

3

INTERNATIONAL COMPLIANCE AND ENFORCEMENT MECHANISMS

A. Introduction	3.01	C. International Institutions and Enforcement Mechanisms	3.21
B. Implementing International Standards	3.04	(1) United Nations mechanisms	3.21
(1) Is the standard law (enforceable versus aspirational standards)?	3.06	(2) International Labour Organization	3.30
(2) Is the State bound by the international standard?	3.08	(3) International Maritime Organization	3.45
(3) Can the international standard be enforced in national courts?	3.14	(4) Regional systems for human rights enforcement	3.51
(4) Which enforcement mechanisms are available and for which parties?	3.19	(5) Other courts	3.67
		D. Case Study	3.76
		E. Conclusion	3.77

A. Introduction

Seafarers' rights are typically enforced through national legal mechanisms. **3.01** Unlike international tribunals, national courts are able to enforce contracts of employment and apply rights arising from national and foreign laws. In some cases, national courts are able to enforce standards arising from international treaties.¹ Yet there are many reasons why national courts may not provide an effective legal remedy. The laws may be incomplete or outdated, while the courts may be slow, corrupt or ineffective. Where access to effective justice is denied at the national level, the seafarer might seek recourse to the enforcement mechanisms set up by the United Nations (UN) and other international organizations.

There has been a phenomenal growth in the use of international courts, tribunals and complaints mechanisms in recent years. Whereas some international **3.02**

¹ See chs 6–17.

institutions existed for decades without much use, potential users have become more aware of the range of procedural options available and there is now a significant interest in using the different procedures at the international and regional levels for practical effect.² However, international procedures and bodies are no panacea and they are best used as part of a broader strategy, whether at the international or the national level. This can serve a number of purposes including increasing public awareness of a particular case or issue; the development of jurisprudence that may be used by international and national advocates; and drawing attention to national legal systems that fall short, thereby encouraging a change in law or policy. Moreover, in some cases, international institutions can provide effective remedies for seafarers with legal claims.

- 3.03** The scope for using international procedures to enforce seafarers' rights remains largely unexplored. This chapter will describe compliance and enforcement mechanisms of relevant international institutions, explain the main features of their use, and identify the advantages and disadvantages they offer for pursuing seafarers' claims. In the first instance, the chapter will discuss the process of implementing international standards.³

B. Implementing International Standards

- 3.04** Standards produced by the International Labour Organization (ILO), the International Maritime Organization (IMO) and similar bodies are creatures of international law. International law is traditionally said to create rights and duties between States, whereas national law creates rights and duties involving individuals or companies in the national sphere. This simple divide is now breaking down, not only because there are many non-State actors on the international stage, but also since some treaties, including many discussed in this book, explicitly recognize the rights of individuals as well as States.⁴ Nevertheless, the general point still holds and international law mainly binds States, not

² One consequence of this change is a growth in the range of materials available to explain the procedures and practicalities of using such mechanisms. See especially P Sands, R Mackenzie and Y Shany, *Manual on International Courts and Tribunals* (1999). See also the website of the Project on International Courts and Tribunals at <http://www.pict-pcti.org> (21 June 2004).

³ International law can sometimes take the form of customary international law based on common practices agreed by States to be binding. In shipping, this is now of less importance due to the proliferation of treaty-based standards. For more on this topic, see ME Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (2nd edn, 1997). The discussion here will be confined to the implementation of treaties and other binding international instruments.

⁴ See R Higgins, *Problems and Process: International Law and How We Use It* (1995).

private parties. Thus, for example, the International Convention for the Safety of Life at Sea 1974 as amended, and Protocols thereto (the SOLAS Convention) creates direct binding obligations on governments to regulate safety of life at sea. Shipowners are affected by the SOLAS Convention but only indirectly through the mediating vehicle of national laws. It follows from this that, at the international level, it is States rather than individuals or companies that can be held accountable for violations of international standards. Again, there are exceptions to this general principle, but they are rare.

Once a relevant international standard has been identified, several questions must be answered to determine whether it can be enforced. The key questions are: **3.05**

- Is the standard law (enforceable versus aspirational international standards)?
- Is the State bound by the international standard?
- Can the international standard be enforced in national courts?
- Which enforcement measures are available and to which parties?

(1) Is the standard law (enforceable versus aspirational international standards)?

International standards on labour, safety, human rights and other issues are written down in documents commonly referred to as 'instruments'. The nature of the international instrument has a direct bearing on its legal status and the mechanisms available for promoting effective implementation. For legal purposes, international instruments are normally divided into two major categories: binding instruments, such as treaties, conventions and covenants, and non-binding instruments, such as recommendations, declarations, guidelines and codes of practice.⁵ The category of 'resolutions' can be particularly difficult. Resolutions of the UN General Assembly are not binding on member States, though many Resolutions of the UN Security Council are binding. For seafarers, it is important to note that resolutions of the Conference of Contracting Governments to the SOLAS Convention are binding and create new law under the provisions of Article VIII of the Convention if they are incorporated into national legislation or into an IMO treaty.⁶ **3.06**

⁵ The ultimate test of whether a standard is binding or non-binding is whether the parties intended to create legally binding relations: this may be deduced from the wording of the document.

⁶ Thus Resolution 9 of the 1997 Conference created the International Management Code for the Safe Operation of Ships and for Pollution Prevention 1993 (ISM Code) which is incorporated as a Protocol to the SOLAS Convention and thus is binding on contracting States even though it is entitled a Code.

3.07 With non-binding standards, compliance is a matter of State choice. There are a number of factors that may encourage a State to implement an international standard even if it has not signed up to a multilateral obligation.⁷ However, in general, international enforcement machinery is only available for binding instruments. The distinction between binding and non-binding should not be confused with effective and non-effective. Some instruments that are legally binding are not effective since they are not observed in practice, while other instruments that are not technically binding can be highly effective in shaping the regulatory environment.⁸ Examples of binding and non-binding instruments are listed in Table 3.1.

(2) *Is the State bound by the international standard?*

3.08 States are only obliged to comply with an international instrument after expressing consent to be bound. If a State has not expressed its sovereign consent to be bound by a treaty or Convention, then it is not under a legal obligation to comply.⁹

Ratification or accession

3.09 In most cases, simply signing the treaty is not sufficient: a process of ratification or accession is normally required to produce legal effect. National processes of ratification vary but in each case, an instrument of ratification will be filed with an international organization or the UN Secretary General. States that have signed but not yet ratified a treaty are obliged to refrain from actions that would violate the objects and purpose of the treaty, but they are not obliged to comply with the treaty as such.¹⁰

Reservations and derogations

3.10 States can also express reservations to treaties. A reservation is a statement made by the government that modifies the application of the treaty to that

⁷ See PM Haas, *Choosing to Comply: Theorizing from International Relations and Comparative Politics in Commitment and Compliance, the Role of Non-Binding Norms in the International Legal System* (2000) 45.

