

# CMI NEWS LETTER

*Vigilandum est semper; multae insidiae sunt bonis.*

COMITE MARITIME INTERNATIONAL

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## NEWS FROM THE CMI

### THE CMI AND CROATIAN MARITIME LAW ASSOCIATION JOINT SYMPOSIUM ON MARITIME LAW

The Joint Symposium, held in Dubrovnik on 11<sup>th</sup> and 12<sup>th</sup> May 2007, was a great success, for the high number of participants, the interest of the topics on the agenda and the perfect organisation of the work as well as of the social and sightseeing programme by the Croatian Maritime Law Association. The Symposium consisted of two sessions, the first, under the responsibility of the Croatian Maritime Law Association, was held in the afternoon of Friday 11<sup>th</sup> May; the second, under the responsibility of the CMI, was held in the morning of Saturday 12<sup>th</sup> May. During the first session papers were delivered by Patrick Griggs on *Wreck Removal*, Aleksandar Bravar on *Maritime Transportation by Tankers and Maritime Environment*, Igor Vio on *The New Croatian*

*Maritime Code*, Peter Kragic on *Issues of transport law*, Dragar Bolanca on *Carriage of passengers in Croatia*, and Marija Pospisil Miler on *IMO Reservation and Guidelines for the Implementation of the Athens Convention*. During the second session papers were delivered by Francesco Berlingieri and Gregory Timagenis on *Rules of Procedure in Limitation Conventions*, Stuart Hetherington on *Places of Refuge (an Update)*, Chris Davis on *The Changing Seascape of Salvage Law*, Archie Bishop on *Environmental Salvage*, José Maria Alcantara on *Sharing information on clients, competition law and practice*.

The Symposium was preceded by a meeting of the CMI Executive Council on 10<sup>th</sup> May and the CMI Assembly in the morning of the 11<sup>th</sup> May.

## MARITIME CRIMINAL ACTS

### REPORT OF THE INTERNATIONAL WORKING GROUP ON UNIFORMITY OF LAW RE MARITIME CRIMINAL ACTS 2005-2007

At its meeting in Hamburg in November of 2004 the Executive Council authorized the undersigned to contact the majority of the Organizations that had participated in the earlier (1998-2000) Joint International Working Group (JIWG) on Acts of Piracy and Maritime Violence, with a view to possible reconstitution of the Group to examine the situation following the atrocities of 11 September 2001, with the CMI providing secretariat services.

The earlier JIWG had ultimately produced the Model National Law approved by the Assembly of the Comité and transmitted to the Member National Associations with a view to their promotion of the Model Law to their respective government authorities and parliaments. For a number of reasons – not least that the 9/11 attacks had thrust terrorism into the forefront of international concern, and correspondingly eclipsed to a significant degree the previous focus upon piracy and maritime violence – the Model National Law had failed to gain sufficient momentum to be considered viable when solutions were urgently being sought to what had become a larger and more threatening world situation.

Representatives of all of the previously participating Organizations – with the exception of the International Maritime Organization (IMO) and the United Nations Office of Legal Adviser, Division of Law of the Sea (UNOLA/DOALOS) – met together in London on 12 April 2005 to discuss the developments since 2001 and to decide any future course of action. Unanimous agreement was quickly reached that further work should be done, taking the text of the previous Model National Law as a basis and also taking into consideration intervening events such as the 2002 *TAJIMA* incident which was brought to the attention of the IMO Legal Committee by the Government of Japan in early 2004, giving rise to concern over problems of coastal state jurisdiction re violent crimes committed on board foreign-flag ships and also the need to facilitate prosecution of organized maritime crime and serious maritime criminal acts other than piracy and armed robbery. By this time, the 9/11 atrocities and the subsequent international war on terrorism had also revealed certain lacunae in the 1988 Convention on Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), and IMO had undertaken an accelerated process of formulating

wide-ranging amendments to the 1988 Convention which were scheduled to come before a diplomatic conference in October 2005.

The Group agreed to circulation of a Questionnaire to the CMI National Member Associations seeking further information as to the status of the Model National Law, ratifications of the 1988 SUA Convention, and the provisions of current national law regarding serious maritime criminal acts. The JIWG next met in London on 1 December 2005 to consider the responses to the CMI's Questionnaire, to review the work of the diplomatic conference adopting the 2005 Protocol to the SUA Convention, and to decide the course of future work. It was agreed that it was necessary to re-write the former Model National Law to take into account the 2002 ISPS Code and the broad range of the 2005 Protocol, to deal as well with serious maritime criminal acts including piracy and maritime violence, to put forward a solution to the "*TAJIMA* problem", and that the document as finally agreed should be laid before the IMO Legal Committee.

At its subsequent meeting in London on 10 April 2006, the JIWG resolved that the format of the Model National Law should be changed, that the new document should be titled as a draft of provisions for national legislation, and that the name of the Group should change to that set forth above in order to emphasize the increase in the scope of its work. Numerous specific changes in the document were agreed, and it was decided to hold one final meeting in late 2006 with a view to laying the document before the IMO Legal Committee at its first meeting in 2007.

The Group held its last meeting in London on 6 December 2006 and reached final agreement in principle on the form and scope of *Draft Guidelines for National Legislation on Maritime Criminal Acts*. Following that meeting four successive drafts of the document were circulated to the participating Organizations, and unanimous agreement on the text has now been achieved.

The Group has likewise agreed that the CMI should submit the *Draft Guidelines for National Legislation on Maritime Criminal Acts* to IMO, together with a short background paper, for the attention of the Legal Committee in consideration of its future work programme at its next regular Session in October 2007. It was also agreed that each of the Non-Governmental Organizations

participating in the work of the JIWG should submit a supporting paper for consideration by the Legal Committee at the same Session.

Sincere thanks are due to Messrs. Ince & Co. of London, for their generosity in providing meeting space, luncheon and copying facilities for the meetings of the Group.

