



IMO
INTERNATIONAL MARITIME LAW INSTITUTE
Established under the auspices of the International Maritime Organization
A specialized agency of the United Nations



**A Law to Incorporate the Protocol of 2005 to the
Convention for the Suppression of Unlawful Acts Against
the Safety of Maritime Navigation and the Protocol of
2005 to the Protocol for the Suppression of Unlawful Acts
against the Safety of Fixed Platforms Located on the
Continental Shelf into the Laws of Luxembourg and to
Provide for the Effective Implementation Thereof**

**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: Barbara UJLAKI (Luxembourg)

Supervisor: Mr. Sanjeet RUHAL

Academic Year 2018-2019

TABLE OF CONTENTS

EXPLANATORY NOTE	4
1. GRAND-DUCAL DECREE OF DEPOSIT OF THE DRAFT LEGISLATION (01.01.2020)	6
2. NATIONAL INTEREST ANALYSIS FOR IMPLEMENTATION.....	7
2.1 HISTORICAL CONTEXT.....	7
A. THE 1988 CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION AND THE PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF.....	7
B. CONTEXT AFTER 2001	9
2.2 THE 2005 SUA CONVENTION AND THE 2005 FIXED PLATFORMS PROTOCOL	11
A. RIGHTS AND OBLIGATIONS OF STATE PARTIES TO THE 2005 SUA CONVENTIONS	12
B. THE GRAND DUCHY OF LUXEMBOURG’S INTEREST TO IMPLEMENT THE 2005 SUA CONVENTIONS	13
2.3 COMMENTARY OF THE ARTICLES OF THE 2005 SUA CONVENTIONS	15
A. THE 2005 SUA CONVENTION	15
B. THE 2005 FIXED PLATFORMS PROTOCOL.....	22
2.4. INCORPORATION OF THE 2005 SUA CONVENTIONS INTO THE LAWS OF LUXEMBOURG	22
 DRAFT LEGISLATION.....	 26
3. A LAW TO INCORPORATE THE 2005 SUA CONVENTION AND 2005 SUA FIXED PLATFORMS PROTOCOL INTO THE LAWS OF LUXEMBOURG.....	27
4. COMMENTARY OF THE DRAFT ARTICLES.....	33
 ANNEXES.....	 39
REFERENCES.....	40

Abbreviations

1988 SUA Convention	1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
1988 SUA Fixed Platforms Protocol	1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
1988 SUA Conventions	1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf
2005 SUA Convention	Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
2005 SUA Fixed Platforms Protocol	Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf
2005 SUA Conventions	Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf
BCN Weapons	Biological, Chemical and Nuclear Weapons
IMO	International Maritime Organization
LOSC	United Nations Law of the Sea Convention
WMD	Weapons of Mass Destruction

Explanatory Note

DRAFT LEGISLATION¹

- **approving the accession of Luxembourg to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted in London on the 14th October 2005 and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf, adopted in London on the 14th October 2005**

- **amending the Law of the 14th April 1992 Establishing a Disciplinary and Criminal Code for the Marine²**

- **adopting ship boarding procedures to prevent and suppress unlawful acts against the safety of maritime navigation**

(Deposited: 01.01.2020)

Table of Contents

1. Grand-ducal Decree of Deposit of the Draft Legislation (01.01.2020)
2. National Interest Analysis for Implementation
3. Law to Incorporate the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf³
4. Commentary of the Articles of the Law to Implement the 2005 SUA Convention and the 2005 SUA Fixed Platforms Protocol
5. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation⁴
6. Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf⁵

¹ This page represents and follows the structure of the first page of a draft legislation as submitted to the Chamber of Deputies in Luxembourg.

² Hereinafter referred to as ‘Criminal Code for the Marine’ or the ‘Code.’

³ According to Art. 62 of the Luxembourgish Constitution, laws and resolutions are adopted by the absolute majority of votes. If the number of votes is equal, the proposition is rejected. The Chamber of Deputies can only adopt resolutions if a majority of its members is present.

⁴ Adopted 14 October 2005, entry into force 28 July 2010. Hereinafter referred to as ‘2005 SUA Convention,’ and as ‘2005 SUA Conventions’ when reference is made to both the 2005 SUA Convention and the 2005 SUA Fixed Platforms Protocol.

*

1. Grand-ducal Decree of Deposit of the Draft Legislation (01.01.2020)

GRAND-DUCAL DECREE OF DEPOSIT

We HENRI, Grand-Duke of Luxembourg, Duke of Nassau,

Considering the report of our Minister of Economy and External Trade and after deliberation of the Government Council;

Decree:

Sole article – Our Minister of Economy and External Trade is authorized to deposit in Our Name to the Chamber of Deputies the draft legislation

– approving the accession of Luxembourg to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted in London on the 14th October 2005; and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf, adopted in London on the 14th October 2005

– amending the Law of the 14th April 1992 Establishing a Disciplinary and Criminal Code for the Marine

– adopting ship boarding procedures to prevent and suppress unlawful acts against the safety of maritime navigation

Chateau de Berg, January 1st, 2020

*The Minister of Economy
and Foreign Trade*
Jean ASSELBORN

HENRI

*

⁵ Adopted 14 October 2005, entry into force 28 July 2010. Hereinafter referred to as ‘2005 SUA Fixed Platforms Protocol,’ and as ‘2005 SUA Conventions’ when reference is made to both the 2005 SUA Convention and the 2005 SUA Fixed Platforms Protocol.

2. National Interest Analysis for Implementation

2.1 Historical Context

A. The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf⁶

After several incidents of crews being kidnapped, passengers threatened and killed, ships being hijacked, deliberately run aground or blown up by explosives during the 1980's, concerns grew about unlawful acts which threaten the safety and security of ships, crew and passengers.⁷ 'The concept of maritime terrorism was initially understood within the context of piracy whereby any unauthorized act of violence on the high seas would be characterized as piracy.'⁸ The *Achille Lauro* and the *So San* were two such interceptions where the international community was confronted with important jurisdictional barriers, since neither incident satisfied the traditional definition of piracy addressed in the LOSC.⁹ Piracy under international law was understood as acts of violence committed for private ends and did not cover acts of violence perpetrated for political or other public reasons.¹⁰ As opposed to the universal jurisdiction principle which covers acts of piracy, no other States except the flag State were able to exercise jurisdiction over maritime terrorism crimes on the high seas.¹¹ These incidents brought forward the need under international law to provide States with the rights to prescribe and enforce jurisdiction over these acts of violence outside the territorial seas.

The United States and other Governments proposed to the IMO to adopt a Convention that includes measures to prevent such unlawful acts 'to provide for a comprehensive suppression

⁶ Adopted 10 March 1988, entry into force 1 March 1992, UNTS 1678. Hereinafter referred to as '1988 SUA Convention' and '1988 SUA Fixed Platforms Protocol,' and as '1988 SUA Conventions' when reference is made to both the 1988 SUA Convention and the 1988 SUA Fixed Platforms Protocol.

⁷ International Maritime Organization (IMO), 'SUA Convention2005'

<<http://www.imo.org/en/about/conventions/listofconventions/pages/sua-treaties.aspx>> accessed 15.12.2018.

⁸ Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 147.

⁹ United Nations Law of the Sea Convention, adopted 10 December 1982, entry into force 16 November 1994, UNTS 1833. Hereinafter referred to as 'LOSC.'

¹⁰ Klein (n 8) 147.