⁸ For example, the ILO Wages, Hours of Work and Manning (Sea) Recommendation 1958 (ILO R109) is widely followed in practice even though it is non-binding in law. Similarly, port State control agreements are not formal treaties but they can have real impact on laws and practices in port States.

⁹ The exception is where a multilateral treaty is said to codify customary international law and the customary law that is reflected in the wording of the treaty binds the State.

¹⁰ Vienna Convention on the Law of Treaties 1969, Article 18.

Table 3.1 Binding and non-binding international instruments

	General Category	Examples
Binding	UN Conventions and Treaties	<ul style="list-style-type: none"> • UN Convention on the Law of the Sea 1982 • International Covenant on Economic, Social and Cultural Rights 1966 • International Covenant on Civil and Political Rights 1966 and protocols thereto
	Global Multilateral Treaties	<ul style="list-style-type: none"> • IMO Conventions <ul style="list-style-type: none"> – International Management Code for the Safe Operation of Ships and for Pollution Prevention 1993 • ILO Conventions <ul style="list-style-type: none"> – Merchant Shipping (Minimum Standards) Convention 1976 (ILO C147)
	Regional Treaties	<ul style="list-style-type: none"> • 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 of Human and Peoples' Rights 1981 and Protocols thereto
	Bilateral Treaties (only two States)	<ul style="list-style-type: none"> • Agreement between the Government of the Republic of Cyprus and the Government of the Democratic Socialist Republic of Sri Lanka on Cooperation in the Field of Merchant Shipping 1984 and 2000 • Inter State Contract on Mercantile Marine between Greece and the Ukraine 2001
Non-binding	UN General Assembly Resolutions	<ul style="list-style-type: none"> • Universal Declaration of Human Rights 1948
	ILO Recommendations	<ul style="list-style-type: none"> • Wages, Hours of Work and Manning (Sea) Recommendation 1958 (ILO R109)
	MO Resolutions and Guidelines	<ul style="list-style-type: none"> • IMO/ILO Resolution A.930(22) Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers 2001
	Codes and Guidelines	<ul style="list-style-type: none"> • OECD Guidelines for Multinational Enterprises 2003 • Accident Prevention on Board Ship at Sea and in Port: An ILO Code of Practice 1996

State only. Reservations are not allowed in the case of ILO Conventions,¹¹ but are sometimes lodged when States ratify other treaties.¹² A reservation that violates the 'object and purpose' of a multilateral treaty is prohibited, though the implementation of this principle is controversial.¹³ A small number of treaties also allow States to derogate from their obligations during times of national emergency. In such circumstances, the State must file a formal statement with the treaty supervising authority. Derogations are, however, rare.¹⁴

Is it in force?

- 3.11** Treaties will usually require that signatory States deposit a certain number of ratifications before the treaty will enter into force and thus become binding on the States in question, often after a time delay.¹⁵ Therefore, even after a State has ratified a treaty and incorporated it into national law, the treaty itself may not be binding if there have not been sufficient ratifications to bring it into force. Some treaties never receive sufficient ratifications to come into force,¹⁶ and others may take many years.¹⁷

Has the State acceded to amendments, protocols or procedures?

- 3.12** In relation to any amendments to, or revisions of, international instruments, generally each body which has created the instrument specifies the procedure to be adopted when treaties are to be amended or revised. Therefore, in considering whether a State has acceded to amendments or protocols,¹⁸ it is necessary to look at what kind of treaty or Convention has been amended. For example, with many IMO Conventions, the tacit acceptance amendment procedure provides that an amendment shall enter into force at a particular time unless, before that date, objections to the amendments are received from a specified number of parties.¹⁹ In relation to ILO Conventions, formal

¹¹ ILO Conventions also often contain flexibility as regards the obligations or the scope of the Convention to enable States with varying lower levels of development to ratify them. See N Valticos, *International Labour Law* (1979) 51.

¹² For example, the US has expressed a reservation with regard to the shore leave provisions of the Convention on Facilitation of International Maritime Traffic 1965 as amended.

¹³ Vienna Convention on the Law of Treaties 1969, Articles 19–23. See UN Special Rapporteur A Pellet, Fifth Report on Reservations to Treaties, A/CN.4/508 and Add 1–4.

¹⁴ Of relevance to seafarers is that derogation is permitted under CCPR, Article 4.

¹⁵ Vienna Convention on the Law of Treaties 1969, Article 24.

¹⁶ For example, none of the UN Convention on Conditions for Registration of Ships 1986, the Maritime Liens and Mortgages Convention 1993, or the International Convention on the Arrest of Ships 1999 are yet in force.

¹⁷ For example, the UN Convention on the Law of the Sea 1982 did not come into force until 1994.

¹⁸ A protocol is an instrument which partially revises a Convention.

¹⁹ See the discussion in C. (3) International Maritime Organization below.

revision may involve the adoption of a new self-contained Convention requiring compliance with the ratification or accession process in order for it to be binding on a particular State. The Vienna Convention on the Law of Treaties further provides for amendment and modification of treaties.²⁰ A protocol is open to ratification by a State already bound by, or simultaneously ratifying and becoming bound by, the Convention in question. Whether a State has acceded to a protocol depends on whether it has carried out the required ratification.

Scope of obligation

When a State ratifies a treaty, it undertakes both negative obligations, namely to refrain from actions that violate the terms of the treaty, and positive obligations, namely to take affirmative action to guarantee that the rights are protected. States are usually free to implement their treaty obligations in the manner they choose. In this respect, international law imposes an obligation of result rather than an obligation of means.²¹ If a State takes steps to implement its treaty obligations, but those steps are ineffective, then it is in violation of international law. **3.13**

Practical help – How to determine if a treaty binds a State

The status of treaties, including ratifications, declarations and reservations are available on a number of sites on the internet. The official web sites of the ILO, the IMO and the United Nations are a good place to start. There are also sites that give information on maritime treaties and the procedures and interpretations of human rights bodies.²²

(3) Can the international standard be enforced in national courts?

