



IMO

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**A LAW TO INCORPORATE THE CONVENTION FOR THE
SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF
MARITIME NAVIGATION, 2005 (2005 SUA CONVENTION) AND THE
PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST
THE SAFETY OF FIXED PLATFORMS LOCATED ON THE
CONTINENTAL SHELF, 2005 (2005 SUA PROTOCOL) INTO THE LAWS
OF MADAGASCAR AND TO PROVIDE FOR THE EFFECTIVE
IMPLEMENTATION THEREOF**

**A Dissertation submitted in partial fulfillment of the requirements for the
award of the Degree of Master of Laws (LL.M.) in International Maritime
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PART I
EXPLANATORY NOTE

INTRODUCTION

The particularity of the legal regime of the ocean is that beyond the States' territorial waters the principle of the freedom of navigation governs the ocean. Worldwide criminal group seize this advantage to undertake and expand criminal activities at sea. This situation has been an international concern since decades and comparing to the other criminal activities, maritime crime is quite specific for the reason that it involves different parameters such as vessels, cargo, crew. Nowadays, it becomes more and more complex due to the advance of technology.¹ Despite these constant threats, it is argued that some countries in the Indian Ocean have great potential to generate exports and Gross Domestic Products due to their capacity to produce raw material as well as their need to import different products from other countries.² As a result, the majority of the Indian Ocean countries have a strategic interest to secure and protect the sea lanes of communication.³

According to the International Maritime Bureau's Reporting Center, 201 incidents of maritime piracy and armed robbery were recorded in 2018.⁴ Indeed, this statistic demonstrates that the shipping industry is subject to constant threat despite the effort undertaken by the international community in the worldwide high-risk areas. Correspondingly, the international community has developed international legal tools to hinder maritime crime at sea. To this extent, this Law aims to implement the latest international legal instrument which is the Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation amended by the protocol 2005 (SUA Convention 2005) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 2005 (SUA Protocol 2005).

For Madagascar, the recent decision of the Malagasy government to enhance the promotion of offshore exploitation requires the reinforcement of the maritime security policy and the legal

¹ The Maritime Executive, 'U.N. Security Council Focuses its Attention on Maritime Crime' <<https://www.maritime-executive.com/article/u-n-security-council-focuses-its-attention-on-maritime-crime>> accessed 11 February 2019

² Amit A. Pandya, Rupert Herbert-Burns, Junko Kobayashi, 'Maritime Commerce and Security: The Indian Ocean' 18 <https://www.stimson.org/sites/default/files/file-attachments/Section_1_-_Maritime_Commerce_and_Security_The_Indian_Ocean_1.pdf> accessed 11 February 2019

³ *ibid* 19

⁴ International Maritime Bureau, 'IMB Piracy Report 2018: Attacks multiply in the Gulf of Guinea' (11 February 2019) <<https://iccwbo.org/media-wall/news-speeches/imb-piracy-report-2018-attacks-multiply-gulf-guinea/>>

framework permitting the protection of this type of exploitation. However, a gap analysis of the legislation and regulations that have been conducted, permits to assert that the legal response capacity of Madagascar to deal with a maritime crime remains relatively weak despite its accession to the 1988 SUA Convention by the Law No 2003-014 of 27 August 2003 and the Decree 2003-871 of 27 August 2003. This is because the Malagasy legislation on maritime crime is embodied in a single instrument which regulates the transnational organized crime and does not encompass the complexity of the crime at sea which may involve specific legal aspects. Therefore, the update and amendment of the existing legal instrument through the adoption and implementation of the 2005 Protocol to the SUA Convention and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 2005 seems necessary. Accordingly, before proposing the legal means of implementation and accession to this Convention, it is important to have an overview of these Conventions and the reasons why their implementation appears crucial for a legal, social, economic and political perspective.

I-HISTORICAL BACKGROUND OF THE SUA CONVENTION AND PROTOCOL

1. 1988 Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation

The high jacking of the Italian cruise *Achille Lauro*, on October 7, 1985, by four Palestinians terrorist increased security awareness among the maritime community since maritime environment became an attractive target for terrorist.⁵ This incident prompted the development of a great number of international instruments related to maritime security. Actually, the *Achille Lauro* case marked the adoption of the Resolution A.584(14) on November 20, 1985, which aims to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crew.⁶ The Resolution requested States, port authorities and administrations, all actors involved in the maritime industry to take a prompt step to review, strengthen port and onboard security.⁷ This Resolution proposed also to the International Maritime Organization (IMO) through the Maritime

⁵ Jeffrey D.Simon, 'The Implication of Achille Lauro Hijacking for the Maritime Community' 4 <<https://apps.dtic.mil/dtic/tr/fulltext/u2/a178441.pdf>> accessed 5 February 2019

⁶ International Maritime Organization (IMO), 'IMO and Maritime Security Historic Background' <http://www.imo.org/en/OurWork/Security/Guide_to_Maritime_Security/Documents/IMO%20and%20Maritime%20Security%20-%20Historic%20Background.pdf> accessed 8 May 2019

⁷ International Maritime Organization (IMO) Measures to Prevent Unlawful Acts which Threaten the Safety of Ships and the Security of their Passengers, and Crews, Resolution A.584(14), 26 November 1985, 25

Safety Committee to develop all necessary measures in order to ensure the security of passengers and crews on board a ship. As a result, the IMO adopted measures to prevent unlawful acts against passenger and crews on board a ship through the MSC/Circ.443 aimed at assisting Governments in improving port and onboard security.⁸

The United Nations General Assembly through Resolution 40/61, confirmed its support to all measures that had been taken by the IMO to eliminate international terrorism.⁹ Besides, another Resolution of the United Nation Security Council invited States to develop international cooperation based on international law with the aim at facilitating the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism.”¹⁰

All of these legal instruments led to the adoption of the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation by a diplomatic conference held in Rome on 10th March 1988.¹¹ This convention entered in force 01 March 1992 and is ratified by 146 States that represent 87.74 per cent of world tonnage.¹²

2. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

Following the request of certain coastal States that possessed fixed platform on their continental shelves, an additional protocol which dealt with the protection of the fixed platforms was added to the Convention.¹³ Actually, it is argued that certain principles laid down by the 1988 SUA Convention could not be applied to a fixed platform since some States were convinced that a terrorist attack might be directed against these installations.¹⁴

⁸ Measure to prevent Unlawful Acts Against Passenger and Crews on Board ships, MSC/Circ.443 26 September 1986

⁹ Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms 9 December 1985, A/RES/40/61 (United Nations General Assembly)

¹⁰ Hostage Taking, Resolution 579 (1985), 18 December 1985 (United Nation Security Council)

¹¹ Helmut Tuerk, ‘Combating Terrorism At Sea -- The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation’ 345 <<https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1044&context=umiclr>> accessed 22 December 2018

¹² *ibid* 346

¹³ *ibid*

¹⁴ Malgosia Fitzmaurice, Norman A Martinez and Ryiaz Hamza (eds), *The IMLI Manual on International Maritime Law: Volume III: Marine Environment and Maritime Security* (The Suppression of Unlawfull Act Against the Safety of Maritime Navigation. Reto A Durler, Oxford University Press) 433

The Protocol has been ratified by 135 States representing 83.06 per cent of the world tonnage.¹⁵

3. Review of the 1988 SUA Convention and the Protocol

After the *Achille Lauro* case, many major incidents like the attack on the *USS Cole* (Navy ship), in the port of Aden in Yemen, 10 June 2000, the attack on the *SS Limburg* (oil tanker), in the Gulf of Aden, off the coast of Yemen, 6 October 2002, the attack on the *Super Ferry 14* (ferry), in the Philippines, 27 February 2004 affected the international community.¹⁶

However, the terrorist attacks in the United States on 11 September 2001 triggered the development of a new legal regime since it led to the consideration that a vessel may be used as instruments of terror.¹⁷ Consequently, the Security Council Resolution 1377 adopted in its 4413th meeting a declaration concerning efforts to eliminate international terrorism. This declaration was conducive to the update of the SUA 1988 Convention and its Protocol. In fact, the Legal Committee within the IMO held its eighty-ninth session in order to review the provision of the 1988 Convention and Protocol.¹⁸ Then, Resolution A.924 (22) was adopted to urge States to take into consideration all measures to prevent the commission of a terrorist act. This Resolution acquiesced the necessity to revise the international legal and technical instrument in force and to undertake new measures to prevent and suppress terrorism against a ship.¹⁹

It should be noted that the revision took into consideration the provision of the Convention of the Safety of Life at Sea (SOLAS) chapter XI-2 as well as the International Ship and Port Facility Security (ISPS) since these instruments aim to "to provide a standardized, consistent framework for evaluating risk, enabling governments to offset changes in threat levels with changes in vulnerability for ships and port facilities."²⁰ Subsequently, a diplomatic conference was conveyed between 10 to 14 October 2005 for the adoption of the SUA Protocol 2005 to amend the

¹⁵ Helmut Tuerk (n 11)

¹⁶ International Maritime Organization (IMO), 'IMO and Maritime Security Historic background' <http://www.imo.org/en/OurWork/Security/Guide_to_Maritime_Security/Documents/IMO%20and%20Maritime%20Security%20-%20Historic%20Background.pdf> accessed 23 December 2018

¹⁷ Maximo Q Mejia Jr, *Contemporary Issue in Maritime Security* (WMU PUBLICATIONS 2005) 163

¹⁸ International Maritime Organization (IMO), 'Report of the Maritime Safety Committee on its Seventy-Ninth Session' <http://www.crs.hr/Portals/0/docs/eng/imo_iacs_eu/imo/msc_reports/MS79-23.pdf?ver=2010-11-03-143734-000> accessed 23 December 2018

¹⁹ Resolution A.924(22) 20 November 2001 (International Maritime Organization)

²⁰ International Maritime Organization (IMO), 'IMO maritime security policy Background paper' <<https://www.osce.org/eea/30455?download=true>> accessed 8 May 2019

1988 SUA Convention which entered into force in July 2010.²¹The 2005 SUA Convention constitutes a new regulatory regime to deal with counterterrorism and other new threats affecting maritime security.

II-ANALYSIS OF THE SUA CONVENTION 2005 AND THE PROTOCOL

1.Scope of application

1.1. Geographical scope of application

The 2005 Protocol does not amend the provision article 4 of the 1988 SUA Convention. Thus, the Convention applies “If the ship is navigating or is scheduled to navigate into, through or from waters beyond the limit of the territorial sea of a single State, or the lateral limits of its territorial with adjacent State”. In fact, this article underlines that the main geographical scope of the Convention covers the “outer limit of a territorial sea of a single State”. The United Nations Convention of the Law of the Sea (UNCLOS) defines the outer limit of a territorial sea which is the line every point of which is at a distance from the nearest point of a baseline equal to the breadth of the territorial sea.²²In other words, the Convention applies to a ship which is navigating on the high seas or in the Exclusive Economic Zone of a State.

