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FOR DEATH, PERSONAL INJURY AND
ABANDONMENT OF SEAFARERS
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**EXAMINATION OF A POSSIBLE LONGER TERM SOLUTION
FOR FINANCIAL SECURITY IN RESPECT OF:**

Abandonment, personal injury and death of seafarers

Submitted by the International Confederation of Free Trade Unions (ICFTU/ITF)

SUMMARY

Executive summary: This document contains an opinion by Professor Vaughan Lowe on International Human Rights Law aspects of death, personal injury and abandonment of seafarers.

Action to be taken: -

Related documents: -

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**OPINION ON INTERNATIONAL HUMAN RIGHTS LAW ASPECTS OF THE DEATH,
PERSONAL INJURY AND ABANDONMENT OF SEAFARERS**

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INTRODUCTION

1. This opinion addresses the human rights aspects of the subjects before the Joint IMO/ILO Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers ('the Working Group'). In particular, this opinion considers whether the provisions of international human rights law are applicable to the situation of seafarers, and whether those provisions bear upon the particular problems of death, personal injury and abandonment of seafarers.
2. My conclusions are that international human rights law not only may be applied but must be applied to seafarers; that international human rights law includes provisions of direct relevance to the problems of death, personal injury and abandonment of seafarers; and that certain specific and binding legal obligations attach to States, and in particular to flag States, in relation to the treatment of seafarers, and that effective procedures exist for the enforcement of those specific obligations.
3. As the Working Group has stated, there is a clear difference between questions of repatriation on the one hand, and personal injury and death on the other hand. In the case of abandonment the need is for immediate shelter and subsequent repatriation: practical assistance, rather than money, is the issue, although it is likely that abandoned seafarers will also have a claim for unpaid wages. In the second case the demand is for the prompt payment of proper compensation for the personal injury or death, to the seafarer or the seafarer's estate. It is an essentially financial matter, although in personal injury cases there is also a question of the provision of prompt and adequate medical care, and of the responsibility for ensuring that seafarers' working conditions are safe. The differences between the demands leads to differences in the legal obligations associated with them, and in the remedies that might resolve or mitigate the problem. Accordingly, the two categories are considered separately.
4. This Opinion identifies the main sources of international rights and duties that might be invoked in the course of handling the problems of abandoned, injured or deceased seafarers. It does not describe, except in the most general terms, the range of private law remedies that may be available under the municipal laws of individual States. Before turning to those matters, however, certain general issues concerning the applicability of international human rights law must be considered.

THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW

Preliminary Points

5. First, the provisions of general international human rights instruments are intended to lay down standards of behaviour for each State. Instruments may have been drafted with particular instances of abusive conduct in mind: for instance, provisions on the protection of property rights may have been drafted against the background of particular concern with the problems of the expropriation of foreign investments. But once the instruments are in force *all* persons, whether or not members of the group particularly contemplated, benefit from the requirement that the protected rights be observed. A right to property may be violated by the taking a seafarer's wages as much as by the taking of a factory. Accordingly, States' obligations towards seafarers are not only to be found in those rules specifically designed for the protection of seafarers: they are also to be found in other human rights instruments, the scope of whose protection extends to seafarers.
6. The second point is closely related to the first. Disputes do not arise with legal labels attached to them. There is no such thing as a dispute that is inherently "a dispute about seafarers' rights." If a seafarer is injured or abandoned, his (for convenience I use 'his', etc, rather than 'his or her') claim may be put forward, and may be upheld, upon the basis of any relevant legal principle, whether or not that principle was developed with seafarers particularly in mind. Successful claims may be based upon unexpected provisions of the law.
7. The third point is also closely related to the first. Human rights are the rights of each and every human being. Human rights obligations are obligations to treat each and every person in accordance with the prescribed standard. The violation of any individual's rights in one specific case cannot be excused on the ground that in 99.99% of other cases that right is observed.
8. Fourth, it must not be supposed that international human rights can simply be removed or overridden by provisions in national legislation or contracts of employment, or otherwise waived. The Universal Declaration of Human Rights refers to "the inalienable rights" of all human beings; and bodies charged with the implementation of human rights have taken the view that rights are indeed inalienable and that individuals cannot validly agree to give them up. For example, the European Court of Human Rights, whose task under Article 19 of the European Convention on Human Rights, 1950, is to ensure the observance of the Convention, has ruled that

“Having regard to its responsibilities in pursuance of Article 19 of the Convention, the Court would not be relieved of its duty by the sole fact that an individual had stated to his Government that he waived rights guaranteed by the Convention.”
(*Vagrancy* cases, ECHR Series A, No. 17, paragraph 33.)

That point would apply with even greater force if the waiver were given, not to the Government, but to a private employer.

9. Fifth, human rights obligations do not only bind the State to refrain from taking action that violates the right. States are under a positive duty to secure the implementation of rights, even against violations threatened not by the state but by private persons. As the European Court of Human Rights put it, in relation to Article 2(1) of the Convention (‘Everyone’s right to life shall be protected by law.’), the Convention “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”¹
10. In consequence of these five points, this Opinion takes a broad view, seeking to identify all of the main sources of international rights and duties that might be invoked in the course of handling the problems of deceased, injured or abandoned seafarers.
11. The final preliminary point is that many human rights obligations under international law lack accessible and effective enforcement mechanisms. But the fact that an obligation may not easily be enforced does not excuse a breach of that violation, any more than the fact that a breach of a State’s criminal law was committed while the police were not watching excuses the crime.

