INTERNATIONAL MARITIME ORGANIZATION

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REPORT OF THE LEGAL COMMITTEE ON THE WORK OF ITS EIGHTY-NINTH SESSION

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A INTRODUCTION

1 The Legal Committee held its eighty-ninth session at IMO Headquarters from 25 to 29 October 2004, under the chairmanship of Mr. A.H.E. Popp, QC (Canada).

2 The session was attended by delegations from the following Member States:

ALGERIA
ANTIGUA AND BARBUDA
ARGENTINA
AUSTRALIA
BAHAMAS
BANGLADESH
BELGIUM
BRAZIL
BULGARIA
CANADA
CHILE
CHINA
CUBA
CYPRUS
DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA
DEMOCRATIC REPUBLIC OF THE CONGO
DENMARK
ECUADOR
EGYPT
ESTONIA
FINLAND
FRANCE
GERMANY
GHANA
GREECE
GUATEMALA
HONDURAS
INDIA
INDONESIA
IRAN (ISLAMIC REPUBLIC OF)
IRELAND
ISRAEL
ITALY
JAPAN
KENYA
LATVIA
LIBERIA
LIBYAN ARAB JAMAHIRIYA
LITHUANIA
MALAYSIA
MALTA
MARSHALL ISLANDS
MEXICO
MOROCCO
MOZAMBIQUE
NETHERLANDS
NEW ZEALAND
NIGERIA
NORWAY
PAKISTAN
PANAMA
PAPUA NEW GUINEA
PERU
PHILIPPINES
POLAND
PORTUGAL
REPUBLIC OF KOREA
ROMANIA
RUSSIAN FEDERATION
SAUDI ARABIA
SINGAPORE
SOUTH AFRICA
SPAIN
SWEDEN
SWITZERLAND
TURKEY
UKRAINE
UNITED KINGDOM
UNITED STATES
URUGUAY
VANUATU
VENEZUELA

and the following Associate Member of IMO:

HONG KONG, CHINA

3 Representatives from the United Nations, the United Nations Office on Drugs and Crime and the International Labour Office participated in the session.

4 Observers of the following organizations took part in the session:

EUROPEAN COMMISSION (EC)
INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS (IOPC FUNDS)
INTERNATIONAL CHAMBER OF SHIPPING (ICS)
INTERNATIONAL SHIPPING FEDERATION (ISF)
INTERNATIONAL UNION OF MARINE INSURANCE (IUMI)
INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS (ICFTU)
INTERNATIONAL MARITIME COMMITTEE (CMI)
INTERNATIONAL ASSOCIATION OF PORTS AND HARBOURS (IAPH)
BIMCO
INTERNATIONAL ASSOCIATION OF CLASSIFICATION SOCIETIES (IACS)
EUROPEAN CHEMICAL INDUSTRY COUNCIL (CEFIC)
OIL COMPANIES INTERNATIONAL MARINE FORUM (OCIMF)
INTERNATIONAL ASSOCIATION OF INSTITUTES OF NAVIGATION (IAIN)
INTERNATIONAL FEDERATION OF SHIPMASTERS' ASSOCIATIONS (IFSMA)
INTERNATIONAL SALVAGE UNION (ISU)
INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO)
INTERNATIONAL GROUP OF P AND I ASSOCIATIONS (P & I CLUBS)
INTERNATIONAL SHIP SUPPLIERS ASSOCIATION (ISSA)
INTERNATIONAL MARINE CONTRACTORS ASSOCIATION (IMCA)
WORLD NUCLEAR TRANSPORT INSTITUTE (WNTI)

5 In his general welcome to participants, the Secretary-General extended a special welcome to those delegates attending the Legal Committee for the first time.

6 The Committee, he said, had the task that week of considering a few issues of particular relevance to the Organization. One of these, which the Committee had rated as its first priority, was the continuation of the preparation of draft protocols to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol relating to Fixed Platforms Located on the Continental Shelf (the SUA treaties).

7 In the painful light of the atrocities committed by terrorists in New York, Washington, Bali, Moscow, Istanbul, Baghdad, Madrid, Beslan and in so many other parts of the world, including the attacks on USS **Cole** and the French tanker **Limburg**, all claiming so many innocent lives, it was incumbent upon us and this Organization to devise and adopt legal and practical technical measures to prevent and combat the spread of terrorism, particularly when directed against shipping.

8 It was with this in mind, he continued, that the Assembly, at its twenty-second session in 2001, had adopted, less than three months after the 11 September attacks, resolution A.924 on the Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships. And, as the Committee knew, the International Ship and Port Facility Security Code, developed pursuant to that resolution, had entered into force on 1 July 2004. Figures at the time, painstakingly collected and collated by the Secretariat

on the basis of information provided by Governments and the port and shipping industries, had indicated that more than 86 per cent of ships and 69 per cent of port facilities had had their security plans issued and approved. Implementation had continued increasing exponentially in the period immediately afterwards, to the extent that, in August 2004, we were able to announce that the compliance figures for both ships and ports were nearing 100 per cent.

9 But the job was still far from over and now the challenge facing us all was to make sure that vigilance remained heightened and that security consciousness should become ingrained throughout the whole of the industry.

10 The objective of the ISPS Code, with its emphasis on the creation of security plans which ships and port facilities are required to have in place, was to prevent or deter terrorist acts at source. The SUA treaties were complementary to the Code in that they regulated the legal situation in the unfortunate event that a terrorist attack nevertheless did occur. In the fight against terrorism, it was vital that the international community had in place a framework for legal action capable of ensuring that terrorists were apprehended and brought to trial wherever in the world they might seek to hide. In this connection, while it could be noted that, as at 25 October 2004, 113 States had become party to the 1988 SUA Convention, a review of this Convention and its Protocol remained an urgent matter. This, because of the need to ensure that the legal framework developed and kept updated by this Organization provided at all times an adequate basis for the arrest, detention and extradition of terrorists acting against shipping or ports or when using ships to perpetrate acts of terrorism.

11 In this regard, he saw the SUA treaties as going hand-in-hand with the ISPS Code and he believed that, if implemented meticulously and rigorously, these legal instruments had the potential to prevent and deter acts of terrorism and make shipping more secure to the benefit of the community at large.

12 It was against this background that he received, with satisfaction, information that substantial progress had been made by the Legal Committee *ad hoc* Working Group, when it met at IMO in July 2004. However, he knew that there was a considerable amount of work still to be done before any decision could be made to proceed with the holding of a conference. The Council had already taken an "in principle" decision to schedule a diplomatic conference in this biennium, but whether such a conference would take place next year would depend very much upon the progress that the Legal Committee would be able to make at this session. He hoped that this proved to be the case. With this in mind, he was pleased to be advised that many delegations had brought with them experts in the field of criminal law to assist the Committee with its deliberations.

13 The other priority item on the Legal Committee's agenda continued to be the development of a convention on the removal of wrecks, which had been under consideration by the Committee for some time. It was expected that this convention, once adopted and entered into force, would provide States with a clear-cut legal mandate to remove, or have removed from their EEZs, those wrecks which might pose a hazard, either to safe navigation or, because of the nature of their cargo, to the security of the marine and coastal environment.

14 Due to circumstances of which everyone was aware, the development of this convention had taken second place to the revision of the SUA treaties. Nevertheless, substantial progress had been made, over recent months, both within the Committee and by its *Ad Hoc* Correspondence Group, in refining the text of the convention, thus enabling the Council to also

give its “in principle” approval to the convening of a diplomatic conference, if not in this biennium, then in the next. It was now up to the Legal Committee to resolve the outstanding legal and technical issues that still remained, so as to enable the Organization to move forward and adopt, at the appropriate time, the convention it had been preparing over the recent years, in order to put an end to the situation of the legal uncertainty which had surrounded the removal of hazardous wrecks for too long.

15 The Legal Committee, he continued, was certainly aware that IMO’s commitment to the consideration of human element issues in shipping ran deep and could be found in much of the work the Organization was doing nowadays. Indeed, in defining its objectives for the current decade, IMO took the conscious decision to focus attention on shifting the emphasis onto people. Within the Maritime Safety Committee, for example, this initiative took the form of the Committee instructing all Sub-Committees to take into consideration appropriate human element-related matters in the course of their work, particularly when reviewing the adequacy of requirements and recommendations for equipment and operating manuals on board ships.

16 Within the Legal Committee, the human element was no less important, as evidenced by the several items on its agenda which had a direct bearing on the welfare of seafarers.

17 He referred, first and foremost, to the new item on the fair treatment of seafarers, the inclusion of which in the Committee’s agenda followed a proposal by a number of Governments and non-governmental organizations that IMO, in co-operation with ILO, should consider the development of appropriate guidelines for the fair treatment of seafarers caught up in maritime accidents, which guidelines should be based not only on the principles of UNCLOS but also on the allegation that the unwarranted detention of seafarers constituted a violation of basic human rights.

18 The frustration and anger of the victims of accidents and of those whose coastlines and livelihoods were damaged by catastrophic pollution incidents was understandable and everyone sympathized with them for their loss and suffering. At the same time, we could not think of anyone who would suggest that those who deliberately (or “wilfully and seriously”, to use the words of UNCLOS) committed an act of pollution and/or knowingly flouted pollution standards, such as those contained in the MARPOL Convention, should escape appropriate punishment; indeed MARPOL required that the penalties to be imposed for such behaviour should be adequate in severity to discourage violations of its provisions. However, denying shipmasters, crews and salvors the right to return to their home countries, over extended periods of time, in the wake of pollution incidents which could not be attributed to a wilful act on their part, may be assessed as a different matter altogether.

19 And although he recognized and respected the independence of the judiciary in any country, he thought that there could be no doubting the detrimental impact any move to impose criminal charges on masters and seafarers would have, particularly if it included the prospect of imprisonment. It was certainly not going to encourage seafarers and salvors to co-operate fully and openly with casualty inquiries or accident investigations. On the other hand, such a move might well act as a disincentive for new recruits to join the maritime profession at a time when the industry was already short of quality officers worldwide.

20 It was for reasons such as these that he appealed to any country or countries concerned, rather than moving unilaterally or regionally to introduce sanctions for infringement in ship-source pollution incidents, to come over to co-operate with the entire IMO membership,

bringing to the Organization the experience they might have obtained in the course of accidents that had affected their population and coasts, so that a global approach may be agreed here to any identified weaknesses and shortcomings of the existing regime before appropriate remedial action was decided upon. Such an approach would not only ensure universality in the formulation of any regulation that might emerge, it would also help to avoid confusion as to what regime applied at which region of the world.

21 The Legal Committee's decision to develop guidelines for the fair treatment of seafarers caught up in situations such as those he had mentioned before, was, therefore, timely and he welcomed, too, its intention to work together with ILO through an *Ad Hoc* joint IMO/ILO Working Group in what had become a subject of serious concern to both Organizations.

22 The establishment of a Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, the sixth session of which was scheduled to take place at a date in 2005 still to be fixed, was another example of the excellent co-operation that existed between the two Organizations. The Secretary-General was concerned however, to learn, of the poor response by Member States and international organizations to the Circular letters issued by both IMO and ILO on monitoring the implementation of the Guidelines on Provision of Financial Security in case of Abandonment of Seafarers and on Reporting in cases of Abandonment. He would, therefore, recommend Governments to assist the Joint Group in its efforts to provide sustainable, long-term solutions to the problem of abandonment of seafarers and issues relating to liability and compensation for personal injury and death.

