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Agenda item 4

LEG 89/4/8
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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 FIXED PLATFORMS LOCATED ON THE CONTINENTAL
SHELF (SUA CONVENTION AND PROTOCOL)**

Comments on the draft preamble, article 1, articles *3bis* and *3ter*

**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 document comments on document LEG 89/4/1 and on the proposed preamble, article 1 (definitions), article *3bis* and article *3ter* (new offences) in particular.

Action to be taken: Paragraph 22

Related documents: LEG 89/4/1

1 This document is submitted as a comment on document LEG 89/4/1 and on the draft preamble, article 1, and articles *3bis* and *3ter* in particular.

General comments

2 The shipping industry, comprising both shipowners' and seafarers' representatives, reiterates its support, in principle, for the United States Government initiative to strengthen the SUA Convention and its Protocol to combat terrorism and enhance the safety of maritime navigation. The industry participated constructively in the development of the maritime security amendments to SOLAS and the ISPS Code, and maintains its commitment to securing improvements in this area.

3 The further security measures proposed in a draft protocol to the SUA Convention focus on the introduction of new criminal offences and on measures to prevent criminal activities. Bearing in mind the proposed measures deal with criminal law and have potentially far-reaching consequences for shipping industry personnel and commercial activity, they should be confined to what is necessary and have clearly defined parameters.

4 The proposed new measures should achieve a balance between maritime security considerations and respect for the law of the sea and international human rights law. They should also reflect the practical realities within the industry to ensure that they achieve the desired result without compromising human rights and commercial viability. It would be

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unfortunate if the proposed new measures, which are meant to promote security and safety of maritime navigation, were to have the unintended effect of criminalising seafarers and shipowners, and of disrupting maritime trade.

Preamble

5 There is a proposal to include preambulatory clauses with respect to United Nations Security Council Resolution 1540 (UNSCR 1540). The shipping industry supports the inclusion of such clauses on the basis that they reproduce the relevant text of the resolution. This would ensure that UNSCR 1540 is not inadvertently misinterpreted.

6 We also support the proposed preambulatory clause with respect to UNCLOS as set out in footnote 1 of annex 1 of LEG 89/4/1, recalling Section 1 of Part VII of that Convention.

Article 1

Defining ‘transports’

7 A number of delegations have expressed a desire for a definition of the term ‘transports’. The shipping industry supports the view of these delegations. Such a definition is necessary to clarify who can be prosecuted for the offences under article 3*bis* (1)(b) and (c), and would ensure that only those who are actually culpable are prosecuted. Broadly criminalising transportation may result in the prosecution of innocent parties such as seafarers who do not have adequate responsibility and/or effective control over the goods being transported. For this reason, we would propose including the first option provided in footnote 12 of Annex 1 of LEG 89/4/1 in article 1, with the following amendments:

*“ ‘transports’ means to have responsibility for initiating, **or** to have effective control over ~~or to otherwise take action to further~~ the delivery of the item or the evasion of persons from criminal prosecution.”*

8 The words ‘or to otherwise take action to further’ have been deleted because a seafarer in the course of his/her normal duties on board a ship could be said to be taking action to further the delivery of the item or person because it is his/her job to facilitate the smooth sailing of the vessel to the intended destination. We are also open to alternative formulations that address the key issues of responsibility and effective control.

Article 3*bis*

Article 3*bis* (1)(b)

General

9 As previously stated, we believe that it would be inappropriate to criminalize the transportation of WMD in maritime transport alone – there is no equivalent initiative relating to other modes of transport – and we remain of the view that article 3*bis*(1)(b) (i) to (iv) should be deleted. In addition, the transportation of WMD is not an activity that *per se* should be treated as an act of terrorism. We reiterate that if the transportation is intentionally connected with terrorist activity towards a Government or an international organization, the transportation 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).

If the Legal Committee considers it necessary to include the offences proposed in article 3bis (1)(b), we would draw attention to the issues below:

Terrorist intent

10 Since they were first introduced during the eighty-seventh session of the Legal Committee in October 2003, discussions on the new offences proposed in article 3bis (1)(b), relating to non-proliferation, have included consideration of the need for a terrorist motive for these offences. The shipping industry supports the view of various delegations that have called for the inclusion of a terrorist motive in the chapeau of article 3bis (1)(b) for all the non-proliferation offences.