The Applicable Human Rights Law

12. The exact range of human rights laws obligations will vary from State to State, according to the pattern of ratifications of the relevant international instruments. What follows is a general survey of the main instruments. The most clearly relevant provisions of international human rights law are those that deal specifically with the right to work. For example, the Universal Declaration of Human Rights, 1948, stipulates that:

¹ *Osman v. United Kingdom*, judgment of 28 October 1998, ECHR Reports 1998-VIII, paragraph 115; see also *L.C.B. v. United Kingdom*, judgment of 9 June 1998, ECHR Reports 1998-III, p. 1403, paragraph 36).

“Article 23

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.

.....

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.” (Article 23).

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

A similar right is recognised in other instruments. The American Declaration on the Rights and Duties of Man, 1948, contains the following provision:

“Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.” (Article XIV)

The 1988 Protocol of San Salvador, a protocol to the American Convention on Human Rights, contains more detailed provisions, including the following:

“Article 7. Just, Equitable and Satisfactory Conditions of Work

The States Parties to this Protocol recognize that the right to work ... presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

...

(d) Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by national legislation;

(e) Safety and hygiene at work.”

States are obliged, furthermore, to report to the Organization of American States on measures taken to implement these rights. Again, the African Charter on Human and Peoples’ Rights stipulates that:

“Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”

13. To these provisions may be added the even more fundamental right to life. This right is secured in, for example, Article 3 of the Universal Declaration of Human Rights, 1948, Article 6 of the International Covenant on Civil and Political Rights, 1966, Article 2(1) of the European Convention on Human Rights, 1950, and Article 4 of the Inter-American Convention on Human Rights, 1969. States may be responsible for breaches of such provisions if they fail to take adequate steps to prevent deaths, whether the deaths arise in the public or the private sector. In the context of seafarers’ employment, this fundamental obligation is in effect implemented by the various ILO Conventions on working conditions, which are discussed below.
14. The fact that these rights are stated in general terms in no way weakens their legal force. The provisions of the US Constitution, and of the European Convention on Human Rights, are also stated in general terms; yet those provisions have been applied with great vigour and firmness by courts in order to mould the principles that they set out to the demands of law and of justice in the specific cases that arise. There is no reason whatever why general human rights principles requiring, as a matter of law, that workers have safe and just conditions of work, should not be similarly applied in concrete cases in order to implement the rights secured by the international human rights instrument. In fact, however, the implications of these general, fundamental, rights are spelled out in greater detail in other instruments.
15. For example, Article 7 of the International Covenant on Economic, Social and Cultural Rights states that:

“The States parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular,

 - (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind...;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
 - (b) Safe and healthy working conditions...”
16. One of the fullest statements of basic human rights relating to working conditions is to be found in the Revised (1996) European Social Charter. The Charter contains many relevant provisions, including the following:

“Article 2 The right to just conditions of work

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:

.....

4. to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations...

Article 3 The right to safe and healthy working conditions

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:

1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment.

2. to issue safety and health regulations;

3. to provide for the enforcement of such regulations by measures of supervision...

Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.....

Article 19 – The right of migrant workers and their families to protection and assistance

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:

1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers...

2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;

.....

7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this Article;

8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality...

Article 24 – The right to protection in cases of termination of employment

With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:

- a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
- b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.

Article 25 – The right of workers to the protection of their claims in the event of the insolvency of their employer

With a view to ensuring the effective exercise of the right of workers to the protection of their claims in the event of the insolvency of their employer, the Parties undertake to provide that workers' claims arising from contracts of employment or employment relationships be guaranteed by a guarantee institution or by any other effective form of protection.”

17. The implications of these instruments are clear. First, there is an explicit and unequivocal affirmation that the fundamental rights of each and every individual include the right to just and safe conditions of work. The point may seem obvious and uncontroversial; but whereas no-one would dare to suggest that, for instance, the human right not to be subjected to torture is a right that could be overlooked or phased in over a period of time, it seems that there is in some quarters a reluctance to accept and fulfil the duties that international law imposes for the protection of other fundamental human rights, such as the right to just and safe conditions of work. The fact remains that the international law does not merely protect individuals from extreme physical abuse and denial of basic civil rights, as might have been

the case in the earlier part of the previous century: international law now clearly recognises that the right to life and to respect for human dignity entails certain elementary duties in respect of the conditions under which people work. The failure to secure for workers just and safe working conditions is not simply a matter of discretion or of moral obligation, but a breach of an obligation imposed by international law upon States.

18. Secondly, it is clear that the protection demanded for workers is specific and extensive. Within the range of topics under consideration in the Working Group, questions of death and personal injury are explicitly covered by the obligation to ensure that workers have safe working conditions. Other duties relate directly to the question of abandonment. In the European Social Charter, for example, the duty to provide assistance to workers (Articles 13, 19), and the provisions protecting workers on the termination of their contracts (Articles 23, 25; and see also, e.g., the Protocol of San Salvador, quoted in paragraph 12 above) would, if fulfilled, do much to alleviate the hardship that abandonment causes to seafarers and to their families. So, too, would any serious attempt to fulfil the obligations in Article 25 of the Universal Declaration of Human Rights, for example, relating to the right to the well-being a worker's family and the right to security in the event of unemployment or other lack of livelihood in circumstances beyond the worker's control. That Article does not specify that workers may not be abandoned in foreign ports without pay or facilities for returning them to their homes: but that Article cannot be interpreted intelligently and in good faith in any way that would render the failure to assist abandoned seafarers consistent with its provisions. And, to repeat a point made above, it should be borne in mind that these rights are as much individual human rights of seafarers as they are rights of any other employee.
19. There are, moreover, human rights that bear directly upon some of the inevitable or near-inevitable consequences of the abandonment of seafarers. If the port State refuses to admit an abandoned seafarer to its territory, the seafarer may be detained in a holding centre or transit zone, or effectively compelled to remain on the vessel. That situation itself gives rise to human rights obligations. The Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (the 'CPT'), for instance, has reported that

“the CPT has always maintained that a stay in a transit or ‘international’ zone can, depending on the circumstances, amount to a deprivation of liberty within the meaning of Article 5(1)(f) of the European Convention on Human Rights.” (*Report to the German Government on the Visit to Frankfurt am Main Airport, 1998*, Council of Europe Document CPT/Inf (99) 10, page 12.)