Article 4 (2) adds that the Convention covers the situation when the alleged offender of an unlawful acts "is found in the territory of the State Party other than the State referred to in paragraph 1". In this case, the words "Territory", includes the zone subject to the sovereignty of the State where it has prescriptive and enforcement jurisdiction.²³ It is based on the principle that only the sovereign State can allow other States to enforce jurisdiction under its sovereignty.²⁴

1.2. Material scope of application of the 2005 SUA Convention and the 2005 Protocol

1.2.1. Ship

Article 1 of the 2005 SUA Convention defines ship as a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft. This definition comprises all vessels operating either above or under the

²¹ Clive Schofield, Seokwoo Lee and Moong-Sang Kwon, *The Limits of Maritime Jurisdiction* (978-90-04-26258-4, Martinus Nijhoff Publisher 2014) 25

²² Article 4 of United Nation Convention of the Law of the Sea 16 November 1994, UNCLOS (United Nations) 350

²³ Law of the Sea Convention, Articles 2 and 49 16 November 1994, LOSC (United Nations)

²⁴ Clive Schofield, Seokwoo Lee and Moong-Sang Kwon (n 21) 1

surface provided that it is not a fixed unit. Particularly, the definition of a ship in the SUA Convention 2005 in its article 1(1) includes the unmanned underwater vehicle (UUV) or unmanned surface vehicle (USV) as long as it mentions that ship comprises “dynamically supported craft, submersibles, or any other floating craft”.²⁵

However, the Convention excludes warship or ships that belong to the State for the purpose of the protection of the territory.²⁶ This is owed to the fact that warships protect the interest of the State in order to control, limit access to the territory or to protect the resources. The exclusion extends also for other government warships that operate for non-commercial purpose as well as a ship “which has been withdrawn from navigation or laid up.”²⁷

1.2.2. Fixed Platforms

In interpreting the provisions of the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, the scope of application of this instrument covers only all fixed platforms within the continental shelf.²⁸ In fact, the fixed platforms encompass artificial islands and installation. On one hand, the term artificial island means “the constructions created by man's dumping of natural substances like sand, rocks, gravel on the seabed”.²⁹ On the other hand, installations refer “to construction resting upon the seafloor and fixed there by means of piles or tube driven into the seafloor, and/or to concrete structures which become fixed by their own weight.”³⁰ Pursuant to article 76 of UNCLOS, the continental shelf is “the seabed and subsoil of the marine submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin”. This definition not only emphasizes the seabed and the subsoil as a component of territory but also it clarifies the scope of application of this protocol.

²⁵ James Kraska, ‘Effective Implementation of the 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation’ (2017) 3 <<https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1031&context=nwc-review>> accessed 26 January 2019

²⁶ Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation, Art.2 July 2010

²⁷ *ibid*

²⁸ Malgosia Fitzmaurice, Norman A. Martinez Gutierrez and Ryiaz Hamza, *The IMLI Manual on International Maritime Law: Volume II: Marine Environment Law and Maritime Security Law* (Oxford University Press 2016) 433

²⁹ Salah E. Honein, *The International Law Relating to Offshore Installations and Artificial Islands* (Lloyd's of London Press 1991) 1

³⁰ *ibid*

1.2.3. Offender

In general, the offender is an accused defendant in a criminal case or one convicted of a crime.³¹ Article 3, paragraph 1 of the 2005 SUA Convention refers to "Any person" to qualify the offender. The Convention considers either the general intent of the offender whose purpose is to endanger safe navigation or the specific intent which is to communicate knowingly false information that endangers the safety of the navigation.³² Article *5bis* extends the identification of an offender to the legal entity which is controlled by the domestic law of the State as well as the person who manages that entity. Subsequently, articles *2bis* and *2ter* of the 2005 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf apply the same approach to characterize the offender.

1.2.4. Master of a ship

Pursuant to article 8 of the 2005 SUA Convention, the master preserves the prerogative which to deliver to the competent authority of the receiving State any person who has committed an offence that endangers the safety of the navigation. In this case, the master of the ship must provide the evidence in his possession to justify the alleged offence.

2. Jurisdiction scope of the 2005 SUA Convention and Protocol

2.1. Offences

Subsequent to articles 3, *3bis*, *3ter* and *3quater* the 2005 SUA Convention introduces new three categories of a criminal offence which are:

- unlawful and intentional acts of violence against ships or persons on board ships since the convention and the protocol precludes directly the use of word "terrorism",
- transportation of certain dangerous materials or weapons on board a ship for the purpose of intimidating a population, government, or international organization,
- acts of conspiracy, acts as an accomplice, or attempts to commit crimes which include transportation by ship of a fugitive.³³

³¹ United Nations Office on Drugs and Crime (UNODC), 'Manual on Mutual Legal Assistance and Extradition' accessed 26 December 2018

³² Article 4 of United Nation Convention of the Law of the Sea (n 22)

³³ James Kraska (n 25) 5

The unlawful acts mentioned above may be intended to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act.³⁴ Furthermore, the Convention broadens the offence in introducing secondary offence like attempt or complicity. It should be noted that following to the international conference on the revision of the SUA treaties (LEG/CONF.15/21, 1st November 2005) the 1988 Convention and its 2005 protocol constitutes one indivisible instrument that may subject to a unique interpretation.

With regard to the offences committed against fixed platforms located on the continental shelf, articles *2bis* and *2ter* of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf establish a new element of offences in accordance with the improvement brought by the 2005 Protocol to the SUA Convention. Indeed, these new offences follow the clause of the offences set out in articles *3bis* and *3ter* of the 2005 SUA Convention.³⁵

2.2. Ship-boarding procedure

The 2005 SUA Protocol, in its article *8bis*, provides and develop the ship boarding procedure which is one of the new procedures introduced by the drafter of the 2005 SUA Protocol to the SUA Convention even though the flag State retains exclusive power to authorize the boarding of its ship. The aim of this procedure relies not only on the fact that it constitutes a means to facilitate the capture of the offender but also to introduce legal justification to board or to visit a ship beyond the territorial sea in order to coordinate efficiently the case of an incident at sea.³⁶ Consequently, it can be argued that the 2005 SUA Protocol to the SUA Convention “represents the latest exception to the traditional rules relating to the exclusive jurisdiction of the flag state over its vessels when those vessels are on the high seas.”³⁷

Actually, the procedure involves the ship-boarding, the procedure of request permission to board, the necessity of the consent of the flag State, the safeguard required in initiating ship

³⁴ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, Art.3bis July 2010

³⁵ Malgosia Fitzmaurice, Norman A.Martinez Gutierrez and Ryiaz Hamza (n 28)

³⁶ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 174

³⁷ Natalie Klein, ‘The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Act Against the Safety of the Marine Navigation’ 289 <<http://djilp.org/wp-content/uploads/2011/08/The-Right-Visit-2005-Protocol-Suppression-Unlawful-Acts-Against-Safety-Maritime-Navigation-Natalie-Klein.pdf>> accessed 9 May 2019

boarding and the effect of the ship boarding.³⁸ Article 8bis (4) set up a mechanism that permits the flag State to request the assistance of a State party if the flag State has a reasonable ground that there is a commission or an attempt of the offences set forth in articles 3, 3bis, 3ter, or 3quater on a ship flying its flag. It should be noted that this article brings significant progress to the law of the sea since it reinforces the power conferred by the international law for warships to exercise the right of visit in respect of any vessel on the high seas.³⁹

2.3. Jurisdiction

Article 6 of the 2005 SUA Convention lays out an extra-territorial jurisdiction system for any unlawful acts against the safety of navigation. Article 6 paragraph 1 and paragraph 4 require a State to institute jurisdiction according to the territorial principle (offence committed in the territory of the State), the nationality principle (offence committed by a national of that State or a Stateless person whose habitual residence is that State), the passive personality principle (during its commission a national of the State is victim of the offence) and the protective principle (the offence is committed in an attempt to compel that State to do or abstain from doing an act). The provisions of article 6 exclude the application of the Convention for ships that only navigate in the territorial sea of the single State. Furthermore, article 5 emphasizes that the sanction of the offence must be effective, proportionate and dissuasive.

Indeed, the provisions of article 6 reflect the fact that the jurisdiction is compulsory or discretionary for the State.⁴⁰ It is compulsory when the offence is perpetrated against the ship flying his flag, within its territory or by its nationals.⁴¹ Conversely, the jurisdiction is optional if the offence is carried out by a Stateless person who resides habitually in the concerned State, or the offence is directed towards its national.⁴² A State may also assume jurisdiction if the offence attempts to compel the concerned State to act or to abstain from doing any act.⁴³

³⁸ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, Art.3bis (n 34)

³⁹ Natalie Klein (n 37) 324

⁴⁰ Jan Van Hauwaert, 'The importance of the SUA Convention in the fight against violence at sea' 37 <https://lib.ugent.be/fulltxt/RUG01/002/479/473/RUG01-002479473_2018_0001_AC.pdf> accessed 26 December 2018

⁴¹ Article 6 para.1 of the 2005 SUA Convention

⁴² Article 6 para.2 of the 2005 SUA Convention

⁴³ Article 3bis of the 2005 SUA Convention

Similarly, article 5 of the 2005 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf establish a jurisdiction based on the territorial and nationality principle since State Party is required to establish its jurisdiction when the offence is committed against either on board a fixed platform located on its continental shelf or committed by its citizen.⁴⁴ Pursuant to the Protocol, a State party is required to implement a jurisdiction if the alleged offender is present in its territory and it does not extradite the offender.⁴⁵ It should be noted that the Protocol continues to apply optional jurisdiction stipulated in its article 3 (2) since it is provided that both the 1988 Protocol and the 2005 Protocol shall be interpreted as one single instrument.⁴⁶

2.4. Obligation to extradite or to prosecute

Pursuant article 11 of the 2005 SUA Convention, a State, where the offender is apprehended in its territory, must extradite the alleged offender or prosecute according to the national law and international law.