23 The Secretary-General then referred to the inclusion, in the Committee's agenda, of the review of the status of conventions and other treaty instruments adopted as a result of its work. At the Committee's last meeting, it had noted the entry into force of the 1996 Protocol to the International Convention on Limitation of Liability for Maritime Claims. He was pleased now to report the entry into force, on 5 September 2004, of the 1993 International Convention on Maritime Liens and Mortgages, which had been largely produced by the *Ad Hoc* Joint IMO/UNCTAD Working Group.

24 He had hoped that he would be able to report to the Committee that the conditions had been met for the entry into force of the 2003 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, which would provide States Parties with compensation of up to 750 million Special Drawing Rights (approximately US$1 billion) in the event of oil tanker spills. With the deposit of an instrument of accession by Japan on 13 July 2004, the number of Contracting Parties now stood at six, out of the requisite eight needed, in addition to the required tonnage of contributing oil. He trusted that the two remaining ratifications necessary to satisfy the entry-into-force provisions of the 2003 Protocol would be forthcoming in the very near future.

25 He was also keen to see progress being made towards the entry into force of the 1996 International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, particularly in view of the Legal Committee's initiative to monitor its implementation by seeking to identify technical and legal difficulties, if any, and to provide appropriate solutions. And although the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage was not characterized by similar complexities, its number of ratifications was, at present, disappointingly

low, despite the pollution damage that spills of bunker oil could cause and despite the widely acknowledged need for an adequate liability and compensation regime of this nature.

26 Before he brought his address to an end, the Secretary-General briefed the Committee on one recent decision of the Council of relevance to technical bodies. This concerned news media attendance at IMO meetings. As the Committee would now have known, the Council, at its June 2004 session, agreed that the interests of the Organization would be well served if its business were conducted in a manner which would promote openness and transparency. To this end, the proceedings of the Committees and their subsidiary bodies would, henceforth, be open to the news media and reporting of their deliberations encouraged, unless there was a specific reason to the contrary. The Committees were all requested to amend their rules of procedure to accommodate this decision. Furthermore and in order to ensure a correct balance between publicity of the work of the Organization and the proper conduct of meetings of Committees and subsidiary bodies, and also in order to maintain an environment which would enable delegates to have a free and open exchange of views on subjects on the agenda of IMO's technical bodies, the outcome of discussions should be reported accurately by the media and speakers should not be quoted by name without their prior consent. In case of any published inaccuracies, the Committees, their subsidiary bodies and/or the Organization would retain the right of reply.

27 The Secretary-General noted that, apart from the two priority items and the others he had mentioned, the Legal Committee had a full agenda to consider. On some of the items, the Committee needed to make decisions that week; others would be placed on its long-term work plan. As usual, the resources of the Secretariat would be at the Committee's disposal throughout the meeting.

28 The Secretary-General then concluded by expressing his confidence that, through consensus and in the spirit of co-operation IMO is renowned for, the Legal Committee would be able to make the right decisions on all items of its agenda; in particular on the two draft treaties which were expected to occupy most of its time. The abilities of its Chairman, Mr. Popp of Canada, to assist it to navigate safely through the delicate and complex hazards of the meeting ahead were a strong guarantee for another fruitful session, which he wished the Committee wholeheartedly.

29 The agenda for the session, as adopted by the Committee, is attached at annex 1.

30 A summary of the deliberations of the Committee with regard to the various agenda items is set out hereunder.

B REPORT OF THE SECRETARY-GENERAL ON CREDENTIALS (agenda item 2)

31 The Committee noted the report by the Secretary-General that the credentials of the delegations attending the session were in due and proper form.

C ELECTION OF OFFICERS (agenda item 3)

32 The Committee unanimously re-elected by acclamation Mr. A.H.E. Popp, QC (Canada) as Chairman for 2005. The Committee also re-elected by acclamation Mr. Kofi Mbiah (Ghana) and Professor Chai Lee-Sik (Republic of Korea) as Vice-Chairmen for 2005.

D 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) (agenda item 4)

33 The Committee continued with its consideration of this agenda item. It agreed that the basic text to be used in its deliberations would be the revised version of the draft protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Navigation. This incorporates the proposals made at the Legal Committee's eighty eighth session and those made at the Legal Committee Intersessional Working Group which met at IMO Headquarters from 12 to 16 July 2004. This draft (hereinafter "the draft" or "the draft protocol", as appropriate) is contained in the annex to document LEG 89/4/1.

34 The Working Group under the Chairmanship of the United States of America as the lead delegation (hereinafter "the Group" or "the Working Group") met in parallel with the Plenary and dealt with issues referred to it by the Committee. The Chair of the Group presented an oral interim report to the Committee. The report of the Working Group is attached to this report at annex 5 solely for the information of Member States.

35 The Committee agreed to begin its work with a consideration of draft article 8*bis*.

Boarding provisions (article 8*bis*) (article 6 of the draft protocol)

Paragraph 1(a)

36 The Committee adopted the text of paragraph 1(a) with the following changes, suggested by the Secretariat, to take account of relevant IMO terminology:

- To add the term "IMO identification number" after the term "registration number" and to change the term "home port" to "port of registry".

Paragraph 1(b)

37 The Committee considered the text in square brackets in paragraph 1(b) which would allow States Parties to take into account the dangers and difficulties of boarding at sea and give consideration to whether appropriate measures could be more safely taken in port.

38 The delegation of China presented its proposal contained in document LEG 89/4/3, paragraph 5, to delete this provision on the grounds that boarding a ship in port went beyond the scope of the SUA protocol and would complicate further an already complex provision by involving the additional jurisdiction of the port State.

39 The observer delegation of ICS introduced the proposal of a number of delegations contained in document LEG 89/4/9, paragraph 5, in which it supported retention of the draft text, on the grounds that it was helpful as not all ships could safely be boarded on the high seas.

40 Delegations were divided in their responses although there was a slight majority in favour of retention of the text.

41 Those delegations against retention cited a variety of reasons including:

- Deviation of a ship from the highs seas to a port for the purpose of boarding and searching operations belonged within the purview of IMO safety instruments and was not an issue to be decided under SUA.

- Additional complications would arise in the case of the port State being different from the requesting State and the consequent involvement of three jurisdictions, namely, that of the port State, the requesting State and the flag State.

- In cases of transport of nuclear weapons the proposed text would compromise a State's adherence to other treaties, which prohibited the bringing of these weapons to port.

- The inclusion of such provisions would necessarily lead to a further complication, namely, the need to address the question of claims for costs entailed as a result of the deviation of the ship to port.

42 Other delegations favoured the inclusion of the text in square brackets for a number of reasons including:

- This was not a jurisdictional provision but a practical one which would offer a suitable alternative in cases such as the boarding of ships for searching of containers which would be very difficult to undertake on the high seas without endangering the safety of the ship and the persons and goods on board.

- Safety is a paramount consideration underlying many IMO instruments and it is appropriate therefore that SUA takes the safety element into account.

- The proposal, if retained, could be expanded beyond the reference to ports to include coastal areas as potential sites for conducting appropriate measures.

- The jurisdictional implications could be avoided by deleting at the end of the proposal the reference to appropriate measures and ending the provision after the word "cargo".

43 It was further suggested that the proposal, if retained, might be moved to the safeguards provision in paragraph 8 of the draft protocol.

44 The Committee decided to request the Working Group to further study this question and to report back to it with a solution later in the week.

Paragraph 2

45 The Committee adopted paragraph 2.

Paragraph 3(a)

46 One delegation repeated a proposal first raised in the Working Group that a time limit be established in which a State would be required to acknowledge the receipt of a request from another State Party as to whether the ship claiming its nationality was entitled to do so. In the view of this delegation, the terminology in the chapeau "as expeditiously as possible" was too vague to be satisfactory for this purpose.

47 This proposal was supported by some delegations which stated that, unless a clear time limit was established, legal uncertainty would arise as to what the requesting Party would be entitled to do in the event an answer was not received. In this regard the opinion was expressed that the requirement in paragraph 1 to respond "as expeditiously as possible" to requests pursuant to this article was not sufficient on account of the fact that this expression could be differently interpreted by the requesting and the requested Party. The establishment of a time limit would strengthen the procedures to be observed in connection with a request which might lead to boarding.

48 A majority of delegations, however, opposed this proposal. In their view, the imposition of a time limit was unnecessary as States would not ignore their obligations under the Convention. Alternatively, it was too constraining, impracticable (especially if different time zones were involved) and served no real purpose. There was also a risk that the absence of reply within an established time limit could create a different kind of legal uncertainty. In this case the uncertainty would stem from how the lack of reply might be interpreted. In this regard it was noted that if the absence of reply was interpreted as an authorization to board, this would be unacceptable to many delegations since such an authorization in many jurisdictions could only be granted by the courts of the flag State.

49 The Committee decided to retain the current text and not to accept the proposal to insert specific time limits in this provision.

Paragraph 3(b), (c), (d) and (e)

50 The Committee agreed with the changes suggested by the Intersessional Working Group in LEG 89/4/1.

51 The Committee considered the proposal by the delegation of China in LEG 89/4/3, paragraph 7, for a new provision requiring express flag State authorization before a boarding could take place. There was some support for this proposal and it was referred to the Working Group for further examination.

Paragraph 4

52 The Committee noted that there were no square brackets in the text of this paragraph.

Paragraph 5

53 The Committee noted that there were no square brackets in the text of this paragraph.

Paragraph 6

54 The Committee discussed the text in square brackets in paragraph 6, which provides that where a boarding occurs pursuant to article 8*bis*, the flag State shall have the primary right to exercise jurisdiction over the ship except where the flag State waives its primary right to exercise jurisdiction. A clear majority of the delegations that spoke supported the inclusion of such a provision.

55 It was noted that the inclusion of an explicit provision on the exercise of jurisdiction was important because, in a boarding conducted pursuant to this article, there may be a number of States having concurrent jurisdiction over the offences in question. For instance, due to the operation of article 6 of the existing SUA Convention, in addition to the flag State, the State – or States – of which the alleged perpetrator is a national would have jurisdiction, as could the State(s) of which the victim is a national. In such a situation, it is necessary to regulate the question of which of the States involved should have the primary right to exercise its jurisdiction where there is a boarding at sea.

56 It was further noted that, while as a general rule, the flag State will normally remain in charge of the boarding operation and of the subsequent steps that might follow, including criminal prosecutions, there may be situations in which it would be more sensible to allow the intervening State – or a third State – to exercise its jurisdiction. This is why it is appropriate to have a provision allowing the flag State to waive its primary right to exercise jurisdiction.

57 The point was made, however, that a waiver of the flag State's right to exercise jurisdiction could have far-reaching consequences, particularly with respect to the rights and protection of the master and crew and for this reason, mere consent to boarding should not be construed as consent to waiver. In this connection, the observer delegation of the ICFTU reminded the Committee of the duty of flag States to protect seafarers on vessels flying their flag.

58 It was also noted that a flag State could only waive the exercise of its jurisdiction in favour of a State having a basis under article 6 of the SUA for exercising jurisdiction.

59 The Committee also discussed the placement of this provision. The view was expressed that the correct place for a provision of this nature is in article 8*bis*, rather than in article 6 of the original SUA Convention. This was because it is the new ship-boarding provisions in article 8*bis* which make it necessary to set out which State has the primary right to exercise jurisdiction. Article 6 of the SUA Convention deals with States Parties' rights and obligations to establish jurisdiction, whereas this provision concerns the right to exercise jurisdiction.