The proposed background paper and the text of the *Draft Guidelines for National Legislation on Maritime Criminal Acts* are attached hereto. The covering paper submitting the document will be drafted with the assistance of the IMO Secretariat. Respectfully submitted,

FRANK L. WISWALL, JR.\*  
*Chairman of the JIWG*

## DRAFT GUIDELINES FOR NATIONAL LEGISLATION

### BACKGROUND PAPER

In 1997 the Comité Maritime International (CMI) invited a group of concerned international organizations to join together in examining the rapidly expanding plague of piracy. It was agreed to form a Joint International Working Group (JIWG), with the CMI providing secretariat services, the aim being to devise more effective measures for the criminal prosecution of cases of piracy and armed robbery. Over a period of three years the JIWG produced a Model National Law on Piracy and Maritime Acts of Violence, which was forwarded to and approved by the constituent Organizations in early 2001.

Before the Model National Law was able to gain significant momentum the events of 9/11/2001 brought the threat of terrorism into sharp focus, and for a time both the frequency of armed robberies and pirate attacks as well as the limited public attention they had received were in sharp decline. Other intervening events, such as the 2002 *TAJIMA* incident which was brought to the attention of the Legal Committee of the International Maritime Organization (IMO) by the Government of Japan in early 2004, began to give rise to concern over problems of coastal state jurisdiction re violent crimes committed on board foreign-flag ships and also the prosecution of serious maritime criminal acts other than piracy and armed robbery. At the same time, the 9/11 atrocities and the subsequent international war on terrorism revealed certain lacunae in the 1988 Convention on Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), and IMO undertook an accelerated process of formulating wide-ranging amendments to the 1988 Convention which resulted in adoption of the SUA Protocol in October 2005.

In early 2005 the CMI contacted the constituent organizations of the original JIWG, suggesting that

they meet again to examine issues of serious maritime crime beyond piracy and armed robbery and also various jurisdictional aspects not previously considered. The reconstituted JIWG has over the past two years produced a set of *Draft Guidelines for National Legislation on Maritime Criminal Acts* considerably broader in scope than the 2001 Model Law, with the intention of presenting these to the IMO Legal Committee for its consideration in October of 2007.

In addition to the CMI, the organizations represented on the JIWG over the period since work first began in 1997 have been the Baltic and International Maritime Council (BIMCO), the International Chamber of Shipping (ICS), the International Criminal Police Organization (INTERPOL), the International Group of P&I Clubs (IGP&I), the International Chamber of Commerce's International Maritime Bureau (ICC-IMB), the International Transport Workers Federation (ITF), and the International Union of Marine Insurance (IUMI). In the earlier work on the Model National Law – because of their particular concerns re piracy – both the United Nations Office of Legal Adviser, Division of Law of the Sea (UNOLA/DOALOS) and the IMO Legal and External Affairs Division were represented on the JIWG, and Prof. Samuel P. Menefee acted as Rapporteur on behalf of the CMI. In the subsequent work on the *Guidelines for National Legislation* it was felt that those inter-governmental organizations should not be put in a position of possible conflict that could arise because of the participation of their Secretariat officers in the formulation of proposals ultimately intended for submission to IMO, and consequently they did not participate.

The contribution to the overall work of individual representatives of the JIWG participating

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\* Chairman of the JIWG; Vice President *honoris causa* of the CMI.

Organizations deserves acknowledgement. They are:

ICC-IMB: Jayant Abhyankar and Niranjan Abeyratne;

INTERPOL: Suzanne Williams, John Porter and Jason Fensome;

BIMCO: Søren Larsen, Grant Hunter and Thomas Timlen;

ICS: Linda Howlett, Brian Parkinson, John Stawpert and Kiran Khosla;

ITF: Joseph Thullier, Miren Del Olmo, Allan Graveson and John Bainbridge;

IGP&I: Hugh Hurst, Nigel Carden, David Baker, Andrew Bardot and John Mace;

IUMI: Nicholas Gooding;

IMO: Brice Martin-Castex, Augustin Blanco-Bazan and Gaetano Librando;

UNOLA/DOALOS: Gabriele Goettsche-Wanli.

FRANK L. WISWALL, JR.  
*Chairman of the JIWG*

## INTRODUCTION

The following draft Guidelines for National Legislation are the result of deliberations by a Joint International Working Group of International Organizations concerned regarding the lack of effective prosecution of piracy and maritime criminal acts.<sup>1</sup> While the original focus of the Group lay exclusively upon acts of violence, in the course of examining how cases such as *The TAJIMA*<sup>2</sup> could best be dealt with the Group brought into consideration both the problems of violent maritime criminal acts and of serious non-violent maritime crime, wherever committed. The draft Guidelines are intended to apply to a broad range of maritime crimes including but not limited to homicide, bodily harm, piracy, armed robbery, extortion, serious fraud, kidnapping by deception, acts of terrorism and facilitation of proliferation of weapons of mass destruction, by systematically dealing with these crimes under national law in recognition that the majority of these criminal acts fall under national admiralty and maritime jurisdiction. The key to effective prosecution of these crimes, in the view of the Group, is a high degree of uniformity in national legislation and the consequent elimination of conflicts of law which pose barriers to jurisdiction, apprehension, collection and admission of evidence, retention in custody, extradition and/or trial and, upon determination of guilt, sentencing to reasonably equivalent and proportionately severe penalties. Specific penalties are not suggested in the draft Guidelines, but it is absolutely necessary that, in

the context of a State's national criminal law, penalties be severe enough to discourage commission of these acts.

The Group appreciates that many States have adopted provisions of the 1988 SUA Convention in their national law, but there remains a real need for uniform legislation clearly applicable to serious maritime criminal acts as well as acts of piracy and armed robbery. It is also fully recognized that the governments undertaking review of their criminal law in light of the draft Guidelines have the greatest knowledge of their own national instances of maritime crime. It must be borne in mind, however, that the problem is international in scope and that, to be effective, national law must be able to deal not only with criminal acts committed on waters outside national jurisdiction but also, to the maximum extent permitted by international law, those committed on board foreign-flag ships coming within a port or place under national jurisdiction, wherever located at the time of commission of the act. These measures are necessary in order to confront and to deal with the wide range of criminal acts now threatening the international maritime community. The draft Guidelines also aim to facilitate restitution and other civil remedies available to victims of maritime crime.