Likewise, article 2 of the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf refer to the same principle. Consequently, the provisions of article 11*bis* and 11*ter* of the 2005 SUA Convention apply *mutatis mutandis* for any offences committed against a fixed platform.⁴⁷

Actually, extradition can be defined as “the formal process whereby a State requests the enforced return of a person accused or convicted of a crime to stand trial or serve a sentence in the requesting State”.⁴⁸ Notably, the objective of the obligation to extradite or to prosecute purports to ensure the effectiveness of the system of criminalization as well as the inspiration of the

⁴⁴ Article 3 para.1 of the 2005 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

⁴⁵ Article 3 para.4 of the 2005 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

⁴⁶ Article 6 of the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

⁴⁷ Article 1 para.1 of the 2005 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

⁴⁸ United Nations Office on Drugs and Crime (UNODC) (n 31)

international community to fight against the impunity for an alleged individual who commits an international offence.⁴⁹

In the perspective of 2005 SUA Convention which requests the cooperation of State Parties in the prevention of the offence set forth in articles 3, *3bis*, *3ter* or *3quater*, extradition forms a substitution to avoid impunity. In fact, States party may establish an extradition treaty and must introduce in such treaty the offence delineated in articles 3, *3bis*, *3ter* or *3quater* as extraditable offences. In the absence of a treaty, States Parties can refer to the convention as a legal justification for extradition. Hence, these obligations request States to include the basic component of the obligation to extradite or to prosecute in their domestic law. A State should also institute the necessary jurisdiction and investigate if the offences provided in articles 3, *3bis*, *3ter* or *3quater* are committed in its territory.⁵⁰

2.5. Mutual legal assistance

Article 12 of the 2005 SUA Convention points out the duty of a State to co-operate in the criminal proceedings related to the offences stipulated in articles 3, *3bis*, *3ter* or *3quater*. In fact, the fight against international crime or transnational organized crime requires the cooperation between States for the granting of international legal assistance. As far as the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf is concerned, its article 2 refers to the clause provided in the article 12 with regard to the measure of assistance in connection with criminal proceedings.

In criminal matters, mutual legal assistance is “a process by which States seek and provide assistance in gathering evidence for use in criminal cases”.⁵¹ According to this definition, the mutual legal assistance in the framework of the 2005 SUA Convention involves the sharing of the evidence between the requested and the requesting State related to the commission of the offences that are set forth in articles 3, *3bis*, *3ter* or *3quater*.

⁴⁹ The obligation to extradite or prosecute (aut dedere aut judicare) , Final Report of the International Law Commission 2014 (International Law Commission)

⁵⁰ *ibid*

⁵¹ United Nations Office on Drugs and Crime (UNODC) (n 31)

III- JUSTIFICATION FOR THE IMPLEMENTATION OF THE 2005 SUA CONVENTION AND THE PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF THE FIXED PLATFORM LOCATED ON THE CONTINENTAL SHELF

Madagascar had ratified the 1988 SUA Convention and accessed to it by the Law No 2003-014 of 27 August 2003 and the Decree 2003-871 of 27 August 2003. Accordingly, the country has introduced in its national policy the fight against international crime throughout the implementation of legislation related to Terrorism and Transnational Organized Crime.⁵² Nevertheless, different factors may justify the accession and the implementation of the 2005 SUA Convention in Madagascar. Actually, the incentive is not only a result of the development of the international, regional and national context concerning global security threats but also the concept of security has changed in the maritime domain pursuant to the evolution of technology as well as the emergence of a new large spectrum of threats.

1.International Context

1.1. Evolution of modern threats to maritime security

The statistics released by the International Maritime Bureau show that 245 attacks on a ship were recorded in the last decade.⁵³The activities of attacking a ship increased and the geographic location changed. The *modus operandi* of the acts consists of attacks to merchant ships with the aim to rob the crews, seizing goods, abducting the ship for sale or the crew for ransom.⁵⁴ “Terrorism Knowledge Base” database also demonstrates that the top ten terrorist groups in the world are based in Africa and Asia.⁵⁵ For maritime terrorism, a certain organization such as the Abu Sayyaf Group had targeted ferries and other maritime targets in Philippine.⁵⁶ The widespread of the technology of communication vehicle maritime terrorism doctrine like the anonymous

⁵² Law No2014-005 on Terrorism and Transnational Organized Crime 17 July 2014 (National Assembly)

⁵³ Alexander IK Natalya A.Knyazeva, ‘Maritime Terrorism and Piracy: The Threat to Maritime Security’ 226 <<https://pdfs.semanticscholar.org/b3d6/06e1c5df550899429dbab4e724d8844547af.pdf>> accessed 28 December 2018

⁵⁴ *ibid*

⁵⁵ Juliet Elu and Gregory Price, ‘The Causes and Consequences of Terrorism in Africa’ <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199687114.001.0001/oxfordhb-9780199687114-e-16>> accessed 23 February 2019

⁵⁶ Rupert Herbert-Burns, Sam Bateman, Peter Lehr, *Lloyd's MIU Handbook of Maritime Security* (CRC Press 2009) 56

publication in Jihadist online magazine Mu'askar al-Battar which promoted "Anti-Ship Warfare".⁵⁷

Apart from these cases, some studies have elaborated on the scenario that emphasizes the possibility of the use of the weapon of mass destruction (WMD) by maritime transportation means or the use of a hijacked liquefied petroleum gas (LPG), liquefied natural gas (LPG) tanker directed to maritime installation.⁵⁸ As a matter of fact, Madagascar is not immune to a terrorist attack on account of the fact that the 2013 Global Terrorism database indicates that one (1) terrorism incident occurred in the country between 1980 and 2013.⁵⁹

1.2. Legal obligations of the Malagasy Government under international law

After the 11 September 2001, the United Nations through the Resolution 60/288 related to the adoption of Global Counter-Terrorism Strategy urged member States to adhere and implement the existing international conventions and protocols against international terrorism.⁶⁰ According to this Resolution, the first step to implement a counter-terrorism strategy is based on the ratification and implementation of the international legal instruments against terrorism at a national level.⁶¹

The second step deals with the setting up of a judicial mechanism to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts throughout mutual judicial assistance and extradition agreements.⁶² The judicial assistance enhances also cooperation between States law enforcement agencies.⁶³ It means that Madagascar should upgrade the judicial system for the prosecution of unlawful acts as well as to improve the mechanism of judicial cooperation so that the country can exchange timely and accurate information. This Resolution also emphasizes that the Member States shall maintain an effective and rule of the law-based national criminal justice system to bring to justice offenders of terrorist acts.⁶⁴

⁵⁷ *ibid*

⁵⁸ *ibid* 57

⁵⁹ Juliet Elu and Gregory Price (n 55)

⁶⁰ Resolution 60/288, The United Nations Global Counter -Terrorism Strategy 20 September 2006 (United Nations General Assembly)

⁶¹ Resolution A.924(22) (n 19)

⁶² Resolution 60/288, The United Nations Global Counter -Terrorism Strategy (n 60)

⁶³ *ibid*

⁶⁴ *ibid*

Thus, the adoption of legal measures to fight against transnational crimes constitutes an obligation under international law for Madagascar since member State of the United Nations has decided to implement the relevant General Assembly resolution to eliminate international terrorism.⁶⁵

1.3. Effective achievement of Goals 16 of the 2030 Agenda for Sustainable Development Goals for Madagascar

Goal 16 of the Sustainable Development Goals promotes peaceful and inclusive societies for sustainable development. It provides access to justice for all and builds effective, accountable and inclusive institutions at all levels plans to decrease the illicit arms flows and combat all forms of organized crime.⁶⁶ In interpreting goal 16, effective enforcement and judicial system is very important in preventing, detecting and investigating organized crime and weapons' proliferation.

Actually, these objectives can only be reached provided that Madagascar strengthens its national legislation framework by implementing an updated convention and protocol related to the suppression of unlawful acts. In addition to that, Resolution 60/288, mentioned earlier, points out not only the necessity of State to ratify "without delay" United Nation Convention related to Transnational Organized Crime but also it requests States to realize the development goals and objectives decided at the major United Nations conference and summits.

2. Eastern Southern Africa- Indian Ocean (ESA-IO) region context

As part of the Eastern Southern Africa- Indian Ocean (ESA-IO) countries, numerous regional strategies and policies have influenced Madagascar law-making policy in the domain of maritime security.

2.1.2050 Africa's Integrated Maritime Strategy (2050 AIM strategy) and the promotion of international legal instruments

Generally, the 2050 AIM strategy consists of "the overarching, concerted and coherent long-term multilayered plans of actions that will achieve the objectives of the African Union to enhance maritime viability for a prosperous Africa".⁶⁷ One of its strategic objectives focuses on

⁶⁵ *ibid*

⁶⁶ United Nations, 'The 2030 Agenda for Sustainable Development'
<<https://sustainabledevelopment.un.org/post2015/transformingourworld>> accessed 28 December 2018

⁶⁷ African Union, '2050 Africa's Integrated Maritime Strategy (2050 AIM strategy)'
<https://au.int/sites/default/files/documents/30928-doc-2050_aim_strategy_eng.doc> accessed 28 December 2018

the promotion of the ratification, domestication, and implementation of international legal instruments.⁶⁸ In terms of maritime security, the strategic objective resides, first, to ensure security and safety of maritime transportation system and, the second, prevent hostile and criminal acts at sea, and coordinate the prosecution of the offenders.⁶⁹

Indeed, the ratification of the 2005 SUA Convention and the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf as well their domestication in the national level constitutes the major step for Madagascar to achieve these goals since the Convention provides a detailed international judicial scheme to prevent and to suppress criminal act at sea as well as to assure the prosecution of the offender.

