2

INTERNATIONAL STANDARDS

A. Introduction

The historical treatment of seafarers as a distinct group of workers with separate entitlements was a response to the particular nature of maritime employment. Long before human rights protection began to take shape as a moral imperative guiding all States, it was recognized that seafarers required special protection due to the hardship and danger which were staples of the seafaring profession. At the international level, standard setting was led by the International Labour Organization (ILO) which, from 1920 onwards, adopted a series of Conventions and Recommendations pertaining to conditions of seafarers.[1] Other **2.01**

[1] The ILO has adopted more than 40 Conventions and more than 30 Recommendations setting labour standards specifically for the maritime sector. See B.(1) ILO standards for seafarers below.

specialized agencies of the United Nations (UN), such as the International Maritime Organization (IMO) have, more recently, adopted standards which recognize that seafarers are vulnerable, and increase protection to seafarers in their working lives.

2.02 At the outset, it is important to consider conceptually the place of seafarers' rights in the international system. First, seafarers have entitlements under international, regional and domestic human rights law by virtue of the fact that they are human beings. Accordingly, States' obligations towards seafarers are to be found not only in those rules specifically designed for the protection of seafarers, but also in other human rights instruments, the scope of whose protection can extend to seafarers. Secondly, seafarers have rights by virtue of the fact that they are workers. The ILO does not define 'worker' in a single and universal way. Thus, seafarers may sometimes fall within the definition of 'worker' in a particular Convention, however, where a Convention seeks to regulate a specific industry or activity, the definition will of necessity exclude seafarers. However, unlike most workers, seafarers cannot leave the workplace at the end of each day. Hence rights in the workplace have an even greater significance.

2.03 This chapter will look at the sources and the nature of seafarers' rights in international law, including how those rights are formulated, adopted and amended. It will cover some of the standards set by the ILO, human rights instruments and relevant standards of the IMO. Chapter 3 will then discuss issues of implementation of international standards, and compliance and enforcement mechanisms for seafarers' rights at the international level.

B. Sources of Seafarers' Rights

(1) ILO standards

ILO Constitution

2.04 The ILO was founded in Geneva in 1919, under the Treaty of Versailles, with the fundamental aim of seeking to promote social justice and to cope with the problem of labour conditions involving 'injustice, hardship and privation'.[2] It is governed by its Constitution.[3] In 1944, the Declaration of Philadelphia

[2] For a history of the ILO, see VY Ghebali, *International Labour Organisation: a case study on the evolution of UN Specialised Agencies* (1988); JM Servais, *International Labour Organization* (1996); GA Johnston, *The International Labour Organisation—its work for social and economic progress* (1970).

[3] See http://www.ilo.org/public/english/about/iloconst.htm (21 June 2004).

was incorporated as an Annex to the ILO Constitution and the mandate of the ILO was broadened to include more general, but related, social policy, human and civil rights. The Declaration of Philadelphia sets out basic principles including:

I . . . (a) labour is not a commodity;
(b) freedom of expression and of association are essential to sustained progress;
(c) poverty anywhere constitutes a danger to prosperity everywhere;

II. . . (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity . . .

In 1946, the ILO became the first specialized agency of the UN.

Conventions and Recommendations

2.05 The ILO sets international labour standards in the form of Conventions and Recommendations. Conventions are formal legally binding standards which, once ratified by a member State, impose obligations on that State in international law.[4] Recommendations are non-binding instruments which set guidelines on certain principles. They typically deal with the same subject matter as a Convention and either provide further detailed definition of the standards in the corresponding Convention, or set more advanced standards. Since its inception in 1919, the ILO has adopted more than 180 Conventions and 185 Recommendations covering many aspects of workers' rights.

2.06 The unique feature of the ILO and one of its significant strengths is its tripartite structure. Thus, in contrast to other UN organizations, ILO procedures provide for representation of governments, employers and workers in all ILO deliberative bodies and activities, including drafting Conventions and Recommendations. International labour standards therefore are essential expressions of international tripartite agreement. Both Conventions and Recommendations are intended to have a concrete impact on working conditions and practices in every country of the world.

Core ILO Conventions

2.07 Pursuant to a decision of the Governing Body of the ILO, eight Conventions are considered fundamental to the rights of human beings at work. These 'core'

[4] List of member States of the ILO available at: http://www.ilo.org/public/english/standards/relm/ctry-ndx.htm (21 June 2004).

Table 2.1 Formation, adoption and amendment of international labour standards by the ILO

- The idea for an international labour standard can come from workers, employers, governments, the public at large, the International Labour Conference (ILC)[1] or another UN organization.[2] The Governing Body of the ILO[3] reviews all proposals and then decides which issues should be placed on the agenda of the ILC. Technical matters are often referred to special technical committees and the role and participation of the tripartite representatives is significant in setting the agenda.
- There follows a 'double-discussion' at two successive ILCs.[4] The ILC forms a special tripartite committee of governments, employers and workers, and a first discussion examines the responses to questionnaires sent to governments on the desirability of a new standard. If the ILC decides that the matter is suitable for a Convention, or a Recommendation, it adopts conclusions, and it is placed on the agenda for a second conference discussion.
- The International Labour Office then prepares a revised draft instrument. This is discussed at a second meeting of the ILC which again forms a special tripartite committee of governments, employers and workers. A final text is then drafted and submitted for adoption to the ILC.
- A majority of two-thirds of the votes of the delegates attending the ILC (governments, employers and workers) is required for adoption of Conventions and Recommendations. If a Convention fails to obtain a two-thirds majority, but does obtain a simple majority, the ILC can decide to submit it for redrafting as a Recommendation.[5]
- When a proposal is adopted as a Convention, it is sent to all member States for ratification. Each member State undertakes that, within one year, or if there are exceptional circumstances, as soon as practicable, but no later than 18 months from the closing of the ILC, the Convention will be brought before the appropriate national authority or authorities for enactment of legislation or other required action.[6]
- If the member State obtains consent from the appropriate authority, the formal ratification of the Convention must be communicated to the Director-General of the ILO and the member State formally undertakes to make the provisions of the Convention effective both in law and practice.[7] The Convention is binding only on member States which ratify it.[8]
- Standards set in Conventions and Recommendations are kept under review by a Working Party created by the Governing Body of the ILO. The standing orders of the ILC provide a specific procedure for the revision of Conventions,[9] however in practice Conventions are revised by the same procedure as adoption of Conventions.

[1] The ILC is the annual meeting of the member States of the ILO.

[2] The idea for adoption of the two main freedom of associations Conventions, ILO C87 and ILO C98, came from the Economic and Social Council of the UN.

[3] The Governing body is the executive body of the International Labour Office.

[4] In cases of urgency, or under special circumstances, the Governing Body can decide to refer a question to the ILC with a view to a single discussion.

[5] The ILC often agrees upon documents less formal than Conventions and Recommendations such as codes of conduct, resolutions and declarations. These are intended to have a normative effect but are not referred to as part of the ILO's systems of international labour standards.

[6] Member States must inform the Director-General of the ILO of the measures taken to bring the Convention before the appropriate authority or authorities, together with particulars of that or those authorities and of the action taken by them.

[7] Member States must inform the Director-General of the ILO of the measures taken to bring the Convention before the appropriate authority or authorities, together with particulars of that or those authorities and of the action taken by them.

[8] ILO Constitution, Article 19(5). Ratifications of ILO Conventions cannot be accompanied by 'reservations', that is a member State is not allowed to pick and choose at its own discretion among the articles of a Convention which it undertakes to apply. However, the texts of some Conventions provide for certain exclusions, exceptions or options.

[9] Articles 44 and 45.

Conventions are endorsed in the ILO Declaration on Fundamental Principles and Rights at Work, adopted by the ILC at its 86th Session on 18 June 1998,[5] and which forms a large part of the ILO's decent work agenda.[6] The eight Conventions are:

(1) ILO Freedom of Association and Protection of the Right to Organize Convention 1948 (ILO C87); and ILO Right to Organize and Collective Bargaining Convention 1949 (ILO C98) (on freedom of association and the effective recognition of the right to collective bargaining);

(2) ILO Forced Labour Convention 1930 (ILO C29); and ILO Abolition of Forced Labour Convention 1957 (ILO C105) (on the elimination of all forms of forced or compulsory labour);

(3) ILO Minimum Age Convention 1973 (ILO C138); and ILO Worst Forms of Child Labour Convention 1999 (ILO C182) (on child labour); and

(4) ILO Equal Remuneration Convention 1951 (ILO C100); and ILO Discrimination (Employment and Occupation) Convention 1958 (ILO C111) (on the elimination of discrimination in respect of employment and occupation).

2.08 Also agreed without dissent at the 1998 International Labour Conference (ILC) was a statement to the effect that:

> all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.

ILO standards for seafarers

2.09 In recognition of the special nature and conditions of life and work for seafarers, the ILO has from the outset dealt with purely maritime issues separately. Special maritime sessions of the ILC were held regularly since 1920 and, as a consequence, during the first decade of ILO activity, more than a quarter of the Conventions adopted concerned standards in the maritime sector and conditions of employment of seafarers.[7] Maritime labour standards can either protect the seafarer in the seafarer's individual capacity as a worker, or as part of a

[5] See http://www.ilo.org/public/english/standards/decl/declaration/text/ (21 June 2004).

[6] See *Decent Work*, Report of the Director General, 87th Session (1999) and *Reducing the decent work deficit—a global challenge*, Report of the Director General, 89th Session (2001).

[7] For details of maritime ILO Conventions and Recommendations, see ILO, *Maritime Labour Conventions and Recommendations*, 4th edn (1998). Also available at: http://www.ilo.org/public/english/dialogue/sector/sectors/mariti/standards.htm (21 June 2004).

group of workers in a dangerous occupation. For the individual seafarer, they aim to regulate the specific problems of the profession, including, for example, recruitment practices and the need for special contracts and identity documents. Also, because life at sea is dangerous, certain standards are set to benefit seafarers as a group. These standards include, for example, standards on the hours of work and manning, crew accommodation and medical treatment. The Governing Body of the ILO is advised on maritime issues by the Joint Maritime Commission (JMC), comprising shipowners and seafarers' representatives however regular sessions of the ILC are also competent to deal with maritime issues should the need arise. At the Session of the JMC in January 2001, a Resolution was adopted calling for the development of a new 'framework' Convention which will embody as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour instruments. The aim of this process is stated to be greater clarity and consistency, more rapid adaptability and easier enforceability. In pursuance thereof, the Governing Body of the ILO established a High Level Tripartite Working Group to assist with the work of developing the proposed new instrument.[8]

(2) Human rights standards

Basis of human rights

2.10 Human rights are the rights which every person possesses and should be able to enjoy simply because they are human. They are universal. Thus, all human beings should enjoy all human rights, regardless of race, colour, creed, sex, age, class, language, national origin or political belief. Human rights are enshrined in international customary law, international treaties, regional treaties, domestic constitutions or bills of rights. In fact, any law that can be used to promote or protect human rights can be considered part of human rights law. A number of decisions and actions by UN organs, as well as other international and regional bodies, can contribute to interpreting human rights principles. Similarly, national courts have contributed much interpretation and substance to human rights law.