Once it has been determined that an international standard is binding on the relevant State, the question of implementation or enforcement arises. Where there is access to an effective national court, it makes sense to seek enforcement there first. Moreover, some international committees and tribunals require that **3.14**

²⁰ Vienna Convention on the Law of Treaties 1969, Articles 39 and 40.

²¹ See *Treaty Making—Expression of Consent by States to be Bound by a Treaty*, Council of Europe (2001) 15. An important exception is the CESCR, Article 2 which provides for the progressive implementation of treaty rights.

²² The single most useful site for users of human rights procedures is at <http://www.bayefsky.com> (21 June 2004).

an individual has attempted to enforce the standard in a national court before bringing the case to the international level.²³ An applicant who has not exhausted domestic remedies through national courts will usually be sent back to the national level to attempt local enforcement.

- 3.15** An alien looking down on the global legal system might assume that if a State has agreed to a treaty, it will naturally agree to having the treaty provisions enforced in national courts. But the matter is not that simple. In most cases, the enforcement of international standards at the national level depends on whether the standards have been incorporated into national law. This is because, in relation to treaties, many States operate a dualist system that puts international law and national law in separate spheres of application. Some States, including the US and many civil law States, operate a monist system which holds that an international treaty, once ratified, is directly enforceable in national courts.²⁴ Direct enforcement is also possible in limited circumstances in some dualist countries, so that some commentators have noted that a clear distinction between monist and dualist approaches is breaking down.²⁵ In practice, it will be necessary to examine the laws and judicial rulings of each country to determine if a particular international standard can be locally enforced.
- 3.16** There are various systems for incorporation of international standards into national law. The most common is to create national legislation that either enforces the treaty provisions directly or re-writes the provisions of the treaty into a body of national law. However, domestic courts' reliance on international law varies from country to country. They can use it as a guide to interpretation of local law, or apply the principles set out in the provisions directly. The use of international standards to interpret and construe national law is increasingly

²³ This is particularly true of human rights bodies. Mechanisms which require exhaustion of domestic remedies as a condition of admissibility for individual/collective complaints include: the UN Human Rights Committee (Article 5, Para 2(b), First Optional Protocol to the CCPR); the European Court of Human Rights (Article 35, Para 1, ECHR); the Inter-American Commission on Human Rights (Article 46, Para 1(a), ACHR); and the African Court on Human and Peoples' Rights (Article 6, Para 2, Protocol on the Establishment of an African Court on Human and Peoples' Rights 1998 in conjunction with Article 56, AC).

²⁴ However some monist States have invented a new form of dualism in distinguishing between 'self-executing' treaties that can be enforced directly, and 'non-self-executing' treaties that require national legislation to be enforced in national courts. Thus although the US has recently ratified a number of human rights treaties, these have been declared to be 'non-self-executing' and therefore cannot be relied upon in national courts. See D Sloss, 'The Domestication of Human Rights: Non-Self-Executing Declarations and Human Rights Treaties' (1999) 24 *Yale Journal of International Law* 129.

²⁵ For example, in the Australian decision of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 it was held that individuals have an enforceable 'legitimate expectation' that a ratified treaty right will be observed in administrative decisions, unless the government has clearly stated that it will not be observed.

important. So even if a treaty standard has not been incorporated into national law, it may play an important role in the reasoning of a local judge. This trend has been particularly important in the area of human rights law and environmental law.²⁶

If a State has agreed to an international standard but its national law is in conflict, then there are two positions. First, from the voice of international law, the position is clear: a State may not invoke the provisions of its national law to justify its failure to perform a treaty obligation.²⁷ The second answer, from many national courts, is equally clear: where national law clearly contradicts an international treaty, national law will prevail.²⁸ This apparent contradiction in the global legal system is one of its weaknesses. In practice, most governments and national courts seek to avoid obvious clashes between international and national rules and will often work to interpret national law in a way that complies with international standards.²⁹ **3.17**

Procedures for invoking international standards vary from country to country. Where the national processes are very slow or demonstrably biased or otherwise unsatisfactory, it is possible to assert that domestic remedies are unavailable or would cause unreasonable delay.³⁰ It is important to remember that not all international mechanisms require the exhaustion of domestic remedies, but for those that do, it is acknowledged that the requirement should be waived where there is no realistic hope of national redress. Thus, where a seafarer is aboard a ship that is many thousands of miles from the flag State, or if the ship has never called at the flag State and is not likely to do so in the near future, or where the courts of the flag State are slow and ineffective, it will normally be possible to show that domestic remedies have been exhausted.³¹ **3.18**

²⁶ See B Conforti and F Francioni (eds) *Enforcing International Human Rights in Domestic Courts* (1997); and M Anderson and P Galizzi, *International Environmental Law in National Courts* (2002).

²⁷ Vienna Convention on the Law of Treaties 1969, Article 27.

²⁸ See FG Jacobs and S Roberts, (eds) *The Effect of Treaties in Domestic Law* (1987).

²⁹ See, for example, M Anderson & M Happold, *Constitutional Human Rights in the Commonwealth* (2003) chs 1, 4, 6, 10, and 11, recounting the influence of international human rights on national judges in common law countries.

³⁰ There is no single standard for determining when the exhaustion of domestic remedies requirement will be set aside.

³¹ The Inter-American Court of Human Rights has held that the lack of access to legal aid or to a state-appointed counsel amounts to frustration of domestic remedies. See *Exceptions to the Exhaustion of Domestic Remedies* (Articles 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights) Advisory Opinion OC-11/90, August 10, 1990, Inter-Am Ct HR Series A No 11 (1990). Also, on the wide latitude granted by the African Commission, see CA Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment', 8 *Transnational Law and Contemporary Problems* (1998) 359.

(4) *Which enforcement mechanisms are available and for which parties?*

- 3.19** International law is not frequently enforced through court-based litigation. Instead, States are expected to comply with international standards in good faith,³² and various systems of supervision, monitoring and evaluation are employed to promote compliance. Since international law primarily binds States, many of the enforcement mechanisms are only available to States. However, a number of the compliance mechanisms include a right for individuals, trades unions or other States to file a complaint or to bring an action for judicial scrutiny in cases of alleged non-compliance. Frequently, there will be more than one organization or mechanism available for the enforcement of a standard: for example, it is conceivable that a complaint regarding a widespread and consistent violation of freedom of association might be taken to at least three different ILO procedures, as well as to the European Court of Human Rights and the UN Human Rights Committee. Institutions have various rules concerning who can institute a complaint and there are strengths and weaknesses of each institutional mechanism.
- 3.20** Table 3.2 sets out types of compliance and enforcement mechanisms available by reference to the parties involved. The relevant compliance and enforcement mechanisms will be discussed in further detail below.

