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GROUP ON FAIR TREATMENT OF
SEAFARERS
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**DEVELOPMENT OF GUIDELINES ON THE FAIR TREATMENT OF SEAFARERS IN
THE EVENT OF A MARITIME ACCIDENT**

Legal aspects

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

SUMMARY

- Executive summary:*** This document contains an opinion by Professor Phillippe Sands, Q.C. and John O'Flaherty on legal aspects of the fair treatment of seafarers in the event of a maritime accident and, in particular, the aspect of the right to silence and not to self-incriminate
- Action to be taken:*** Paragraph 2
- Related documents:*** IMO/ILO/WGFTS/1/11, annex 4, C 89/D; IMO Guidelines on Casualty Investigation

1 The eighty-ninth session of the IMO Council (document C 89/D, paragraph 12.1(v)) decided to:

- (i) instruct the Committees of the Organization and through them their subsidiary bodies, when developing new instruments or amendments to existing ones, to ensure that these are compatible and not in conflict with other instruments of international law and that they cannot be interpreted or used in a way that conflicts with such instruments and in particular the ones addressing human rights;

Action requested of the Joint Working Group

2 The Joint Working Group is invited to consider the implication of the opinion when it considers the draft guidelines and to also evaluate whether the current IMO Guidelines on Casualty Investigation contain the necessary protections for the human rights of seafarers.

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ANNEX

THE CRIMINALIZATION OF SEAFARERS AND INTERNATIONAL
HUMAN RIGHTS LAW

INTRODUCTION

1 A number of maritime incidents that have occurred in recent years, and the manner in which those incidents, and those involved in them, have been treated by the State authorities investigating the incidents, have raised quite serious concerns that in many such cases, the fundamental human rights of seafarers are perhaps not being adequately respected. Two prominent examples of such incidents include:

- (i) The **Erika** was a tanker that foundered off the French coast in 1999 and subsequently caused heavy oil pollution. The Erika was Italian-owned and flew the Maltese Flag. The master of the Erika, an Indian national, was arrested and imprisoned for some time by the French authorities;
- (ii) The **Prestige** was a Greek-owned, Bahamas flag tanker that sank off the coast of Spain, again causing serious oil pollution, the Prestige having previously been refused access to a place of refuge in order to undertake salvage operations. The Greek master was forcibly removed by the Spanish military and subsequently jailed for over three months until bail of €3 million was paid. He was refused permission to leave Spain for 17 months and is now in Greece pending trial when he will have to return to Spain; and
- (iii) While we make no comment on the detail of these, or other, individual cases, it is incidents such as these which have brought to the fore the issue of the human rights, and rights and protections derived from international law, of seafarers involved in maritime incidents.

2 We have been asked to advise specifically on a number of issues that arise in this context, including the right to silence under international law and what advice should be given to seafarers concerning non-incrimination. We are also asked to comment on the issues of detention without charge and the availability of compensation where a seafarer has been detained for a significant time with no subsequent charge and/or conviction.

3 In providing this advice, we have focused on the relevant rules of international human rights law. Other rights may arise under the provisions of the 1982 UN Convention on the Law of the Sea, in particular Article 292 on the prompt release of vessels and crew. This provision has been the subject of extensive case-law at the International Tribunal for the Law of the Sea, and in particular its Judgment of 1 July 1999 in *M/V "Saiga" (No.2)*, (*Saint Vincent and the Grenadines v Guinea*), recognising that extended detention of crew members may give rise to a violation of the 1982 Convention and an obligation to release the crew promptly, failing which a claim for reparation may be made.

BACKGROUND

4 In summary, the background to the present matter is the issue of ships' masters and seafarers being detained ashore following incidents that have occurred on ships on which they served. There have also been incidents where not only the master and some of the officers and crew were detained, but also the salvage master sent to the scene to try to address the situation. There have been a number of cases, some high profile, others receiving little media attention, which have brought this issue very much to the fore.¹ Some of these incidents related to pollution at sea and others to collisions. One high profile incident related to a ship (the Tampa) which went to the aid of a boat overloaded with refugees which had got into distress in international waters.

5 The key concern is the risk to seafarers of prolonged detention following an incident at sea, the status of such detainees and respect for their basic human rights, in particular protection from arbitrary interference with their right to liberty. There is also concern about the consequences of that risk for the well-being of the seafarers and their families (and in particular the risk to seafarers' livelihoods posed by prolonged detention), the morale of seafarers and the ability of the industry to continue to attract high quality candidates to the maritime profession. Finally, there is the very real concern that fear of prolonged detention will in fact discourage seafarers from actively, openly and fully cooperating with investigators trying to identify causes and explanations for particular incidents.