The CPT has proceeded to examine matters such as access to lawyers and the provision of health care for persons ‘detained’ in this sense.

20. Similarly, certain practices allegedly used to persuade seafarers or their families to abandon claims against shipowners for damages for death or injury, or for the costs of unlawful abandonment in breach of contract, or for wages due, may also violate the seafarer’s human rights. The application of duress to persuade the seafarer to abandon a claim may vitiate any ‘consent’ that the seafarer is said to have given. That is a matter to be determined by the applicable national contract law. It is, furthermore, conceivable that in extreme cases duress of this kind may become practically indistinguishable from the use of menaces to obtain a pecuniary benefit, and it may also amount to an offence under the criminal law. Besides these consequences under national laws, international human rights law would also be engaged. If a seafarer is compelled by duress to sign away claims against his employer, that is a plain violation of the right to fair wages.² It may, furthermore, amount to a violation of other rights, such as the right to a fair and public hearing for the determination of the seafarer’s rights,³ the right to equal protection of the law,⁴ and the right to the peaceful enjoyment of property.⁵
21. It will be evident that there is no shortage of legal bases upon which the fundamental rights of seafarers might be protected. Nor is there any shortage of clear prescriptions that these rights must be implemented effectively.
22. What is at issue in cases where these rights are ignored is a simple question of legal protection. The situation is no different in principle from situations where the duty not to punish people without trial, or not to confiscate property without due legal process, is ignored. The applicable principles of international human rights law are so elementary that their relevance may be overlooked. For example, the Universal Declaration of Human Rights contains the following provisions:

“Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

² See, e.g., International Covenant on Economic, Social and Cultural Rights, Article 7; European Social Charter, Article 4; Protocol of San Salvador, Article 7.

³ See, e.g., European Convention on Human Rights, Article 6.

⁴ See, e.g., International Covenant on Civil and Political Rights, Article 14.

⁵ See, e.g., First Protocol to the European Convention on Human Rights, Article 1.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Similarly, Article 26 of the International Covenant on Civil and Political Rights provides that

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

The relevance of these provisions to the situation of seafarers may not be immediately obvious; but they are nonetheless significant. Seafarers abandoned in foreign ports without money, and with wages owing to them, are supported at two levels by human rights instruments. First, their substantive rights are supported by provisions requiring that they have safe and just working conditions, and that they do not have their contracts unlawfully terminated or the debts owed to them repudiated. Second, they are supported by provisions that require the substantive rights to be effectively secured. If abandoned seafarers labour under some particular difficulty in obtaining redress for wrongs done to them and in securing the implementation of their rights, it may surely be argued that States must address that particular difficulty if the seafarers are to be accorded equal protection of the law.

23. This point is made even more clearly in the International Covenant on Economic, Social and Cultural Rights, which includes the following provisions:

“Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

.....

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

The duty of States to ensure that the rights set out in the Covenant are actually effective in practice is made quite clear. The “weak” version of the commitment, limited by the “available resources”, is a significant limitation on the enforcement of, for instance, rights to health and education; but it cannot credibly be maintained that the cost of protecting abandoned seafarers offers a justification for failures to protect them, or that the cost of securing safe working conditions offers such an excuse. In any event, as is explained below, States (and particularly flag States) are under separate obligations in relation to these matters, and in respect of which “available resources” are not specified as a limitation on the obligation.

The Enforcement of Human Rights Law

24. As is well-known, individuals for whose benefit human rights laws are drafted often face great difficulty in enforcing those rights. It may be that, in a given case, the domestic legal system of a particular case will give legal effect to human rights norms, so that they may be enforced through municipal courts. In other cases it may be possible to present an individual complaint to a body such as the European Court of Human Rights, or the Inter-American Court of Human Rights; or a complaint may be made to, and investigated by, an international body such as the UN Human Rights Committee. In other cases, however, no effective procedure may be available⁶ (even though the entitlement to an effective remedy is itself a fundamental human right, so that the States parties to these instruments are obliged at least to provide a remedy under national law)⁷; and in any event, it is likely that no procedure will be so accessible and swift as to provide effective protection for abandoned seafarers. This weakness in the present enforcement mechanisms ought, if anything, to increase the commitment of States to securing the rights of those for whom effective remedies may be no more than a theoretical possibility. But in any event, the weaknesses in the enforcement provisions do not weaken the duty to comply with the substantive requirements of human rights laws.
25. The human rights obligations are binding upon all States that have accepted them. They are very widely accepted indeed: for example, the International Covenant on Civil and Political Rights has 146 ratifications, and the International Covenant on Economic, Social and Cultural Rights has 142. Those States are, broadly speaking, obliged to apply the provisions of these instruments to all persons within their territory or within their jurisdiction. The

⁶ States and international institutions are, however, increasingly making matters such as development aid dependent upon the observance by recipient States of human right norms.

provisions would, accordingly, impose obligations upon a State in respect of seafarers on ships flying the flag of the State and seafarers in the State's ports; and the obligations might also extend in some circumstances to States in respect of seafarers who are its nationals. The ubiquity of the application of human rights applications marks them out from certain other, more specialised, bodies of law whose application is considered next.