¹¹ Ibid. Christophe C. Joyner describes maritime terrorism as 'the systematic use or threat to use acts of violence against international shipping and maritime services by an individual or group to induce fear and intimidation in a civilian population in order to achieve political ambitions or objectives.' In 'Suppression of Terrorism on the High Seas: the 1988 IMO Convention on the Safety of Maritime Navigation' (1989) 19 *Israel Yearbook on Human Rights* 348.

of unlawful acts committed against the safety of maritime navigation which endanger innocent human lives, jeopardize the safety of persons and property, seriously affect the operation of maritime services and thus are of grave concern to the international community as a whole.’¹²

Eventually the international community adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf at a Diplomatic Conference in Rome in March 1988.¹³ The main purpose of the 1988 SUA Convention was to ensure effective and practical measures for the prevention, prosecution and punishment of all unlawful acts against the safety of maritime navigation and their perpetrators.¹⁴ Geographically, it applies to ships navigating, or scheduled to navigate, beyond the limits of a State’s territorial sea.¹⁵ Its article 3(1) introduces new offenses, such as *inter alia*, the seizure or control of ships by force, acts of violence against persons on board a ship, destruction or damage of a vessel, its cargo or navigational facilities, the placement of devices or substances likely to endanger the safe navigation of the vessel, the communication of false information, as well as injuries and death of any persons in connection with any of these offenses. Under article 3(2) offenses also include the attempt of these unlawful acts, the abetment or being an accomplice thereof, as well as the threat compelling a person to commit any of the listed offenses.¹⁶ States are called upon to establish their jurisdiction over these offenses under the territoriality, nationality, passive personality and protective principles.¹⁷ The Convention further establishes in its articles 6(4) and 10(1) the principle ‘aut dedere aut judicare,’ either to extradite or to prosecute alleged offenders present in a State Party’s territory.

The 1988 SUA Fixed Platforms Protocol defines ‘fixed platforms’ as 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.¹⁸ It identifies specific offenses committed on board or against fixed platforms located on the continental shelf and provides

¹² IMO (n 7).

¹³ Adopted 10 March 1988, entry into force 1 March 1992, UNTS 1678. The 1988 SUA Convention has currently 166 State parties, while the 1988 SUA Fixed Platform Protocol has 156 State Parties.

¹⁴ 1988 SUA Convention, preamble.

¹⁵ *Ibid* art 4.

¹⁶ *Ibid* art 3.

¹⁷ *Ibid* art 6.

¹⁸ 1988 SUA Fixed Platforms Protocol, art 1(3).

the basis for State Parties' jurisdiction over them.¹⁹ Rather than reformulating the same offenses within the Protocol, there is a *renvoi* to the relevant provisions of the 1988 SUA Convention.²⁰

The 1988 SUA Convention and 1988 SUA Fixed Platforms Protocol were incorporated into the laws of Luxembourg by the 'Law of the 27th October 2010,' through 1) approving the 1988 SUA Convention and the 1988 SUA Fixed Platforms Protocol and through 2) amending the 'Law of the 14th April 1992 establishing a Disciplinary and Criminal Code for the Marine.' The new offenses established by the 1988 SUA Conventions were introduced in the Criminal Code for the Marine through the replacement of or addition to existing provisions.

B. Context After 2001

Several other terrorist acts against vessels occurred since the adoption of the 1988 SUA Conventions. The Tamil Tigers used such acts as part of their liberation struggle, inter-island ferries in the Philippines have been targeted by terrorists, and suspected Al Qaeda-affiliated guerrillas have launched a suicide attack against the USS *Cole* in Yemen in 2000, as well as an attempted attack against the USS *Sullivans* in 1999.²¹

In the aftermath of the 11th September 2001 terrorist attacks in the United States, the international community feared follow-on catastrophic attacks and recognized the vulnerability to terrorism of the maritime domain. The concerns were that the global maritime transportation system 'could be used to smuggle weapons of mass destruction or persons, conduct attacks on port infrastructure or bridges to paralyze commerce, or attack oil and liquefied natural gas tankers to attempt to produce large secondary explosions.'²² Arguably, the vulnerability of the maritime industry had already been of great concern before, but the 9/11 attacks reshaped the way the international community thought about maritime security. Other terrorist attacks followed after 2001, such as the *Limburg* incident, where small vessels packed with explosives were deployed, while various port facilities became the scene of car

¹⁹ Klein (n 8) 152

²⁰ Ibid; referring to Natalino Ronzitti, 'The Prevention and Suppression of Terrorism against Fixed Platforms on the Continental Shelf' in Natalino Ronzitti (ed), *Maritime Terrorism and International Law* (Martinus Nijhoff, 1990) 91.

²¹ Ibid 148.

²² James Kraska, 'Effective Implementation of the 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2017) 70(1) *Naval War College Review* 11.

bombs, parcel bombs and suicide bombers.²³ Al Qaeda was suspected to own or control ‘about 15 cargo ships that could be used as floating bombs against cruise ships and other high interest vessels, or to smuggle explosives, chemical or biological weapons, such as radioactive dirty bombs into a U.S. port, or to transport Al Qaeda members into a third country.’²⁴

First of all, the IMO Member States amended the Safety of Life at Sea (SOLAS) Convention²⁵ by introducing a new Chapter XI(2), enshrining, *inter alia*, the International Security and Ports Security (ISPS) Code.²⁶ The ISPS Code’s aim is to detect and deter acts that threaten maritime security, through evaluating risks, changing threat levels and recognizing the vulnerability of both ships and port facilities. Port security had been a neglected domain before 2002, but underwent major changes after the introduction of the ISPS Code.

The IMO Member States called for a critical examination of the existing maritime security architecture and prevention of maritime terrorism, consisting at that time of twelve international counter-terrorism instruments, to identify existing gaps and strengthen any needs.²⁷ Several gaps were identified in the maritime domain, including the lack of addressing modern threats of terrorism to the safety of shipping and the persons on board, the lack of boarding and search provisions, as well as the interruption of an ongoing SUA offense. The 1988 Convention also did not cover the use of ships or their cargo as a weapon in itself; a possibility not seriously contemplated before 9/11, neither did it cover the shipment by sea of weapons of mass destruction (WMD).²⁸

These considerations led to the Security Council’s Resolution 1540 which recognized the urgent need to take more effective measures to prevent the proliferation of biological, chemical, and nuclear weapons (BCN) and their means of delivery.²⁹ The IMO’s study

²³ Klein (n 8) 148.

²⁴ Ashley J Roach, ‘Initiatives to Enhance Maritime Security at Sea’ (2004) 28 *Marine Policy* 41.

²⁵ Adopted 1 November 1974, entry into force 25 May 1980, UNTS 1184.

²⁶ Adopted 1 July 2004, entry into force 1 December 2002. Hereinafter referred to as ‘ISPS Code.’

²⁷ Foreign Affairs, Defence and Trade Committee of New Zealand, ‘International Treaty Examination of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf’ (2009) Report.

²⁸ Chris Trelawny, Lecture, IMO International Maritime Law Institute, 22 January 2019. Weapons of mass destruction are hereinafter referred to as ‘WMD.’

²⁹ United Nations Security Council Resolution (UNSCR) 1540, 28 April 2004. Biological, chemical and nuclear weapons are hereinafter referred to as ‘BCN.’

mandated by its Resolution A 925(22) unfolded over three years and culminated in two draft protocols eventually adopted by a Diplomatic Conference at the IMO in October 2005.³⁰ These amendments were adopted in the form of Protocols to the 1988 SUA Conventions.³¹

*

2.1 The 2005 SUA Convention and the 2005 Fixed Platforms Protocol

The 2005 SUA Conventions consist of the 1988 SUA Conventions as amended by the 2005 Protocol for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

To realize its vision of an effective global regime to combat maritime terrorism, the 2005 SUA Conventions' aim was to build a comprehensive regime for counter-terrorism and counter-proliferation at sea.³² They highlight the continuing threat of terrorist attacks on a worldwide scale and express the need for supplementary provisions to suppress terrorist acts of violence against the safety and security of international maritime navigation as well as to improve their effectiveness.³³

The 2005 SUA Conventions are the first international treaty framework to combat and to prosecute individuals that seize vessels by force or use ships or their cargo as weapons, or as a means to commit a terrorist attack.³⁴ The amendments cover the transportation of cargo intended to be used as WMD, as well as the placement on board vessels of devices or substances that may be used to cause death, serious injury or damage.³⁵ The amendments further cover the transportation of fugitives by ships in order to escape prosecution.³⁶ Another major addition are the newly established procedures to facilitate ship boardings in international waters, when there are reasonable grounds to suspect that the vessel is involved in the commission of a 2005 SUA offense.³⁷ Procedures and conditions are laid down for

³⁰ Kraska (n 22) 12.