2.2. The Djibouti Code of Conducts and the provision of article 8 of the African Charter on Maritime Security and Safety and Development in Africa (Lome Charter)

Madagascar signed the Djibouti Code of Conduct on 29 January 2009 with eighteen other countries from twenty-one eligible countries in Western Africa.⁷⁰ Article 2(c) of the Djibouti Code of Conducts outlines that its implementation helps to ensure the prosecution of persons committing or attempting to commit a transnational organized crime in the maritime domain such as maritime terrorism, Illegal Unregulated Unreported fishing, and other illegal activities. In its preamble, the Code recalls the States parties of the importance of the implementation of the 2005 SUA Convention and the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf in order to punish, establish jurisdiction and to deliver any offender of unlawful acts.⁷¹

Secondly, Madagascar only signed the Lome Charter on 15 October 2016 but it has not ratified yet.⁷² In fact, one of the purposes of this Charter is to prevent and suppress national and

⁶⁸ *ibid*

⁶⁹ *ibid*

⁷⁰ International Maritime Organization (IMO), 'Djibouti Code of Conduct: Project Implementation Unit' <http://www.imo.org/en/OurWork/Security/PIU/Documents/PIU_Brochure_1st_edition.pdf> accessed 28 December 2018

⁷¹ Resolution 1 for the adoption of the Code of Conduct Concerning The Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Guld of Aden 29 January 2009 (International Maritime Organization (IMO))

⁷² African Union, 'African Charter on Maritime Security and Safety and Development in Africa' <https://au.int/sites/default/files/treaties/33128-sl-african_charter_on_maritime_security_and_safety_and_development_in_africa_lome_charter.pdf> accessed 28 December 2018

transnational crime including terrorism, piracy and armed robbery against a ship.⁷³ Obviously, if Madagascar does not accede and implement the 2005 SUA Convention 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf , it will affect its capacity to deal, in accordance with the international law, with the suppression of unlawful acts delineated in article 3 (a) of the Lome Charter. It should be noted also that in correlation with the Djibouti Code of Conduct, the Charter, in its article 8, set outs out the States responsibility to harmonize their national legislation to the Protocol of the 2005 SUA Convention2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

Accordingly, the similarity of these two legal instruments resides to the fact that their effectivity depends solely on the reinforcement of the coordination and harmonization of legislation at the inter-State level through the implementation of the SUA Convention and the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

2.3. Regional Agreement on the Coordination of Operation at Sea in the Western Indian Ocean

The Regional Agreement on the Coordination of Operation at Sea in the Western Indian Ocean is the latest regional agreement signed by Madagascar on 29 Avril 2018 to enhance the maritime security. In operational terms, this agreement aims to organise and/or coordinate an intervention at sea to prevent and stop acts affecting maritime security and safety.⁷⁴ Indeed, the requirements set forth in article 8 paragraph 1 of this agreement require the implementation of the 2005 SUA Convention2005 as well as the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf at a national level. This is because the provisions of this article demand the setting up of a mechanism related to boarding procedure and judicial legal assistance in the national legislation of each State Party.

⁷³ African Union, 'African Charter on Maritime Security and Safety and Development in Africa' (15 October 2016) <https://au.int/sites/default/files/treaties/33128-treaty-0060_-_lome_charter_e.pdf> accessed 28 December 2018

⁷⁴ Article 3 paragraph 2 (c) of Regional Agreement on the Coordination of Operation at Sea in the Western Indian Ocean

3.National Context

Madagascar is the fourth largest island in the world and the first largest island in Africa. It has its own specifics in terms of geography, geostrategic, social, political and economic aspects. All of these aspects interact so that each of them can justify the ratification and domestication of the 2005 SUA Convention and the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

3.1 Geostrategic situation of Madagascar

Madagascar is located between the 11° 57'S, 25° 30' S latitude and 043 ° 14'E, 50° 27'E longitudes in the southern hemisphere of the Indian Ocean. The Mozambique channel separates Madagascar from Africa for a distance of 400 Km. Its proximity to Africa renders Madagascar vulnerable to maritime security threats owing to geopolitics factors. However, the geographic position of the country can be advantageous for a geostrategic reason which correlates to the exploitation of the Blue Economy.

China's "One Belt, One road" initiative (OBOR) is intended to pass through West Africa. Thus, Madagascar is one of the western African countries that will benefit from this project.⁷⁵In fact, the OBOR project will lead to the creation of new maritime critical infrastructures like ports in certain western African countries such as Djibouti, Sudan, Ethiopia, Tanzania, and South Africa. It follows from this perspective that the rate of maritime traffic will increase due to this project.⁷⁶

Accordingly, the maritime security concerns will be not only a contribution for the realization of the project but also a deficiency if the coastal State or insular State such as Madagascar does not have an adequate legal framework in accordance with international law to suppress or prevent maritime threats.

Besides the international project of development, data collected within the Regional Maritime Fusion Information Center hosted by Madagascar shows that not less than 7 000 vessels per day pass across the usual shipping route from Cap of Good Hope.⁷⁷It should be noted that this maritime route is close to the Economic Exclusive Zone of Madagascar. Consequently, this data demonstrates that maritime security plays an important role in the protection of the shipping route. This is because the hypothetical circumstance of unlawful acts against the safety of maritime

⁷⁵ Julia Breuer, 'Two Belts, One Road? The role of Africa in China's Belt & Road initiative' 4 <https://www.eu-china.net/uploads/tx_news/Blickwechsel_OBOR-Afrika_Maerz2018_03.pdf> accessed 29 December 2018

⁷⁶ *ibid*

⁷⁷ Regional Maritime Information Fusion Center (RMIFC), Madagascar, 'RMIFC Daily Briefing 2017'

navigation in this area necessitates the existence of legal for the closest country nearby to deal adequately with the situation. In other words, in the hypothesis of an incident involving unlawful acts against the safety of maritime navigation occurring in the shipping route which passes through Madagascar, the domestication of international convention facilitates the investigation and the prosecution of the offender.

3.2. Threats to maritime security in Madagascar: *The M/V Zouficar and Felicity cases*

In general, Madagascar has a great maritime potential due to its geographic position. The country has also a lot of marine biological or non-biological resources in its maritime zones. However, the country has faced maritime security threats that have has an impact on its social and economic development, without appropriate legal frameworks.⁷⁸

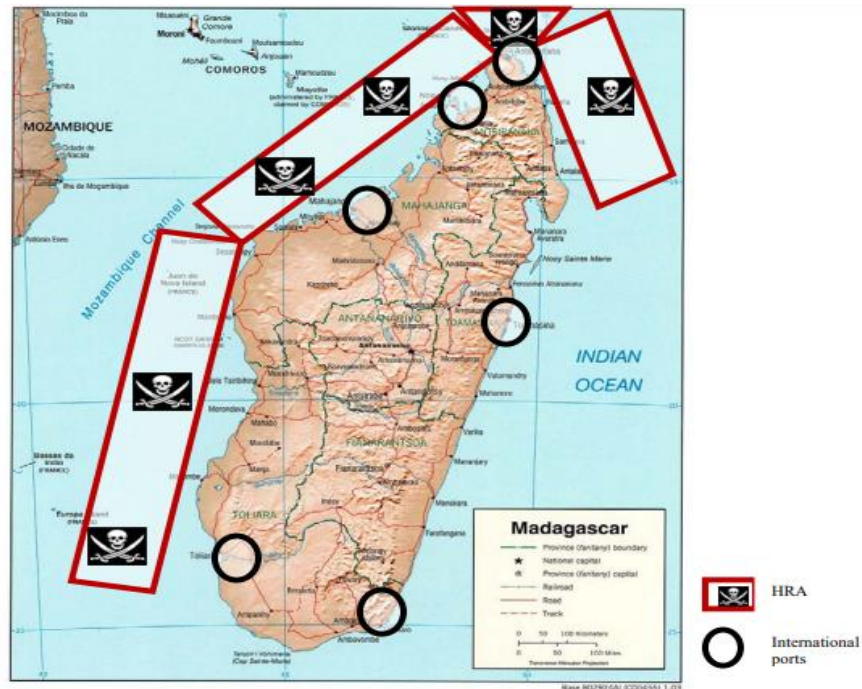
Actually, according to certain studies, thirteen piratical acts occurred in the territorial sea of Madagascar in 2010.⁷⁹ Before that, eight piracy attacks were recorded in the maritime zone of Madagascar between 1991 and 2008.⁸⁰ Therefore, studies related to maritime piracy in Madagascar concluded that the act of piracy and armed robbery may threaten the country in the northern part and in the west coast.⁸¹ The map below illustrates the area where the risk of maritime piracy and armed robbery may occur.

⁷⁸ Antso Rajaona, 'Madagascar : Des pirates somaliens condamnés à cinq années de travaux forcés' *Indian Ocean Times* <https://www.indian-ocean-times.com/Madagascar-Des-pirates-somaliens-condamnes-a-cinq-annees-de-travaux-forces_a311.html> accessed 29 December 2018

⁷⁹ Jean Edmond Randrianantenaina, 'Maritime Piracy and Armed Robbery Against Ships: Exploring the Legal and the Operational Solutions.The Case of Madagascar' 10 <http://www.un.org/depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/Randrianantenaina_1213_Madagascar.pdf> accessed 29 December 2018

⁸⁰ *ibid*

⁸¹ *ibid* 11



Map 1: Somali piracy and armed robbery against ships in the High-Risk Area off the coast of Madagascar

Source: Jean Edmond Randrianantenaina, in ‘Maritime Piracy and Armed Robbery Against Ships: Exploring the Legal and the Operational Solutions. The Case of Madagascar

The situation that proved the existence of real maritime piracy and armed robbery threats for Madagascar was the case of the *M/V Zouficar* and the *Felicity cases* that occurred in 2010 and 2011 in its territorial sea. Even if the case concern particularly an act of piracy, it constitutes valuable evidence of the probability of occurrence of maritime crime in Madagascar's maritime zone.

The Felicity case:⁸² the *Felicity* which is a Malagasy owned-vessel flying Malagasy flag was attacked by seven heavily armed pirates on board a skiff in the north-western part of Madagascar on 12 December 2010. After the attack, the *Felicity* was used as a mother ship to attack other vessels around Tanzania and the Mozambique Channel before it was released by the pirates in the middle of the Mozambique Channel. It should be noted that during the high jacking of the ship by the pirates, the latter committed an act of violence against the Master.

⁸² ibid 12

*The M/V Zoulficar case*⁸³: *M/V Zoulficar* is a Comoros vessel which was attacked by Somali pirates between Moroni and Dar-Es-Salam on 31 October 2010. The chief engineer was killed during the attack and the ship was under the control of the pirates before it was captured by a joint-operation of the Malagasy Navy and the Atalanta Task Force at 60 nautical miles off the coast of Madagascar. In this offence, the pirates were accused of the crime of piracy, arbitrary detention, involuntary manslaughter, violence, assault and battery, and attempted rape.

These cases justify the domestication of an international legal instrument such as the 2005 SUA Convention because it exposes the judicial complexity of the maritime crime in terms of jurisdiction and prosecution. Indeed, *the M/V Zoulficar case* illustrates the importance of having a judicial mechanism based on international treaty even though the Malagasy competent authority had initiated the prosecution of the offenders.

In terms of maritime terrorism, Madagascar has not experienced any attack or attempt related to it since its independence. However, the recent discovery of important gas reserve in Western Africa may generate some disputes which are related to the ownership of the offshore reserves.⁸⁴ This geopolitical issue may lead to a terrorist act against the eventual offshore platforms that will be installed in the disputed area.

