU) was established at IMO headquarters in 2010. The PIU focuses in the following area: Training, capacity building, legal and information sharing as they are considered as the four pillars of the DCoC. Since its signature up to present day, significant progress has been made through the DCoC in terms of training and capacity building, review of national legislation and information sharing. Training of coastal guards and experts has been organized and has contributed to raise awareness as well as the hope for the control over the piracy and armed robbery problems in the region in the long run<sup>310</sup>. In terms of DCoC signatory States cooperation for the repression of maritime piracy and armed robbery against ships, Tanzania, Mozambique and South Africa entered into an agreement, in January 2012, to join forces and to authorize the signatories to chase pirates beyond their respective national waters without prior notification<sup>311</sup>. The three countries held a joint anti-piracy operation in April 2012<sup>312</sup>. In the area of information

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<sup>309</sup> *Ibid.*, paragraph 9 to 12

<sup>310</sup> Bueger, C. & Saran, M.S., Finding a Regional Solution to Piracy: Is the Djibouti Process the Answer ?, *Piracy Studies, Academic Research on Maritime Piracy, 18 August 2012*, available at <http://piracy-studies.org/2012/finding-a-regional-solution-to-piracy-is-the-djibouti-process-the-answer/>

<sup>311</sup> Balile, D., Tanzania, Mozambique, South Africa fight piracy jointly, *SABAH*, *Covering the Horn of Africa, April 25, 2012*, available at [http://sabahionline.com/en\\_GB/articles/hoa/articles/features/2012/04/25/feature-02](http://sabahionline.com/en_GB/articles/hoa/articles/features/2012/04/25/feature-02)

<sup>312</sup> *Id.*

sharing, three information sharing centers (ISCs) have been established in Sana'a, Yemen, Mombasa, Kenya and in Dar-Es-Salaam, Tanzania and serving as networks of national focal points. Each signatory State appoints a national focal point to facilitate coordinated, timely and effective information flow both internally at national level and externally at regional level<sup>313</sup>.

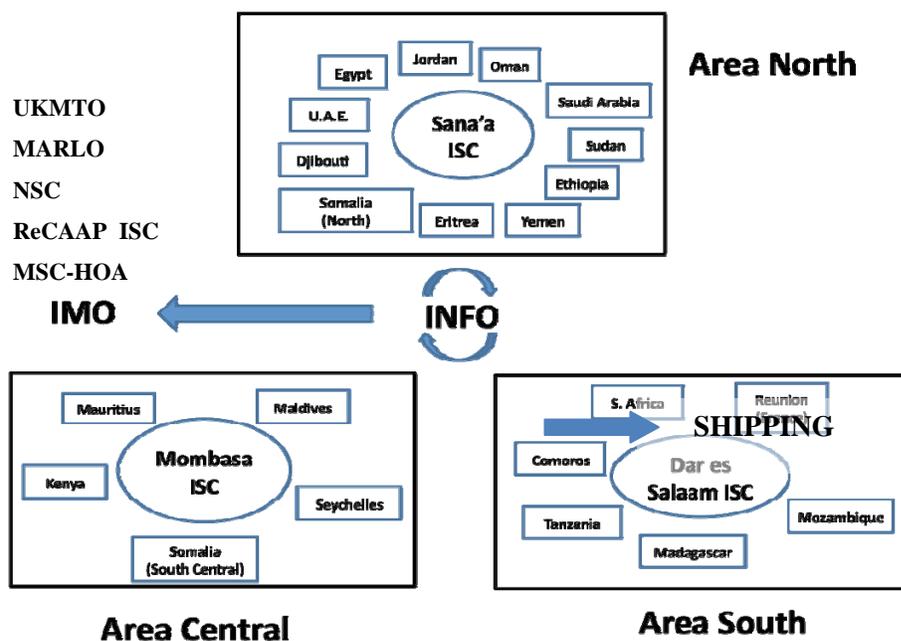


Figure 4 Information Sharing Centres arrangement under the Djibouti Code of Conduct  
 (Source: IMO at <http://www.imo.org/OurWork/Security/PIU/Pages/Information%20Sharing.aspx>)

The DCoC has been recognized as an essential instrument for the promotion of onshore regional capacity building in the fight against maritime piracy and armed robbery in the region<sup>314</sup>. In fact, the progress made up to date in implementing the DCoC in the field of regional information sharing and training provides a pathway toward the regional capacity building. It offers the Gulf of Aden, the Eastern Africa and the Western Indian Ocean coastal States which face a common threat an opportunity to join their effort and capabilities to address the issue. Nevertheless, there is a perception of challenges with regards to the implementation of the Code due to the fact that the region does not have yet a successful

<sup>313</sup> DCoC, article 8(1)

<sup>314</sup> Report of the UN Secretary-General pursuant to UNSCR 1846(2008), 13 November, 2009/590.

history of regional political cooperation. National rivalries, diverging history and interests, and unsolved disagreements weaken also the cooperation.

## **B.2 – Eastern and Southern Africa-Indian Ocean (ESA-IO) Regional Strategy and Regional Plan of Action:**

In view of the constant piracy outbreak in the region, Ministers and government representatives of the ESA-IO countries established a regional strategy and plan of action during their second meeting on piracy and maritime security in the ESA-IO region held in Mauritius in October 2010. The regional strategy promotes a regional framework to prevent and combat piracy, and promote maritime security based on a three pillar approach consisting of (1) the development and implementation of a Somalia Inland Action Plan to counter and prevent piracy; (2) encouraging States in the region to prosecute pirates with financial and technical support of the international community; and (3) strengthening regional States' capacities to secure their maritime zones<sup>315</sup>. The regional plan of action supports the regional strategy and includes information exchange, cooperation, joint action, and capacity building measures<sup>316</sup>. Furthermore, it was established an Inter-Regional Coordination Committee (IRCC) composed by the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Indian Ocean Commission (IOC), the Southern African Development Community (SADC) and the European Union (EU). The IRCC is intended to serve as the secretariat of the regional coordination mechanism to implement the regional strategy and regional plan of action<sup>317</sup>. Despite the fact that the ESA-IO Regional Ministerial meetings on piracy is more a politically oriented assembly, it can offer a venue for regional States for the establishment of operational cooperation and coordination through information sharing and joint action. Under this initiative, the EU has accepted to financially support a regional maritime security programme called MASE for a period of five years.

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<sup>315</sup> Joint Communiqué from the Eastern and Southern Africa – Indian Ocean Ministers and European Union High Representative, at the 2<sup>nd</sup> Ministerial Meeting on Piracy and Maritime Security in the Eastern and Southern Africa and Indian Ocean Region, 7<sup>th</sup> October 2010, Grand Bay, Republic of Mauritius, Preamble, paragraph 7, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/116942.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/116942.pdf)

<sup>316</sup> *Id.*, resolution, paragraph 1.

<sup>317</sup> *Id.*, resolution, paragraph 2

### **B.3 – The International Criminal Police Organization (INTERPOL) and the United Nations Office on Drugs and Crime (UNODC) regional initiatives:**

The INTERPOL participates in the global effort to counter piracy and armed robbery against ships in the following areas : improving evidence collection, facilitating data exchange, building regional capabilities and working in partnership with international and regional organizations<sup>318</sup>. On the regional level, INTERPOL provided law enforcement training in Somalia and other Eastern African countries to combat maritime piracy and armed robbery against ships off the coast of Somalia<sup>319</sup>. To support Indian Ocean piracy investigations, INTERPOL opened a Command and Coordination Centre in the Singapore Regional Bureau. Its regional law enforcement branch in East Africa was funded by the EU along with the development of forensic capacity in the Seychelles. In 2012, INTERPOL in partnership with the United Kingdom has helped the Regional Anti-Piracy Prosecutions Intelligence Coordination Centre (RAPPICC) to develop a centre for collecting personal data used to identify suspected pirates including fingerprints, name or alias, date and place of birth, nationality, sex, driving licenses, identification documents and personal data. Data related to the equipment used by suspected pirates will also be shared. In addition, INTERPOL in collaboration with the UNODC, has conducted training for law enforcement officials from countries in the Eastern Africa and Western Indian Ocean region.

The UNODC counter-piracy programme (CPP) started in 2009 and has a mandate to help six countries in the region including Kenya, Seychelles, Mauritius, Tanzania, Maldives and Somalia<sup>320</sup>. It has delivered support in the form of training, mentorships and providing equipment for police investigators, prosecutors, coast guard officers, judges, court staff, prison officers and building prisons, police facilities and courtrooms<sup>321</sup>. Although the main focus of the UNDOC CPP is on the judicial process and incarceration, on the operational

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<sup>318</sup> INTERPOL, Maritime piracy: INTERPOL's response, at <http://www.interpol.int/Crime-areas/Maritime-piracy/Maritime-piracy>

<sup>319</sup> INTERPOL, Combating terrorism and maritime piracy across Horn of Africa: Focus on INTERPOL training, *Media release, 21 February 2012*, available at <http://www.interpol.int/News-and-media/News-media-releases/2012/PR012>

<sup>320</sup> UNODC, UNODC and piracy, 2012, available at <http://www.unodc.org/easternafrika/en/piracy/index.html>

<sup>321</sup> UNODC, Counter Piracy Programme, Support the trial and related treatment of piracy suspects, *UNODC Brochure, Issue 9, July 2012*, at p.8

aspect, it has developed handover guidance for the transfer of suspected pirates and delivered training on collection and preservation of evidence.

#### **B.4 – The Regional Anti-Piracy Prosecutions Intelligence Co-ordination Centre (RAPPICC) :**

The RAPPICC is a joint UK-Seychelles initiative based in Victoria, Seychelles, aiming to be a centre of intelligence gathering, investigations, and prosecution of pirates and pirate financiers<sup>322</sup>. The initiative has received support and participation from the USA, Norway, Australia, the Netherlands, the Seychelles, Italy and Denmark. In addition, RAPPICC collaborates with Eastern Africa and Western Indian Ocean States. The proposed task of the initiative is to gather prosecution package for naval/flag state jurisdiction including the accused, complaint, and evidence to deliver to the chosen forum. The plan is to use a non-military approach of disrupting pirate groups operating in the Arabian Sea, Red Sea, Gulf of Oman, Gulf of Aden and in the Somali Basin. Hence, the RAPPICC appears to be a useful source of information and intelligence for the law enforcement agencies of the countries in the region.

#### **Conclusion to chapter 1:**

The analysis of international and regional operational response and initiatives to address maritime piracy and armed robbery against ships off the coast of Somalia permitted to recognize the different operational mechanisms and plans that have been put in place to address the issue and to which countries in the region as well as Madagascar can benefit from. Additionally, it allowed to identify key elements that constitute the different components of the operational response.