DUTIES UNDER OTHER BODIES OF LAW

26. International human rights law cannot be considered in isolation from other bodies of international law. The rights of seafarers must be viewed in the context of International Labour Organization instruments, the international Law of the Sea, and customary international law in general. In fact, those other sources provide the most effective vehicle for the enforcement of seafarers' rights.
27. The rights and obligations that arise under those bodies of law are of concern to States whose relationship to seafarers is defined and falls into one (or more) of three categories already mentioned: flag States⁸; port States; and the national States of seafarers. Each will be dealt with separately. If in some particular case one and the same State fulfils more than one of these roles –for example, if the port State is also the flag State– it bears the duties attaching to each role, cumulatively.

DUTIES OF THE FLAG STATE

Basic Duties of the Flag State

28. The flag State of a vessel carries the primary responsibility for ensuring the fulfilment of human rights obligations in respect of those persons employed on board the vessel. The obligations under human rights instruments apply not merely to the territory of the State, but also to other areas that are within the jurisdiction of the State.⁹ Vessels are plainly within the jurisdiction of the flag State; and flag States are therefore bound to secure the human rights of their crews. The applicable human rights standards were described above. In addition to these obligations flag States are under further and more detailed obligations, in particular those established within the framework of the Law of the Sea.

⁷ See, e.g., the International Covenant on Civil and Political Rights, Article 2(3); European Convention on Human Rights, Article 13; American Convention on Human Rights, Article 25; Universal Declaration of Human Rights, Article 8.

⁸ ILO instruments actually refer to ships "registered in the territory of a State". In some contexts it may be inexact to use the term "flag State"; but the term is adequate for the purposes of this Opinion.

⁹ See, e.g., Article 1 of the European Convention on Human Rights; *Loizidou v. Turkey*, ECHR Series A, vol. 310 (1995), paragraph 62.

29. The main duties concerning the protection of seafarers arise under the United Nations Convention on the Law of the Sea, 1982 ('LOSC'), and are subject to its compulsory dispute settlement procedures. The basic duties of the flag State are set out in Article 94 of the Law of the Sea Convention. That Convention binds the 135 States and other entities (i.e., the European Union) that have ratified it. The provisions relating to the high seas, including Article 94, are widely considered to reflect the rules of customary international law that bind all States, including non-Parties.
30. LOSC Article 94 is of central importance to the question of seafarers' rights. The provisions of particular relevance are Article 94(1), Article 94(2)(b), Article 94(3)(b), and Article 94(5). They make clear that being a flag State entails responsibilities as well as rights; and they read as follows: -
- “1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
 - 2. In particular every State shall: ...
 - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
 - 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to: ...
 - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments...
 - 5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.”
31. The link between Article 94 of the Law of the Sea Convention and the ILO instruments on duties respecting seafarers is clearly established in the practice of the ILO. For example, ILO Recommendation 108 (*Social Conditions and Safety (Seafarers) Recommendation 1958*) first noted the requirement in the 1958 Convention on the High Seas that every flag State must “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag” (1958 Convention on the High Seas, Article 5), and then described in some detail the content of the duty to adopt safety and welfare measures in order to satisfy that requirement. It recommended the implementation of internationally accepted safety standards, and standards generally accepted by the traditional maritime countries in relation to working conditions and repatriation of seafarers.
32. To like effect, Article 94(5) of the Law of the Sea Convention requires that in fulfilling its obligations to ensure safety at sea by taking measures with regard, *inter alia*, to labour

conditions on ships, “each State is required to conform to generally accepted international regulations, procedures and practices.”

33. It will be noted that under the Law of the Sea Convention conformity with international standards is not a matter of discretion or policy: it is stipulated as a legal obligation. That leads to the question, what are the relevant international regulations, procedures and practices?

Specific Duties of the Flag State

34. The applicable standards are indicated in part by ILO Convention 147, the *Merchant Shipping (Minimum Standards) Convention 1976*. That Convention refers in its preamble to ILO Recommendation 108, and to ILO Recommendation 107. The provisions of ILO Recommendation 108 concerning shipping safety have already been noted (above, paragraph 31). ILO Recommendation 107 indicates that States should discourage seafarers within their jurisdiction from joining vessels registered in States that lack proper provision for the repatriation of seafarers put ashore in foreign ports. Having “recalled” ILO Recommendations 107 and 108, Article 2 of ILO Convention 147 proceeds to require each State:-

- (a) to have laws or regulations laying down, for ships registered in its territory--
 - (i) safety standards, including standards of competency, hours of work and manning, so as to ensure the safety of life on board ship;
 - (ii) appropriate social security measures; and
 - (iii) shipboard conditions of employment and shipboard living arrangements, in so far as these, in the opinion of the Member, are not covered by collective agreements or laid down by competent courts in a manner equally binding on the shipowners and seafarers concerned; and to satisfy itself that the provisions of such laws and regulations are substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to this Convention, in so far as the Member is not otherwise bound to give effect to the Conventions in question;
- (b) to exercise effective jurisdiction or control over ships which are registered in its territory in respect of--
 - (i) safety standards, including standards of competency, hours of work and manning, prescribed by national laws or regulations;
 - (ii) social security measures prescribed by national laws or regulations;
 - (iii) shipboard conditions of employment and shipboard living arrangements prescribed by national laws or regulations, or laid down by competent courts in a manner equally binding on the shipowners and seafarers concerned;