It should be emphasized that, as opposed to the 1988 SUA Convention, one of the advantages of the provision of the 2005 SUA Convention resides on the fact that it anticipates the widespread use of the unmanned system and other commercial or civilian technology that may be used to endanger life at sea or as a weapon.⁸⁵ This is because the definition of a ship in the Convention involves an Unmanned Underwater Vehicle (UUV) or Unmanned Surface Vehicle (USV).⁸⁶

Apart from that, this Convention regulates asymmetric criminal activities which cannot be predicted during the drafting of the 1988 SUA Convention such as the use of a ship as a weapon.⁸⁷

⁸³ *ibid* 13

⁸⁴ Juliette Renaud, Darek Urbaniak, Viviana Varin, Holly Rakotondralambo, 'Madagascar: The New Eldorado for Mining and Oil Companies' 11 <<http://www.amisdela terre.org/IMG/pdf/madagascareldoradooilmining-foefrance.pdf>> accessed 29 December 2018

⁸⁵ James Kraska (n 25)

⁸⁶ *ibid*

⁸⁷ *ibid*

3.3. Economic resources of Madagascar and the promotion of offshore exploitation

Currently, Madagascar has announced the availability of a license for the exploitation of 44 gas and oil offshore located on the basin of Morondava.⁸⁸ The maritime zone that will be occupied by these offshore platforms is 63.296 km², each square measure 1.940 km².⁸⁹ This offer will probably attract some international investors since Madagascar has applied to the World Bank Strategy for the mining sector that facilitates the access of potential international investor.⁹⁰ In this situation, the national legal framework aims generally to provide favourable conditions for foreign investment. Nonetheless, practice shows that the investor relies on the existence of legislation which secures not only their investment but also makes the State accountable for the reparation, compensation or the prosecution of an unlawful act that may affect their investment.

As a result, the accession and the domestication of 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf is an effective legal measure that should be initiated in order to attract investors in the sector of offshore exploitation. The more efficient is the legal framework, the more attractive is the country.

Furthermore, the effect of the eventual unlawful act against the safety of maritime navigation and fixed platforms should be taken into account. Economically speaking, these acts may affect the principal sources of Madagascar's economy. Firstly, unlawful acts against ships may affect the maritime trade in the Western Indian Ocean region because such situation disrupts and increases the cost in the carriage of good by sea. Consequently, it causes a loss of profit and income in the shipping industry. Secondly, maritime tourism that is one of the future economic pillars of the country, may be disturbed by the occurrence of any unlawful act at sea owing to the fact that a company specialized in the maritime tourism such cruise liner will probably include the country in its blacklist.

Thirdly, in terms of offshore activities, the risk of attack may produce the disruption of supply and may increase the cost of production as well as the price of gas and oil. Then, in order to avoid this situation, the act of the competent authority in charge of law enforcement should be

⁸⁸ Antsa R. 'Pétrole et gaz : Un appel d'offre pour 44 blocs situés à Morondava' *Midi Madagasikara* (14 November 2018) <<http://www.midi-madagasikara.mg/economie/2018/11/14/petrole-et-gaz-un-appel-doffre-pour-44-blocs-situes-a-morondava/>> accessed 29 December 2018

⁸⁹ *ibid*

⁹⁰ Juliette Renaud, Darek Urbaniak, Viviana Varin, Holly Rakotondralambo (n 84) 6

framed by a legal instrument that can help to resolve the international issue which requires mutual legal assistance between States. This legal instrument is obtained by the ratification and the domestication of the 2005 SUA Convention and the 2005 SUA Protocol on fixed platforms located on the Continental Shelf.

3.4. Social consideration: Implementation of 2005 SUA Convention and the 2005 SUA Protocol on a fixed platform located on the continental shelf as an instrument of dissuasion

The implementation of particular legislation that regulates criminal acts at sea is a means of dissuasion of social behaviour. In fact, social comportment is guided by the self-interest of an individual that is considered as “defined as the rational calculation of the magnitude of liability discounted by the probability of enforcement”.⁹¹ Therefore, the existence of published legislation and the degree of punishment related to unlawful acts prevent deviant behaviour in society. Since Madagascar, is an insular country, the probability of the uprising or widespread maritime criminal is not excluded. In this perspective, the ratification and the domestication of the 2005 SUA Convention and 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf constitute a means of anticipation of a future unlawful act against the safety of maritime navigation and fixed platforms.

IV- LEGAL ANALYSIS OF THE EXISTING NATIONAL LEGISLATION AND REGULATIONS ON MARITIME CRIME

In order to ensure the effectivity and the coherence of the 2005 SUA Convention and Protocol to the domestic law, an examination of the existent legislation and regulation appears fundamental.

1. Madagascar's Constitution of 2010

As the highest in the hierarchy of norms, Madagascar's Constitution of 2010 provides a landmark for the identification of the willingness of the country to regulate the development of the economy and the society in promoting peace and national security. In its preamble, the Constitution sets out that the factor of the durable and full development lies in the preservation of peace and human security. Firstly, in terms of human right, compared to the provisions of the 2005

⁹¹ Deborah E. Rupp and Cynthia A. Williams, ‘The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum’ 583 <<http://eial.tau.ac.il/index.php/til/article/download/786/744>> accessed 30 December 2018

SUA Protocol in its Article 8 paragraph 10(ii) and article 9, the Malagasy's Constitution guarantees the protection of human rights in its article 8 and 9. It is mentioned in article 8 (2) that "No one may be submitted to torture or to cruel, inhuman or degrading penalties or treatments".⁹² Article 9 provides that "No one may be prosecuted, arrested or detained except in cases determined by the law and accordingly to the forms prescribed by it."⁹³

Secondly, in terms of judicial proceedings or legal assistance mentioned in article 11 of the 2005 SUA Protocol, article 13 of the Constitution imposes the basic procedural rules which are: the regulation of evidence collection, the principle of no punishment without law, presumption of innocence trials, right to counsel, principle of the publication of law, principle of no punishment without law and the prohibition of double jeopardy.

Even though article 137 of the Constitution requires the procedure of the control of the constitutionality of the convention subject to ratification, this brief comparative analysis demonstrates that some provisions of the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf comply with the basic provision of Malagasy's Constitution.

2. Malagasy Penal Code

2.1 Law No 2016-017 of 22 August 2017 on Malagasy Penal Code

The Malagasy Penal Code was first published in the Official Gazette on 7 September 1962 and it has been modified by various amendments. The last amendment is dated on 26 July 2018. In 2017, the Law 2016-017 dated 22 August 2016 has incorporated in the Malagasy Penal Code new provisions in accordance with the evolution of cyber criminality and the transnational organized crime.

In fact, this legislation focuses on the introduction of new procedural rules adjusted to certain types of offences related to information and technology of communication concerning visits, searches, and seizures in the case of breaches of information systems. The provision of this law that regulates the cyber criminality may constitute a basis for the prosecution of the use of software that endangers ship delineated in article 3 *bis* of 2005 SUA Convention.

⁹² Article 8, para.2 of Malagasy Constitution 2010

⁹³ Article 9 of Malagasy Constitution 2010

2.2. Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

The most important amendment of the penal code that may interest the 2005SUA Convention and Protocol is the Law 2014-005 dated on 17 July 2014 related to the fight against terrorism and the transnational organized crime. This law was adopted by the parliament on 19 June 2014 and it contains forty-five articles with five different titles.

The first titles concern the fight against terrorism. It has twenty-one articles that deal with four categories of offences concerning terrorism which are:

- offences against the safety of civil aviation,
- offences against the safety of airports (national and international),
- offences against the safety of ships and fixed platform,
- offences against an internationally protected person.

Indeed, the provision related to the offence against the safety of ships and fixed platforms results to the fact that Madagascar had ratified the 1988 SUA. Article 1 related to terminology and definitions provides the definition of an act of terrorism, ship, fixed platform, public transportation system nuclear and radioactive material. Similarly, article 02 of the 2005 SUA Protocols set out the meaning of each of these words. For the case of the fixed platform, the definition used by the law 2014-005 is identical to article 1 paragraph 3 of the 1988 SUA Protocol against fixed platforms located on the continental shelf.

Then, article 5 provides that:

” § 1 - Whoever:

1) performs an act of violence against a person on board a ship or a fixed platform,

2) destroys or causes serious damage to a ship, its cargo or a fixed platform,

3) place or causes to be placed on a ship or a fixed platform, by any means, a device or substance that is capable of destroying the ship or fixed platform or causing damage to the ship, its cargo or a fixed platform,

4) destroys or seriously damages marine navigation installations or services or seriously interferes with their operation,

5) communicates information that he knows to be false,

Is punishable by five to ten years imprisonment if such an act compromises or is likely to compromise the safety of the ship or a fixed platform.”

Moreover, article 9 of the law is dedicated to the offences committed against a ship and a fixed platform. Pursuant to this article:

“§ 1 - Whoever, when this act, by its nature or its context, aims to intimidate the population or the government or an international organization established on the territory of the Republic, to accomplish or refrain from performing any act:

1) uses against or on board a ship or a fixed platform, or discharges from a ship, explosives, radioactive material or biological, chemical or nuclear (BCN) which causes or threatens to cause death or serious bodily or material injury,

2) discharges, from a ship or a fixed platform, hydrocarbons, liquefied natural gas, or other harmful or potentially dangerous substances, which are not referred to in the preceding paragraph, or are not provided for by law by Law No. 2004-019 of 19 August 2004, implementing the International Conventions for the Protection of the Marine and Coastal Environment from Pollution by Oil Spills, in Quantities or Concentrations which causes or is likely to cause serious bodily injury or material damage,

3) uses a ship in a manner that causes death or serious bodily injury or property damage,

4) threatens to commit any of the offences referred to in the preceding paragraphs, whether or not the threat is subject, under domestic law, to a condition,

Is punished with hard labour for life.

§ 2 - Whoever carries on board a ship:

1) explosives or radioactive materials, knowing that it is intended to cause or threaten to cause death, serious bodily injury or material injury, whether or not the threat is subject to a condition, in order to intimidate or to compel the government or an international organization to do or refrain from doing any act,

2) any BCN weapon, knowing that it is a BCN weapon as defined in Article 1,

3) any source or special fissionable material, equipment or material specially designed or prepared for the treatment, use or production of special fissionable material, with the knowledge that such material, material or equipment is intended for nuclear explosive activity or any other nuclear activity not subject to safeguards under a comprehensive safeguard agreement of the International Atomic Energy Agency (IAEA),

4) equipment, materials or software or related technologies that significantly contribute to the design, manufacture or launch of an NCB weapon, with the intention of using it for that purpose, Is punished with the penalty of five to twenty years of forced labour.”

Actually, compared to the 2005 SUA Protocol, the provision of articles 5 and 9 of this law focuses only on the description of the offences and the penalties even though the provision delineates the basic offences provided by the 2005 Convention which are: terrorism and proliferation of weapon of mass destruction. It should be noted that the Law No 2014-005 of 17 July 2005 use literally the definition of ships and fixed platform provided by the 2005 SUA Convention.