1. Preparedness or readiness component: From the analysis of the international and regional operational initiatives, it can be asserted that the main pillars of a preparedness or readiness to combat maritime piracy and armed robbery against ships are a cooperation of

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<sup>322</sup> The Atlantic Council, Managing the Global Response to Maritime Piracy, *Report of the Atlantic Council Counter-Piracy Task Force, 2012*, at p. 6

stakeholders with a coordination of their actions, information sharing arrangement, adequate capabilities and skilled personnel.

a. Cooperation of stakeholders and coordination of actions : The study of the international and regional operational initiatives in the Eastern Africa and Western Indian Ocean region permitted to realize that the operational aspect of the fight against maritime piracy and armed robbery at sea involves several stakeholders which include the shipping community (Ship owners, ship operators, shipping companies, seafarers, manning agents, federations and unions, seafarer welfare associations) and their partners (PMSCs and marine insurance companies), the flag States (Maritime Administrations), the coastal States, the foreign naval forces, and the international as well as regional organizations. It has been demonstrated during the international and regional counterpiracy and armed robbery against ships effort that the cooperation of these diverse stakeholders is fundamental. Given the variety of stakeholders involved in the operational response, it is important to identify the role and task of each participant, and to determine as well as to organize at which stage or phases of the operation they intervene. For instance, shipping companies (Ship operators or ship owners) role is to prepare the crew and the ship prior transiting piracy HRAs by taking appropriate measures as established by the BMP, to act when its ships are under attack or are captured by pirates (Interface role between the ships and the flag state, the seafarer's family, and navies) and during post release of ships and crew (Post incident response). Flag States have a regulatory role in the prevention and the protection of the interest role for ships flying its flag and their crew, and intervene prior, during and post incident. Navies or maritime law enforcement agencies have a prevention, a protection and a security response role. In the Somalia case, the multinational naval forces act prior the incident by providing protection, intervene during the incident by rescuing and after the incident by delivering the offenders to the regional coastal state's judiciary body. It is also important to highlight that to ensure the coordination, a link should be established among the stakeholders to enable communication and exchange of information. In other words, there is a need for an organizational interface between the different actors. It is in this perspective that the fact of having an information and coordination centres such as MSC-HOA, UKMTO, NSC, and MARLO becomes important to ensure the connection between the civilian shipping community and the naval forces. Another coordination aspect that needs to be considered is the internal coordination of each stakeholder

and more importantly the external or the overall coordination of the ensemble. The internal coordination can be ensured through clear command and control. The external or overall coordination of the group can be achieved by creating a forum where all the stakeholders can get together for exchanging views and proposals, sharing information and deciding on common actions. In these two aspects, the multinational naval forces engaged in the international counterpiracy and armed robbery at sea efforts off the coast of Somalia have had in their own respective group a clear command and control (within CMF, EU NAVFOR, NATO, etc.) and as for external coordination, the role of venues such as SHADE and CGPCS have been very important and successful at some extent. Hence, it is vital to recognize the role and attributions of the different stakeholders and to put in place a platform of coordination in order to reach synergy in the actions while conducting the counter-piracy and armed robbery against ships operation.

b. Information sharing arrangement: The importance of the information sharing was also highlighted during the examination of the international and regional operational initiatives to combat maritime piracy and armed robbery against ships in the Eastern Africa and Western Indian Ocean region. Indeed, the information helps to be aware, to prevent, to anticipate and to respond to incidents. Hence, it is important to have at disposal all the necessary information regarding maritime piracy and armed robbery against ships in the area of operation to be able to prepare and to plan the response. In this regard, exchange of information among the stakeholders becomes of capital importance. Therefore, there is a need to have the means to acquire and to transmit information both on board ships (either civilian or military) and on land to ensure a proper exchange of information. In this respect, the use of radio communication resources as established by the SOLAS and SAR Conventions and the military communication system as well as the establishment of information sharing centres such as the MSC-HOA, MARLO, NSC, UKMTO and alike becomes necessary. To avoid duplication and additional investment, the existing SAR infrastructure and means may be utilized by adding to their mandate a maritime piracy and armed robbery at sea mandate. However, to be able to achieve the exchange of information, interoperability is paramount and communication protocols should be established. The challenges in information sharing among stakeholders, especially between naval forces, reside often in information sharing policy of

each entity, national security policies and political concerns. The DCoC information sharing organization based on information sharing centres and the national focal point network appears to be a good example that can be adapted on a national basis. From the available information, there is also a need to set up a Maritime Situational Awareness (MSA) in the area of operation. The Regional Maritime Picture (RMP) created by the multinational coalition forces disseminated through the military communication system and the Mercury system is an example in this regard that can be imitated on a national basis. Nevertheless, building an MSA requires more advanced technical arrangement. In addition, it is important to highlight that coastal States in the Eastern Africa and western Indian ocean region such as Madagascar can benefit from the information sharing arrangement established through the international and regional operational initiatives such as access to the RMP or the Mercury created by the multinational naval forces operating in the region, the INTERPOL and the RAPPICC piracy database, and the regional MSA project under the DCoC.

c. Adequate capabilities and skilled personnel: It is related to the fact of having at disposal the adequate and the necessary equipments and maritime assets on land, at sea and in the air and the trained personnel able to handle the treatment and management of the information, the proficiency in operating the various informational and operational means in the context of maritime piracy and armed robbery against ships. Having adequate capabilities, in terms of detection and communication means, types of ships, and weapon system, are crucial. For ships, speed and sustainability at sea appear to be amongst the criteria to be considered in the context of maritime piracy and armed robbery against ships operation as experienced in the Somalia counterpiracy and armed robbery at sea case. It is also important to note that maritime patrol and reconnaissance aircraft (MPRA), embarked helicopters and UAVs have played an important role. However, the acquisition and the required logistical support to operate such maritime capabilities are expensive. The skills are gained through training and drills or exercises. Indeed, it is important that the crew member of commercial ships or fishing vessels are adequately trained and prepared to face eventual maritime piracy and armed robbery attacks. It is the duty of ship operators (ship owners or shipping companies) to organize such training preparation for the crew as stated by the BMP and the Good Practice Guide for Shipping Companies and Manning Agents for the Humanitarian

Support of Seafarers and their Families. Similarly, navy or maritime law enforcement personnel need to be trained in the operational aspect of addressing the issue including boarding, arrest and seizure, but also handling evidence, treatment of suspected offenders and handling the seized pirate ship. In the case of the multinational naval forces counterpiracy off the coast of Somalia, the naval units constantly train their personnel and coastal States Navy or Coast Guards by setting up drills, exercises or joint exercises to upgrade their operational ability to address piracy and armed robbery attacks. Opportunities are also available in the area of training and capacity building for Madagascar and coastal States in the region through the DCoC arrangement, the MASE project under the ESIO initiative, the UNODC counter-piracy programme and the INTERPOL counterpiracy scheme.

2. Prevention and mitigation component: In referring to the counter-piracy and armed robbery at sea operation off the coast of Somalia, it appears that the prevention and mitigation aspects are mainly two folds namely reducing ship's vulnerability and maritime policing.

a. Reducing ship's vulnerability: It can be achieved through a proper implementation of the ISPS Code both in ports and on board ships. Similarly, implementing the BMP decreases ship's vulnerability by taking preventive actions (Crew preparation, company and master voyage planning, proper meaning, etc.), and putting in place Ship Protection Measures. An additional way of reducing ship's vulnerability is embarking a PCASP or a VPD.

b. Maritime policing: In the context of the multinational naval forces counterpiracy and armed robbery at off the coast of Somalia modus operandi, it consists of protecting the passage of commercial ships through maritime piracy and armed robbery prone area by creating a protected sea lanes in establishing a transit corridor such as the IRTC and providing escort convoys . It is done also through maritime patrol to deter and disrupt piracy and armed robbery activities by exercising the right of visit through boarding and inspection of suspicious vessels, eventually arrest and seize suspected pirates and armed robbers at sea. Similar arrangement can be envisaged on a national arrangement in the vicinity of vital sea lanes and identified HRA. In terms of maritime patrol, the bigger challenge is often to ensure the coverage of the area of operation with available limited maritime assets such as in the Somalia case. In this regards, initiatives such as the DCoC encourages the joint patrol and

shiprider arrangement amongst the regional coastal States. These maritime policing measures are also adaptable in the national context.

3. In terms of the incident response component, the Somalia counterpiracy and armed robbery at sea showed that it is handled in two manners namely vessel and crew rescue by the multinational naval forces units along with an apprehension of the pirates or armed robbers at sea if these latter did not yet take control of the vessel and shipowner or ship operator negotiation for the release of the vessel and the crew if the vessel is hijacked and already under the control of the pirates or armed robbers. In the first case, the practice during the incident response operations in the Somalia case illustrated that the navies of the participating nations developed rules of engagement for counter-piracy and armed robbery against ships and procedures related to the arrest of suspected offenders, the seizure of a pirate ship and the evidence collection. In the second case, the ship owner or operator with the help of a hostage negotiator and the marine insurance company ensure the negotiation process with pirates or armed robbers, the delivery of the ransom and the release of the crew and the ship. Information of the crew's family regarding the evolution of the hostage taking and negotiation should be ensured as suggested by the Good Practice Guide for Shipping Companies and Manning Agents for the Humanitarian Support of Seafarers and their Families.

4. Post incident component: The experience learned from the Somali counterpiracy and armed robbery against ships effort showed that the post incident component comprises:

- The transfer of offenders and the pirate ship to the judicial authorities of either the coastal States in the Eastern Africa and Western Indian Ocean Region with whom a transfer agreement is in place or those at home of the arresting naval unit. A transfer procedure of the suspected pirates or armed robbers at sea has been developed in this regard in cooperation with the UNODC for some coastal States.

- The investigation conducted by the organization in charge of such function during the judicial proceedings.

- The release of the crew and victim ship and their return respectively to their home country for the former and to the shipowner or ship operator for the latter. In this regard, the Good Practice Guide for Shipping Companies and Manning Agents for the Humanitarian Support of Seafarers and their Families provides some guidance for the post incident measures for the crew victim of maritime piracy or armed robbery against ships attack.

Apart from the identification of the above mentioned key elements of the maritime piracy and armed robbery at sea operational components, the examination of the international and regional operational initiatives in the Eastern Africa and Western Indian Ocean region on the matter permitted to recognize the international and regional organizations with which Madagascar can build partnerships and the field of possible cooperation .

Stakeholders	Partners' or initiatives' name	Operational response components						
		Preparedness or readiness			Prevention and mitigation	Incident response	Post incident	References
		Information sharing arrangement (tools, platforms, venue, etc.)	Training	Capabilities building				
International organizations	<b>IMO</b>	AIS, GMDSS, SSAS, LRIT, VDR, and VTS ( as source)  MRCC and MRSC (as ISC)	Through the DCoC	Through the DCoC	ISPS Code implementation	-	-	SOLAS, SAR, DCoC
	<b>UNODC CPP</b>	-	Training of navy and law enforcement personnel on evidence gathering and transfer of suspected pirates	Equipment of investigators	-	-	Assistance during the transfer of suspected pirates and investigations	-
	<b>INTERPOL</b>	INTERPOL piracy database	Similar to UNODC training programme	-	-	-	Forensic assistance	-

Stakeholders	Partners' or initiatives' name	Operational response components						
		Preparedness or readiness			Prevention and mitigation	Incident response	Post incident	References
		Information sharing arrangement (tools, platforms, venue, etc.)	Training	Capabilities building				
Shipping industry and its partners	Shipping industry	AIS, GMDSS, SSAS, LRIT, VDR	Pre-sailing operational, physical and psychological training the ship's crew member	-	SPMs	Negotiation with the pirates in case of capture.  Ransom payment  Information of seafarers' family	Post incident arrangement upon release for the ship and its crew  Post incident care for the Seafarers	BMP, Good Practice Guide for Shipping Companies and Manning Agents for the humanitarian support of seafarers and their families
	PMSCs	Providing intelligence and security audit	Pre-sailing training for the crew	-	Armed guards and/ or escort vessel	Providing negotiator and ransom delivery arrangement	-	-
	VPD	-	-	-	Military armed guards	-	-	-
	MPHR	Database and information on the humanitarian response to piracy and armed	Training of first humanitarian responders following a piracy and armed	-	-	-	-	Good Practice Guide for Shipping Companies and Manning Agents for

Stakeholders	Partners' or initiatives' name	Operational response components						
		Preparedness or readiness			Prevention and mitigation	Incident response	Post incident	References
		Information sharing arrangement (tools, platforms, venue, etc. )	Training	Capabilities building				
		robbery incident	robbery incidents					the humanitarian support of seafarers and their families
	<b>ISAN</b>	-	-	-	-	-	24 hours help line for seafarers	Good Practice Guide for Shipping Companies and Manning Agents for the humanitarian support of seafarers and their families
	<b>SOS</b>	Raising awareness about the impact of piracy on seafarers  Provide information on the human cost and the economic cost of piracy	-	-	-	-	-	
	<b>IMB PRC</b>	ISC, interface between ship Masters and local law enforcement agencies worldwide	-	-	-	-	-	-

Stakeholders	Partners' or initiatives' name	Operational response components						
		Preparedness or readiness			Prevention and mitigation	Incident response	Post incident	References
		Information sharing arrangement (tools, platforms, venue, etc.)	Training	Capabilities building				
Multinational Naval Forces	EUNAVFOR	MSC-HOA (ISC, interface between commercial ships and the coalition forces)  RMP and Mercury (MSA)	Training and joint exercise with coastal States navies		IRTC Maritime Patrol	Maritime Patrol, arrest of suspected pirates and seizure of pirate ships	Transfer of suspected pirates for prosecution in regional coastal States or prosecution at home	
	CTF 151	MARLO (ISC, interface between commercial ships and the coalition forces)  RMP and Mercury (MSA)	Training and joint exercise with coastal States navies	-	IRTC Maritime Patrol	Maritime Patrol, arrest of suspected pirates and seizure of pirate ships	Transfer of suspected pirates for prosecution in regional coastal States or prosecution at home	-
	NATO	NSC (ISC, interface between	Training and joint exercise with coastal States navies	-	IRTC Maritime Patrol	Maritime Patrol, arrest of suspected	Transfer of suspected pirates for prosecution	-