C. International Institutions and Enforcement Mechanisms

(1) *United Nations mechanisms*

- 3.21** The major types of enforcement procedures available in the UN system are:
- Reporting procedures under human rights treaties;
 - Complaints procedures under human rights treaties; and
 - Special thematic and country procedures established within the framework of the UN Commission on Human Rights.

In addition, opportunities exist within the three regional systems which presently exist for the protection of human rights: the Council of Europe system, the Inter-American system and the system established under the African Charter on Human and Peoples' Rights.³³ Often, regional systems provide a more effective route for redressing violations. The three regional systems are considered later in this chapter.

³² Vienna Convention on the Law of Treaties 1969, Article 26.

³³ For a comparison of the three regional Courts on human rights, see the website of the Association for the Prevention of Torture at <http://www.apr.ch> (21 June 2004).

Table 3.2 Compliance and enforcement mechanisms

Parties / Mechanism	Examples	Seafarers' Procedural Rights
State v State Adjudication or Complaint	<ul style="list-style-type: none"> • International Court of Justice • International Tribunal for the Law of the Sea • European Court of Human Rights • UN Committees on Human Rights • ILO complaint procedure 	<ul style="list-style-type: none"> • No direct rights for seafarers • Possible for a State to take up an action on behalf of a seafarer under diplomatic protection • Conceivable that a group may be given intervener status in ITLOS litigation
Individual v State Adjudication	<ul style="list-style-type: none"> • European Court of Human Rights 	<ul style="list-style-type: none"> • Direct rights to a judicial remedy
Individual v State Complaint	<ul style="list-style-type: none"> • Human Rights Committee • ILO complaint procedure (complainant must be delegate of ILC) 	<ul style="list-style-type: none"> • Procedural rights to complain, but findings not directly enforceable
International Supervision Mechanism Reports	<ul style="list-style-type: none"> • Human Rights Committee • Committee on Economic, Social and Cultural Rights • ILO Committee of Experts • Reports under ESC 	<ul style="list-style-type: none"> • Individuals and groups can bring information to the attention of committees, but no directly enforceable rights
International Supervision Mechanism -Complaints	<ul style="list-style-type: none"> • Human Rights Committee • ILO complaint procedure (complainant must be delegate of ILC) • ESC Collective complaints procedure • Inter American Commission • African Commission on Human and Peoples Rights 	<ul style="list-style-type: none"> • Individuals and/or groups can submit complaint, but findings not directly enforceable
State v Ship/ Owner or other private party	<ul style="list-style-type: none"> • Flag State, Port State, Coastal State enforcement of IMO and ILO Conventions and UNCLOS. Eg. Paris MOU, Tokyo MOU 	<ul style="list-style-type: none"> • Rarely gives seafarers direct legal rights of action, but may provide a channel for seafarer complaints
Individual v State National Courts	<ul style="list-style-type: none"> • Enforcement of international standards in national courts (where incorporated) • Actions against public bodies where seafarers' rights are part of national law (eg enforcement of constitutional rights) 	<p>National level: see Chapters 6–17.</p>
Individual v Ship/Owner or other private party National Courts	<ul style="list-style-type: none"> • Wage claim • Personal injury action 	<p>National level: see Chapters 6–17.</p>

- 3.22** Enforcement mechanisms are usually categorized by the type of UN body that receives communications or carries out the monitoring process. These can broadly be divided into three categories: treaty or Convention based bodies and mechanisms (as being related to a specific human rights treaty), such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Elimination of Racial Discrimination; Charter based bodies and mechanisms, such as the UN Commission on Human Rights and the UN Sub-Commission on the Promotion and Protection of Human Rights; and mechanisms contained in UN specialised agencies, such as the ILO. ILO enforcement mechanisms are considered later in this Chapter.

Treaty-based procedures

Reporting procedures

- 3.23** The six core human rights treaties establish committees that monitor their implementation.³⁴ Once a State has ratified one of these treaties, it is required to submit, on a periodic basis, a report to the relevant UN committee outlining the progress made and the problems encountered in implementing the treaty.³⁵ The committees are given the task of reviewing these reports during their annual meetings. The review usually takes the form of what is known as constructive dialogue, in which representatives of the State concerned are invited to attend a committee's meeting to present the State report and respond to inquiries made by committee members. Following this, the committee concerned will adopt a set of concluding observations outlining areas where the committee considers that the State is not complying with the treaty, and will make specific recommendations for action by the government.
- 3.24** Non-governmental organizations (NGOs) can play an important role in reporting procedures, both at the national and the international level, since they can submit independent information to the committees to supplement or contradict the version given by governments. There is therefore scope for raising issues relevant to seafarers before a number of committees when the issues fall within the scope of a relevant treaty. This can inform and influence the issues which a committee raises with the government and which it then includes in its recommendations to the government concerned.

³⁴ Human Rights Committee (for the CCPR), Committee on Economic, Social and Cultural Rights (for the CESCR), Committee on the Elimination of Racial Discrimination (for the CERD), Committee on the Elimination of Discrimination against Women (for the CEDAW), Committee Against Torture (for the CAT), Committee on the Rights of the Child (for the CRC).

³⁵ It should be noted however that the committees have no power to enforce this requirement and national governments often miss reporting deadlines or fail to submit reports.

Individual complaint procedures

Four of the six principal UN treaties have complaints procedures which permit individuals to lodge complaints with the supervisory committee alleging that their rights granted under the treaty have been violated by a State, provided that the State concerned has accepted the procedure.³⁶ Domestic remedies must be exhausted, however, before a case can be considered admissible. Also, remedies available are limited³⁷ and the UN mechanisms are often slow and time consuming. However, for seafarers, as for most individual complainants, the value of a decision from a UN committee lies in the fact that attention is drawn to a State's non-compliance with its human rights obligations which is likely to generate significant pressure on the government. **3.25**

The most important treaty based procedure open to individuals is the individual complaint procedure before the Human Rights Committee³⁸ under the First Optional Protocol to the International Covenant on Civil and Political Rights 1966 (CCPR). Article 1 of the Protocol allows an individual who is a victim of a violation of one of the rights set forth in the CCPR³⁹ to submit a communication to the Committee for consideration. The Human Rights Committee is not a court but an expert body composed of 18 independent persons of recognized competence in the field of human rights. The Committee examines the issue of admissibility first.⁴⁰ The State against which the complaint is filed must be a party to both the CCPR and the Optional Protocol.⁴¹ Also, the applicant must be subject to the jurisdiction of the State against which the complaint is made. This is of particular significance for seafarers. Thus, a seafarer will be subject to the jurisdiction of the flag State when the ship is on the high seas, and the **3.26**

³⁶ Under the CCPR, First Optional Protocol; CAT, Article 22; CERD, Article 14; and CEDAW, Optional Protocol. Efforts are underway to adopt a system in relation to CESCPR but the main objection seems to be that economic and social rights are considered non-justiciable. See M Craven, 'The Committee on Economic, Cultural and Social Rights', in *Economic, Cultural and Social Rights*, (2nd edn, 2001).

