



IMO

INTERNATIONAL MARITIME LAW INSTITUTE



Established under the auspices of the International Maritime Organization

A specialized agency of the United Nations

MARITIME SECURITY OFFENCES ACT

A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) in International Maritime Law at the IMO International Maritime Law Institute

Submitted By: _____Lydia Muthoni Ngugi_____ (Kenya)

Supervisor: _Mr.Riyaz Hamza_____

Academic Year 2013/2014

TABLE OF CONVENTIONS AND STATUTES.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention 1988)

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2005 (2005 SUA Convention)

Geneva Convention on the High Seas, 29 April 1958

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located On the Continental Shelf, 1988 (SUA Protocol) 1988

Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, 2005 (2005 SUA Protocol)

The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970

The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971

The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963

United Nations Convention on the Law of the Sea Montego Bay, 10th December 1982, in force

Vienna Convention on the Law of Treaties, Vienna, 23 May, 1969, in force

Legislation

Constitution of the Republic of Kenya, 2010

The Interpretation and General Provisions Act (Cap 2)

The Judicature Act (Cap 8)

The Merchant Shipping Act of Kenya (Act No.4 of 2009)

The Kenya Maritime Authority Act, 2005 (Act No.5 of 2006)

Treaty Making and Ratification Act No.45 of 2012

EXPLANATORY NOTE

1.0 Executive Summary.....1

1.1 Historical Background on the Achille Lauro Incident..... 2

1.2 International Instruments That Paved Way to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention 1988) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located On the Continental Shelf, 1988 (SUA Protocol) 1988.....3

1.2.1 Justification for the Adoption SUA Convention 1988 and the SUA Protocol 1988.....4

1.2.2 Major Provisions of the SUA Convention 1988 and the SUA Protocol 1988.....6

1.3 Historical Background to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, 2005 (2005 SUA Protocol).....8

1.3.1 Resolutions that were Considered in drafting the 2005 SUA Convention and the 2005 SUA Protocol.....9

1.4 Salient Features of the 2005 SUA Convention and 2005 SUA Protocol.....10

1.4.1.The New Offences under the 2005 SUA Convention.....11

1.4.1.1 Counter-terrorism Offences.....11

1.4.1.2 Non-proliferation Provisions.....12

1.4.1.3 Transport of Terrorist Fugitives..... 14

1.4.1.4 Accessory Offences.....14

1.4.1.4.1 Offences under the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 2005.....14

1.4.2 Ship boarding Procedure.....16

2.0 The Need for Kenya to Ratify the 2005 SUA Convention and 2005 SUA Protocol.....	17
3.0 The Kenyan Legal and Legislative Framework.....	19
3.1 Application of International Law through Domestic Institutions in implementing International Maritime Conventions.....	21
3.1.1 Need to have a Maritime Offences Act as Opposed to amending Substantive Legislation.....	23
3.1.2 The Admiralty Court in Kenya.....	23
4.0 Explanation of the Draft Text.....	25
4.1 Objective of the draft.....	25
4.2 Structure of the Act.....	25
4.2.1 Part One – Preliminary.....	25
4.2.2 Part Two – Organization and Offences	25
4.2.3 Part Three - Jurisdiction of Offences.....	26
4.2.4 Part Four – Boarding Provisions.....	26
4.2.5 Part Five – Extradition.....	26
4.2.6 Part Six – Auxilliary Provisions.....	26
4.2.7 Part Seven – Miscellaneous.....	27

EXPLANATORY NOTE

1.0 Executive Summary

Kenya plays an important role in the International Shipping Community due to its coastal geographic location and also due to the fact that it is an international maritime centre in East Africa. Kenya is located close to the Gulf of Eden and the Western Indian Ocean which are current piracy hotspots. These aspects have seen the country encounter a number of security threats that have been triggered by the country's political stand in supporting the international suppression of terrorism and piracy. Kenya's maritime industry is regulated by the government through the Kenya Maritime Authority. This Authority ensures that the country abides by the relevant international maritime conventions provided by the International Maritime Organization (IMO) which Kenya is a party to.

The international community through the United Nations has been at the forefront in promoting 'Counter Terrorism' conventions that can be relied upon to combat maritime crimes such as ship hijacking and unlawful acts against the safety of maritime navigation.¹ This learns towards creating criminal liability for apprehended suspects before a court of law when such a crime is committed into, through or from beyond the outer limit of the territorial sea of a single State or the lateral limits of its territorial sea with adjacent States.² Governments which are Member States of the United Nations are constantly being urged to ensure that they are abreast with the most current terrorist preventive measures.

It is note worthy to consider that much as the term terrorism is often used in this context, there is no one accepted international definition to it. However, though this term does not have a definition per say it is certain that such nature of actions need to be regulated as they are committed for political reasons and cause a lot of harm to innocent people.

¹Roach Ashley J; Global Conventions on Piracy, Ship Hijacking and Maritime Terrorism in Roach Ashley J and Beckman .C. Robert(Ed); Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation, Edward Elgar Publishing Limited, UK, 2012, Page 38.

²Ibid page 47.

IMO which is an ambit of the U.N and is incharge of sustaining legal and administrative developments in the maritime sector has been actively involved in urging Member States to take measures to suppress unlawful acts against the safety of maritime navigation. Through this initiative the 1988 SUA Convention and later in 2005 the Protocol to the SUA Convention came into existence. The main aim purpose of the SUA Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force, acts of violence against persons on board ships and the placing of devices on board a ship which is likely to destroy or damage it.³ It is thus important for Kenya to consider modern day factors that will enable watertight legal maritime terrorism preventive measures.

In this regard, this explanatory note will focus on what factors need to be considered in incorporating the Convention that will be discussed herein with main focus being on the prevention and suppression of maritime terrorism in the Kenyan maritime industry.

1.1 Historical Background on the Achille Lauro Incident

The historic milestone in the maritime industry that led to the adoption of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located On the Continental Shelf, 1988 was brought about by the hijacking of an Italian cruise ship by the name *Achille Lauro* on 7 October 1985.⁴ The vessel was some 30 miles off the coast of Egypt when it was hijacked by four Palestinians who had posed as passengers⁵ in the cruise ship before the dreadful ordeal.

Further facts to this case provide that the hijackers were members of the political group known as the Palestinian Liberation Front. Their primary mission during the hijacking was to secure the

³Gutierrez Martinez A.Norman; *Serving the Rule of International Maritime Law: Essays in Honor of Professor David Joseph Attard*, Routledge 2010, 2 Park Square, Milton Park, Abingdon, Oxon.

⁴Liput, Andrew; *An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice* Fordham International Law Journal Volume 9, Issue 2 1985 Article 5. <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1123&context=ilj>>18 January 2014.

⁵Klein, Natalie; *Maritime Security and the Law of the Sea*, Oxford University Press, Oxford, 2011, page 151.

release of fifty Palestinians who were serving jail terms at that time in Israel. This they would trade with the release of the four hundred passengers inclusive of the crew who were onboard the vessel.⁶ To put emphasis on their demands, the said hijackers killed an innocent disabled American tourist passenger onboard and threw his body into the sea while he was in his wheel chair.⁷ An occurrence that was instigated by the refusal of the Israeli government to release the Palestinian prisoners as ransom to the hijackers.⁸

Two days later, the Egyptian Government after noticing that Israel was not relinquishing its stand came to a settlement with the Chairman of the Palestinian Liberation Front. The Egyptian Government organized for a rescue aircraft to transport the four hijackers and land in Tunisia. Contrary to their expectation; the Tunisian Government objected to the landing of the aircraft. It was at this point that an interception by the United States Government occurred and a safe landing was prevailed in Italy. The Italian Government took up the case and the hijackers were convicted of terrorist activities in Italian Courts.⁹

1.2 International Instruments That Paved Way to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention 1988) and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located On the Continental Shelf, 1988 (SUA Protocol) 1988

In 1985 the International Community through the International Maritime Organization (IMO) came up with Resolution A. 584 (14) titled “Measures to prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of their Passengers and Crews.”¹⁰ This resolution advised

⁶Ibid.

⁷Davis. M. Antony; Terrorism and the Maritime Transportation System: Are we on a Collision Course, Wingspan Press, Livermore, CA, 1st Edition, 2008, page 143.

⁸Harris, David; Cases and Materials on International Law, Sweet and Maxwell, 7th Edition, page 382.

⁹ Harris, David; Loc cit.