However, the limit of this law lies on the fact that it does not precise the competent authority to ensure the coordination of an incident at sea, the boarding procedure as well as the process of extradition and mutual legal assistance which are the core measures for the suppression of the unlawful act at sea. Apart from that, it excludes the regulation related to the transportation of fugitives as well as the accessory offence outlined in article *3quater* of the 2005 SUA Convention. Moreover, this Law does not contain any provision related to the designation of competent authority to receive and respond to request for mutual legal assistance from other States.

Consequently, these discrepancies justify the amendment of certain provisions of this law with regard to maritime terrorism in accordance with the provisions of the 2005 SUA Convention and the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf

2.3. Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs

Recently adopted, the Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs regulates the procedure of extradition and mutual legal assistance. The

provisions of this law comply with the international standards developed by the United Nations Office on Drugs and Crime (UNODC) on extradition and mutual legal assistance in criminal matters.⁹⁴ Thus, this law can cover the requirements delineated in articles 11, 11*bis*, 11*ter* and 12*bis* of the 2005 SUA Convention.

V- PROCESS TO IMPLEMENT THE LAW ON THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF NAVIGATION AND FIXED PLATFORMS

1-Administrative process

1.1.Procedures of consultation

Besides the usual legal procedure for the adoption of law before the parliament, the drafting of the law on the suppression of unlawful acts against the safety of navigation and fixed platforms should involve different government department and agency. The specificity of the law requires an inter-ministerial approach for the drafting of the law. To this extent, the drafting process starts with the consultation of the department and agency in charge of the State's action at sea. These department and agency are the:

- Primature,
- Ministry of the Justice,
- Ministry of National Defense,
- Ministry in charge of Interior,
- Ministry in charge of the Internal Security,
- Ministry in charge of Foreign affairs,
- Secretary in charge of the “Gendarmerie Nationale”
- Ministry in charge of Petrol and strategic industry,
- Ministry in charge of Transport,
- National Maritime Agency,
- National Agency in charge of the Fight against Terrorism and Transnational Organized Crime
- Central Intelligence Service,

⁹⁴ <<http://www.unodc.org/unodc/fr/legal-tools/model-treaties-and-laws.html>>

- Maritime Information Fusion Center.

The authority in charge of the technical drafting of the legislation will submit the drafts before the entities mentioned above. Indeed, to ensure the effective participation of these entities, the procedure of assent (“Avis conforme”) should be adopted. In other words, this procedure ensures that the consultation among the government departments and agencies process is mandatory before the final adoption.

1.2. Technical drafting

Since the Law of incorporation will amend the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime, the competent authority in charge of the drafting is the Ministry in charge of Justice. As mentioned earlier, the drafted law must be submitted to the different departments and agencies involved in the Law for their approval.

2. Adoption process

After the approval of the Ministry of Justice, this department will submit the drafts of the law of ratification and implementation to the General Secretary of the Government via the Directorate of the Legislation and the Litigation of the Primature. This structure is in charge of the control of the legality of the draft Law. Then, the Council of Ministers authorizes the adoption of the draft and proposes it to the National Assembly and the Senate for voting in accordance with article 86 of the Malagasy Constitution. After that, according to articles 116(1) and 117 of the Constitution, the Constitutional Court proceeds to verify the constitutionality of the adopted Law. Finally, the President of the Republic promulgates the Law in the Official Gazette of the Republic.

3. Adoption of supporting measures

3.1. Ship boarding Standard Operating Procedure (SOP) and access to fixed platforms

The boarding procedure requires specific concertation between the Ministry in charge of National Defense, Ministry in charge of Internal Security and the Ministry of Justice. The objectives are, first, to avoid overlapping of competence between the Navy, the “Gendarmerie Nationale” and the Police in their respective territorial jurisdiction. Second, these entities should draft a Standard Operational Procedure (SOP) with regard to the ship boarding procedures and access to fixed platforms which comply with this Law proposal as well as international law.

3.2. Conclusion of a treaty of extradition

To ensure the effectivity of the Law proposal and other Regional Agreement to which Madagascar has been a State Party, the government should proceed to the negotiation conclusion of the bilateral or multilateral treaty about extradition, at least, in the regional level. This attribution belongs primarily to the Ministry in charge of Justice and the Ministry in charge of Foreign Affairs.

3.3 Overview of the law proposal

Owing to the fact that the law proposal provides more detailed and exhaustive enactment about the maritime crime at sea, it consolidates the Malagasy Penal Code in amending certain provisions of the Law No 2014-005 of 17 July 2015 on Terrorism and Transnational Organized Crime. The justification of this option lies not only on the procedural aspect of the law proposal that focuses particularly on the boarding procedure, extradition of the offender and the mutual legal assistance but also the jurisdictional scope of the 2005 SUA Convention should be reflected in a legal instrument referring to enforcement and judicial powers. It should be emphasized that the provisions on extradition and the mutual legal assistance is regulated in accordance with the Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs.

In addition, the insertion of the law proposal to the Penal Code by amending the Law No 2014-005 of 17 July 2015 on Terrorism and Transnational Organized Crime is justified by the implementation of a specific penalty for each of the offences outlined by the 2005 SUA Convention. It can be also introduced to the national Maritime Code but this option requires the recasting of the Code that may necessitate a long period of time.

Indeed, the law proposal to amend the Law No 2014-005 of 17 July 2015 on Terrorism and Transnational Organized Crime spells out the general principle described by the 2005 SUA Convention and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf in relation to the offences, the appropriate penalties, the attribution of the law enforcement, extradition or prosecution of the offence, boarding procedure and the mutual legal assistance. Thus, certain definitions provided by the article 1 of the 2005 SUA Convention are incorporated in article 01 of the since this article does not provide an extended definition of basic concept stipulated in the 2005 SUA Convention. After that, the provision articles *3bis*, *3ter*, *3quarter* of the 2005 SUA Convention replace article 5 of the Law No 2014-005 of 17 July 2015 on Terrorism and Transnational Organized Crime in order to harmonize

the offences provided in the Convention and the national law. To this extent, the degree of the punishment prescribed in the law proposal is determined according to the effect of the offences.

Furthermore, the provisions related to boarding, power of master, operational measures at sea provided in article *8bis* are included in article 9 of the Law No 2014-005. With regard to the procedures of Mutual legal assistance and extradition underlined in articles 11bis, 11ter, 12bis, 14 and 15 of the Convention, a cross-reference to the Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs is inserted in article 33 of the Law No 2014-005 of 17 July 2015.

The law is structured in two chapters with twenty-one articles:

- Chapter I-Modification;
- Chapter II -Miscellaneous and final provision.

PART II

**LAW ON THE ACCESSION OF THE CONVENTION FOR THE SUPPRESSION OF
UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION
(SUA PROTOCOL 2005) AND THE PROTOCOL FOR THE SUPPRESSION OF
UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORM LOCATED ON
THE CONTINENTAL SHELF**

**LAW TO AMEND THE LAW NO 2014-005 OF 17 JULY 2015 ON TERRORISM AND
TRANSNATIONAL ORGANIZED CRIME**



LAW No-----

Authorizing the accession to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005 (SUA Convention 2005) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on The Continental Shelf (SUA Protocol 2005)

The National Assembly and Senate have adopted at their respective session on.....and
.....the Draft Law as follows:

THE PRESIDENT OF THE REPUBLIC,

- Considering the Constitution,
- Considering the Decision, No 07-HCC/D1 of the High Constitutional Courts on 10 January of 2018,

PROMULGATE THE FOLLOWING LAW:

Article 1.- The accession by the Republic of Madagascar to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005 and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf 2005 is hereby authorized.

Article 2.- This Law shall be published in the Official Gazette of the Republic.

Antananarivo, _____

THE PRESIDENT OF THE SENATE

PRESIDENT OF NATIONAL ASSEMBLY

Rivo RAKOTOVAO

Jean Max RAKOTOMAMONJY



NATIONAL ASSEMBLY

Law No-----

to amend certain provisions of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

EXPLANATORY MEMORANDUM

Owing to the globalization, the Blue Economy plays an important role in the development of coastal States. As the fourth largest island in the world and the first biggest island in Africa, Madagascar has a great potential maritime that has not been fully exploited. In fact, under its jurisdiction, Madagascar controls a maritime zone which contains biological as well as non-biological marine resources. Apart from that, Madagascar has improved gradually the maritime activities such as maritime transportation, yachting, nautical sports and maritime tourism that contribute to the increase of its Gross Domestic Product.

Recently, two major decisions have marked the willingness of the Malagasy government to promote the blue economy. Firstly, the National Assembly has adopted the Law n°2017-23 of 28 November 2017 on the Special Economic Zone that provides a competitive environment for business. Secondly, the country has launched a regional and international campaign to promote offshore exploration in order to upgrade oil and gas investment in Madagascar.

Indeed, the effectiveness of these decisions requires the improvement of the maritime security based on the update the national legislation on maritime security in accordance with International law. One of the important international legal instruments in the maritime security recently adopted is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005 (SUA Convention 2005) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (SUA

Protocol 2005). Actually, this Convention and Protocol constitutes a legal response to curb the evolution of maritime security threats. Therefore, the domestication of this international legal instruments and its implementation in the Malagasy legislation contribute to achieve national development policy owing to the fact that not only it guarantees the potential investor to invest in the blue economy but also it provides a national and international legal tool to the suppression of maritime threats.

This is the purpose of the current law.



NATIONAL ASSEMBLY

Law No-----

to amend certain provisions of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

CHAPTER I-MODIFICATION

Article 1.- The purpose of this Law is to amend the provisions of articles 1, 5,9 and 33 of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 2.- The following text is added as article *1bis* of the Law No 2014-005 of 17 July on Terrorism and Transnational Organized Crime

Article *1bis*. - Definition and interpretation

a) “A person sought” means a person whose extradition or provisional arrest with a view to extradition is requested by means of submitting a relevant request to the competent authorities of Madagascar.

b) “BCN weapon” means:

i) “biological weapons”, which are:

1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or

2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

ii) “chemical weapons”, which are, together or separately:

1) toxic chemicals and their precursors, except where intended for:

A) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or

B) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or

C) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; or

D) law enforcement including domestic riot control purposes, as long as the types and quantities are consistent with such purposes; (2) munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (ii)(1), which would be released as a result of the employment of such munitions and devices;

3) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (ii)(2).

iii) nuclear weapons and other nuclear explosive devices.

c) “Extradition” means the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.

d) “Transport” means to initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or item.

e) “International Criminal Police Organization” means the international police organization that facilitates cross-border police co-operation, and supports and assists all organizations, authorities, and services whose mission is to prevent or combat international crime.

f) "Judicial police officer" means all the police, customs and gendarmerie officers specially authorized to investigate criminal law offences, gather the evidence and search for and arrest the perpetrators under the authority of the prosecutor.

g) “Organization” means the International Maritime Organization (IMO).

h) “Precursor” means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

i) “Rome Convention” means the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988, as amended by the Protocol of 2005 to that Convention, done at London on 14 October 2005.

j) “Rome Protocol” means the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988, as amended by the Protocol of 2005 to that Protocol, done at London on 14 October 2005.

k) “Secretary-General” means the Secretary-General of the Organization

l) “Ship” means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft. It includes an unmanned underwater vehicle (UUV) or unmanned surface vehicle (USV).

m) “serious injury or damage” means:

i) serious bodily injury; or

ii) extensive destruction of a place of public use, State or government facility, infrastructure facility, or public transportation system, resulting in a major economic loss;
or

iii) substantial damage to the environment, including air, soil, water, fauna, or flora.

n) “toxic chemical” means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

o) the terms “source material” and “special fissionable material” have the same meaning as given to those terms in the Statute of the International Atomic Energy Agency (IAEA), done at New York on 26 October 1956.