³⁷ None of the UN bodies has legal competence to order compensation or other remedies. The Human Rights Committee may make recommendations calling on States to pay compensation, or afford other remedies, but they do not specify the amounts or other forms of redress due.

³⁸ Set up under Part IV of the CCPR. See P Alston, 'The Commission on Human Rights', in *The United Nations and Human Rights, A Critical Appraisal* (1992) 209.

³⁹ The Committee cannot review in abstract whether national legislation contravenes the CCPR.

⁴⁰ Pursuant to the First Optional Protocol, a petition will be considered inadmissible, *inter alia*, if the complainant has not exhausted all domestic remedies, if the same matter is pending before another international body, or if the complaint is anonymous or incompatible with the CCPR. See S Lewis-Anthony, 'Treaty-based Procedures for Making Human Rights Complaints within the UN System', in *Guide to International Human Rights Practice* (2nd edn, 1992) 46.

⁴¹ First Optional Protocol, Article 1.

admissibility requirement is also met when the violation occurs in the territorial waters of a State.⁴²

- 3.27** Subject to issues of admissibility, the Committee brings any communication submitted to it to the attention of the defendant State. It then considers all written information in closed meetings. The views of the Committee are taken by the vote of the majority of the members present. They are communicated to the State party concerned and to the individual. They are not legally binding under public international law but are considered authoritative. The only sanction is the publication of the findings and recommendations of the Committee in the annual report of the Committee.⁴³

Inquiry procedures

- 3.28** Under the CAT and the Optional Protocol to the CEDAW, the respective committees have the power to institute an inquiry on their own initiative into the situation in a country. The procedure has been initiated under the CAT on only a few occasions. The CEDAW procedure has yet to enter into force.

Charter-based procedures

- 3.29** Whilst the mainstay of human rights supervision and enforcement is treaty-based, this is supplemented by several Charter based procedures developed by the UN Commission on Human Rights. The two main procedures, known as the 1235 and 1503 procedures (named after Economic and Social Council (ECOSOC) resolutions), allow for consideration of petitions and other urgent information by the UN Commission on Human Rights and its Sub-Committee and provide for a range of follow up measures, such as the conduct of on-site visits to the States and the drafting of reports by country or thematic special rapporteurs, representatives, experts and working groups. The procedures however are not intended to provide individual redress but to inform the body concerned of particular situations or the existence of particular types of violations that may need to be addressed. They are primarily political procedures insofar as their operation is ultimately dependant upon decisions being taken within the Commission itself (which is composed of UN member States) and they are unlikely to be of assistance to seafarers.

⁴² *Sergio Euben Lopez Burgos v Uruguay*, Communication No R 12/52 (6 June 1979), UN Doc Supp No 40 (A/36/40)176 (1981) (United Nations).

⁴³ In 1990, a procedure for monitoring the implementation of the decisions of the Committee was established and a specific organ, the Special Rapporteur for the Follow-Up of Views was set up, given the task of ensuring compliance with the Committee's findings. However, the Special Rapporteur has no more enforcement powers than the Committee.

Table 3.3 CCPR complaint procedure

Mechanism Overview	Individual complaint procedure before the Human Rights Committee (the Committee) pursuant to the First Optional Protocol to the CCPR
What it covers	Enforcement of rights set forth in the CCPR
Of interest to seafarers	<ul style="list-style-type: none"> • Right to a legal remedy (for breach of CCPR right) • Right to life • Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment • Right not to be held in slavery or be required to perform forced or compulsory labour • Right to liberty and security of the person • Right to privacy and to family life • Right to freedom of association and to form and join trade unions • Right to be free from discrimination
Type of procedure	<ul style="list-style-type: none"> • Quasi-judicial/non binding procedure involving three stages: <ul style="list-style-type: none"> – Preliminary assessment on admissibility – Consideration of information in closed meeting by a Working Group of the Committee – Final stage before the Committee
Who can bring a case	Victim of a violation of one of the rights set forth in the CCPR subject to the jurisdiction of the State against whom the complaint is alleged
Admissibility requirements	<ul style="list-style-type: none"> • All available domestic remedies must be exhausted unless the application of remedies is unreasonably delayed • Communications must not be anonymous or an abuse of the right of submission or incompatible with the provisions of the CCPR • Matter must not be under investigation or settlement in other international procedures
Procedure	<p>Nature: Non judicial Structure: Mostly written Hearing: None Appeal: None Intervention of third parties: NGOs may be invited to comment</p>
Remedies	<ul style="list-style-type: none"> • Findings and recommendations of the Committee are published in annual report of the Commission • Monitoring of the implementation of the recommendation by a Special Rapporteur for the follow-up of views • Publication of the report of the Committee on the findings of the monitoring procedure
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> • Publicity of the views of the Committee draws attention to violations. • Direct access to justice for individual human rights violations <p>Disadvantages</p> <ul style="list-style-type: none"> • Non-binding nature of the outcome • No power to award compensation • Length of procedure (admissibility determination can take up to 2 years and determination on the merits can take up to 6 years) • Proceedings are not public • No on-site investigations (special measures not widely used although available in theory)

(2) International Labour Organization

Preliminary observations

- 3.30** The ILO operates a unique supervisory system for enforcement of its labour standards. Once a Convention is ratified, the State is under an obligation to make the provisions of the Convention effective in law and practice.⁴⁴ There are then two key elements to the ILO's system of supervision. First, States have an obligation to report to the ILO, among other things, on the measures taken to give effect to Conventions they have voluntarily ratified.⁴⁵ There are requirements concerning the periodicity of the reports,⁴⁶ and the contents of the reports.⁴⁷ Secondly, reports by States are examined by two separate committees: in the first instance, by a Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts), and subsequently at the annual session of the International Labour Conference (ILC), where the report of the Committee of Experts is examined by a special tripartite Conference Committee.⁴⁸

*Committee of Experts on the Application of Conventions and Recommendations
(Committee of Experts)*

- 3.31** The Committee of Experts consists of 20 independent experts who are appointed by the Governing Body of the ILO.⁴⁹ Their task is to examine government reports on the application of ratified Conventions and to determine the extent to which the situation in each country appears to be in conformity with ratified Conventions. For this task, the Committee refers not only to the government report, but also to any other information available, such as texts of collective agreements, or court decisions, sources used by other UN organizations in their meetings, or decisions or information submitted by workers' or employers' organizations. In this last respect, workers and employers can participate fully in the supervisory system of the ILO.

