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FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Submitted by the International Shipping Federation (ISF), the International Chamber of Shipping (ICS) and the International Confederation of Free Trade Unions (ICFTU)

SUMMARY

Executive summary: ISF, ICS and ICFTU fully support the recently-adopted Guidelines on fair treatment of seafarers in the event of a maritime accident. This document comments on various points raised at the ninety-first session of the Legal Committee, with a view to addressing the concerns of some States and ensuring that the Guidelines are implemented by all States as soon as possible.

Action to be taken: Paragraph 23

Related documents: LEG 91/5/2; LEG 91/12; resolution LEG.3(91); resolutions A.971(24) and A.987(24); C 89/D and UN General Assembly resolution 217 A III (Universal Declaration of Human Rights)

Introduction

1 The International Shipping Federation (ISF), International Chamber of Shipping (ICS) and International Confederation of Free Trade Unions (ICFTU) believe that the fair treatment of seafarers following a maritime accident should be regarded as a fundamental principle for everyone in the maritime community and fully support the recently adopted Guidelines on fair treatment of seafarers in the event of a maritime accident (resolution LEG.3(91)).

2 As Social Partners of the International Labour Organization (ILO) and active participants in the tripartite *ad hoc* expert working group, ISF, ICS and ICFTU have the following comments on the various points raised at the last session of the Legal Committee when the Guidelines were adopted.

3 It is essential that any review of the Guidelines looks at the position of seafarers and considers them from their perspective. In this regard, it is important to recall some of the issues addressed in IMO Assembly resolution A.987(24) (which was also adopted by the ILO Governing Body). We consider the following citations as being fundamental to the intent of the IMO Assembly and the ILO Governing Body, when they adopted the resolution:

“AWARE ALSO that seafarers may not be familiar with the law and processes of a port or coastal State and the impact those national laws may have on them,

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CONCERNED ALSO that in some cases the detained seafarers have been subject to conditions in which their basic human rights appear not to have been fully respected,

CONCERNED FURTHER that these cases have an adverse impact on the morale of seafarers, on the attraction and recruitment of young people into the seafaring profession, and on retention of current seafarers in the profession,

RECALLING ALSO the ILO Declaration on Fundamental Principles and Rights at Work, 1998 and the generally accepted principles of international human rights applicable to all workers,

CONSIDERING that, given the global nature of the shipping industry, seafarers need special protection,

CONVINCED ALSO that the protection of the rights of seafarers through the application of the Guidelines referred to above is necessary to avoid the financial, physical and emotional burden which prolonged detention inflicts on seafarers and their families,”

4 It is also important to recall the decision of the eighty-ninth session of the Council (document C 89/D, paragraph 12.1(v)) to:

“1 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;”.

5 It should also be recalled that the High-Level Action Plan of the Organization and Priorities for the 2006-2007 Biennium, as set out in IMO Assembly resolution A.971(24), includes:

“Increasing the emphasis on the role of the human element and safeguarding the human rights of seafarers in secure shipping.”

Joint IMO/ILO development on a tripartite basis

6 ISF, ICS and ICFTU believe strongly that issues of seafarers' welfare, of which fair treatment of seafarers is one, are central to the mandate of both ILO and IMO and it is essential to ensure coherence between the two organizations and, in this regard, to recall the joint co-operation agreement between them.

7 While we regret that a Legal Committee Working Group on a tripartite basis was not established at this session, it should be recalled that the Guidelines have been jointly developed and agreed by IMO and ILO, and were originally produced on a tripartite basis.

8 ISF, ICS and ICFTU are willing to participate fully in the Legal Committee Working Group and are prepared to address the concerns that some Governments raised at the ninety-first session of the Legal Committee. It should, however, be noted that all of these issues were raised and fully discussed in the Joint IMO/ILO Working Group, with compromise text often being agreed.

9 The following paragraphs take up the various issues raised in the report of the Legal Committee's ninety-first session (document LEG 91/12) and in document LEG 91/5/2, submitted by the United States.

Definition of "maritime accident"

10 ISF, ICS and ICFTU do not agree with the suggestion that the Guidelines define "maritime accident" too broadly, in particular by not referring to actual or potential damage. The definition used in the Guidelines was developed by legal experts from the Comité Maritime International (CMI). There is no connection between assessing whether damage has or has not been caused, or could have been caused, and whether seafarers should be treated fairly or not in accordance with the Guidelines.