11 The SUA Convention is being reviewed because it is considered necessary to adopt provisions supplementary to those of the Convention, to suppress additional terrorist acts of violence against the safety and security of international maritime navigation and to improve its effectiveness, as stated in the preamble. Assembly resolution A.924(22), which provides the mandate for the review refers to “the need for the Organization to review, with the intent to revise, existing international legal and technical measures, and to consider appropriate new measures, to prevent and suppress terrorism against ships and to improve security aboard and ashore, in order to reduce the risk to passengers, crews and port personnel on board ships and in port areas and to the vessels and their cargoes.”

12 In other words, the SUA Convention is being reviewed to address the perceived heightened risk of terrorism. It is not a non-proliferation Convention. If it is decided that the SUA Convention should include non-proliferation offences, they should be directed at combating terrorism and there should be a requirement for a terrorist motive.

13 We would therefore propose that the terrorist motive currently in article 3bis (1)(a) be reproduced in the chapeau of article 3bis (1)(b) as follows:

“(b) transports on board a ship, 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: ...”

Subjective or mental elements – knowledge and intent

14 Given the seriousness with which the offences in article 3bis (1)(b) are viewed, and the penalties that could potentially be imposed on individuals, it is crucial that the subjective, or mental element necessary to commit the offence is sufficiently well defined. It is this subjective or mental element that should establish the basis for who is criminally liable. Factors that need to be taken into account include the fact that due to the pressures of modern shipping, it is unrealistic to expect seafarers to know exactly what they are transporting. Consideration should also be given to circumstances where seafarers may be acting under duress or threats.

15 It is crucial that all of the offences in article 3*bis* (1)(b) (i) to (iv) contain the mental elements of knowledge and intent so as to avoid miscarriages of justice. The shipping industry is particularly concerned that article 3*bis* (1)(b) (ii) does not provide sufficient protection to innocent personnel. The chapeau text ‘unlawfully and intentionally’ does not provide seafarers and shipowners with adequate protection. The international movement of these types of goods is controlled by exporting and importing regimes and not by restrictions on their carriage. It is ‘unlawful’ to export/import any prohibited weapon without the proper permits (the existence of which will be unknown to seafarers, and in some cases also unknown to shipowners, because they will be obtained by the consignor/consignee). And it is very much the ‘intention’ of seafarers and shipowners to transport the goods on board the ship because it is their job to do so. As this is a criminal law instrument, there is a need for clarity and any ambiguities should be eliminated.

16 The offences in article 3*bis* (1)(b) (i) to (iv) are drawn from the various non-proliferation treaties. But they differ in that the offences in the non-proliferation treaties relate to States parties, whereas it is proposed that the SUA offences would apply to non-State actors – individuals and commercial legal entities. We appreciate that States may implement their obligations under the non-proliferation treaties through their penal codes so that they apply to individuals. However, criminal offences that apply to individuals commonly include a subjective or mental element.

17 A number of delegations indicated during the Working Group meeting in July 2004 that there was a need for further discussion on this issue, particularly on the meaning of the term ‘knowing’, and we do not wish to pre-empt that discussion by suggesting text at this stage.

Article 3*bis* (1)(c)

18 Our comments above in relation to article 3*bis* (1)(b) are also applicable to article 3*bis* (1)(c).

19 We are concerned that article 3*bis* (1)(c) refers to offences in other treaties because shipowners and seafarers have no reason to know about complex non-proliferation treaties and it would be unreasonable to expect them to know what constitutes an offence under those instruments.

Article 3*ter*

Article 3*ter* (5)

20 We would propose the deletion of paragraph 5 (b) because knowledge of the intention of others to commit an offence should not be sufficient to criminalise an individual. We therefore propose that article 3*ter* (5) read as follows:

“5. *contributes to the commission of one or more offences as set forth in Article 3, 3 bis or paragraph 1 or 2 of this Article by a group of persons acting with a common purpose, intentionally and either:(a) 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 as set forth in Article 3 or Article 3 bis or*

b) — in the knowledge of the intention of the group to commit an offence as set forth in Article 3 or Article 3 bis.

21 The shipping industry has 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

22 The Legal Committee is invited to take into account the views of the shipping industry when discussing the revision of the SUA Convention.