⁴⁴ ILO Constitution, Article 19(5).

⁴⁵ ILO Constitution, Article 22.

⁴⁶ Generally reports are requested every other year on important Conventions, such as those dealing with basic human rights, while for other Conventions, reports are normally requested at five yearly intervals.

⁴⁷ Each report has to be supplied on the basis of a report form which is approved by the Governing Body of the ILO.

⁴⁸ In addition, under Article 19(5)(e) and (6)(d) of the ILO Constitution, the Governing Body can request reports from each member State on the position of its law and practice in regard to the matters dealt with in Conventions which have not been ratified, or Recommendations, showing the extent to which effect is given, or is proposed to be given, to any of the provisions of the Conventions or Recommendations.

⁴⁹ Members of the Committee are appointed for a period of three years, their term of office being renewable for successive periods of three years. They meet towards the end of each year in Geneva.

If the Committee of Experts finds that a government has not given effect to a ratified Convention, or complied with its constitutional obligations regarding Conventions and Recommendations, it draws up comments in the form of observations which are published in its report. Generally, this refers to more serious or long standing cases of failure to comply with obligations. If a minor discrepancy is involved, the Committee can make 'direct requests' to governments to initiate dialogues with respect to particular problems, or to seek clarification. These 'direct requests' are not published but are sent directly to the governments concerned and are copied for information to workers' and employers' organizations in the country concerned. **3.32**

Conference Committee on the Application of Conventions and Recommendations
(Conference Committee)

The report of the Committee of Experts is submitted to each annual session of the ILC, where it is examined and discussed by the Conference Committee. This is a tripartite Committee consisting of governments, workers and employers. The Committee examines individual cases. Governments which have been mentioned in the report of the Committee of Experts as not fully applying a ratified Convention may be invited to explain their position to the Conference Committee. The object of the Committee is not to apportion blame but to adopt a positive attitude to obtain results. This form of moral sanction, in effect mobilizing the pressure of public opinion in favour of renewed efforts to meet commitments, appears to have been quite effective in securing improved implementation of ILO Conventions to date.⁵⁰ The Conference Committee submits a report to the ILC in which attention is drawn to the most serious cases of failure to comply with ILO instruments. The report is discussed in one or more of the plenary sessions of the ILC. **3.33**

ILO mechanisms

There are three types of complaint procedures under the ILO Constitution:⁵¹ a representation under the ILO Constitution, Articles 24 and 25; a complaint under the ILO Constitution, Article 26; and a special procedure for the Freedom of Association and Protection of the Right to Organize Convention 1948 (ILO C87) and the Right to Organize and Collective Bargaining Convention 1949 (ILO C98) (on freedom of association and the effective recognition of the right to collective bargaining). **3.34**

⁵⁰ See K Samson, 'The Standard-Setting and Supervisory System of the International Labour Organisation', *Social Rights as Human Rights* (1994) 129.

⁵¹ Both Article 24 and Article 26 procedures are referred to in the ILO Constitution as 'complaints' procedures however only Article 26 is a 'complaint' in practice.

Representation procedure

- 3.35** Article 24 of the ILO Constitution provides a mechanism whereby any workers' or employers' organization may file a representation against a State alleging that it is not effectively observing the provisions of a particular Convention which the State has ratified. The workers' or employers' organization making the representation does not have to be connected in any way with the case. The representation must be in writing and be sent to the International Labour Office in the first instance. The Office informs the government concerned and the Governing Body of the ILO.
- 3.36** The Governing Body then determines receivability.⁵² If the representation is admitted, the matter is then examined by a tripartite ad hoc committee consisting of three members appointed by the Governing Body. After examination, the ad hoc committee reports back to the Governing Body and the government concerned is invited to send a representative. The Governing Body can then decide to publish the representation and any statement made in reply to it.⁵³ This closes the procedure.
- 3.37** The structure and function of the representation procedure has been developed by the Governing Body in practice in three ways. First, the representation procedure has been used as a tool to focus more on particular violations of international obligations than is normally possible in the context of the work of the Committee of Experts.⁵⁴ In this respect, the Governing Body has sometimes referred the subject matter of a representation to the Committee of Experts for the latter to include the issue on the agenda of its routine supervision.⁵⁵ Secondly, the reports may be published in the Official Bulletin, thus providing a further form of moral blame for the government concerned. Thirdly, in the course of a representation procedure, the Governing Body may at any time commence a complaint procedure, under Article 26 of the ILO Constitution.
- 3.38** The representation procedure has been used with increasing frequency.⁵⁶ The procedure is preventative in nature, rather than curative of particular violations. However, whilst it does not provide direct remedies for violations suffered by individuals, it does serve a number of long term objectives of protection in that it informs governments of their responsibilities under ILO

⁵² Article 2 of the Standing Orders: Representations, Articles 24 and 25 of the Constitution.

⁵³ ILO Constitution, Article 25.

⁵⁴ The Committee of Experts is currently over-burdened. It examines nearly 1,500 reports per year. For a more detailed analysis, see E Cordova, 'Some Reflections on the Over-Production of International Labour Standards' (1997) 18 Comp Lab Law J 362.

⁵⁵ See Samson and Schindler, 'The Standard Setting and Supervisory System of the ILO', in *An Introduction to the International Protection of Human Rights*, (2nd edn, 1999).

⁵⁶ *ibid*, 205.

Conventions and serves as a catalyst for implementing laws at the national level.