THE RELEVANT INTERNATIONAL LAW

6 To an extent, the idea of a general "international human rights law" may be of little utility as human rights problems occur in specific legal contexts. Thus the relevant issues may arise in domestic law, or within the framework of a regional standard-setting convention or within general international law. Depending on the setting, the applicable law may be the domestic law of a particular State, a regional treaty (such as the European Convention on Human Rights, or the African Charter, or the Inter-American Convention) or principles of general international law.

7 The basic rules of international human rights law are reflected in the Universal Declaration of Human Rights, adopted by the United Nations in 1948. This non-binding instrument has been further developed in binding conventions, the main provisions of which are broadly considered to reflect customary international law.

8 The two instruments of general application are the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights ("ICCPR"), both adopted in 1966. There are also a number of important regional conventions, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("ECHR"), the American Convention on Human Rights (1969) and the African Charter on Human and Peoples' Rights (1981).

¹ Examples include the Erika, the Prestige (see above), the Virgo and the Tampa amongst others.

9 In relation to the question upon which we are asked to advise, the relevant principles of international law are set out principally in the ICCPR. We will also consider in this advice, as an example of the regional treaties that have relevance in this area, the ECHR, as this is the instrument with by far the most developed body of human rights case law. It is also of importance because the ICCPR is to a large extent modelled on the provisions of the ECHR and the experience based upon the ECHR.

The ICCPR

10 The ICCPR was adopted in 1966 and came into force in 1976. This Covenant has legal force as a treaty for the 152 parties to it and constitutes a detailed codification of a number of fundamental human rights.

11 Article 2 of the ICCPR sets out the general obligation of State Parties under the Covenant, providing:

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*
 1. *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
 2. *To ensure that the competent authorities shall enforce such remedies when granted.*

12 Article 9 sets out the right to liberty and Article 14 provides for the right to a fair trial. Article 9 provides as follows:

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*
4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*
5. *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.*

13 Article 14 sets out in some detail the elements of a fair trial which the Covenant seeks to guarantee²:

1. *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*
2. *Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*
3. *In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
 1. *To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
 2. *To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
 3. *To be tried without undue delay;*

² As to when these fair trial guarantees become operative, this is normally evident from the text of the Covenant. So, for example, the right in Article 14(3)(1) to be informed in a language the person understands is operative at the time that the person is informed of the case against them (which must be “promptly”). Similarly, the right to an interpreter in Article 14(3)(6) will be operative when the individual is being tried in court.

4. *To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
 5. *To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 6. *To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*
 7. *Not to be compelled to testify against himself or to confess guilt.*
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4. *In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*
 5. *Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*
 6. *When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*
 7. *No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

The ECHR

14 The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed on 4 November 1950 and entered into force on 3 September 1953, and constitutes a comprehensive bill of fundamental rights, which is binding on the State Parties to it.

15 Article 1 of the ECHR provides that the parties to the Convention (the members of the Council of Europe) shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention.

16 Article 5 provides for the right to liberty³ and Article 6 the right to a fair trial⁴. The language of the ECHR is very similar to the language of the ICCPR, for the reason, noted earlier, that the provisions of the ICCPR were modelled on those of the ECHR.⁵

17 Article 5 provides as follows:

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
 - a. *the lawful detention of a person after conviction by a competent court;*
 - b. *the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
 - c. *the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
 - d. *the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
 - e. *the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; and*
 - f. *the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
2. *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.*

³ See similarly Article 7 of the American Convention on Human Rights (which is in very similar terms) and Article 6 of the African Charter on Human and People's Rights (which is more narrowly drafted).

⁴ See similarly Article 8 of the American Convention on Human Rights and Article (which is in very similar terms) and Article 7 of the African Charter on Human and People's Rights (which again is more narrowly drafted).

⁵ The same comments on when rights become operative, discussed above at note 2 in relation to the ICCPR, apply, *mutatis mutandis*, to the equivalent provisions of the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and People's Rights.

3. *Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
5. *Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.*

18 Article 6 enumerates virtually the identical elements of the right to a fair trial as Article 14 of the ICCPR:

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - a. *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - b. *to have adequate time and facilities for the preparation of his defence;*
 - c. *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d. *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - e. *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

THE RIGHT TO SILENCE

19 There is no provision in either the ICCPR or in the ECHR which expressly protects a right to silence. However, Article 6(2) of the ECHR⁶, which is mirrored in Article 14(2) of the ICCPR, provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, and although not specifically mentioned as an element of fairness, the right to remain silent under police questioning and the privilege against self-incrimination are international standards that lie at the heart of a fair procedure.