60 The Committee tasked the Working Group to consider this provision in the light of the above comments.

Paragraph 7

61 The Committee agreed to two technical changes in the first sentence, replacing "persons on board" with "other persons" and replacing "where" with "when".

62 The Committee considered two alternative proposals developed at the Intersessional Working Group (LEG 89/4/1/corr./1) relating to the use of force in boarding, as follows:

Any use of force pursuant to this Article shall not exceed [that which is necessary and reasonable] OR [the minimum degree of force which is necessary and reasonable] in the circumstances."

63 A number of delegations said that neither of the two options provided for the concept of proportionality which should be expressly included in the text. Other delegations, however, were of the view that the concept was encompassed within the phrase "necessary and reasonable" and that an express reference would be superfluous. It was also noted that the term "proportional" was relative and would need to be linked with another term, such as risk of injury or damage.

64 The Committee agreed to retain the wording in the second set of brackets and adopted the paragraph as amended.

Paragraph 8(a)

65 The Committee agreed to delete the words "national law and" from paragraph 8(a)(iii).

66 The Committee then considered a number of proposals concerning the right of the master to communicate with the flag State and/or the ship owner in paragraph 8(a)(viii).

67 Some delegations supported the proposal of ICS, ISF and ICFTU in LEG 89/4/9, paragraph 7, to add the following new paragraph:

"(i) Notwithstanding the provisions contained in article 8bis (10), (11) and (12), the ship shall be advised prior to any boarding and the master shall be afforded sufficient time to verify that the boarding is duly authorized by the flag State;"

68 Some delegations stated that this provision would be consistent with the provisions of SOLAS and the ISPS Code which require Contracting Governments to have a point of contact when ships are in need of assistance, and for ships to be able to deny access except by authorized persons.

69 In this regard, the Committee also considered the bracketed text in paragraph 8(a)(viii), as well as the alternative text proposed by the delegation of the United Kingdom in LEG 89/WP.1. There was some support for each of these proposals.

70 The Committee referred the paragraph back to the Working Group for further examination.

Paragraph 8(b)

71 The Committee turned its attention to the compensation provisions in paragraph 8(b). In this connection, while all delegations that spoke agreed on the need for the Protocol to address the issue of compensation for unjustified boarding, several delegations were of the view that the existing text was not satisfactory and needed to be modified.

72 Some delegations were of the view that the reference to "national law" created uncertainties since it was not clear whether this meant that the law of the flag State or that of the intervening State would be applied. The references to "international law" and to "States Parties" were also criticised as vague and unhelpful.

73 The Committee examined three new submissions relating to this paragraph. The first of these was a proposal by the delegation of Mexico to include in the paragraph the concepts of joint and several liability, arbitration and the right of direct action against flag and boarding States (document LEG 98/4/2). This delegation also proposed that the Committee should decide whether the flag State or the intervening State or both of them would be jointly and severally liable for compensation.

74 However, this proposal found little support on the basis, primarily, that it was too detailed and would be difficult to implement. The view was expressed that this proposal, if adopted, would amount to an unprecedented and unnecessary expansion of international law and that several States were constitutionally prohibited from agreeing to such a detailed claims structure. The view was also put that, pursuant to paragraph 8*bis* (5), a flag State may subject its authorization to board under paragraphs 3 or 4 to conditions, and if a particular flag State wishes to impose conditions relating to claims such as arbitration or private right of action, it could do so under this paragraph. The concept of "direct action" in the context of this article was also questioned and it was pointed out that this concept was usually applied in connection with the right of action against insurers.

75 Some delegations noted that UNCLOS and several other international conventions on maritime law already included provisions relating to compensation for wrongful detention of a ship by a State Party. They suggested, therefore, that rather than looking for new solutions, a suitable claims regime might be found in other conventions and that further study could be done on those conventions.

76 The observer delegation from ICFTU suggested that the current text used expressions which were not clear and suggested a different wording along the lines proposed in document LEG 89/4/10.

77 The delegation of Germany proposed a different wording in LEG 89/WP.4.which substituted the existing paragraph 8(b). This received some in principle support.

78 The Committee agreed to send the paragraph to the Working Group for further consideration.

Paragraph 8(e)

79 The Committee referred to the Working Group a proposal by the delegation of China, contained in document LEG 89/4/3, paragraph 13, to add a requirement to the effect that law enforcement or other authorized officials involved in boarding or searching requests be required to produce appropriate proof of identity. The Working Group was also requested to examine this provision with a view to advising the secretariat as to precisely what follow-up action would be required of the Secretary-General pursuant to this provision.

Paragraph 9

80 The Committee decided to remove the square brackets from this paragraph.

Paragraph 10

81 The Committee decided to incorporate the expression “are encouraged to” instead of “shall”.

Paragraph 12

82 The Committee decided to incorporate the expression “article” instead of “Convention, as amended”.

New offences (draft article 3*bis*)

83 The Committee continued its consideration of the new offences contained in this article. Before, however, doing so it agreed that the Working Group should consider the relationship between article 8*bis* and article 3, in particular, the question whether all or only some of the offences in articles 3, 3*bis* and 3*ter* would trigger the boarding provisions of article 8*bis*.

84 Two delegations restated their views, attached as annexes 2 and 3, that some of the new offences proposed as amendments to the SUA treaties were outside the scope of the mandate contained in Resolution A.924(22). They accordingly objected to the Committee’s consideration of them, in particular, those transport offences referring to the carriage of nuclear weapons. It was recalled however that previous decisions of the Council and the Assembly had endorsed the Committee’s mandate to include these offences in the draft treaties.

Paragraph 1(b): Chapeau

85 The Committee discussed whether the term “transports” required a definition. While in the view of some delegations a definition was not necessary or desirable, a clear majority of delegations were of the view that the term, left undefined, was too broad. A definition might alleviate the concern of those delegations that favoured the inclusion of additional subjective elements. A definition was also needed to introduce certainty as who should be prosecuted and to assist in avoiding undue criminalization of innocent passengers or members of the crew.

86 The Committee instructed the Working Group to work on a clarification of the term “transports” using, as a basis, the proposal put forward as alternative 2, set out in footnote 12 of LEG 89/4/1 and the proposal put forward by the observer delegations of ICS, ISF and ICFTU in document LEG 89/4/8, paragraph 7.

Paragraph 1(b) (ii)

87 The Committee discussed whether the reference to the knowledge element in this paragraph should be further clarified by the inclusion of a subjective element, namely, the explicit requirement of a terrorist motive either in the text or in the chapeau to this paragraph, as proposed by the observer delegations of ICS, ISF and ICFTU in document LEG 89/4/8, paragraph 15.

88 In the view of several delegations, the inclusion was necessary, either in the chapeau or in the body of the text, in order to protect innocent seafarers. Persons responsible for the transport of cargo must know what they are carrying before being accused of a crime and could not be expected to know what might constitute a prohibited transport under international or national law.

89 Most delegations that spoke, however, opposed the addition of a terrorist motive. In their view, adequate subjective elements were already included in the chapeau language of “intentionality”. Moreover, once the Committee clarified the meaning of “transports” this would provide enough legal certainty to avoid a situation in which innocent parties might be accused of offences under the Convention. In the view of these delegations, to add a further subjective requirement of knowledge applicable to paragraph (ii) would amount to establishing an additional threshold of knowledge which would unduly narrow the offence and would make the prosecution of those unlawfully and intentionally involved in the perpetration of transport offences inordinately difficult.

90 The Committee decided to remove the square brackets from the text of paragraph (ii).

Paragraph 1(b)(iii)

91 The Committee briefly considered a proposal by the delegation of Canada in document LEG 89/4/4 to revise the offence in 1 (b)(iii) so that the items referred to cannot be transported for use in any other nuclear activity not subject to a comprehensive safeguards agreement.

92 The Committee decided to defer its consideration of this proposal pending further examination of the issue by the Working Group. As part of this examination the Working Group was instructed to take into account the outcome of the Committee’s consideration of the need for additional subjective elements and a clarification of the term “transports”, as summarized above under paragraph 1(b)(ii).

Paragraph 1(b)(iv)

93 The majority of the Committee expressed their support in principle for the inclusion of an offence for the transport of dual-use materials and related technology but expressed the view that further work was required on the wording of such an offence. Two delegations however suggested the deletion of this paragraph.

94 The Committee examined a proposal for alternative wording presented in footnote 19 in LEG 89/4/1, annex. It was noted that the language of this alternative text was too complicated and unwieldy to be workable and that the expansion of subjective elements was unclear and unhelpful. Some delegations said the Committee should focus on the objective rather then the subjective elements of the offence. The relevance of referring to financial gain was questioned. The Committee instead favoured the approach taken in paragraph 1(b) (iv), on the understanding that text could be improved.

95 It was noted that UNSCR 1540 provided a useful source of wording for referring to dual use materials and related technology. In this regard, however, it was noted that the scope of the UNSC resolution was different from that of the SUA Convention, and this would need to be borne in mind if it was used as a drafting source.

96 It was also suggested that export control laws might be a source of wording to clarify the concept of dual use materials and related technology.

97 The Committee referred the paragraph to the Working Group for further consideration.

Paragraph 1(c)

98 The Committee examined paragraph 1(c) which creates the offence of transporting a fugitive.

99 There was general agreement in the Committee for the inclusion of an offence of this nature although some delegations questioned its location in this particular article.

100 A number of delegations expressed a preference for having the transport of fugitives provision as a stand-alone offence. It was suggested in this regard that the transport of a fugitive was an offence at a different level from other offences in the article, such as the transport of a prohibited weapon. It was noted that footnote 20 in document LEG 89/4/1, annex, provided a possible text for a stand-alone offence. However, it was also noted that this text, unlike the current paragraph 1(c), did not reflect the requirement that the offence must be committed "unlawfully and intentionally."

101 With respect to the suggestion that it be attached to article 3*ter*, the point was made that the proposed text in paragraph 1(c) covered the case where the person being transported had already committed a terrorist offence whereas the provisions of article 3*ter* covered cases of aiding and abetting someone before or during the commission of a terrorist offence.

102 With regard to the reference in the paragraph to a list of terrorist conventions in the annex, it was suggested that it would be more appropriate to identify the specific offences in the Protocol itself. It was also noted that it would be difficult to prove the knowledge of such a wide range of offences. On the other hand, it was also noted that there was precedent for taking this approach (as pointed out in footnote 21 in LEG 89/4/1, annex), and that development of a list of specific offences would significantly prolong the development of the Protocol.

103 Several delegations expressed support for the principle (contained in footnote 22 in LEG 89/4/1, annex) of allowing States to declare that they would apply the provisions of paragraph 1(c) in accordance with the principles of their criminal law which exempted the family of the accused from liability. The proposal was made that this exemption should not be limited to family members.

104 It was suggested that the relationship between the transport of fugitives offence and the boarding provisions of article 8*bis* required careful examination.

105 The paragraph was referred to the Working Group for further examination in light of the Committee's discussion and the square brackets were removed.

Article 1 (definitions)

Paragraph 1(a)

106 With regard to the definition of "death or serious injury or damage", particularly the reference in square brackets to the environment, it was noted that the text in LEG 89/4/1, annex was a compromise text developed by the Intersessional Working Group.

107 One delegation, while acknowledging the need for a definition, stated its reservations about this particular definition, which in its view was vague and ambiguous. It suggested the Protocol should only apply when the environmental damage also resulted in major economic loss, along the lines of a proposal contained in footnote 3 in LEG 89/4/1, annex. This delegation also said that it would not be appropriate to punish, under the SUA Convention, an act that would cause no death, injury or damage as specified in paragraphs (a), (b) and (c) of the same article, but only damage to the environment. It was noted by another delegation, however, that in the current text, a terrorist motive, pursuant to article 3*bis* 1(a) was also required, in addition to intentional pollution, to be punishable under the Protocol.