Complaint procedure

Pursuant to Article 26 of the ILO Constitution, a complaint can be made that an ILO member State is not satisfactorily securing the effective application of an ILO Convention which it has ratified. The procedure is more far-reaching than the representation procedure, however in practice it is used less often.⁵⁷ The right to file a complaint under Article 26 belongs to another ILO member State which has ratified the same Convention, or to any delegate of the ILC. Workers' and employers' associations are not allowed to file a complaint in their ordinary capacity unless they are delegates to the ILC. **3.39**

On receipt of a complaint under Article 26, the Governing Body of the ILO may communicate the complaint to the government in question. Thereafter, it may appoint a Commission of Inquiry (composed of three prominent persons appointed in a personal capacity) whose task is to thoroughly investigate the complaint. The Commission can structure the procedure as required by the case.⁵⁸ The procedures adopted in the past have included fact-finding, hearing witnesses and asking for information from NGOs. The Commission prepares a report of its findings, including recommendations, which is sent to the Governing Body and to each of the governments concerned in the complaint. The report is also published in the Official Bulletin. Each of the governments concerned have three months to indicate whether or not it accepts the recommendations made in the Commission's report. If any government concerned does not accept the report, it may refer the complaint to the International Court of Justice for final decision.⁵⁹ The Committee of Experts follows up on the implementation of the recommendations. **3.40**

Special procedure

A special freedom of association complaint procedure was set up in 1950 by an agreement between the UN Economic and Social Council and the ILO Governing Body. It is appropriately called 'special' on the ground that it is available only with respect to violations of the Freedom of Association and Protection of the Right to Organize Convention 1948 (ILO C87) and the Right to Organize and Collective Bargaining Convention 1949 (ILO C98). A complaint can be **3.41**

⁵⁷ As at November 1998, 26 complaints had been made under Article 26 of the ILO Constitution. See: http://www.ilo.org/public/english/standards/norm/enforced/complnt/a26_use.htm#list (21 June 2004).

⁵⁸ In a case brought by France against Panama, concerning the observance by Panama of ILO C53, ILO C23 and ILO C68, the complaint was deferred, and ultimately discontinued, to allow for ILO direct contacts missions or technical assistance to overcome the problems.

⁵⁹ ILO Constitution, Article 29(2).

Table 3.4 ILO Representation procedure

Mechanism overview	Representation by workers' or employers' organization, or by member State of the ILO, to the Governing Body of the ILO pursuant to Articles 24 and 25 of the ILO Constitution
What it covers	Enforcement of rights set forth in ratified ILO Conventions
Of interest to seafarers	International standards set forth in ILO Conventions applying to seafarers
Type of procedure	Non-binding procedure, mostly in writing: <ul style="list-style-type: none"> • Governing Body determines receivability • Tripartite Ad Hoc Committee (three members appointed by the Governing Body of the ILO) examines the matter • Governing Body considers report and may publish the representation or initiate a complaint (under Article 26 of the Constitution)
Who can bring a case	<ul style="list-style-type: none"> • Any workers' or employers' organization, regardless of any link between the complainant and the violation alleged • Any member State party to the Convention, the non-observance of which is alleged
Admissibility requirements	<ul style="list-style-type: none"> • Defendant State must be member of the ILO and have ratified the relevant ILO Convention • Complaint must be in writing and from an industrial association of employers or workers • Complaint must make specific reference to Article 24 of the ILO Constitution and indicate alleged breach
Procedure	<p>Nature: Non-judicial/reporting Structure: Mostly written Hearing: Optional Appeal: None Intervention of third parties: Not explicitly authorized</p>
Remedies	<ul style="list-style-type: none"> • Published report of Ad Hoc Committee in Official Bulletin of the ILO • Commencement <i>ex officio</i> of a complaint procedure under Article 26
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> • Availability to workers' and employers' organizations • Focus on specific violations <p>Disadvantages</p> <ul style="list-style-type: none"> • Non-binding report • No individual complaints • No compensation awarded

filed by governments, workers' or employers' organizations having consultative status in the ILO, or by workers' or employers' organizations having an interest in the matter.⁶⁰ In practice, complaints are usually filed by workers' organizations.

⁶⁰ The complaint can be made direct to the ILO, or through the United Nations, which will be transmitted to the International Labour Office.

Table 3.5 ILO Complaint procedure

Mechanism overview	Complaint by a member State of the ILO, or a delegate of the ILC to the Governing Body of the ILO under Article 26 of the ILO Constitution
What it covers	Enforcement of rights set forth in ratified ILO Conventions
Of interest to seafarers	International standards set forth in ILO Conventions applying to seafarers
Type of procedure	Quasi-judicial: <ul style="list-style-type: none"> • Governing Body refers matter to Commission of Inquiry to investigate the complaint • Commission's report sent to Governing Body and to government concerned and then published • Committee of Experts follows up on implementation of recommendation
Who can bring a case	<ul style="list-style-type: none"> • Another ILO member State that has ratified the same Convention • Any Delegate of the ILC during the session of the Conference • The Governing Body of the ILO on its own motion
Admissibility requirements	<ul style="list-style-type: none"> • Defendant State must be a member of the ILO and have ratified the relevant ILO Convention • Membership of the ILC as a delegate • Complaint must be in writing and make reference to Article 26 of the ILO Constitution and to alleged breach
Procedure	<p>Nature: Non-judicial/reporting Structure: Inquisitorial Hearing: Optional Appeal: None Intervention of third parties: Not explicitly authorized, but the Commission of Inquiry can ask for information from third parties</p>
Remedies	<ul style="list-style-type: none"> • Published report of the Commission of Inquiry in Official Bulletin of the ILO • In case of failure to carry out the recommendations, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> • Fact-finding proceedings • Governments have a constitutional obligation to cooperate in providing information <p>Disadvantages</p> <ul style="list-style-type: none"> • Non-binding report • Non-availability to individuals or NGOs (unless individual is a delegate of the ILC) • No compensation awarded

Individuals may not file cases. Unlike representations and complaints, a case can be brought against any State, even if it has not ratified the relevant Convention.