Article 3.- The following text is added as article 1ter of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 1ter.- Scope of application

1) This Law does not apply to:

a) a warship; or

b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or

c) a ship which has been withdrawn from navigation or laid up.

d) offence related to the act of piracy

2) Nothing in this Law affects the immunities of warships and other Government ships operated for non-commercial purposes.

3) Nothing in this Law shall affect in any way the rules of international law pertaining to fixed platforms located on the continental shelf.

4) Nothing in this Law shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow on 1 July 1968, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow on 10 April 1972, or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993.

5) Nothing in this Law shall affect the rights, obligations and responsibilities under the Regional Agreement on the Coordination of Operation at Sea in the Western Indian Ocean on 29 April 2018 done at Mauritius.

Article 4.- Article 5 of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime is replaced by the following text

Article 5.- Offences relating to ship and fixed platforms

1) Any person commits an offence if that person unlawfully and intentionally:

a) seizes or exercises control over a ship or fixed platform by force or threat thereof or any other form of intimidation; or

b) performs an act of violence against a person on board a ship or fixed platforms if that act is likely to endanger the safe navigation of that ship or the safety of a fixed platform; or

c) destroys a ship or fixed platform or causes damage to a fixed platform or a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

d) places or causes to be placed on a ship or fixed platform, by any means whatsoever, a device or substance which is likely to destroy that ship or fixed platform, or cause damage to that fixed platform or ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

2) Any person also commits an offence if that person threatens, with or without a condition, as is provided for under the Malagasy national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs 1(b), (c), and (e), if that threat is likely to endanger the fixed platform or the safe navigation of the ship in question.

3) Any person commits an offence if that person unlawfully and intentionally:

a) when the purpose of the act, by its nature or context, is to intimidate a population or to compel the Malagasy government or an international organization located to do or to abstain from doing any act:

1. uses against or on a ship or fixed platform or discharges from a ship or a fixed platform any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
2. discharges, from a ship or fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(1), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
3. uses a ship in a manner that causes death or serious injury or damage; or
4. threatens, with or without a condition, as is provided for under Malagasy national law, to commit an offence set forth in subparagraph (a)(1), (2) or (3); or

b) transports on board a ship:

1. any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or
2. any BCN weapon, knowing it to be a BCN weapon as defined in Article 1; or
3. any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency comprehensive safeguards agreement; or
4. any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

4) It shall not be an offence within the meaning of this Law to transport an item or material covered by paragraph 1(b)(3) or, insofar as it relates to a nuclear weapon or other nuclear explosive devices, paragraph 1(b)(4), if such item or material is transported to or from the territory of Madagascar, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where:

a) the resulting transfer or receipt, including internal to a State, of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and,

b) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive devices of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, the holding of such weapon or device is not contrary to that State Party's obligations under that Treaty.

5) Any person also commits an offence if that person:

a) unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in article 3, paragraph (1), (2), and (3); or

b) attempts to commit an offence set forth in paragraph (1), (2), and (3); or

c) participates as an accomplice in an offence set forth in paragraphs (1), (2), (3) and article *5bis*; or

d) organizes or directs others to commit an offence set forth in article 3 paragraph (1), (2), (3) and article 4; or

e) contributes to the commission of one or more offences set forth in 3 paragraphs (1), (2), (3) and article 4 by and group of persons acting with a common purpose, intentionally and either:

i) with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence set forth in paragraphs (1), (2), (3) and article *5bis*; or

ii) in the knowledge of the intention of the group to commit an offence set forth in paragraphs (1), (2), (3) and article *5bis*.

Article 5.- The following is added as article 5 bis of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 5bis. - Offences relating to transportation of fugitives by ship

Any person commits an offence if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in articles 5, 5bis, 5ter and intending to assist that person to evade criminal prosecution.

Article 6.- The following is added as article 5ter of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 5ter.- Offense relating to communication of false information

Any person commits an offence if that person unlawfully and intentionally communicates information which that person knows to be false, thereby endangering the safe navigation of a ship or the safety of a fixed platform.

Article 7.- The following is added as article 5quater of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 5quater.- Penalties

- 1) Any person who is found guilty of committing any of the offences set forth in article 5, paragraphs (1) (a), (b) and paragraphs (3)(b) shall on conviction be liable to term of imprisonment not less than 25 years with forced labour.
- 2) Any person who is found guilty of committing any of the offences set forth in article 5, paragraphs (1) (c), (d), (e), paragraph (2) and paragraph (3) (a) shall on conviction be liable to term of imprisonment of 40 years with forced labour.
- 3) Any person who is found guilty of committing any of the offences set forth in article 5, paragraphs (5) (b), (c), (d) and (e) of this Law shall on conviction be liable to term of imprisonment of 20 years.
- 4) Any person who is found guilty of committing any of the offences set forth in article 5bis shall on conviction be liable to term of imprisonment of 10 years.

5) Any person who is found guilty of committing any of the offences set forth in article 5^{ter} shall on conviction be liable to term of imprisonment of 5 years.

Article 8.- Article 09 of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime is replaced by the following text

Article 9.- Power to board and search a ship

1) Madagascar's law enforcement agency may exercise power to:

- a) approach a ship;
- b) board a ship;
- c) search a ship.

2) The provisions of articles 146.4 and 146.5 of the Law No 2016-017, 22 August 2016 on Code of Criminal Procedure shall be applicable in respect of the powers conferred by paragraph (1).

3) A judicial police officer or agent shall not interfere with any attempt by the master of a foreign ship to communicate with the competent authorities of the flag State of the ship during the boarding and search.

4) In case of seizure and arrest of the ship, a judicial police officer shall report immediately to the competent judicial authorities.

5) Boarding and search teams may operate from the vessels and aircraft of the law enforcement agencies of any of the States parties to Rome Convention and from the vessels and aircraft of the law enforcement agencies of other State in accordance with the modalities to be agreed between this State and Madagascar.

6) A judicial police officer or agent may exercise the powers specified in paragraph (1) in relation to a ship if the officer or agent has reasonable grounds to suspect that:

a) a person on board the ship has committed, is committing, or is about to commit an offence against this Law; or

b) the ship has been, is, or is about to be used in the commission of an offence against this Law.

7) Paragraph (6) applies to a Malagasy ship whether the ship is in Madagascar's internal waters, territorial sea, or exclusive economic zone, or on the high seas or in the exclusive economic zone of another State.

8) Paragraph (6) applies to a foreign ship only if:

a) the foreign ship is in Madagascar's internal waters or territorial sea and the judicial police officer or agent has reasonable grounds to suspect the offence has been, is, or is about to be committed in Madagascar's internal waters or territorial sea; or

b) in every other case, the flag State of the foreign ship has consented to the exercise of the powers in relation to a foreign ship.

9) If a judicial police officer or agent exercises power to board a foreign ship described in paragraph (8)(a) and the officer or the agent is the first law enforcement officer to board the ship on that occasion, the officer or the agent must, at the time of the boarding of the ship, arrange for notice of the boarding to be given to the competent authorities of the flag State of the foreign ship.

10) A judicial police officer or agent must exercise powers in relation to a foreign ship described in paragraph 8 (b) in accordance with any conditions that the flag State attaches to its consent.

11) A judicial police officer or agent may enter in the fixed platform if the judicial police officer or agent has reasonable grounds to suspect that:

a) a person on board the fixed platform has committed, is committing, or is about to commit an offence against this Law; or

b) the fixed platform has been, is, or is about to be used in the commission of an offence against this Law.

12) The provisions of articles 146.4 and 146.5 of the Law No 2016-017 of 22 August 2016 modifying and supplementing certain provisions of the Malagasy's Code of Criminal Procedure shall be applicable in respect of the powers conferred by paragraph (11).

13) Nothing in this article limits the provisions of articles 126 and 127 of the Law No. 2007-21 of 30 July 2007 on the Code of Criminal Procedure for the purpose of this Law.

14) The following are designated as a judicial police officer or agent:

a) "Police Nationale" that has jurisdiction over the prefecture, sub-prefecture where is implanted a police station or the adjoining prefecture in case of emergency;

b) "Gendarmerie Nationale" or the "Brigade Nautique de la Gendarmerie Nationale" that have jurisdiction over the prefecture, sub-prefecture of their command post or the adjoining sub-prefectures in case of emergency.

15) Every officer in command of a ship or an aircraft of the Malagasy's Armed Force is considered as a judicial police officer for the purpose of this Law. An officer in command of a ship or an aircraft of the Malagasy's Armed Force may direct a person under his or her command to exercise the powers of a judicial police officer or agent in accordance with the provisions of the Law No. 2007-21 of 30 July 2007 on the Code of Criminal Procedure.

16) The Ministry in charge of Justice may in writing designate any judicial police officer or agent or any other agent of Malagasy competent authority to be an authorized judicial police officer or agent for purposes relating to the exercise of powers under paragraphs (6), (7), (8), (9), (10), (11), (12) and article 9^{ter} in case of emergency.

17) The Ministry in charge of National Defense may authorize the officers of designated law officers of another State Party to Rome Convention or another State to embarked on a vessel or aircraft of the Malagasy's Armed Force on such terms and condition deemed adequate between Madagascar and that State.

Article 9.- The following is added as article 9^{bis} of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 9^{bis}.- Operational framework for measures at sea

1) Any measure taken at sea pursuant to article 9, paragraphs (1), (6), and (11) shall be carried out only by warships or military aircraft, or by other government ships or aircraft including custom and police vessel clearly marked and identifiable as being on government service and authorized to that effect.