³¹ IMO (n 7).

³² Kraska (n 22) 13.

³³ 2005 SUA Convention, Preamble.

³⁴ United States Department of State, 'Fact Sheet - Protocols to the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)' (2005) <<https://2001-2009.state.gov/t/isn/rls/fs/58322.htm>> accessed 29 December 2018 accessed 29.12.2018.

³⁵ 2005 SUA Convention, art 3*bis*.

³⁶ *Ibid* art 3*ter*.

³⁷ *Ibid* art 8*bis*.

foreign warships to request the right to board and search a vessel flying the flag of another State Party, to be conducted with the express consent of the flag State.³⁸

The 2005 SUA Conventions' amendments can therefore be broadly divided into non-proliferation offenses, counter-terrorism offenses, as well as ship boarding provisions, creating rights and obligations upon State Parties. In order to provide for effective implementation of these provisions, it is crucial for State Parties to enact adequate laws in their domestic system. A more detailed explanation of the articles of the 2005 SUA Conventions follows in Chapter 2.3.

A. Rights and Obligations of State Parties to the 2005 SUA Conventions

The 2005 SUA Conventions impose a number of actions to be taken by State Parties in order to effectively carry out their international obligations.

First of all, State Parties to the 2005 SUA Conventions are required to make the offenses enumerated in its articles 3, *3bis*, *3ter* and *3quater* punishable under their national law, by 'appropriate penalties which take into account the grave nature of those offenses.'³⁹

Second, a State Party shall establish jurisdiction over the offenders 1) if the offense occurred within its territory or territorial sea of the State, 2) if it is the flag State, 3) if the offender is a national or 4) if the offender is present in its territory.⁴⁰

Third, a State Party is under the obligation to cooperate with and assist other State Parties' requests to board and search ships flying either its own or a foreign flag, when there are reasonable grounds to suspect that the vessel in question is involved in unlawful acts against the safety of maritime navigation or fixed platforms.⁴¹ Each State Party is required to designate a competent authority to deal with requests for confirmation of nationality, authorizations for boarding or to take appropriate measures and provide mutual legal assistance within the SUA framework as expeditiously as possible.⁴²

³⁸ Ibid.

³⁹ Ibid art 5.

⁴⁰ Robert C Beckman and Ashley J. Roach, *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (NUS Centre for International Law series, Edward Elgar 2012) 41.

⁴¹ 2005 SUA Convention art 8.

⁴² Ibid art *8bis*(15).

Fourth, State Parties are required to take an alleged offender present in their territory into custody and to either prosecute or extradite the latter. This includes the obligation to make the SUA offenses extraditable offenses.⁴³

Fifth, State Parties shall provide mutual legal assistance to each other in connection with criminal proceedings brought in respect of the offenses set forth under the 2005 SUA Conventions.⁴⁴ They are further required to cooperate in the prevention of the SUA offenses by taking all practicable measures and exchanging information to prevent the commission of any of these offenses.⁴⁵

B. The Grand Duchy of Luxembourg's Interest to Implement the 2005 SUA Conventions

The implementation of the 2005 SUA Conventions allows Luxembourg to extend its existing jurisdiction to the newly established offenses and to provide a legal basis for the boarding measures that have been created under these amendments. It further allows Luxembourg to provide for the appropriate sanctions to these unlawful acts against the safety of maritime navigation and against fixed platforms. In the spirit of the 1988 SUA Conventions, the judiciary is habilitated to establish jurisdiction and to take the appropriate measures in case one of its nationals is killed or injured in the context of one of the offenses created by articles *3bis*, *3ter* and *3quater*. In turn, Luxembourg may prosecute or require extradition of its nationals that commit any of these offenses or prosecute suspects present in its territory.

This implementation is in line with the 'Global Counter Terrorism Strategy,' endorsed by the United Nations General Assembly resolutions, that urge all State Parties to ratify and apply all international instruments against terrorism, whether coastal or landlocked.⁴⁶ Luxembourg has implemented the 1988 SUA Conventions in 2010 as the last Member State of the European Union. So far, eleven EU Member States have ratified the 2005 SUA Convention and twelve have ratified the 2005 SUA Fixed Platforms Protocol, in addition to some of the largest flag States such as Panama, Marshall Islands and the United States of America. The

⁴³ 2005 SUA Convention, arts 7 and 10.

⁴⁴ Ibid art 11.

⁴⁵ Ibid art 12.

⁴⁶ United Nations Resolution 60/288 (2006) and United Nations Resolution 62/272 (2008).

1988 SUA Conventions do not address modern threats of terrorism to the safety of shipping. They did not envision the use of ships and their cargoes as weapons, the sabotage or hijacking of high interest vessels, the importation of WMD by container or other clandestine means, the mining of critical ports by swimmer or small boat, the sabotage of critical infrastructure or the transportation of criminals.⁴⁷ Another crucial shortcoming is the lack of boarding, search and arrest measures to interrupt the commission of a SUA offense.

In light of the worrisome increase of terrorist attacks in recent years throughout the European Union, Luxembourg can no longer be considered an isolated territory off the radar of international terrorism. Luxembourg prides itself with the quality and strong implementation capacities of its flag State duties, as well as with its exemplary compliance with all major IMO Conventions. Luxembourg's position as a recognized quality flag would be strengthened through the implementation of the 2005 SUA Conventions. The new amendments create the necessary legal basis for jurisdiction and prosecution of the new counter-terrorism and non-proliferation offenses, as well as the relevant ship boarding provisions. These are concerns of all mankind and can only be dealt with through the common effort of the international community. As a founding member of the European Union and the North Atlantic Treaty Organization (NATO), Luxembourg has always been on the forefront of international cooperation and contributed to the strengthening of international security.

It is therefore recommended that Luxembourg reiterates its commitment to combat international terrorism and the proliferation of WMD through implementation of the 2005 SUA Conventions.

*

⁴⁷ Chris Trelawny, Lecture, IMO International Maritime Law Institute, 22 January 2019.

2.3 Commentary of the Articles of the 2005 SUA Conventions

A. The 2005 SUA Convention

The following provides a brief overview and commentary of the main amendments contained in the 2005 SUA Convention.

Article 1

Article 1⁴⁸ contains all necessary definitions for the proper understanding of the terms of the 2005 SUA Convention. These definitions are absent from the 1988 SUA Convention, which was limited to the definition of the term ‘ship.’ The 2005 SUA Convention adds the definitions of ‘transport,’ ‘toxic chemicals,’ ‘precursor,’ ‘Organization’ and ‘Secretary General.’

Providing a detailed definition of ‘biological, chemical or nuclear (BCN) weapon’ is crucial in the context of the 2005 SUA Conventions, because the possession and transfer of such weapons is not necessarily unlawful under international law.⁴⁹ Many of the components, technologies and production materials associated with WMD are dual-use in nature.⁵⁰ In other words, they may be used for both civilian or military purposes, for lawful or unlawful ends.

The definition of the terms ‘serious injury or damage’⁵¹ is important because several of the maritime terrorism and counter-proliferation offenses under article 3*bis* are qualified by these terms. In other words, where these terms are used, the offense is only punishable when it causes or is likely to cause death, serious injury or damage.

Furthermore, terms such as ‘place of public use,’ ‘State or government facility,’ ‘infrastructure facility,’ public transportation system,’ are assigned the same meaning as in the International Convention for the Suppression of Terrorist Bombings,⁵² whereas the terms ‘source material’ and ‘special fissionable material’ are assigned the same meaning as in the Statute of the International Atomic Energy Agency (IAEA).⁵³

⁴⁸ As amended by article 2 of the 2005 SUA Convention.

⁴⁹ Mark J Valencia, *The Proliferation Security Initiative: Making Waves in Asia* (Routledge, Oxford 2005) 42.

⁵⁰ Klein (n 8) 156.

⁵¹ The terms ‘serious injury or damage’ are used in article 3*bis*.

⁵² Adopted on the 12 January 1999, entry into force 23 May 2001, 2149 UNTS.

⁵³ Adopted 23 October 1956, entry into force 29 July 1957, UNTS 374.

