



INTERNATIONAL CONFERENCE ON
THE SUPPRESSION OF UNLAWFUL
ACTS AGAINST THE SAFETY OF
MARITIME NAVIGATION -
Agenda item 6

IMO

CONSIDERATION OF THE DRAFT CONVENTION FOR THE SUPPRESSION OF UNLAWFUL
ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION AND THE DRAFT
PROTOCOL FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST
THE SAFETY OF FIXED PLATFORMS LOCATED ON THE
CONTINENTAL SHELF

Comments from the Legal Committee of the
International Maritime Organization

Note by the Secretary-General

1 At the request of the Council of IMO, the Legal Committee of the Organization examined the texts of the draft Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and of the draft Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, as prepared by the Ad Hoc Preparatory Committee on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. The examination was held at an extraordinary session of the Legal Committee which had been convened for this purpose in accordance with the decision of the Council.

2 The Legal Committee noted that the Council had invited the Committee to consider the draft convention and the draft protocol, and to make such comments as it deemed fit. In particular, the Council had also drawn the Committee's attention to the following four matters:

- (a) the reference to "demise or bareboat" charterer in article 7 of the draft convention;
- (b) the issue concerning the obligation of States Parties to accept alleged offenders detained by the master of a ship, as raised in article 10 of the draft convention;

- (c) the question regarding the handling of crew discipline and its relationship with the scope of application of the draft convention; and
- (d) the question of harmonization of the terminology of the draft instruments with that of the United Nations Convention on the Law of the Sea.

3 The Legal Committee agreed to consider the above four issues and to consider any other matters which might be raised by delegations in the remaining time available to it.

4 Pursuant to the decision of the Council, the comments of the Legal Committee on the above-mentioned matters and other aspects of the draft treaty instruments are submitted to the diplomatic conference in the annex to this document. The comments consist of relevant excerpts from the report of the Legal Committee on the work of its first extraordinary session.

ANNEXComments of the Legal Committee

(Excerpts from the report of the Legal Committee (document LEG/ES.1/5))

(I) The reference to "demise or bareboat" charterers in article 7 of the draft convention

11 The Committee noted article 7.2 in square brackets of the draft convention which would allow a State Party to establish its jurisdiction over offences, inter alia, when:

"(d) the demise-charterer in possession of the ship concerned in the offence [is a national of that State and] has its principal place of business in that State".

12 The Committee further noted that, at the second session of the Ad Hoc Preparatory Committee, an indicative vote had shown that 9 delegations had supported the inclusion of this optional clause, while 8 delegations had opposed it and 22 delegations had abstained.

13 There was a difference of opinion in the Legal Committee on the desirability of this subparagraph.

14 A large majority of delegations which intervened in the discussion felt that the subparagraph was not desirable and should not be included in the final convention.

15 Some of these delegations considered that the subparagraph would increase further the number of possible jurisdictions, and that such a proliferation of jurisdictions was undesirable since a large number of competing jurisdictions would increase the likelihood of conflict among States claiming jurisdiction.

16 It was the view of some delegations that, in any case, there was no need for the provision. Where a demise charter resulted in a change of flag in accordance with the applicable laws of the States concerned, there would be a new flag State and that State would have jurisdiction under article 7.1(a).

Some of these delegations also referred to article 7.4 and suggested that that provision empowered States to establish additional bases for jurisdiction under their national law, if they so wished.

17 Some delegations considered that granting jurisdiction in respect of demise-charterers would be contrary to the 1982 United Nations Convention on the Law of the Sea, in particular articles 91 and 92 thereof, which recognized the exclusive jurisdiction of the flag State.

18 Some delegations further stated that, in their view, there was no precedent for such a provision in maritime law.

19 Several other delegations, however, were in favour of the subparagraph in the final text of the convention.

20 These delegations noted that, in many cases, the flag State might be located at a great distance from the usual sailing patterns of a vessel, and there might be only a tenuous link between the flag State and the particular offence committed against or aboard a ship.

21 Some of these delegations also emphasized that, in their view, it was essential to ensure that the convention left no gaps or loopholes. They therefore considered that it would be preferable to have overlapping jurisdictions rather than run the risk that there might be a case in which there was no State which could exercise jurisdiction under the convention.

22 Furthermore, some of these delegations did not agree with the view that articles 91 or 92 of the 1982 United Nations Convention on the Law of the Sea precluded the establishment of jurisdiction of a State other than the flag State. They pointed out that article 92, paragraph 1, of the Convention provided for exceptions to the principle in "exceptional cases expressly provided for in international treaties". One delegation also pointed out that it was precisely article 92, paragraph 1, which authorized exceptions to the principle of exclusive jurisdiction not only in the case of the charterer but also in all other cases envisaged in article 7.2.

