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ANY OTHER BUSINESS

Maritime criminal acts – draft guidelines for national legislation

Submitted by the Comité Maritime International (CMI)

SUMMARY

<i>Executive summary:</i>	This document proposes draft guidelines for national legislation on maritime criminal acts for the consideration of the Committee
<i>Action to be taken:</i>	Paragraph 10
<i>Related documents:</i>	LEG 85/10; LEG 89/8, LEG 89/8/1 and LEG 89/16 (paragraphs 188 to 192)

Introduction

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

2 Before the Model National Law was able to gain significant momentum, the events of 9/11/2001 brought the threat of terrorism into sharp focus and, for a time, both the frequency of armed robberies and pirate attacks, as well as the limited public attention they had received, were in sharp decline. Other intervening events, such as the **M/V Tajima** incident in 2002, which was brought to the attention of the Legal Committee by the Government of Japan (document LEG 85/10), began to give rise to concern over problems of coastal State jurisdiction, with regard to violent crimes committed on board foreign-flagged ships, and also the prosecution of serious maritime criminal acts other than piracy and armed robbery. At the same time, the 9/11 atrocities and the subsequent international war on terrorism, revealed certain lacunae in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (SUA), and IMO undertook an accelerated process of formulating wide-ranging amendments to the 1988 SUA Convention (which resulted in the adoption of the SUA Protocols in October 2005).

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3 At its thirty-eighth International Conference, in June 2004, in Vancouver, CMI undertook to examine the possibility of formulating a model national law addressing criminal offences committed on board foreign-flagged ships, as well as other maritime criminal acts. To this end, the Conference adopted a resolution recommending the establishment, by CMI, of a Joint International Working Group to draft a model national law concerning such offences and, upon approval of the text of such model national law by the CMI Assembly, the promulgation of it to the national Member Associations of the CMI, with the request that the model law be reviewed and adapted by them and presented to their respective Governments, together with recommendations for its enactment.

4 It will be recalled that the Legal Committee had previously given consideration to certain aspects of this subject, at its eighty-fifth, eighty-sixth, eighty-seventh and eighty-ninth sessions. As noted in documents LEG 89/8, LEG 89/8/1 and LEG 89/16 (the report of the Committee's eighty-ninth session), the Legal Committee decided that no further work was required of it at that moment, but suggested that the CMI, instead of developing a model national law, might consider working with the Legal Committee to formulate an instrument which could possibly develop into customary international law (document LEG 98/16, paragraphs 191 and 192).

5 In April 2005, CMI, given the high level of concern of the constituent organizations of the original JIWG, suggested that they meet again, to examine issues of serious maritime crime beyond piracy and armed robbery, and also various jurisdictional aspects not previously considered. It was the unanimous view of the reconstituted JIWG, now expanded to include the Baltic and International Maritime Council (BIMCO), the International Chamber of Shipping (ICS), the International Criminal Police Organization (INTERPOL), the International Group of P&I Associations (P&I Clubs), the International Maritime Bureau (IMB) (the specialized bureau of the International Chamber of Commerce), the International Transport Workers Federation (ITF), and the International Union of Marine Insurance (IUMI), that the events of 9/11 had fundamentally changed both perspective and orientation concerning international criminal law, and that the objectives of the 2001 Model Law for Acts of Piracy and Maritime Violence had been overtaken and, as a result, the original Model Law should be completely revised so as to take into account not only the problem of criminal offences committed on board ships, but also the developments of the International Ship and Port Facility Security (ISPS) Code, the 2005 Protocols to the 1988 SUA Convention and Protocol, and the updating of Guidelines, etc., produced by the Maritime Safety Committee relating to piracy and other maritime criminal acts. The Group commenced substantive work in December 2005, and this work continued via further meetings and correspondence until early 2007.

6 It should be noted that in the earlier work on the Model National Law, because of their particular concerns about piracy, both the United Nations Office of Legal Adviser, Division of Law of the Sea (UNOLA/DOALOS) and the IMO Legal Affairs and External Relations Division were represented on the JIWG, and Professor Samuel P. Menefee acted as rapporteur, on behalf of CMI. In the subsequent work on the Guidelines for National Legislation, it was felt that those inter-governmental organizations should not be put in a position of possible conflict that could arise because of the participation of their Secretariat officers in the formulation of proposals ultimately intended for submission to IMO, and consequently they did not participate.

7 The product of the Group's effort was a set of draft guidelines for national legislation on maritime criminal acts considerably broader in scope than the 2001 Model Law. The draft guidelines have now been circulated to the constituent organizations, and are presented by CMI in the annex to this document for consideration and further action by the Legal Committee at its ninety-third session. As will be seen from the introduction to the draft guidelines, comprehensive

national legislation is proposed, both as a means of enforcing the relevant international law, and as the most effective means of achieving uniformity of national law, which is critically important to the present struggle to suppress unlawful and criminal acts in the maritime context.