Article 3bis

The 2005 SUA Convention adds a new article *3bis*,⁵⁴ which can broadly be divided into counter-terrorism (article *3bis(a)*) and non-proliferation (article *3bis(b)*) offenses.

i. Counter-Terrorism Offenses

The new counter-terrorism offenses under article *3bis(a)* criminalize the use of a ship to intimidate a population or to compel a government or international organization to do or abstain from doing any act by 1) using against, on, or discharge from a vessel any explosives, radioactive material or BCN weapons; 2) discharge from a ship any oil, liquefied natural gas or other hazardous or noxious substances; or 3) any other use of a ship in a manner that causes death, serious injury or damage; or 4) threatening to commit any of these acts. This article therefore covers the use of a ship either for terrorist acts or in enabling terrorist acts.

As opposed to the existing article 3 under the 1988 SUA Convention, which is mainly concerned with offenses ‘endangering the safe navigation of a ship,’ article *3bis* lacks this reference and instead refers to unlawful uses of a ship that ‘cause or are likely to cause death, serious injury or damage.’

ii. Non-Proliferation Offenses

The Non-Proliferation Treaty (NPT),⁵⁵ Chemical Weapons Convention⁵⁶ and the Biological Weapons Convention⁵⁷ all permit State Parties to possess and trade dual-use materials.⁵⁸ In this context, article *3bis(b)* of the 2005 SUA Convention criminalizes the transport on the high seas by commercial vessels of WMD or related materials and their delivery systems only under specific circumstances. In essence, their shipment requires the knowledge and intention of their use in an unlawful manner, such as causing death, serious injury or damage, using them as a nuclear explosive or for the equipment of a BCN weapon. These requirements are meant to ensure the protection of legitimate trade and innocent seafarers.⁵⁹ By virtue of the definition of ‘transport’ provided for under article 2 of the 2005 SUA Convention, any person

⁵⁴ Articles *3bis*, *3ter* and *3quater* are added by article 4 of the 2005 SUA Convention.

⁵⁵ Adopted 1 July 1986, entry into force 5 March 1970, UNTS 729. Hereinafter referred to as ‘NPT.’

⁵⁶ Adopted 13 January 1993, entry into force 29 April 1997, UNTS 1974.

⁵⁷ Adopted 10 April 1972, entry into force 26 March 1975, UNTS 1015.

⁵⁸ Klein (n 8) 156.

⁵⁹ United States Department of State (n 34).

commits an offense within the meaning of this article who initiates, arranges, or exercises effective control, including decision-making authority, over the movement of an item.⁶⁰ Mere knowledge by a seafarer of the existence of a criminal activity on board is therefore not sufficient for the purposes of this article.⁶¹ To be held liable, there must be proof that the seafarer had knowledge about the item, intentionally initiated, arranged or exercised effective control over it, and knew that the item was intended to be used in the design, manufacture or delivery of a BCN weapon.⁶²

Under article *3bis*(2), there are limited exemptions for the transport of the referenced materials under *3bis*(2)(b)(iii) and (iv), to ensure that the 2005 SUA Convention does not limit the rights of States party to the NPT.⁶³ This is in line with article *2bis* which provides that the rights, obligations and responsibilities established under the existing international non-proliferation treaties are not affected, thus the 2005 SUA Convention is consistent with existing international treaties.⁶⁴ In other words, notwithstanding the wording of article *3bis*, nuclear transport activities remain permissible under certain circumstances. Transport to or from the territory of, or under the control of an NPT State Party of determined nuclear-related materials is not criminalized as long as the resulting transfer or receipt of such items is not contrary to the international obligations of the concerned NPT Party.⁶⁵

These non-proliferation offenses fill a gap in existing international treaties, by criminalizing certain transports of nuclear-related items associated with nuclear weapons or explosive devices, thus providing complementary law enforcement mechanisms to the nuclear non-proliferation regime.⁶⁶

Article *3ter*

Article *3ter* creates the new offense of transporting fugitives. It criminalizes the transportation of persons on board a ship that have committed any of the offenses under the SUA Conventions or any treaty listed in the Annex.⁶⁷ To be punishable, the intention of the person transporting the offender must be to help the offender escape prosecution. In other

⁶⁰ 2005 SUA Convention, art 2(1)(b).

⁶¹ Beckman and Roach (n 40) 49.

⁶² Ibid.

⁶³ Foreign Affairs, Defence and Trade Committee of New Zealand (n 27) 10.

⁶⁴ Nuclear Non-proliferation Treaty, Chemical Weapons Convention, Biological Weapons Convention.

⁶⁵ Beckman and Roach (n 40) 45–46.

⁶⁶ Ibid 44–45.

⁶⁷ The Annex is found in art 7 of the 2005 SUA Convention.

words, the person must be aware that the latter has committed any of the offenses set forth in articles 3, *3bis* and *3quater*. The formulation of the article aims to prevent that innocent seafarers on board the same vessel are criminalized if they were assisting in the transport without knowledge and intention. Same as in the previous article, the term transport is understood in relation to persons who initiate, arrange, or exercise effective control, including decision-making authority, over the movement of a person.

Article *3quater*

Under the 1988 SUA Convention, the injury or death of any persons in connection with the offenses established under article 3 were contained within the same article. However, the 2005 SUA Convention unites the provisions relating to injury or death of persons with the criminal liability provisions for accessory offenses under the new article *3quater*. These conspiracy offenses extend various secondary liability provisions from the 1988 SUA Conventions and introduce several new forms of secondary liability, including direction, organisation and contribution to the commission of any of the 2005 SUA offenses.⁶⁸ The provision further includes the already existing offenses of attempt to commit and participation as an accomplice in any of the relevant offenses. Under this article, the unlawful and intentional killing or injury of persons is not only provided for in connection with articles 3, *3bis* and *3ter*, but also in relation to the offenses under article *3quater* itself. Article *3quater* thus strengthens the ability of State Parties to investigate, prosecute and extradite persons who conspire or otherwise contribute to the commission of offenses under the 2005 SUA framework.⁶⁹

Article 7

Article 7 of the 2005 SUA Convention adds an Annex consisting of nine existing counter-proliferation conventions. Article *3quater* makes a direct reference to the Annex and criminalizes the transportation of fugitives under these conventions. These conventions already criminalize aiding and abetting of fugitives to flee during the course of a crime, but

⁶⁸ Foreign Affairs, Defence and Trade Committee of New Zealand (n 27).

⁶⁹ Beckman and Roach (n 40) 47.

the 2005 SUA Convention's provisions also criminalize assisting a fugitive to avoid apprehension after the crime has been completed.⁷⁰

Article 8bis

The 2005 SUA Convention introduces a comprehensive set of procedures and safeguards designed to facilitate the boarding of a vessel when there are reasonable grounds to suspect that the vessel has been, is, or will be involved in the commission of any of offenses set forth in articles 3, *3bis*, *3ter* and *3quater*. In conformity with existing international law practice, the boardings under the newly established article *8bis*⁷¹ are to be conducted with the express authorization of the flag State. In addition to eliminating the need to create time-consuming *ad hoc* boarding arrangements when facing the immediacy of ongoing criminal activity, the ship boarding provisions provide safeguards that ensure the protection of innocent seafarers.⁷²

The provisions in article *8bis* require the authorization and cooperation of the flag State before a boarding on the high seas, including other State's EEZ.⁷³ The first three paragraphs set forth general principles of cooperation to prevent and suppress SUA offenses, as well as the obligation to respond as expeditiously as possible (paragraph 1).⁷⁴ Each boarding request should contain a minimum of information (paragraph 2) and take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo. The request should consider whether there are no alternative and more appropriate measures to undertake such boarding in the next port of call or elsewhere (paragraph 3).

A State Party that has reasonable grounds to suspect that one of the ships flying its flag is involved in unlawful activities may request the assistance of other States (paragraph 4). This paragraph does not oblige a State Party to board or search the vessel, but only to use their best

⁷⁰ Ibid 46.

⁷¹ Added by article 8 of the 2005 SUA Convention.

⁷² United States Department of State (n 34).

⁷³ IMO (n 7).