108 It was proposed that the term "serious injury" should not be limited to bodily injury but should be extended to include psychological injury. While accepting that this might be a concern, other delegations noted that this would introduce a new level of issues, and there was little support in the Committee for adding psychological injury to the definition.

109 On the basis of the strong support for this compromise text the Committee agreed to remove the square brackets.

Article 3*bis*

Paragraph 1(a)(ii)

110 With regard to the references in square brackets to the IMDG Code and the HNS Convention, it was noted that, since the definition of "hazardous and noxious substances" in article 1 of the HNS Convention referred explicitly to substances covered by the IMDG Code, there was no apparent need to make a separate reference to that Code.

111 It was suggested by one delegation that a reference to the HNS Convention might not be appropriate since that Convention was not yet in force. Another delegation, however, suggested that such a reference did not imply any obligation on the part of a non-State party. Further, that Convention was a useful reference even if it was not yet in force.

112 The point was also made that the HNS Convention was intended to address liability and compensation matters and the IMDG code addressed carriage of substances in packaged form and that neither reference was suitable for the purposes of the SUA Convention.

113 Some delegations suggested that the words in square brackets could be deleted on the basis that it was superfluous and unduly limitative since the remaining, un-bracketed text (i.e. "in such quantity or concentration, that causes or is likely to cause death or serious injury or damage") made it unlikely that there could be a problem in identifying when a hazardous or noxious substance was being used in connection with a terrorist offence.

114 The Committee referred the paragraph to the Working Group for further consideration in light of its discussion.

Additional Protocol on Fixed Platforms on the Continental Shelf

115 The Committee agreed that the draft text of the protocol in annex 3 of document LEG 89/4/5, submitted by the United States, should be prepared by the Secretariat as the basic text for consideration by the Committee at its next session. The Secretariat was requested to adjust the text of that draft protocol in line with decisions agreed by the Committee at the present session.

116 An official from the United Nations Office on Drugs and Crime was present and offered his assistance to ensure that the text under discussion would be consistent with other instruments against terrorism developed by the United Nations.

E DRAFT CONVENTION ON WRECK REMOVAL (agenda item 5)

117 The Committee continued with its consideration of this agenda item.

118 The delegation of the Netherlands, as lead country for the intersessional consultations, introduced document LEG 89/5. In so doing, it summarized the work done between the two sessions and the results of the consultations, and explained the content of the annexes to the document. It noted that the revised text of the draft convention on wreck removal (DWRC) in annex 1 included amendments approved by the Committee at its eighty-eighth session, appearing in normal print, amendments discussed and agreed by the Working Group at the eighty-seventh session, or at the eighty-sixth session, which were underlined and proposals developed intersessionally following the eighty-seventh and eighty-eighth sessions, which appeared in bold type. Both the underlined and the text printed in bold required approval by the Committee.

119 Annex 2 contained explanatory notes on the amendments in annex 1, and annex 3 contained the proposals that were not incorporated into the revised DWRC, together with the reasons for not including them.

120 The delegation concluded by thanking those delegations that had actively participated in the intersessional work and, recognizing that the Committee at its last session had made good progress in its consideration of the draft, expressed the hope that, at this session, negotiations would continue to be fruitful, taking the DWRC a step closer to diplomatic conference.

121 The Secretariat introduced document LEG 89/5/1/Rev.1. The document had been prepared at the invitation of the Committee at its last session and contained a number of largely editorial suggestions aimed at refining the draft convention.

122 The representative of the Comité Maritime International (CMI) introduced document LEG 89/5/1, which contained the results of a study carried out by the CMI at the Committee's request, on the compatibility of the DWRC with the 1989 Salvage Convention and other existing maritime conventions. It pointed out that an area of concern involved the situation immediately following a maritime casualty, when a salvor may be in possession of the vessel, which, by definition under article 1(4)(d), is not a wreck. In that situation, the State may not intervene in accordance with article 10(4), because the ship is not a wreck, even if it may reasonably be expected to sink or strand. In reality, if a casualty was drifting towards the coast

and a salvor did not appear to be averting the danger, the coastal State may well wish to intervene and take action under the DWRC, either because the salvor was not doing a good job in assisting the ship and the vessel was therefore a wreck on the true and proper construction of article 1(4)(d), or because the ship constituted a hazard pursuant to article 7. He suggested that one solution was to amend article 1(4)(d) to read: "in the absence of effective action to assist the ship or any property in danger, a ship that is about, or may reasonably be expected, to sink or to strand."

123 The CMI representative further commented that, in practice, the 1989 Salvage Convention and the DWRC should be compatible, provided that the coastal State behaves reasonably and fairly, does not impose unreasonable conditions and does not intervene unreasonably. If, on the contrary, the coastal State acts unreasonably, this could result in the salvor being in breach of its obligations under article 8 of the Salvage Convention to perform salvage services, and lead to a claim. That potential area of conflict could be solved by incorporating appropriate consultative procedures into article 10(i), of the type set out in article III of the 1969 Intervention Convention. The possibility of unfair dispossession could be dealt with by the inclusion of a compensation provision similar to Article VI of the Intervention Convention. The Committee expressed its appreciation to the CMI for the work it had undertaken.

124 In introducing the joint submission of Brazil, France, the United Kingdom and the United States in document LEG 89/5/3, which proposed an amendment of article 2(1) of the DWRC, the delegation of the United States explained that the proposed amendment to article 2 was necessary to clarify the measures that could be taken under the DWRC. It stressed the need for the draft convention to be consistent with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), including article 311(3), which, in line with the 1969 Vienna Convention on the Law of Treaties, requires, *inter alia*, that agreements among States Parties to UNCLOS do not affect the enjoyment by third States of rights and obligations under UNCLOS. Not only must the DWRC not impose obligations upon non-Parties, but it may not impose obligations or accord rights to Parties that would adversely affect the rights and obligations of non-Parties under customary International Law of the Sea.

125 In introducing document LEG 89/5/4, the delegation of Canada commented that placing the obligation to report wrecks on the "operator of the ship" as defined in article 1(9) of the DWRC represented an improvement to the treaty text. However, it fell short of identifying the person or persons with direct operational control of the ship, namely, the master of the ship or another person having charge of the ship at the time of the wreck. It noted that major IMO Conventions such as MARPOL 73/78 (Article I, Protocol I), SOLAS 1974 (Regulation 2, Chapter V) and OPRC 1990 (Article 4) expressly identified the master as a party responsible for reporting various types of information to relevant authorities. In particular, the reporting requirement set out in MARPOL 73/78 clearly placed the responsibility for reporting on those on board the ship at the time of an incident and where such reporting was not possible, the burden of reporting was placed on other parties. The delegation proposed a new text for article 6, which was modeled on article I, Protocol I of MARPOL 73/78. If accepted and as a consequence, current paragraph 2 of article 6 would need to be re-numbered as paragraph 3.

126 Turning to document LEG 89/5/5, the Canadian delegation stated that, whilst the purpose of article 7 was to provide guidance to States Parties who were required to determine that a wreck had become a "hazard" as comprehensively defined in article 1(5), the conjunction of the expression "shall be applied" (line 2 in the chapeau of article 7) and the expression "as

appropriate" (line 1 of the chapeau of article 7) may create an unintended ambiguity, in the sense that the word "shall" is typically employed in describing a mandatory requirement, whereas, the expression "as appropriate" implies the conferring of a discretion and would be used to structure a provision that is recommendatory in nature. Any ambiguity in the language of that article could jeopardize the success of a claim by a State Party for the recovery of its removal costs pursuant to Article 10 in a court of law. It therefore recommended correcting that ambiguity by proposing a new text for the chapeau of article 7.

127 Following these introductions, the Committee continued its article-by-article examination of the DWRC, starting with article 8, on the understanding that it would consider the proposals in the various submissions in connection with each of the specific articles to which they referred.

Article-by-Article discussion

Locating wrecks (article 8, paragraph 1)

128 The Committee approved the deletion proposed by the Working Group.

Marking of wrecks (article 9, paragraph 3)

129 The Committee approved the re-drafting of the paragraph proposed by the Secretariat in document LEG 89/5/1/Rev.1. The approved text reads as follows:

> 3. "The State whose interests are the most directly threatened by the wreck shall promulgate the particulars of the wreck marking by use of all appropriate means, including the appropriate nautical publications."

Measures to facilitate the removal of wrecks (article 10)

Paragraph 1

130 Referring to the comments in document LEG 89/5/2, the representative of the CMI suggested that there was a need to consider incorporating appropriate consultative procedures into this article, of the type set out in article III of the 1969 Intervention Convention. She also suggested an amendment to the definition of "wreck" in article 1(4)(d).

131 Most delegations that spoke expressed the opinion that the DWRC already contained provisions sufficient to guarantee an adequate exchange of information between all involved parties, including the shipowner and the salvor, and that, as drafted, it reflected a good balance of all interests involved. Nevertheless the Committee decided that the issue of the consultative process deserved further study. Interested delegations were therefore invited to get together and find a possible solution.

Paragraphs 2, 3 and 4

132 The Committee focused on the amendments proposed by the Secretariat in document LEG 89/5/1/Rev.1, paragraph 8. After some discussion of treaty implementation under different systems of law, the Committee decided to maintain the text as drafted for the time being but requested interested delegations to find language that would satisfy both legal systems.

133 The Committee approved the amendments to paragraphs 3 and 4 proposed by the Working Group.

Paragraph 6(a)

134 The Committee noted that, should the proposal submitted by Canada in document LEG 89/5/5 to article 7 be approved, there might be a need for a consequential amendment to this paragraph.

Paragraphs 6(b), 7, 8, and 9

135 The Committee noted the amendments proposed by the Secretariat in document LEG 89/5/1/Rev.1 and agreed that these should be considered in informal consultations.

136 The Committee took note of oral proposals to re-arrange the different paragraphs and to insert at the beginning of paragraph 8 the wording "Notwithstanding paragraphs 6 and 7,", in order to make it clear that, in case of emergency, the provisions of that paragraph superseded those contained in the two preceding paragraphs. The Committee decided that these proposals needed to be further considered among interested delegations, keeping in mind the structure of the whole article.

137 The point raised by the representative of the CMI, with regard to unfair dispossession of the salvor in the event that the coastal State acted unreasonably, was also discussed in this context. However, the delegations that intervened could not support the CMI view. Nevertheless, it was recognized that the issue deserved further informal consultation.

Financial liability for locating, marking and removing wrecks (article 11)

138 One delegation stated that its National Maritime Law Commission was of the view that the words "act of war", contained in paragraph 1(a), as well as in the corresponding provisions of other liability and compensation conventions, included acts of terrorism. Some other delegations expressed the opinion that acts of terrorism were covered in paragraph 1(b).

139 In this connection, another delegation expressed the opinion that, in order to cover acts of terrorism, it would be preferable to insert specific wording, similar to that used in the ISPS Code and in the 2002 SOLAS amendments. This view was supported by the representatives of the International Group of P&I Clubs and by IUMI. However, most delegations that intervened were against the insertion of specific language in the DWRC to cover acts of terrorism, since inserting specific language in this convention could imply that acts of terrorism were not covered under the other existing liability and compensation treaties. These delegations felt that the problem was broader and required a common solution.