8 It is stressed that the suggested guidelines are in draft form. It is expected that the Legal Committee will make changes to the guidelines in consideration of matters beyond the direct focus of the Group. In particular, the minimization of possibilities for misinterpretation or misapplication of national legislation that could result (a) in unintended criminalization of actions taken in defence, or (b) in unnecessarily severe punishment for petty criminal offences, is a matter which the Group requests the Legal Committee keep in mind when reviewing the draft guidelines.

9 What is of utmost importance in the view of the Group is the need for the Legal Committee to consider and to take action at the earliest possible time regarding the rapidly expanding problem of serious maritime criminal acts, including piracy. CMI urges the Legal Committee to give this matter the highest priority.

Action requested of the Legal Committee

10 The Legal Committee is invited to take note of the information in this document and to comment and decide as it deems appropriate.

ANNEX

MARITIME CRIMINAL ACTS

Draft guidelines for national legislation

Introduction

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

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

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

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

The draft guidelines are intended as a benchmark against which the content and effect of present national law may be measured. However, the form in which the draft guidelines are set forth is not intended to govern the form of subsequent national legislation; the content rather than the form of national law is clearly the matter of highest importance.³

Draft guidelines – Title on Maritime Criminal Acts

Article I

Definitions

- 1 For the purposes of this Title, the following terms shall have the meanings indicated:
 - (i) the term “ship” includes any type of vessel or other water craft;⁴
 - (ii) the term “maritime structure” includes any floating or fixed artefact that is connected to the seabed, other than a ship at anchor or temporarily moored;
 - (iii) the term “person” includes, where applicable, entities having juridical personality as well as individual natural persons; and
 - (iv) the term “collateral act” includes any act committed to facilitate or in an attempt to conceal a maritime criminal act.
- 2 A maritime criminal act is committed when, for any unlawful purpose:
 - (a) any person or persons, intentionally or knowingly and without regard to the consequences:
 - (i) injure or kill any person or persons in connection with the commission or the attempted commission of any of the offences set forth in paragraph 2 (a) (ii)-(x) or (b) of this article; or
 - (ii) perform or threaten an act of violence against a person or persons on board a ship; or

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

⁴ Seaplanes when afloat, “wig” craft and hovercraft operating in the marine environment fall within this definition. (Ref. COLREG 72, Rule 3.)

- (iii) seize or exercise control over a ship or any person or persons on board by actual force or by any other form of intimidation or by deception; or
- (iv) engage in an act resulting in unlawful detention of a person or a ship; or
- (v) destroy or cause damage to a ship or a ship's cargo, a maritime structure, or an aid to navigation; or
- (vi) employ in the commission of a criminal act any device or substance which is likely to destroy or cause damage to a ship, its equipment or cargo, or an aid to navigation; or
- (vii) destroy, remove or cause damage to a maritime structure or navigational aid or facility, or interferes with its operation, if that act would be likely to endanger the safe navigation of a ship or ships; or
- (viii) engage in an act involving interference with navigational, life support, emergency response or other safety equipment, if that act would be likely to endanger the safe operation or navigation of a ship or ships or a person or persons on board a ship; or
- (ix) communicate false information endangering or being likely to endanger the safe operation or navigation of a ship or ships; or
- (x) endanger or damage the marine environment, or the coastline, maritime installations or facilities, or related interests of any State; or
- (xi) engage in any of the acts described in paragraph 2 (a)(i)-(x) of this article, to the extent applicable, where such acts involve a maritime structure or affect a person or persons on a maritime structure; or
- (xii) obtain possession of a ship or maritime structure, wherever located, by theft or deception; or
- (xiii) obtain possession of a ship's tackle, equipment or appurtenances, having substantial aggregate value, wherever located, by theft or deception; or
- (xiv) obtain possession of a ship's cargo while on board and having substantial aggregate value, by theft or deception; or
- (xv) obtain possession by theft or deception, committed on board a ship or maritime structure, of property having substantial aggregate value that belongs to the owner of the ship or structure or to any person legitimately on board whether or not engaged in the service of the ship or maritime structure; or
- (xvi) knowingly receives possession of and/or converts any property described in paragraph 2 (a)(xii)-(xv) of this article acquired by unlawful means; or