¹⁰Tuerk Helmut, Combating Terrorism at Sea-The Suppression of Unlawful Acts Against the Safety of Maritime Navigation page 339. <<https://www.unodc.org/tldb/bibliography/Helmut%20Tuerk.pdf>> 18 January 2014.

the Committee to “develop, on a priority basis detailed and practical techniques to ensure the security of passengers and crews onboard.”¹¹

It is important to note that most of the ideas for the resolution came from the International Civil Aviation Organization. Its implementation procedures dealt with the development of standards and recommended practices for airport and aircraft security.¹² This had the backing of the United Nations General Assembly through Resolution 40/61 that was adopted by a consensus vote in the year 1985.¹³ The General Assembly was concerned by the lack of appropriate measures to deal with the problem of terrorism aboard or against ships.¹⁴

The United Nations Security Council took up the matter of the *Achille Lauro* incident and through Resolution 579 which basically is against “any act of terrorism and hostage situation” work was in progress towards the making of a suitable set of rules. Through the proposal of the United States serious deliberations by the Security Council towards getting a Convention started in the year 1986.¹⁵

1.2.1 Justification for the Adoption SUA Convention 1988 and the SUA Protocol 1988

The major question that needed to be answered was whether the incident that occurred in the *Achille Lauro* was one that amounted to an act of Piracy, as per the views of the United Nations at the time.¹⁶ This argument was solved by Article 15 of the Geneva Convention on the High Seas, 1958 which was adopted on 29 April 1958 and came into force on 30 September 1962. This provision was later duplicated in Article 101 of the United Nations Convention on the Law of the Sea, 1982 which was adopted in December 1982 and came into force in the year 1994. Both provisions duly describe piracy as any illegal acts of violence, detention, or any act of

¹¹Ibid page 339.

¹²Ibid page 339.

¹³Ibid page 339.

¹⁴Ibid page 340.

¹⁵Ibid page 340.

¹⁶Ibid page 341.

depredate, committed for private ends, by the crew or the passengers of a private ship or a private aircraft, and directed (1) on the high seas, against another ship or aircraft or against persons or property onboard such ship or aircraft. (2); it should be against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.¹⁷

Much as this is the text of the Conventions; the acts upon the *Achille Lauro* did not amount to piracy since the hijackers did not pursue it for private ends but rather political ends.¹⁸ In this context, there was a vacuum as no specific Convention was yet in place to deal with acts of terrorism in the maritime realm.

There was need to have an independent Convention to deal with this issue. Austria, Italy and Egypt strongly supported this idea. These countries put into consideration the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 in coming up with the title Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.¹⁹

The SUA Convention, 1988 and the SUA Protocol, 1988 were adopted through a Diplomatic Conference held in Rome. Both the Convention and the Protocol came into force on 1 March 1992. As stated in the executive summary much as terrorism does not have an internationally accredited definition, the Special Representative of the United Nations Secretary General at the Rome Conference clarified that piracy and terrorism were two different components. The former needed to have the aspects committed for private ends in place and there needed to be two vessels involved which are features that never arise in the later.²⁰

¹⁷Ibid page 342.

¹⁸Ibid page 343.

¹⁹Ibid page 343.

²⁰Ibid.

1.2.2 Major Provisions of the SUA Convention 1988 and the SUA Protocol 1988

Article 3 of the SUA Convention, 1988 provides that any person commits an offence within the meaning of the Convention if the alleged person unlawfully and intentionally;

1. Seizes or exercises first control over a ship by force, threat or any other form of intimidation;
2. Performs an act of violence against, person on board a ship if that act is likely to endanger the life of that ship;
3. Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
4. Places or causes to be placed on a ship by any means a device or substance which is likely to destroy that ship or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of the ship;
5. 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
6. Communicates information which is known to be false thus endangering the safe navigation of a ship.

Article 4 of the SUA Convention provides that it shall apply if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States. In addition to this, situations where the Convention does not apply nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State in prior reference.

Article 5 of the SUA Convention places emphasis as to the prosecution of the offences provided to be punishable by appropriate penalties which take account the grave nature of those offences.

Article 6 gives a wide jurisdictional basis over the offences when against or on board a ship flying the flag of the State at the time the offence is committed; in the territory of that State, including its territorial sea and by a national of that State. Furthermore a State Party may establish its jurisdiction over any such offences when it is committed by a stateless person whose habitual residence is in that State; during its commission a national of that State is seized,

threatened, injured or killed and when it is committed in an attempt to compel that State to do or abstain from doing any act.

The article further provides that any State Party which has established jurisdiction as illustrated above shall notify the Secretary-General. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General. The Convention emphasizes that State Parties establish jurisdiction over the offender when he is present in the territory and has not extradited him to another State Party which also has jurisdiction. This aspect does not exclude criminal jurisdiction exercised in accordance with national law.

Article 10 of the SUA Convention, 1988 provides that the State Party in the territory of which the offender or alleged offender where extradition shall not be applicable, be obliged without exception irrespective of where the offence was committed to submit the case to the competent authorities for the purpose of prosecution through the States national laws. Fair treatment will be given to all suspects in conformity with international human rights.

Article 11 of the SUA Convention, 1988 provides that the offences provided by the Convention shall also be considered extraditable offences where there is a treaty that exists between the State Parties. States which make extradition conditional from States with no extradition treaty shall make reference to the provisions of the Convention's extradition provisions. Article 11 further provides that State Parties which do not make extradition on the existence conditional in the existence of a treaty shall recognize the offences set out in the Convention as extraditable offences amongst each other. Jurisdictional aspects are also put into consideration between the State Parties involved. A State Party which receives more than one request for extradition from States which have established jurisdiction in accordance with Article 6 and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag ship was flying at the time of the commission of the offence.

The SUA Protocol, 1988 has similar provisions mentioned above on the offence and jurisdiction within the context of the fixed platforms located on the Continental Shelf.

1.3 Historical Background to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, 2005 (2005 SUA Protocol)

All was well with regard to the application of the SUA Convention, 1988 and the SUA Protocol, 1988 which was a step in the right direction, until the gruesome events of 11 September 2001.²¹ On this day, around nineteen men hijacked four commercial airlines headed towards the West Coast in America.²² The World Trade Centre was part of the attack.²³ More than two thousand people were killed in New York City, Washington D.C and the exterior of Shanksville, Pennsylvania.²⁴ This was the worst form of a terrorist's attack the world had ever seen.²⁵

These events moved the international community to recognize that the nature of attacks were being elevated a notch higher by terrorists.²⁶ It is at this point that deliberations began to amend its rules and regulations to curb suchlike attacks in the maritime industry with regard to the SUA Convention, 1988 and the SUA Protocol, 1988.²⁷

²¹Mejia Q Maximo, Contemporary Issues in Maritime Security, A selection of papers and presentations from the Workshop-Symposium on the Practical Implementations and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to September 2004 published in Sweden, 2005. Page163.

²² September 11 Anniversary Fast Facts By CNN Library September 11, 2013 -- Updated 1501 GMT (2301 HKT) <<http://edition.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/>> 21 January 2014.

²³Herbert-Burns Rupert, Bateman Sam, Lehr Peter; Lloyd's MIU Handbook of Maritime Security, CRC Press, London, 2008, Page 187.

²⁴Mejia Maximo Loc.cit

²⁵Ibid.

²⁶Ibid.

²⁷Ibid.

1.3.1 Resolutions that were Considered in drafting the 2005 SUA Convention and the 2005 SUA Protocol

The International Maritime Organization passed Resolution A. 924(22) that was essentially to “review existing legal and technical measures to prevent and suppress terrorist acts against ships both at port and at sea, as well as improve security aboard and ashore.”²⁸ This essentially meant that the SUA Convention, 1988 and the SUA Protocol, 1988 would undergo some major amendments. This Resolution referred to Resolution A.584, MSC/Circ.443, MSC/Circ.754, the SUA Convention 1988 and the SUA Protocol of 1988 for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf. The Legal Committee set up a Correspondence Group in April 2002 that was headed by the United States of America.²⁹ Accordingly, a Diplomatic Conference on Maritime Security was convened by the IMO at its London Headquarters, from 9 to 13 December 2002. Eleven resolutions were adopted at this Conference. Conference resolution 1, adopted on 12 December 2002, brought in several amendments to the Annex to the International Convention for the Safety of Life at Sea (SOLAS), 1974.