Main human rights treaties

2.11 In the aftermath of the Second World War, the UN General Assembly adopted the Universal Declaration of Human Rights 1948 (UDHR). The UDHR sets a

[8] See press release of the ILO at: http://www.ilo.org/public/english/bureau/inf/pr/2001/05.htm (21 June 2004). A number of Conventions will automatically be denunciated upon ratification of more up to date standards.

common standard for all UN member States,[9] and proclaims rights which workers, as human beings, are entitled to enjoy.[10] Since the UDHR was adopted in 1948, many instruments have been developed and added to its basic structure to establish what might be regarded as a code of human rights. Not all these instruments have been developed by the UN. For example, ILO standards have inspired the formulation of economic and social rights in universal and regional human rights instruments.[11]

The most important human rights treaties adopted by UN organizations are: **2.12**

- International Covenant on Economic, Social and Cultural Rights 1966 (CESCR);
- International Covenant on Civil and Political Rights 1966 (CCPR) and Protocols thereto;
- International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD);
- Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) and Protocol thereto;
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) and Protocol thereto; and
- Convention on the Rights of the Child 1989 (CRC) and Protocols thereto.

There are also regional treaties and systems to protect human rights in Europe, the Americas and Africa. Important human rights instruments adopted at the regional level include: **2.13**

- European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) and Protocols thereto;
- European Social Charter 1961 (ESC) and Protocols thereto, and the European Social Charter (Revised) 1996 (Revised ESC);
- American Convention on Human Rights 1969 (ACHR) and Protocol thereto; and
- African Charter on Human and Peoples' Rights 1981 (AC) and Protocols thereto.

[9] For a list of member States of the UN, see: http://www.un.org/Overview/unmember.html.

[10] These rights include the right to be free from discrimination, the right to life, liberty and security of the person, the right to be free from torture or inhuman and degrading treatment or punishment, the right to a legal remedy, the right to a fair trial or public hearing, the right to free expression, the right to social security, the right to just and favourable remuneration, the right to work, the right to free choice of employment, the right to protection against unemployment, the right to join trade unions, the right to rest and leisure, the right to a standard of living adequate for the health and well-being of the person and his family.

[11] This integrated approach to workers' rights as human rights was set out clearly in the Declaration of Philadelphia.

Applicability of international human rights law

2.14 The provisions of general international human rights instruments are intended to lay down standards of behaviour for each State. When a State ratifies a human rights treaty, it is under a duty to create working conditions that respect, protect and ensure human rights. For many core human rights—such as the right to life, freedom from forced labour—the State is under a customary law obligation, even if it has not ratified the relevant treaty provisions.[12] Further, international human rights cannot be removed, or overridden, by provisions in national legislation or contracts of employment, or otherwise waived. The UDHR refers to the 'inalienable rights' of all human beings, and bodies charged with the implementation of human rights have taken the view that individuals cannot validly agree to give them up. For example, the European Court of Human Rights, whose task under the ECHR, Article 19 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.[13]

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

2.15 Unlike the global human rights treaties sponsored by the UN, the regional human rights systems only bind those States within the region that have ratified the relevant treaty. Their coverage is patchy. Thus, whilst 51 States have ratified the AC,[14] only 25 have ratified the ACHR[15] and important regions such as Asia and the Pacific do not have a regional mechanism at all. Yet, within shipping, the impact of regional human rights treaties may still benefit a wider geographical community. They may apply to ships flagged under their jurisdiction even when those ships carry foreign nationals and are in foreign ports. Thus for instance, the Philippine seafarer onboard a Panamanian vessel may be entitled to protection under the ECHR when the ship is in a German or Russian port. Similarly, a ship flying the Norwegian flag, even under the International Register, will be subject to the requirements of the ECHR even if none of the crew are Norwegian and it never calls into a Norwegian port.[16]

---

[12] There is some debate concerning which rights are protected under customary law, but most international lawyers agree that the list continues to grow. See O Schachter, *International Law in Theory and Practice* (1991) 85.

[13] *Neumeister v Austria* (1974) ECHR Series A No 17, paragraph 33.

[14] See http://www.africaninstitute.org/html/ratification_of_african_charte.html (21 June 2004).

[15] See http://oas.org/juridico/english/Sigs/b_32.html (21 June 2004).

[16] See the discussion on jurisdiction in Ch 4 below.

(3) IMO standards

IMO Convention

The IMO was established in 1948 with the principal aim of promoting safety at sea.[17] It is a specialized agency of the UN. The purpose of the Organization, as set out in the Convention formally establishing IMO,[18] is: **2.16**

> to provide machinery for co-operation among governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.

By the time the IMO began its operations some 10 years later, the mandate was extended to include the protection of the marine environment.[19]

Human element

Integral to both aspects of the IMO's mandate is the Organization's recognition of the so-called human element. The human element was given express recognition by the IMO Assembly at its 20th Session in November 1997 when it adopted Resolution A.850(20) on the human element, vision, principles and goals for the Organization.[20] This Resolution was subsequently replaced by Resolution A. 947(23)[21] which in essence recognizes that the human element affects maritime safety and marine environmental protection, and involves the entire spectrum of human activities performed by ships' crews, shore based management, regulatory bodies, recognized organizations, shipyards, legislators and other relevant parties. The Resolution acknowledges the need for increased focus on human related activities in the safe operation of ships, and the need to achieve and maintain high standards of safety and environmental protection for the purpose of significantly reducing maritime casualties.[22] The human element is one of several key initiatives that underpin the current philosophy of the **2.17**

[17] The original name was the Inter-Governmental Maritime Consultative Organization, or IMCO, but the name was changed in 1982 to IMO.

[18] The IMO Convention was adopted at UN International Conference in Geneva in 1948 and entered into force in 1958.

[19] For a list of member States of IMO, see http://www.imo.org/About/mainframe.asp?topic_id=315 &doc_id=840 (10 August 2004).

[20] The Resolution recalled two previous Resolutions A. 680(17) of 1991 concerning safety management and A. 772(18) of 1993 concerning fatigue factors in manning and safety.

[21] Resolution A. 947(23). Human Element, Vision, Principles and Goals for the Organization (27 November 2003).

[22] The main forum within IMO for achieving these goals has been a Joint Maritime Safety Committee/Marine Environment Protection Committee Working Group on the Human Element established in 1991.

IMO. Consideration of the human element has become a standing subject within the Organization and all of the IMO's sub-committees are now charged with addressing human element factors when deliberating new and existing regulations and providing guidance.

IMO Conventions relevant to seafarers

2.18 The IMO has adopted more than 40 Conventions and Protocols, several of which implement standards that guarantee protection to seafarers in their working conditions. Chief amongst these are the International Convention for the Safety of Life at Sea 1974 as amended and Protocols thereto (the SOLAS Convention); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 as amended (the STCW Convention); and the International Management Code for the Safe Operation of Ships and for Pollution Prevention 1993 (ISM Code), adopted under Chapter IX of the SOLAS Convention. IMO Conventions, however, are conceptually different from ILO and human rights treaties. Both human rights treaties and ILO Conventions intend to create rights for individuals which can be asserted against the State in domestic courts, and often before some form of international body. IMO Conventions on the other hand do not, and are not, intended to create rights of this kind. Rather, they impose obligations on States, a number of which have the effect of creating benefits (rather than rights) for seafarers.[23]

The SOLAS Convention

2.19 The SOLAS Convention, in its successive forms,[24] is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The main objective of the SOLAS Convention is to specify minimum standards for the construction, equipment and operation of ships, compatible with their safety. Flag States are responsible for ensuring that ships under their flag comply with its requirements, and a number of certificates are prescribed in the Convention as proof that this has been done. Control provisions also allow contracting States to inspect ships of other contracting States, if there are clear grounds for believing that the ship and its equipment do not substantially comply with the requirements of the Convention. So far as safety of seafarers is concerned, the provisions of SOLAS are of great importance.

[23] Other subjects of relevance to seafarers within the IMO agenda include measures to combat piracy, places of refuge, stowaways, crimes onboard ship and maritime security.

[24] The first version was adopted in 1914 in response to the '*Titanic*' disaster, the second in 1929, the third in 1948 and the fourth in 1960. A completely new Convention was adopted in 1974 and several amendments have been made since.

Table 2.2 Formation, adoption and amendment of international maritime standards by the IMO

- IMO's governing body is the Assembly which is made up of all member States and which normally meets once every two years. Between sessions, a Council acts as IMO's governing body. Most of the technical work is carried out by various committees and sub-committees, the primary ones being the Maritime Safety Committee (MSC), the Marine Environment Protection Committee, the Legal Committee and the Facilitation Committee.
- The need for a new Convention, or amendments to existing Conventions, is usually initiated by a member or member States at committee level since committees meet more frequently than the main organs. If agreement is reached at such level, the proposal passes the Council, and if necessary, the IMO Assembly. If the Assembly or Council approve the proposal, the committee in question will proceed to consider the matter and will draw up a draft instrument. In certain cases, the matter may be referred to a specialized sub-committee for detailed consideration.
- Work at committee and sub-committee level is carried out by representatives of member States of the IMO. The views of non-governmental organisations with observer status at the IMO are welcomed in these bodies.
- An agreed draft Convention is then reported to the Council and Assembly with a recommendation that a diplomatic conference be convened to consider the draft for formal adoption. In advance of the diplomatic conference, the draft Convention is circulated to the invited governments and organisations for their comments. The diplomatic conference considers all comments and produces a draft which is acceptable to all or the majority of the governments present.
- The agreed Convention is then adopted by the Conference and deposited with the Secretary General of the IMO, who then sends copies to member States. The Convention is open for signature by States usually for a period of 12 months. Signatories may ratify or accept the Convention, while non signatories may accede.[1]
- Before a Convention comes into force and binding on a member State that has ratified or acceded to it, it has to be accepted formally by the individual member States. Each Convention includes appropriate provisions stipulating conditions which have to be met before it enters into force. These conditions vary and the complexity of the Convention document will affect how stringent these provisions are.[2] Once the appropriate conditions have been fulfilled, the Convention enters into force for the member States who have accepted it: this is generally after a period of grace intended to enable all the member States to take the necessary measures for implementation.[3]
- In order to accept a Convention, member States generally must deposit a formal instrument with the depositary. Often the governments then must enact or change national laws to enforce the provisions of the Convention.
- In addition to Conventions and other formal treaty instruments, IMO has adopted several hundred codes, guidelines and recommendations which are not binding but which provide guidance in framing national requirements.
- Most technical Conventions adopted by IMO since the early 1970s contain the 'tacit acceptance' amendment procedure. This procedure means that amendments—which are nearly always adopted unanimously—enter into force on a set date unless they are specifically rejected by a specified number of countries. This procedure is considerably faster than the usual procedure for amendment by 'explicit acceptance', by which amendments can only enter into force so many months after being accepted by a specified number of parties to the original Convention.

[1] The terms 'signature', 'ratification', 'acceptance', 'approval' and 'accession' refer to some of the methods by which a member State can express its consent to be bound by a treaty. See the discussion in ch III, section 3(b)(ii) below.