140 Subject to these comments, the Committee approved the whole article.

Article 12 , paragraph 1

141 The delegation of the Netherlands explained the amendments developed intersessionally.

142 One delegation, referring to its comments at previous sessions on this article and the relationship with other liability conventions, such as the Civil Liability Convention (CLC), the Bunkers Convention and the HNS Convention, reiterated that a clear line should be drawn between the application of the DWRC and the application of the other conventions to avoid double compensation.

143 In the opinion of that delegation, the possible conflict could be avoided by clarifying in the context of the article in question that the DWRC applies "only to the extent that this is not in conflict with article III, paragraph 4 of the CLC, article 5, paragraph 5 of the Bunkers Convention and article 7, paragraph 4 of the HNS Convention."

144 All delegations which spoke agreed with the principle that there should be no possibility of double compensation and that the matter was essentially one of drafting. It was suggested therefore that other conventions be looked at in order to resolve this issue.

145 Subject to these comments, the Committee approved the article.

Article 13

146 In introducing this provision, the delegation of the Netherlands recalled that the text had been approved by the Committee at its eighty-fifth session.

147 The Committee noted that the Secretariat's suggestion in document LEG 89/5/1/Rev.1 to amend paragraph 1 by inserting the words "at least" between the words "amount" and "equal" was not entirely a drafting point, and that it could slightly change the meaning of the provision. There was some support for the Secretariat's proposal but other delegations felt that the text should remain as it is. The draft was sent back to interested delegations for further consultation.

148 The Secretariat comments with regard to the length threshold versus the tonnage threshold criterion contained in other liability and compensation conventions were also noted, but it was decided to keep the length threshold criterion.

Article 2(1)

149 The Committee then considered the joint proposal in document LEG 89/5/3, to add the words "of other States Parties" in article 2(1), in order to make it clear that any measures provided for in the DWRC could only apply between States Parties to the Convention.

150 One delegation commented that there was no need to insert the proposed amendment, since it reflected a well established principle of international law. Moreover, because of the opting-in clause, the inclusion would imply that a State would not be able to remove wrecks of non-Parties in its territorial waters under national law. The delegation concluded that, if necessary, the principle would be better placed in the preamble to the DWRC.

151 These comments were supported by other delegations on the grounds, *inter alia*, that a coastal State is entitled to take action in relation to the removal of a wreck when the wreck constitutes a pollution hazard under UNCLOS, the Intervention Convention or customary international law. It was suggested that the proposed amendment could perhaps lead to the misunderstanding that no action can be taken when the State of the ship's registry is not a party

to the DWRC, even if there is a risk of major harmful consequences, as described in article 221 of UNCLOS.

152 Should the amendment be approved, one way to eliminate the risk of misunderstanding would be to add at the beginning of article 2(1) the words “without prejudice to other rules of international law.”

153 The Committee decided that the proposal in document LEG 89/5/3 required further informal consultations.

Submission of documents LEG 89/5/4 and LEG 89/5/5

154 The Committee decided to defer its consideration of documents LEG 89/5/4 and LEG 89/5/5 submitted by Canada to its next session.

155 The Committee agreed that the text of the DWRC required further intersessional drafting in the light of the comments and proposals at this session, including the Secretariat’s drafting suggestions contained in document LEG 89/5/Rev.1.

156 Interested delegations were invited to continue working intersessionally under the leadership of the delegation of the Netherlands to further refine the text.

F PROVISION OF FINANCIAL SECURITY (agenda item 6)

(i) Progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

157 In introducing document LEG 89/6/1, the IMO Secretariat reported that no meeting of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers (the Joint Working Group) had been held during the intersessional period.

158 The Secretariat recalled that the Committee, at its eighty-eighth session, had taken note of the report of the fifth session of the Group, as contained in document IMO/ILO/WGLCCS 5/3, which was attached to document LEG 88/5/1, and that it had approved all the points requiring decision in the document. In particular, it had authorized the Group to proceed with the development of longer-term sustainable solutions to address the problems of financial security with regard to compensation in case of death and personal injury, leaving aside, for the time being, whether these should be mandatory or not. It was understood that the eventual solution should not in any way interfere, affect, erode or in any way whatsoever, diminish any rights or remedies seafarers may enjoy in a particular State under an existing legal framework.

159 The Committee had also authorized the Joint Secretariat to prepare suggestions of possible sustainable solutions for the consideration of the Group at its next session, approved the revised terms of reference for the Group, and had endorsed the Guidelines on methods of work.

160 Member States and non-governmental organizations had been urged by the Committee to respond without delay to Circular letters No.2531 on monitoring the implementation of the

Guidelines on Provision of Financial Security in case of Abandonment of Seafarers (resolution A.930(22)) and No.2532 on reporting in cases of abandonment. However, as stated by the Secretary-General in his opening speech, so far, only a few replies had been received by the Joint Secretariat.

161 The Joint Secretariat, by Circular letter No.2575 of 13 July 2004, had circulated the outcome of the discussions of the Legal Committee at its last session and of the ILO Governing Body at its 289th session (11 to 26 March 2004) on the recommendations of the Group. That should enable Social Partners and Governments to prepare their written submissions on the format and content of possible eventual solutions as soon as possible.

162 The Council, at its ninety-second session (21 to 25 June 2004), had taken note of the decisions of the Legal Committee.

163 The Committee was informed that date for the sixth session of the Joint Working Group would be determined in consultation with ILO, the Chairman and the Social Partners.

164 The representative of the International Labour Office (ILO) reported that the ILO Secretariat had also issued Circular Letters Nos.2531 and 2532 and their annexes to its constituents, as well as to the participants in the High Level Tripartite Working Group on Maritime Labour Standards, in order to maximize their distribution. The ILO fully associated itself with the pleas expressed by the IMO Secretary-General and the IMO Secretariat, in order to receive more information in the form of responses to the questionnaires from Member States and interested Organizations. ILO was currently developing the database on cases of abandonment, which was expected to be ready and fully operational in the course of the first quarter of 2005. The representative concluded its intervention by conveying the expressions of ILO gratitude to the International Ship Suppliers Association (ISSA) for its financial support to the development of the database.

165 The representative of the International Chamber of Shipping (ICS), intervening on behalf of the International Shipping Federation (ISF), Social partner in the Joint Working Group, stressed that, in order to make progress in the consideration of the issues at stake, more data was needed well in advance of the next session of the Working Group. It therefore renewed the invitation to reply to the questionnaire as soon as possible.

166 The Committee noted the progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, as contained in document LEG 89/6/1, as well as the supplementary information by the Joint Secretariat and urged Member States and non-governmental organizations to respond without delay to Circular letters No.2531 on monitoring the implementation of the Guidelines on Provision of Financial Security in case of Abandonment of Seafarers (resolution A.930(22)) and No.2532 on reporting in cases of abandonment.

(ii) Follow-up on resolutions adopted by the International Conference on the Revision of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974

167 The Committee noted the report from the CMI in document LEG 89/6 concerning a study of the current practice of registration of bareboat chartered vessels and the implications for insurance certificate-issuing obligations under IMO liability conventions. The representative of the CMI noted that, while there was no common definition for bareboat charterers, it was generally agreed that, under a bareboat charter contract, full possession and control of a ship was transferred from the shipowner to the bareboat charterer. In such cases, third party liability, along with the obligation to insure for such liabilities, should be borne by the bareboat charterer. The CMI representative said this was an interim report, and the CMI working group would be continuing its work with the aim of providing a fuller report to the Committee in due course.

168 It was noted that one of the approaches suggested in document LEG 89/6 was a resolution extending the interpretation of the term ‘registered owner’ to include a “registered bareboat charterer”. Further study was needed on the effect this approach might have on conventions containing references to the registered owner.

169 One delegation expressed the view that there did not seem to be any problem with the current arrangements, and use of a resolution to interpret the convention might raise practical problems for those countries which relied on the convention as the legal foundation for maintaining insurance.

170 The Committee encouraged the CMI to continue its study.

171 The Committee noted the report submitted by Norway in document LEG 89/6/2 on informal, intersessional consultations on the availability of financial security in respect of the Athens Convention, 2002. The Committee noted that the report identified two key issues relating to the compulsory insurance provisions of the Athens Convention, 2002, which would need to be addressed: (a) the amount issue, that is the issue that the Athens Convention on passenger liability requires a higher amount of compulsory insurance and of liability than previous IMO pollution conventions; and (b) the war risk and acts of terrorism issue, that is the issue that article 3 of the Athens Convention is not strictly confined to non-war P and I insurance, but may also affect war risk insurance.

172 The Committee also noted that the document contained a number of possible approaches to resolving these issues, particularly in paragraphs 6, 7, 8 and 11. It was noted that no conclusions had been reached by those involved in the informal consultations and they intended to continue these consultations.

173 It was generally agreed the revision of the Athens Convention was not an option for addressing these issues.

174 The representative of the ICS called the Committee’s attention particularly to the following statement in paragraph 12 of document LEG 89/6/2: “there is no offer in the market today that satisfies the Athens insurance requirements.” The consequence of this, according to the ICS representative, was that no State Party could certify that a ship owner held sufficient insurance, and such a certificate would be required as a licence to trade if the Athens Convention 2002 was in force today. The representative expressed the view that the option set out in

paragraph 8 of document LEG 89/6/2 for clarifying the terrorist issue by means of a uniform interpretation agreed to between State Parties, as permitted under article 31(3) of the Vienna Convention on the Law of Treaties, was an attractive one. In this regard, he suggested that the term "acts of war and hostilities" could be deemed to include "acts of terrorism".

175 It was noted that any interpretation along these lines would have a bearing on other liability conventions, such as the CLC.

176 With regard to the option as set out in paragraph 11 of document LEG 89/6/2 for addressing the amount of compulsory insurance cover required by the Athens Convention 2002, and the use of the LLMC 1996 limits as an interim solution, the representative of the ICS expressed support for giving further consideration to this approach. Some delegations, while remaining open to examining this option, also expressed concern that this "interim" approach, if adopted, should not be left in place indefinitely.

177 Some delegations said they did not believe the option set out in paragraph 7 of document LEG 89/6/2 on "mandatory pooling" between ship owners was a practical solution. It was noted that this would require national legislation, and the current policy in some countries was not to use legislation to interfere in the insurance market, in part because this might result in the need for government guarantees.

178 With regard to the option set out in paragraph 9 of document LEG 89/6/2, it was suggested that a "government reinsurance scheme" had been introduced through national laws to address other terrorism conditions and should not be discarded as an option for further consideration.

179 The representatives of IUMI and the International Group of P & I Clubs said they were willing to co-operate in finding a solution to the two issues raised in document LEG 89/6/2. The representative of IUMI confirmed that the liability amounts available in the market were similar to those available at the time of the Athens Conference in October 2002. The representative of the International Group of P & I Clubs said that the capacity issue will be put to Club Boards once a solution has been found to the terrorism issue. However, at this stage, it is uncertain whether Club Boards will agree to cover the amounts, particularly because passenger ships constitute only a small percentage of the Group's membership.

180 The Committee encouraged those involved in the informal consultation process to continue their efforts. All delegations were invited to contribute to this work.

G PLACES OF REFUGE (agenda item 7)

181 The Committee recalled that the CMI had carried out a study on places of refuge, with particular reference to financial aspects, as requested by the Legal Committee at its eighty-seventh session in 2003.