The draft Guidelines are intended as a benchmark against which the content and effect of present national law may be measured. However, the form in which the draft Guidelines are set forth is not

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<sup>1</sup> The Working Group has been composed, from time to time, of representatives of the following international organizations: the Comité Maritime International (CMI), the Baltic and International Maritime Council (BIMCO), the International Chamber of Shipping (ICS), the International Criminal Police Organization (INTERPOL), the International Group of P&I Clubs (IGP&I), the ICC International Maritime Bureau (IMB), the International Maritime Organization (IMO), the International Transport Workers Federation (ITF), and the International Union of Marine Insurance (IUMI).

<sup>2</sup> Brought to the attention of the IMO Legal Committee by the Delegation of Japan; see documents LEG 88/7/2 and 88/7. The provisions set out in article II (6) are intended to deal with such cases.

intended to govern the form of subsequent national legislation; the content rather than the form of national law is clearly the matter of highest importance.<sup>3</sup>

ARTICLE I  
*Definitions*

For the purposes of this Title, the following terms shall have the meanings indicated:

1. a) The term *ship* includes any type of vessel or other water craft.<sup>4</sup>
  - b) The term *maritime structure* includes any floating or fixed artefact that is connected to the seabed, other than a ship at anchor or temporarily moored.
  - c) The term *person* includes, where applicable, entities having juridical personality as well as individual natural persons.
  - d) The term *collateral act* includes any act committed to facilitate or in an attempt to conceal a maritime criminal act.
2. A *maritime criminal act* is committed when, for any unlawful purpose, any person or persons, intentionally or knowingly and without regard to the consequences:
  - a)
    - i) injures or kills any person or persons in connection with the commission or the attempted commission of any of the offences set forth in paragraph (2) (a) (ii)-(x) or (b) of this article; or
    - ii) performs or threatens an act of violence against a person or persons on board a ship; or
    - iii) seizes or exercises control over a ship or any person or persons on board by actual force or by any other form of intimidation or by deception; or
    - iv) engages in an act resulting in unlawful detention of a person or a ship; or
    - v) destroys or causes damage to a ship or a ship's cargo, a maritime structure, or an aid to navigation; or
    - vi) employs in the commission of a criminal

act any device or substance which is likely to destroy or cause damage to a ship, its equipment or cargo, or an aid to navigation; or  
vii) destroys, removes or causes damage to a maritime structure or navigational aid or facility, or interferes with its operation, if that act would be likely to endanger the safe navigation of a ship or ships; or

viii) engages in an act involving interference with navigational, life support, emergency response or other safety equipment, if that act would be likely to endanger the safe operation or navigation of a ship or ships or a person or persons on board a ship; or

ix) communicates false information endangering or being likely to endanger the safe operation or navigation of a ship or ships; or

x) endangers or damages the marine environment, or the coastline, maritime installations or facilities, or related interests of any State;

xi) engages in any of the acts described in paragraph (2)(a)(i)-(x) of this article, to the extent applicable, where such acts involve a maritime structure or affect a person or persons on a maritime structure;

xii) obtains possession of a ship or maritime structure, wherever located, by theft or deception;

xiii) obtains possession of a ship's tackle, equipment or appurtenances, having substantial aggregate value, wherever located, by theft or deception;

xiv) obtains possession of a ship's cargo while on board and having substantial aggregate value, by theft or deception;

xv) obtains possession by theft or deception, committed on board a ship or maritime structure, of property having substantial aggregate value that belongs to the owner of the ship or structure or to any person legitimately on board whether or not engaged in the service of the ship or maritime structure; or

xvi) knowingly receives possession of and/or

<sup>3</sup> The Working Group specifically urges ratification of or accession to and adoption into national law of the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention"), and (where applicable) the 2005 Protocol on Fixed Platforms, as well as the 1982 Convention on the Law of the Sea. The Group notes that many existing national laws do not directly track the provisions of these international conventions, and urges that care to do so be taken in the drafting of enabling legislation. Attention is also drawn to the IMO Code of Practice/Instruments/Guidance Note for the Investigation of the Crime of Piracy and Armed Robbery Against Ships (2001), developed by the Maritime Safety Committee, to the IMO *Draft Regional Agreement on Co-operation in Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships* (MSC/Circ.622/Rev.1, Annex, Appendix 5), and to the IMO *Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships* (MSC/Circ. 623/Rev.2(2001)).

<sup>4</sup> Seaplanes when afloat, "wig" craft and hovercraft operating in the marine environment fall within this definition. (Ref. COL-REG 72, Rule 3.)

converts any property described in subparagraph (2)(a)(xii)-(xv) of this article acquired by unlawful means.

b)

i) engages in an act constituting an offence under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 2005; or

ii) engages in an act constituting an offence under the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 2005.

c) The provisions of paragraphs (a) and (b) of section 2 of this article shall not be construed so as to impede otherwise lawful measures taken in the course of a labour dispute.

3. An act of *piracy* is committed when any person or persons:

a) engages in piracy as that act is defined by Article 15 of the 1958 Convention on the High Seas; or

b) engages in piracy as that act is defined by Article 101 of the 1982 Convention on the Law of the Sea.<sup>5</sup>

4. An act of *piracy* is also committed when any person or persons, for any unlawful purpose, intentionally or knowingly and without regard to the consequences:

a) engages in an act defined as piracy under the national criminal code; or

b) engages in an act held to constitute piracy by a decision of the national court of ultimate jurisdiction currently in force; or

c) engages in an act deemed piratical under applicable customary international law.<sup>6</sup>

5. An attempt or conspiracy to commit any of the offences listed in paragraphs (2), (3) or (4) of this article, or any unlawful effort intended to aid, abet, counsel or procure the commission of any of these offences shall constitute a maritime criminal act.<sup>7</sup>

6. A threat to commit any of the offences listed in

paragraphs (2), (3) or (4) of this article shall constitute a maritime criminal act.