(c) to satisfy itself that measures for the effective control of other shipboard conditions of employment and living arrangements, where it has no effective jurisdiction, are agreed between shipowners or their organisations and seafarers' organisations constituted in accordance with the substantive provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949;

(d) to ensure that--

(i) adequate procedures--subject to over-all supervision by the competent authority, after tripartite consultation amongst that authority and the representative organisations of shipowners and seafarers where appropriate--exist for the engagement of seafarers on ships registered in its territory and for the investigation of complaints arising in that connection;

(ii) adequate procedures--subject to over-all supervision by the competent authority, after tripartite consultation amongst that authority and the representative organisations of shipowners and seafarers where appropriate--exist for the investigation of any complaint made in connection with and, if possible, at the time of the engagement in its territory of seafarers of its own nationality on ships registered in a foreign country, and that such complaint as well as any complaint made in connection with and, if possible, at the time of the engagement in its territory of foreign seafarers on ships registered in a foreign country, is promptly reported by its competent authority to the competent authority of the country in which the ship is registered, with a copy to the Director-General of the International Labour Office;

....

(f) to verify by inspection or other appropriate means that ships registered in its territory comply with applicable international labour Conventions in force which it has ratified, with the laws and regulations required by subparagraph (a) of this Article and, as may be appropriate under national law, with applicable collective agreements;

.....

35. The Appendix referred to in subparagraph (a)(iii) lists, *inter alia*, the following conventions:- *Repatriation of Seamen Convention, 1926* (No. 23); *Shipowners' Liability (Sick and Injured Seamen) Convention, 1936* (No. 55)¹⁰; *Prevention of Accidents (Seafarers) Convention, 1970* (No. 134)(Articles 4 and 7). Because C147 in effect incorporates into its own text obligations arising under other ILO Conventions such as C23 and C55, by reference to those other Conventions in Article 2(a)(iii) of C147 and in its Appendix, States Parties to C147 are bound to conform to the standards in those other Conventions whether or not they have ratified them.

¹⁰ The aims of this Convention may be met, according to ILO Convention 147, by substantial compliance with the *Sickness Insurance (Sea) Convention, 1936* (No. 56), or the *Medical Care and Sickness Benefits Convention, 1969* (No. 130).

The Nature of Flag State Duties

36. States' obligations under Article 2(a) of Convention 147 in relation to the instruments listed in the Appendix have been explained as follows:

“Article 2 (a) of the Convention requires a ratifying State to satisfy itself that the general goals laid down in the instruments included in the Appendix to Convention No. 147 are respected. On the other hand, national laws and regulations can be different in detail and ... it is not required that the ratifying State adhere to the precise terms of these instruments as long as their general goals are respected, except of course in so far as it has also ratified the Conventions concerned.”¹¹

37. Under ILO Convention 147 States are not obliged merely to enact laws: they must implement them. The ILO Constitution stipulates that "... the Member... will take such action as may be necessary to make effective the provisions of the Convention."¹² The same point is made in the Law of the Sea Convention itself. The flag State is obliged *both* to ensure that its national law extends to and regulates matters on board each ship flying its flag (Article 94(2)(b)), *and* to ensure that the jurisdiction that it thereby secures over each ship flying its flag is effectively exercised (Article 94(1)).

38. There is, therefore, a clear line through from the basic stipulations in Article 94 of the 1982 Law of the Sea Convention (and its predecessor in the 1958 High Seas Convention), to ILO Recommendations 107 and 108, to ILO Convention 147, and thence to ILO Conventions 23, 55 and 134. Each State Party to the 1982 Convention is under an obligation (a) to ensure that it takes measures substantially equivalent to those ILO measures, in respect of ships flying its flag, and (b) to ensure that those measures are made effective. The implications of these obligations for questions of personal injury or death, and of repatriation, of seafarers may now be considered.

Flag State Duties In Respect Of Repatriation

39. The primary obligations of the flag State concerning repatriation are set out in ILO Conventions 23, and 166. Convention 23, the *Repatriation of Seamen Convention 1926*, provided that any seaman who is landed during the term of his engagement or on its expiration shall be entitled to be taken back to his own country, or to the port at which he was engaged, or to the port at which the voyage commenced, as shall be determined by national law. It has always been understood that it is in the first place the responsibility of

¹¹ *ILC: Interpretation of a decision concerning Convention No. 147, Merchant Shipping (Minimum Standards), 1976 The United States. Published: 1983. Paragraph 5.*

the shipowner¹³ actually to arrange repatriation; but the flag State itself bears a direct responsibility. It is obliged to supervise repatriation (Article 6), and to ensure that the entitlement to repatriation is made effective (Article 10). This basic obligation is amplified in the other provisions of the 1926 Repatriation of Seamen Convention.

40. ILO Convention C23 was replaced by ILO Convention C166, the *Repatriation of Seafarers Convention (Revised), 1987*, which provides generally for the implementation of seafarers' rights to repatriation. Repatriation is stated as a *right* of each individual seafarer. The duty to arrange repatriation lies, as it always has done, initially upon the shipowner. The key provision of C166 concerning the duties of the flag State is Article 5, which reads as follows: -

Article 5

If a shipowner fails to make arrangements for or to meet the cost of repatriation of a seafarer who is entitled to be repatriated-

(a) the competent authority of the Member in whose territory the ship is registered shall arrange for and meet the cost of the repatriation of the seafarer concerned; if it fails to do so, the State from which the seafarer is to be repatriated or the State of which he or she is a national may arrange for his or her repatriation and recover the cost from the Member in whose territory the ship is registered;

(b) costs incurred in repatriating the seafarer shall be recoverable from the shipowner by the Member in whose territory the ship is registered;

(c) the expenses of repatriation shall in no case be a charge upon the seafarer, except as provided for in paragraph 3 of Article 4 above¹⁴.