20 In *Funke v France* (1993) 16 EHRR 297, at paragraph 42, the European Court of Human Rights (“ECtHR”) recalled that Article 14 of the ICCPR protected individuals from self-incrimination and stated, at paragraph 44, that Article 6 of the ECHR protects the right of anyone charged with a criminal offence “to remain silent and not to contribute to incriminating himself”.

21 Referring to the decision of the Court in *Funke*, in *Murray v United Kingdom* (1996) 22 EHRR 29, at paragraph 45, the ECtHR said:

“Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 (see the Funke judgment cited above, loc. cit.). By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.”

22 In *Saunders v United Kingdom* (1996) 23 EHRR 313, at paragraphs 68-69, the Court elaborated somewhat on the nature and rationale of this protection:

“68. The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 (art 6) ... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.

⁶ Article 8(2) of the American Convention on Human Rights is in identical terms, so far as is material. Article 7(1)(b) of the African Charter on Human and People’s Rights though not identically worded, provides similarly.

69. *The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent.*”

23 Similarly, in *Serves v France* (1997) 28 EHRR 265, at paragraph 46, the Court said that the right of any person charged to remain silent and the right not to incriminate himself are:

“generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 of the Convention. Their rationale lies, inter alia, in protecting the “person charged” against improper compulsion by the authorities and thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the “person charged”

24 In *Heaney and McGuinness v Ireland* (2001) 33 EHRR 12, the ECtHR held that the threat and imposition of a criminal sanction on the applicants because they failed to supply information to the authorities investigating the alleged commission of criminal offences by them destroyed the very essence of their privilege against self-incrimination and their right to remain silent, and that this could not be justified by reference to security and public order concerns.

25 The ECtHR provided a very useful overview of the relevant case law and a summary of the current state of the law in the recent case of *Weh v Austria* [2004] ECHR 38544/97:

“39. The Court reiterates that, although not specifically mentioned in art 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under art 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art 6 (see, John Murray v UK, judgment of 8 February 1996, Reports of Judgments and Decisions 1996-I, p 49, para 45). The right not to incriminate oneself in particular presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right in question is closely linked to the presumption of innocence contained in art 6(2) of the Convention (see Saunders v UK, judgment of 17 December 1996, Reports 1996-VI, p 2064, para 68; Serves v France, judgment of 20 October 1997, Reports 1997-VI, pp 2173-74, para 46; Heaney and McGuinness v Ireland [2000] ECHR 34720/97 at para 40; JB, cited above, para 64).

40. *The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent (Saunders, cited above, p 2064, para 69; Heaney and McGuinness, cited above, para 40).*

41. *A perusal of the Court’s case-law shows that there are two types of cases in which it found violations of the right to silence and the privilege against self-incrimination.*

42. *First, there are cases relating to the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him, or - in other words - in respect of an offence with which that person has been "charged" within the autonomous meaning of art 6(1) (se Funke, p 22, para 44; Heaney and McGuinness, paras 55-59; JB, paras 66-71, all cited above).*

43. *Second, there are cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution (Saunders, cited above, p 2064, para 67, IJL v UK [2000] ECHR 29522/95 at para 82-83).*

44. *However, it also follows from the Court's case-law that the privilege against self-incrimination does not per se prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned.*

45. *For instance, it has not been suggested in Saunders that the procedure whereby the applicant was requested to answer questions on his company and financial affairs, with a possible penalty of up to two years' imprisonment, in itself raised an issue under art 6(1) (Saunders, ibid.; see also IJL and Others, cited above, para 100). Moreover, in a recent case the Court found that a requirement to make a declaration of assets to the tax authorities did not disclose any issue under art 6(1), although a penalty was attached to a failure to comply and the applicant was actually fined for making a false declaration. The Court noted that there were no pending or anticipated criminal proceedings against the applicant and the fact that he may have lied in order to prevent the revenue authorities from uncovering conduct which might possibly lead to a prosecution did not suffice to bring the privilege against self-incrimination into play (see Allen v the United Kingdom (dec), no. 76574/01, ECHR 2002-VIII). Indeed, obligations to inform the authorities are a common feature of the Contracting States' legal orders and may concern a wide range of issues (see for instance, as to the obligation to reveal one's identity to the police in certain situations, Vasileva v Denmark [2003] ECHR 52792/99 at para 34)."*

26 It is clear from these authorities that it is incompatible with the protections provided by Article 6 of the ECHR and Article 14 of the ICCPR to base a conviction solely or mainly on an accused's silence or his failure to answer questions or to give evidence. However, the ECtHR has made clear that it is necessary to assess the impact of an infringement on the fairness of a trial as a whole before concluding that there has been a breach of Article 6.