7. Notwithstanding the definitions in paragraphs (2), (3), (4) and (5) of this article, reasonable acts to rescue a person or to recover stolen property or to regain lawful control of a ship or maritime structure shall not be held to constitute maritime criminal acts or acts of piracy.

8. Notwithstanding the definitions in paragraphs (2), (3), (4) and (5) of this article, reasonable or proportionate acts to protect a person, ship or maritime structure, or related property, against a maritime criminal act or act of piracy shall not be held to constitute maritime criminal acts or acts of piracy.

## ARTICLE II

### *Jurisdiction and Prosecution*

1. The offences defined in article I (2), (4) and (5) shall be prosecuted if committed within the territory, internal waters or territorial sea, and to the degree that the exercise of national jurisdiction is permitted by the 1958 Geneva Conventions on the High Seas and Contiguous Zone or the 1982 Convention on the Law of the Sea, within the exclusive economic zone, continental shelf, contiguous zone or archipelagic waters, and on the high seas or in any place outside the jurisdiction of any State.

2. The offences defined in article I (2), (4) or (5) shall also be prosecuted if committed:

a) on board or against a ship registered in or entitled to fly the flag of the enacting State,<sup>8</sup> wherever located; or

b) on or against a maritime structure licensed by or operating within the jurisdiction of the enacting State.

3. Jurisdiction to prosecute shall also lie in the State apprehending or having custody of a person accused of committing an offence defined in article I (2), (4) or (5).

4. Jurisdiction to prosecute shall also lie when the

<sup>5</sup> The act of piracy defined in paragraph (3) and the acts defined in paragraphs (4) and (5) are separate offences; none of the latter includes piracy as defined in paragraph (3).

<sup>6</sup> *I.e.*, the uncodified Law of Nations.

<sup>7</sup> As applied in respect of an offence under paragraph (4), a *maritime criminal act* as defined in paragraph (5) is an act separate from “inciting” or “intentionally facilitating” an act of *piracy* as contemplated in the cited Articles of the Conventions referenced in paragraph (3).

<sup>8</sup> “Enacting State” refers to the State enacting this provision of the Guidelines into its national law.

person accused of committing an offence defined in article I (2), (4) or (5) is a citizen or national of the enacting State, or is a resident foreign national, or is a stateless person.

5. Jurisdiction to prosecute shall also lie when an offence defined in article I (2), (4) or (5) is committed against a person who is a citizen or national of, or is a foreign national resident in the enacting State, or is a stateless person.

6. Jurisdiction to prosecute shall also lie when an offence defined in article I (2), (4) or (5) is committed on board a foreign-flag ship, where:

- a) the law enforcement or other public authority of the port or place where the ship is located has been requested to intervene by the State whose flag the vessel is entitled to fly, or by the shipowner, or the Master or other person on board the ship; or
- b) the commission of that act or a collateral act has disturbed the peace and tranquillity of a port or place under national jurisdiction.

7. Paragraphs 1 and 6 of this article shall not be applicable if the ship in question is a warship or auxiliary or is a government-owned ship employed in non-commercial service and under the control of government authorities at the time of the act otherwise giving rise to jurisdiction.

8. Jurisdiction to prosecute an act of piracy as defined in article I (3) (a) and (b) shall lie as set forth in the relevant Convention.

9. Trial of an alleged offender *in absentia* shall be allowed as permitted under national law.

10. Any prosecution under this article shall ensure the protection of the human rights of the alleged offender.

#### ARTICLE III *Extradition*

1. Extradition of an alleged offender may take place when another State has jurisdiction over the offences defined in article I (2), (3), (4) or (5). The possession of jurisdiction by the enacting State shall not preclude the extradition of an alleged offender to another State.

2. If another State having a direct connection to the incident or other substantial interest claims jurisdiction with regard to a maritime criminal act or an act of piracy, and the alleged offender is not promptly brought to trial in the enacting State, the alleged offender shall, subject to applicable provisions of the requested State's national law, be extradited to such requesting State. If multiple States with reasonable jurisdictional claims make requests for extradition in the absence of a trial in the enacting State, the alleged offender shall, subject to the applicable provisions of national law, be extradited to one of the requesting States.

#### ARTICLE IV *Punishment, Forfeiture and Restitution*

1. An individual person found guilty of a *maritime criminal act* shall be subject to a term of imprisonment, and in addition shall be subject to any restitution or forfeiture that may be required, and any other penalties that may be imposed.<sup>9</sup>

2. An individual person found guilty of the crime of *piracy* shall be subject to a term of imprisonment, and in addition shall be subject to any restitution or forfeiture that may be required, and any other penalties that may be imposed.<sup>9</sup>

3. An entity with juridical personality found guilty of a maritime criminal act or the crime of piracy shall be subject to a monetary penalty or fine reflecting the grave nature of the offence, and in addition shall be subject to any restitution or forfeiture that may be required, and any other penalties that may be imposed.<sup>9</sup>

4. In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of such crime shall also be liable to whatever criminal penalties may be imposed under other provisions of national law for that injury, death, loss or damage.

5. In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of such crime shall also be liable to whatever civil remedies are available under national law.

<sup>9</sup> Such penalties must be severe enough to reflect the grave nature of the offence.

6. Where ships, cargo, goods, or equipment have been employed in or were the subject of maritime criminal acts or acts of piracy, such property shall be liable to forfeiture to the State exercising criminal jurisdiction to prosecute the offender(s). However, stolen or misappropriated property shall in all cases be returned to the person(s) having lawful title to or legal custody of the property. Any mortgagee of the property may assert a claim for payment of the current mortgage obligation.

7. Where ships, cargo, goods, or equipment employed in or the subject of maritime criminal acts or acts of piracy are liable to forfeiture to the State exercising criminal jurisdiction to prosecute the offender(s), such property shall be restored as expeditiously as possible to the person having lawful title to or custody of the property, unless the State proves the wilful complicity of such person in those maritime criminal acts or acts of piracy. If such person is denied return of such property, any mortgagee of the property shall be entitled to recover payment of the current mortgage obligation out of the proceeds of sale of the property at a public judicial sale, with the remaining balance being forfeit to the State, unless the State proves the wilful complicity of such mortgagee in those maritime criminal acts or acts of piracy.