2) When taking measures against a vessel in accordance with article, 9 paragraphs (1), (6), and (11), a judicial police officer or agent is required to take all necessary steps:

a) to ensure the safety and humane treatment of the persons on board;

b) to ensure that any measures taken are compliant with human rights and humanitarian obligations;

c) to take due account of the need not to endanger the security of the vessel or its cargo

d) to take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

e) to ensure, within available means, that any measure any taken with regard to the vessel is environmentally sound.

Article 10.- The following text is added as article 9^{ter} of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 9^{ter}.- Arrest and transfer

1) If a judicial police officer or agent has reasonable grounds to suspect that any person has committed an offence against this Law, the officer or agent may arrest the person:

a) on board a ship to which article 9, paragraphs (6), (7), (8), (9), and (10) applies;

b) on board a fixed platform to which article 9, paragraph (11), and (12) applies;

c) if the person has left a ship or platform referred to in paragraph (a) or (b) and the judicial police officer or agent is pursuing the person.

2) However, a judicial police officer or agent shall not arrest a person on board a foreign ship described in article 9, paragraph 8 (b) or a person who has left such a ship and whom the judicial police officer or agent is pursuing unless the flag State of the foreign ship has consented to the person's arrest.

3) If a judicial police officer or agent (not being a constable) arrests a person under paragraph (1), the officer or the agent must arrange for the person to be delivered into the custody of a constable as soon as practicable.

4) In case of arrest or seizure, the officer in command of a ship or an aircraft of Malagasy's Armed Force shall report immediately to the competent judicial authority through the Navy or the Air Force Command.

5) If the alleged offender is arrested at sea, the delay of 48 hours provided by the Code of Criminal Procedure in its article 135 can be extended 24 hours per 13.50 nautical miles.

6) Nothing in this article limits the application of article 13 of the Law No 2017-013 of 26 July 2017 on the Code of Criminal Procedure relating to the defense of the parties, preliminary investigation and pre-trial detention during prosecution and instruction.

Article 11.- The following text is added as article *9quater* of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article *9quater*.- Conditions and limitations on the exercise of special enforcement powers by a judicial police officer or agent

1) Any powers conferred on judicial police officer or agent as a result of articles 9, *9ter* and *34bis* shall be exercisable in relation to ship and fixed platform for the purpose of detecting and taking appropriate action in respect of the offences set forth in articles 5, *5bis*, and *5ter*.

2) Those powers shall not be exercised in relation to a ship beyond the limit of the territorial sea of Madagascar and flying the flag or displaying the marks of registry of another State party to the Rome Convention except if:

a) Madagascar is exercising its right of control in its contiguous zone or the right of hot pursuit, or

b) the Malagasy competent authority was given authority by the State parties to Rome Convention.

3) The Malagasy competent authority shall not give the authority contained in paragraph 2(b) unless satisfied that:

a) the flag State has requested the assistance of Madagascar for purpose of detecting or preventing the commission of the offences set forth in articles 5 and *5bis*, or

b) the State party to Rome Convention has authorized Madagascar to act for that purpose.

4) The Malagasy competent authority shall impose such conditions or limitations on the exercise of the powers as may be necessary to give effect to any conditions or limitations impose by the State parties to the Rome Convention.

Article 12.- The following text is added as article *9quinquies* of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article *9quinquis*. - Power of Master

- 1) A master of a Malagasy ship may deliver to the appropriate authorities of a State that is a party to the Rome Convention any person whom the master has reasonable grounds to believe has committed an offence set forth in articles 5 and *5bis*.
- 2) A master who intends to deliver a person under paragraph (1) shall notify the appropriate authorities of the State, whenever practicable, and if possible before entering the territorial sea of the State.
- 3) A notification under paragraph (2) concerns:
 - a) the intention to deliver the person to those authorities; and
 - b) the reasons for intending to do so.
- 4) If a master delivers a person under paragraph (1), the master must give to the authorities of the State any evidence relating to the alleged offence that is in the master's possession.

Article 13.- The following text is added as article *9sixties* of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article *9sixties*. - Power of a foreign ship's Master

- 1) If a master of foreign ship delivers to the Malagasy competent authority any person whom the master has reasonable grounds to believe has committed an offence set forth in articles 5 and *5bis*, the Malagasy competent authority shall accept the delivery, except where it has grounds to consider that the Rome Convention is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of article 9 paragraph (10).
- 2) In accepting the delivery, the Malagasy competent authority shall request the flag State to accept the delivery of the offender.
- 3) Any refusal to accept delivery shall be accompanied by a statement of the reasons for refusal.

4) If the Malagasy competent authority refuses to accept the delivery, it shall notify the master or the flag State the reasons for refusal.

Article 14.- The following is added as article 33bis of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 33bis.- Jurisdiction

This Law applies in relation to an offence that occurs through or from waters beyond the outer limit of Madagascar's territorial sea if:

1) the offence is committed:

a) against or on board a ship; or

b) against or on board a fixed platform located on Madagascar's continental shelf; or

2) the alleged offender is:

a) a Malagasy citizen; or

b) a person ordinarily resident in Madagascar but not the citizen of any State; or

c) present in Madagascar; or

d) a legal person located in Madagascar's territory or organized under Malagasy's law.

Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

3) For the purposes of paragraph (1) (a) and (b), an offence is deemed to be committed against or on board a ship or a fixed platform if any act or omission forming part of the offence, or any event necessary to the completion of the offence, occurs against or on board the ship or the fixed platform.

Article 15.- The following text is added as article 33ter of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 33ter.- Designation of national competent authority

1) For the purpose of facilitating cooperation between Madagascar and other States parties to the Rome Convention, the Ministry in charge of Justice shall designate by means of appropriate legal procedures an authority or authorities:

- a) to receive and respond to requests for assistance from State parties to Rome Convention;
- b) to transmit requests for assistance to State parties to the Rome Convention;
- c) to receive and respond to requests for authorization from State parties to the Rome Convention to take appropriate measures as stipulated in this Law;
- d) to receive and respond to requests for confirmation of registry or the right of a vessel to fly the Madagascar's flag;
- e) to transmit requests for authorization to State parties to the Rome Convention to take the appropriate measure as delineated in this Law.

2) The competent national authority or authorities shall respond expeditiously to any request made under paragraph (1).

3) Nothing in this article limits the application of articles 3 and 4 of the Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs.

Article 16.- The following text is added as article 33quater of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 33quater. - Extradition

The provisions of the Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs shall be applicable to the request and proceeding of extradition to or from Madagascar.

Article 17.- The following text is added as article 33^{quinqies} of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 33^{quinqies}. - Mutual legal assistance

- 1) The provisions of the Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs shall be applicable to the request and proceeding of legal assistance.
- 2) In urgent circumstances, the communication of legal assistance can be addressed through the International Criminal Police Organization (ICPO/ INTERPOL).

Article 18.-The following text is added as article 34^{bis} of the Law No 2014-005 of 17 July 2014 on Terrorism and Transnational Organized Crime

Article 34^{bis}. - Use of force

A judicial police officer or agent may use reasonable force that must be proportionate if:

- a) the safety of the officer or the persons on board of a ship or fixed platform is threatened;
or
- b) the execution of the authorized action is obstructed.

CHAPTER II-MISCELLANEOUS AND FINAL PROVISION

Article 19.- The Ministry in charge of Justice, the Ministry in charge of Defense, the Ministry in charge of Internal Security, The Ministry in charge of Foreign Affairs, the Ministry in charge of Transport, the Ministry in charge of Interior, the governmental department or agency in charge of national intelligence shall issue the necessary directive required to implement the provisions of this Law.

Article 20.- Regulations shall be issued for the purpose of this Law.

Article 21.- This Law shall enter into force following date of its publication in the Official Gazette of the Republic.

Antananarivo,

The President of the Senate

The President of National Assembly

TABLE OF NATIONAL LEGISLATIONS

- ❖ Constitution of the Republic of Madagascar 2010
- ❖ Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs
- ❖ Law No 2016-017 of 22 August 2017 on Malagasy Penal Code
- ❖ Law No 2014-005 of 17 July 2015 on Terrorism and Transnational Organized Crime
- ❖ Law No. 2004-019 of 19 August 2004, implementing the International Conventions for the Protection of the Marine and Coastal Environment from Pollution by Oil Spills
- ❖ Law No 2016-017 amending certain provisions of the Malagasy Code of Criminal Procedure of 22 August 2016
- ❖ Law No 2017-027 of 29 January 2018 on International Cooperation in Criminal Affairs

TABLE OF INTERNATIONAL CONVENTIONS

- ❖ Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on 16 December 1970, 12325 U.N.T.S 860.
- ❖ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, 974 U.N.T.S. 178
- ❖ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973, 3166 U.N.T.S. 1035
- ❖ International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 1979, 21931 U.N.T.S. 1316
- ❖ Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979,
- ❖ United Nations Convention of the Law of the Sea, done at Montego Bay on 10 December 1982, 1833 UNTS 397
- ❖ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988, 14118 U.N.T.S. 1589

- ❖ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms
Located on the Continental Shelf, done at Rome on March 1988, 29004 U.N.T.S. 1678
- ❖ International Convention for the Suppression of Terrorist Bombings, adopted by the
General Assembly of the United Nations on 15 December 1997, 37517 U.N.T.S. 2149
- ❖ International Convention for the Suppression of the Financing of Terrorism, adopted by
the General Assembly of the United Nations on December 1999
- ❖ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts of Violence
Against the Safety of Maritime Navigation, done in London, United Kingdom on 14
October 2005

TABLE OF INTERNATIONAL RESOLUTIONS

- ❖ Resolution A.924(22) review of measures and procedures to prevent acts of terrorism
which threaten the security of passengers and crews and the safety of ships adopted on 20
November 2001 (Agenda item 8)
- ❖ Resolution 60/288, The United Nations Global Counter -Terrorism Strategy 8 September
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- ❖ Amit A. Pandya, Rupert Herbert-Burns, Junko Kobayashi, 'Maritime Commerce and Security: The Indian Ocean' <https://www.stimson.org/sites/default/files/file-attachments/Section_1_-_Maritime_Commerce_and_Security_The_Indian_Ocean_1.pdf> accessed 11 February 2019.
- ❖ Deborah E. Rupp and Cynthia A. Williams, 'The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum' <<http://eial.tau.ac.il/index.php/til/article/download/786/744>> accessed 30 December 2018
- ❖ Helmut Tuerk, 'Combating Terrorism At Sea -- The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation' <<https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1044&context=umiclr>> accessed 22 December 2018.
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- ❖ Jan Van Hauwaert, 'The importance of the SUA Convention in the fight against violence at sea' <https://lib.ugent.be/fulltxt/RUG01/002/479/473/RUG01-002479473_2018_0001_AC.pdf> accessed 26 December 2018
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