Chapter V dealing with ‘*Safety of Navigation*’, was amended. The existing Chapter XI, dealing with ‘*Special measures to enhance maritime safety*’, was re-numbered as Chapter XI-1. The most far-reaching change was the introduction of a new Chapter XI-2, on ‘*Special measures to enhance maritime security*’. This Chapter enshrines the new International Ship and Port Facility Security Code or what is now commonly referred to as the ISPS Code. The text of the ISPS Code is set out in the Annex to Conference resolution 2, which was also adopted on 12 December 2002. The outcome of the Conference was a new, comprehensive security regime for international shipping, to enter into force by 1 July 2004, in terms of the Tacit Acceptance

²⁸Klein Natalie, “The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against The Safety Of Maritime Navigation.”, page 369.
<<http://www.law.du.edu/documents/djilp/35No2/The-Right--Visit-2005-Protocol-Suppression-Unlawful-Acts-Against-Safety-Maritime-Navigation-Natalie-Klein.pdf>> 18 January 2014.

²⁹ Herbert-Burns Rupert, Bateman Sam, Lehr Peter; Op.cit p.188.

Procedure (TAP). The aim was to develop a draft paper that will contain possible amendments to the SUA Convention, 1988 that were to be presented at the 85th session of the Legal Committee in October 2003.³⁰

The other aim of setting up this Correspondence Group was to make a recommendation to IMO to organize an International Diplomatic Conference that will focus on the amendment of the SUA Convention, 1988 and the SUA Protocol, 1988.³¹ The United States of America as chair to the Correspondence Group prepared and finalized a document containing amendments to the SUA Convention, 1988 and SUA Protocol, 1988.

Once the Correspondence Group handed over their work, the Legal Committee worked on the draft for a period of three years. This Legal Committee completed its work at the 90th Session April 2005. To this effect an International Conference on the Revision of the SUA Treaties was held in October 2005 to adopt amendments to the SUA Convention, 1988 and the SUA Protocol, 1988.³²

The 2005 SUA Convention and the 2005 SUA Protocol entered into force on 28 July 2010. To be a Party of the 2005 SUA Convention and the 2005 SUA Protocol a State must first be a party of the SUA Convention, 1988 and the SUA Protocol, 1988.³³

1.5 Salient Features of the 2005 SUA Convention and 2005 SUA Protocol

The 2005 SUA Convention and 2005 SUA Protocol have introduced to the SUA Treaties some very important elements that are to improve the preventive aspect towards maritime terrorism. The nature of amendment to this type of Convention and Protocol can be loosely termed as “legislation by disaster”; as its inception was instigated by tragedy.

³⁰ Herbert-Burns Rupert, Bateman Sam, Lehr Peter; Op.cit p.189-190.

³¹ Herbert-Burns Rupert, Bateman Sam, Lehr Peter; Op.cit p. 190 - 201.

³² Ibid.

³³ Ibid.

The two major elements that were of utmost importance and were thus missing from the 1988 SUA Convention and Protocol included the nature of offences and the procedural elements that States are to put into consideration while boarding a ship.³⁴ The United States of America proposed some important changes which in summary included:³⁵

1. New offences into Article 3 of the SUA Convention, 1988 and the SUA Protocol, 1988. Four of these offences included activities taking place on the ship or directed towards the ship that involve a terrorist purpose.
2. New provisions permitting the boarding and search of a suspect ship by the Authority of another State when the ship is in international waters. In the event there is reasonable suspicion of committing the offences set out in Article 3 of the Convention. (New provisions included). New provisions were thus introduced will be elaborated herein below.

1.5.1 The New Offences under the 2005 SUA Convention

1.4.1.1 Counter-terrorism Offences

The 2005 SUA Convention provides that any person commits an offence within the meaning of the Convention if that person unlawfully and intentionally,³⁶

1. When the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act³⁷ that uses against or on a ship or discharges from a ship any explosive, radioactive material or Biological Chemical Nuclear weapons in a manner that causes or is likely to cause death or serious injury or damage;³⁸

³⁴Klein, Natalie; Loc.cit

³⁵ Ibid.

³⁶2005 SUA Convention Article 3bis 1.

³⁷Article 3bis (a).

³⁸Article 3bis (a) (i).

2. When he discharges, from a ship oil, liquefied natural gas, or other hazardous or noxious substances, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;³⁹
3. When he uses a ship in a manner that causes death or serious injury or damage;⁴⁰
4. When he threatens, with or without a condition, as is provided for under national law, to commit an offence as set out in the 2005 SUA Convention respectively.⁴¹

1.4.1.2 Non-proliferation Provisions

The 2005 SUA Convention further provides that it will be considered a crime if a person unlawfully and intentionally transports on board a ship,⁴²

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;⁴³
2. Biological Chemical Nuclear weapons or 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 IAEA comprehensive safeguards agreement;⁴⁴

³⁹Article 3bis (a) (ii).

⁴⁰Article 3bis (a) (iii).

⁴¹Article 3bis (a) (iv).

⁴²Article 3bis (b).

⁴³Article 3bis (b) (ii).

⁴⁴ Article 3bis (b) (iii).

3. Any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a radioactive weapon, with the intention that it will be used for such purpose.⁴⁵

The 2005 SUA Convention also includes acts that will not be considered an offence. These include transporting an item or material with 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.

Insofar as it relates to a nuclear weapon or other nuclear explosive device, any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a radioactive weapon, with the intention that it will be used for such purpose, if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons.⁴⁶

The 2005 SUA Convention further provides in this Context that 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.⁴⁷

In addition to this if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device 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.⁴⁸

⁴⁵ Article 3bis (b) (iv).

⁴⁶Article 3bis (2).

⁴⁷Article 2 (a).

⁴⁸Article 2(b).

1.4.1.3 Transport of Terrorist Fugitives

Article 3ter of the 2005 SUA Convention provides that any person commits an offence within the meaning of this Convention 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 within the meaning of the nature of offences stipulate in the Convention or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.

1.4.1.4 Accessory Offences

Article 3quarter provides that any person also commits an offence within the meaning of this Convention if that person unlawfully and intentionally injures or kills any person; attempts to commit an offence; participates as an accomplice in an offence; organizes or directs others to commit an offence and lastly contributes to the commission of one or more offences. In addition to this, the Article 3quarter also provides that an offence committed by a group of persons acting with a common purpose, intentionally and either 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; or in the knowledge of the intention of the group to commit an offence shall be considered an part and parcel of a offence. The Accessory Offences strengthen the ability of the international community to investigate, prosecute and extradite those who conspire or otherwise contribute to the commission of offenses under the Convention.⁴⁹

1.4.1.4.1 Offences under the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 2005

The 2005 SUA Protocol now provides that any person commits an offence

1. If that individual unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act that uses against or on a fixed

⁴⁹Roach, Ashley J; and Beckman.C. Robert; Op.cit., p.47.

platform or discharges from a fixed platform any explosive, radioactive material in a manner that causes or is likely to cause death or serious injury or damage;⁵⁰

2. When he discharges, from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;⁵¹
3. Which threatens, with or without a condition, as is provided for under national law, to commit an offence as stipulated in the 2005 SUA Protocol.⁵²

The 2005 SUA Protocol further provides that a person also commits an offence within the meaning of the Protocol;

1. If he unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in the convention;⁵³
2. Attempts to commit an offence;⁵⁴
3. Participates as an accomplice in an offence;⁵⁵
4. Organizes or directs others to commit an offence⁵⁶ and
5. Contributes to the commission of one or more offences by a group of persons acting with a common purpose, intentionally with the aim of furthering the criminal activity⁵⁷
6. Criminal purpose of the group or in the knowledge of the intention of the group to commit an offence as stipulated in the Protocol.⁵⁸

⁵⁰Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 2005 Article 2bis(a).

⁵¹Ibid, Article 2bis (b).

⁵²Ibid, Article 2bis(c).

⁵³Ibid, Article 2ter (a).

⁵⁴Ibid, Article 2ter (b).

⁵⁵Ibid, Article 2ter (c).

⁵⁶Ibid, Article 2ter (d).

⁵⁷Ibid, Article 2ter (e) (i).

⁵⁸Ibid, Article 2ter (e) (ii).