8. Where ships, cargo, goods or equipment have been wrongfully taken by person(s) subsequently convicted of maritime criminal acts or acts of piracy but such ships, cargo, goods or equipment have **not** been employed in the commission of such crime(s):

- a) Such property if unconverted shall be returned to its owners or custodians upon proof of ownership or lawful custody.
- b) Converted property shall be sold at public judicial sale and the proceeds distributed to the lawful claimants according to admiralty and maritime law, with any balance remaining being forfeited to the State.
- c) Items not claimed within the period established by law may be subject to public judicial sale, or transfer to a fund for financing

State or regional action to fight maritime criminal acts or acts of piracy.

9. Port expenses and other dues normally chargeable shall be waived during detention for investigation or prosecution of maritime criminal acts or acts of piracy; such port expenses or other dues normally chargeable may be recovered as restitution owed by the successfully prosecuted offender(s).

10. Nothing in paragraphs (1) through (9) of this article shall compromise or affect any rights or remedies which a person injured in the course of a maritime criminal act or act of piracy might otherwise assert against any perpetrator of the act or acts.

#### ARTICLE V *Reporting of Incidents*

1. Any incident which may constitute a maritime criminal act or act of piracy shall be reported by the following, as applicable:

- (a) the Master or senior surviving officer,<sup>10</sup>
- (b) the ship security officer (“SSO”),<sup>11</sup>
- (c) the company security officer (“CSO”), shipowner, agent or manager,
- (d) the port facility security officer (“PFSO”),
- (e) the crew representative or seafarers’ trade union,
- (f) the cargo representative,
- (g) the insurers,
- (h) the harbour master or port authority,
- (i) the vessel traffic management system (“VTS”) authority,
- (j) the investigating authorities, or
- (k) other persons having knowledge of the incident.

Reports shall be made as soon as reasonably possible following receipt of knowledge of the incident. Reports shall be sent to the designated national authority<sup>12</sup> and shall be in the form required by that authority.<sup>13</sup>

Each person or entity listed above has an

<sup>10</sup> The Master or senior surviving officer is to report as soon as possible to the law enforcement and/or maritime authorities of the State in which the incident occurred or which is the coastal State nearest to the position of the incident, and also to the Administration of the Flag State.

<sup>11</sup> Note the requirements contained in Chapter XI-2 of the Annex to SOLAS 74 as amended (in particular Regulations 6 and 7), and the International Ship and Port Facility Security Code (“ISPS”).

<sup>12</sup> *I.e.* the authority designated by the enacting State.

<sup>13</sup> See the forms in IMO MSC/Circ.622/Rev.1, Annex, Appendices 3 and 4, and MSC/Circ.623/Rev.2, Annex, Appendices 2 and 4.

obligation to report every known incident. This obligation may be met by filing a joint report, or by forwarding and commenting upon a report on the occurrence made by another listed person or entity.

Persons or entities listed in sub-paragraphs (a) – (g) above having knowledge of but failing to report an incident may be subject to an appropriate civil penalty.

2. The designated national authority shall be under a continuing duty to make reports without delay and in the required formats to the ICC International Maritime Bureau (ICC-IMB)<sup>14</sup> and the International Maritime Organization (IMO).<sup>15</sup>

3. The facts of the occurrence of an incident lie in the public domain, but the content of all incident reports made under paragraph (1) of this article may be held confidential and not be made open to the public.<sup>16</sup>

## NEWS FROM INTERGOVERNMENTAL AND INTERNATIONAL ORGANIZATIONS

### NEWS FROM IMO

*By Resolution LEG.3(91) adopted on 27 April 2006 the Legal Committee of the International Maritime Organization adopted the Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident. In view of the importance of such*

*Guidelines, it is thought that it may be useful to publish them in the CMI News Letter in order to contribute to their knowledge by the maritime world at large.*

### GUIDELINES ON FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

THE LEGAL COMMITTEE OF THE INTERNATIONAL MARITIME ORGANIZATION AND THE GOVERNING BODY OF THE INTERNATIONAL LABOUR ORGANIZATION,

RECALLING resolution A.987(24) approved by the Assembly of IMO at its twenty-fourth regular session and the ILO Governing Body at its 292nd session, by which the IMO Assembly and the ILO Governing Body, *inter alia*, agreed to the adoption of Guidelines on fair treatment of seafarers in the event of a maritime accident as a matter of priority and authorized the IMO Legal Committee and the ILO Governing Body to promulgate the said guidelines once finalized, by appropriate means;

HAVING considered the Guidelines as prepared by the Joint IMO/ILO *Ad Hoc* Export Working Group on Fair Treatment of Seafarers in the Event of a Maritime Accident;

REALIZING the need to keep the Guidelines under review;

RECALLING the Vienna Convention on Consular Relations, in particular, Article 36

concerning communication and contact with nationals;

NOTING MSC/MEPC.4/Circ.1 on Retention of original records/documents on board ships dated 26 September 2005;

BEARING IN MIND the importance of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982, in particular articles 97, 228, 230, 232 and 292, and of the customary international law of the sea;

CONSIDERING that the Guidelines provide a code of best practice;

MINDFUL of the need to monitor the application and implementation of the Guidelines; and

BEARING IN MIND FURTHER, the adoption of the ILO Maritime Labour Convention on 23 February 2006; hereby,

1. ADOPT the Guidelines on fair treatment of

<sup>14</sup> Maritime House, 1, Linton Road, Barking, Essex, United Kingdom IG11 8HG. See [www.icc-ccs.org.uk](http://www.icc-ccs.org.uk)

<sup>15</sup> Refer to IMO MSC/Circ.622/Rev.1, Annex, Appendix 4, and MSC 59/33, paragraph 19.22.