[2] For example, the SOLAS Convention provided that entry into force required acceptance by 25 States whose merchant fleet comprise not less than 50 per cent of the world's gross tonnage.

[3] At present, IMO Conventions enter into force within an average of five years after adoption.

2.20 In July 2004, a new comprehensive security regime for international shipping entered into force. Adopted as a series of amendments to the SOLAS Convention, the International Ship and Port Facility Security Code (ISPS Code) is intended to strengthen maritime security and prevent and suppress acts of terrorism against shipping. The ISPS Code sets out detailed security-related requirements for governments, port authorities and shipping companies, which are contained in a mandatory section of the Code (Part A). A non-mandatory section of the Code (Part B) contains a series of guidelines about how governments can meet the requirements of Part A. The Code is a major change and will have an effect on seafarers in areas such as shore leave, access of visitors to ships and search of crew members when boarding a ship, all of which must be carried out within the safeguards in the ISPS Code and in particular the preamble to the mandatory Part A of the Code as follows:

> 10. Nothing in this Code shall be interpreted or applied in a manner inconsistent with the proper respect of fundamental rights and freedoms as set out in international instruments, particularly those relating to maritime workers and refugees including the International Labour Organisations Declaration of Fundamental Principles and Rights of Work as well as international standards concerning maritime and port workers.

The ISM Code

2.21 During the late 1980s, a number of very serious accidents occurred which were manifestly caused by human error, with management faults also identified as contributing factors. Lord Justice Sheen, who led the enquiry into the loss of the '*Herald of Free Enterprise*', famously described the management failures as 'the disease of sloppiness'. At its 16th Assembly in October 1989, the IMO adopted Resolution A.647(16) concerning guidelines in management for the safe operation of ships and for pollution prevention. The guidelines had as their objective the prevention of human injury and loss of life, and the avoidance of damage to the environment, in particular the marine environment, and to property.

2.22 After some experience in the use of the guidelines,[25] in 1993, the IMO adopted the ISM Code.[26] The Code establishes safety and management objectives, and requires a Safety Management System (SMS) to be established by the shipping

[25] Resolution A. 647(16) was revoked by Resolution A.680(17)). IMO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention (25 November 1991).

[26] Resolution A. 741(18). International Management Code for the Safe Operations of Ships and for Pollution Prevention (17 November 1993) (ISM Code). The ISM Code became mandatory under Chapter IX of SOLAS for passenger ships and tankers on 1 July 1998 and for cargo ships on 1 July 2002.

company.[27] This includes a safety and environmental protection policy; instructions and procedures to ensure safe operation of ships, and protection of the environment, in compliance with relevant international and flag State legislation; defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel; procedures for reporting accidents and non-conformities with the provisions of the Code; procedures to prepare for, and respond to, emergency situations; and procedures for internal audits and management reviews.[28] Every company is expected 'to designate a person or persons ashore having access to the highest level of management'.[29] The procedures required by the Code must be documented and compiled in a safety management manual, a copy of which should be kept onboard the ship.[30]

The STCW Convention

2.23 In 1978, the STCW Convention was the first to prescribe, at the international level, minimum standards relating to training, certification and watchkeeping for seafarers. The technical provisions of the Convention are contained in an Annex, divided into six Chapters. One especially important feature of the STCW Convention is that it applies to ships of non-States parties when visiting ports of States which are parties to the Convention.[31]

2.24 In 1995, the STCW Convention was radically revised with several aims including clarifying the skills and competences required to take account of modern training methods; requiring administrations to maintain direct control over, and endorse the qualifications of, those Masters, officers and radio personnel they authorize to serve on their ships; and making parties to the Convention accountable to each other, through the IMO, for their proper implementation of the Convention, and the quality of their training and certification activities. The technical annex of the 1995 amendments was divided into regulations (in turn divided into Chapters as before). Additionally, the Conference which

[27] The 'Company' is defined as the ship owner or any person such as the manager or bareboat charterer who has assumed responsibility for operating the ship.

[28] ISM Code, Part A, Section 2. For further details, see LC Sahatjian, 'The ISM Code: A Brief Overview' (1998) 29 JMLC, No 3.

[29] ISM Code, Part A, Section 4.

[30] ISM Code, Part A, Section 11.3. In discussing the effect of the ISM Code, Professor W Tetley, writing in *Fairplay* on 7 June 2001, praises the ISM Code for setting a new standard of responsibility in maritime law. According to the author, the Code has changed the rules of maritime law by saying that shipowners and ship operators are responsible for their management of the ship, not merely for defects in the ship, or for the fault of the Master and crew. He also notes that the concept of seaworthiness itself has been changed by the ISM Code in that it adds ship safety management to ship seaworthiness and crew competence.

[31] This is one reason why the Convention has received wide acceptance. By December 2000, the Convention had 135 parties representing 97.53 per cent of world shipping tonnage.

adopted the Convention also adopted a number of resolutions, including a resolution establishing the STCW Code.[32] Part A of the Code is mandatory while Part B is recommended.

2.25 The amendments in 1995 make the STCW Convention a wide ranging instrument covering a number of areas relevant to the welfare of seafarers. They placed emphasis in particular on competence and training. For example, Chapter I of the revised STCW Convention, Regulation I/9, read with Section B-I/9 of the associated STCW Code, requires States' parties to establish standards of medical fitness for seafarers, particularly regarding eyesight and hearing. Chapters II to VII of the Convention set out, in some detail, the relevant standards of competence, both theoretical and practical, that each category of seafarers is required to attain and maintain. Chapter VI establishes mandatory minimum requirements for familiarization, basic training and instruction for seafarers.

Regulation 1/14 reinforces the provisions of the ISM Code by requiring each administration to hold companies responsible for the assignment of seafarers for service in their ships, in accordance with the provisions of the Convention. Companies are required to ensure that each seafarer assigned to any of its ships holds an appropriate certificate in accordance with the provisions of the Convention, and as established by the administration; that its ships are manned in compliance with the applicable safe manning requirements of the administration; that documentation and data relevant to all seafarers employed on its ships are maintained and readily accessible, and include information on their experience, training, medical fitness and competence in assigned duties; that seafarers, on being assigned to any of its ships, are familiarized with their specific duties and with all ship arrangements, installations, equipment, procedures and ship characteristics that are relevant to their routine or emergency duties; and that the ship's complement can effectively coordinate their activities in an emergency situation, and in performing functions vital to safety or to the prevention or mitigation of pollution.

2.26 The STCW Convention is also noteworthy as the only IMO instrument in which the organization has assumed a direct role in implementation.[33]

(4) Other sources of international standards

2.27 Seafarers' rights cannot be considered in isolation from other bodies of international law. As seen, the rights of seafarers must be viewed in the context of international human rights law, ILO instruments, IMO standards and the international law of the sea. In fact, the regime of the law of the sea establishes

[32] Resolution no. 2 of the Conference, 7 July 1995.

[33] See the discussion in Ch 3, C. (3) International Maritime Organization below.

important rules on the jurisdiction of flag, port and coastal States which have a direct bearing on seafarers' rights. These matters will be considered in Chapter 4 below.

C. Seafarers' Rights

(1) Right to life

2.28 The right to life is guaranteed by the UDHR, Article 3, the CCPR, Article 6, the ECHR, Article 2(1), the ACHR, Article 4 and the AC, Article 4. For example, the UDHR, Article 3 states that 'Everyone has the right to life, liberty and security of person'. The CCPR, Article 6 states:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The right to life can be seen to comprise three elements. First, the State must observe the negative injunction to refrain from unlawful taking of life. Secondly, the State has a positive duty to introduce policies and measures that will safeguard life. Thirdly, the State has an obligation to supervise relations between private parties, in order to protect the lives of all individuals from private, as well as public, threats.

2.29 Thus, States may be responsible for violations of the right to life if they fail to take adequate steps to prevent deaths, whether the deaths arise in the public or the private sector. The UN Human Rights Committee[34] has clearly indicated that this includes an obligation to protect the lives of workers and trades union officials from injury or death inflicted by any individual, whether acting in a public or private capacity.[35] States parties to the CCPR are obliged to 'prevent and punish deprivation of life by criminal acts,'[36] and to provide an effective remedy, including a thorough investigation, to a party complaining of a violation of the right.[37] As the European Court of Human Rights put it, in relation to the ECHR, Article 2(1), 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.[38]

---

[34] For a discussion of this Committee, see Ch 3, C.(1) United Nations Mechanisms below.

[35] See, for example, *Mojica v Dominican Republic* (449/1991) CCPR, A/49/40 Vol II (15 July 1994).

[36] UN Human Rights Committee, General Comment 6 (16th session, 1982) A/37/40.

[37] See, for example, *Celis Laureano v Peru* (540/1993) CPR, A/51/40 Vol II (25 March 1996).

[38] *Osman v United Kingdom* (1998) ECHR Series A No 8, para 115. See also *LCB v United Kingdom* (1998) ECHR Series A No 3, para 36.

In practical terms, flag States under a treaty obligation to protect the right to life are required to introduce policies to protect life onboard their ships. They are also required to supervise relations amongst private individuals in order to prevent the taking of life by criminal acts. The same obligations would apply to a port or coastal State when a ship is within territorial waters.[39]

2.30 There is a direct link between the right to life and the right to safe and healthy working conditions as enunciated in the CESCR, Article 7(b),[40] insofar as the latter may be necessary in order to preserve life. Therefore, a seafarer who knows that a ship is unseaworthy and would present a risk to life, can have the right to refuse to work onboard that ship pursuant to the right to life. Further, where a seafarer has lost his life, it is possible that, in a case resulting from a failure to institute or enforce appropriate safety measures at sea, the jurisdiction of the various human rights courts and committees may be invoked by the family of the victim. In this context, such a claim could be based not solely upon a violation of the individual's right to life but also on the seafarer's right to family life.[41]

(2) Freedom from forced labour

2.31 The UDHR states that:

> . . . no one shall be held in slavery or in servitude; slavery and the slave trade shall be prohibited in all their forms.[42]

The CCPR contains a prohibition of slavery, the slave trade and compulsory work, and imposes an obligation on States to prohibit compulsory labour as well as slavery.[43] It also imposes on States supervisory and preventive roles with regard to employment conditions. Its importance is emphasized by the fact that it is a non-derogable right under the CCPR, Article 4(2). At the regional level, the ECHR, the ACHR and the AC all prohibit slavery and compulsory labour.[44]

Slavery and forced labour are also prohibited under the Slavery Convention 1926 as amended.[45] This Convention makes an express mention of the aboli-

[39] For a full discussion of the obligations of States relating to human rights treaties, see Ch 4 below.

[40] See section (12) below.

[41] The right to family life is contained in CCPR, Article 17; ECHR, Article 8; ACHR, Article 17; AC, Article 18.

[42] UDHR, Article 4.

[43] CCPR, Article 8.

[44] ECHR, Articles 4 and 5; ACHR, Article 6; AC, Article 5.