23 Several of the delegations who were in favour of retaining the subparagraph pointed out that there were several precedents for such a

provision in air law. Specific references were made in this context to article 4.1(c) of the Hague Convention and article 5.1(d) of the Montreal Convention.

24 Some of the delegations opposed to the subparagraph pointed out that parallels to air law were not valid since, in air law, a chartered aircraft automatically acquired the nationality of its charterer, whereas maritime law did not have such an automatic transfer of nationality to ships which were demise-chartered.

25 Additional doubts were expressed by some delegations with regard to the use of the nationality of the demise-charterer as a criterion for establishing jurisdiction. One delegation suggested that there was no precedent in international law for establishing criminal jurisdiction on the basis of the nationality or the domicile of a private third party.

26 Another delegation, which was in favour of retaining the reference to the nationality of the demise-charterer, suggested that the word "and" be replaced by "or" so that nationality would be an alternative criterion to the place of business of the demise-charterer, but this was considered even more objectionable by another delegation for the reasons expressed in paragraph 15.

27 Some delegations felt that both the terms "principal place of residence" and "nationality" were not sufficiently clear and could create difficulties in the interpretation and application of the provision.

(II) Obligation of State Parties to accept alleged offenders detained by the master of a ship

28 The Committee gave consideration to a draft article which would oblige a State Party to accept, at the request of the master, delivery of an alleged offender who had been detained by the master of a ship. The text of the draft article, as reproduced in the report of the second session of the Ad Hoc Preparatory Committee (PCUA 2/5, paragraph 127), is as follows:

"1 The master of the ship of the State Party may deliver to the authorities of any other State Party any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.

2 Any State Party shall accept the delivery, except where it considers that the Convention is not applicable to the acts giving rise thereto, and shall proceed according to the provisions of article 8. Any refusal to accept such delivery shall be accompanied by a statement of reasons.

3 The master of the ship shall furnish the authorities to whom any alleged offender is delivered in accordance with the provisions of this article with evidence and information which, under the law of the State of the ship's flag, are lawfully in his possession."

29 The delegation of Spain recalled that it had submitted a simpler form of this provision at the first session of the Ad Hoc Preparatory Committee (see PCUA 1/4, paragraph 86) and that the provision had been expanded as a result of informal consultations at the second session of the Ad Hoc Preparatory Committee. The delegation noted that the draft article had not been included in the draft convention, but it stated that, in its view, the provision should be given further consideration by the diplomatic conference.

30 Some delegations expressed the view that the draft article gave some protection to the master who had detained an alleged offender on board his ship and said the draft article should be included in the convention.

31 Some delegations, however, could not support the draft article as drafted. Some of these delegations did not consider it appropriate to leave to the discretion of a master the decision of whether an alleged offender should be delivered to the authorities of a particular State Party. One of these delegations said it felt it was not appropriate for an international convention to authorize an individual to exercise the power to create obligations for States. Furthermore, in the opinion of these delegations, other articles in the draft convention, in particular article 7, paragraph 3, and articles 8 and 10, already addressed the problem in cases where an alleged offender was present in the territory of a State Party.

32 Some delegations expressed the view that, if the provision was included in the convention, the wide discretion given to the master under paragraph 1 of the draft article should be limited to cases where no other reasonable alternative was available.

33 Some delegations noted that there might be many reasons, some of them political, for a port State to refuse to accept delivery of an alleged offender.

34 One delegation, on the other hand, expressed the view that the provision did not involve any significant innovation since the master already enjoys a wide degree of discretion as to whom to keep on board his ship or to remove. In that sense, paragraph 1 of the proposed text might not be necessary. This delegation did not see any objection to the provision in paragraph 2 which obliged the port State to accept the delivery of alleged offenders from the master. The delegation noted that this provision recognized that a port State could refuse to accept the alleged offender and give a statement of reasons.

35 Several delegations expressed sympathy for the principle underlying the draft article. Some of these delegations said, however, that any article obliging a port State to receive an alleged offender from a master should also place an obligation on the flag State to accept the offender if the port State so requested.

36 One delegation expressed the opinion that the draft article raised a number of political and practical problems, such as whether the master was the proper person to choose the port State to which he would deliver a detained alleged offender; what the consequence would be of a flag State's refusal to accept jurisdiction over the offence; which State would bear any repatriation expenses; and what the port State would do if the master was unable to provide convincing proof of an offence when delivering an alleged offender.