1.4.2 Ship boarding Procedures

The 2005 SUA Convention gives a detailed outline of ship boarding procedures under article 8bis. The idea came from the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;⁵⁹ the Protocol against the Smuggling of Migrants by Land, Sea and Air⁶⁰ and the agreements that are in relation to suppressing maritime trafficking in narcotic drugs and psychotropic substances in the Caribbean.⁶¹

Further to this, this right originates from Article 110 of the United Nations Law of the Sea Convention, (to which Kenya is a party.) This article by the heading “right to visit” illustrates the basic components that need to be put into consideration by a warship in the high seas towards a foreign ship. The reasons governing boarding procedures that have been incorporated into the 2005 SUA Convention and Protocol include boarding a ship on reasonable ground that the ship is suspected to be engaged in piracy, slavery, unlawful broadcasting and where there is suspicion on its nationality.⁶²

Under the 2005 SUA Convention, the issue of ship boarding is clearly set out in Article 8bis which gives the procedure that State Parties can implore on flag States of suspect vessels to permit boarding outside of the territorial sea of any State.⁶³

The three major elements that were incorporated to the new boarding procedures include (1) anticipating consent on an *ad hoc* basis; (2) where consent has been sought through prior informing the IMO- Secretary-General and no response to a request is forthcoming in a time limit of four hours and (3) in the event where permission has been granted by the Secretary General but there is no justifiable probable cause to await four hours before action is taken upon

⁵⁹Klein, Natalie; Op.cit, page 320.

⁶⁰Klein, Natalie; Op.cit, page 321.

⁶¹Klein, Natalie; Op.cit, page 322.

⁶²Klein, Natalie; Op.cit, page 323.

⁶³Klein, Natalie; Op.cit, page 319.

the vessel.⁶⁴ It is important to note that this article applies to States that are party to the Convention and not to third party States.⁶⁵

Another notable new feature in the 2005 SUA Convention and Protocol, is that related to the fact that before one State boards the vessel of another State Party, prior to this, it ought to have sent out a request as has been discussed above. This request should contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination and any other relevant information.⁶⁶ The Convention allows this communication to be made orally.

2.0 The Need for Kenya to Ratify the 2005 SUA Convention and 2005 SUA Protocol

Kenya is located in Eastern Africa and has a total square area of 582,650 square kilometers.⁶⁷ The country is endowed by a coastal strip measuring 536 square kilometers long on the Indian Ocean.⁶⁸ Currently, the leading source of revenue is sea borne trade of imports and exports. The country has also begun investing in the Oil and Gas industry.

This means that the Kenya needs to work on legislation that will prevent acts of terrorism in the country's oil and gas industry especially onboard fixed platforms.⁶⁹ This can only take place through the ratification of the 2005 SUA Convention and Protocol.⁷⁰ Bomb threats, detonation of

⁶⁴Klein, Natalie; Op.cit page 319.

⁶⁵Klein, Natalie; Op.cit page319.

⁶⁶Klein, Natalie; Loc.cit.

⁶⁷ <<http://www.nationsencyclopedia.com/economies/Africa/Kenya.html> >20 January 2014

⁶⁸ Final Report of the Taskforce on the Review of Maritime Laws of Kenya, Government Printers 2003, page 1.

⁶⁹“Kenya Maritime Authority Urges Action on Sea of Crime.” <http://www.the-star.co.ke/news/article-97260/kma>. Also see, KMA Director General Nancy Karigithu quote “cases of piracy, terrorism, illicit trade and illegitimate exploitation of marine resources are a threat to regional economy. The sector requires a coordinated security awareness and collaboration to counter security threats.” Speech during the workshop on Piracy Maritime and Awareness Risks in Mombasa Kenya town 2013.

⁷⁰Ibid.

explosives or bombs, underwater attacks, use of stand-off weapons, armed intrusion, seizure of an offshore installation, hostage taking, kidnapping of offshore workers, use of transport infrastructure as a weapon against an offshore installation, disclosure of confidential information which may assist perpetrators in carrying out or planning an attack, and even attempted and unsuccessful attacks⁷¹ are on a broader scale the main elements that the 2005 SUA Protocol will prevent if not control.⁷²

Kenya is an active member of the International Maritime Organisation and the government has dedicated itself to ensure that the country is a party to important conventions that it has not ratified.⁷³ In this sense prompt measures need to be taken to ratify the 2005 SUA Convention and 2005 SUA Protocol.⁷⁴ Kenya is currently a party to the 1988 SUA Convention and 1988 SUA Protocol.

⁷¹Kashubsky Mikhail, "Protecting Offshore Oil and Gas Installations: Security Threats and Countervailing Measures, Journal of Energy Security. Wednesday 11 December 2013.
<http://www.ensec.org/index.php?option=com_content&view=article&id=476:protecting-offshore-oil-and-gas-installations-security-threats-and-countervailing-measures&catid=140:energysecuritycontent&Itemid=429> 20th January 2014.

⁷²Ibid.

⁷³Cabinet Secretary for Transport Eng. Kakau noted that Kenya will seek technical assistance from the IMO to develop an integrated maritime policy and drafting of the necessary legal instruments for domestication of IMO Conventions. Further Mr. Sikimizu IMO Secretary General praised Kenya's role and participation in the IMO programmes in her capacity as an IMO Council member. He further commended Kenya for taking a decisive action to deal a mortal blow to piracy and terrorism, which he noted were a great threat to world shipping. Kenya Ministry of Transport and Infrastructure. <http://www.transport.go.ke/~transport/images/docs/LondonIMOmeeting.pdf> November 2013.

⁷⁴[...]The [2005 SUA Protocol and the 2005 Fixed Platforms Protocol] require participating States Parties to enact legislation to criminalize the unlawful maritime transport of WMD, a key requirement in stopping the spread of WMD, and an important step in helping to enforce the sanctions in current UN Security Council resolutions. [Both Protocols] establish a legal basis for international cooperation in the investigation, prosecution, and extradition of those who commit or aid terrorist acts or trafficking in WMD aboard ships at sea or on fixed platforms. The ability of States Parties to prosecute the perpetrators of these acts under the domestic legislation that States Parties must adopt will be a means to impose "consequences" on the perpetrators of these acts. The 2005 SUA Protocol's shipboarding regime will provide a multilateral basis for the interdiction at sea of WMD, their delivery systems, and related materials, as well as terrorist fugitives in Article:Protocols Of 2005 To The Convention Concerning The Safety Of Maritime Navigation And To The Protocol Concerning The Safety Of Fixed Platforms On The Continental Shelf September 16, 2008.—Ordered to be printed Mr. BIDEN, from the Committee on Foreign Relations, submitted the following Report 110th Congress Exec. Rept. 2d Session Senate 110–25. <<http://www.foreign.senate.gov>.> 20 January 2014.

The West Gate Mall terrorist attack that took place in Nairobi Kenya on 21 September 2013 ought to act as a wakeup⁷⁵ call into the ratification of the 2005 SUA Convention and Protocol. This ratification cannot come at a better time for Kenya as even this year's (2014) World Maritime Day theme is titled "IMO conventions: effective implementation". The Secretary General of the International Maritime Organization expressed the hope that this year would see genuine progress towards effective and global implementation of all IMO conventions."⁷⁶

3.0 The Kenyan Legal and Legislative Framework

Kenya is a former British colony thus the system of law that governs the country is that which is also applicable in England. The country became a British colony in the year 1895; acquired independence in 1963 and became a Republic in the year 1964. The system of law that governs the land is the English Common Law Legal System. Currently, the country is in the process of implementing a new Constitution that was adopted in the year 2010 that is commonly referred to as "the Constitution of Kenya 2010." This came into place after a National Referendum took place and the old Constitution that had been in use since independence became repealed.

In line with the implementation of International Law which is the subject herein; the Constitution of Kenya 2010 in Chapter One deals with Sovereignty of the people and the Supremacy of the Constitution. Under article 2 (5) it provides that the general rules of international law shall form part of the law of Kenya. In addition to this, subsection (6) provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. This is the

⁷⁵ "Apache Corp. says quits Kenyan offshore oil block." <www.reuters.com/kenya-oil-apache-id> 9 October 2013 Apache had informed the Kenyan government of the move on Sept. 27. The company stated the was not influenced by a militant attack on a Nairobi shopping mall a week earlier which killed at least 67 people. The attack, the worst on Kenyan soil since the 1998 U.S. Embassy bombing carried out by al Qaeda, has raised questions over the security of oil and gas exploration facilities.