[45] Protocol amending the Slavery Convention 1926, adopted 23 October 1953.

tion of slaves being transported onboard ships. Its scope of application includes a country's territorial waters.[46] The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 is also important as it includes a definition, albeit of a very general nature, of forms of slavery. Thus the Slavery Convention 1926, Article 1(1) states that 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised' and 'Slave means a person in such condition or status'. The Supplementary Convention 1956 added to this definition by forcing States to abolish certain institutions and practices referred to as 'servile status'. The combined definitions remain the accepted definition of slavery today.

2.32 The elimination of all forms of forced or compulsory labour is also a principal aim of the ILO. As already discussed, ILO C29 and ILO C105 are recalled in the Declaration of Fundamental Rights of the ILO. They are the only international instruments that set out a definition of forced labour.[47]

2.33 In the modern maritime industry, several abuses reported by seafarers contain elements akin to forced or compulsory labour. Chief amongst these are refusals by shipowners to repatriate seafarers, or imposing excessively onerous working hours on seafarers without any entitlement to overtime payment.[48] Another practice that has been likened to forced or compulsory labour is the practice of withholding wages. International standards do not specify that withholding wages or failing to pay an employee is a form of slavery, forced or compulsory labour however insofar as a seafarer remains unpaid and without the means to return home, and is required to continue working, these are common elements of a violation of the right.

(3) Freedom from torture, cruel, inhuman or degrading treatment

2.34 Torture, cruel, inhuman or degrading treatment is prohibited by the UDHR, Article 5, the CCPR, Article 7, the ECHR, Article 3, the ACHR, Article 5(2) and the AC, Article 5. The UDHR, Article 5 and the CCPR, Article 7 are in same terms and state:

[46] Slavery Convention 1926, Article 3.

[47] ILO C29, Article 2(2), states that 'forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. It should be noted that not all forms of forced labour are prohibited under the two ILO Conventions. Exempted activities are those that form part of the 'civic activities' of a country, such as military service as well as forced labour during times of emergency (war, epidemic, etc.).

[48] See, for example, ITF, *Sweatships—what it's really like to work onboard cruise ships* (2002). Available at: http://www.itf.org.uk (21 June 2004).

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . .

States are obliged to protect individuals from torture, or inhuman or degrading treatment. Equally, they are obliged themselves to desist from inflicting such treatment upon individuals. In relation to the CCPR, Article 7, the UN Human Rights Committee has said:

> . . . it is the duty of the States party to afford protection through legislative and other measures as may be necessary against the acts prohibited in Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.[49]

In contrast, the CAT, Article 1 limits the definition of torture to those acts inflicted by officials, but this narrower definition does not confine the wider definitions adopted elsewhere.

2.35 In the case of seafarers, serious ill treatment on the part of a shipowner, particularly where intentionally inflicted, will engage the responsibility of the State. Jurisdiction will be exercised if it can be shown that the State failed to take appropriate steps to avoid the risk of such treatment. It is also possible that if the danger to individuals is such as to constitute a grave threat to the life of the individual, the State's responsibility as regards the right to life itself may be engaged, even if the individual concerned does not actually die.[50]

(4) Freedom from discrimination

2.36 International instruments prohibit discrimination on a number of grounds. The CERD imposes on member States the obligation not to engage in any racially discriminatory action, and states that:

> . . . racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[51]

The Convention provides that such obligations shall be extended to civil, political, socio-economic and cultural rights.[52] It also obliges States to provide legal redress covering claims for compensation.[53]

---

[49] HRC General Comment No. 20 (1992) in respect of CCPR, Article 7.

[50] See *Gomez Lopez v Guatemala*, Case 11.303, (1997) Report No 29/96, Inter-American Court of Human Rights, OEA/Ser.L/V/II.95 Doc 7 rev, 425.

[51] CERD, Article 1(1). According to Article 1(2) of CERD, it '. . . shall not apply to distinctions, exclusions or preferences made by a States party to this Convention between citizens and non-citizens'.

[52] CERD, Articles 1, 2 and 5.

[53] CERD, Article 6.

Discrimination is also prohibited by the UN Charter, the UDHR, the CCPR and the CESCR.[54] Both the CCPR and the CESCR prohibit discrimination in general, as well as gender-based discrimination in respect of the substantive guarantees covered in the relevant Covenant.[55] The CEDAW protects all women against sex discrimination,[56] and obliges States to take positive measures to ensure the prohibition of sex discrimination. Both the CEDAW and the CESCR provide that equal pay for equal work must be guaranteed.[57] **2.37**

At the regional level, the ECHR states that the rights guaranteed by the Convention are to be enjoyed 'without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.[58] The ACHR deals with eliminating discrimination against women[59] and imposes duties on individuals not to discriminate against each other.[60] The right to respect and to equality of treatment without distinction of race, sex, language, creed or any other factor is set out in the American Declaration of the Rights and Duties of Man.[61] **2.38**

Also, as seen, ILO C100 on equal remuneration and ILO C111 on discrimination in employment and occupation are two of the ILO's core labour Conventions. ILO C111 urges States to provide for a national policy designed to eliminate, in respect of employment and occupation, all discrimination based on race, colour, sex, religion, political opinion, national extraction or social origin. The Convention does not expressly forbid discrimination on the grounds of nationality, however Article 1(1)(b) extends the application of the term discrimination to 'such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of treatment in employment or occupation'. Thus, it can be read broadly enough to extend to discrimination on the basis of nationality and this has been the view of the ILO Committee of Experts on the Application of Conventions and Recommendations Committee of Experts (the Committee of Experts).[62] In practice, multinational crews are prevalent in the shipping industry today and many national **2.39**

[54] UN Charter, Article 1(3); UDHR, Article 2; CCPR, Articles 3 and 26; CESCR, Articles 2 and 3.

[55] CCPR, Articles 3 and 26; CESCR, Articles 2.2 and 3.

[56] CEDAW, Articles 1 and 2.

[57] CEDAW, Article 11; CESCR, Article 7.

[58] ECHR, Article 14.

[59] ACHR, Article 18(3).

[60] ACHR, Article 27(2).

[61] Article 2.

[62] For further information on the work of this Committee, see Ch 3 below. For discussion on the application of the Convention in practice, see H Nielsen, 'The Concept of Discrimination in ILO Convention No. 111' (1994) 43 ICLQ 827.

legislations allow discrimination in pay as between different nationalities of seafarers on their ships.

(5) Child labour

CRC and ILO

2.40 The CRC is the most widely ratified international human rights instrument. It expressly protects children from 'economic exploitation'.[63] The CESCR also recognizes that children deserve special protection,[64] as does the ESC.[65]

2.41 Further, as already discussed, ILO C182 is one of the ILO's core labour Conventions to which it has dedicated a great deal of resources in terms of running special ratification campaigns and raising awareness. The Convention names slavery, bonded labour, prostitution, pornography, the drugs trade and other criminal activities, and any other work that harms the health, safety or morals of children. For the purposes of the Convention, a child is defined as less than 18 years old. The Convention obliges governments to draw up a detailed list of what constitutes the worst forms of child labour, and to endeavour to eliminate them as soon as possible.

2.42 The ILO standards relating to child labour and the CRC complement each other. Thus, the CRC, Article 32 concerning the right of the child to be protected from economic exploitation, refers to 'the relevant provisions of other international instruments' in defining exact measures to be taken.

Minimum age for seafarers

2.43 There have been a number of Conventions produced by the ILO dealing with the minimum age of seafarers, the most recent being the ILO Seafarers' Hours of Work and Manning of Ships Convention 1996 (ILO C180). ILO C180 states that persons working on a ship should not be under 16 years of age.[66] Previously, the ILO Minimum Age (Sea) Convention 1920 (ILO C7), the ILO Minimum Age (Sea) Convention (Revised) 1936 (ILO C58), and the ILO Minimum Age Convention 1973 (ILO C138) prescribed different minimum ages as a condition for admission to employment onboard ships. ILO C7 set the minimum age at 14 years for vessels other than those on which only members of the same family are employed.[67] ILO C58 set the minimum age at 15 years

[63] CRC, Article 32.
[64] CESCR, Article 10(3).
[65] ESC and Revised ESC, Articles 7 and 17.
[66] ILO C180, Article 12.
[67] ILO C7, Article 2.

(14 years for authorized educational purposes).[68] ILO C138, which deals with child labour in more than just the maritime sector, provides that States must declare a national minimum age for admission to employment which shall be not less than the completion of compulsory schooling. In most countries, the minimum age should be at least 15 years, although it may be 14 years in cases of countries whose economic and education facilities are insufficiently developed.[69]

(6) Right to a legal remedy and access to justice

2.44 In international human rights law, the right to access a legal remedy is guaranteed by the UDHR, Article 8, the ECHR, Article 6, the ACHR, Articles 8 and 25, the AC, Article 7(1)(a), the CERD, Article 6, the CAT, Articles 13 and 14 and the CRC, Article 37(d).[70] The UDHR, Article 8 states:

> 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.

The procedural dimension of the right to a legal remedy includes a right of access to justice, which includes the right of access to a court, the right to legal representation, and the right to notice of administrative decisions that interfere with civil rights.[71] It also includes the right to a fair hearing within a reasonable time by a competent and independent tribunal previously established by the law. The substantive dimension of the right requires States to establish norms and remedies to protect an individual's rights, such as interim measures and monetary compensation. The systems for such enforcement must be genuinely effective.[72]

2.45 Thus, it is well established as a matter of customary international law that States must allow persons within their jurisdiction reasonable access to their courts for redress. In circumstances where the relevant court is inaccessible, or the right to an effective remedy is hindered by technical restrictions, that State will be deemed to be in violation of its obligation to provide access to justice.[73]

---

[68] ILO C58, Article 2.1 and 2.2 and 3.

[69] ILO C138 imposes an alternative minimum of at least 18 years in cases where morals, health or safety may be jeopardized. Articles 2 and 3.

[70] CCPR, Article 2(3) requires States to provide a remedy only once a CCPR protected right has been breached. This breach may be either an act or an omission.

[71] In relation to the ECHR, see decisions of the European Court in *Golder v UK* (1975) ECHR Series A No 18; *Airey v Ireland*, (1979) ECHR Series A No 32; and *De Geouffre de la Pradelle v France*, (1992) ECHR Series A No 253-B.

[72] See *Velasquez Rodriguez Case* (1988) Inter-American Court of Human Rights Series C No 4, paras 57–68.

[73] See examples of cases where this right has been denied seafarers, for example the *'Kyoto 1'*, cited in AD Couper, CD Walsh, BA Stanberry and GL Boerne, *Voyages of Abuse, Seafarers, Human Rights and International Shipping* (1999) 106–117.

(7) Freedom of association and the right to collective bargaining

UN and regional provisions

2.46 At the international level, both the CCPR[74] and the CESCR[75] set out the right to freedom of association. The CESCR is more detailed and states:

> 1. The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
> . . .