⁷⁴ This first paragraph is in line with art 17(1) of the 1988 Vienna Narcotic Drug Convention, as well as art 7 of the 2000 Migrant Smuggling Protocol.

endeavours and means available to render assistance in the suppression or prevention of an offense under the Convention.⁷⁵

Paragraph 5 sets down the procedures to be followed whenever the law enforcement vessel of a State Party requests the boarding of another State's ship because it has reasonable suspicions to believe that the ship was, is, or will be involved in a SUA offense. This paragraph provides the flag State with a set of possible responses to such a request, including authorization or refusal to board, to conduct the boarding itself or in cooperation with the requesting State. Article *8bis* clearly states that no boarding or other measures may be taken by the requesting State without the express authorization of the flag State.

Pursuant to this article, a State Party may notify the IMO Secretary-General that it grants other State Parties the authorization to board and search ships flying its flag when there is no response from its competent authorities within four hours, or that it allows boarding and search for the purpose of determining whether an offense has been, or is about to be committed.

When evidence of unlawful conduct is found as a result of boarding, paragraph 6 gives flag States the option to authorize the boarding State to detain the ship, its cargo and persons on board, pending further instructions from the flag State. In any case, the flag State may subject its authorization to board to any conditions it deems necessary, including obtaining additional information from the requesting Party (paragraph 7). The Convention further provides that the flag State always retains jurisdiction over ships flying its flag, its cargo and persons on board, whether detained or not (paragraph 8). This means that even when the flag State has given consent to another State's jurisdiction, it may re-establish its jurisdiction at any moment.

The use of force is to be avoided, except when necessary to ensure the safety of officials and persons on board, or where the officials are obstructed in the execution of authorized actions (paragraph 9).

Article *8bis* includes important safeguards when a State Party takes measures against a ship, including boarding (paragraph 10). The safeguards include: not endangering the safety of life

⁷⁵ Beckman and Roach (n 40) 51.

at sea, ensuring that all persons on board are treated in a manner which preserves human dignity and is in line with human rights law, taking due account of safety and security of the ship and its cargo, ensuring that measures taken are environmentally sound, and taking reasonable efforts to avoid a ship being unduly detained or delayed.⁷⁶ This paragraph further creates a framework for liability and recourse arising from any damage, harm or loss attributable to the boarding State, but the manner of ‘effective recourse’ remains at the discretion of each State Party.⁷⁷

These provisions do not limit other lawful ship boarding measures under international law (paragraph 11).⁷⁸ Finally, paragraph 15 requires each State Party to designate the competent authority to receive and respond to requests for assistance, for confirmation of nationality and for the authorization to take appropriate measures. Through notification to the IMO, the contact information of such competent authority shall be circulated amongst the State Parties, a crucial provision to guarantee swift response and action in case of urgency.

Article 11bis

The 2005 SUA Convention brings the 1988 SUA Conventions’ extradition provisions in line with modern terrorism conventions.⁷⁹ The addition of article 11bis⁸⁰ ensures that none of the offenses under the 1988 and 2005 SUA Conventions shall be considered a political offense for the purposes of extradition or mutual legal assistance requests. Accordingly, such requests may not be refused on the sole ground that it concerns a political offense or are inspired by political motives.

Article 11ter

This new article 11ter⁸¹ states that the obligation to extradite or to afford mutual legal assistance shall not apply if the request for extradition is believed to have been made for the purpose of prosecuting or punishing a person on account of that person's race, religion,

⁷⁶ IMO (n 7).

⁷⁷ Beckman and Roach (n 40) 54.

⁷⁸ Ibid 55.

⁷⁹ Beckman and Roach (n 40) 58.

⁸⁰ Added by article 10 of the 2005 SUA Convention.

⁸¹ Added by article 10 of the 2005 SUA Convention.

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.⁸²

B. The 2005 Fixed Platforms Protocol

The following provides a brief overview and commentary of the main amendments contained in the 2005 SUA Fixed Platforms Protocol.

Article 2bis

Article 2bis⁸³ is the equivalent of article 3bis(1)(a) of the 2005 SUA Convention, in that it adds new crimes to the list of existing offenses under the 1998 SUA Conventions. Article 2bis criminalizes the threat, or use against or on a fixed platform, or discharges from a fixed platform of any explosive, radioactive material, BCN weapon, oil, liquefied natural gas, or other hazardous or noxious substances in a manner that causes or is likely to cause death or serious injury. The purpose of these unlawful and intentional activities must be to intimidate a population, or to compel a government or international organization to do or abstain from doing any act, thus clearly establishing the existence of a terrorist motive. This article therefore covers the use of a fixed platform either for terrorist acts or in enabling terrorist acts.

Article 2ter

Article 2ter of the 2005 SUA Fixed Platforms Protocol is the equivalent of article 3ter of the 2005 SUA Convention. Under this provision, conspiracy, attempt, organization, direction or otherwise contribution to the commission of one of the offenses listed in article 2 and 2bis constitute offenses under international law. Article 2ter further criminalizes the injury or death of persons in connection with the commission of any of these offenses.

*

2.4. Incorporation of the 2005 SUA Conventions into the Laws of Luxembourg

Pierre Pescatore, one of the leading legal academics in Luxembourgish law, stated that 'international treaties are directly applicable in national law, without requiring special

⁸² International Maritime Organization, 'SUA Convention 2005' <<http://www.imo.org/en/about/conventions/listofconventions/pages/sua-treaties.aspx>> accessed 15 December 2018.

⁸³ Articles 2bis and art 2ter are added by article 4 of the 2005 Fixed Platforms Protocol.

incorporation, unless the terms of their provisions expressly require it. In general, international treaties are therefore, what is called in English ‘self-executing,’ meaning that they directly create rights and obligations for national subjects and they shall be applied, without any transformation, by the national courts. It also means that their non-application by a national court is subject to being overturned by the Supreme Court.’⁸⁴ Even though the Luxembourgish Constitution does not *expressly* provide for the primacy of international law over national law, this principle has been established by legal precedence in the 1950’s and is attached to the official text of the Constitution.⁸⁵

In general, the provisions creating offenses and establishing jurisdiction under the 2005 SUA Conventions are not regarded as self-executory and require a State Party to take additional steps under national law. The formal act of accession to the 2005 SUA Conventions is not sufficient to provide for effective implementation under national law. Nonetheless, States that have implemented the 1988 SUA Conventions already possess a solid legal foundation to introduce the new elements of the 2005 SUA Conventions.⁸⁶ To implement the 1988 SUA Conventions, Luxembourg was required to adopt a new law to approve accession to the 1988 SUA Conventions and to amend the articles of its Criminal Code for the Marine, through modifying or adding provisions to the existing ones. The accession to the 1988 SUA Conventions and the amendments were enacted by the ‘Law of the 27th October 2010 Implementing the 1988 SUA Conventions.’

Not all provisions of the 2005 SUA Conventions are applicable to Luxembourg given its status as a landlocked State, thus only those articles which are relevant to the Grand Duchy need to be expressly incorporated. Some aspects of the 2005 SUA Conventions are already provided for in whole or in part by Luxembourg’s existing criminal legal framework. Some

⁸⁴ Pierre Pescatore, *Introduction à la Science du Droit*, (Luxembourg, 1978), No 113, 175. Author’s translation from French to English: ‘Les traités internationaux sont susceptibles d’application directe dans l’ordre juridique interne sans requérir une mise en œuvre, à moins que leurs termes ne prévoient expressément le contraire. Normalement les traités internationaux sont donc, ce qu’on désigne en anglais par le mot de self-executing, c.-à-d. qu’ils créent directement des droits et des obligations pour les sujets de la souveraineté nationale, qu’ils sont susceptibles, sans autre transformation, d’être appliqués par les juridictions nationales et que leur méconnaissance par une juridiction nationale donne ouverture à cassation.’

⁸⁵ Text of the Luxembourgish Constitution with the ‘Jurisprudence’ attachments: <http://data.legilux.public.lu/file/eli-etat-leg-recueil-constitution-20161020-fr-pdf.pdf>.