⁷⁶[...]an IMO convention is only worthwhile and meaningful if it is effectively and universally implemented IMO Secretary-General launches 2014 World Maritime Day theme: "IMO conventions: effective implementation" Briefing: 04, January 21, 2014 <<http://www.imo.org/MediaCentre/PressBriefings/Pages/04-wmd-launch-2014.aspx>> 21 January 2014. Also see Kenya Maritime Authority Director General Nancy Karigithu quote "For terrorists seeking mass casualties or severe economic impact, this environment offers many targets," Maritime industry Debates Strategy for Vessel Safety <<http://in2eastfrica.net/maritime-industry-debates-strategy-for-vessel-safety/>>

backbone of treaty implementation to the Kenyan maritime industry which plays a significant role in earning the country revenue as more than 90% of trade is through the sea.

The Vienna Convention to the Law of Treaties in Article 2 (b) provides that “ratification” means the International Act so named whereby a State establishes on the international plane its consent to be bound by a treaty. In essence this is what happens in Kenya which is a member of the International Maritime Organization. This takes effect through the consideration of Article 94 of the Constitution of Kenya 2010. It provides in subsection (1) that the legislative authority of the Republic is derived from the people and at the national level, is vested in and exercised by parliament. Subsection 5 further provides that no person or body, other than Parliament, has the power to make provisions having the force of law in Kenya except under authority conferred by this Constitution or by legislation.

The dispensation of the new Constitution has brought with it critics as to whether Kenya is dualist or monist state. Malcom Shaw states that “dualism stresses that the rules of the systems of international law and municipal law exist separately and cannot have an effect of or overrule the other.⁷⁷ On the other had monists are of the unitary position of viewing the law as a whole and are divergent to the division of law into branches.⁷⁸

Several cases have thus given clear cut explanation to this subject matter. In the case *Republic Of Kenya In The Industrial Court Of Kenya At Nairobi Cause No. 312 Of 2010 Fred A. Odhiambo - Versus- The Honourable Attorney General 1st Respondent And Postal Corporation Of Kenya 2nd Respondent* part of the judgment read that article 2 (6) of the Constitution has effectively transformed Kenya from a dualistic state to a monistic state. This was further emphasized in the case *Republic of Kenya In The Industrial Court Of Kenya At Nairobi Cause No. 116 Of 2010 V M K -Versus-C U E A Respondent* where part of the judgment read that,

Article 2 of the Constitution of Kenya 2010, titled Supremacy of this Constitution at sub-Article (5) reads; “The general rules of international law shall form part of the law of Kenya” whereas Sub-Article (6) provides; “Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this Constitution.”

⁷⁷Shaw, Malcom; International Law, Cambridge University Press, New York, 6th Edition,2008 page 132.

⁷⁸Ibid.

“....The effect of these provisions is to transform Kenya from a dualistic State where national law prevailed over international law to a monistic State where national laws are on an equal footing with international law. The provisions of the Constitution of course supersede other national and international law. To this extent, the court shall refer to the international law relevant to this matter with a view to place our national standards referred to earlier in the context of the family of nations and more importantly for the court to demonstrate the concepts of discrimination and equality as applied in this matter.”

In this regard, the issue of whether Kenya is a dualist or monist State is clearly explained.

However in practice; the country still abides by the dualist system of procedure when it comes to implementation of International Treaties. In addition to this; Kenya has recently enacted the Treaty Making and Ratification No.45 of 2012 which is an Act of Parliament to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and rules for ratification of treaties and connected purposes. Section 7 of the Act provides in part that aspects that need to be put into consideration while ratifying a treaty include Constitutional implications, national interests, policy and legislative considerations.

3.1 Application of International Law through Domestic Institutions in implementing International Maritime Conventions

The main institution that focuses on the maritime division is the Kenya Maritime Authority. This Authority came into place in the year 2004.⁷⁹ However; the institution’s Act came into place in the year 2006 through legal notice No. 5 of 2006, and in its section 3 (1) the Act provides that the Authority shall be a body corporate with perpetual succession and a common seal that will enable it to sue and be sued and enter into contracts and perform all other things for the furtherance of the provisions of the Act which may be lawfully done by a body corporate.

The elements that put the Authority’s function into perspective in the implementation of international law are also clearly spelt out. Section 5 (c) provides that the Authority will advise the government and other measures necessary for the implementation of relevant international conventions, treaties and agreements to which Kenya is a Party. This means that the Authority shall undertake and coordinate research, investigation and surveys in the maritime field.⁸⁰ Key

⁷⁹ “Kenya Maritime Authority Three years regulating the Maritime Industry” Director General Kenya Maritime Authority. Presentation for International Commercial Shipment Terms, 22nd October 2009.

⁸⁰Kenya Maritime Authority Act, No 5 Laws of Kenya, Section 5 (d).

emphasis ought to be in the word “investigate” as the Authority can outsource for back up in trying to ensure that certain treaties are ratified by the country.

The major Act that the Authority goes by is the Kenyan Merchant Shipping Act of 2009 which provides in its preamble that it is an Act of Parliament to make provision for the registration and licensing of Kenyan ships, to regulate proprietary interests in ships, the training and the terms of engagement of masters and seafarers and matters ancillary thereto; to provide for the prevention of collisions, the safety of navigation, the safety of cargoes, carriage of bulk and dangerous cargoes, the prevention of pollution, maritime security, the liability of ship-owners and others, inquiries and investigations into marine casualties; to make provision for the control, regulation and orderly development of merchant shipping and related services; generally to consolidate the law relating to shipping and for connected purposes.

Maritime security issues are dealt with in part XVI of the Kenyan Merchant Shipping Act No.4 of 2009(MSA) from section 369 to 383. The issue of maritime terrorism is handled under Section 370. This Section covers the hijacking and destroying of ships. In summary its provisions set out the offences under the SUA Convention 1988 for the Convention Countries. Section 373 further provides the term “Convention country” means a country in which the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which was signed in Rome on 10th March, 1988, is for the time being in force, and the Minister may, by Order, certify that any country specified in the Order is for the time being a Convention country, and any such Order for the time being in force shall be conclusive evidence that the country in question is for the time being a Convention country or, where a country being a party to the Convention has not been issued with a certificate from the Director-General, shall be conclusive evidence that the country in question is for the time being a Convention country.

This basically means that only the 1988 SUA Convention is only provided for under MSA and details pertaining to its implementation are not clear-cut.

3.1.1 Need to have a Maritime Offences Act as Opposed to amending Substantive Legislation

It is worthy to note that the MSA does not give a clearly detailed account to such like activities which can be considered criminal in nature. In retrospect, there should be a separate Act of Parliament that brings into force the 2005 SUA Convention and 2005 Protocol given the reasons that have been highlighted in this explanatory note. This can only happen through a repeal of the section 370 that deals with maritime terrorism offences in the Merchant Shipping Act.

The reason why this should to be a separate Act is based on the fact that having it in the MSA will create interpretation problems and important elements specific to maritime terrorism will be left out or overlooked. The Act is also a maritime security offences Act thus offences will be punishable under the criminal law procedure through the office of the Director of Public Prosecutions which currently does not have such an Act to go by.

The 2005 SUA Convention and 2005 SUA Protocol being incorporated through new legislation is more preferable than making an amendment to the MSA. It is better off in the form of a new Act since amendments at most times have to undergo political scrutiny which causes drastic time lapses. This is due to the fact that the MSA is quiet a comprehensive piece of legislation that suchlike amendments may alter the general scheme of the Act bringing into force political interference.

3.1.2 The Admiralty Court in Kenya

Admiralty matters in Kenya are governed by the Judicature Act.⁸¹ This is an Act of Parliament to make provision concerning the jurisdiction of the High Court, the Court of Appeal and subordinate courts, and to make additional provision concerning the High Court, the Court of Appeal and subordinate courts and the judges and officers of court.

⁸¹ Cap 8 Revised Edition 2007 (2003).

In this sense, issues related to Admiralty are governed by the High Court of Kenya.⁸² This Court exercises admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.⁸³ The admiralty jurisdiction of the High Court is exercisable,⁸⁴ over and in respect of the same persons, things and matters;⁸⁵ in the same manner and to the same extent,⁸⁶ and in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.⁸⁷ In the exercise of its admiralty jurisdiction, the High Court may exercise all the powers which it possesses for the purpose of its other civil jurisdiction.⁸⁸

With regard to appeals in the Admiralty division all shall lie from any judgment, order or decision of the High Court in the exercise of its admiralty jurisdiction within the same time and in the same manner as an appeal from a decree of the High Court under Part VII of the Kenya Civil Procedure Act.