27 Moreover, it is clear that the right to silence is not absolute. In *Murray*, the ECtHR said, at paragraph 47:

"On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

Wherever the line between these two extremes is to be drawn, it follows from this understanding of “the right to silence” that the question whether the right is absolute must be answered in the negative.

It cannot be said therefore that an accused’s decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government have pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point.

Whether the drawing of adverse inferences from an accused’s silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

28 This proposition was reiterated in *Weh*, where the ECtHR said, at paragraph 46:

“Furthermore, the Court accepts that the right to silence and the right not to incriminate oneself are not absolute, as for instance the drawing of inferences from an accused’s silence may be admissible (Heaney and McGuinness, para 47 with a reference to John Murray, cited above, p 49, para 47). Given the close link between the right not to incriminate oneself and the presumption of innocence, it is also important to reiterate that art 6(2) does not prohibit, in principle, the use of presumptions in criminal law (see Salabiaku v France, judgment of 7 October 1988, Series A no 141, p 15, p 28).”

29 Thus, while the ICCPR and the ECHR protect the right of the individual not to self-incriminate, and the courts have interpreted the protections provided in Article 6(2) ECHR and Article 14(2) ICCPR as incorporating a right to silence, this right is not absolute. Whether or not the drawing of adverse inferences from an accused’s silence infringes the accused’s rights is to be determined in the light of all of the circumstances of the case. Similarly, the impact of any given infringement of an accused’s rights on the fairness of a trial as a whole will have to be assessed before concluding that there has been a breach of the accused’s Article 6 (or Article 14) rights to a fair trial.

30 As to when the individual enjoys the right not to self-incriminate, in general terms this is an ever-present right, so that the authorities of a State are never entitled to force an individual to give evidence or answer questions which might incriminate himself, nor are they entitled to use evidence given by an individual in one context against that individual in another context. This is, of course, subject to the same exceptions that we have outlined above, namely exceptions that the courts recognize as being compatible with the fundamental rights protected by the relevant treaties and covenants.

DETENTION

31 Pursuant to Article 9 of the ICCPR, everyone has the right to liberty and security of person, no one may be subject to arbitrary arrest or detention and no one may be deprived of his liberty except on such grounds as are established by law and in accordance with a procedure prescribed by law. Moreover, everyone who is arrested must be informed at the time of arrest for the reasons for his arrest and “promptly” of any charge against him. Anyone arrested or detained on a criminal charge must be brought promptly before a judge and entitled to a trial within a reasonable time or to release pending trial, and the general rule is that persons awaiting trial shall not be detained in custody, though this may be subject to conditions. Anyone deprived of his liberty by arrest or detention is entitled to take proceedings by which the lawfulness of his detention will be decided without delay by a court and his release ordered if his detention is not lawful. Finally, Article 9 provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

32 Article 9 is modelled very closely on Article 5 of the ECHR, save that Article 5 actually sets out (in Article 5(1)(a)-(f)) the specific cases in which a person may be deprived of his liberty in accordance with a procedure prescribed by law. There are some other subtle differences in that Article 5 specifically requires anyone arrested not only to be informed promptly, of the reasons for his arrest and of any charge against him, but also specifically to be informed in a language which he understands. Similarly, Article 5 refers to the person arrested being informed “promptly” of the reasons for his arrest, while Article 9 ICCPR requires him to be informed of this “at the time of arrest”. Article 6 refers to a right to have a court decide “speedily” on the lawfulness of the detention, whereas Article 9 ICCPR require that a court decide “without delay”.

33 Nonetheless, the fundamental provisions of Article 6 ECHR and Article 9 ICCPR are for all practical purposes identical, and the interpretation and operation of Article 9 ICCPR must again be informed very much by the jurisprudence of the ECtHR.

34 In light of these provisions, it is clear that there are rights which a seafarer detained for an excessive period of time, particularly where no charges are brought, could seek to rely on. This is so in relation to the very fact of being detained without charge, being detained for an excessive period, and of not being given prompt access to a court to challenge any detention being imposed.