⁸⁶ ‘A Checklist for Assessing Implementation In National Legislation,’ Center for International Law, National University of Singapore (2010) <https://cil.nus.edu.sg/wp-content/uploads/2010/10/Checklist-for-2005-SUA-Protocol.pdf> accessed 18.12.2018.

amendments are necessary however to ensure that the domestic framework is fully in line with the obligations created under the 2005 SUA Conventions.

Effect to the new offenses and boarding procedures is given in the form of a law implementing the 2005 SUA Conventions. The new offenses fit into three main categories: maritime terrorism, illicit trafficking and delivery of WMD and other related materials, and the transportation of fugitives by ship.⁸⁷ Articles *3bis*, *3ter* and *3quater* create new offenses under international law and thus require the addition or amendment of relevant offense provisions in the Criminal Code for the Marine, along with the appropriate penalties that take into account the grave nature of those offenses.⁸⁸

Amendments to existing international conventions are usually incorporated into domestic law by using the technique of grand-ducal decrees, a form of secondary legislation in Luxembourg. However, the 2005 SUA Conventions introduce new offenses under international law, and a simple decree of approval is therefore not appropriate. In order to effectively implement the new provisions, Parliament⁸⁹ needs to amend the relevant provisions in the Criminal Code for the Marine as well. Therefore, the amendments of the 2005 SUA Conventions need to be incorporated in a new law to give effect to the newly established provisions by approving the 2005 SUA Conventions and by amending the Criminal Code for the Marine. A grand-ducal decree is still a necessary formality to be adopted by the Grand-Duke in order to authorize the Minister of Economy and Trade to deposit the draft legislation to the Chamber of Deputies.

The Criminal Code for the Marine is a comprehensive code consisting of three main parts:

1) Infractions and Penalties

- ‘disciplinary violations’ are punished by disciplinary penalties
- ‘offenses’⁹⁰ are punished by correctional penalties (8 days to 5 years imprisonment or a fine)

⁸⁷ United States Department of State (n 34).

⁸⁸ 2005 SUA Convention, art 5.

⁸⁹ Also referred to as ‘Chamber of Deputies.’

⁹⁰ The terms ‘offense’ and ‘crime’ are used interchangeably within this explanatory note. They do not make reference to the legal differences under Luxembourgish law.

- ‘crimes’⁹¹ are punished by criminal penalties (specified by article 7 of the general Criminal Code, referring inter alia to imprisonment of 5 yeas or more)

2) Jurisdiction

3) Criminal Procedure

The new offenses established under the 2005 SUA Conventions will be inserted in the ‘Infractions and Penalties’ part of the Code, while matters relating to jurisdiction are amended in the relevant ‘Jurisdiction’ part. Through retaining the 1988 SUA Conventions’ provisions, it is ensured that all related provisions exist within the same Code. The new ship boarding provisions are not integrated in the Code, as they do not directly relate to the criminal procedures contained in the Criminal Code for the Marine. They will therefore be incorporated as a separate article in the new draft law.

Following the format of Luxembourgish laws, the law incorporating and effectively implementing the 2005 SUA Conventions consists of three parts:

1. Approving the accession of Luxembourg to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted in London on the 14th October 2005 and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf, adopted in London on the 14th October 2005
2. Amending the Law of the 14th April 1992 Establishing a Disciplinary and Criminal Code for the Marine
3. Adopting ship boarding procedures to prevent and suppress unlawful acts against the safety of maritime navigation

⁹¹ Ibid.

Draft Legislation

3. A Law to Incorporate the 2005 SUA Convention and 2005 SUA Fixed Platforms Protocol into the Laws of Luxembourg

*

TEXT OF THE DRAFT LEGISLATION

Art. 1 The Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, adopted in London on the 14th October 2010 and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Situated on the Continental Shelf, adopted in London on the 14th October 2010, are hereby approved.

Art. 2 The provisions of the Law of the 14th April 1992 Establishing a Disciplinary and Criminal Code for the Marine are amended as follows:

- 1) Art. 3, paragraph 4 shall be replaced by the following text:⁹²

‘As opposed to the provision in paragraph 1, the penalties set forth under Art. 19, 20, 23, 32, 33, 41, 43, 44, 47, 57, 58, 65-1, 65-2, 65-3, 65-4 and 65-5 apply to any person who has committed any of the offenses set forth in these articles.’

- 2) The following provisions in Art. 65-1 shall be deleted:

Art. 65-1(1)(g)

Art. 65-1(2)

- 3) Art. 65-2 shall be replaced by the following text:

Art. 65-2: Any person who:

- (1) Threatens, with or without a condition, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the

⁹² Art. 65-3, 65-4 and 65-5 are added to the list of existing offenses.

offenses set forth in Art. 65-1(1)(b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship or the safety of the fixed platform

- (2) By whatever means, directly or indirectly, intentionally and unlawfully has provided or collected finances, funds, or any other goods of any nature, with the intention to have them utilized or knowing that they will be utilized, in full or partly, to commit any of the offenses set forth in Art. 65-1, irrespective of whether these means have been eventually used to commit or attempt to commit any of these offenses

Shall be sentenced to a term of imprisonment between 5 and 10 years.

- 4) The following shall be added as Art. 65-3:

Art. 65-3 Any person who unlawfully and intentionally:

- (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 act:
- a) uses against or on a ship or fixed platform or discharges from a ship or fixed platform any explosive, radioactive material or biological, chemical or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage; or
 - b) discharges, from a ship or fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (1)(a), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
 - c) uses a ship in a manner that causes death or serious injury or damage; or
 - d) threatens, with or without a condition, to commit an offence set forth in subparagraph (1)(a), (b) or (c); or

(2) transports on board a ship:

a) 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, 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

b) any biological, chemical or nuclear weapon; or

c) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency comprehensive safeguards agreement; or

d) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a biological, chemical or nuclear weapon, with the intention that it will be used for such purpose

Shall be sentenced to a term of imprisonment between 10 and 15 years.

5) The following text shall be added as Art. 65-4:

Art. 65-4 Any person who unlawfully and intentionally transports another person on board a ship, knowing that the person has committed any of the offenses set forth in Art. 65-1, 65-3 and 65-5 with the intention to assist that person to evade criminal prosecution

Shall be sentenced to a term of imprisonment between 5 and 10 years.

6) The following text shall be added as Art. 65-5:

Art. 65-5 (1) Any person who:

- a) attempts to commit an offence set forth in Art. 65-1, Art. 65-3 (1)(a)(b) or (c), or subparagraph (e) of this article; or
- b) participates as an accomplice in an offence set forth in Art. 65-1, 65-3, 65-4, or subparagraph (a) or (e) of this article; or
- c) organizes or directs others to commit an offence set forth in Art. 65-1, 65-3, 65-4, or subparagraph (a) or (e) of this article; or
- d) contributes to the commission of one or more offenses set forth in Art. 65-1, 65-3, 65-4 or subparagraph (a) or (e) of this article, 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 Art. 65-1, 65-3 or 65-4; or
 - (ii) in the knowledge of the intention of the group to commit an offence set forth in Art. 65-1, 65-3 or 65-4
- e) unlawfully and intentionally causes injury resulting in minor bodily harm to any person in connection in connection with the commission of any of the offenses set forth in Art. 65-1, 65-3 or 65-4

Shall be sentenced to a term of imprisonment between 10 and 15 years.

(2) Any person who causes injury resulting in aggravated bodily harm to any person, as provided for in Art. 399 and 400 of the Criminal Code,⁹³ in connection with the commission of any of the offenses set forth in Art. 65-1, 65-3 or 65-4 shall be sentenced to a term of imprisonment between 10 and 15 years.

Any person who causes injury resulting in the death of any person, as provided for in Art. 401 of the Criminal Code,⁹⁴ in connection with the commission of any of the offenses set forth in Art. 65-1, 65-3 or 65-4 shall be sentenced to a term of imprisonment between 20 and 30 years.

Shall be sentenced to a life sentence the premeditated killing of any person in connection with the commission of any of the offenses set forth in Art. 65-1, 65-3 or 65-4.