2.47 In Europe, freedom of association is protected in the ECHR, Article 11 and in the ESC, Articles 5 and 6 which also recognizes the right to strike.[76] In the Americas, the ACHR, Article 16 provides for freedom of association and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights 1988 (Protocol of San Salvador), Article 8 develops this further. The AC contains no provisions directly on freedom of association for employers and workers, but does contain a general right to free association,[77] as well as the right to assemble freely with others.[78]

ILO freedom of association Conventions

2.48 Freedom of association and the effective recognition of the right to collective bargaining constitute part of the fundamental rights recognised by the ILO and covered by the Declaration of Fundamental Principles and Rights at Work 1998. ILO C87 and ILO C98 are considered so fundamental that their application is supervised by a special tripartite Committee on Freedom of Association (CFA)[79] that can examine cases submitted to it, whether or not the country in question has ratified any ILO Convention on the subject.[80]

---

[74] CCPR, Article 22.
[75] CESCR, Article 8.
[76] See section (8) below.
[77] AC, Article 10.
[78] AC, Article 11.
[79] See the discussion in Ch 3, C. (2) International Labour Organization.
[80] See also the ILO Collective Agreements Recommendation 1951 (ILO R91) and the ILO Collective Bargaining Convention 1981 (ILO C154).

ILO Freedom of Association and Protection of the Right to Organize Convention 1948 (ILO C87)

2.49 ILO C87 establishes the principle that workers and employers shall have the right to establish and join organizations of their own choosing, without previous authorization. Article 2 aims at securing some degree of freedom of choice as to the organisation which workers may wish to establish or join. Thus, a trade union monopoly, imposition of a single central trade union, or legislative prohibitions on the existence of more than one trade union in the same branch of activity are considered contrary to ILO C87, Article 2.[81] ILO C87, Article 3 recognizes the right of organizations to draw up their constitution and rules, to elect their representatives in full freedom, to organize their administration and activities, and to formulate their own programmes. Article 4 recognizes an additional guarantee by declaring that organizations shall not be liable to be dissolved or suspended by administrative authority. In relation to the ILO C87, Article 3 the Committee of Experts has stated that the right of access of trade union leaders to the workplace is essential for the promotion and defence of workers' rights.[82]

ILO Right to Organize and Collective Bargaining Convention 1949 (ILO C98)

2.50 ILO C98 protects workers from dismissal when exercising their right to organize; it upholds the principle of non-interference between workers and employers' organisations; and it promotes voluntary collective bargaining. Specifically, ILO C98 establishes the complete independence of workers' organizations from employers,[83] and encourages States to promote the full development of machinery for voluntary negotiations between employers (or their organizations), and workers (or their organizations), with a view to regulation of terms and conditions of employment by means of collective agreements.[84]

2.51 The CFA has indicated that seafarers are not considered as providing essential services which are normally excluded from the application of ILO C98.[85] However, interference in the collective bargaining process remains a matter of concern for the Committee of Experts whether in the form of denial of the right

[81] See Report of the Committee of Experts, ILC, 81st Session, *6th General Survey on Convention Nos. 87 and 98* (1994) 38–48.

[82] ibid, 55–57.

[83] ILO C98, Article 2. Examples of interference by public authorities that would be contrary to the spirit of Article 2 are intervention in the drafting of the collective agreements; interference in the application of collective agreements; refusal to approve a collective agreement; restrictions imposed by the authorities on future negotiations.

[84] ILO C98, Article 4.

[85] See 313th Report of the CFA, Case No. 1981 (Turkey) paragraph 263. The CFA stated that seafarers not resident in the country cannot be excluded from collective bargaining.

to bargain collectively to certain categories of workers, approval of collective agreements by authorities, restrictions on subjects for collective bargaining, or simply intervention by governments in the bargaining process.[86] Also, the Committee has upheld several complaints of denial to seafarers of the right to organize or join a union under threats of dismissal or blacklisting.[87]

(8) Right to strike

UN and regional provisions

2.52 The right to strike has not been widely accepted at the international level. The CCPR, Article 22 prescribes the freedom to associate with others, but it does not expressly refer to the right to strike. However, the CESCR expressly mentions the right to strike in Article 8 which states:

> The States Parties to the present Covenant undertake to ensure:
>
> (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

In terms of European standards, protection under the ECHR is drafted in very similar terms to the CCPR, but the ESC is more specific with a reference to the right to strike in Article 6(4). However, this right can be restricted under Article 31 as is 'necessary in a democratic society for the protection of rights and freedoms of others or for the protection of public interest, national security, public health or morals'.

Right to strike developed by the ILO

2.53 There is no ILO Convention which specifically mentions the right to strike. However, the ILO's CFA has, over the years, made important rulings in relation to ILO C87 that make it clear that such a right does exist, and that limitations on exercising the right should only be allowed in very strictly defined circumstances. Thus, the CFA has repeatedly emphasized that 'the right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests'.[88] The CFA has

---

[86] See Report of the Committee of Experts, ILC, 81st Session, *6th General Survey on Convention Nos 87 and 98* (1994) 126.

[87] See Complaint against the Government of China presented by the International Confederation of Free Trade Unions (ICFTU) Report No. 304, Case(s) No(s). 1819 International Labour Office, Official Bulletin, Vol. LXXIX, 1996, Series B, No. 2, 31–41. Also Complaint against the Government of Myanmar presented by the International Transport Workers' Federation (ITF) Report No. 295, Case(s) No(s). 1752. International Labour Office, Official Bulletin, Vol. LXXVII, 1994, Series B, No. 3, 25–36.

[88] See *Digest of Decisions of the Freedom of Association Committee* (Geneva, 3rd edn, 1985) para 363.

maintained that no one should be penalized for carrying out, or attempting to carry out, a legitimate strike;[89] that workers should not be dismissed, or refused re-employment, on account of their having participated in a strike or other industrial action;[90] that the use of extremely serious measures, such as dismissal of workers for having participated in a strike, and refusal to re-employ them, implies a serious risk of abuse, and constitutes a violation of freedom of association;[91] and that no one should be deprived of their freedom, or be subject to penal sanctions, for the mere fact of organizing or participating in a peaceful strike.[92]

2.54 Transport workers, including seafarers, are amongst the workers who enjoy the right to strike, as transport does not constitute a part of essential services.[93] There are, however, limitations to this right. Thus, the CFA has made it clear that the exercise of the right to strike is linked to the objective of promoting and defending the economic and social interests of workers. This excludes strikes of a purely political nature from the scope of international protection.[94] Workers can undertake sympathy strikes when the initial strike they are supporting is itself lawful.[95] The CFA has also recognized certain procedural limitations in relation to the right to strike.[96]

(9) Right to employment agreement

2.55 According to traditional maritime practice, seafarers are entitled to articles of agreement specifying terms of employment.[97] The ILO Seamen's Articles of Agreement Convention 1926 (ILO C22) provides that articles of agreement are to be signed both by the shipowner (or his representative) and by the seafarer.[98] The form and contents of these articles are set out in ILO C22, Article 6. Thus,

[89] See 295th Report, Case Nos. 1552–1793.

[90] See 277th Report, Case 1540, para 90.

[91] See Digest 1985, para 444.

[92] See 230th Report, Case 1184, para 282 and 240th Report, Case No. 1304, para 99.

[93] See Digest of 1985, paras 407 and 405.

[94] See for instance, 238th Report, Case 1309, para 360; 241st Report, Case No. 1309, para 800; 260th Report, Cases 997, 999 and 1029 para 39, and 277th Report case No. 1549, para 445.

[95] The CFA has also ruled that where the right is restricted, there should be some safeguards, such as for example the ability to take part in adequate, impartial and speedy arbitration and conciliation proceedings. See Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, (4th revised edn, 1996) under 'Prerequisites', para 501.

[96] ibid, para 500, 502, 503, 506, 508, 510–512. For example giving prior notice; engaging in conciliation or voluntary arbitration; complying with a given quorum or obtaining the agreement of a given majority; and the secret ballot method.

[97] In UK law, as early as 1729, penalties were set out for breach of the requirement that a signed agreement be entered into between the Master and the seafarer before the ship set sail (Act 2, George II, ch 36).

[98] ILO C22, Article 3.

the articles must contain the name and age of the seafarer; the place and date of completion of the contract; the name of the vessel; the minimum manning requirement under national law; the voyage or voyages to be undertaken, if known at the time of engagement; the seafarer's capacity, the seafarer's function onboard; the place and date in which a seafarer is supposed to report onboard for service; the scale of the provisions to be supplied to the seafarer; the amount of wages; the provisions for annual leave for seafarers with more than 12 months' service with the same company; and date and conditions thereof specified for termination of the contract of employment, including the port of discharge and required period of notice for rescission, and entitlement to wages upon discharge. Reasonable facilities to examine the articles before they are signed are to be given to the seafarer and also to any adviser.[99] The seafarer is also entitled to receive a document containing a record of his employment onboard the vessel without any statement as to the quality of the seafarer's work.[100]

2.56 Today, many crews are hired through manning agents who often provide the seafarer with local contracts which are signed in the seafarer's home country before leaving to join the ship. The contract may be with the agent as principal, or as agent of the owner or manager. This contract will be distinct from any collective agreement that may be applicable to the terms of the crew on a particular ship, but which the crew may not know about. On arrival at the ship, the seafarer might then be presented with a further contract, or be requested to sign ship's articles, sometimes on terms below those promised. The precise identity of the seafarer's employer and the terms of the seafarer's employment therefore can be greatly confused.[101] These practices can leave the seafarer exposed to many forms of abuse.

(10) Right to free employment services and continuity of employment

2.57 The ILO Placing of Seamen Convention 1920 (ILO C9), one of the first Conventions of the ILO, establishes the principle that fees should not be charged for finding employment for seafarers on any ship.[102] This principle is repeated in the ILO Recruitment and Placement of Seafarers' Convention (Revised) 1996 (ILO C179) which also requires the competent authority to closely supervise all recruitment and placement services, and to license, or otherwise regulate, private recruitment and placement services which operate

[99] ILO C22, Article 3.

[100] ILO C22, Article 5. The practice of issuing such records has fallen into disuse since seafarers' books are now issued containing the record of the seafarer's career and remarks on the seafarer's professional ability and attitude while onboard.

[101] See the discussion in Ch 5 below.

[102] ILO C9, Article 2.

within its territory. ILO C179 also protects seafarers against monetary loss caused by the failure of a recruitment and placement service and allows the filing of complaints concerning the activities of such services.

Laws and regulations controlling the activities of manning agencies exist in particular in countries with a long tradition of supply of seafarers for the international market, for example Philippines, India, Bangladesh, Sri Lanka and Indonesia. Yet seafarers regularly report to unions and missions that they have had to pay charges to manning agents to gain employment. The Mission to Seamen in their submission to the House of Lords Inquiry into Ship Safety in 1991 reported: **2.58**

> Seafarers from developing countries commonly have to pay manning agents in order to get work. Sometimes they have to work for many months before they are actually earning money for themselves.[103]

The ILO Continuity of Employment Convention 1976 (ILO C145) seeks to protect seafaring recruitment by ensuring continuous and regular employment for qualified seafarers. It encourages a minimum period of employment, or either a minimum income or monetary allowance, taking into consideration the diverse economies and social contexts of countries.