- (b) any person or persons, intentionally or knowingly and without regard to the consequences:
- (i) engage in an act constituting an offence under the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005; or
 - (ii) engage in an act constituting an offence under the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005; or
- (c) The provisions of paragraphs 2 (a) and (b) 2 of this article shall not be construed so as to impede otherwise lawful measures taken in the course of a labour dispute.
- 3 An act of piracy is committed when any person or persons:
- (i) engage in piracy as that act is defined by Article 15 of the 1958 Convention on the High Seas; or
 - (ii) engage in piracy as that act is defined by Article 101 of the 1982 Convention on the Law of the Sea.⁵
- 4 An act of piracy is also committed when any person or persons, for any unlawful purpose, intentionally or knowingly and without regard to the consequences:
- (i) engage in an act defined as piracy under the national criminal code; or
 - (ii) engage in an act held to constitute piracy by a decision of the national court of ultimate jurisdiction currently in force; or
 - (iii) engage in an act deemed piratical under applicable customary international law.⁶
- 5 An attempt or conspiracy to commit any of the offences listed in paragraphs 2, 3 or 4 of this article, or any unlawful effort intended to aid, abet, counsel or procure the commission of any of these offences shall constitute a maritime criminal act.⁷
- 6 A threat to commit any of the offences listed in paragraphs 2, 3 or 4 of this article shall constitute a maritime criminal act.
- 7 Notwithstanding the definitions in paragraphs 2, 3, 4 and 5 of this article, reasonable acts to rescue a person or to recover stolen property or to regain lawful control of a ship or maritime structure shall not be held to constitute maritime criminal acts or acts of piracy.

⁵ The act of piracy defined in paragraph 3 and the acts defined in paragraphs 4 and 5 are separate offences; none of the latter includes piracy as defined in paragraph 3.

⁶ *I.e.*, the uncodified Law of Nations.

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

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

Article II

Jurisdiction and prosecution

- 1 The offences defined in article I, paragraphs 2, 4 and 5 shall be prosecuted if committed within the territory, internal waters or territorial sea, and to the degree that the exercise of national jurisdiction is permitted by the 1958 Geneva Conventions on the High Seas and Contiguous Zone or the 1982 Convention on the Law of the Sea, within the exclusive economic zone, continental shelf, contiguous zone or archipelagic waters, and on the high seas or in any place outside the jurisdiction of any State.
- 2 The offences defined in article I, paragraphs 2, 4 or 5 shall also be prosecuted if committed:
- (i) on board or against a ship registered in or entitled to fly the flag of the enacting State,⁸ wherever located; or
 - (ii) on or against a maritime structure licensed by or operating within the jurisdiction of the enacting State.
- 3 Jurisdiction to prosecute shall also lie in the State apprehending or having custody of a person accused of committing an offence defined in article I, paragraphs 2, 4 or 5.
- 4 Jurisdiction to prosecute shall also lie when the person accused of committing an offence defined in article I, paragraphs 2, 4 or 5 is a citizen or national of the enacting State, or is a resident foreign national, or is a stateless person.
- 5 Jurisdiction to prosecute shall also lie when an offence defined in article I, paragraphs 2, 4 or 5 is committed against a person who is a citizen or national of, or is a foreign national resident in the enacting State, or is a stateless person.
- 6 Jurisdiction to prosecute shall also lie when an offence defined in article I, paragraphs 2, 4 or 5 is committed on board a foreign-flag ship, where:
- (i) the law enforcement or other public authority of the port or place where the ship is located has been requested to intervene by the State whose flag the vessel is entitled to fly, or by the shipowner, or the master or other person on board the ship; or
 - (ii) the commission of that act or a collateral act has disturbed the peace and tranquillity of a port or place under national jurisdiction.

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

- 7 Paragraphs 1 and 6 of this article shall not be applicable if the ship in question is a warship or auxiliary or is a government-owned ship employed in non-commercial service and under the control of government authorities at the time of the act otherwise giving rise to jurisdiction.
- 8 Jurisdiction to prosecute an act of piracy as defined in article I, paragraphs 3 (a) and (b) shall lie as set forth in the relevant Convention.
- 9 Trial of an alleged offender *in absentia* shall be allowed as permitted under national law.
- 10 Any prosecution under this article shall ensure the protection of the human rights of the alleged offender.

Article III

Extradition

- 1 Extradition of an alleged offender may take place when another State has jurisdiction over the offences defined in article I, paragraphs 2, 3, 4 or 5. The possession of jurisdiction by the enacting State shall not preclude the extradition of an alleged offender to another State.
- 2 If another State having a direct connection to the incident or other substantial interest claims jurisdiction with regard to a maritime criminal act or an act of piracy, and the alleged offender is not promptly brought to trial in the enacting State, the alleged offender shall, subject to applicable provisions of the requested State's national law, be extradited to such requesting State. If multiple States with reasonable jurisdictional claims make requests for extradition in the absence of a trial in the enacting State, the alleged offender shall, subject to the applicable provisions of national law, be extradited to one of the requesting States.