7) Art. 68-1 shall be replaced by the following text:⁹⁵

Art. 68-1 The offenses set forth in Art. 65-1, 65-2, 65-3, 65-4 and 65-5, when committed ‘against’ a platform or vessel flying the Luxembourgish flag, are assimilated to offenses committed ‘on board’ a platform or ship flying the Luxembourgish flag.

8) Art. 69, paragraph 2 shall be replaced by the following text:

‘Any Luxembourgish national or any non-national who has committed any of the offenses set forth under Art. 19, 20, 23, 32, 33, 41, 43, 44, 47, 57, 58, 65-1, 65-2, 65-3, 65-4 and 65-5 of the present Code outside of the territory of the Grand Duchy, may be prosecuted in the Grand Duchy.’

⁹³ Art. 399 of the Criminal Code refers to either bodily harm that results in disease or incapacity to work. Art. 400 refers to bodily harm resulting in an incurable disease, permanent incapacity to work, permanent organ failure or grave mutilation. Both articles provide for higher penalties when the bodily harm was inflicted with premeditation.

⁹⁴ Article 401 of the Criminal Code refers to wilful bodily harm that has results in the unintentional death of a person, or premeditated acts of violence.

⁹⁵ Ibid.

9) Art. 69-1 shall be replaced by the following text:

Art. 69-1 Any person present in the territory of the Grand Duchy who has committed any of the offenses set forth in Art. 65-1, 65-2, 65-3, 65-4 and 65-5 outside the territory of the Grand Duchy, shall be prosecuted and sentenced in the Grand Duchy when a request for extradition has been made but the offender is not extradited.⁹⁶

Art. 3 The Attorney General is the competent authority in charge of receiving and responding to requests for mutual legal assistance and cooperation or their transmission to the competent authorities for execution, in accordance with articles 11, 12 and 13 of the 2005 SUA Convention. The Attorney General may refuse assistance or cooperation if the execution of the request endangers the sovereignty, security or public order or other essential interests of the Grand Duchy of Luxembourg.

Art. 4 (1) The Attorney General may request the assistance of other State Parties to prevent or suppress offenses, where there are reasonable grounds to suspect that an offence set forth in Art. 65-1, 65-2, 65-3, 65-4 or 65-5 has been, is being, or is about to be committed involving a ship flying the Luxembourgish flag.

(2) The Attorney General is the competent authority in charge of receiving and responding to requests for confirmation of nationality and/or authorizations to board by other State Parties in accordance with article 8*bis*, paragraph 5 of the 2005 SUA Convention, when there are 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 offense set forth in Art. 65-1, 65-2, 65-3, 65-4 or 65-5.

(3) The Attorney General may grant 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 set forth in Art. 65-1, 65-2, 65-3, 65-4 or 65-5 has been, is being or is about to be committed. If nationality is confirmed, the Attorney General shall either authorize the requesting Party to board and to take appropriate measures set out in this paragraph, subject

⁹⁶ Ibid.

to any conditions he may impose in accordance with paragraph 4, or decline to authorize the boarding and search.

(4) When evidence of conduct described in Art. 65-1, 65-2, 65-3, 65-4 or 65-5 is found as the result of a boarding conducted pursuant to this article, the Attorney General may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of further instructions from the Grand Duchy. The Attorney General may subject his authorization under this paragraph to conditions, including obtaining additional information from the requesting Party, and to conditions relating to the responsibility for and the extent of measures to be taken.

(5) For all boardings pursuant to this article, the Grand Duchy has the right to exercise jurisdiction over a detained ship flying its flag, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. However, the Grand Duchy may consent to the exercise of jurisdiction by another State having jurisdiction under article 6 of the 2005 SUA Convention.

*

4. Commentary of the Draft Articles

Art. 1

This article contains the standard formula used in national legislation to approve the relevant international convention. This article makes the international convention binding upon Luxembourg and has direct effect under national law.

Art. 2

1) Art. 3, paragraph 4: Art. 3 of the Criminal Code for the Marine enumerates the list of persons to whom the Criminal Code for the Marine applies. Its paragraph 1 provides that it applies to all members of the crew and any person accepted on board the vessel, including passengers. As exception to this provision, paragraph 4 provides that the penalties applicable in an exhaustive list of articles apply to any person guilty of any of the offenses contained in them. The law incorporating the 1988 SUA Conventions has

added the offenses provided for in the 1988 SUA Conventions to this exhaustive list. The amendment of Art. 3, paragraph 4 is therefore necessary to add the new offenses established under the 2005 SUA Conventions to this list.

- 2) **Art. 65-1(1)** makes the following offenses a crime under Luxembourgish law, when committed unlawfully and intentionally: (a) the seizure or exercise of control over a ship or fixed platform by force, (b) any act of violence against a person onboard a ship or a fixed platform, (c) the destruction or damage caused to a ship, its cargo or a fixed platform, (d) the placement on board a ship of any device or substance likely to destroy the ship or cause damage to the ship or its cargo, (e) the destruction or damaging of maritime navigational facilities, (f) the communication of information known to be false, (g) minor injury of any person in connection with any of the offenses set forth in paragraphs (a) to (f). These crimes are punished with a 10 to 15-year prison sentence.

Art. 65-1(2): Under the existing provision, when in connection with any of these offenses a person 1) suffers aggravated injuries as defined in the Criminal Code under Art. 399 and 400,⁹⁷ the punishment is imprisonment of 15 to 20 years; 2) suffers wilful bodily harm resulting in unintentional death as defined in Art. 401 of the Criminal Code, the punishment is imprisonment of 20 to 30 years; 3) is killed with premeditation, the punishment is a life sentence.

Paragraph (g) which penalizes the injury or death of a person in connection with any of these crimes is deleted under the 2005 SUA Convention. Therefore, Art. 65-1(2) must be deleted as well, as it directly relates to paragraph (g). Under Luxembourgish laws, there are different levels of ‘injury,’ depending on whether the victim has suffered minor injuries, aggravated injuries and/or a permanent disability or incapacity to work, or fatal injuries, and whether the offender acted with premeditation or not. These provisions are reinserted in Art. 65-5(2) which deals with the injury or death of persons in connection with any of the SUA offenses. This reshuffling of this paragraph reflects the logic of the 2005 SUA Convention.

⁹⁷ See (n 89)

- 3) **Art. 65-2:** Under current Luxembourgish laws, no effect has been given to articles 3 (2)(a) and (b) of the 1988 SUA Convention which criminalizes the attempt, commissioning, or persons otherwise accomplice to any of the offenses set forth in article 3(1). Neither was effect given to article 3(2)(c) which makes the threat aimed at compelling a person to do or refrain from any act to commit any of the offenses set forth in article 3(1) a crime.

The *existing* text of Art. 65-2 contains elements that are absent from both the 1988 and 2005 SUA Convention but have been added by the Luxembourgish legislator.

This *existing* text is kept under 65-2(2). Furthermore, the provisions provided for under article 3(2) of the 2005 SUA Convention and article 2(2) of the 2005 SUA Fixed Platform Protocol are added to Art. 65-2. Article 3(2) of the 2005 SUA Convention only reflects article 3(2)(c) of the 1988 SUA Convention, as article 3(2)(a) and (b) have been deleted under the 2005 SUA Convention. Article 3(2) makes the threat aimed at compelling a person to do or refrain from any act to commit any of the offenses set forth in article 3(1)(b)(c) and (e), if that threat is likely to endanger the safe navigation of the ship the safety of the fixed platform.

The reason why this provision is integrated into Art. 65-2 is that it is closely related to persons involved in a SUA offense in a role other than that of the active offender.

- 4) **Art. 65-3:** This articles is added to give effect to the new offenses established under article 3*bis* of the 2005 SUA Convention and 2*bis* of the 2005 SUA Fixed Platforms Protocol. The offenses under Art. 65-3(1) are maritime terrorism offenses and those under 65-3(2) criminalize the illicit trafficking and delivery of WMD and related materials.

Article 3*bis*(2) of the 2005 SUA Convention does not require a specific incorporation into Luxembourgish law, as its purpose is only to describe what does *not* constitute an offense under the 2005 SUA Convention.