Stakeholders	Partners' or initiatives' name	Operational response components							
		Preparedness or readiness			Prevention and mitigation	Incident response	Post incident	References	
		Information sharing arrangement (tools, platforms, venue, etc.)	Training	Capabilities building					
		commercial ships and the coalition forces)  RMP and Mercury (MSA)					pirates and seizure of pirate ships	in regional coastal States or prosecution at home	
	<b>Independent Navies</b>	Mercury (MSA)	-	-	National escort convoys Maritime Patrol		Maritime Patrol, arrest of suspected pirates and seizure of pirate ships	Prosecution of pirates mainly at home	-
	<b>UKMTO</b>	ISC, interface between commercial ships and the coalition forces	-	-	-		-	-	-
	<b>SHADE</b>	Information exchange and operational coordination meeting	-	-	-		-	-	-

Stakeholders	Partners' or initiatives' name	Operational response components						
		Preparedness or readiness			Prevention and mitigation	Incident response	Post incident	References
		Information sharing arrangement (tools, platforms, venue, etc. )	Training	Capabilities building				
	CGPCS	WG 1 meetings on the coordination of naval operation and regional capacity development	-	Coordination of regional capacity development	-	-	-	-
Regional organizations or initiatives	DCoC	ISCs (Sana'a, Mombassa, Dar-Es-Salam) and National Focal Points  Regional MSA project	Training on information sharing, operational interdiction skills, criminal investigation,  Establishment of the Djibouti Regional Training Centre (DRTC)	Operational capability enhancement programme under project	Promotion of joint patrol	Promotion of joint counter piracy operations, bilateral and multilateral patrol agreement, shiprider agreement	Facilitation of treatment and repatriation of victims of piracy and armed robbery against ships	-
	ESA – IO meeting on Piracy and Maritime Security	Promotion of information exchange	-	Promotion of a Somalia Inland Action Plan	Promotion of joint patrol	Promotion of joint counter piracy operations	-	-

Stakeholders	Partners' or initiatives' name	Operational response components						
		Preparedness or readiness			Prevention and mitigation	Incident response	Post incident	References
		Information sharing arrangement (tools, platforms, venue, etc. )	Training	Capabilities building				
				Promotion of capacity building through the MASE Project				
	<b>RAPICC</b>	Intelligence, Pirates and their financiers database	-	-	-	-	Assisting in the investigation and prosecution of pirates and their financiers	-

Table 9 International and regional operational initiatives in the Eastern Africa and Western Indian Ocean regional

## **Chapter 2: Madagascar operational arrangements to address maritime piracy and armed robbery against ships: Current status and proposed areas of improvement.**

Madagascar does not escape from the scourge of Somali maritime piracy and armed robbery against ships as already stated earlier. Similar to the countries like Kenya, Tanzania, Comoros, Seychelles, Mauritius, South Africa, Madagascar has begun to feel the impact of the Somali piracy on the maritime activities in the maritime zones under its jurisdiction. Somali piracy is a new threat to the country. Its violent and deadly character raises multiple concerns regarding the operational response to be envisaged for it. Additionally, the political, the socio-economic and the internal security environment on land in Madagascar seems to deteriorate gradually and may reach to the point of forming a new niche of maritime piracy and armed robbery against ship activity.

In view of this situation, it is important for the country to evaluate its current maritime response organization and capacity to properly respond to such threat. In the process, the international and regional counterpiracy efforts in the region as discussed in the previous chapter should be taken into consideration to allow Madagascar operational response to integrate and to be linked to these existing international and regional initiatives in order to take benefit from them. Hence, in this chapter, Madagascar's current response capacity is examined firstly by considering the identified key elements forming the operational response components in the previous chapter. Secondly, improvements in the operational response components are proposed based on eventual gaps in the current operational response arrangement.

### **Section A: Madagascar's current operational response capacity assessment**

Given the threat of Somali maritime piracy and armed robbery against ships outside and in the maritime zones under the jurisdiction of Madagascar as well as the possible outbreak of armed robbery in its ports and coastal areas, Madagascar's existing operational response capacity needs to be examined by considering the current status of preparedness or readiness, prevention and mitigation measures in place, incident response ability and post incident arrangement. As the aim is to improve the existing operational response in order to

address maritime piracy and armed robbery against ships, the SWOT (Strengths, Weaknesses, Opportunities and Threats) analysis is the tool to be used in the examination of each key element. Indeed, this method allows the study of the internal strengths and weaknesses of each area to be analyzed as well as the examination of the external opportunities and threats related to its environment.

	<b>Positive</b> (Helpful to achieving the goal)	<b>Negative</b> (Harmful/Risks to achieving the goal)
<b>Internal</b> (Facts/factors related to the area to be analyzed)	Strengths: Things that are good now, build on them and use as leverage	Weaknesses: Things that are bad now, remedy, change or stop them.
<b>External</b> (Facts/factors related to the environment in which the area to be analyzed evolves)	Opportunities: Things that are good for the future, prioritize them, build on them and optimize	Threats: Things that are bad for the future, manage or counter them.

Table 10 The logic of the SWOT analysis.

(Source: RAPIDBI\_SWOT analysis (TOWS matrix) Made Simple)

Taking into consideration these internal and external factors, maximizing the potential strengths and opportunities and minimizing the effects of the weaknesses and the threats would permit to bring the necessary improvement.

#### **A.1 – The current preparedness or readiness status:**

As indicated from the previous chapter, the preparedness or readiness component comprises the coordination of stakeholders' actions, the information sharing arrangement and the availability of adequate capabilities (Equipment, infrastructure and skilled personnel). Hence, the current status of these different key elements will be evaluated in the following.

### **A.1.1 - The coordination of stakeholders' actions:**

Following the signature by Madagascar of the DCoC in 2009, the fight against maritime piracy and armed robbery against ships has started to receive the attention of the Malagasy authorities and it has begun to be handled in a relatively structured way. Additionally, the occurrence of the M/V Zoulficar case attracted the public opinion and the Malagasy government attention. At some extent, it has triggered the acknowledgment of grave impacts that could be generated by these two crimes.

#### **a) The participating agencies :**

Initiated by the Ministry of Transports, a certain number of government agencies have been called upon to work together to address the issue of maritime piracy and armed robbery against ships in the operational aspect. These government agencies comprise the Ministry of Transports, the Ministry of Armed Forces, the State Secretariat for the Gendarmerie, the Ministry of Internal Security, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Fisheries and Aquaculture, and the Ministry of Tourism. Each agency has involved its operational branch, if such branch exists, in the operational response system.

<b>Government Agencies</b>	<b>Operational branch involved</b>
Ministry of Transports	Maritime Operation Centre (MOC)
	Agence Portuaire Maritime et Fluviale (Port, Maritime and Waterways Agency known as the APMF)
Ministry of Armed Forces	General Staff of the Armed Forces
	Navy
	Air Force
Secretariat of State for the Gendarmerie	Nautical Brigade
Ministry of Internal Security	Border Control Police (Maritime Branch)
Ministry of Justice	Public Prosecutor's office of the first instance courts

<b>Government Agencies</b>	<b>Operational branch involved</b>
Ministry of Foreign Affairs	-
Ministry of Fisheries and Aquaculture	Fisheries Surveillance Centre
Ministry of Tourism	-

Table 11 Government agencies involved in the current counterpiracy and armed robbery at sea effort in Madagascar

- The Ministry of Transports:

The Ministry of Transports is the civilian leading agency in the operational response to maritime piracy and armed robbery against ships in Madagascar. It has two operational branches participating in the operational system namely the Maritime Operation Centre (MOC) and the “Agence Portuaire, Maritime et Fluviale” (Port, Maritime and Waterways Agency) known as the APMF. In 2010, the Ministry of Transports created the MOC as a division of the Ministry with a primary mandate to participate in maritime security activities in collaboration with national and international competent authorities<sup>323</sup> and acts as the national focal point on maritime piracy and armed robbery against ships in conformity with the DCoC<sup>324</sup>. In practice, the MOC handles not only piracy and armed robbery at sea information sharing but it has extended its area of authority by intervening and directing the anti-piracy and armed robbery against ships overall operation.

The APMF is an independent agency under the supervision of the Ministry of Transports. It acts as Port, Maritime and Waterways authority in Madagascar. As such, in the maritime domain, it is the regulatory body of the port activities and ensures the role of a maritime administration as a flag State<sup>325</sup>. Hence, it plays a role in port administration and security such as overseeing the ISPS Code implementation and is responsible for civilian ships (Merchant ships, fishing vessels, pleasure crafts) safety and security as well as seafarers

<sup>323</sup>Decree n° 2011-174 related to the attributions of the Minister of Transports and the organization of its Ministry, article 6, paragraph I.4

<sup>324</sup> DCoC, article 8 & 9

<sup>325</sup> Decree n° 2003-659 of June 4, 2003 creating the Agence Portuaire, Maritime et Fluviale, article 3

administration. It contributes also in SAR operations by having a coordinating role through a Joint Rescue Coordination Centre (JRCC).

- The Ministry of Armed Forces:

The Ministry of Armed Forces participates also in the operational response to maritime piracy and armed robbery against ships as it has under its supervision the General Staff of the Armed Forces, the Army, the Navy and the Air force which are the operational tools for a military intervention. The General Staff of the Armed Forces is in charge of military operations coordination and management<sup>326</sup>. Based upon its traditional mandate in maritime security<sup>327</sup> and as authorized by the Maritime Code<sup>328</sup>, the Navy is in charge of conducting maritime patrol and interdiction, and can proceed to the arrest of pirates, seizure of pirate ships<sup>329</sup>. The Air Force has also a maritime mandate as it plays a role in the aerial surveillance of the land and maritime traffic, in providing air support to other branches of the armed forces (Army and Navy) and in collecting of the required intelligence for land, air and maritime operations<sup>330</sup>.

- The State Secretariat for the Gendarmerie:

The State Secretariat for the Gendarmerie is in charge of the National Gendarmerie which is a law enforcement agency that executes a similar function as the National Police but they mainly operate in rural areas. It has a maritime and waterways branch called the 'nautical brigade' which has a mandate in ensuring the surveillance of the inland waterways, the international port security, and the coastal shoreline surveillance. The maritime mandate of the nautical brigade flows from the National Gendarmerie's mandate participating in the border control. However, it does not have a specific piracy mandate

- The Ministry of Internal Security:

The Ministry of Internal Security supervises the National Police which ensures the security in cities as opposed to National Gendarmerie which handles security issues in the rural areas. In addition to their security role in the cities, the National Police is also in charge

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<sup>326</sup> Decree n° 2003-171 of March 04, 2003, modifying and completing certain provisions of the decree n° 2002-1216 of October 9, 2002 related to the general organization of the Malagasy National Armed Forces, article 3

<sup>327</sup> Decree n° 2003-1118 of December 02, 2003 related to the creation of the Naval Forces Command, article 9

<sup>328</sup> Maritime Code of 2000, article 1.5.06

<sup>329</sup> Maritime Code of 2000, article 1.4.05

<sup>330</sup> Decree n° 2003-1115 of December 2, 2003, related to the creation of the Air Forces Command, article 9

of immigration control in airports and ports during departure and arrivals of passenger aircrafts or ships operating internationally. The border control police is the branch of the national police that is in charge of the immigration control and it has been called upon to participate in the operational response to maritime piracy as it controls also immigration in ports.

- The Ministry of Justice:

Administrating the judicial system, the Ministry of Justice has a major role to play in the fight against maritime piracy and armed robbery against ships not only during the judicial proceeding but also during the operational aspect. In fact, according to the Malagasy Criminal Procedure Code, the Public Prosecutor of any first instance court is the one who supervises all actions of the law enforcement officers (National Police and Gendarmerie or others) in the region under his jurisdiction related to any arrest and investigation in criminal matters.