182 In document LEG 89/7, the CMI reported on the outcome of its Vancouver conference in June 2004 with regard to Places of Refuge. The CMI informed the Committee that it had identified several concerns in the present system, one of which was that there was no single international convention establishing the rights and obligations of a coastal State when it was faced with a request for a place of refuge. The CMI suggested that one possible solution in this matter could be the preparation of an international convention.

183 The International Group of P&I Clubs introduced document LEG 89/7/1, which set out its proposals on the provision of financial security to authorities in relation to vessels granted a place of refuge. According to the International Group, it would be premature for IMO to decide at present that there was a need to draft a further convention relating solely to places of refuge as had been suggested by the CMI, until the remaining conventions on liability and compensation have entered into force and their effect in relation to places of refuge has been determined. In the absence of the entry into force of all the conventions, the International Group had formulated a standard letter of guarantee, as set out in LEG 89/7/1, to facilitate access to places of refuge in appropriate cases.

184 While some delegations supported the CMI's proposal for a new convention on this matter, most delegations and observer delegations that spoke were of the view that there was no need to draft further conventions. In this regard concern was expressed that certain fundamental and well-established principles in the international liability and compensation regime were not fully taken into account in the report. Additionally, they were of the opinion that the regime of liability and compensation for pollution damage as put in place by IMO conventions worked reasonably well. These delegations noted that not all the conventions were in force, which meant that there were gaps in the regime, and the proper way to fill the gaps was not to create a new convention or draft amendments to the existing conventions but to ratify and implement the existing conventions.

185 One delegation observed that the Assembly gave a mandate to the Legal Committee to deal only with the compensation issue. The delegation could not endorse the suggestion of the International Group of P&I Clubs concerning a model letter of guarantee pointing out that provisions of financial guarantees were already established in their national law. On the other hand, it was noted that letters of guarantee did work well in some jurisdictions.

186 The observer delegation from IAPH agreed with the CMI report. The attention of the Committee was drawn to the IAPH document submitted at the eighty-fourth session of the Legal Committee (LEG 84/7/1) and the topics raised in that document were not, in the view of the IAPH, sufficiently addressed in the existing conventions.

187 The Committee took note of the information provided by the CMI and the International Group of P&I Clubs and agreed that this matter required further study, in order to make a report to the Assembly.

H MEASURES TO PROTECT CREWS AND PASSENGERS AGAINST CRIMES COMMITTED ON VESSELS (agenda item 8)

188 The Committee noted the information in document LEG 89/8 reporting the adoption of a resolution by the Assembly of the CMI in June 2004 concerning the ability of coastal States to take custody of a foreign citizen who has been accused of a criminal offence on a foreign flag ship on the high seas. The resolution recommended that the CMI establish a Joint International Working Group to draft a model national law concerning such offences and that the text of such model national law be promulgated to the Member Associations of the CMI.

189 The delegation of Japan, in the annex to document LEG 89/8/1, identified a number of legal points which it said should be taken into account in considering what options may be available to protect crews and passengers against crimes committed on ships.

190 One delegation called the Committee's attention to a recent incident where, due to a jurisdictional problem, the police could not take immediate action. The police from the coastal State initially took the position that since (a) the vessel did not fly the flag of the coastal State, (b) the accused persons were not nationals of the coastal State, and (c) no offence had taken place within the territory of the coastal State, they had no jurisdiction in the matter and were therefore not able to assist in any manner whatsoever. In this case the police eventually agreed, at the instance of Interpol, to conduct a forensic investigation for the purpose of preserving evidence, and to keep the suspects in custody until arrangements could be made to fly them to their country of citizenship. According to this delegation, the incident demonstrated the need for development of new legal instruments perhaps along the lines of those recommended by the CMI.

191 It was suggested that the CMI, instead of developing a model national law, might consider working with the Legal Committee with the view to developing an instrument that might develop into customary international law.

192 The Committee took note of the information contained in documents LEG 89/8 and expressed its appreciation for the identification of legal points in LEG 89/8/1. It was decided that no further action was required of the Committee at this time but that the matter could be reactivated at some future meeting by interested delegations.

I FAIR TREATMENT OF SEAFARERS (agenda item 9)

193 The Committee recalled that the Council at its ninety-second session had approved this new item on the Committee's work programme to develop guidelines on the fair treatment of seafarers and agreed that a joint IMO/ILO Working Group should be established. The Committee was informed by the representative from the ILO that the ILO Governing Body, at its 290th session (June 2004), had approved the establishment of a Joint IMO/ILO *Ad Hoc* Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident as a tripartite body (i.e., to be composed of eight Government experts nominated by IMO, as well as four Shipowner and four Seafarer experts nominated by ILO). The ILO representative said the outcome of the Committee's consideration of this issue, including any agreed terms of reference, would be brought to the attention of the next session of the ILO Governing Body in November.

194 The Committee agreed to the Terms of Reference as contained in the annex to document LEG 89/9/1 with an amendment to the fourth bullet, which will read as follows: internationally recognized standards and guidelines on settlement of disputes, including various liability and compensation regimes. The approved terms of reference are attached at annex 6 to this report.

195 It was noted that the terms of reference did not extend to treatment of seafarers following incidents committed with criminal intent.

196 The Committee agreed to appoint the following eight countries to represent the Organization on the Joint *Ad Hoc* Expert Working Group: China, Egypt, Greece, Nigeria, Panama, Philippines, Turkey and the United States. The Committee was informed that other delegations may attend meetings of the Joint *Ad Hoc* Expert Working Group as observers.

197 The Committee was advised that the first meeting of the Joint *Ad Hoc* Expert Working Group was tentatively scheduled to take place from 17 to 19 January 2005 at IMO Headquarters.

198 Documents submitted to this session with proposals (LEG 89/9/1 submitted by IFSMA and LEG 89/9/2 submitted by Brazil), as well as document C 92/6/1 submitted by India to the Council, were referred to the Joint *Ad Hoc* Expert Working Group to be taken into consideration in its work. All delegations, and the social partners (ICS/ISF and ITF/ICFTU) were encouraged to submit proposals to the Group. It was also requested that the IMO and ILO Secretariats prepare a document for the Group containing background materials such as copies of documents referred to in the Terms of Reference.

199 The representative of the CMI informed the Committee that the CMI had established an international working group on fair treatment of seafarers and hoped to make a contribution to the work of the Joint *Ad Hoc* Expert Working Group.

200 The Committee expressed its appreciation to the Secretary-General for his personal efforts in calling attention to the issue of the fair treatment of seafarers.

J MONITORING THE IMPLEMENTATION OF THE HNS CONVENTION (agenda item 10)

201 The delegation of the United Kingdom introduced document LEG 89/10 which reported on the progress of States participating in the HNS Correspondence Group towards ratification of the HNS Convention.

202 As leader of the Correspondence Group, the delegation stated that there was a recognition that the HNS Convention had complexities that differed from the similar IOPC Fund regime, especially in respect of contributions. It also mentioned that the ratification process had been held back to ensure that as many States ratify at or about the same time, thereby triggering the entry into force of the treaty.

203 The Committee noted that article 43 of the HNS Convention imposed a requirement on States Parties to report information on contributing cargo at the time of ratification and on an annual basis, including nil reports. The Committee requested the Secretariat to remind States of their treaty obligations under article 43 when their instruments of ratification or accession were deposited with the Secretary-General.

204 The Committee was informed that the IOPC Fund had now produced a database for identifying and recording contributing cargo. The Committee expressed its appreciation to the IOPC Fund for undertaking the task of producing the contributions calculator.

205 The Committee took note of the information and thanked the delegation of the United Kingdom for its leadership in the management of the HNS Correspondence Group.

K MATTERS ARISING FROM THE NINETY-SECOND SESSION OF THE COUNCIL (agenda item 11)

206 The Secretariat introduced document LEG 89/11, dealing with matters arising from the ninety-second session of the Council and document LEG 89/11/1, dealing with possible amendments to the Committee's Rules of Procedure to allow attendance of news media at the proceedings of the Committee, in the light of the Guidelines adopted by the ninety-second session of the Council for media access to meetings of Committees and their subsidiary bodies.

207 The Legal Committee took note of the information in document LEG 89/11. In particular, the Committee noted the Guidelines for media access to meetings of Committees and their subsidiary bodies contained in the annex to that document.

208 The Committee noted the information in document LEG 89/11/1, including the outcome of the Facilitation Committee's consideration of this item, and the wording of its amended rule. The Committee also noted the different outcome of the Marine Environment Protection Committee (MEPC) at its fifty-second session (11 to 15 October 2004) on the same matter, as reported orally by the Secretariat.

209 The Committee noted that a system of accreditation of representatives from the maritime news media had now been set up. It was further noted that meetings of working groups and drafting groups would remain private.

210 The Committee then considered a draft amendment to Rule 9 of its Rules of Procedure contained in paragraph 5 of document LEG 89/11/1. The draft amendment, which had been prepared by the Secretariat, would explicitly allow access to Committee meetings by news media, without opening the meetings to the general public.

211 After debate, the Committee adopted the amendment in paragraph 5 of document LEG 89/11/1, with some modifications.

212 The revised Rule 9 is contained in annex 4 to this report.

L TECHNICAL CO-OPERATION: SUBPROGRAMME FOR MARITIME LEGISLATION (agenda item 12)

213 The Committee took note of the information contained in documents LEG 89/12 and its annex and LEG 89/12/Corr.1.

214 The Senior Deputy Director of the Technical Co-operation Division (TCD) provided the Committee with the following additional information on Technical Co-operation (TC) activities in relation to maritime legislation:

- The Technical Co-operation Committee (TCC) at its fifty-fourth session held in June 2004 had considered the final report of the Integrated Technical Co-operation Programme (ITCP) for the 2002-2003 biennium. That biennium saw a remarkable and sustained increase in the delivery of TC activities. One of the achievements was the development of some 18 models of primary or secondary legislation and details could be found in document TC 54/3.

- IMO had completed an impact assessment exercise on the ITCP activities during 2000-2003, which included activities on maritime legislation, and submitted it to the fifty-fourth session of the TCC for consideration. The conclusion of the assessment in the field of maritime legislation was positive and the report submitted by the external consultants could be found in document TC 54/7. The outcome of the consideration of the report by TCC could be found in document TC 54/15.

- The ITCP was developed based on regional needs, thematic priorities established by various IMO Committees, as well as on donor interests. It was the understanding of the Secretariat that the Legal Committee, unlike other Committees, did not choose thematic priorities for a given biennium. However the Committee had established a framework of major areas of concern in the field of maritime legislation, as a base for the developing countries to identify their specific needs. If not instructed otherwise by the Committee, the Secretariat would use the same framework (as shown in document TC 53/4) for the development of the ITCP for 2006-2007.

215 The Committee noted that the fifty-fifth session of the TCC to be held in June 2005 is expected to consider and adopt the new ITCP for 2006-2007.

216 The Committee took note of this information as well as a change in the name of the agenda item to "Technical Co-operation activities related to maritime legislation."

M REVIEW OF THE STATUS OF CONVENTIONS AND OTHER TREATY INSTRUMENTS ADOPTED AS A RESULT OF THE WORK OF THE LEGAL COMMITTEE (agenda item 13)

217 The Committee took note of the information provided by the Secretariat in documents LEG 89/13 and its annex and LEG 89/WP.2 on the status of conventions and other treaty instruments adopted as a result of the work of the Legal Committee.

