



LEGAL COMMITTEE
88th session
Agenda item 3

LEG 88/3/2
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**REVIEW OF THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS
AGAINST THE SAFETY OF MARITIME NAVIGATION, 1988, AND ITS PROTOCOL
OF 1988 RELATING TO THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE
SAFETY OF FIXED PLATFORMS LOCATED ON THE CONTINENTAL SHELF
(SUA CONVENTION AND PROTOCOL)**

Comments on draft article 3bis

**Submitted by the International Chamber of Shipping (ICS), the International Shipping
Federation (ISF) and the International Confederation of Free Trade Unions (ICFTU)**

SUMMARY

Executive summary: This submission comments on document LEG 88/3 and on the proposed new offences (draft article 3bis) in particular.

Action to be taken: Paragraph 18

Related documents: LEG 88/3

1 This document is submitted as a comment on document LEG 88/3 and on draft article 3bis in particular.

General comments

2 The shipping industry supports in principle the United States Government initiative to strengthen the SUA Convention and its Protocol to combat terrorism and enhance the safety of maritime navigation. The initiative is consistent with resolution A.924(22) which called for a review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships.

3 The shipping industry participated constructively in the development of the maritime security amendments to SOLAS and the ISPS Code and is committed to ensuring that the industry fulfils the demands placed on it by those instruments.

4 The introduction of further security measures that have an impact on the shipping industry concentrate on the introduction of criminal offences and on measures to prevent criminal activities. Such measures should therefore be confined to what is necessary and have clear parameters. Proposed new measures should respect and be consistent with the law of the sea and international human rights law. In addition, practical safety considerations should be paramount.

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Proposed new offences

5 Provisions that may give rise to criminal liabilities should be drafted in a way that is clear, unambiguous and precise. Otherwise interpretation of the provisions may vary from jurisdiction to jurisdiction and seafarers and others may unwittingly fall foul of the criminal law. Certainty and clarity are essential in all areas of the law but especially in criminal law where a breach may result in imprisonment or other criminal sanctions. The following suggestions are made in the light of these views.

6 Article 3*bis*(1): For the sake of clarity and in order to be consistent with more recent Conventions (e.g. the Convention on The Suppression of Terrorist Bombings and the Convention for the Suppression of the Financing of Terrorism), we would like to suggest the insertion of the words “*within the meaning of this Convention*” after “offence”. The same comment is applicable to article 3(1) and the chapeau of 3*ter*.

7 Article 3*bis*(1)(a) and article 3*bis*(1)(b)(i): We would agree with others on the insertion of “unduly” and “seriously” in article 3*bis*(1)(a). This should also apply to article 3*bis*(1)(b)(i). We would also suggest the deletion of the words “by its nature or context” in article 3*bis*(1)(a) on the basis that the phrase is too vague and broad and introduces an objective element in interpreting the purpose of the act.

8 Article 3*bis*(1)(a)(iv) refers to a threat "with or without a condition". The condition however should have a realistic chance of being fulfilled since an unreasonable condition being attached to a threat would make it trivial. We therefore propose the phrase “that could reasonably be fulfilled” be inserted after the word “condition”. The same amendment should apply to article 3(2).

9 We believe it would be inappropriate to criminalise the transport of WMD in maritime transport, and would suggest the deletion of article 3*bis*(1)(b)(ii),(iii), and (iv). The transport of WMD is not an activity which *per se* should be treated as an act of terrorism. However, if the transport is intentionally connected with terrorist activity towards a Government or an international organization, the transport will be considered as aiding the commission of a criminal act and will give rise to criminal liability as proposed in article 3*ter*(3) (accomplice) and (5) (contributor). Shipping is a service industry in competition with other modes of transport. It is therefore essential that the proposed amendments to the SUA Convention do not disadvantage shipping by putting in place requirements that do not apply to other transport modes, for example by only criminalizing the transport of weapons of mass destruction in maritime transport.

10 Article 3*bis*(1)(b) and (c): The shipping industry is very concerned about a growing criminalization of seafarers. The term “transport” potentially creates a broad net of criminal liability covering all the participants in a logistics chain including charterers, operators, banks, and crew members.

11 We have noted the explanation in footnote 13 of annex 1 of document LEG 88/3 that the term is intended to cover situations where goods have been contracted for transport or smuggled on board a ship, and is not intended to cover individuals such as crew members who do not have responsibility or control over such goods. However, this interpretation of the term is not clear from the provision itself nor is it legally binding given that it is not in the actual text of the Convention.

12 Accordingly we suggest that additional text should be inserted in article 3*bis*(1)(b) and (c) to give effect to footnote 13 of annex 1 of document LEG 88/3.

13 Alternatively, it may be appropriate to define “transports” in article 1 to clarify that it does not include individuals, such as crewmembers, who do not have responsibility or control over goods or persons, or who are acting under duress and/or threat and/or oppressive conduct by a third party.

14 Article *3ter*(1): We note that this offence has been shifted from article 3(1)(g) of the existing SUA to proposed new article *3ter*(1). However in its present position, the offence has to be committed “unlawfully and intentionally” whereas in its proposed new position no such requirement applies. We believe that the offence should continue to be qualified by a requirement that it be committed “unlawfully and intentionally”.

15 Furthermore we believe that there should be a mental element for the other proposed offences in article *3ter*. Intentions should be taken into account otherwise unwitting and innocent seafarers may be liable for the proposed offences.

16 In order to assist the Committee we attach a clean copy of article *3bis* in annex 1 to this document.

17 The organizations concerned have further comments on other sections of the text and will raise these at the appropriate time during the course of the discussions.

Action requested of the Legal Committee

18 The Committee is invited to take into account the views of the sponsoring organizations when discussing the revision of the SUA Convention.

ANNEX

Article 3bis

- 1 Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
 - (a) when the purpose of the act is to seriously intimidate a population, or to unduly compel a Government or an international organization to do or to abstain from doing any act:
 - (i) uses against or on a ship or discharges from a ship any explosive, radiological material or prohibited weapon in a manner that causes or is likely to cause, on or off the ship, serious injury or damage, or
 - (ii) [discharges, from a ship, oil, liquefied natural gas, or other like substance in such quantity or concentration, that causes or is likely to cause serious injury or damage, or]
 - (iii) uses a ship in a manner that causes or is likely to cause serious injury or damage, or
 - (iv) threatens, with or without a condition that could reasonably be fulfilled, as is provided for under national law, to commit an offence set forth in subparagraph (i), (ii) or (iii); or
 - [(b) transports on board a ship any explosive or radiological material, knowing that it is intended to be used to cause, or in a threat to cause, serious injury or damage for the purpose of seriously intimidating a population, or unduly compelling a Government or an international organization to do or to abstain from doing any act; or]
 - (c) transports another person on board a ship knowing that the person has performed an act that constitutes an offence under article 3 or paragraph 1(a) or (b) of this article or an offence set forth in any treaty listed in the annex and intending to assist that person to evade criminal prosecution.
 - 2 On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Protocol to the State Party, the treaty shall be deemed not to be included in paragraph 1, subparagraph (c). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the Secretariat of this fact.
 - 3 When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.
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