- The Ministry of Fisheries and Aquaculture:

It is the ministry in charge of fisheries and aquaculture management and control. As such, it has an operational branch called the Fisheries Surveillance Centre (FSC) which monitors and controls the fishing activities. Due to the fact that the FSC has real time information on the fishing activities (For example the location of fishing vessels at sea), they have been invited to participate in the counterpiracy operational response.

- The Ministry of Foreign Affairs:

Being in charge of international diplomatic relations, the Ministry of Foreign Affairs has been invited to take part in the counterpiracy operational response for several reasons. Indeed, it is the interface between the Malagasy government and the foreign missions (Embassies and consulates) as well as the regional and the international organizations.

- The Ministry of Tourism has been invited to participate in the forum of agencies involved in counterpiracy and armed robbery against ships efforts as it has been noted that Madagascar has been a preferred destination for cruise ships since the last few years and due to the development of the maritime tourism activities.

The above mentioned government agencies hold meetings under the chairmanship of the Ministry of Transports from time to time to discuss maritime piracy and armed robbery against ships issues. The agendas of the meetings mainly relate to the exchange of information to update the participating agencies about the evolution of the threat in the Eastern Africa and

Western Indian Ocean region as well as in the maritime zones under Madagascar's jurisdiction and to discuss about the legal and operational aspect. Apart from these meetings initiated by the Ministry of Transports, there is no formal inter agency organization and coordination up to date.

**b) SWOT analysis of the coordination of stakeholders' actions:**

	<b>Strengths</b>	<b>Weaknesses</b>
<b>Internal factors</b>	<ul style="list-style-type: none"> <li>- Participation of the majority government agencies having an important role in the maritime domain in the meetings organized by the Ministry of Transports</li> </ul>	<ul style="list-style-type: none"> <li>- Non implication of the non-State organizations or the private maritime sector (Ship owners association, ship agents association, seafarers unions, fisheries association, coastal communities, etc.) in the forum</li> <li>- Competition for the leadership between the Ministry of Transports and the Ministry of Armed Forces as well as their respective operational branches (MOC and the Navy) as the first holds the informational power and the second has control over the operational maritime assets.</li> <li>- Lack of full commitment of the participating agencies due to the deficiency of official legal framework and arrangement regarding the interagency coordination in the fight against piracy and armed robbery against</li> </ul>

	<b>Strengths</b>	<b>Weaknesses</b>
		<p>ships.</p> <ul style="list-style-type: none"> <li>- Difficulty in the coordination due to lack of clear definition of each participating agency task in the operational response and lack of interagency operational procedures</li> <li>- Delays in the operational response due to heavy bureaucracy and administrative procedures from one ministry to another ministry.</li> </ul>
	<b>Opportunity</b>	<b>Threat</b>
<b>External factors</b>	<ul style="list-style-type: none"> <li>- Public and political awareness of the existence and the threat posed by maritime piracy and armed robbery against ships.</li> </ul>	<ul style="list-style-type: none"> <li>- The current political crisis in Madagascar diverts the attention of the government and the political decision-maker to focus more on solving political and internal problems rather than solving issues like maritime piracy and armed robbery against ships.</li> </ul>

Table 12 SWOT analysis of the current coordination of stakeholders in fight against maritime piracy and armed robbery against ships in Madagascar

**c) Summary:**

Despite the participation of government agencies following the attempt of coordination in the operational response initiated by the Ministry of Transports, gaps remain prevalent. These gaps reside in the absence amongst the stakeholders of non governmental maritime participants, competition amongst the main participating agencies (Ministry of Transports and Ministry of Armed Forces) to lead the operational response, a lack of commitment of the

participating agencies due to the deficiency of a legal framework establishing the inter-agency cooperation on the issue of maritime piracy and armed robbery against ships and an absence of clear task's definition of each participating agency as well as an agreed operational procedures. In addition, the current political crisis in the country minimizes the prioritization of the fight against maritime piracy and armed robbery against ships as compared to political and internal issues.

#### **A.1.2 - Information sharing arrangement and operational capabilities current status:**

##### **a) The current information sharing arrangement and operational capabilities:**

Apart from having good coordination of the stakeholders, the basis of success in the operational response to maritime piracy and armed robbery against ships is the existence of State's response capacity. The response capacity should enable the coastal State to ensure the surveillance, monitoring and control tasks. Hence, in order to do so, the response capacity usually includes information sharing and management means and platforms (Shore-based or with space-based), surface vessels, aircraft, underwater vessels and systems and trained manpower. Indeed, there is a need to be informed and aware of an event of interest related to maritime piracy and armed robbery against ships in the maritime zones under Madagascar jurisdiction and beyond, to be able to identify the location where the event occurs, to track it, to provide the required response and to apply the law related to the matter.

In Madagascar, the government agencies that are participating in the current anti-piracy and armed robbery against ships effort and which have at their disposal exploitable operational capabilities are the Ministry of Transports (Through the MOC and the APMF), the Ministry of Armed Forces (Through the Navy and the Air Force), the State Secretariat of Gendarmerie (through the Nautical Brigade), and the Ministry of Fisheries and Aquaculture (Through the Fisheries Surveillance Centre). The Table 13 below shows the current status of the operational capabilities of the various operational branches of the participating agencies.

Administration	Operational branch	Operational capabilities						Observations
		Surface	Air	Underwater	Shore-based	Space-based	Training (*)	
Ministry of Transports	MOC	0	0	0	01 information centre	No	Intermediate	Insufficient manpower and budget
	APMF	0	0	0	01 JRCC	No	Basic	Insufficient manpower
Ministry of Armed Forces	Navy	Patrol vessels: 01 (30m) 06 (12m)	0	0	01 Navy Base 03 Navy Stations	No	Intermediate	Navy Base and Navy Stations situated in piracy and armed robbery prone areas Insufficient manpower, budget and maritime assets compared to area of operation
	Air Force	0	02 patrol aircraft 04 helicopters	0	01 Air Force Base	No	No training	Limited autonomy of the air assets, insufficient manpower and budget
State Secretariat of Gendarmerie	Nautical brigade	08 shoreline patrol craft (6 m) 09 inland waterways patrol craft (6m)	0	0	0	No	Basic	Limited budget
Ministry of Fisheries and Aquaculture	Fisheries Surveillance Centre (FSC)	02 patrol vessels (35m) 01 auxiliary vessel (25m)	02 chartered maritime patrol aircraft	0	02 information and coordination centres 05 operational stations	Yes	No training	Acceptable financial and operational capabilities

(\*): Level of training in maritime piracy and armed robbery against ships issues (Operational and/or legal)

Table 13 Status of Madagascar's current operational capabilities

**a) SWOT analysis of the current operational capabilities:**

Table 13 illustrates Madagascar’s current operational capabilities in the areas of information sharing and management, available maritime and air assets, the level of training of the personnel and observations on the manpower and the financial issues. Based on the provided information, the following SWOT issues can be stated :

	<b>Strengths</b>	<b>Weaknesses</b>
<b>Internal factors</b>	Information sharing and management	
	<ul style="list-style-type: none"> <li>- Under the DCoC arrangement, as the national focal point, the MOC is linked and has access to information on maritime piracy and armed robbery against ships in the region from the ISCs Dar-Es-Salam, Mombassa, Sana’a and other information centres such as MSC-HOA, UKMTO, MARLO, NSC, RECAAP and IMB PRC. The MOC has also access to the Mercury system.</li> <li>- Availability of a real time activity of all fishing vessels authorized to fish in Madagascar’s maritime zones at the FSC information centre from a satellite-based information known as the Vessel Monitoring System</li> <li>- Availability of SAR information in the region from the APMF JRCC and its coastal regional representation</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of channels of communication between the general public in coastal communities with the existing information centres to receive human intelligence information</li> <li>- Lack of communications networks between the various participating agencies. The information of the MOC and the FSC information centres are not exchanged and not accessible to other participants especially the Navy which is somehow responsible of intervening at sea</li> <li>- Lack of shore-based information centres equipped with coastal radar, GMDSS and AIS land-based reception equipments to receive information from ships and to support the development of a Maritime Situational Awareness to ensure surveillance and monitoring</li> <li>- Nonexistence of a real time information about the non-conventional merchant and private vessel</li> </ul>

		<ul style="list-style-type: none"> <li>- Nonexistence of a LRIT system which should provide information on the international merchant fleet registered in Madagascar</li> </ul>
	Assets, support and maintenance infrastructure, financial and manpower capability	
	<ul style="list-style-type: none"> <li>- The existence of patrol vessels operated by the Navy and the FSC</li> <li>- The existence of the patrol aircraft charter by the FSC for the fisheries surveillance</li> <li>- Location of the Navy Base and Navy Stations in the vicinity of the prone areas of maritime piracy and armed robbery against ships</li> </ul>	<ul style="list-style-type: none"> <li>- A very limited number of maritime assets compared to the area of responsibility (5,000 km of coastline, 111,120 square Km of territorial sea and approximately 1,140, 000 square Km of EEZ) and the existing ones are not very adequate for anti-piracy and armed robbery against ships operations</li> <li>- The FSC maritime units are not armed and do not have a maritime piracy and armed robbery against ships mandate</li> <li>- The existing naval patrol vessels are not totally adequate for counterpiracy and armed robbery operations due to technical and autonomy limitations</li> <li>- Inadequate Air Force air assets to conduct air surveillance in the maritime zones of Madagascar and to participate fully in the counterpiracy and armed robbery against ships operation due to limited autonomy and technical capabilities</li> <li>- Insufficient manpower to man the maritime and air assets as well as to ensure the technical maintenance</li> <li>- Insufficient budget to maintain and to operate the maritime and air assets as well as to ensure the logistical support of maritime patrol and operations</li> </ul>

	<b>Training</b>	
	<ul style="list-style-type: none"> <li>- The navy and the MOC personnel received training on legal and operational aspect of maritime piracy and armed robbery against ships (Boarding, maritime interdiction, etc.)</li> <li>- Training of the Navy personnel to form a Vessel Personnel Detachment (VPD)</li> </ul>	<ul style="list-style-type: none"> <li>- Insufficient knowledge and training on maritime piracy and armed robbery against ships legal and operational aspect for the Nautical brigade which should play a role in waterways and shoreline patrol</li> <li>- Insufficient training on evidence gathering, forensic, transfer of suspected pirates and armed robbers at sea, and investigation for the navy and nautical brigade personnel.</li> </ul>
	<b>Opportunity</b>	<b>Threat</b>
<b>External factors</b>	<b>Information sharing and management</b>	
	<ul style="list-style-type: none"> <li>- Information sharing arrangement and the future development of an MSA in the Gulf of Aden and the Somali basin under the DCoC</li> <li>- The existence of intelligence and pirates and financiers database from the RAPPICC</li> <li>- INTERPOL piracy database</li> <li>-</li> </ul>	<ul style="list-style-type: none"> <li>- International community suspension of cooperation with Madagascar due to the current political crisis</li> </ul>
	<b>Assets, financial and manpower capability</b>	
	<ul style="list-style-type: none"> <li>- Capacity building opportunity under the DCoC and the MASE project of the ESA-IO initiative</li> </ul>	<ul style="list-style-type: none"> <li>- Non prioritization of investment in the maritime security due to the political crisis</li> </ul>

	<ul style="list-style-type: none"> <li>- Bilateral cooperation arrangement with allied country (USA, France, China, etc.)</li> </ul>	<ul style="list-style-type: none"> <li>- International community suspension of cooperation with Madagascar due to the current political crisis</li> </ul>
	Training	
	<ul style="list-style-type: none"> <li>- Training arrangement under the DCoC</li> <li>- UNODC and INTERPOL counter-piracy programme</li> </ul>	<ul style="list-style-type: none"> <li>- International community suspension of cooperation with Madagascar due to the current political crisis</li> </ul>

Table 14 SWOT analysis of Madagascar’s current operational capabilities

**b) Summary :**

Madagascar faces a big challenge in anti-piracy and armed robbery against ships’ operations due to scarce resources. In the area of information sharing and management which forms the basis of a successful counterpiracy and armed robbery at sea operation, a big gap is noticed due to the deficiency of shore-based information centres and coastal means of detection. Similarly, there is a lack of communication network arrangement between the various agencies that are supposed to work together in the counterpiracy operation. The maritime and air resources to respond to an incident and to conduct patrol are not only insufficient but they are inadequate for conducting anti-piracy operations due to technical and autonomy limitations. Despite the opportunities in the domain of combating maritime piracy and armed robbery against ships offered by the international, regional and bilateral initiatives and cooperation, the international community suspension of cooperation with Madagascar, due to the current political crisis that the country faces, may pose an obstacle in capacity building until the resolution of the political crisis. In addition, the political crisis turns away the attention of the political decision-makers in investing in maritime security issues.