The hurdle that the Court faces is with regard to the implementation of the law in concrete situations. Reference is made to the MSA but in some case the Act does not give proper direction especially in areas dealing with maritime terrorism. It is in this regard that the 2005 SUA Convention and 2005 Protocol need to be ratified. In addition to the ratification, the Convention and Protocol need to be domesticated into law through an Act of Parliament. This will set out clear cut procedures on how unlawful acts against the safety of maritime navigation and fixed platforms located on the Continental Shelf in Kenya are to be addressed and solved given that both the 2005 SUA Convention and 2005 Protocol are of grave national interest to Kenya and both have not been ratified.

⁸²Judicature Act, (Cap 8) Section 4 (1).

⁸³ Ibid.

⁸⁴ Ibid section 4 (2).

⁸⁵ Ibid section 4 (2) (a).

⁸⁶ Ibid section 4 (2) (b).

⁸⁷ Ibid section 4 (2) (c).

⁸⁸ Ibid section 3.

4.0 EXPLANATION OF THE DRAFT TEXT

4.1 Objective of the draft

The objective of this draft is in accordance with the 2005 SUA Convention and Protocol. This draft provides an adequate legislative framework for the implementation of the Convention through domestication into a Maritime Security Offences Act. The draft gives detailed legal procedure to be followed when dealing with maritime offences from the criminal law point of view. Currently, Kenya is under constant terrorist threats and attacks. The country needs to ensure that the level of security in the maritime industry is guided by a solid legal regime as will be further elaborated in this explanation of the draft text.

4.2 Structure of the Act

The Act is divided into six parts that will be elaborated in summary detail as follows.

4.2.1 Part One - Preliminary

This part provides the Short title and Commencement date of the Act in accordance with the Kenyan legal system. The Interpretation section provides the meanings of words as provided in the SUA Convention and Protocol. This part is also guided by the Interpretation and General Provisions Act Cap 2 of Kenya which is an Act of Parliament to make provision in regard to the construction, application and interpretation of written law. The Section giving the Area of Application provides for the type of vessels that the Act will not apply to while the Section pertaining to the Limits of Application give the maritime geographical location respectively.

4.2.2 Part Two – Organization and Offences

This part lists out the governmental Authorities that are incharge of handling the offences committed within the context of the Act. Part two of the Act also stipulates the unlawful acts directed towards the safety of maritime navigation and the safety of fixed platforms located on the Continental shelf. Criminal liability is also expounded upon in the Section providing for the Accessory offences. This provision gives the procedure for investigation and prosecution. The rules of engagement relating to the transportation of terrorist fugitives is given under the Section

titled willful and deliberate transportation by an offender. This section ensures that assistance given to a fugitive is also considered a criminal offence. Exceptions to the offences caused and the penalties for the offences are provided for under this section. This includes offences committed by governmental officials under the Section Juristic Persons.

4.2.3 Part Three - Jurisdiction of Offences

This part of the Act gives the Jurisdiction in terms of the specific nature of actions that the Court will put into consideration while prosecuting the case. This Section further gives the power to detain an offender plus the procedure to be followed while seizing and delivering an offender.

4.2.4 Part Four – Boarding Provisions

This part gives the general legal procedure to be followed in the boarding of a suspect vessel in the territorial sea. The co-operation between Member States in the suppression of crime is also provided for in this part. Prohibition to ship boarding is also looked at in detail outlining the elements that cannot be compromised to allow the boarding of a suspect ship. Part four also puts into consideration the precautionary safeguards towards boarding of a suspect vessel. In this context the limits to ship boarding are also provided in this part. The last section of this part outlines provisions for the basic joint co-operation that States can accord each other in the implementation of the boarding provisions.

4.2.5 Part Five – Extradition

This part gives a detailed order of the proceedings that will be instituted once prosecution of the offenders needs to take place in another jurisdiction. Extraditable offences are thus listed and exceptions to extraditable offences are also provided. The procedure of the transfer of offenders is also clearly elaborated in this part.

4.2.6 Part Six – Auxilliary Provisions

This part gives the preventive measures that can be undertaken in the prevention of unlawful acts against the safety of maritime navigation and safety of fixed platforms located on the continental shelf. The element to be considered in the reasonable suspicion by Kenyan authorities in the

apprehension of crimes provided under this Act is provided for under this part of the Act. This works hand in hand with the section that gives the procedure for the communication in the reporting of the final outcome of proceedings to the Secretary – General. Part six also provides for the arbitration element that will be put into consideration once there is an urgent need for an out of court settlement.

4.2.7 Part Seven – Miscellaneous

This part gives the section of the Merchant Shipping Act No. 4 of 2009 that was repealed to give leeway to the incorporation of this Maritime Security Offences Act



MARITIME SECURITY OFFENCES ACT NO..... OF 2014

PART 1 – PRELIMINARY

1. Short title and Commencement

2. Interpretation

3. Application of the Act

4. Limits to Application

PART 11 - ORGANIZATION AND OFFENCES

5. Organization

6. Unlawful Acts against the Safety of Maritime Navigation

7. Unlawful Against the Safety of Fixed Platforms Located on the Continental Shelf

8. Unlawful Acts Intimidating a Population and Transporting Illegal Substances.

9. Accessory Offences

10. Willful and Deliberate Transportation by an Offender

11. Exceptions to the Offences

12. Penalties for the Offences

13. Offences Committed By Juristic Persons

PART III - JURISDICTION OF OFFENCES

14. Jurisdiction

15. Power to Detain an Offender

16. Seizure and Delivery of an Offender

PART IV - BOARDING PROVISIONS

17. Boarding of a Suspect Vessel

18. Co-operation between Member States in the Suppression of Crime

19. Prohibition to Ship Boarding

20. Exceptions to Prohibition of Ship Boarding Provisions.

21. Precautionary Safeguards towards a Boarding of a Suspect Vessel.

22. Limits to Ship Boarding.

23. Joint Co-operation

PART V - EXTRADITION

24. Extradition Proceedings

25. Extraditable Offences.

26. Exceptions to The Extraditable Offences.

27. Extradition Transfer of Offenders.

28. Preventive Measures

PART VI – AUXILIARY PROVISIONS

29. Reasonable Suspicion by Kenyan Authorities

30. Communication auxiliary

31. Arbitration

PART VII - MISCELLANEOUS

32. Repeal

MARITIME SECURITY OFFENCES ACT NO.....OF 2014

An Act of Parliament to make provision for criminal offences to incorporate the provisions of 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 Located On the Continental Shelf, 2005 and for all other matter connected therewith and incidental thereto.

ENACTED by the Parliament of the Republic of Kenya follows:

Part 1 – Preliminary

1. Short title and Commencement

This Act may be cited as the Kenyan Safety of Maritime Navigation Offences No..... of Act 2014 and shall come into operation on such date as the Cabinet Secretary may, by notice in the Gazette, appoint.

2. Interpretation

In this Act, unless the context otherwise requires-

“**2005 SUA Convention**” means the 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

“**2005 SUA Protocol**” the 2005 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

“**Authority**” means the Kenya Maritime Authority established under the Kenya Maritime Act 2006.

“**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.

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for the matters relating to transport.

“**Court**” means the High Court of Kenya.

“**fixed platforms**” means an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes.

“Secretary-General” means the Secretary-General of the Organization.

“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.

“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 major economic loss; or
- (iii) Substantial damage to the environment, including air, soil, water, fauna, or flora.

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

“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.

“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.

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

The terms **“place of public use”**, **“State or government facility”**, **“infrastructure facility”**, and **“public transportation system”** have the same meaning as given to those

terms in the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997; and

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.

3. Application of the Act

(1) Unless otherwise expressly provided, this Act shall not apply to-

- (a) a warship;
- (b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes;
- (c) a ship which has been withdrawn from navigation or laid up.
- (d) rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law.

(2) Except as otherwise provided in this Act nothing in this Act shall apply to the immunities of-

- (a) warships and other government ships operated for non-commercial purposes;
- (b) to the activities of the armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law;
- (c) the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law.

4. Territorial Scope of Application

(1) The provisions of this Act applies to ships navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a Kenya, or the lateral limits of its territorial sea with adjacent States.

(2) The provisions of this Act shall apply to all ships flying the Kenyan flag.

(3) Notwithstanding Subsection (1) of this Section this Act does not apply pursuant to situations when the offender or the alleged offender is found in the territory outside of Kenya's jurisdiction.