Presumption of innocence

11 It was also stated, at the ninety-first session of the Legal Committee, that the Guidelines fail to include a statement that they are not intended to apply following incidents committed with criminal intent. This is correct, since all seafarers should be treated fairly when detained. Whether criminal intent is involved is not a matter for accident investigators or detaining authorities, but for the courts to decide. Seafarers, like anyone else, are innocent until proved guilty following due legal process, and any seafarer who is detained should be treated fairly in accordance with the Guidelines.

12 In this regard it should be recalled that the Universal Declaration of Human Rights provides, in article 11(1) that:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

Right to remain silent

13 It has also been suggested that a seafarer's right not to self-incriminate, in particular the right to remain silent, should be qualified by the fact that accident investigators are allowed to compel seafarers to co-operate with an investigation. Such an amendment to the Guidelines, however, would confuse seafarers, as they would not be in a position to know when their statements could be used against them. In any case, an amendment is unnecessary, since the right to silence is part of the right not to self-incriminate. If there is no danger of self-incrimination and thus prosecution, then there will be no need to remain silent and so co-operation will be given. It is up to the State to satisfy the seafarer that there is no danger of self-incrimination.

14 It should also be noted that, as a result of the Secretariat being instructed to bring the Guidelines to the attention of the IMO Flag State Implementation (FSI) Working Group as it revises the IMO Code for the Investigation of Marine Casualties and Incidents, the issue of self-incrimination in accident investigations is being addressed in that context. Therefore, it is suggested that it would be premature to revise the Guidelines until the revision of the IMO Code has been concluded.

Payment of wages

15 Some concerns were raised about the guidance on the payment of wages, with some States believing that this would involve Governments in burdensome responsibilities in ensuring that wages were paid. It should be noted, however, that the Guidelines recommend that wages are not the responsibility of the detaining State only, as payment of wages is contained in all sections of the Guidelines, including, quite properly, the section on shipowner responsibilities. The Guidelines only recommend that steps are taken to ensure/verify that measures are in place to provide wages and that this should only be done when appropriate. The Guidelines do not require States actually to provide such measures or do more than take appropriate steps with regard to payment of wages. This allows States a large degree of flexibility in approach and should not generally prove onerous.

16 However, in order to address the concern of many Governments, we would suggest the addition of the following text to paragraph 1(6) of the Guidelines after the word “shipowner”:

“in accordance with the seafarer’s employment agreement and/or any applicable collective bargaining agreement”.

State jurisdictions

17 It was argued that the Guidelines failed to take account of jurisdictional rights of States, other than the flag State, in subparagraph 9.21. However, the Guidelines do not seek to override international law on States’ rights and only recommend that steps are taken to respect flag State jurisdiction in accordance with international law.

Non-interference with national laws

18 The Guidelines do not seek to call into question or prevent the use of a State’s criminal law where appropriate, but simply to ensure that, when it is applied to seafarers, it is done so in a fair way. It is important to remember that the Guidelines are recommendatory in nature. They recognise that legal regimes differ between nations and, as guidance, offer flexibility in their application.

19 It was also suggested that the concept of the Guidelines being subject to national laws be incorporated directly into key provisions in the document. This principle is already covered in the introduction, in paragraph 4 and, as such, applies to the Guidelines in their entirety. It would only create confusion if certain provisions were expressly stated to be subject to national laws and others were not.

20 It should also be noted that seafarers are often subject to the laws of a State other than that of their domicile of residence and, therefore, cannot be expected to be aware of all the provisions of an individual State’s laws, procedures or practices. Not unreasonably, they look towards the provisions of the international human rights instruments and not to how they have been transposed into national law. As the Guidelines have been produced to protect seafarers, it is important that the principle underpins the Guidelines.

Conclusion

21 ISF, ICS and ICFTU believe that the Guidelines agreed by the joint IMO/ILO Working Group and adopted by both the IMO Legal Committee and the ILO Governing Body generally constitute a balanced document and an excellent example of best practice to ensure the fair treatment of seafarers following maritime accidents, and thus assist States by ensuring clarity in such situations. It is hoped that this document addresses the concerns raised by some States and that the Guidelines will be implemented by all Member States as soon as possible.

22 It is accepted that the text may not be perfect, but it was the result of often delicate negotiations. In any event, the Legal Committee and ILO Governing Body resolution, which adopted the Guidelines, agreed to keep them under review. We therefore suggest that it would be appropriate to gain some experience in their implementation and, on the basis of that experience, perhaps once the outcome of the revision of the IMO Code for the Investigation of Marine Casualties and Incidents is known, only then to subject them to a more detailed review and possible revision.

Action requested of the Legal Committee

23 The Legal Committee is invited to take note of the content of this document and to comment or decide as it deems appropriate.