**A. 2 – The prevention and mitigation component current status:**

The prevention and mitigation measures that are to be assessed concern the reduction of ship's vulnerability measures and shoreline and maritime policing as the threats to be considered are maritime piracy and armed robbery against ships.

**a) SWOT analysis of current prevention and mitigation measures:**

	<b>Strengths</b>	<b>Weaknesses</b>
<b>Internal factors</b>	Reduction of ships' vulnerability	
	<ul style="list-style-type: none"> <li>- Progress in implementation of ISPS code in international ports in Madagascar in terms of infrastructure</li> <li>- Acceptance of ships having on board a PCASP or a VDP to navigate within Madagascar maritime zones and to call in national ports subject to the authorization of the Ministry of Transports and the Ministry of Armed Forces</li> <li>- Establishment of national VDP teams that are available for national and foreign flagged vessel on demand</li> </ul>	<ul style="list-style-type: none"> <li>- Deficiencies in the implementation of the ISPS Code in terms of taking security measures in ports</li> <li>- Non membership of Madagascar in any Port State Control's Memorandum Of Understanding (MOU) which should ensure that ship calling at its port comply with the IMO international standards of safety and security</li> <li>- Lack of campaign promoting ship's protection measures to protect against maritime piracy and armed robbery against ships for non conventional vessels<sup>331</sup> operating within the maritime zones of Madagascar and the BMP for national and foreign conventional vessel</li> </ul>
	Shoreline and maritime policing	
	<ul style="list-style-type: none"> <li>- Existence of the Nautical brigade units having the mandate to perform shoreline and waterway patrol</li> <li>- Placement and distribution of the</li> </ul>	<ul style="list-style-type: none"> <li>- No organized or planned border or foot patrol along the shoreline</li> <li>- Insufficient number of maritime</li> </ul>

<sup>331</sup> Merchant vessels, fishing vessels and pleasure crafts that are not subject to international standards set in international conventions and which operate mainly on national level i.e between national ports and with national maritime zones.

	<p>existing naval assets to the Naval Base and Naval Stations in the vicinity of the prone areas of maritime piracy and armed robbery against ships</p> <ul style="list-style-type: none"> <li>- Presence at sea of the Fisheries Surveillance patrol vessels at a regular interval of time despite the fact that they do not have an anti-piracy and armed robbery at sea mandate.</li> </ul>	<p>patrol operations due to limited maritime assets and limited budget to support the patrol.</p> <ul style="list-style-type: none"> <li>- When patrolling, insufficient coverage of the maritime space under jurisdiction due to scarce maritime assets and the vastness of the area of operation</li> <li>- No escort operations or establishment of transit corridor in the vicinity of port area located in the maritime piracy and armed robbery against ships high risk areas.</li> </ul>
	<b>Opportunities</b>	<b>Threats</b>
<b>External factors</b>	<ul style="list-style-type: none"> <li>- The presence of the multinational naval forces in the Gulf of Aden and Somali basin</li> <li>- Active engagement of neighboring countries (Seychelles, Tanzania, Kenya, South Africa, France) in maritime patrols in the maritime zones under their jurisdiction and beyond such as the Mozambique channel.</li> </ul>	<ul style="list-style-type: none"> <li>- International community suspension of cooperation with Madagascar due to the current political crisis</li> <li>- Non prioritization of funding and investment in the maritime security due the political crisis</li> </ul>

Table 15 SWOT analysis of Madagascar’s current prevention and mitigation measures

**b) Summary:**

In terms of preventive and mitigation measures, although a progress has been made in terms of implementation of the ISPS Code in international ports in Madagascar regarding the infrastructure aspect, problems still remain in terms of implementation of the said code with regards to the organizational and security measures aspect such as having enough security manpower, certified and trained personnel in the ISPS Code, etc. A big gap reside also in the fact that Madagascar is not yet

member of any Memorandum Of Understanding on Port State Control which pose an obstacle to fully ensure that ships calling in its ports are in conformity with IMO safety and security standards as that constitute at some extent preventative and mitigative measures against piracy and armed robbery against ships in the sense that the required equipments and radio communications are installed on board and the necessary safety and security measures are taken as required by the international Conventions<sup>332</sup>. Lack of a campaign promoting the implementation of ship protection measures for non conventional ships operating within the maritime zones of Madagascar as well as the BMP for conventional ships operating on international voyages constitute also a gap. In terms of shoreline and maritime policing, the main problem is linked to the insufficient number of operational capabilities and not enough budget which lead to insufficient shoreline and maritime patrol operations covering the maritime zones under Madagascar jurisdiction that should provide dissuasive and deterrent effect.

**A.3 - The incident response component current status:**

The incident response component is related to the vessel and crew rescue just prior or during or after a maritime piracy and armed robbery against ships has occurred. It is based upon the promptitude of the response which is dependent on the presence in the nearby area where the attack occurred of units that can undertake the rescue. Hence, it is mainly linked to maritime policing (Presence at sea of maritime units) or availability in the nearby shore station of maritime units that are ready to intervene. However, incident response is also based on the procedures that are in place to conduct the response actions including the rules of engagement (ROE), procedures related to the arrest of the offenders, to the seizure of a pirate ship, and to protect and collect the evidence.

**a) SWOT analysis of the current incident response :**

	<b>Strengths</b>	<b>Weaknesses</b>
<b>Internal factors</b>	Procedures	
	- Existence of general procedure for maritime surveillance for the Navy	- Lack of specific Rules of Engagement for anti-piracy and armed robbery against ships'

<sup>332</sup> SOLAS & SAR Convention.

		<p>operations</p> <ul style="list-style-type: none"> <li>- Lack of procedures for handling suspected pirates, pirate and victim ships, and evidence after the arrest and seizure at sea by the naval units to ensure a successful investigation and prosecution</li> </ul>
	<b>Availability of Maritime units to respond</b>	
	<ul style="list-style-type: none"> <li>- Location and existence of a Navy Base and Navy Stations in the vicinity of the prone areas of maritime piracy and armed robbery against ships</li> <li>- Maritime patrol conducted by the Navy from time to time and presence at sea of the FSC patrol vessels at a regular interval of time</li> </ul>	<ul style="list-style-type: none"> <li>- Technical inadequacy to counterpiracy and armed robbery at sea operation and insufficient number of the existing maritime assets</li> <li>- The FSC units do not have a maritime piracy and armed robbery against ships mandate and are not equipped with adequate armament for the counterpiracy and armed robbery at sea operation.</li> <li>- Insufficient coverage and presence of maritime units within the maritime zones of Madagascar due to their limited number and insufficient budget to support frequent patrol</li> <li>- State of readiness of the maritime assets affected by insufficient budget</li> </ul>
	<b>Opportunity</b>	<b>Threat</b>
<b>External factors</b>	<b>Procedures</b>	
	<ul style="list-style-type: none"> <li>- The existence of the UNODC counter piracy program in capacity building in terms of developing procedures for evidence gathering</li> </ul>	
	<b>Availability of Maritime units to respond</b>	

	<ul style="list-style-type: none"> <li>- The presence of the multinational naval forces in the Gulf of Aden and Somali basin</li> <li>- Active engagement of neighboring countries (Seychelles, Tanzania, Kenya, South Africa, France) in maritime patrols in the maritime zones under their jurisdiction and beyond such as the Mozambique channel.</li> </ul>	<ul style="list-style-type: none"> <li>- Non prioritization of funding and investment in the maritime security due to Madagascar economical situation and the political crisis</li> </ul>
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Table 16 SWOT analysis of Madagascar’s current incident response

**b) Summary:**

The current incident response to maritime piracy and armed robbery against ships in Madagascar faces enormous problem due to the limited number of maritime assets and budget. Indeed, this situation affects the presence and the coverage of the maritime zones when conducting maritime patrol and consequently it has an impact on the rapidity of the response. Despite of the presence of a naval base and naval stations in the vicinity of prone areas of maritime piracy and armed robbery at sea, the limited budget to ensure proper technical maintenance affects sometimes the state of readiness of the maritime assets and has an impact on the incident response which may be delayed. Nevertheless, the presence of the multinational naval forces in the Somali basin and the active maritime policing conducted by the neighboring States may offer a complementary option to ensure an alternative to the national incident response. In terms of procedural issues, there is a lack of proper rules of engagement related to maritime piracy and armed robbery against ships and procedures with regards to the arrest of offenders, to the seizure of a pirate ship, and to the protection and collect of evidence. The execution of the incident response during the M/V Zoulficar case illustrates these various issues encountered in the realm of incident response.

**A.4 – The current post incident component:**

As stated earlier, the post incident component includes the transfer of the suspected pirates or armed robbers at sea to the judicial authorities, the investigation as the beginning of the judicial proceedings and the release of the crew and the victim ship. The following SWOT analysis is based on the experience during the treatment of the M/V Zoulficar case which is the first and the only maritime piracy case that was handled from the arrest of the suspected offenders phase up to their conviction.

**a) SWOT analysis of the current post incident component:**

	<b>Strengths</b>	<b>Weaknesses</b>
<b>Internal factors</b>	Transfer of arrested offenders to the judicial authorities	
	- Presence in each Malagasy major port of a nautical brigade unit which acts as investigator authority in criminal matters and to which the arrested offenders can be transferred	- Lack of procedures in place related to the transfer of suspected offenders and the seized pirate ships
	Investigation	
	- Presence in each Malagasy major port of a nautical brigade as unit which acts as investigator authority affiliated to the first instance court and the criminal court in the region where the port is located	- Lack of forensic capabilities with the nautical brigade and the local level  - Limited knowledge of the nautical brigade regarding the maritime domain and maritime activities  - Communication problem during the investigation due to language barrier and scarce translators
	Release of the crew and the victim ship	
	- The presence of regional representative office of the APMF (Acting as Maritime Administration) in the area where a Malagasy major port is located and which can handle the organization of the release of	- Possible abandonment of the crew and the victim ship by the shipowner depending on the interest and the cost involved in the repatriation and the recovery of the ship

	<p>the crew and the victim ship by liaising with its headquarter. This latter in turn will contact the flag of the ship and the embassies of the countries from which the crew is a national either directly or through the Ministry of Foreign Affairs</p> <ul style="list-style-type: none"> <li>- The existence of the seafarer’s mission and representatives of international seafarers’ unions such as ITF to help and advise seafarers regarding their rights</li> <li>- The presence of a medical personnel in each major port in charge of inspecting the medical status of the crew and the passenger during the arrival of a foreign vessel</li> </ul>	<ul style="list-style-type: none"> <li>- Insufficient Medical expertise to handle post traumatic case in every city where Malagasy major ports are located</li> </ul>
	<b>Opportunities</b>	<b>Threats</b>
<b>External factors</b>	Transfer of arrested offenders to the judicial authorities	
	<ul style="list-style-type: none"> <li>- The existence of the UNODC counter piracy program in capacity building in terms of developing procedures for a transfer of suspected</li> </ul>	
	Investigation	
	<ul style="list-style-type: none"> <li>- Availability of forensic and investigation support from INTERPOL</li> </ul>	
	Release of crew and victim ship	
	<ul style="list-style-type: none"> <li>- The existence of the International Seafarers Assistance Network (ISAN) or SeafarerHelp based in London which offers a 24/7 helpdesk and call-centre to give a gratis and confidential service to seafarers who need support or</li> </ul>	

	assistance in case of a Malagasy seafarer having an issue abroad following a release of crew in the context of maritime piracy and armed robbery against ships	
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Table 17 SWOT analysis of Madagascar’s current post incident component

**b) Summary:**

In terms of post incident response, the main gaps in the Madagascar case are mainly regarding the lack of procedure related to the transfer of suspected offenders from the control of the Navy to the judicial authority represented by the Nautical Brigade unit, the lack of forensic expertise, language problem during the investigation due to the scarcity of translator for some language (For example the Somalian language or other) and insufficient knowledge of the investigators of the maritime domain and activities. There is also the lack of medical expertise to treat post traumatic issues following a maritime piracy and armed robbery incident at sea.