<sup>16</sup> In the absence of legal action, where available, to compel disclosure of such information.

seafarers in the event of a maritime accident set out in the annex to the present resolution;

2. INVITE Member Governments to implement these Guidelines as from 1 July 2006;

3. INVITE ALSO Member Governments and non-governmental organizations in consultative status with IMO and ILO to circulate the Guidelines as widely as possible in order to ensure their widespread promulgation and implementation;

4. INVITE, where appropriate, Member Governments to consider amending their national legislation to give full and complete effect to the Guidelines;

5. INVITE FURTHER Member Governments to take note of the principles contained in these Guidelines when considering fair treatment of seafarers in other circumstances where innocent seafarers might be detained; and

6. AGREE on the need to keep the Guidelines under review.

## ANNEX

### GUIDELINES ON FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

#### *I Introduction*

1 It is recommended that these Guidelines be observed in all instances where seafarers may be detained by public authorities in the event of a maritime accident.

2 Seafarers are recognized as a special category of worker and, given the global nature of the shipping industry and the different jurisdictions that they may be brought into contact with, need special protection, especially in relation to contacts with public authorities. The objective of these Guidelines is to ensure that seafarers are treated fairly following a maritime accident and during any investigation and detention by public authorities and that detention is for no longer than necessary.

3 These Guidelines have been prepared in accordance with resolution A.987(24)<sup>17</sup> on Guidelines on fair treatment of seafarers in the event of a maritime accident adopted on 1 December 2005 by the Assembly of the International Maritime Organization. This resolution is attached at annex to these Guidelines.

4 These Guidelines do not seek to interfere with any State's domestic, criminal, or civil law processes nor the full enjoyment of the basic rights of seafarers, including those provided by international human rights instruments, and the seafarers' right to humane treatment at all times.

5 Seafarers are entitled to protection against coercion and intimidation from any source during or after any investigation into a maritime accident.

6 The investigation of a maritime accident should not prejudice the seafarer in terms of repatriation, lodgings, subsistence, payment of wages and other

benefits and medical care. These should be provided at no cost to the seafarer by the shipowner, the detaining State or an appropriate State.

7 These Guidelines do not apply to warships or naval auxiliaries.

#### *II Definitions*

8 For the purposes of these Guidelines, "seafarer" means any person who is employed or engaged or works in any capacity on board a ship;

"shipowner" means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities of the shipowner, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner;

"maritime accident" means any unforeseen occurrence or physical event connected to the navigation, operations, manoeuvring or handling of ships, or the machinery, equipment, material, or cargo on board such ships which may result in the detention of seafarers;

"investigation" means an investigation into a maritime accident;

"detention" means any restriction on the movement of seafarers by public authorities, imposed as a result of a maritime accident, including preventing them leaving the territory

<sup>17</sup> Not included in this document.

of a State other than the seafarer's country of nationality or residence.

### III Guidelines for the port or coastal State

#### 9 The port or coastal State should:

- .1 take steps so that any investigation they conduct to determine the cause of a maritime accident that occurs within their jurisdiction is conducted in a fair and expeditious manner;
- .2 co-operate and communicate with all substantially interested States, shipowners, and seafarers, and take steps to provide seafarers' representative organizations in the port or coastal State with access to seafarers;
- .3 take steps to ensure that adequate measures are taken to preserve human rights of seafarers at all times, and the economic rights of detained seafarers;
- .4 ensure that seafarers are treated in a manner which preserves their basic human dignity at all times;
- .5 take steps to ensure/verify that adequate provisions are in place to provide for the subsistence of each detained seafarer including, as appropriate, wages, suitable accommodation, food and medical care;
- .6 ensure that due process protections are provided to all seafarers in a non-discriminatory manner;
- .7 ensure that seafarers are, where necessary, provided interpretation services, and are advised of their right to independent legal advice, are provided access to independent legal advice, are advised of their right not to incriminate themselves and their right to remain silent, and, in the case of seafarers who have been taken into custody, ensure that independent legal advice is provided;
- .8 ensure that involved seafarers are informed of the basis on which the investigation is being conducted (i.e., whether it is in accordance with the IMO Code for the Investigation of Marine Casualties and Incidents (resolution A.849(20) as amended by resolution A.884(21) or as subsequently amended), or pursuant to other national legal procedures);
- .9 ensure that the obligations of the Vienna Convention on Consular Relations, including those relating to access, are promptly fulfilled and that the State(s) of the nationality of all seafarers concerned are notified of the status of such seafarers as required, and also allow access to the seafarers by consular officers of the flag State;
- .10 ensure that all seafarers detained are provided with the means to communicate

privately with all of the following parties:

- family members;
  - welfare organizations;
  - the shipowner;
  - trade unions;
  - the Embassy or Consulate of the flag State and of their country of residence or nationality; and
  - legal representatives;
- .11 use all available means to preserve evidence to minimize the continuing need for the physical presence of any seafarer;
  - .12 ensure decisions taken pursuant to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL 73/78) are consistent with the provisions of Annex 1 (Regulations for the prevention of pollution by oil), Regulation 11;
  - .13 promptly conduct interviews with seafarers, when done for a coastal State investigation following a maritime accident, taking into account their physical and mental condition resulting from the accident;
  - .14 take steps to ensure that seafarers, once interviewed or otherwise not required for a coastal State investigation following a maritime accident, are permitted to be re-embarked or repatriated without undue delay;
  - .15 consider non-custodial alternatives to pre-trial detention (including detention as witnesses), particularly where it is evident that the seafarer concerned is employed in a regular shipping service to the detaining port or coastal State;
  - .16 promptly conclude its investigation and, if necessary, charge seafarers suspected of criminal actions and ensure that due process protections are provided to all seafarers subsequent to any such charge;
  - .17 have in place procedures so that any damage, harm or loss incurred by the detained seafarer or by the shipowner, in relation to the detention of that particular seafarer, attributable to the wrongful, unreasonable or unjustified acts or omissions of the detaining port or coastal State are promptly and fully compensated;
  - .18 insofar as national laws allow, ensure that a process is available for posting a reasonable bond or other financial security to allow for release and repatriation of the detained seafarer pending resolution of any investigatory or judicial process;
  - .19 take steps to ensure that any court hearing, when seafarers are detained, takes place as expeditiously as possible;

.20 take steps to ensure decisions taken are consistent with generally applicable provisions of the law of the sea;

.21 take steps to respect the generally accepted provisions of international maritime law regarding the principle of exclusive flag State jurisdiction in matters of collision or other incidents of navigation; and

.22 take steps to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations.