(11) Right to identification documents and shore leave

The ILO Seafarers' Identity Documents Convention 1958 (ILO C108) requires a government to issue a seafarer's identity document to each of its nationals who is a seafarer. Identity documents are country specific and many are issued in countries where ships are registered. In 2003, the ILO Seafarers' Identity Documents Convention (Revised) 2003 (ILO C185)[104] was created in a climate of urgency for standardised documents for seafarers entering US and foreign ports. ILO C185 replaces ILO C108 and sets new standards for the issuance of identity documents, including a new biometric identity verification system based on a computerised profile of a fingerprint. Each seafarer's document has to be issued by either the seafarer's country of origin or his country of residence.[105] **2.59**

Seafarers' identification is used to gain shore leave and for crew transit. Countries which have ratified ILO C108 are under the obligation to permit entry into **2.60**

[103] *Safer Ships, Cleaner Seas*, Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping (1994) HMSO, London.

[104] ILO C185 is not yet in force and will enter into force six months after it has been ratified by two States.

[105] Much of the details about the identity document and the new global system to ensure its security are contained in annexes to the Convention.

their territory to a seafarer holding a valid seafarer's identity document, when entry is requested in order to (1) join the ship or transfer to another ship; (2) pass in transit to join his ship in another country or for repatriation or (3) any other purpose approved by the authorities of the State concerned. The IMO Convention on the Facilitation of International Maritime Traffic 1965 as amended (FAL) provides that crew members shall not be required to hold a visa for the purpose of shore leave. The language on shore leave in ILO C185 states that 'seafarers shall not be required to hold a visa' and that 'any member which is not in a position to fully implement this requirement shall ensure that its laws and regulations or practice provide arrangements that are substantially equivalent'.[106]

(12) Right to safe and healthy working conditions

UN and regional provisions

2.61 The right to safe and healthy working conditions is stated in the CESCR, Article 7(b) and the ESC, Article 3. The CESCR, Article 7 provides:

> The States parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: . . . (b) Safe and healthy working conditions;

Article 3 of the Revised ESC states:

> 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 . . .

2.62 The fundamental rights of each and every human being therefore include the right to safe and healthy conditions of work. International law imposes on States the obligation to ensure that this right is respected even if it is placed in the

[106] Following negotiations of the Convention, the US said in a Federal Register notice published 18 March 2004, that it will not accept the new international seafarers' document. See news stories from the Missions to Seafarers on restrictions on shore leave for seafarers at: http://www.missiontoseafarers.org (21 June 2004).

hands of private individuals or corporations in their capacity as employers. Thus, the CESCR, Article 2(1) provides that the State is responsible for ensuring the 'full realisation of the rights . . . by all appropriate means'. The failure to secure for seafarers 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.

ILO

Minimum standards

2.63 The ILO Merchant Shipping (Minimum Standards) Convention 1976 (ILO C147) and its Protocol of 1996 (ILO P147), supplemented by the Merchant Shipping (Improvement of Standards) Recommendation 1976 (ILO R155) constitute the central statement by the ILO of what may be regarded as the minimum internationally acceptable labour standards in merchant ships.[107] ILO C147 is also the only ILO instrument to introduce the concept of port State control, involving even non-signatory States. The Convention essentially applies to every seagoing ship employed for any commercial purpose. ILO C147, Article 2 requires States to have laws or regulations for 'ships registered in its territory' laying down:

> (a) . . .
>
> i. safety standards, including standards of competency, hours of work and manning, so as to ensure the safety of life onboard ship;
>
> ii. appropriate social security measures; and
>
> iii. shipboard conditions of employment and shipboard . . .
>
> 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.

2.64 The Conventions in the Appendix cover minimum age, sickness insurance or benefits and medical care, medical examination, prevention of accidents, crew accommodation, food and catering onboard ship, officers' competency certificates, articles of agreement, repatriation, freedom of association, the protection of the right to organize and collective bargaining.[108]

[107] See E Osieke, 'The International Labour Organisation and the Control of Substandard Merchant Vessels' (1981) 30 ICLQ 508.

[108] They are ILO C138; ILO C58; ILO C7; ILO C55; ILO C56; ILO C130; ILO C73; ILO C134 (Articles 4 and 7); ILO C92; ILO C68 (Article 5); ILO C53 (Articles 3 and 4); ILO C22; ILO C23; ILO C87; ILO C98 respectively. ILO R155 adds ILO C133; ILO C135; ILO C91; ILO C146; ILO C70; ILO R137; IMCO/ILO Document for Guidance 1975.

2.65 ILO C147 also provides that member States should verify compliance with ships registered in its territory with applicable ILO Conventions and national laws 'by inspection or other appropriate means'.[109] As indicated, importantly it allows port authorities to 'take measures necessary to rectify any conditions onboard which are 'clearly hazardous to safety or health'.[110]

2.66 A recent development worthy of note is the entry into force of P147.[111] The 1996 Protocol allows countries to inspect ships purely because of concerns over seafarers' hours of work. The inspections will be legal even on ships that are sailing under the flag of a country which has not ratified ILO C147 or ILO P147. Previously, countries had been able to launch port inspections and detain vessels on other aspects of working conditions, but not out of a concern for excessive working hours of those employed on the ship. The Protocol establishes the principle that the fatigue of a vessel's employees can be a legitimate legal concern of a State in whose port the ship is docked even when the ship is registered and owned elsewhere.

Safe crewing

2.67 ILO C180 obliges States to ensure that ships are sufficiently, safely and efficiently crewed in accordance with the safe manning document or an equivalent issued by the competent authority. Further, when determining, approving or revising crew levels, the competent authority must take into account the need to avoid, or minimize as far as is practicable, excessive hours of work, to ensure sufficient rest and to limit fatigue.[112]

Crew accommodation

2.68 The ILO Accommodation of Crews Convention (Revised) 1949 (ILO C92)[113] and the ILO Accommodation of Crews (Supplementary Provisions) Convention 1970 (ILO C133) set out provisions relating to seafarers' living accommodation and welfare facilities onboard a ship. The Conventions state that such living accommodation must be safe and decent and that seafarers must be able to file complaints in this regard to the competent authority. The Conventions entitle seafarers to enjoyment of recreational facilities, sufficient measures to ensure privacy, facilities for washing and drying clothes, and separate and

[109] ILO C147, Article 2(f).

[110] ILO C147, Article 4. For further details on port State control, see ch 4 below. Violations of ILO C147 are reported in the annual reports of regional port State control MOUs. For example in the reports of the Paris MOU on PSC between 1997 and 2002, approximately 13% of vessels were detained on account of safety. Available at: http://www.parismou.org (21 June 2004).

[111] The new Protocol came into force on 10 January 2003.

[112] ILO C180, Article 11. See also the Certification of Able Seamen Convention, 1946 (C74).

[113] The Accommodation of Crews Convention 1946 (ILO C75) never entered into force.

appropriate sleeping and living accommodation as per national habits and customs. Detailed provisions relating to living accommodation such as bedding, toiletries, air conditioning or noise control are contained in ILO Recommendations.[114]

Food and catering

2.69 The ILO Food and Catering (Ships' Crews) Convention 1946 (ILO C68) obliges States to ensure that seafarers have proper access to good quality food and water under regulated sanitary conditions by qualified catering personnel. The ILO Certification of Ships' Cooks Convention 1946 (ILO C69) continues the requirements contained in ILO C68 on the qualification and certification of catering personnel.[115]

Training and qualifications

2.70 The ILO Officers' Competency Certificates Convention 1936 (ILO C53) sets out criteria and obligations of a State to ensure that seafarers engaged in an officer position hold valid certificates of competency to carry out their duties. Further, States are under an obligation to ensure that certificates are issued and approved by the appropriate public authority.[116] The ILO Vocational Training (Seafarers) Recommendation 1970 (ILO R137)[117] sets out details of minimum standards of vocational training for seafarers of all ranks to work onboard ships at sea.

Accident prevention

2.71 The ILO Prevention of Accidents (Seafarers) Convention 1970 (ILO C134) requires States to specify measures for the prevention of accidents which are peculiar to maritime employment by enacting laws, regulations, codes of practice or other appropriate means. The Convention is supplemented by the ILO Prevention of Accidents (Seafarers) Recommendation 1970 (ILO R142) concerning the prevention of industrial accidents to seafarers, and two Recommendations in 1958 (ILO R105 and ILO R106) concerning medical advice by radio to ships at sea and the contents of medicine chests onboard ship.[118]

---

[114] For example, see ILO R78, ILO R140 and ILO R141. The annual port State control report from the Paris MOU of 2002 shows that the number of ships found to have Crew and Accommodation deficiencies was 1853 in 2003. The Tokyo MOU Report shows the number of cases in 2002 as 606. See: http://www.tokyo-mou.org (21 June 2004).

[115] The number of ships reported to have food and catering deficiencies in 2002 was 664 (Paris MOU) and 194 (Tokyo MOU).

[116] ILO C53, Article 3.

[117] ILO R137 supersedes the Vocational Training (Seafarers) Recommendation 1946 (ILO R77).

[118] The number of ships reported to have accident prevention deficiencies in 2002 was 1429 (Paris MOU) and 572 (Tokyo MOU).

IMO

2.72 As already discussed, the IMO has adopted a number of significant instruments towards the creation of safer seas which have a bearing on achieving a safe and healthy work place for the seafarer.[119] Specifically in relation to safe manning, IMO Assembly Resolution A.890(21) as amended adopts principles of safe manning to provide for, inter alia, the issue of an appropriate safe manning document or equivalent, as evidence of minimum safe manning pursuant to the provisions of Regulation V/14 of the SOLAS Convention.[120] The Resolution notes all the relevant factors that should be taken into account in determining minimum safety levels, and describes the responsibility of companies and of administrations in this regard. The guidelines provide a standardized table showing shipboard working arrangements, a suitable format for records of seafarers' daily hours of work and rest and guidelines for monitoring compliance.

2.73 Also relevant is the ongoing work by a joint IMO/ILO ad hoc expert working group set up to examine, inter alia, options for financial security for seafarers' contractual claims for personal injury or death. In November 2001, the IMO Assembly and the ILO Governing Body adopted Resolution A.931(22) Guidelines on Shipowners' Responsibilities in Respect of Contractual Claims for Personal Injury to or Death of Seafarers.[121] The Guidelines express the responsibility of shipowners to have effective insurance cover, or other form of financial security for seafarers' claims and they urge member States when discharging their obligations as flag States 'to ensure that shipowners comply with the Guidelines'. Discussion continues on whether a solution should be in the form of a mandatory regime.

(13) Right to fair wages

UN and regional provisions

2.74 Article 23 of the UDHR provides that:

> Everyone has the right . . . to just and favourable conditions of work . . .

The CESCR, Article 7(a) (i) and (ii) provides that all workers are entitled to:

> . . . fair wages and equal remuneration for work of equal value . . . and a decent living for themselves and their families . . .

2.75 The ESC, Article 4 is wide-ranging and guarantee a decent standard of living, overtime work, equal pay for equal work, the right to reasonable notice upon

[119] See section (3) above.