35 Even if the person is to be charged, he must be charged promptly. It is not clear what exactly “promptly” means, and circumstances will be important, but a delay of ten days has been held by the ECtHR to involve a violation of Article 5: *Van der Leer v Netherlands* (1990) 12 EHRR 567. Moreover, Article 6(1) ECHR requires that having been charged, the individual is entitled to a trial within a “reasonable time” (Article 14(3) ICCPR provides similarly that anybody charged is entitled to be tried without undue delay). What is meant by a “reasonable time” or “without delay” is again not the subject of any absolute time limit, and the reasonableness of the delay will depend on the particular circumstances of the case. According to the jurisprudence of the ECtHR, in assessing reasonableness, relevant factors will include the complexity of the case, the conduct of the accused and the conduct of the judicial authorities, but particular urgency has been held to be required where the applicant is in detention pending the outcome of his case: *Abdoella v Netherlands* (1992) 20 EHRR 585.

36 The difficulty, of course, will be in enforcing these rights, and this is discussed further in the following section, which deals with the issue of enforcement and compensation.

ENFORCEMENT AND COMPENSATION

37 We describe here, in brief, the mechanisms available to enforce rights derived from the ICCPR and the ECHR.

38 In relation to the ICCPR, there is an obligation on State Parties to submit reports to a Human Rights Committee on measures adopted to give effect to the rights recognized by the Covenant.⁷ There is also a complaints procedure under which parties to the Covenant may complain of non-compliance, subject to a bilateral attempt at adjustment and prior exhaustion of domestic remedies, provided that such complaints are only admissible if both parties have recognized the competence of the Committee to receive complaints.⁸ The Committee may make use of ad hoc Conciliation Commissions in resolving issues raised in this manner, but only with the prior consent of the State Parties concerned.⁹ In addition, the Optional Protocol to the ICCPR provides for applications to the Human Rights Committee created by the Covenant from individuals subject to its jurisdiction who claims to be victims of violations of provisions of the Covenant, and who have exhausted all available domestic remedies. The State charged with a violation is under an obligation to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State. Subsequently, the Committee forwards its view to the State Party concerned and to the individual. However, there is no public determination of the issue on a judicial or quasi-judicial basis, and the view of the Committee is not binding on the State Party concerned.

39 In contrast, the ECHR expressly provides a mechanism for judicial determination of complaints of violations of rights derived from the ECHR. Article 19 establishes the European Court of Human Rights. Article 32 of the ECHR gives the Court jurisdiction to consider all matters concerning the interpretation and application of the ECHR and the protocols thereto which are properly referred to it. Article 33 allows any contracting party to refer any alleged breach of the ECHR by another contracting party. Article 34 enables the court to received applications from individuals who claim to be a victim of a violation by one of the contracting parties of their rights under the ECHR. Pursuant to Article 46 the contracting parties undertake to abide by the judgment of the Court, and Article 41 allows the Court to provide just satisfaction to an injured party where the internal law of the relevant State allows only partial reparation to be made. An individual whose ECHR rights have been violated is entitled to compensation. Again, it is important to note that the Court will only exercise its jurisdiction after all domestic remedies have been exhausted “according to the generally recognized rules of international law”. Improper delay by national tribunals is deemed to be an exhaustion of local remedies. Nonetheless, the process of taking a case to the Court is, to say the least, less than expeditious.

⁷ In particular, Article 40 provides that State Parties must provide reports within one year of entry into force of the Covenant for the State Party concerned and thereafter whenever the Committee requests.

⁸ Article 41 ICCPR.

⁹ Article 42 ICCPR.

40 Finally, as noted earlier, both Article 9(5) of the ICCPR and Article 5(5) of the ECHR provide a right to compensation where the Article 9 of Article 5 rights of the individual to liberty have been violated. Suffice to say for the present, that the right to compensation under the ECHR is likely to provide a more effective remedy to an individual whose rights have been violated, unless the domestic laws of the relevant State have given effect to the requirement set out in Article 9(5) ICCPR.

CONCLUSION

41 In summary, we would advise that both the ICCPR and the ECHR:

- provide protection against arbitrary detention without charge,
- entitle any individual detained to be informed promptly of the charges against him;
- entitle that individual prompt access to a court to challenge the lawfulness of his detention;
- entitle the individual to a trial without undue delay;
- entitle an individual detained unlawfully to compensation;
- protect a person accused of an offence from having to incriminate himself and protect his right to silence (though as has been discussed, the right to silence is not absolute).