PART 11 ORGANIZATION AND GENERAL PROVISIONS OF OFFENCES

5. Organization

- (1) The Authority may, without prejudice to the provisions of this Act, administer matters pertaining to the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf in the manner provided in section 5 (i) of the Kenya Maritime Authority Act, 2006 and for the purposes of the 2005 SUA Convention and 2005 SUA Protocol.
- (2) The Authority, Court and the Director of Public Prosecutions may, administer the implementation process, having due regard that the nature of offences is within the meaning of this Act.
- (3) Offences under this Act may be prosecuted in the High Court.

6. Unlawful Acts against the Safety of Maritime Navigation

- (1) Any person commits an offence within the meaning of this Act if he unlawfully and intentionally:
 - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

(f) communicates information which that person knows to be false, thereby endangering the safe navigation of a ship.

(2) Any person further commits an offence if that person threatens, with or without a condition, as is provided for under the 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 Section 6 (1) (b), (c), and (e), if that threat is to endanger the safe navigation of the ship in question.

7. Unlawful Against the Safety of Fixed Platforms Located on the Continental Shelf

(1) Any person commits an offence within the meaning of this Act if he unlawfully and intentionally-

- (a) Seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation;
- (b) Performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety;
- (c) Destroys a fixed platform or causes damage to it which is likely to endanger its safety;
- (d) Places or cause to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety.

(2) Any person further commits an offence if that person threatens, with or without a condition, as is provided for under the 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 SubSection (1) (b) and (c), if that threat is to endanger the safety of the fixed platform.

8 Unlawful Acts Intimidating a Population and Transporting Illegal Substances

(1) Any person commits an offence within the meaning of this Act if unlawfully and intentionally:

- (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
 - (i) uses against either or on a ship or fixed platform or discharges from a ship or 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
 - (ii) discharges, from a ship or fixed platform, oil, liquefied natural gas, or other hazardous or noxious substances, which is not covered by Section 6 (a) (i), in such

- quantity or concentration that causes or is likely to cause death or serious injury or damage; or
- (iii) uses a ship in a manner that causes death or serious injury or damage; or
 - (iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in this section under (a)(i), (ii) or (iii); towards a ship or fixed platform.
- (b) transports on board a ship:
- (i) 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
 - (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or
 - (iii) 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 IAEA comprehensive safeguards agreement; or
 - (iv) 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.

9. Accessory Offences

Any person also commits an offence within the meaning of this Act 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 a ship or fixed platform along the continental shelf.
- (b) attempts to commit any offence set forth in this Act on a ship or fixed platform.
- (c) participates as an accomplice in an offence set forth in this Act on a ship or fixed platform.
- (d) organizes or directs others to commit an offence set forth in this Act on a ship or fixed platform.
- (e) contributes to the commission of one or more offences set forth in this Act on a ship or fixed platform in by a 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 this Act on a ship or fixed platform.
- (ii) in the knowledge of the intention of the group to commit an offence set forth in this Act on a ship or fixed platform.

10. Willful and Deliberate Transportation by an Offender

Any person commits an offence within the meaning of this Act 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 this Act or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.

11. Exceptions to the Offences

- (1) A person shall not be held liable to have committed an offence within the meaning of this Act-
 - (a) if the act is to transport an item or material covered by section 8 1(b) (iii) or,
 - (b) insofar as it relates to a nuclear weapon or other nuclear explosive device, mentioned in section 1(b)(iv), if such item or material is transported to or from the territory of, or is otherwise transported under control to the Non-Proliferation of Nuclear Weapons where:
 - (i) 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,
 - (ii) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device 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.

12. Penalties for the Offences

Any person who contravenes the provisions connected to the offences set forth in this Act commits an offence and shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding twenty years and not less than ten years, or to both such fine and imprisonment.

13. Offences Committed By Juristic Persons

(1) The Cabinet Minister may delegate to the Director General of the Authority or any other officer appointed under this Act and specific in such notification the exercise of any powers or the performance of any duties conferred or imposed on him under the Authority's Act.

(2) Proceedings for Criminal, Civil or Administrative liability may be imposed where the Director General or any other officer appointed under this Act commits any offence as set forth herein. This liability shall not be without prejudice to the criminal liability of individuals having committed the offences.

(3) Any person who contravenes the provisions of subsection 2 commits an offence and shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

PART IV - JURISDICTION OF OFFENCES

14. Jurisdiction

(1) For purposes of this Act, the High Court that shall have competent jurisdiction will consider actions committed-

- (a) against or on board a ship flying the flag of the Kenya at the time the offence is committed; or
- (b) in the territory of Kenya, including its territorial sea; or
- (c) against or on board a fixed platform while it is located on the continental shelf.
- (d) by a national of Kenya.

(2) Kenya shall extend its jurisdiction for bringing further proceedings to an extent sufficient over any offence within the meaning of this act when-

- (a) it is committed by a stateless person whose habitual residence is in Kenya; or
- (b) during its commission a national of Kenya is seized, threatened, injured or killed; or
- (c) it is committed in an attempt to compel Kenya to do or abstain from doing any act.

(2) The Authority through the Director General shall notify the Secretary-General of the jurisdiction.

- (i) Where the Court rescinds to that jurisdiction, the Director General shall notify the Secretary-General.

15. Power to Detain an Offender

1. An officer upon being satisfied that the circumstances so warrant, shall, in accordance with the law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted as instructed by the Director of Public Prosecutions.
2. The Director of Public Prosecutions shall immediately make a preliminary inquiry into the facts, in accordance with the law.
3. Any person regarding whom the measures referred to in Subsection 15 (1) are being taken shall be entitled to -
 - (a) communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;
 - (b) be visited by a representative of that State.
4. The rights referred to in Subsection 3 shall be exercised in conformity with the laws and regulations of the jurisdiction of Kenya subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under subsection 3 are intended.
5. Pursuant to the provisions of this Section Kenya shall immediately notify the States which have established jurisdiction in accordance with Section 15, subsection 1 of the person in custody, and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. Kenya will institute the preliminary inquiry contemplated in subsection 2 of this section and shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

16. Seizure and Delivery of an Offender

1. The master of a Kenyan Ship (the "flag State") may deliver to the authorities of any national in question any person who the master has reasonable grounds to believe has committed an offence as set out herein.
2. The flag State shall ensure that the master of its ship is obliged, whenever practicable, and if possible before entering the territorial sea of the receiving State carrying on board any person whom the master intends to deliver in accordance with subsection 1, to give notification to

the authorities of the receiving State of his intention to deliver such person and the reasons therefore.

3. The Receiving State shall accept the delivery from Kenya, except where it has grounds to consider that the 2005 SUA Convention and 2005 SUA Protocol is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of section 15 and Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.
4. The flag State shall ensure that the master of its ship is obliged to furnish the authorities of the receiving State with the evidence in the master's possession which pertains to the alleged offence.
5. A receiving State which has accepted the delivery of a person in accordance with paragraph 3 may, in turn, request the flag State to accept delivery of that person. The flag State shall consider any such request, and if it accedes to the request it shall proceed in accordance with section 15. If the flag State declines a request, it shall furnish the receiving State with a statement of the reasons therefore.

PART V - BOARDING PROVISIONS

17. Boarding of a Suspect Vessel

Unless otherwise provided the Authority shall ensure that -

1. States Parties shall co-operate to the fullest extent possible to prevent and suppress unlawful acts as provided herein in this Act, in conformity with international law, and shall respond to requests pursuant to this section as expeditiously as possible.
2. Each request pursuant to this Section may, if possible, contain-
 - (i) the name of the suspect ship,
 - (ii) the IMO ship identification number,
 - (iii) the port of registry,
 - (iv) the ports of origin and destination,
 - (v) any other relevant information.
 - (vi) If a request is conveyed orally, the requesting Party shall confirm the request in writing as soon as possible. The requested Party shall acknowledge its receipt of any written or oral request immediately.
3. Pursuant to the provisions of this Section Kenya shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration

to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere.

18. Co-operation between State Parties in the Suppression of Crime

1. Unless as otherwise provided whenever Kenya's law enforcement or other authorized officials acting in the capacity of a ("the requesting Party") encounter a ship flying the flag or displaying marks of registry of another State Party ("the first Party") located seaward of any State's territorial sea, and Kenya as a requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in the provisions of this Act and/or the requesting Party desires to board-

- (a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and
- (b) if nationality is confirmed, Kenya in the capacity of requesting Party shall ask the first Party (hereinafter referred to as "the flag State") for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence as set forth in this Act has been, is being or is about to be committed, and
- (c) the flag State shall either:
 - (i) authorize Kenya as the requesting Party to board and to take appropriate measures set out in subsection (b), subject to any conditions it may impose in accordance with section 7; or
 - (ii) conduct the boarding and search with its own law enforcement or other officials; or
 - (iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with section 7; or
 - (iv) decline to authorize a boarding and search.