#### *IV Guidelines for the flag State*

10 The flag State should:

.1 take steps to ensure that any investigation to determine the cause of a maritime accident is conducted in a fair and expeditious manner;

.2 co-operate and communicate with all substantially interested States, shipowners, and seafarers, and take steps to provide seafarers' representative organizations with access to seafarers;

.3 where appropriate, participate directly, under the IMO Code for the Investigation of Maritime Casualties and Incidents (IMO Assembly resolution A.849(20) as amended by resolution A.884(21) and as may be subsequently amended), in any casualty investigation;

.4 assist in ensuring that shipowners honour obligations to seafarers involved in a maritime accident or any investigation;

.5 ensure/verify that adequate provisions are in place to provide for the subsistence of each detained seafarer, including, as appropriate, wages, suitable accommodation, food and medical care;

.6 ensure that shipowners honour obligations to co-operate in any flag, coastal or port State investigation following a maritime accident;

.7 assist seafarers to secure fair treatment, and assist shipowners in the event of an investigation by a port or coastal State;

.8 fund the repatriation of seafarers, where necessary, following the aftermath of a maritime accident in instances where shipowners fail to fulfil their responsibility to repatriate;

.9 assist, as provided for in national law, in the issuance and service of process and the return to a port or coastal State of seafarers subject to its jurisdiction who are needed solely as witnesses in any proceeding following a maritime accident;

.10 take steps to ensure that its consular

officers are permitted access to the involved seafarers, irrespective of their nationality;

.11 take all necessary measures to ensure the fair treatment of seafarers who were employed or engaged on a vessel flying its flag. This may ultimately include utilizing international dispute resolution mechanisms, which can secure the prompt release of vessels and crews upon the posting of a reasonable bond or financial security; and

.12 take steps to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations.

#### *V Guidelines for the seafarer State*

11 The seafarer State should:

.1 co-operate and communicate with all substantially interested States, shipowners, and seafarers, and take steps to provide seafarers' representative organizations with access to seafarers;

.2 monitor the physical and mental well-being and treatment of seafarers of their nationality involved in a maritime accident, including any associated investigations;

.3 fund the repatriation of their national seafarers, where necessary, following the aftermath of a maritime accident in instances where shipowners and the flag State fail to fulfil their responsibility to repatriate;

.4 assist, as provided for in national law, in the service of process and the return to a port or coastal State of seafarers subject to its jurisdiction who are needed solely as witnesses in any proceeding following a maritime accident;

.5 take steps to ensure that its consular officers are permitted access to the involved seafarers;

.6 take steps to provide support and assistance, to facilitate the fair treatment of nationals of the seafarer State and the expeditious handling of the investigation;

.7 take steps to ensure that all funds remitted by shipowners, the detaining State, or any other State for detained seafarers, or for support of those seafarers' families, are delivered for the intended purposes; and

.8 take steps to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations.

#### *VI Guidelines for shipowners*

12 With regard to investigations, shipowners have an overriding duty to protect the rights of the

seafarers employed or engaged, including the right to avoid self-incrimination and to take steps to ensure their fair treatment, and should:

- .1 take all available measures to ensure that no discriminatory or retaliatory measures are taken against seafarers because of their participation during investigations and take steps to ensure that such conduct by other entities is not tolerated;
- .2 co-operate and communicate with all substantially interested States, other shipowners, as appropriate, and seafarers, and take steps to provide seafarers' representative organizations with access to seafarers;
- .3 take action to expedite the efforts of a port, coastal, or flag State investigation;
- .4 take steps to encourage seafarers and others under their employment, with due regard to any applicable rights, to co-operate with any investigation;
- .5 use all reasonable means to preserve evidence to minimize the continuing need for the physical presence of any seafarer;
- .6 fulfil their obligation in relation to the repatriation of, or take steps to re-embark, the seafarers; and

.7 ensure/verify that adequate provisions are in place to provide for the subsistence of each seafarer, including, as appropriate, wages, suitable accommodation, food and medical care.

#### VII Guidelines for seafarers

##### 13 Seafarers should:

- .1 take steps to ensure, if necessary, that they have appropriate interpretation services;
- .2 take steps to ensure that they fully understand their right not to self-incriminate, and that they fully understand that when statements are made to port, coastal or flag State investigators, these may potentially be used in a future criminal prosecution;
- .3 take steps to ensure, if they consider it necessary, that they have arrangements for access to legal advice prior to deciding whether to give statements to port, coastal or flag State investigators; and
- .4 participate in an investigation, to the extent possible, having regard to their right not to self-incriminate, with port, coastal or flag State investigators, by providing truthful information to the best of their knowledge and belief.

## NEWS FROM THE IOPC FUNDS

### IOPC FUNDS MEETINGS – MARCH 2007

The Spring Meetings of the IOPC Funds took place at the INMARSAT Building in London on 14<sup>th</sup> to 16<sup>th</sup> March 2007. The CMI was, as usual, represented as an observer delegation. The Executive Committee discussed inter alia STOPIA and liability; the Working Group promoting quality shipping covered information exchange, incidence of spills, risk assessment and CLC certificates.

The Executive Committee considered, inter alia, two cases which presented an interesting contrast. The Philippines registered tanker “*Solar 1*” (998 gt) laden with 2,081 tonnes of fuel oil, sank in August 2006 in heavy weather in the Philippines’ Guimaras Straits. This is the first time that the Small Tanker Oil Pollution Indemnification Agreement 2006 (STOPIA), which was introduced with effect from 20 February 2006, has been applied. Under this agreement an owner’s limit of liability is increased to some 20 million Special Drawing Rights (approximately £15.8m) for vessels not more than 29,548 GT. The Secretariat reported that there had

been good cooperation with the owner’s P&I Club and that STOPIA have been invoked without any problem.