37 Several delegations noted that a ship might regularly operate between foreign ports and rarely return to a port in its flag State, and in such a case it should be possible for the master to deliver an alleged offender to the authorities of another State Party. Particular reference was made in this context to land-locked flag States whose ships could never return to ports of the flag States.

38 Some of these delegations called attention to a similar provision in article 9 of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention).

39 One delegation, however, thought this precedent was not directly relevant since, in its view, it was more practicable for a ship's master to detain an alleged offender on board a ship than for the captain of an aircraft to retain an alleged offender on the aircraft.

40 The observer from the International Chamber of Shipping (ICS) remarked that it was an illusion to believe that ships could have the space to keep alleged offenders in detention for long periods. The observer stated that to leave a terrorist on a ship, with the possibility of rescue attempts against the ship, would be contrary to the objective of the proposed convention.

41 Regarding the wording of paragraph 3 of the proposed article, some delegations expressed doubts about the words "are lawfully in his possession" at the end.

42 One delegation suggested that the phrase might be intended to deal with the fact that, under the legal systems in some countries, some evidence might not be admissible at the trial. It noted, however, that the decision on whether any evidence was admissible or not should be left to the courts dealing with the matter and the master of the ship should not have any powers with regard to this matter. Some delegations, therefore, proposed that the words "which, under the law of the State of the ship's flag, are lawfully in his possession" should be deleted.

43 One delegation, supported by others, proposed that a new provision be added to require the master to notify the authorities of the port State, before the ship arrived in port, of the intention to deliver an alleged offender. It was noted that such a provision is contained in article 9, paragraph 2 of the Tokyo Convention. That paragraph provides as follows:

"The aircraft commander shall, as soon as practicable, and if possible before landing in the territory of the Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor".

44 One delegation expressed the view that the text of paragraph 2 of the draft article might suggest a different test to be applied by a State, in deciding whether to take custody of an alleged offender, from the test

provided in paragraph 1 of article 8. The delegation said the words "except where it considers that the Convention is not applicable to the acts giving rise [to the delivery]" in the draft article, may not be consistent with the opening words of article 8, "Upon being satisfied that the circumstances so warrant...". It was suggested that the diplomatic conference be invited to give attention to this matter in order to bring about the required consistency.

(III) The question regarding the handling of crew discipline and its relationship with the scope of application of the draft convention

45. The Committee noted the suggestion, which had been made at the second session of the Ad Hoc Preparatory Committee, to insert an additional provision in the draft convention which might read as follows:

"Nothing in this Convention shall create any new offence or any new powers of enforcement in relation to the normal maintenance of crew discipline on board ship".

46. The vast majority of the delegations which participated in the discussion on this issue felt that there was no need for such a provision in the convention itself.

47. Several of these delegations felt that the substance of the provision was self-evident. Other delegations thought that the issue of crew discipline had no direct relevance to the aims and purposes of the convention. Some delegations suggested that offences committed by crew members would be a matter for the criminal law of the State concerned. Another delegation suggested that the proposed text would have the undesired effect of excluding from the scope of application of the convention terrorist acts committed by a member of the crew of the vessel. It was suggested that potential offenders might try to obtain employment on board a ship as a crew member in the hope of thus escaping the application of the convention.

48. Several delegations, while agreeing that the provision might not be necessary, stated that the problem which it was intended to address was important. They explained that it would be useful to clarify that the convention was not intended to cover acts by crew members which were normally amenable to the routine discipline of the master. This would not necessarily displace the possible application of the convention in cases where acts by a

crew crossed the border of matters for internal discipline. They suggested, however, that the problem could usefully be resolved by means of an appropriate paragraph in the preamble of the convention.

(IV) Harmonization of the terminology of the draft instruments with that of the United Nations Convention on the Law of the Sea

49 The Committee examined articles of the draft convention with a view to identifying any terms which appeared to conflict with the relevant terminology in the provisions of the United Nations Convention on the Law of the Sea. In particular, the Committee's attention was drawn to article 4, paragraph 1, article 5, paragraphs 1 and 2; article 7, paragraph 1(b); article 8, paragraph 1; article 10, paragraph 1 and article 13, paragraph 2.

50 The Committee took note of the statement by the representative of the Office of Ocean Affairs and Law of the Sea, to the effect that the Office had discovered no major disharmonies between the terminology of the draft convention and the Law of the Sea Convention. The representative observed, however, that the Office had noted that the draft convention used the phrase "lateral limits" of a State's territorial sea, that the words "lateral limit" were not used in the United Nations Convention on the Law of the Sea.

51 One delegation proposed that, in article 4, paragraph 1, article 5, paragraph 1, and article 7, paragraph 1(b), the words "the outer or lateral limits of" should be deleted. Several delegations supported this proposal.