Overall, Madagascar has already the basic foundation for an operational response arrangement to maritime piracy and armed robbery against ships. The core of the problem resides however in the cooperation and coordination of the stakeholders; in the information sharing arrangement; in the insufficiency of operational capabilities in quantity and quality; in the need for training of the participants in the operational response in certain field such as the arrest of suspected offenders, the seizure of pirate ships, the collection and treatment of evidence and forensic expertise; the establishment of procedures related the rules of engagement, the arrest of suspected offenders, the seizure of pirate ships, and the transfer of suspected offenders to judicial authorities in view of the investigation in preparation of the prosecution process.

**Section B: Improving the operational aspect of combating maritime piracy and armed robbery against ships in Madagascar**

Based on the SWOT analysis of the existing operational response arrangement in Madagascar, the following improvements are proposed in the area of preparedness or readiness, prevention and mitigation, incident response and post incident response:

**B.1 Preparedness or readiness:**

By considering the identified gaps in the existing operational arrangement in Madagascar, there is a need to improve the preparedness or readiness of the country to face maritime piracy and armed robbery against ships. In this regard, the areas that need enhancement concern the organization and planning and the operational response capacity which includes the information sharing arrangement, the operational resources and the training aspect.

### **B.1.1 Organization and planning:**

To overcome the inter-agency coordination difficulty and the cooperation problem, a solution would be the establishment of a maritime piracy and armed robbery against ships board and to identify clearly the role of each participating stakeholders.

#### **a) Creation of a Maritime Piracy and armed robbery against ships national board:**

- Establishing the national board by enacting a legislation:

It was seen in the previous section that there was an initiative of the Ministry of Transports to call upon government agencies to work together to fight against maritime piracy and armed robbery against ships by organizing meetings from time to time to exchange information and to try to coordinate the operational response. However, it appeared that the initiative has failed at some extent as it was noticed a competition of leadership between the Ministry of Transports and the Ministry of Armed Forces, a lack of commitment of the participants and an interdepartmental communication problem when handling piracy and armed robbery case. This situation occurred because many of the participants considered the meetings as informal and there was no formal structure compelling the agencies to comply with what was said or decided. Therefore, it becomes necessary to create the maritime piracy and armed robbery against ships board by law in form of a decree for instance to formalize officially its establishment but moreover to oblige the participants to fulfill their obligations as stipulated in the body of law creating it. The piece of legislation creating the board should provide for the agencies and organizations that should participate in it, its mission and the organization of the board.

- The participating agencies and organizations:

The government agencies that participated in the forum initiated by the Ministry of Transports should remain part of the board plus in addition Ministry of Health which participates also in control of health in ports upon arrival of ships and would provide the expertise related to examination of the

health status of the suspected pirates, the crew and the victims when they arrive in ports escorted by the Navy after an arrest and seizure at sea. In addition, non-state key players should be part of the board for the sake of cooperative approach. They include the shipowners association, the shipping agent association, the federation of seafarers' union, and the fisheries industry association. Indeed, the participation of the non-State participants working in the maritime domain affected by maritime piracy and armed robbery against ships is vital not only for the purpose of information exchange and dissemination but also to enhance the implementation of the preventive measures. The list of the government agencies and the non-state organizations that should be members of the national board of maritime piracy and armed robbery against ships is as follows:

	<b>Ministries and Associations</b>	<b>Operational branch</b>
<b>Government stakeholders</b>	Ministry of Transports	Maritime Operation Centre (MOC)
		Port, Maritime and Waterways Agency (APMF)
	Ministry of Armed Forces	General Staff of the Armed Forces
		Navy
		Air Force
	State Secretariat of Gendarmerie	Nautical Brigade
	Ministry of Internal Security	Border Control Police
	Ministry of Fisheries and Aquaculture	Fisheries Surveillance Centre (FSC)
	Ministry of Health	-
	Ministry of Justice	-
Ministry of Foreign Affairs	-	
<b>Non-State stakeholders</b>	Shipowners Association	-
	Shipping Agents Association	-
	Federation of Seafarers' Union	-
	Fisheries Industry Association	-

Table 18 Proposed list of the government agencies and non-State actors forming the maritime piracy and armed robbery against ships national board

It is suggested that each participating agency and association nominates a permanent representative and an alternate within the national boarding. The two persons will be the point of contact within its agency or association of origin to facilitate the transmission of information and communication.

- The mission of the national board:

The main mission of the national board is to determine and establish the national policy related to the repression of maritime piracy and armed robbery against ships. It should focus particularly in the coordination of action by establishing and agreeing on informational and operational procedures to be used, the use of available assets belonging to the various agencies, in the determination of the logistical and capacity needs of the country to face such threat as well as the development of a regional and international cooperation orientation.

- The board’s organization:

In determining who should be the leader of the national board, two options are available to avoid competition amongst the main participating agencies. The first option is to give the leadership to the Prime Minister’s office so that the government stakeholders do not contest its authority and consent to any decision in virtue of hierarchical respect. The second option is to adopt a more collaborative approach and establish a joint-leadership of the Ministry of Transports and the Ministry of Armed Forces as they appear to be the main player in the anti-piracy and armed robbery against ships operation. As for the methods of working to be adopted by the national board, it is suggested the establishment of working groups depending on the area of expertise and the department or association of origin of the members.

**b) Clear definition of the role of participating stakeholders:**

To be effective it is important to agree and clarify the role of each stakeholder during the operational process. The following table describes the general role that should be ensured by each participating agency and association :

<b>Stakeholders</b>	<b>Role in the anti-piracy and armed robbery against ships operation</b>
Ministry of Transports	- Coordination of the civilian support of the operation
Maritime Operation Centre (MOC) (It should be transferred to the APMF to avoid redundancy)	<ul style="list-style-type: none"> <li>- Act as national focal point (Under the DCoC)</li> <li>- Reception, analysis and dissemination of operational information</li> <li>- Administrative and technical support of the Ministry of Transports in the coordination of the civilian support of the operation</li> </ul>
Port, Maritime and Waterways agency (APMF)	<ul style="list-style-type: none"> <li>- Provide information related to the activities of either national or foreign merchant vessel and pleasure craft operating within Madagascar’s maritime zones or in its vicinity</li> <li>- Ensure the implementation of preventive measures (Implementation of ISPS Code and SOLAS radio communication safety and security requirement, BMP) in</li> </ul>

<b>Stakeholders</b>	<b>Role in the anti-piracy and armed robbery against ships operation</b>
	<ul style="list-style-type: none"> <li>- Liaison with the flag State in case of foreign ships involved in piracy or as victim in collaboration with the Ministry of Foreign Affairs</li> <li>- Facilitation and support of the restitution to its owner or operator of a foreign ship victim of an act of piracy or armed robbery at sea and the repatriation of its crew during the post incident pulse</li> <li>- Handle Malagasy seafarer case or national flagged ship victim of piracy and armed robbery against ships outside Madagascar in collaboration with manning agent, shipowner or operator and the Ministry of Foreign Affairs.</li> </ul>
Ministry of Armed Forces	<ul style="list-style-type: none"> <li>- Coordination of the military operation either during the preventive and mitigative phase (Maritime patrol) or incidence response and post incident response phase</li> </ul>
General Staff or Armed Forces	<ul style="list-style-type: none"> <li>- Operational coordination of the military intervention</li> </ul>
Navy	<ul style="list-style-type: none"> <li>- Participation in the prevention and mitigation by executing maritime patrol and interdiction</li> <li>- Prepare the technical and operational file for development of joint patrol agreement with foreign Navy or shiprider agreement</li> <li>- Response to maritime piracy and armed robbery against ships incident by proceeding to the boarding of the pirate ship, its seizure and arrest of suspected pirates or armed robbers at sea</li> <li>- Liaison through the Navy headquarter with the Public prosecutor of the first instance court having jurisdiction in the planned port of diversion of pirate ship to report the arrest and seizure</li> <li>- Evidence gathering</li> <li>- Diversion to the appropriate port of the pirate ships and the suspected pirates in view of the judicial proceedings</li> <li>- Transfer to the nautical brigade (National Gendarmerie) of the suspected pirates and pirate ships for the investigation under the supervision of the Public Prosecutor</li> <li>- Participation and support in the investigation</li> </ul>
Air Force	<ul style="list-style-type: none"> <li>- Aerial survey for intelligence collection and air support during Navy maritime patrol and incident response</li> </ul>
Ministry of Internal Security/Border Control Police	<ul style="list-style-type: none"> <li>- Assistance during the transfer of suspected pirates to the nautical brigade for immigration control</li> <li>- Process the immigration process of the crew (and passenger) of the victim ship</li> </ul>

<b>Stakeholders</b>	<b>Role in the anti-piracy and armed robbery against ships operation</b>
Ministry of Health/ Health Inspector	<ul style="list-style-type: none"> <li>- Health examination of the suspected pirates prior the investigation</li> <li>- Assistance to the health examination of the victims (seafarers and passengers)</li> </ul>
State Secretariat of Gendarmerie/Nautical Brigade	<ul style="list-style-type: none"> <li>- Investigation of the case (Beginning of criminal proceeding)</li> </ul>
Ministry of Justice/ Public Prosecutor of the first instance court	<ul style="list-style-type: none"> <li>- Supervision of the arrest and seizure at sea</li> <li>- Supervision of the investigation of the case</li> </ul>
Ministry of Fisheries and Aquaculture/Fisheries Surveillance Centre	<ul style="list-style-type: none"> <li>- Provide information related to the activities of national and foreign fishing vessel operating within Madagascar's maritime zones or in its vicinity</li> <li>- Provide maritime or aerial support to the Navy if the circumstances permitted</li> </ul>
Ministry of Foreign Affairs	<ul style="list-style-type: none"> <li>- Liaise with foreign mission if necessary regarding contact of flag States, pirates or victims' country representatives</li> <li>- Liaise with Malagasy embassies and consulates overseas in case of a national or a national flagged vessel is a victim of piracy and armed robbery at sea in collaboration with the Port, Maritime and Waterways Agency</li> </ul>
Shipowners Association	<ul style="list-style-type: none"> <li>- Support in the dissemination of information and implementation of preventive measures such as the BMP , the ISPS code on board ships, and the ship protecting measures (SPM)</li> <li>- Each shipowner or operator has the duty to ensure that the crew is physically, technically and mentally prepared to transit to high risk area</li> <li>- Each shipowner or operator has to arrange for the negotiation for the release of his ship and his crew in case of kidnap for ransom</li> <li>- Each shipowner or operator has to handle the repatriation of the crew upon release and their post traumatic treatment</li> </ul>
Shipping Agents Association	<ul style="list-style-type: none"> <li>- Supports the dissemination of information and implementation of preventive measures such as the BMP , the ISPS code on board ships, and the ship protecting measures (SPM) to their respective clients</li> <li>- The ship agent liaises with the shipowner or operator and the Port, Maritime and Waterways Agency, the nautical brigade regarding the condition of the crew and the ship during the investigation and organizes the repatriation of the crew and the departure of the victim ship .</li> </ul>
Federation of Seafarers' Union	<ul style="list-style-type: none"> <li>- Informs the seafarers on the importance of physical, technical and psychological preparation prior the departure</li> </ul>

Stakeholders	Role in the anti-piracy and armed robbery against ships operation
	with a transit in a high risk area - Provides advice to seafarers regarding their rights in relation to maritime piracy and armed robbery at sea incidents such as insurance issues, post incident treatment .
Fisheries Industry Association	- Supports the dissemination of information and implementation of preventive measures such as the BMP adapted in the fisheries activity

Table 19 Proposed detailed role of the stakeholders in the operational aspect of combating maritime piracy and armed robbery against ships

**B.1.2 Upgrade and improve the operational capabilities:**

An area that presented big gaps and weaknesses in the case of Madagascar is the operational capabilities which are at the basis of operational success in combating maritime piracy and armed robbery against ships. Indeed, in order for the country to deter and to repress these crimes, it should be capable of conducting surveillance, monitoring and control in its maritime space. This action is entirely dependent on the capabilities. In this regard, based on the assessment of the operational capabilities, three areas need to be looked at particularly namely the information sharing and management arrangement, operational means and operating support, and training.