The other incident concerned the Japanese vessel “*Shosei Maru*” (153 GT) which collided on 28<sup>th</sup> November 2006 with the Korean cargo vessel “*Trust Busan*” (4,690 GT) in the Seto Inland Sea in Japan. Some 60 tonnes of heavy fuel oil and bunker diesel oil escaped into the sea from the “*Shosei Maru*” which was insured with the Japan P&I Club. Since the vessel was only engaged in coastal trade it was not entered in the pooling arrangements of the International Group of P&I Clubs (IG); nor had the owner of the vessel given written consent to her being entered in STOPIA 2006. Consequently the CLC limit of liability of the ship owner is 4.51m SDR (£3.4m), and claims in excess of this figure will fall on the 1992 Fund without being subsequently reimbursed under STOPIA.

Delegates expressed their concern that STOPIA was not applicable to the second incident. The delegate of the P and I Clubs advised that the agreement was not automatically applicable if the

vessel was not entered in the Group's pooling arrangement. Some 6,000 vessels are so entered and all participate in STOPIA. The Group was encouraging its members to enter into STOPIA vessels not entered in the Group pooling arrangement. It was understood that of Japan Club's 327 coastal tankers over 100 GT, 197 were entered in STOPIA in 2006, but that this figure has risen to 251 for the current year. The International Group delegates were urged to get their member P and I Clubs to extend STOPIA to as many vessels as possible, and actively to encourage shipowners to enter their vessels into the Agreement.

Steady progress was reported in completing the settlement of the claims arising from the "Erika" and "Prestige" incidents.

#### *The Working Group*

The 4<sup>th</sup> Intersessional Working Group is charged with examining and developing proposals for developing non-technical measures and guidelines for Contracting States and the industry to promote quality shipping (by ensuring that effective checks and procedures are in place to establish that ships insured and certified are suitable for the carriage of oil by sea as covered under the Civil Liability Convention/Fund regime). The Working Group is chaired by Mrs Birgit Olsen (Denmark).

#### Sharing of information between insurers

The Working Group examined legal barriers to the exchange by insurers of information on ship standards. Details were provided of the new statute adopted by the Norwegian Parliament, the Ship Safety Act 2007, which removes the previous prohibition on the exchange of information on ship standards by marine insurers. This new law also provides that an assured has to be informed about what information has been sent to a new or proposed insurer. A number of delegations are examining their law in this area to see whether such a prohibition actually exists.

The UK delegate advised the meeting that under English law there is no general prohibition, however care has to be taken due to the potential commercial sensitivity of such information, and therefore it is prudent to seek the permission of the assured before passing on such information. The delegate of the International Group reported that it has considered recommending to its members a model rule which requires such permission. However it is not presently possible to make such a rule change as there are some issues of competition law which are unresolved. In certain states the anti-competition laws prevail over local legislation and private contracts. The Group delegate reported that its members have in

recent years established a much more rigorous underwriting practice to evaluate more thoroughly a proposed entry into a Group club. If the seller of a ship declines to consent to the release to the buyer's Club of all information relating to the ship's condition, the new club is put on notice of a potential problem and will usually require a full survey. This practice has gone a long way to solving the problem.

The CMI has offered to assist the Working Group by conducting a survey of the relevant laws from its member maritime law associations, but it was agreed that the Working Group should await enquiries from the insurance industry as to the exact nature of their concerns regarding the sharing of information before embarking on further work.

#### Incidence of spills

The Working Group was presented with a report undertaken by the secretariat of the IOPC Funds concerning the incidence of spills from vessels entered with clubs in the International Group, and those from vessels insured by other liability cover providers. The Funds have been involved in some 137 incidents over a 28 year period since 1978 of which 14 vessels, all under 2000 dwt, were not insured by a member of the Group. 8 of these vessels had no insurance and the remaining 6 were insured with fixed premium insurers. The International Tanker Owners Pollution Federation (ITOPF) has been involved with some 1,313 spills over a 35 year period of which only 15 spills involved vessels which were not insured through a member of the Group.

#### Risk assessment

The Working Group then considered the paper submitted by the International Group advising Member States that their members should operate both a desk-based risk management system and also, for certain categories of vessels, a physical risk assessment. New entries over 12 years old are inspected, as are vessels over 10 years old if they have carried heavy fuel oil as a cargo. The Group now maintains a database of all inspections carried out by its members. If a vessel fails to meet acceptable quality standards a committee will then consider whether the vessel should become a "designated vessel". If so, any Group club taking on that vessel will be subject to a double retention of risk - USD 14m as opposed to USD 7m before pooling the claim - and would not be able to participate in the Group's re-insurance scheme. It is thought that no member of the Group would wish to take on such a risk, as it would effectively be gambling the club's entire assets on the performance of the designated vessel.

### CLC certificates

The UK then introduced a paper which provided details of its procedure for issuing CLC certificates. For vessels insured by a member of the International Group, certificates are automatically granted, whereas for vessels carrying other insurance the UK's Financial Services Authority is asked to check the financial status of the insurer. Cyprus advised the Working Group that before it issued a CLC certificate a check was made concerning the vessel's safety record. Canada advised it was operating on similar lines and was considering introducing a requirement that, before

a certificate was issued, a vessel had to have been through a Port State Control inspection within the previous 3 months.

The Working Group's Chairman called on Member States to consider whether there should be guidelines introduced for States issuing certificates to a vessel not insured by a member of the International Group.

The Working Group will meet again in June 2007 in Montreal where the next meeting of the IOPC Funds will take place.

RICHARD SHAW\*\*

## **RATIFICATION AND DENUNCIATION OF INTERNATIONAL CONVENTIONS**

### **INSTRUMENTS OF RATIFICATION OF AND ACCESSION TO THE FOLLOWING CONVENTIONS HAVE BEEN DEPOSITED WITH THE DEPOSITARY:**

- **International Convention on Salvage, 1989**  
*Finland: 12 January 2007*
  
- **International Convention on Maritime Liens and Mortgages, 1993**  
*Peru: 23 March 2007*

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