52 One delegation proposed that the draft convention should be consistent in its use of the word "territory" and that this applied to both land territory and territorial sea in accordance with the Convention on the Law of the Sea. The delegation cited in particular articles 7.1(b), 10.1 and 13.2 of the draft convention where different terminology had been used for the same substance. He noted that article 7.1(b) referred to the "territory of that State, or inside ... its territorial sea", while article 10.1 referred only to "the territory", and article 13.2 referred to a "State Party in whose territory the ship or passengers or crew are present".

53 The representative from the Office of Ocean Affairs and the Law of the Sea said the Office noted the issue of harmonization in this case would

involve article 2 ("land territory") and article 33 ("within its territory or territorial sea") of the Law of the Sea Convention. The term "territory", according to the representative, included internal waters.

54 Several delegations did not agree with the suggestion that the term "territory" should be used in place of "territory or territorial sea".

55 One delegation explained the use of different terminology in different articles was appropriate. The delegation pointed out that article 7.1 concerned the establishment of jurisdiction, and it was, therefore, appropriate to refer to both territory and territorial sea, whereas article 10 concerned the exercise of jurisdiction and consequently was appropriately confined to "territory" only. This delegation cited article 27 of the Law of the Sea Convention to support this difference in terminology, by noting that article 27 imposed limits on the exercise of criminal jurisdiction by the coastal State over foreign flag vessels in the territorial sea, whereas there were no such limits to the jurisdiction in the territory of the State.

56 This analysis was supported by several delegations.

57 One delegation observed that this analysis was not accurate; the fact that the coastal State cannot exercise jurisdiction over foreign flag vessels in its territorial sea does not mean that article 10 should not be applied if a person is actually found within the territorial sea, for example on board a small sailing boat or another vessel which for some reason is not entitled to innocent passage. In the view of that delegation, "territory" (whenever this word occurs) in article 10.1 should include the territorial sea.

58 One delegation also explained that the use of the terms "territory" and "territorial waters" was appropriate. That delegation pointed out that the reference to territory and to the territorial sea in article 7.1 corresponded to the distinction made by the Law of the Sea Convention which introduced a specific regime for territorial waters. Thus, article 27 of that Convention provided for limited penal jurisdiction of the coastal State within territorial waters. On the other hand, in article 10 of the draft convention it was sufficient to refer merely to territory since in that case it was a matter of criminal proceedings undertaken by a State.

59 One delegation observed that the terminology "territory or territorial sea" and "territory including the territorial sea" had been used in other conventions, inter alia, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, and the International Convention on Civil Liability for Oil Pollution Damage, 1969.

60 Several delegations observed that in article 10.1, the term "territory" is used twice in the same sentence with a slightly different meaning. One delegation pointed out that it might be useful to include appropriate definitions at the beginning of the convention.

61 The Legal Committee agreed that the drafting committee of the diplomatic conference should be required to examine the matter and to determine the appropriate terminology to be used.

62 Several delegations expressed their concern over the contents of article 5.2. Some of these delegations expressed doubts about the need for such a provision. Several delegations felt that the provision was superfluous since they understood that, as drafted, it stated the right of the coastal State to apply the Convention to ships flying its flag when navigating in its own territorial sea in a strait used for international navigation.

63 The delegation of Spain expressed opposition to the inclusion of article 5.2 on substantive grounds and pointed out that that paragraph was contrary to the provisions of article 34 of the 1982 United Nations Convention on the Law of the Sea in that it made distinctions within the territorial sea of one of the same State.

64 Other delegations, however, did not agree with that opinion.

65 The Committee concluded that the difference of opinion regarding article 5.2 was essentially of a political nature and did not involve a conflict of terminology. It was noted that the Ad Hoc Preparatory Committee had agreed to leave the issue for solution by the diplomatic conference.

(V) Other matters

(i) Article 7, paragraphs 2 and 4

66 The Committee considered a proposal by the delegation of Argentina to insert in paragraphs 2 and 4 of article 7 a phrase requiring that jurisdiction established or exercised by States Parties should be "under a law prior to the commission of the offence" involved.

67 A number of delegations agreed with the principle that offences and their punishment should be conditional on the existence of a specific law to this effect. They however noted that this principle of non-retroactivity of penal law was incorporated in their national law and in a number of important international instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. They did not think, therefore, that there was any need for a specific provision on the subject in the proposed convention.

68 Some delegations felt that the proposed additions were not appropriate in the context of article 7, paragraphs 2 and 4. Paragraph 2 dealt with the establishment of jurisdiction and did not contain a substantive provision of a penal nature, whereas in paragraph 4, the issue of retroactivity did not arise.