**a) Improving information sharing and management arrangement:**

The information sharing and management arrangement depends on the means to acquire the information, to treat it and the network system to share it. As stated in the previous chapter, the the existence on-board ships of the SOLAS required radio communication systems such as AIS, GMDSS, LRIT and SSAS helps a lot in acquiring the information. Thus, it is vital that merchant ships are equipped with such equipment and so do the Navy ships to enable the reception of the information. It is also important to have shored-based information centres equipped with the land-based reception and communication equipment in order to receive the information from the sea. In addition, the fact of having coastal radars, linked and supported by the shore-based information centres, provides a major advantage in the establishment of a maritime situational awareness. It is up to the Port, Maritime and Waterways Agency (APMF) which acts as maritime administration to ensure that AIS, GMDSS, LRIT and SSAS equipments are installed on-board ships flying the Malagasy flag and to establish shore-based information centres equipped with land-based counterpart of these equipments to ensure proper

reception and the flow of information. To avoid redundancy, the MOC which is a division of the Ministry of Transports should be transferred to the APMF and merged with the information centre (The JRCC) located in the capital city under the supervision of the APMF headquarter. It is suggested that the land-based information centres are co-managed and co-operated by the Navy and the APMF. They can be used both for maritime piracy and armed robbery against ships and SAR crisis management centres. They should be established in the in proximity of the six international ports of Madagascar<sup>333</sup>. At the present time, the APMF has already in each of its regional representative offices, located in the cities where are located the major international ports, usable site and infrastructure for the establishment of information centres. In total, there should be seven land-based information centres including the one in the capital city (Antananarivo) which is a Joint Rescue Command Centre (JRCC). There are advantages of having these information centres co-managed by the Navy and the APMF. The first advantage is the shared-cost. The second benefit is the collaboration between civilian and military institutions. The third gain is the exchange of experience between the personnel of both institutions and the access at the same time to a more complete information.

It should be highlighted that there should be a fusion of information emanating from the APMF (Source of the information regarding merchant ships and pleasure crafts), the FSC information centre (Source of the information regarding fishing vessels through the VMS) and the Navy (Source of information on maritime security) and the DCoC information sharing network to enable the development of an MSA around Madagascar. As Madagascar aspires to become a major flag State in the future, it is therefore advisable to establish already at this stage the LRIT system that will help in tracking ships flying Malagasy flag operating internationally but also to assist in the fight against maritime piracy and armed robbery against ships.

The technological acquired information should be combined with human provided information. Indeed, human intelligence (HUMINT) plays an important role in the repression of crimes like maritime piracy and armed robbery against ships. In fact, the preparation of maritime piracy or armed robbery at sea attacks happens mainly on land and along the coast or an ongoing attack may be seen from the coast. Such preparation can be noticed or heard by coastal communities. Such information has its particular value in the area of preventing and repressing such crimes. Thus, it is important to encourage people to transmit information and to put in place a channel of communication between the general public and the established information centres by creating a toll free number (or green line)

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<sup>333</sup> See figure

through which individuals can provide information related to maritime piracy and armed robbery against ships.

**b) Acquiring adequate assets and increasing manpower and budget:**

The acquisition of adequate maritime and air assets to upgrade the existing is vital for the success in the operational response. Given the nature of the threat of maritime piracy and armed robbery against ships with its violent character, the maritime means used by the pirates (High speed skiffs and mother ships), and deadly weaponry (AK47 and RPGs), the following parameters should be taken into account in choosing the type of naval ship that is adequate to combat such crimes:

- Type: Offshore Patrol Vessel (OPV)
- Ship's length: between 40 m to 60 m to allow enough space on-board to have a detention quarter for the suspected pirates
- Speed: Superior or equal of 35 Knots to enable the patrol vessel to chase the pirates and armed robbers at sea and to permit the unit to maneuver in order to avoid to the opening fire from the pirates and armed robbers at sea
- Draft: Lower draft to enable the vessel to navigate in shallow waters
- Armament: As front armament, a 40 mm machine gun and sides weaponry, two 12.7 mm to ensure proportional response and to provide the dissuasive effect.
- Accurate means of detection.

For an effective operational response, it is proposed the acquisition of six OPVs so that four of them would perform maritime patrol with two OPVs patrolling in the Mozambique Channel, two OPVs patrolling the north east and north west part of Madagascar and the remaining two OPVs would be on base for maintenance or repair waiting to replace the two OPVs having finished their deployment duty.

As for the air assets, one Maritime Patrol and Reconnaissance Aircraft (MPRA) would be necessary to support the maritime surveillance.

It is of capital importance to increase the manpower of the Navy, the APMF and the Air force as well as their respective budget to ensure the proper operation of the maritime and aerial capabilities as well as the information centres. It has to be highlighted that the acquisition of such capabilities are

not only for the fight against piracy and armed robbery at sea but to be used in addressing all threats and concerns related to the maritime domain such as drug trafficking, illegal immigration, illegal fishing, maritime terrorism, SAR, marine pollution response, etc.

**c) Training :**

As pointed out earlier, the training of the personnel is crucial in terms of preparedness to face and combat maritime piracy and armed robbery against ships. The category of personnel who needs focus on training is the seafarers, the navy and the National Gendarmerie. The type of training needed are the following:

- For seafarers : Pre-sailing physical and psychological training to enable the seafarers to face maritime piracy and armed robbery against ships attack and to resist against the pressure of the detention in case of kidnap for ransom. Drills and familiarization with the use of ship protection measures that will be put in place such as the citadel are also necessary.

- Navy personnel: the legal aspect of maritime piracy and armed robbery against ships, boarding tactics and procedures, maritime interdiction, the use of force, arrest of suspected pirates and armed robbers at sea, seizure of pirate ships, evidence gathering, forensic, transfer of suspected pirates and armed robbers at sea, investigation of a case.

- National Gendarmerie personnel: the legal aspect of maritime piracy and armed robbery against ships, arrest of suspected pirates and armed robbers at sea, seizure of pirate ships, evidence gathering, forensic, transfer of suspected pirates and armed robbers at sea, investigation of a case.

The training of the seafarers falls under the responsibility of the ship operator and the ship master. It can be organized also in collaboration with PMSCs (Private Maritime Security Companies) as stated earlier. However, the training of the Navy personnel and the National Gendarmerie personnel may be organized in cooperation with the UNODC, the INTERPOL, the multinational naval forces operating in the Gulf of Aden and the Somali basin, the neighboring countries naval forces, or in the context of the DCoC.

**B.2 Prevention and mitigation:**

The prevention and mitigation consist of reducing the risk of the occurrence of maritime piracy and armed robbery against ships. As such, all the efforts should be deployed in this part by the involved stakeholders in order to avoid the occurrence of any incident. Hence, the prevention and mitigation measures that should be applied are the implementation of the ISPS Code in ports and on board ships, compliance with BMP, use of PSCAP and VPD and maritime patrol.

### **B.2.1 Strict implementation of the ISPS Code in ports and on board ships:**

As already stated previously, the ISPS Code plays an important role in preventing and mitigating maritime piracy and armed robbery against ships. Thus, in ports to avoid armed robbery against ships, it is necessary to apply in a strict manner the provisions of the ISPS code in international ports. This should be oversight and controlled by the Port, Maritime and Waterways Agency (APMF) and executed by the port administration. It is also important for Madagascar to be a party to one MOU on Port State Control so that it can participate in the control of compliance to IMO instruments on safety and security which have an impact on the prevention and mitigation of maritime piracy and armed robbery against ships. Hence, through port state control, the implementation of the ISPS Code should be very strict for ships alongside or at anchor within the port area. The firm implementation of the ISPS Code in ports and on board ships reduces the risk of being a victim.

### **B.2.2 Promoting the implementation of the BMP :**

As a lesson learned from the piracy off the coast of Somalia, the implementation of the BMP by the shipping industry appears to be a major preventative measure. In the case of Madagascar, there is a need for identifying the high risk areas in the maritime zones under the jurisdiction of Madagascar and disseminate them to the shipping agent and the shipping companies so that they implement the BMP appropriately for the ships that they are in charge of. In implementing the BMP, it is very important to consider the ship protection measures.

### **B.2.3 The use of a PSCAP or a VPD:**

Due to limited resource in terms of operational capabilities, Madagascar does not have too much choice apart accepting the use of a PSCAP or a VPD. However, for the sake of maritime sovereignty and security, a certain number of arrangement needs to be established to control of the transit in territorial waters, the arrival and the departure of ships having on board a PSCAP or a VPD. The acceptance of foreign ships having on board a PSCAP or a VDP requires the development of rules and regulations in this regards and control procedures. In addition, Madagascar has initiated the training of Navy personnel to be utilized as VPDs for the interested national flagged vessel or foreign ships.

#### **B.2.4 Shoreline and maritime patrol :**

To reduce the risk of armed robbery against ships originating from the inland of Madagascar, it is important to put in place a systematic border and shoreline patrol in addition to the strict implementation of the ISPS Code in international ports. This activity should be ensured by the entities that are in charge of border control which are the National Gendarmerie and the National Police based on their mandate. Indeed, such patrol has a deterrence and dissuasive effect.

The maritime patrol or sea patrol is another means to dissuade and interdict the pirates and armed robbers at sea not to perpetrate any criminal acts in the maritime zones under the jurisdiction of Madagascar. It is a preventative and mitigative measures. It generally consists of exercising the right of visit by conducting boarding of suspicious vessel but it permits also to intervene rapidly to protect merchant ships or fishing vessel in the vicinity against imminent attacks. Similar to the modus operandi of the multinational naval task force in the Gulf of Aden and the Somali basin, a transit corridor can be established in the identified high risk area such as the Mozambique channel accessing to the international ports in the areas such as Toliary, Majunga, Nosy Be and Antsiranana. In the field of maritime patrol, due to scarce resources, it should be envisaged to develop and promote the cooperation with neighboring countries through joint patrol agreement and shiprider agreement. The joint patrol agreement permits the participating States in the accord to conduct joint patrols in maritime zones but it can be extended also to the possibility of States parties to allow each other to patrol in the maritime zones under the jurisdiction of other States parties without prior notification or authorization even to arrest and to seize pirate ships. Such arrangement exists already between South Africa, Mozambique and Tanzania. Hence by entering into an agreement with South Africa which has a relatively strong Navy in the region, also with France , Mozambique, Tanzania and Kenya, it will help Madagascar a lot

in ensuring the surveillance, monitoring and control of maritime piracy and armed robbery activities in the maritime zones under Madagascar's jurisdiction and outside.

To enable them to participate fully in the counterpiracy and armed robbery at sea efforts, the Nautical Brigade of the National Gendarmerie and the FSC should be given also a maritime piracy and armed robbery against ships mandate.

### **B.3 - Incident response:**

When a maritime piracy and armed robbery at sea attack occurs, the entity in charge of the task of responding is usually the Navy as provided by the law. This is also the case in Madagascar.

#### **B.3.1 - Ensuring a rapid incident response:**

The rapidity of an incident response is dependent on the presence of a naval unit or other maritime responder in the vicinity of the location where the attack is perpetrated. It is in this perspective that the fact of conducting maritime patrols in high risk areas is important in order to deter any attack but also in order to respond quickly to any distress call following an attack. Apart from being present in high risk areas by conducting maritime patrols, another way of ensuring an expeditious incident response is the establishment of Navy stations or Navy bases in the vicinity of maritime piracy and armed robbery at sea prone areas. This is the case for Madagascar at present where a Navy Base and two Navy stations are located in the north and along the north west coast. However, if these Navy stations and naval base are situated in a strategic location, there is a need to assign to them the adequate maritime response capabilities such as the adequate patrol boat for instance to ensure a more or less rapid incident response.

#### **B.3.2 – Development of rules and procedures:**

As identified during the assessment of the current operational response arrangement in Madagascar, it was identified that there are gaps in terms of rules and procedures given the peculiarity of the maritime piracy and armed robbery against ships. Hence, to ensure an efficient and successful incident response, there is a need to develop adequate Rules Of Engagement (ROE) to control the use of force and Standard Operating Procedures (SOP) related to the arrest of offenders and evidence gathering.