N WORK PROGRAMME AND LONG-TERM WORK PLAN (agenda item 14)

218 The Committee noted the information in document LEG 89/14 and its annex.

219 The Committee recalled that the Assembly, at its twenty-third session, had approved, on a planning basis, the convening of one diplomatic conference in 2005, and that it was generally understood by the Legal Committee that this conference was intended for the revision of the 1988 SUA Treaties. The Committee also recalled that, subject to confirmation by the Assembly at its twenty-fourth session, the Assembly at its last session had approved in principle the holding of another diplomatic conference in 2006. Nevertheless, the Committee considered that, even if the Working Group on the revision of the SUA treaties had made good progress at the present session, the draft instruments would still require another week of the Committee's time.

220 In the light of the above-considerations, the Committee decided:

- to hold a second session of the Working Group on the revision of the SUA Convention and Protocol from 31 January to 4 February 2005;

- to have a two-week Legal Committee meeting from 18 to 29 April 2005, on the understanding that the first week would be completely devoted to the finalization of the revision of the SUA treaties and the second week would then be devoted to the Draft Wreck Removal Convention and to the remaining items on the Committee's agenda. In this connection, Friday, 12 March 2005 would be the extended document deadline for bulky SUA documents (i.e. more than 6 pages) only (i.e. 5 weeks before the opening of the session, instead of the usual 9 weeks, which will continue to apply to all other bulky documents); and

- to hold a diplomatic conference on the revision of the SUA treaties from 10 to 14 October 2005, in lieu of the ninety-first session of the Legal Committee.

221 The Committee noted that, at its next session, it would have to finalize its long-term work plan.

O ANY OTHER BUSINESS (agenda item 15)

Torres Strait PSSA associated protective measure - compulsory pilotage

222 The Committee was informed that the Sub-Committee on Safety of Navigation (NAV), at its fiftieth session, had reviewed proposals by Australia and Papua New Guinea to extend the existing Great Barrier Reef compulsory pilotage scheme to the Torres Strait. After reviewing these proposals, NAV agreed that the proposed compulsory pilotage scheme in the Torres Strait was operationally feasible and largely proportionate to provide protection to the marine environment.

223 The Committee was also informed that, on reaching this conclusion, the NAV Sub-committee recognized that the following issues had not been considered:

- whether the proposed measure is the only measure which can improve the safety of navigation in the area;

- what other feasible associated protective measures can be implemented; and

- the effect of the implementation of other feasible measures in general and in comparison with the effect of the implementation of the proposed measure.

224 NAV 50 also noted the opinion of a number of delegations that there was no clear legal basis to adopt a compulsory pilotage regime in straits used for international navigation. Consequently, NAV invited the Marine Environment Protection Committee (MEPC), at its fifty-second session, to refer the legal aspects of compulsory pilotage in straits used for international navigation to the Legal Committee (LEG), for consideration at this session, in order to enable the Maritime Safety Committee (MSC), at its seventy-ninth session, to consider the proposal with the issue of the legal basis resolved. The matter was subsequently discussed at MEPC 52 and that Committee endorsed this recommendation.

225 Australia introduced document LEG 89/15 which provided a legal analysis of this issue to assist the Legal Committee in its consideration of this matter. The Australian delegation stated that there was no provision in the United Nations Law of the Sea Convention (UNCLOS) that would prevent the introduction of a scheme of compulsory pilotage and that it was entirely consistent with international law, in the unique circumstances of the Torres Strait. Indeed, the IMO guidelines on PSSAs expressly recognized compulsory pilotage as an appropriate special measure. The Australian delegation also added that the aim of introducing compulsory pilotage was to improve safety of navigation, not to hamper the transit passage through a strait used for international navigation.

226 There was a general recognition of the importance of protecting the marine environment of the Torres Strait. The Committee took note of the intervention made by Papua New Guinea

concerning the particular vulnerability of the indigenous population bordering the Strait to marine disasters.

227 There was general agreement on some of the fundamental principles of international law as codified in UNCLOS, in particular the right of transit passage through straits used for international navigation. There was also agreement that IMO is the competent international organization to address measures such as the one proposed.

228 Some delegates supported the Australian and Papua New Guinean proposal and pointed out that the introduction of a compulsory pilotage scheme through IMO procedures was in full compliance with the overall principles of freedom of navigation. They acknowledged the legitimate interest of coastal States to adopt pilotage schemes in order to protect the sensitive environment in their waters. Those delegates believed that Australia and Papua New Guinea had demonstrated the compelling need for the introduction of compulsory pilotage in the Torres Strait due to its unique character.

229 One delegation expressed the opinion that the examination of this question by the Legal Committee was pointless and would not lead to any definitive conclusion. This delegation expressed its concern and its opposition with regard to the possibility of a systematic examination by the Legal Committee of a decision-making process which should be the concern of the technical committees only, and which may possibly delay resolution of this matter.

230 Some delegations noted that UNCLOS does not contain specific articles either to sanction or prevent compulsory pilotage, therefore, compulsory pilotage can be introduced legally under the auspices of IMO.

231 Some delegations were also of the view that the absence of an express legal basis did not justify a further delay of the proposed compulsory pilotage. However, it should not be seen as a precedent. In this respect, several delegations were of the view that IMO should consider each proposal submitted to it on a case by case basis to determine whether the proposal met the conditions set out in the guidelines.

232 Some delegations were of the view that unimpeded transit passage was one of the most critical freedoms of navigation provided for in UNCLOS. They referred to the express provisions of UNCLOS providing that laws and regulations shall not have the practical effect of denying, impairing or impeding the right of transit passage and imposing a duty on States not to hamper transit passage. Those delegations were also of the view that imposing pilotage on a compulsory basis implied the intention to impose some form of sanctions on those vessels, which did not take a licensed pilot.

233 Some delegations stated that the introduction of compulsory pilotage was of itself an impediment of transit passage. Therefore, the introduction of a compulsory pilotage scheme would have the practical effect of denying or hampering the transit passage regime. Those delegations also expressed the view that the articles cited by Australia and Papua New Guinea as authority for compulsory pilotage did not provide the proper legal basis. Moreover, they were of the view that there was no provision which expressly allowed the introduction of compulsory pilotage that would counter the express provisions providing for transit passage and that the absence of such a provision in UNCLOS does not signify that it is possible to establish compulsory pilotage.

234 Some delegations were of the view that there might be a need for more analysis, especially on the issue of impairment of the right of transit passage. In this respect, those delegations suggested that it might be appropriate to refer the matter to LEG 90 to permit sufficient time to consider fully the implications under UNCLOS. It was noted that LEG 90, MSC 79 and MSC 80 would all meet before MEPC 53 would receive the matter. That meeting of MEPC would then be in a position to decide what should be recommended to the Assembly in 2005. Some delegations opposed the suggestion for a referral of the matter to LEG 90 and proposed that the issue should be resolved in the appropriate organs of IMO, not in the Legal Committee. These delegations also noted that the proposal had already been considered by at least four different IMO Committees and Sub-Committees to date.

235 One delegation identified alternative legal avenues upon which States might want to agree. These were:

- compulsory pilotage as a condition of port entry for vessels in accordance with Article 38.2 of UNCLOS;

- States bordering a strait may pursue agreements with user States to require compulsory pilotage under article 43 of UNCLOS;

- flag States supporting pilotage in the Torres Strait could undertake measures to ensure full compliance by vessels of their flag with Australia's current pilotage scheme.

236 In relation to port entry, Australia noted that the majority of vessels transiting the Torres Strait do not make port calls in Australia or Papua New Guinea. On the possibility of bilateral agreements, Australia stated that this would not provide a comprehensive solution and that IMO is the appropriate forum to consider compulsory pilotage.

237 Some delegations suggested that, in order for IMO to be able to consider any other proposal concerning compulsory pilotage, further instruments were needed and should be developed. Some suggested that a new regulation in SOLAS chapter V could be adopted concerning compulsory pilotage. Moreover, the new regulation should also be supported by the development of new guidelines and criteria for adoption of pilotage schemes.

238 Some delegations also pointed out that while NAV 50 had stated that compulsory pilotage could be operationally feasible, the NAV Ships' Routeing Working Group, set up to study the matter, was instructed to assess the operational point of view and to refrain from discussing the legal issues. Accordingly, necessary details related to whether the measure would impair, impede or hamper the essential right of transit passage through a strait used for international navigation had not been satisfactorily examined. They were of the view that it was not possible for Governments to know, on the basis of the current proposal, whether or not transit passage would be impaired, impeded or hampered.

239 Some delegations also expressed their concern on the practicality of this measure, in other words, whether a compulsory pilotage scheme would enhance the transit passage through the straits and whether a sufficient number of trained pilots would be available. They further suggested that additional factual information must be considered before any analysis of whether the proposed compulsory pilotage scheme would, as a practical matter, impair, hamper or impede transit passage.

240 In relation to the concerns expressed by those delegations, Australia noted:

- Sufficient numbers of pilots would be available. If a pilot were not available, Australia would not impede passage through the Strait.

- Compulsory pilotage would enhance passage by increasing the safety and security of vessels transiting the Strait.

241 In the final analysis, the Committee remained divided on resolving the legality of compulsory pilotage in straits used for international navigation.

EXPRESSION OF CONDOLENCES

242 The Committee received with deep sadness information on the recent passing away of:

- Captain Hubert Wardelmann (Germany), former Head of Cargoes Section, Maritime Safety Division and until recently Representative of the International Road Transport Union (IRU) to IMO; and

- Mrs. Vassiliki Syrpis (Greece), interpreter for more than thirty years,

both of whom had rendered invaluable services to the Organization in their respective capacities.

243 The Committee requested the Secretariat to convey its deep condolences to the bereaved families, colleagues and friends of the two deceased officials.

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ANNEX 1

AGENDA FOR THE EIGHTY-NINTH SESSION

Opening of the session

1 Adoption of the agenda

2 Report of the Secretary-General on credentials

3 Election of officers

4 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)

5 Draft convention on wreck removal

6 Provision of financial security:

(i) progress report on the work of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers; and

(ii) follow-up on resolutions adopted by the International Conference on the Revision of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974

7 Places of refuge

8 Measures to protect crews and passengers against crimes committed on vessels

9 Fair treatment of seafarers

10 Monitoring the implementation of the HNS Convention

11 Matters arising from the ninety-second session of the Council

12 Technical Co-operation: subprogramme for maritime legislation

13 Review of the status of Conventions and other treaty instruments adopted as a result of the work of the Legal Committee

14 Work programme and long-term work plan

15 Any other business

16 Report of the Committee

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ANNEX 2

RESERVATION BY THE DELEGATION OF INDIA WITH REGARD TO THE REVISION OF THE SUA CONVENTION AND PROTOCOL

India is in agreement with the need to effect amendments in the SUA Convention and Protocol to ensure the safety of maritime navigation. But is of the view, as highlighted previously in the eighty-eighth session of the Legal Committee, the ninety-second session of the Council of IMO as also during the Legal Committee Intersessional Working Group meeting on the revision of the SUA Convention and Protocol in July 2004, that discussions on this issue should be within the framework of the principles contained in the Assembly resolution A.924(22).

The delegation of India objected to the expansion of the mandate provided by the Assembly resolution A.924(22) on the grounds that:

(i) the mandate did not include a discussion of principles related to the Nuclear Non-Proliferation Treaty, which by definition are outside the competence of the IMO;

(ii) the imposition of the obligations of the NPT, the CWC and the BWC on States not party to these treaties was a violation of the Vienna Convention on Law of the Treaties; and

(iii) the mandate of resolution A.924(22) is derived from its text and not from the will of the majority.

The delegation of India very strongly believes that incorporating principles related to the Nuclear Non-Proliferation Treaty into the SUA Protocol would be going beyond the mandate of the Legal Committee flowing from resolution A.924(22).