69 A number of delegations, moreover, expressed doubts about the specific wording proposed and suggested that this be further considered.

70 One delegation proposed that the words "under a law" be deleted.

71 Some delegations suggested that consideration be given to introducing the provision against non-retroactivity of criminal laws into article 6 rather than article 7.

(ii) Political offences exception

72 The Committee discussed the proposal submitted by the delegation of Argentina for a new paragraph to be added to article 11 as follows:

"None of the offences provided in article 3 of this Convention shall be considered as being in the category of political offences not subject to extradition".

73 The delegation of Argentina introduced this proposal by expressing the view that it would represent an advance in international law.

74 Many delegations stated that they understood the intention of the proposal, but did not think it was appropriate for inclusion in the draft convention. Among the reasons given for this position were the following; it could create political problems for States; it might not be compatible with the constitutional systems of some States; a similar provision was not included in other conventions of a similar nature; and the possibility that refusal of extradition may be based on improper political considerations was reduced by article 10, which required States Parties to prosecute if they did not extradite the alleged offender.

75 Some delegations felt that the proposal was too ambitious in view of the level of co-operation presently existing among national legal systems. These delegations said the draft convention was more realistic because it referred to existing treaties or the national law of the State from which extradition was requested. This permitted extradition by reference only to the criteria stipulated in the treaties or in the national law of the requested State.

76 In response to a question, one delegation noted that there was a similar provision in the European Anti-Terrorist Convention, but this provision was narrowly drafted with a number of qualifications. Furthermore, another delegation pointed out that many States had made reservations on the provision when ratifying the European Convention.

(iii) Clarification of the term "Fixed Platform"

77 The delegation of Australia referred to the draft Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf and expressed the view that the term "Fixed Platform" had to be defined more clearly. According to this delegation, there was the possibility of confusion between the concept of a "ship" as used in the draft convention and the concept of "permanently attached" platforms as used in the draft protocol. Particular reference was made to the case of a ship engaged

in exploration for minerals, a platform being towed to a place to be attached, and a floating hotel. The delegation suggested that these concepts needed to be considered to ensure that no gap existed between the draft convention and the draft protocol. These structures were extremely vulnerable to the kind of offences covered by the convention, and care should be taken that they were not left out of protection.

78 This concern was shared by another delegation.

(iv) Article 3, paragraphs 1(e) and 1(f)

79 One delegation invited the Committee's attention to the footnote in the draft convention which states that article 3, paragraphs 1(c) and 1(f) were to be reviewed at the diplomatic conference.

80 The Committee was informed that these matters were linked to article 4 concerning the geographical scope of application of the convention, and that any review of the subparagraphs would depend on the final decision on the contents of article 4.

(v) Article 3, paragraph 1(g)

81 Two delegations expressed the view that article 3, paragraph 1(g) was superfluous in so far as it was conditional upon the commission of an offence. They noted, furthermore, that attempts to commit an offence were covered by paragraph 2.

82 However, many delegations expressed the view that 1(g) was necessary and should be retained since it emphasized that there should be a connection between the killing and an offence covered by the convention.

(vi) Article 7, paragraph 2(c)

83 One delegation expressed the view that article 7, paragraph 2(c) was an unacceptable expansion of grounds for jurisdiction. This delegation was opposed to the inclusion of a provision which allowed jurisdiction solely on the basis that the State concerned had been the object of the offence.

(vii) Article 8, paragraph 4

84 One delegation expressed the view that paragraph 4 of article 8 imposed an unacceptable condition on States by providing that laws and regulations are applicable "subject to the proviso that they must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended". In the opinion of this delegation, national laws and regulations of the involved State will always be applicable in the exercise of rights, and the applicability of such national laws should not be subject to any condition.

85 In this connection, one delegation noted that article 8, paragraph 4 was taken directly from article 6, paragraph 4, of the International Convention Against the Taking of Hostages. The intent of the provision was to ensure that a State would not promulgate laws and regulations which, in effect, denied the alleged offender the exercise of the rights provided by paragraph 3.

(viii) Article 9

86 The delegation of Spain proposed that the Spanish text of article 9 be redrafted to read as follows (the suggested change is underlined):

"Nothing in this Convention shall be construed as affecting in any way the existing rules of international law pertaining to the competence of States to conduct investigations or exercise their jurisdiction on board ships not flying their flag."

(ix) Statement by the delegation of Cuba

87 The delegation of Cuba stated that, with respect to the subject matter of the draft convention, it favoured the use of bilateral rather than multilateral instruments. The delegation stated, however, that this preference should not be viewed as an objection to the adoption of the draft convention.