- **Rules of engagement:** Control of the use of force.

In the maritime piracy and armed robbery at sea context, the control of the use of force has its particular importance as the context is not a context of war situation but a circumstance related to a confrontation with criminals. However, the level of threat is high as the pirates and armed robbers at sea are heavily armed. Hence, a reasonable use of force may be allowed to achieve the aimed result with minimum injury to people and property. In the event of an imminent attack, the naval unit can adopt the suitable defensive response (i.e assertive or aggressive):

- o Assertive defense: The situation necessitates explicit involvement on the part of the naval unit. This may comprise warning to pirates or armed robbers at sea of the grave consequences of failing to stop an attack. It will mean a rapid transit by the naval unit to the scene of the incident. It may involve the use of air assets to show force and to push the attackers to abandon.

- o Aggressive defense: The naval unit will take the required aggressive action to protect the potential victim vessel. This may include using aggressive non lethal tactics to prevent the attack from succeeding, such as putting the naval unit between pirates and the potential victim vessel, conducting wave-creating maneuvers, or firing warning shots. An aggressive defense remains essentially defensive.

- o Interdiction posture: It involves offensive actions against pirates and armed robbers at sea. It consists of active interference with movement or intended activity of the pirate ships or personnel, including disruption of communication, disabling vessels or equipment, or any activity that involves lethal force. This may include maritime interdiction operation, rescue hostage operation and opposed boarding operations.

- **Procedure related to the arrest of suspected pirates and armed robbers at sea:**

In terms of apprehension of the pirates and armed robbers at sea, the United States Coast Guard proposed a use of force continuum model which defines various levels of force for a given level of resistance and to which a reference can be made:

- o Level One: The presence of an enforcer is enough to achieve the desired objective. Many people are inclined to calm down and follow instructions in the presence of an authority.

- Level Two: Verbal commands allow the enforcer to identify him/herself and to order the offender to do something. If the offender does not obey, the enforcer is justified in going to the next level of force.

- Level Three: Soft, bare hand control is used to restrain a suspect who has disregarded a verbal order to do something. In this situation, the amount of physical force is determined by the amount of resistance being encountered.

- Level Four: Hard, bare hand control is used to counter a physical attack by the suspect. This involves the enforcer punching or using restraining to hold on the arms or the neck of the suspect.

- Level Five: Intermediate weapon control may be required to reach compliance in the case where the suspect is resisting with or without weapons, but with sufficient force that the enforcer is in danger of being injured. Weapons such as firearms or bladed weapons should only be used as a last resort.

- Level six: Deadly force may only be used in the case where the enforcer or someone else at the scene is in danger of being killed.

It is important to highlight a certain number of measures related to the detention at sea of suspect pirates and armed robbers. The respect of human rights is paramount in the treatment of suspected pirates. This includes the provision of adequate food, drinking water, shelter, clothing and medical treatment, the free exercise of religion depending on the requirements of detention, the protection against threats or acts of violence, etc.

- Evidence gathering:

Evidence collection has its particular importance in the repression of maritime piracy and armed robbery against ships as the successful prosecution of the offenders depends on it. Being part of the military system, the Navy personnel are not used to this type of activity. For this reason, there is a need for the Navy personnel to be trained in evidence gathering.

Firstly, it consists of securing the important crime scenes on board of the pirate ship and the victim ship. This step is crucial as those crime scenes will be examined thoroughly by the forensic team during the investigation at the beginning of the judicial proceeding. Due to the severe conditions at sea, it is not easy to maintain the state of the crime scenes. It is suggested to designate one boarding team member to act as videographer and another one as a photographer for every boarding to have an information on the status of the crime scenes on board at that moment which may be different of its

status once arrived in port due to severe condition at sea that changed the whole set of things on board. The videographer should video every aspect of the boarding and hone in on key pieces of evidence. The photographer should picture every piece of the vessel, including pieces of equipment, ladder, , the pirates, etc.

Secondly, the boarding party should proceed to the collection and seizure of all items that are considered to be necessary or relevant in proving that an offense has been committed. These include the pirate ship, the small boats, the weapons used during the attack, the equipments and the gears utilized such as ladders, binoculars, satellite phones, fuel barrels, and other pertinent items. It is important to collect every piece of evidence that can be recovered. The collection of evidence should be done without hurry and in a meticulous manner. An extensive search and verification should be conducted in every place on board the pirate and victim ships. One person on the naval unit should be designated to ensure the chain of custody of the collected evidence and the appointed person should be the only person to tag and bag the evidence.

The third part of the evidence gathering is the preliminary interrogation of the suspected offenders if time and the conditions on board allow. Prior the interrogation, pictures of the pirates or armed robbers at sea should be taken. The interrogations should be done separately so that the pirates and armed robbers at sea can corroborate each other's responses. The interrogation should focus on personal information about the pirates (Name, age, point of origin, clan, etc.), about their leader, details about the preparation and the execution of the attack, and information about the logistics and financial supports of the criminal activities.

#### **B.4 - Post-incident arrangement:**

The post incident arrangement consists of transferring the suspected pirates or armed robbers at sea to the nautical brigade of the National Gendarmerie at the port of diversion after the administrative formality with the immigration service of the National Police and the health examination of the suspected offenders by the inspector of health. It includes also the investigation and the release of the victim ship and the repatriation of its crew. This ends normally the operational phase and the judicial proceedings should follow.

#### **B.4.1 – Transfer of suspected offenders to the judicial authorities:**

After arriving in port , the suspected offenders and the pirate ship are handed over to the nautical brigade of the National Gendarmerie. The victim ship and its crew (and the passenger) are also transferred to the Nautical Brigade.

The following issues should be considered when effectuating the transfer :

- The transfer should be done in the presence of the Navy personnel, the prosecutor and the Nautical brigade personnel.
- The suspected pirates or armed robbers at sea are handed over one by one along with a documentation related to his personal information.
- The evidences are also handed over along with the documentation related to.
- The pirate ship and the victim ship are handed over at the end by undertaking a visit and a presentation of the different compartment on board especially the crime scene.
- The health of the suspected pirates and the crew of the victim ship should be checked and taken care of prior the beginning of any investigation process.

#### **B.4.2 – The investigation:**

The investigation should be conducted with a representative of the Navy in order to provide help to the nautical brigade with regards to issues related to the maritime domain. It is important to secure translators in order to ensure a proper investigation.

#### **B.4.3 – The Release of the crew and the victim ship:**

The release of the crew and the victim ship are subjected to the authorization of the nautical brigade and the Public Prosecutor who supervises the investigation when this phase is finished. The release should be organized in collaboration with the APMF (acting as Maritime Authority), the ship agent if any or the ship operator or its representative, the Ministry of foreign Affairs and the foreign mission of the countries from which the crew and ship operator or ship owner are nationals.

## Conclusion to part II

The operational aspect is an important component of the repression of maritime piracy and armed robbery against ships. Indeed, it is the means to enforce the legislation that has been established in the matter. The analysis of the international and regional operational initiatives in the Eastern Africa and the Western Indian Ocean permitted to realize that not only they propose ways to tackle the problem operationally but it allowed also to identify the key elements that form the operational response. Indeed, it permitted to realize the following :

- The preparedness or readiness component is dependent to a cooperation of stakeholders and a coordination of their action, to the existence of an information sharing arrangement, adequate capabilities and trained personnel.

- Reducing ship's vulnerability and maritime policing forms the prevention and mitigation component.

- The incidence response is dependent on the presence of maritime assets in the vicinity of maritime piracy and armed robbery against ships prone area as well as a proper establishment of rules of engagement and procedures related to the arrest of the suspected offenders and seizure of pirate ships and handling evidence.

- The post incident response consists of the transfer of the suspected offenders and the pirate ships to the judicial authorities and the release of the victim ship and its crew.

The international and regional initiatives offer also to Madagascar opportunities to take benefit from them by entering and participating in the cooperation mechanism.

The assessment of the current Madagascar operational response capacity permitted to realize that the main problem of the country resides in the insufficiency and adequacy of informational and operational capabilities as compared to the maritime zones under the responsibility of the country and the level of the threat. There is also a gap in the coordination of the stakeholder's actions as well as in the establishment of rules and procedures that are related and specific to maritime piracy and armed robbery against ships. To rectify these gaps it is proposed to undertake the following :

- Enhancing preparedness through improvement of the operational organization and planning by creating a maritime piracy and armed robbery against ships national board and clarifying the role of the stakeholders; upgrading the operational capabilities through the developing information

sharing and management co-managed by the APMF (Maritime, Port and Waterways Authority) and the Navy, acquisition of adequate assets, increasing the manpower and the budget , and training.

- Promoting prevention and mitigation through strict implementation of the ISPS Code and the BMP, the use of PSCAP and VPD, the conduct of the regular shoreline patrol and maritime patrol.

- Responding to piracy and armed robbery incident as much as possible by increasing the presence prone area of armed robbery against ships of the maritime units and in optimizing the response procedures.

- Ensuring a proper post incident arrangement by coordinating the action of the maritime administration, the ship owner or the ship operator, the ship agent, the Ministry of Foreign Affairs, and the foreign mission of the countries of origin of the crew. .

## **FURTHER RECOMMENDATION AND CONCLUSION**

### **1. Further recommendation : The need for a political will**

As realized during the analysis for the exploration of legal and operational possible solutions to maritime piracy and armed robbery against ships , there is a need of legal reform, a requirement of upgrading the judicial capacity as well as increasing the operational capabilities either in terms of equipment, infrastructure , manpower and budget. In addition, there is a real need of cooperating nationally, regionally and internationally in the fight against maritime piracy and armed robbery against ships. Those ensembles of necessity and requirements depend mainly on political decision and will. Hence, for the legal and operational arrangement in Madagascar to be efficient and effective, there is a real need of political support in order to enable the realization of the improvement proposed in the legal and operational aspect. In this regard, political will, decision and support are needed in the following area:

- On the national level:
  - o Creation of the maritime piracy and armed robbery against ships national board as the coordination platform
  - o A commitment to invest in maritime security by providing the necessary financial support to upgrade the judicial capacity and operational capabilities of Madagascar in terms of equipment, infrastructure, manpower and budget
  - o Endorsement of the legal reform
- On the regional and international level: Promotion of regional and international cooperation supporting the legal and operational arrangement.

It is important to highlight that it is also in the interest of the regional and international community to cooperate with Madagascar in the realm of maritime piracy and armed robbery against ships especially in the context of the Somalia case.

### **2. Conclusion:**

Madagascar faces similar problems as the countries of the Eastern Africa and the western Indian Ocean in terms of maritime piracy and armed robbery against ships . There is also a perception of a

possible maritime piracy and armed robbery against ships originating from its coast if the current political crisis persists. There is a legislation in place but it contains a certain number of gaps that need to be rectified. Hence, a reform of the national legislation on maritime piracy needs to be conducted in order to ensure an effective and successful arrest, prosecution and conviction of the pirates and armed robbers at sea. In doing so, the international legal framework on maritime piracy and armed robbery at sea offers diverse provisions from which Madagascar can refer to. In addition, the national legislations of the neighboring countries can be used also as models because Madagascar faces the same problem as they. Indeed, a legislation reform is needed but along with an improvement of the judicial capacity. To enforce the established legislation, an efficient and effective operational arrangement is required to better address the issue. It appears however that there are also certain weaknesses in the current operational arrangement in Madagascar which is mainly marked by a coordination of stakeholders' actions issues, a crucial deficiency in terms of operational capabilities in the area of information sharing arrangement, equipment, infrastructure, manpower and budget but also in terms of operational procedural issues. It is therefore vital for the country to upgrade its operational response capacity. In this regard, the international and regional initiatives undertaken in the Gulf of Aden, the Somali Basin and the Indian Ocean offer opportunities for Madagascar to take benefit from them through active participation and cooperation. However, improving the legal and operational arrangement is dependent on a political will as support and decision emanating from the political decision-makers are needed to allow to bring and to realize the proposed improvements. Hence, a political will is needed at the national level to create the coordination platform in the fight against maritime piracy and armed robbery against ships, to invest in upgrading capabilities, manpower and budget. A political will is also asked to promote the international and the regional cooperation in the fight of combating these two crimes.

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