Therefore, the delegation of India proposed that document LEG 89/4/1 containing the draft amendments to the SUA Convention and its Protocol be referred back by the Legal Committee to the IMO Assembly at its next session, with a view to determining whether this document was in conformity with resolution A.924(22).

Since our objections were not accepted, India was constrained to record its strong reservations with respect to the discussions of NPT related principles by the Committee beyond its mandate and reserved the right to raise the matter again in the Assembly, the Council and the other IMO forums.

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ANNEX 3

RESERVATION BY THE DELEGATION OF PAKISTAN WITH REGARD TO THE REVISION OF THE SUA CONVENTION AND PROTOCOL

Article 3*bis*

Like several other delegations, Pakistan also is of the firm view that non-proliferation issues are beyond the remit of the SUA Convention or for that matter of the IMO Provisions of Article 3*bis*(b), as drafted, relate to non-proliferation issues covered under relevant non-proliferation multilateral instruments, namely, the BTWC, the CWC, the NPT and other relevant IAEA instruments.

Secondly, the draft provisions, if accepted, would prohibit commercial activities that are absolutely legitimate under international law and the above-mentioned multilateral legal instruments.

Resolution A.924(23) of the Assembly has not mandated the Legal Committee to embark upon negotiating a non-proliferation instrument. Moreover, it is for the Assembly to interpret its resolution and the mandate contained therein, and not for the Council to do so.

There are two options:

Option one is to delete the entire paragraph. The NPT, the BTWC and the CWC do contain effective mechanisms to address violations. If there are loopholes, those should be plugged in within the framework of the three instruments rather than through the SUA Convention.

Option two is to make paragraph (b) clearly terrorism specific by adding the terrorist motive in article 3*bis* (1) (b) as suggested by ICFTU in LEG 89/4/8.

Pakistan agrees with those delegations who contend that neither the definition of "transport" nor adding another sub-paragraph, as proposed by Germany (SUA/WG 1), can be a substitute for the terrorist motive provision.

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ANNEX 4

LEGAL COMMITTEE RULES OF PROCEDURE

Rule 9

Publicity

1 The Committee may decide to hold meetings in private or in public. In the absence of a decision to hold meetings in public, they shall be held in private. Meetings of subsidiary bodies of the Committee shall be held in private, unless the Committee decides otherwise in any particular case.

2 Notwithstanding paragraph 1, representatives of the news media, duly accredited in accordance with the Guidelines adopted by the Organization, may attend meetings of the Committee and its subsidiary bodies, unless the Committee or its subsidiary bodies decide otherwise.

3 Meetings of working groups and drafting groups established by the Committee and its subsidiary bodies shall in any case be held in private.

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ANNEX 5

REPORT OF THE WORKING GROUP ON THE 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)

1 As agreed by the Legal Committee, the work on this subject continued in a Working Group that met concurrently with the Committee. The Group met from Tuesday, 26 October to Friday, 29 October 2004.

2 The following delegations participated: Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, China, Denmark, Finland, France, Germany, Greece, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Kenya, Liberia, Malaysia, Malta, Marshall Islands, Mexico, Netherlands, New Zealand, Norway, Pakistan, Panama, Poland, Portugal, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sweden, Turkey, United Kingdom, United States, Venezuela, Hong Kong, China, United Nations Office on Drugs and Crime, European Commission (EC), International Chamber of Shipping (ICS), International Shipping Federation Ltd (ISF), International Confederation of Free Trade Unions (ICFTU).

3 The Working Group based its work on the draft protocol to the SUA Convention contained in LEG 89/4/1 annex 1.

4 A revised draft of annex 1 will be prepared, based on the work of the Working Group at the eighty-ninth session of the Legal Committee, and will be published as a Secretariat document. It will also be circulated shortly to the Correspondence Group.

5 The Group adopted the decisions reflected in the following paragraphs.

OFFENCES (Article 4 of the draft protocol incorporating article 3*bis* and 3*ter*)

Article 3*bis* paragraph 1

6 A proposal was made to incorporate a new subparagraph (d) with the following text:

> "(d) If a person acquires the knowledge he or she is transporting items covered by Article 3*bis* paragraph 1(b) (ii), (iii) or (iv) and immediately notifies and follows the instructions of appropriate authorities, such transport is not an offence under this Convention."

7 The Group did not accept this proposal and referred this issue, along with the issue of the definition of "transports" to an informal drafting group. The informal drafting group proposal is provided in paragraph 12.

Article 3*bis*, paragraph 1(a)(ii)

8 The Group decided to remove the brackets around "which is not covered by (i)" and delete the remaining definitional text.

Article 3*bis*, paragraph 1(b)(iii)

9 The Group decided to remove brackets around this paragraph as a whole.

10 The Group decided that the internal brackets should be kept and included in the brackets a second alternative text contained in LEG 89/4/4, paragraph 2, namely: [any other nuclear activity not subject to a comprehensive safeguards agreement].

11 A few delegations restated their position against the inclusion of paragraph 1(b).

Article 3*bis* 1(b) (Definition of "transports")

12 The Group noted a proposal by an informal drafting group which reads as follows:

> "transports" means to [arrange,] initiate or have effective decision-making authority over the movement of a person or item" .

13 The Group decided to consider this definition during the intersessional period, including whether this resolved concerns of whether additional subjective elements were necessary, such as knowledge of a terrorist motive.

Article 3*bis* 1(b)(iv)

14 The Group noted a proposal by an informal drafting group which reads as follows:

" (b) Transports on board a ship (….)

[(iv) [to non-State actors, including terrorist groups] [related materials that require] **OR** [any equipment, materials, software or technology that could be used for the design, manufacture or delivery of a prohibited weapon and requires] a permit, licence or other authorization to be exported or otherwise removed from [, or imported or otherwise brought in to,] a[n] [exporting] **OR** [or importing] State

- where the required permit, licence or other authorization was not obtained or was obtained by fraudulent means [or deceit]; and

- knowing that the [related materials] **OR** [equipment, materials, software or technology] [are] **OR** [is] intended to be used in the design, manufacture or delivery of a prohibited weapon; or]"

Article 1.2c

"For the purposes of this Convention, …

2. [(c) the term "related materials" has the meaning given that term in Resolution 1540 of the United Nations Security Council (UNSCR 1540), adopted on April 28, 2004.]"

15 The Group decided to consider this proposal during the intersessional period.

Article 3*bis*, paragraphs 1(c), 2 and 3

16 Following a decision by the Group to include the "fugitive offence" in a separate article (see below) these provisions have been deleted.

New Article 3*ter*

17 It was decided to incorporate the following text as article 3*ter* (new):

"1. A person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence under (i) Article 3, (ii) Article 3*bis*, (iii) Article 3*quater* pertaining to an offence under Article 3 or Article 3*bis*, or (iv) 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. 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.

4 On depositing its instrument of ratification, acceptance, approval or accession a State Party may declare that it will apply the provisions of paragraph 1 in accordance with the principles of its criminal law concerning family exemptions of liability."

Article *3quater* (previously article 3*ter*), paragraph 4

18 Reference to paragraph 2 was added in subparagraph 4 so that the subparagraph reads as follows (addition in brackets):

"organizes or directs others to commit an offence as set forth in article 3, article 3*bis* or paragraphs 1 **or 2** of this article; or"

19 It was noted that corresponding changes to Article *3quater* would be made to reflect the creation of the new Article 3*ter*.

BOARDING (Article 6 of the draft protocol incorporating article 8*bis*)

Article 8*bis* paragraph 1

20 The Group agreed to replace subparagraph (b) with the following text:

> (b) States Parties shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere.

21 A minority of delegates preferred to end the text after either "States concerned" or "safely taken."

Article 8*bis* paragraph 3

22 The following sentence was added at the end of subparagraph (c)(iv):

> "The requesting State shall not board the ship or take measures set out in subparagraph (b) of this paragraph without the express authorization from the flag State."

23 The group did not accept the text, as proposed**,** for a new sub paragraph (d) contained in document LEG 89/WP.3.

Article 8*bis*, paragraph 6

24 The Group agreed to replace paragraph 6 with the following text:

> For all boardings pursuant to this Article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board (including seizure, forfeiture, arrest and prosecution); however, the flag State may, subject to its Constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under Article 6.

Article 8*bis* paragraph 8

25 The Group decided to replace subparagraph 8(a)(viii) with the following text:

> "ensure that the master of the ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State;"

26 The Group decided that the following text be added to paragraph 8(a) as new subparagraph (ix):

> "take reasonable efforts to avoid a ship being unduly detained or delayed."

27 The Group agreed to replace paragraph 8(b) with the following text:

> "[State Parties] shall be liable for any damage or loss attributable to them arising from measures taken pursuant to this Article when:
>
> (i) the grounds for such measures prove to be unfounded, provided that the ship has not committed any act justifying the measures taken; or
>
> (ii) such measures are unlawful or exceed that reasonably required in light of available information to implement the provisions of this Article.
>
> States Parties shall provide for effective recourse in respect of such damage."

28 "States Parties" was left in brackets in recognition of the significant number of delegations that expressed a preference for alternative terms. These alternatives will be reflected in a footnote in the next draft of annex I.

29 The Group decided to delete the text "to the ship" that was previously located in the first line of subparagraph (b) following "shall be liable." However, the Group agreed that alternatives offered in place of the deleted text would be included in a footnote in the next draft of annex I.

30 The Group decided to replace subparagraph (e) with the following text:

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

31 The Group discussed which offences under SUA should be subject to the boarding provisions and agreed to discuss this matter intersessionally.

OTHER MATTERS

Definition of "person"

32 The Group decided to delete the present definition and add a stand alone **provision** on the basis of the one contained in article 5 of the Terrorist Financing Convention.

Platforms protocol

33 Members were invited to exchange views on this subject, in particular in connection with the application *mutatis mutandis* of articles in the draft additional Protocol. It was noted that only those offences contained in 3*bis* 1(a) and 3*quater* are included in the draft additional Protocol.

Articles 11*bis*/*ter*

34 The Group noted explanations given in connection with draft articles 11*bis* and 11*ter*, and several delegations supported the current text. Reference was given to **articles 11 and 12 of the Terrorist Bombing Convention, and articles 14 and 15 of the Terrorist Financing Convention.** The Group agreed to retain these articles in brackets for further discussion intersessionally. **A proposal to delete these articles was not accepted. An alternative proposal with respect to these articles was presented and not accepted. The delegation presenting this alternative proposal will provide alternative text for intersessional review.**

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ANNEX 6

DRAFT TERMS OF REFERENCE FOR THE JOINT IMO/ILO *AD HOC* EXPERT WORKING GROUP ON THE FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

The Joint IMO/ILO *Ad Hoc* Expert Working Group should examine the issue of the fair treatment of seafarers in the event of a maritime accident.

In doing so, the Group should take account of relevant international instruments, including:

- the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as other internationally recognized standards, guidelines, practices and procedures relating to the rights of those who may be detained for the purpose of assisting in the investigation of a crime, a civil offence, or a maritime casualty or incident;

- the United Nations Convention on the Law of the Sea;

- pertinent IMO and ILO instruments, including MARPOL 73/78 and the ILO Declaration on Fundamental Principles and Rights at Work, 1998; and

- internationally recognized standards and guidelines on settlement of disputes.

The Group should prepare suitable recommendations for consideration by the IMO Legal Committee and the ILO Governing Body, including draft guidelines on the fair treatment of seafarers in the event of a maritime accident.

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