[120] Resolution A. 890(21) Principles of Safe Manning (25 November 1999) was amended by Resolution A.955(23) Amendments to the Principles of Safe Manning (5 December 2003).

[121] Effective 1 January 2002.

termination and protection from deductions from wages. There is no definition of what constitutes 'wages' in international human rights law. However, the Committee of Independent Experts of the European Social Council has adopted a decency threshold concerning wages equal to 68 per cent of the national average wage in a given country.[122]

ILO

2.76 The ILO has adopted a number of Conventions concerning wages for seafarers, none of which have yet entered into force.[123] The ILO Wages, Hours of Work and Manning (Sea) Recommendation 1958 (ILO R109) sets a minimum basic wage for a calendar month for an able-bodied seafarer. The figure is updated at regular sessions of the JMC using an arithmetical formula. The ILO Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation 1996 (ILO R187) recalls that:

> 10. The basic pay or wages for a calendar month of service for an able seaman should be no less than the amount periodically set by the Joint Maritime Commission or another body authorized by the Governing Body of the International Labour Office . . .[124]

The figure set is a basic wage only for normal hours of work and does not include payments for overtime worked, bonuses, allowances, paid leave or any other additional remuneration.[125] It refers only to the recommended wages of an able-bodied seafarer. Thus the recommended basic wage of other ranks onboard would be relative to the figure set for the able-bodied seafarer.

2.77 Also relevant is the ILO Protection of Wages Convention 1949 (ILO C95) which is one of the more highly ratified non-maritime ILO Conventions of general application. It prescribes that workers have the right to have wages paid directly to them except when it is otherwise provided by national laws, collective

[122] The Committee of Independent Experts, established by Protocol amending ESC 1991, is one of the bodies which supervises application of the European Social Charter. See: http://www.humanrights.coe.int/Intro/eng/GENERAL/employ.htm (21 June 2004).

[123] See ILO Hours of Work and Manning Convention 1936 (ILO C57); ILO Wages, Hours of Work and Manning Convention 1946 (ILO C76); ILO Wages, Hours of Work and Manning (Sea) Convention, (Revised) 1949 (ILO C93); ILO Wages, Hours of Work and Manning (Sea) Convention, (Revised) 1958 (ILO C109); ILO Seafarers' Hours of Work and Manning of Ships Convention 1996 (ILO C180). See also ILO Protection of Wages Convention 1949 (ILO C95).

[124] At the 29th Session of the Joint Maritime Commission (Geneva, January 2001), the ILO Minimum Wage for Able Seamen was set at US$450 as of 1 January 2002 and US$465 as of 1 January 2003. The rate from 1 January 2005 is US$500.

[125] ILO R187, Article 2(a). Representatives of the ITF and ISF who made up the Joint Working Group of the ILO JMC agreed on 25 July 2003 that the total monthly wage package for an able-bodied seafarer should be US$817 based on the minimum basic wage of $465 set out in ILO R180.

agreement or arbitration award, or the worker has agreed to the contrary,[126] and to have wages paid regularly.[127] Further, workers must be made aware of any deductions taken from their wages and in principle, deductions from the seafarers' wages are permitted only under conditions and to the extent prescribed by national laws, or fixed by collective agreement or arbitration awards.[128]

2.78 In the event of the bankruptcy or judicial liquidation of employers, ILO C95 states that workers have the right to be treated as a privileged creditor in respect of certain wages. Seafarers also are entitled to wages in full before ordinary creditors may establish any claim to a share of the assets.[129] ILO C95 also opens the spectrum of liability for the payment of wages to a wide range of employers. Thus the responsibility may fall to the ship manager or manning agency or shipowner itself according to different national laws.[130]

Maritime liens—protection of seafarers' wages

2.79 The ILO Wages, Hours of Work and Manning (Sea) Convention (Revised) 1958 (ILO C109), Article 10(b) states that each member shall take the necessary measures:

> to ensure that any person who has been paid at a rate less than that required by this Convention is enabled to recover, by an inexpensive and expeditious judicial or other procedure, the amount by which he has been underpaid.

In the event of underpayment or non-payment of wages, seafarers can exercise a maritime lien against their vessel which is granted them by most jurisdictions. The relevant international Conventions and provisions concerning maritime liens are discussed further in Chapter 5 and subsequent national chapters.

(14) Right to reasonable working hours and holidays

UN and regional provisions

2.80 The CESCR, Article 7(d) enshrines the right to 'rest, leisure and reasonable working hours and periodic holidays with pay, as well as remuneration for public holidays'. Arguably, the obligation is on the State to ensure that such working time provisions are implemented, even if they are the provision of public goods which are in the hands of private individuals or corporations.

---

[126] ILO C95, Article 5.

[127] ILO C95, Article 12. The exception to this rule is when there was a previous arrangement, which ensures the payment of wages at regular intervals. Such intervals shall be prescribed by national laws fixed by collective agreement or arbitration award.

[128] ILO C95, Article 8.

[129] ILO C95, Article 11.

[130] ILO C95, Article 15.

The Revised ESC, Articles 2(1), (2), (3), (4) and (5) deal with rest and reasonable working hours and holidays. Paragraph (4) is unique because it directs States to eliminate risks in inherently dangerous or unhealthy occupations and if it is not possible to reduce these risks, to provide workers with additional holidays or days off. **2.81**

ILO

The ILO Forty-Hour Week Convention 1935 (ILO C47) is of general application to workers and sets the standard working week at 40 hours. Overtime beyond statutory working hours should be limited and voluntary. Concerning seafarers specifically, several Conventions have dealt with working hours, however none of them have yet entered into force.[131] ILO C180, also not yet in force, prescribes maximum hours of work (or minimum periods of rest) onboard ship, as well as various manning requirements. Thus, seafarers are entitled to an 8-hour working day, with one day of rest per week and rest on public holidays. Article 5(1) of the Convention states that the maximum number of hours worked shall not exceed 14 hours in any 24-hour period and 72 hours in any seven-day period. The minimum hours of rest shall not be less than 10 hours in any 24-hour period or 77 hours in any seven-day period. **2.82**

The ILO Seafarers' Annual Leave with Pay Convention 1976 (ILO C146) provides that seafarers shall be entitled to annual leave, with pay, of at least 30 calendar days for one year of service. Any seafarer whose length of service is less than one year shall be entitled to receive annual leave with pay, proportionate to the length of service in that year. The Convention further stipulates that every seafarer taking annual leave as envisaged in the Convention shall receive, in respect of the full period of that annual leave, at least his normal remuneration (including the cash equivalent of any part of that remuneration which is paid in kind), calculated in a manner to be determined by the competent authority or through appropriate machinery in each country.[132] **2.83**

IMO

The provisions of the ILO are complemented by the STCW Convention which prescribes that persons performing part of a watch must be provided with a minimum of 10 hours' rest in any 24-hour period. The rest hours may be **2.84**

[131] See ILO Hours of Work and Manning (Sea) Convention 1936 (ILO C57); ILO Wages, Hours of Work and Manning Convention 1946 (ILO C76); ILO Wages, Hours and Manning (Sea) Convention (Revised) 1949 (ILO C93); ILO Wages, Hours of Work and Manning (Sea) Convention (Revised) 1958 (ILO C109).

[132] Article 6 of the Convention sets out holidays and absences that may not be counted as part of the minimum annual leave with pay.

divided into two periods, one of which must be of at least six hours.[133] Similar to ILO C180, the STCW Convention also requires watch schedules to be posted in an easily accessible manner onboard.

(15) Right to health and medical care

2.85 The right to health includes three separate components: the right to safe and healthy conditions; health care freedoms, including the right to control one's body and to seek health care without discrimination; and entitlement to a health care system that provides care on a non-discriminatory basis.[134] The extent to which any State provides publicly funded health care varies a great deal. Some States, including, for example, India[135] and South Africa,[136] have recognized a constitutional human right to health care which includes an absolute entitlement to emergency health care. The South African provision is especially relevant since it applies to nationals and non-nationals alike. Thus, any seafarer in the South African territorial sea is entitled to State sponsored emergency medical treatment.

2.86 In addition to general rights to health care, seafarers are often entitled to more specific and definite rights to health care under the provisions of the maritime law. The medieval right to 'maintenance and cure', for instance, is still recognized under the provisions of US law.[137]

UN and regional provisions

2.87 To date, only one international human rights instrument, the Protocol of San Salvador, adopted within the framework of the Organization of American States, actually proclaims a right to health, although that term is interpreted in the relevant Article to mean the enjoyment of the highest level of physical and mental health and social well-being. Article 10 of the Protocol states:

> 1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

---

[133] STCW Code paragraph A-VIII/1. In cases of emergencies, the rest period is not compulsory.

[134] See V Leary, 'The Right to Health in International Human Rights Law', (1994) Health and Human Rights, Vol 1, No 1.

[135] See *Paschim Banga Khet Mazdoor Samity v State of West Bengal* [1996] All India Reporter (AIR) SC 2426; (1996) 4 Supreme Court Cases (SCC) 37; summarized in (1998) 2 Commonwealth Human Rights Law Digest 109.

[136] See *Soobramoney v Minister of Health*, KwaZulu-Natal (1998) 1 South African Law Reports 765 (CC); (1997) 12 Butterworths Constitutional Law Reports (BCLR) 1696 (CC).

[137] See VA McDaniel, 'Recognising Maintenance and Cure as an Admiralty Right' (1991) 14 Ford International LJ 669; and Shields, 'Seamens' Rights to Recover Maintenance and Cure Benefit', (1981) 55 Tul L Rev 1046. Also see Ch 17.

There are today many international human rights instruments that address health and health-related issues. Among the most important of these are the UDHR, Article 25, the CESCR, Article 12,[138] the CEDAW, Article 12, the CRC, Article 24 and ESC, Article 11. For example, the UDHR, Article 25 states: **2.88**

> (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.

The CESCR, Article 12 states:

> 1. The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

These provisions express the responsibility for health on the part of States by formulating the right to health as an individual right or by stating concrete State obligations and correlative duties.[139]

ILO

Medical certificate

The ILO Medical Examination (Seafarers) Convention 1946 (ILO C73) requires a certificate of fitness signed by a medical practitioner or an authorized person before a seafarer can be employed onboard a vessel. In addition, the ILO Medical Examination of Young Persons (Sea) Convention 1921 (ILO C16) provides that for persons under 18 years old, the continuation of employment at sea must be subject to medical examinations at yearly intervals.[140] **2.89**

Medical care

The ILO Health Protection and Medical Care (Seafarers) Convention 1987 (ILO C164)[141] endorses the principle that free of charge medical care and health protection is to be provided to seafarers during their employment, and that health protection and medical care are to be comparable to that generally **2.90**

[138] The UN Committee on Economic, Cultural and Social Rights has adopted a General Comment No. 14 on the Right to Health, UN doc. E.C.12/2000/4.

[139] B Toebes, 'The Right to Health' from *Economic, Social and Cultural Rights, A textbook* (2nd edn, 2001).

[140] ILO C16, Article 3. Should the medical certificate expire in the course of a voyage, it shall remain in force until the end of that voyage.