The primary obligation of the flag State to “arrange for and meet the cost of the repatriation” if the shipowner fails to do so is set out explicitly and unequivocally. A failure to discharge that obligation would amount to a violation of international law by the flag State.

41. There can be no doubt that as a matter of international law each and every flag State is under a duty to ensure that seafarers employed on ships sailing under its flag have an effective right to repatriation at no cost to the seafarer. These ILO provisions set out what is explicitly made a right of each individual seafarer. Like other human rights obligations,

¹² See *ILC: Interpretation of a decision concerning Convention No. 55, Shipowners' Liability (Sick and Injured Seamen), 1936 United States. Published: 1950.* Paragraph 3.

¹³ The term “shipowner” has a wide meaning. Like the French term “armateur” it encompasses not only the owner of the ship but also persons on whose account the ship is fitted out: see *ILC Interpretation of a decision concerning Convention No. 70, Social Security (Seafarers), 1946 The Netherlands, Published: 1957*, paragraphs 8, 9.

¹⁴ I.e., “where repatriation has taken place as a result of a seafarer being found, in accordance with national laws or regulations or collective agreements, to be in serious default of his or her employment obligations.”

these are obligations to treat each and every person in accordance with the prescribed standard.

Flag State Duties In Respect Of Personal Injury And Death

42. The main ILO instruments dealing with personal injury and death of seafarers are: Convention C55, the *Shipowners' Liability (Sick and Injured Seamen) Convention 1936* and Convention C147, the *Merchant Shipping (Minimum Standards) Convention 1976*. ILO Convention C55, the *Shipowners' Liability (Sick and Injured Seamen) Convention 1936*, requires flag States to impose upon shipowners¹⁵ liability for seafarers' sickness and injury arising during their engagement, and death resulting from such sickness or injury. The liability extends to the obligation to pay full wages while the seafarer remains on board, and to defray the expenses of repatriating the sick or injured seafarer. States are left free to choose exactly how they fulfil their duty to "make effective" the provisions of the Convention. Insurance schemes which permit claims to be made directly by an injured seafarer or a deceased seafarer's dependants might be one solution; social security provisions in which the State pays out in respect of injury or death and recovers in some way the amounts in question from the shipowner might be another. If, however, the only mechanism by which the shipowner's liability can be enforced is by litigation whose complexity and expense is such that it is in practice beyond the reach of most of those whom the Convention's provisions are intended to benefit, it would be difficult to say that the duty to "make effective" the provisions had been fulfilled.
43. The provisions of Article 2 of ILO Convention C147 impose upon flag States the obligation to apply to their ships laws or regulations relating to safety standards, and to exercise effective jurisdiction or control in respect of safety standards and shipboard conditions of employment. If the flag State fails to fulfil this obligation, and a seafarer is injured or killed as a result, the State is internationally responsible for the injury to the extent that it was caused by the State's failure.
44. The ILO provisions cited above indicate that the flag State is responsible for maintaining a system of laws adequate to secure shipboard safety. The flag State duty goes further, and extends to an obligation to provide a system for obtaining legal redress where seafarers are injured or killed. This obligation derives from customary international law, and is

¹⁵ The *ILC Interpretation of a decision concerning Convention No. 147, Merchant Shipping (Minimum Standards), 1976. The United States. Published: 1983*, paragraphs 4-7, makes it clear that the obligation in such cases lies upon the flag State.

independent of (but very similar to) the duty explained above to “make effective” ILO conventions. The independence is important. For instance, a flag State would be obliged to provide a system of legal redress for death or injury on board ship whether or not the State was party to any ILO convention.

45. It is well established that as a matter of customary international law all States are bound to allow all persons within their jurisdiction reasonable access to their courts for the redress of wrongs done to them.¹⁶ Flag States are, accordingly, obliged also to ensure that there is effective access to their courts for seafarers injured, and for (the dependants of) seafarers killed, upon ships flying the State’s flag.
46. It is an anomaly, apparently without any principled basis, that while regimes attaching strict liability to shipowners have grown up in other contexts, for example in respect of damage to the environment and injury to passengers on ships, no such benefits have been extended to the group of people most immediately and most continuously at risk from commercial maritime operations –seafarers. Similarly, the fact that measures such as the 1976 IMO Convention on Limitation of Liability for Maritime Claims¹⁷ have allowed shipowners to limit their liability for personal injuries suffered by their crews further deepens the anomaly, and may be thought inequitable. The point is recognized in the preamble to IMO Resolution A.898(21) (4 February 2000), where it is affirmed that

the right to limited liability must be balanced by a duty for the shipowner to take proper steps to ensure that legitimate claims are met, in particular by taking out effective insurance cover.

DUTIES OF THE PORT STATE

47. The following paragraphs address the question of the responsibility of port States under the ILO conventions and under general international law. In any specific case, however, the exact duties of any particular port State may vary from those described here. There may be in force a bilateral treaty, typically a treaty of Friendship, Commerce and Navigation, or a consular convention, which modifies the States rights and duties. There are very many such treaties in existence.