- 5) **Art. 65-4:** This provision incorporates article 3*ter* of the 2005 SUA Convention, which criminalizes the transportation of fugitives on board a vessel. It provides the Luxembourgish judiciary with the necessary legal basis to prosecute this offense

whenever a Luxembourg flagged vessel was used for, or a national of Luxembourg involved in transporting fugitives.

- 6) **Art. 65-5:** This provision incorporates article *3^{quater}* of the 2005 SUA Convention and article *2^{ter}* of the 2005 SUA Fixed Platforms Protocol, which criminalizes the injury or death of a person in connection with any of the established SUA offenses. It also makes the attempt to commit, the participation as an accomplice, the organization or direction of and the contribution to the commission of any of the SUA offenses a crime under Luxembourgish law. Since the Luxembourgish Criminal Code differentiates between different levels of bodily harm, injury and killing of a person, different levels of penalties are provided for. In the currently existing law which incorporated the 1988 SUA Conventions, these provisions were found under Art. 65-1(2).
- 7) **Art. 68-1:** It shall be noted that Art. 68 which precedes Art. 68-1 in the Criminal Code for the Marine⁹⁸ provides that ‘any offense committed onboard a vessel flying the Luxembourgish flag is assimilated to an offense committed on the territory of the Grand Duchy.’⁹⁹ Art. 68 further attributes jurisdiction to the competent courts in Luxembourg to adjudicate such cases.

Added under the 1988 SUA Convention, Art. 68-1, which must be read in conjunction with Art. 68, extends Luxembourg’s jurisdiction over any person that has committed a 1988 SUA offense either onboard or against a Luxembourg-flagged ship. This provision therefore allows the Luxembourgish judiciary not only to establish jurisdiction and to prosecute offenders that have engaged in unlawful acts of violence *on board* Luxembourg-flagged ships, but also offenders that have committed crimes *against* Luxembourg-flagged vessels. The proposed amendment of this article in the present draft law adds the 2005 SUA Convention offenses that may be assimilated as acts perpetrated onboard Luxembourg-flagged vessels.

Read together, Art. 3 paragraph 4, 68, 68-1 and 68-1 as amended establish Luxembourg’s jurisdiction over any of the 2005 SUA offenses when committed against or onboard a

⁹⁸ It shall be noted that these are two separate stand-alone articles in the Criminal Code for the Marine.

⁹⁹ Author’s translation of Art. 68 of the Criminal Code for the Marine.

platform or ship flying the Luxembourgish flag, thereby effectively implementing article 6(1)(a) of the 2005 SUA Convention.

- 8) Art. 69, paragraph 2:** The existing Art. 69 paragraph 2 of the Criminal Code for the Marine provides that ‘any Luxembourgish national or non-national who has committed outside the territory of the Grand Duchy one of the offenses set forth under Art. 19, 20, 23, 32, 33, 41, 43, 44, 47, 57 and 58 of the Code may be prosecuted in the Grand Duchy.’ Paragraph 3 further provides that ‘such prosecutions may take place even if the offender is not present in the territory of the Grand Duchy.’¹⁰⁰

The proposed amendment of this article adds the new 2005 SUA offenses to an exhaustive list of offenses that allows Luxembourg to establish jurisdiction over any national or non-national that has committed any of the 2005 SUA offenses against or onboard platforms or vessels flying the Luxembourgish flag, even when such person is not present in the Grand Duchy’s territory. Read in conjunction with Art. 3 paragraph 4, 68, 68-1, 68-1 as amended and 69 as amended, this provision establishes Luxembourg’s jurisdiction based on the nationality, protective and passive personality principles in accordance with article 6 of the 2005 SUA Convention.

- 9) Art. 69-1:** This article establishes the principle ‘aut dedere, aut judicare,’ either to extradite or to prosecute offenders present in the territory of the Grand Duchy. The 2005 SUA offenses are added to the list of extraditable offenses provided for by national law. This article effectively incorporates articles 6(4) and 10(1) of the 2005 SUA Convention, which require States to establish jurisdiction over persons present in their territory when the alleged offender is not extradited. In this article, Luxembourg does not expressly make extradition conditional on the existence of treaty, therefore the ordinary provisions of the Criminal Code and Criminal Procedure Code apply.

¹⁰⁰ Author’s translation of Art. 69 of the Criminal Code for the Marine.

Art. 3

This article empowers the Attorney General to provide other State Parties with legal assistance and cooperate with them for the purpose of suppressing and preventing offenses committed under the 2005 SUA Conventions. At the same time, Luxembourg reserves the right to deny such assistance to cooperation where it would endanger the sovereignty, security or public order of the Grand Duchy.

Art. 4

Article 4 of the Law incorporating the 2005 SUA Conventions implements the ship boarding procedures introduced under article 8*bis* of the 2005 SUA Convention.¹⁰¹ Since Luxembourg is a landlocked country and does not dispose of a Navy or other maritime law enforcement services, it is sufficient to incorporate only those provisions of article 8*bis* which may apply to Luxembourg in its role as a flag State. Article 4 clearly designates the competent authorities to respond to requests for claims of nationality, authorizations of boarding and other appropriate measures, thereby giving effect to article 8*bis*(15) of the 2005 SUA Convention. Since Luxembourg has exclusive jurisdiction over the vessels flying its flag on the high seas, criminal jurisdiction remains in the hands of the Luxembourgish judiciary, unless authorization to exercise jurisdiction has been expressly given to another State. Article 4 specifically establishes a basis under which Luxembourg may surrender its jurisdiction to another State.

¹⁰¹ N.b.: Grand Ducal Decrees in the context of the ratification of international treaties always limit themselves to approve amendments to existing treaties. They do not add, detail or regulate specific provisions. For this reason, the ship boarding procedures contained in article 8*bis* of the 2005 SUA Convention are not incorporated in a separate decree, but as an additional article in the draft law. It is added as article 4 and refers back to the 2005 SUA Convention. This method of '*renvoi*' is commonly used in national laws when incorporating specific provisions of international conventions. An example is the incorporation into national laws of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. One of the articles of the law incorporating this Convention designates the competent authority in charge of the mutual legal assistance provision in the Convention, while pointing to the specific article in the Convention. It should be noted that article 17 the 1988 UN Vinnea Drug Convention provides for ship boarding procedures similar to those in 2005 SUA Convention, but the national legislator has not expressly incorporated those provisions into national law. In the present draft legislation of the 2005 SUA Conventions, it has been opted to incorporate the ship boarding provisions as Art. 4, while making a *renvoi* to article 8*bis* of the 2005 SUA Convention.

Annexes

- Annex I: Draft Law incorporating the 1988 SUA Conventions
- Annex II: Law of the 27th October 2010 incorporating the 1988 SUA Conventions
- Annex III: Disciplinary and Criminal Code for the Marine
- Annex IV: Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
- Annex V: Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

References

Beckman RC and Roach JA, *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (NUS Centre for International Law series, Edward Elgar 2012).

Foreign Affairs, Defence and Trade Committee of New Zealand, 'International Treaty Examination of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf' (2009).

International Maritime Organization, 'SUA Convention 2005'
<<http://www.imo.org/en/about/conventions/listofconventions/pages/sua-treaties.aspx>>
accessed 15 December 2018.

Klein N, *Maritime Security and the Law of the Sea* (Oxford University Press 2011).

Kraska J, 'Effective Implementation of the 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2017) 70(1) *Naval War College Review*.

National University of Singapore, 'A Checklist for Assessing Implementation In National Legislation,' Center for International Law, (2010) <https://cil.nus.edu.sg/wp-content/uploads/2010/10/Checklist-for-2005-SUA-Protocol.pdf> accessed 18.12.2018.

Roach AJ, 'Initiatives to Enhance Maritime Security at Sea' (2004) 28 *Marine Policy*.

United States Department of State, 'Fact Sheet - Protocols to the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)' (2005) <<https://2001-2009.state.gov/t/isn/rls/fs/58322.htm>> accessed 29 December 2018.

Valencia MJ, *The Proliferation Security Initiative: Making Waves in Asia* (Routledge, Oxford 2005).