[141] Seafarers can also receive protection under the umbrella of the general ILO C130 which includes flexibility provisions in favour of countries whose economic and medical facilities are insufficiently developed.

available to workers ashore. ILO C164 also guarantees to the seafarer the right to visit a doctor without delay in ports of call.[142]

Sickness and injury

2.91 The ILO Shipowners' Liability (Sick and Injured Seamen) Convention 1936 (ILO C55) refers to treatment and benefits that must be borne by a shipowner in the case of a seafarers' sickness, injury or death during active service. Flag States are required to impose upon shipowners 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 onboard, and to defray the expenses of repatriating the sick or injured seafarer. The Convention states that its provisions must be enjoyed by all seafarers, irrespective of nationality, domicile or race. States are left free to choose exactly how they fulfil their duty to 'make effective' the provisions of the Convention.

(16) Right to social security and welfare

UN and regional provisions

2.92 The right to 'security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood' is stated in the UDHR, Article 25. Article 12 (1) of the ESC provides a broader right of protection and obliges States to establish a system of social security, whilst Article 13 creates a right to social and medical assistance to all persons in need.[143] The CESCR has a general 'right to social security, including social insurance' in Article 9, as well as a right to social security during maternity leave in Articles 16 and 17. At the regional level, the American Declaration of the Rights and Duties of Man also protects the right to social security in certain circumstances.[144] There are also provisions in the thematic UN treaties.[145]

ILO

2.93 The ILO Social Security (Seafarers) Convention (Revised) 1987 (ILO C165)[146] sets standards for a system of social security for the seafaring profession. There are also ILO Conventions dealing with welfare generally,[147] sickness,

[142] ILO C164, Article 4 (a), (b), (c) and (d).

[143] The European Committee of Social Rights has developed case law in relation to Article 13 (1) which effectively makes the rights it protects justifiable rather than a simple direction to States to take certain measures to ensure that a right is protected. See M Schienin 'Economic and Social Rights as Legal Rights' in *Economic, Cultural and Social Rights, A textbook* (2nd edn, 2001) 42.

[144] Article 16 protects against unemployment, old age and mental and physical disability.

[145] CERD, Article 5 (e)(iv), CEDAW, Art 11 (1)(e), 11 (2)(b) and 13 (a).

[146] This Convention revised the Social Security (Seafarers) Convention, 1946 (C70) which has not yet entered into force.

[147] See Seafarers' Welfare Convention 1987 (ILO C163).

and unemployment insurance. Thus, the ILO Sickness Insurance (Sea) Convention 1936 (ILO C56) stipulates that seafarers employed onboard a ship must be insured under a compulsory sickness insurance scheme. Article 2 of the Convention states that an insured seafarer who is rendered incapable of work and deprived of wages due to sickness is entitled to a cash benefit for at least the first 26 weeks or 180 days of incapacity. The ILO Seafarers' Pensions Convention 1946 (ILO C71) provides for the establishment, or to secure the establishment of, a scheme for the payment of pensions on retirement for seafarers from sea service. The ILO Unemployment Indemnity (Shipwreck) Convention 1920 (ILO C8) stipulates that, in the event of loss or foundering of any vessel, the seafarers employed onboard the vessel shall be paid an indemnity against unemployment resulting from the said loss or foundering.[148]

(17) Right to repatriation

ILO

2.94 The obligations concerning repatriation of seafarers are set out in the ILO Repatriation of Seamen Convention 1926 (ILO C23) and the ILO Repatriation of Seafarers' Convention (Revised) 1987 (ILO C166). ILO C23 provides that any seafarer who is landed during the term of engagement, or on its expiration, shall be entitled to be taken back to the seafarer's 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. ILO C23 was replaced by ILO C166 which sets out the circumstances when a seafarer is entitled to repatriation, including when the seafarer's contract comes to an end or the vessel ceases trading.[149] Given the importance of the question of responsibility for repatriation, this is considered further below.

Shipowner

2.95 The duty to arrange repatriation lies initially upon the shipowner. ILO C166, Article 4 states that it is the responsibility of the shipowner to arrange for repatriation 'by appropriate and expeditious means', and that 'the cost of repatriation shall be borne by the shipowner'. The cost to be borne by the shipowner includes:

[148] Also the Unemployment Insurance (Seamen) Recommendation 1920 (ILO R10) stipulates the establishment of an effective system of insurance for seafarers against unemployment arising out of shipwreck or any other cause either by means of Government insurance or by means of Government subventions to industrial organizations whose rules provide for the payment of benefits to their unemployed members.

[149] ILO C166, Article 2.

(a) passage to the destination selected for repatriation . . .
(b) accommodation and food from the moment the seafarer leaves the ship until he or she reaches the repatriation destination;
(c) pay and allowances from the moment he or she leaves the ship until he or she reaches the repatriation destination, if provided for by national laws or regulations or collective agreements;
(d) transportation . . . of the seafarer's personal luggage . . .
(e) medical treatment when necessary until the seafarer is medically fit to travel to the repatriation destination.[150]

The shipowner cannot demand any form of advance payment from the seafarer to go towards repatriation nor can he recover such costs from seafarers' wages.[151]

Flag State

2.96 If the shipowner fails to repatriate the seafarer, it becomes the flag State's duty to do so. ILO C166, Article 5 reads:

> 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 para 3 of Article 4 above.

2.97 Thus, 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. As a matter of international law, it is clear that 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.

Port State

2.98 ILO C166, Article 5 provides a final fall back position if the flag State fails to act, and empowers the port State and the national State of the seafarer to arrange repatriation and recover the cost from the flag State. Article 5 does not actually oblige the port State to make arrangements for repatriation, however

[150] ILO C166, Article 4.4.
[151] ILO C166, Article 4.5.

the Repatriation of Seafarers Recommendation 1987 (ILO R174) is phrased in positive terms, and indicates that the port State should arrange repatriation.

Port States also have duties under the Vienna Convention on Consular Relations and Optional Protocol 1963. 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 crew member. 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. **2.99**

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. **2.100**

Crew supply State

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 unlikely to be involved in the repatriation of seafarers. **2.101**

As has been noted, Articles 5, 28 and 36 of the Vienna Convention on Consular Relations place obligations on the sending State and these obligations are complemented by ILO C166, Article 5. Again, Article 5 does not oblige the national State to make arrangements for repatriation but ILO R174 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. **2.102**

IMO/ILO Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers

In November 2001, the IMO Assembly and the ILO Governing Body adopted Guidelines on provision of financial security in case of abandonment of seafarers.[152] This was in recognition of the fact that abandonment of seafarers is a serious problem involving a human and social dimension and that if **2.103**

[152] IMO/ILO Resolution A.930(22). The Guidelines were effective from 1 January 2002.

shipowners do not have adequate financial security, seafarers may not receive remuneration or be promptly repatriated in cases of abandonment.[153] The Guidelines state that shipowners should have in place a financial security system that provides for the expenses of repatriation to be met without cost to the seafarer, and for the maintenance of the seafarers from the time of abandonment to their arrival at the location chosen for repatriation. The Guidelines also recognize that in cases where the shipowner fails to perform, flag States and in some cases the State of nationality of the seafarer or the port State may be called upon to intervene.[154]

D. Conclusion

2.104 There is no shortage of standards at the international level of which seafarers in principle might avail themselves. As seen, the efforts to create rights and remedies have been driven by international institutions such as the UN and its agencies, the ILO and the IMO, as well as by regional groupings of States, such as the Council of Europe and the Organization of African States. States have, by signing up to such standards, committed to granting protection to individuals against abuses of their labour and human rights. However, it is noteworthy that many of the relevant ILO Conventions have never entered into force.

However, since international standards are applied and enforced in a world that has been carved up into separate nation States, the practical impact of international standards will depend on the willingness and capacity of States to translate rights into reality. Even where international standards are accepted as 'universal' or 'common standards' of aspiration, they still need to be implemented by government machinery at the national level. The standards discussed in this chapter are therefore subject to the vicissitudes of State ratification and rely on the support not only of flag States but also of port States, crew States and other relevant States. Chapter 3, therefore, will look at the system of implementation of international standards and discuss mechanisms of compliance and enforcement available at the international level to secure the realisation of documented rights. In the following Chapter 4, consideration will be given to how international standards, including regulations, criminal laws and other rules of a public nature are enforced at the national level.

[153] In the period 1 July 1999 to 31 December 2001, a total number of 118 cases of crew abandonment were reported by the ITF, which involved over 5,229 seafarers. In the period 1 January 2002 to 30 June 2002, 89 cases of crew abandonment were reported by the ITF, involving some 1,780 seafarers.

[154] The Guidelines are an interim measure and discussions are ongoing within the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment.

Table 2.3 Main international labour, human rights and maritime standards relevant to seafarers

<table>
<tr>
<td rowspan="2">ILO Core Labour Standards
• ILO Nos C87 and C98 on freedom of association and the effective recognition of the right to collective bargaining.
• ILO Nos C29 and C105 on the elimination of all forms of forced or compulsory labour.
• ILO Nos C138 and C182 on child labour.

• ILO Nos C100 and C111 on the elimination of discrimination in respect of employment and occupation.</td>
<td>ILO Maritime Labour Conventions
ILO Nos C7, C8, C9, C16, C19, C22, C23, C29, C47, C53, C54, C55, C56, C57, C58, C68, C69, C70, C71, C72, C73, C74, C75, C76, C87, (C91), C92, C93, C95, C97, C98, C100, C105, C108, C109, C111, C130, C133, C134, C138, C143, C145, C146, C147, P147, C154, C163, C164, C165, C166, C178, C179, C180, C182, C185.</td>
</tr>
<tr>
<td>ILO Maritime Labour Recommendations
ILO Recommendation Nos R9, R10, R27, R28, R48, R49, R75, R76, R77, R78, R90, R91, R105, R106, R107, R108, R109, R137, R138, R139, R140, R141, R142, R153, R154, R155, R173, R174, R185, R186, R187.</td>
</tr>
<tr>
<td>IMO Conventions
• International Convention for the Safety of Life at Sea 1974 as amended and Protocols thereto
• International Management Code for the Safe Operation of Ships and for Pollution Prevention 1993 (under Chapter IX of SOLAS)
• International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 as amended</td>
<td>International Bill of Human Rights
• Universal Declaration of Human Rights 1948
• International Covenant on Economic, Social and Cultural Rights 1966
• International Covenant on Civil and Political Rights 1966 and Protocols thereto</td>
</tr>
<tr>
<td>Regional Human Rights Treaties
• European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and Protocols thereto
• European Social Charter 1961 and Protocols thereto and European Social Charter (Revised) 1996
• American Convention on Human Rights 1969 and Protocol thereto
• African Charter on Human and Peoples' Rights 1981 and Protocols thereto</td>
<td>Thematic UN Human Rights Treaties
• International Convention on the Elimination of All Forms of Racial Discrimination 1965
• Convention on the Elimination of All Forms of Discrimination against Women 1979 and Protocol thereto
• Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and Protocol thereto
• Convention on the Rights of the Child 1989 and Protocols thereto</td>
</tr>
</table>