¹⁶ See, e.g., the European Convention on Human Rights, Article 6; American Declaration on the Rights and Duties of Man, Article XVIII; Universal Declaration of Human Rights, Article 10; 1929 Harvard Draft Convention on the Responsibility of States, 23 *American Journal of International Law, Special Supplement*, 133 (1929). See further, e.g., I. Brownlie, *The Principles of Public International Law*, 5th ed., (1998), pp. 526-533; *Restatement (Third), Foreign Relations law of the United States*, (1987), paragraph 711 and accompanying comment paragraph (e).

Port State Duties In Respect of Repatriation

48. Port States have specific responsibilities in respect of abandoned seafarers. ILO Convention 166, Article 5, imposes a duty upon flag States to arrange for and meet the cost of the repatriation; and it empowers the port States and the national State of the seafarer to arrange repatriation and recover the cost from the flag State if the flag State fails to act. Article 5 of C166 does not actually oblige the port State to make arrangements for repatriation; however, ILO Recommendation 174, the *Repatriation of Seafarers Recommendation 1987*, is phrased in positive terms, and indicates that the port State should indeed arrange repatriation.
49. An abandoned seafarer is likely to be present in the port State without the benefit of any formal status under the State's immigration laws. The 1956 Convention on Facilitation of International Maritime Traffic provides that crew members shall not be required to hold a visa for the purpose of shore leave. While that provision may facilitate trade, it is also likely to lead to situations where a seafarer, no longer on 'shore leave' because he has been abandoned, is an illegal immigrant, liable to deportation. Indeed, it is likely that in many cases the abandoned seafarer will have been detained or imprisoned pending deportation (though if the port State is prepared to bear the burden of arranging deportation, it is hard to see why it would not arrange repatriation). Deportation may deprive the seafarer of the right to return to the port State in the future.
50. A seafarer facing deportation may have a right to be heard: see, e.g., Article 8 of the American Convention on Human Rights, and Article 6 of the European Convention on Human Rights. Seafarers must not be deported in defiance of these fundamental rights. This offers, however, very little indeed in the way of protection to the highly vulnerable group of abandoned seafarers.
51. Port States also have duties under the Vienna Convention on Consular Relations. Article 5 of the Vienna Convention lists assistance to the crews of vessels having the nationality of the sending State as a consular function. There is no limitation imposed in respect of the nationality of the crewmember. Article 28 of the Vienna Convention requires, in general terms, the host State –in this context, the port State– to accord full facilities for the performance of consular functions; and Article 36 provides more specifically for free communication between the consul and nationals of the sending State, and, at the request of the consul, for notice of the arrest or detention of any national. (Similar obligations are

imposed by Article 23 of the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families.¹⁸⁾ These obligations upon the host State are by no means purely formal. In the past three years two cases have been brought in the International Court of Justice, in order to enforce those obligations under the Vienna Convention: see *Vienna Convention on Consular Relations* (Paraguay v. United States of America) (1998); *LaGrand* (Germany v. United States of America) (1999).

52. The port State accordingly has powers in respect of repatriation, and certain limited duties to facilitate repatriation and communication between the seafarer and his national State.
53. The port State also has other duties under international human rights law. As was noted above, the detention of an abandoned seafarer, in a detention facility or on board ship, may be held to be a deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights. It may entail obligations for the port State (and for the flag State, in cases where the seafarer remains on the vessel) concerning the provision of medical aid and food and access to legal advice.

Port State Duties In Respect of Injury And Death

54. As far as personal injury and death are concerned, the responsibility of the port State is limited to the duty to provide access to its courts in order that claims for personal injury or death (or, indeed, for payment of wages, or for the costs of repatriation) might be brought by, or on behalf or in respect of, seafarers. That is not to say that the courts must entertain every case. It is possible that the application of principles of private international law will in some cases lead the courts to conclude that the claim has insufficient connection with the port State for it to be properly within the jurisdiction of the port State's courts.¹⁹ It is also possible that the jurisdiction of the courts over disputes between a foreign seafarer and his employer may be limited by provisions in bilateral treaties of Friendship, Commerce and Navigation.
55. If the ship remains in the port it is in principle possible to arrest the ship, or, subject to certain conditions, a sister ship, as security for claims for personal injury or death, and for wages. This is recognised in the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Vessels, 1952,²⁰ and the International Convention

¹⁸ It is not entirely clear which categories of seafarer are covered by this Convention.

¹⁹ See, e.g., T. J. Schoenbaum, *Admiralty and Maritime Law*, 2nd ed., (1994), vol. 1, pp. 279-288.

²⁰ [Article 1\(1\)\(b\).\(m\).](#)

on Arrest of Ships 1999.²¹ If the ship is abandoned, or is in the process of being arrested by other creditors, or if there are many seafarers with claims against the shipowner, that step may be sensible: but it is far from likely that the step will be practicable in relation to individual claims or to bankrupt shipowners. The existence of a right to institute lengthy and costly proceedings in a foreign port, where the seafarer is likely to have no right of residence, is plainly not an effective safeguard of the seafarer's interests; and such proceedings can in any event succeed only if the value of the ship exceeds the shipowner's debts.

DUTIES OF THE NATIONAL STATE OF THE SEAFARER

56. The State whose nationality an individual seafarer bears has a potentially important role to play in the protection of the seafarer's interests, although it may have a limited ability to render immediate practical assistance. The seafarer's national State in this context is assumed not to be either the flag State or the port State. The national State will, therefore, by definition be a distant State, and the seafarer's point of contact will be with the national State's consular official (if any) in the port. The national State is accordingly likely to be involved in the repatriation of seafarers, although it also has an important role in respect of claims for injury or death.