Article IV

Punishment, forfeiture and restitution

- 1 An individual person found guilty of a maritime criminal act shall be subject to a term of imprisonment, and in addition shall be subject to any restitution or forfeiture that may be required, and any other penalties that may be imposed.⁹
- 2 An individual person found guilty of the crime of *piracy* shall be subject to a term of imprisonment, and in addition shall be subject to any restitution or forfeiture that may be required, and any other penalties that may be imposed.⁹

⁹ Such penalties must be severe enough to reflect the grave nature of the offence.

- 3 An entity with juridical personality found guilty of a maritime criminal act or the crime of piracy shall be subject to a monetary penalty or fine reflecting the grave nature of the offence, and in addition shall be subject to any restitution or forfeiture that may be required, and any other penalties that may be imposed.⁹
- 4 In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of such crime shall also be liable to whatever criminal penalties may be imposed under other provisions of national law for that injury, death, loss or damage.
- 5 In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of such crime shall also be liable to whatever civil remedies are available under national law.
- 6 Where ships, cargo, goods, or equipment have been employed in or were the subject of maritime criminal acts or acts of piracy, such property shall be liable to forfeiture to the State exercising criminal jurisdiction to prosecute the offender(s). However, stolen or misappropriated property shall in all cases be returned to the person(s) having lawful title to or legal custody of the property. Any mortgagee of the property may assert a claim for payment of the current mortgage obligation.
- 7 Where ships, cargo, goods, or equipment employed in or the subject of maritime criminal acts or acts of piracy are liable to forfeiture to the State exercising criminal jurisdiction to prosecute the offender(s), such property shall be restored as expeditiously as possible to the person having lawful title to or custody of the property, unless the State proves the wilful complicity of such person in those maritime criminal acts or acts of piracy. If such person is denied return of such property, any mortgagee of the property shall be entitled to recover payment of the current mortgage obligation out of the proceeds of sale of the property at a public judicial sale, with the remaining balance being forfeit to the State, unless the State proves the wilful complicity of such mortgagee in those maritime criminal acts or acts of piracy.
- 8 Where ships, cargo, goods or equipment have been wrongfully taken by person(s) subsequently convicted of maritime criminal acts or acts of piracy but such ships, cargo, goods or equipment have not been employed in the commission of such crime(s):
 - (i) such property if unconverted shall be returned to its owners or custodians upon proof of ownership or lawful custody;
 - (ii) converted property shall be sold at public judicial sale and the proceeds distributed to the lawful claimants according to admiralty and maritime law, with any balance remaining being forfeited to the State; and
 - (iii) items not claimed within the period established by law may be subject to public judicial sale, or transfer to a fund for financing State or regional action to fight maritime criminal acts or acts of piracy.

- 9 Port expenses and other dues normally chargeable shall be waived during detention for investigation or prosecution of maritime criminal acts or acts of piracy; such port expenses or other dues normally chargeable may be recovered as restitution owed by the successfully prosecuted offender(s).
- 10 Nothing in paragraphs 1 through 9 of this article shall compromise or affect any rights or remedies which a person injured in the course of a maritime criminal act or act of piracy might otherwise assert against any perpetrator of the act or acts.

Article V

Reporting of incidents

- 1 Any incident which may constitute a maritime criminal act or act of piracy shall be reported by the following, as applicable:
- (i) the master or senior surviving officer,¹⁰
 - (ii) the ship security officer (“SSO”),¹¹
 - (iii) the company security officer (“CSO”), shipowner, agent or manager,
 - (iv) the port facility security officer (“PFSO”),
 - (v) the crew representative or seafarers’ trade union,
 - (vi) the cargo representative,
 - (vii) the insurers,
 - (viii) the harbour master or port authority,
 - (ix) the vessel traffic management system (“VTS”) authority,
 - (x) the investigating authorities, or
 - (xi) other persons having knowledge of the incident.

Reports shall be made as soon as reasonably possible following receipt of knowledge of the incident. Reports shall be sent to the designated national authority¹² and shall be in the form required by that authority.¹³

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

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

¹² *I.e.* the authority designated by the enacting State.

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

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

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

- 2 The designated national authority shall be under a continuing duty to make reports without delay and in the required formats to the ICC International Maritime Bureau (ICC-IMB)¹⁴ and the International Maritime Organization (IMO).¹⁵
- 3 The facts of the occurrence of an incident lie in the public domain, but the content of all incident reports made under paragraph 1 of this article may be held confidential and not be made open to the public.¹⁶

¹⁴ Maritime House, 1, Linton Road, Barking, Essex, United Kingdom IG11 8HG. See www.icc-ccs.org.uk

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

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