19. Prohibition to Ship Boarding

Pursuant to the provision of this Section Kenya as a requesting Party shall not board the ship or take measures set out in Section 18 without the express authorization of the flag State in the following circumstances.

- (d) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth herein this Act has been, is being or is about to be committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.
- (e) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence set forth herein has been, is being or is about to be committed.

20. Exceptions to Prohibition of Ship Boarding Provisions

Unless as otherwise expressly provided the notifications made pursuant to this Section can be withdrawn at any time in the event where-

- a. When evidence of conduct described in the form of offences stipulated in this Act is found as the result of any boarding conducted pursuant to this Section, the flag State may authorize Kenya as the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. Kenya as the requesting Party shall promptly inform the flag State of the results of a boarding, search, and detention conducted pursuant to this article. Kenya as the requesting Party shall also promptly inform the flag State of the discovery of evidence of illegal conduct that is not subject to this Act.
- b. The flag State, consistent with the other provisions of this Act, may subject its authorization under Section 14 to conditions, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements.
- c. For all boardings pursuant to this Section, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. However, the flag State may, subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under Section 14.
- d. When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant

to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

21. Precautionary Safeguards towards Boarding of a Suspect Vessel

1. Necessary measures shall be taken against a ship with reasonable suspicion to have committed an offence in accordance with this Act. These include-

- (vii) take due account of the need not to endanger the safety of life at sea;
- (viii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;
- (ix) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;
- (x) take due account of the safety and security of the ship and its cargo;
- (xi) take due account of the need not to prejudice the commercial or legal interests of the flag State;
- (xii) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
- (xiii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in this Act are afforded the protections of Section 24, regardless of location;
- (xiv) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State at the earliest opportunity; and
- (xv) take reasonable efforts to avoid a ship being unduly detained or delayed.

2. Provided that authorization to board by a flag State shall not per se give rise to its liability, States Parties shall be liable for any damage, harm or loss attributable to them arising from measures taken pursuant to this article when:

- (i) the grounds for such measures prove to be unfounded, provided that the ship has not committed any act justifying the measures taken; or
- (ii) such measures are unlawful or exceed those reasonably required in light of available information to implement the provisions of this article.

States Parties shall provide effective recourse in respect of such damage, harm or loss.

3. Where a State Party takes measures against a ship in accordance with this Act it shall take due account of the need not to interfere with or to affect:

- (i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or
- (ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.

4. Any measure taken pursuant to this article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding Section 3 the provisions of this article shall apply.

5. For the purposes of this Section "law enforcement or other authorized officials" means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorized by their government. For the specific purpose of law enforcement under this Act, law enforcement or other authorized officials shall provide appropriate government-issued identification documents for examination by the master of the ship upon boarding.

22. Limits to Ship Boarding

1. Pursuant to the contents of the provision of this Section this does not apply to or limit boarding of ships conducted by any State Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.

2. Procedures to be followed in the boarding of Kenyan Flagged vessels shall be in line with the provisions of this Part V of this Act, however a written electronic message to the Authority shall be made within a period of four hours.

23. Joint Co-operation

1. Kenya is encouraged to develop standard operating procedures for joint operations pursuant to this Section and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

2. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article.

3. Kenya shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to act pursuant to this Section.

4. (1)The Authority and the Office of the Director of Public ProsecutionsUpon or after depositing its instrument of ratification, acceptance, approval or accession, each State Party shall receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures.

(2)Such designation, including contact information, shall be notified to the Secretary-General who shall inform all other States Parties within one month of the designation.

(3)The Authority shall be responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information.

PART VI – EXTRADITION

24. Extradition Proceedings

Notwithstanding to the provisions of this Act-

a. Kenya as the territory of which the offender or the alleged offender is found shall, in cases to which Section 14 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of Kenya. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of Kenya.

b. Any person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out pursuant to this Act, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of Kenya in the territory of which that person is present and applicable provisions of international law, including international human rights law.

25. Extraditable Offences

1. The offences set forth in this Act shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. Kenya makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, Kenya may, at its option, consider this Act as a legal basis for extradition in respect of the offences set forth in this Act. Extradition shall be subject to the other conditions provided by the law of Kenya.
3. In the event Kenya does not make extradition conditional on the existence of a treaty shall recognize the offences set forth in this Act as extraditable offences between themselves, subject to the conditions provided by the law of the requested State Party.
4. Notwithstanding the necessity, the offences set forth in this Act shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of Kenya as the requesting extradition.
5. In the event Kenya receives more than one request for extradition from States which have established jurisdiction in accordance with Section 14 and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence.
6. In considering a request for the extradition of an alleged offender pursuant to this Convention, the requested State shall pay due regard to whether his rights as set forth in Section 15 subsection 3, can be effected in Kenya as the requesting State.
7. Unless as otherwise provided, the offences as defined in this Act and the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Act.

26. Exceptions to the Extraditable Offences

(i)None of the offences set forth in this Act shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

(ii)Notwithstanding the provisions of this Act shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if Kenya as the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in this Act or for mutual legal assistance with respect to such offences has been made for the purpose of

prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

27. Extradition Transfer of Offenders

Notwithstanding the provisions of this Act a person who is being detained or is serving a sentence in the jurisdiction of Kenya whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in this Act may be transferred if the following conditions are met:

- (a) the person freely gives informed consent; and
 - (b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.
2. For the purposes of this article:
 - (a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
 - (b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;
 - (c) the State to which the person is transferred shall not require from Kenya initiation of extradition proceedings for the return of the person;
 - (d) the person transferred shall receive credit for service of the sentence being served in the State from which the person was transferred for time spent in the custody of the State to which the person was transferred.
3. Unless the State Party from which a person is to be transferred in accordance with this Section so agrees, that person, whatever that person's nationality, shall not be prosecuted or detained or subjected to any other restriction of personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to that person's departure from the territory of the State from which such person was transferred.

PART VI – AUXILIARY PROVISIONS

28. Preventive Measures

1. Kenya shall co-operate in the prevention of the offences set forth in this Act, particularly by:
 - (a) taking all practicable measures to prevent preparation in their respective territories for the commission of those offences within or outside their territories;
 - (b) exchanging information in accordance with their national law, and co-ordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in this Act.
2. Notwithstanding when, due to the commission of an offence set forth in this Act the passage of a ship has been delayed or interrupted, any State Party in whose territory the ship or passengers or crew are present shall be bound to exercise all possible efforts to avoid a ship, its passengers, crew or cargo being unduly detained or delayed.

29. Reasonable Suspicion by Kenyan Authorities

Pursuant to the provision of this Section, in the event Kenya having reason to believe that an offence set forth in this Act will be committed shall, in accordance with its national law, furnish as promptly as possible any relevant information in its possession to those States which it believes would be the States having established jurisdiction in accordance with Section 14.

30. Communication

(1) Pursuant to the provisions of this Section the Authority shall, in accordance with Kenyan national law, provide to the Secretary-General, as promptly as possible, any relevant information in its possession concerning:

- (a) the circumstances of the offence;
- (b) the action taken pursuant to Section 29.
- (c) the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.

(2) The Authority where the alleged offender is prosecuted shall, in accordance with its national law, communicate the final outcome of the proceedings to the Secretary-General.

(3)The information transmitted in accordance with Section 1 and 2 shall be communicated by the Secretary-General to all States Parties, to Members of the Organization, to other States concerned, and to the appropriate international intergovernmental organizations.

31. Arbitration

Unless as otherwise expressly provided;

1. Any dispute between two or more States Parties concerning the interpretation or application of this Act which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Kenya may declare that it does not consider itself bound by any or all of the provisions of Section 1. The other States Parties shall not be bound by those provisions with respect to Kenya which has made such a reservation.
3. Notwithstanding the provisions of this Section where Kenya has made a reservation in accordance with subsection 2 may, at any time, withdraw that reservation by notification to the Secretary-General.

PART VII - Miscellaneous

32. Repeal

The Merchant Shipping Act No. 4 of 2009 Sections 370 and 372 are hereby repealed.

ANNEX

CONVENTIONS CONSIDERED IN DRAFTING THE ACT.

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. 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.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979.
6. 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.
7. 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.
8. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
9. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.