National State Duties In Respect of Repatriation

57. Article 5 of the Vienna Convention on Consular Relations lists assistance to the nationals of the sending State as a consular function. Article 28 of the Vienna Convention requires, in general terms, the port State to accord full facilities for the performance of consular functions; and Article 36 provides more specifically for free communication between the consul and nationals of the sending State, and, at the request of the consul, for notice of the arrest or detention of any national. These obligations are complemented by Article 5 of ILO Convention C166. As has been noted, Article 5 does not oblige the national State to make arrangements for repatriation; but ILO Recommendation 174, *Repatriation of Seafarers Recommendation 1987*, indicates that where the shipowner and flag State fail to arrange the repatriation of a seafarer, the national (or the port State) "should arrange for his or her repatriation" and recover the cost from the flag State.

²¹ Article 1(1)(b), (c). This Convention is not yet in force.
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58. It is possible that in some States there may be a duty imposed by national law upon the government to assist nationals in distress who are outside the State. Were that so, the obligation to assist abandoned seafarers might, in principle, be enforceable by actions in the national State's courts.

National State Duties In Respect of Injury And Death

59. As far as claims and responsibilities arising from personal injury and death are concerned, the national State has no specific obligations as a matter of international law, beyond the duty to allow access to its courts for the bringing of claims. As in the case of the port State, however, it is possible that even if a claim is brought, in some instances the courts may conclude that the claim has insufficient connection with the national State for it to be properly within the jurisdiction of the national State's courts.
60. The national State of the seafarer has another potential role. If a flag State or port State fails to perform its international legal obligations in respect of the seafarer, the national State may be able to institute proceedings. This might be done, for example, through the LOSC or ILO procedures, or by bringing a case in the International Court of Justice or some other tribunal whose jurisdiction over the matter in issue had been accepted by both the national State and the alleged wrongdoing State.

REMEDIES

61. Many human rights obligations in international law lack effective enforcement mechanisms for individual claims. They establish procedures in which the compliance of a State with its human rights obligations is investigated and made the subject of a report in general terms. The publicity to which defaulting States are exposed exercises some pressure upon them to fulfil their obligations. There are, however, some other practical procedures in existence by which complaints of breaches in individual cases of the obligations that have been described may be made the subject of formal adjudications.

LOSC Procedures

62. The 1982 Law of the Sea Convention is of great significance in this context. Article 94 imposes upon flag States duties in relation to redress for personal injury or death, and to repatriation, of seafarers. A breach of the Article 94 duties would plainly be a breach of the Convention. Part XV of the Convention sets out a comprehensive system for the settlement

of disputes concerning the interpretation or application of the Convention (LOSC, Article 286). Although there are certain exceptions from that compulsory system, none is relevant in the present context. Proceedings may be instituted unilaterally by the claimant State; and the tribunal may proceed to a final decision even if the respondent State refuses to co-operate.

63. If a flag State failed to fulfil the obligations that are imposed upon it by Article 94 of the Convention, in respect of personal injury or death or repatriation of seafarers, that failure might be made the subject of an action under the Part XV dispute settlement procedures. For example, the national State of an injured or deceased seafarer, or the port State in which a seafarer is abandoned, might institute proceedings against the flag State. The exact nature of the proceedings would vary in accordance with the provisions of Part XV, which allow States to choose various fora within which the action would be heard. The fora include *ad hoc* arbitral tribunals, the International Tribunal for the Law of the Sea, and the International Court of Justice. Unless both the applicant and the respondent State have agreed upon some other tribunal, disputes are to be submitted to an *ad hoc* arbitral tribunal established under Annex VII of the Law of the Sea Convention.
64. These procedures provide a powerful instrument, of great potential significance, by means of which a flag State may be held responsible, on a case-by-case basis, for failures to comply with its duties to exercise effective jurisdiction and control over ships flying its flag, by States that have a legal interest in the fulfilment of the flag State's duties.

ILO Procedures

65. The Law of the Sea Convention procedures are not the only mechanism available for the enforcement of the duties outlined above. There are specific procedures relating to ILO obligations. There is a regular system of periodic reporting by Governments on the measures taken to give effect to the ILO conventions that they have ratified (Article 22 of the ILO Constitution), and the examination of reports by the Committee of Experts on the Application of Conventions and Recommendations. There are also complaints procedures. Under Article 24 of the ILO Constitution any national or international workers' organization may make a representation that a specific State has failed to secure in any respect the effective observance within its jurisdiction of any ILO convention to which it is a party. Under Article 26 of the ILO Constitution any ILO Member State may bring a complaint that a specific State is not securing the effective observance of any ILO convention to which both States are parties. Article 26 complaints may also be brought by

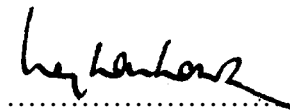
an ILO conference delegate, or by the ILO Governing Body. Both Article 24 and Article 26 procedures entail the investigation of the alleged breach and the publication of a report.

Other International Judicial Procedures

66. In addition to the LOSC and ILO procedures, certain States may have accepted the jurisdiction of an international tribunal, typically the International Court of Justice (an option also included in the ILO system, under Article 29 of the ILO Constitution), in respect of all international legal disputes, or a defined category of disputes including disputes arising from the provisions discussed above.

Enforcement Through National Courts

67. Finally, it should be noted that in certain States treaty provisions that are specific and considered to have been intended to create rights and duties for individuals may be directly enforceable by national courts, in the same way that national laws are enforced. It is a matter to be determined by the law of each State whether any particular convention has this 'self-executing' status.²²



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²² See *ILC. Interpretation of a decision concerning Convention No. 55, Shipowners' Liability (Sick and Injured Seamen)*, 1936 United States. Published: 1950. paragraph 3