Complaints are dealt with by the Committee on Freedom of Association (CFA). **3.42**
The CFA is a tripartite body comprised of nine members with an independent

chairman. It functions in a quasi-judicial manner.⁶¹ Hearings are held in private and no representative of the State, or any person occupying an official position in the organization having filed the complaint, may participate. Following consideration of a case, the CFA submits recommendations to the Governing Body concerning action a government might take with regard to any anomalies they might have discovered. The Governing Body may transmit the recommendations to the government, but care is taken to avoid direct accusations and use of the term 'violations'. The reports of the CFA are not binding upon the States. The decisions of the Committee are approved by the Governing Body and then published in the ILO Official Bulletin.⁶²

- 3.43** A wide variety of factual and legal situations have been presented to the CFA over the years. ILO C87 and ILO C98 have been widely ratified and the CFA has given greater precision to them in the many cases it has considered.⁶³ As a consequence, there is a great deal of jurisprudence on the matter which has served to substantiate a right to freedom of association.⁶⁴

Effectiveness of ILO supervisory mechanisms

- 3.44** Many benefits for workers can be observed in the ILO system however some concerns can also be raised about how effective the mechanisms are for providing relief for violations of seafarers' rights. First, although international labour standards exist, violations continue. This is evidenced by the high number of complaints submitted to the ILO supervisory system each year. A high volume of complaints suggests that the parties concerned have confidence in the system, yet it also casts doubt if breaches are not curtailed. Secondly, it appears that some States are unwilling to give effect to Conventions. They are late in submitting their reports (or sometimes do not submit them at all), they allow violations to continue and they ratify Conventions and never implement them. This may be explained in part by changing political and economic circumstances which can create difficulties for maintaining an existing level of social protection.⁶⁵ Also, some States may face practical difficulties, such as

⁶¹ It enjoys discretion as to the procedure, and has used several types of procedural schemes ranging from proceedings based on written submissions to direct contact missions to States.

⁶² See Samson and Schindler, 'The Standard Setting and Supervisory System of the ILO', in *An Introduction to the International Protection of Human Rights*, (2nd edn, 1999) 210.

⁶³ The CFA has considered well over 2,000 cases since it was established.

⁶⁴ See the discussion in Ch 2, C. (7) freedom of association and the right to collective bargaining above.

⁶⁵ On the consequences of changing economic and political world order for the ILO, see also B Creighton, 'The Internationalisation of Labour Law', in R Mitchell (ed) *Redefining Labour Law* (Centre for Employment Law and Labour Relations Law, Melbourne, 1995) and N Haworth and S Hughes, 'Trade and International Labour Standards: Issues and Debates over a Social Clause', 39 *Journal of Industrial Relations* (1997) 179, 188.

Table 3.6 ILO Special procedure

Mechanism overview	Complaint by member States of the ILO, workers' or employers' organizations to the Committee on Freedom of Association
What it covers	Enforcement of rights set forth in ILO C87 and ILO C98
Of interest to seafarers	Protection of seafarers' rights contained in ILO C87 and ILO C98
Type of procedure	Special complaint procedure established by the 1950 agreement between the ECOSOC and the ILO Governing Body. <ul style="list-style-type: none"> • Preliminary stage before the Freedom of Association Committee • Possible referral to the Fact-Finding and Conciliation Commission on Freedom of Association • Recommendation to the Governing Body of the ILO
Who can bring a case	<ul style="list-style-type: none"> • A member State • Any workers' or employers' organization having consultative status in the ILO and an interest in the matter
Admissibility requirements	<ul style="list-style-type: none"> • Locus standi of the complainant • Defendant State must be a member of the ILO or the UN but need not have ratified relevant ILO Convention • Complaint must be in writing and make reference to alleged breach of relevant Convention
Procedure	<p>Nature: Non-judicial/reporting</p> <p>Structure: Relevant bodies enjoy wide discretion in procedural matters</p> <p>Hearing: Possible in principle</p> <p>Appeal: None</p> <p>Intervention of third parties: Not explicitly authorized</p>
Remedies	<ul style="list-style-type: none"> • Published report of findings of the Freedom of Association Committee in the Official Bulletin of the ILO • Report of the Fact-Finding and Conciliation Commission which may contain recommendations
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> • Fact-finding proceedings • Availability to workers' organizations • Availability against a State that is not party to or has not ratified ILO C87 or ILO C98 • Expeditionness of the hearings (generally completed in less than a year) • Integration of procedures with other ILO procedures <p>Disadvantages</p> <ul style="list-style-type: none"> • Non-binding report • No individual complaints • Hearings conducted in private

inadequate resources, in implementing their treaty obligations. However, the absence of sanctions by the ILO to ensure observance of treaty obligations means that defaults in the system can continue. Thirdly, even though the ILO mechanisms have certain quasi-judicial features, they do not lead to binding determinations. Some commentators argue that changes in social matters have

greater economic implications than those affecting civil and political rights, and that this non-intrusive approach of ILO supervisory mechanisms is better suited to rights which require some degree of progressive implementation.⁶⁶ However, the non-binding nature of the ILO enforcement mechanisms means they are less effective than, for example, some of the enforcement mechanisms of the IMO. Finally, although the ILO's tripartite system is considered to be one of its greatest strengths, the procedures might also be seen to be impenetrable and difficult to use. Any notion that they are aimed at preventing future abuses and building up case law militates against their use by individuals suffering from violations requiring immediate relief, such as is often the case with seafarers.

(3) *International Maritime Organization*

- 3.45** IMO Conventions place obligations on States to comply with certain standards. They give no direct rights or remedies to individuals. In general, once a treaty has been adopted, it is left to the States parties to deliver its implementation and IMO can only encourage States to ratify treaties and to implement them internally. However, certain IMO Conventions contain innovative mechanisms for making their standards effective. Three procedures will be considered briefly only in the context of seafarers' rights: the STCW White list, the tacit acceptance amendment procedure and the safety management system under the ISM Code.⁶⁷

The STCW Convention 'White List'

- 3.46** The amendments to the STCW Convention in 1995 introduced, for the first time, a role for the IMO in relation to compliance and implementation. Under Chapter I, regulation I/7 of the Convention, parties are required to provide detailed information to the IMO concerning administrative measures taken to ensure compliance with the Convention; education and training courses; certification procedures; and other factors relevant to implementation. On receipt of this information, it is subject to scrutiny by the IMO with the object of ensuring that the Convention is being given 'full and complete effect'. The Secretary-General is assisted by a panel composed of 'competent persons approved by the Maritime Safety Committee, including competent persons

⁶⁶ There are many that would argue against this view in stating that the enforcement of civil and political rights require just as much expenditure. See M Craven, 'The Justiciability of Economic, Cultural and Social Rights', in R Burchill, D Harris and A Owers (eds) *Economic, Social and Cultural Rights: Their implementation in UK law* (1999).

⁶⁷ The IMO, as well as the ILO, are also giving cognizance to the oversight system of the International Civil Aviation Organization.

made available or recommended by the Parties,⁶⁸ who express their views on the information provided by the State concerned and the degree of compliance with the provisions of the Convention.⁶⁹ The Secretary-General then reports to the Maritime Safety Committee (MSC). Countries assessed to be properly implementing the STCW Convention are included on a so-called White List.⁷⁰ A position on the White List entitles other parties to the Convention to accept in principle that certificates issued by or on behalf of the parties on the list are in compliance with the Convention.⁷¹

By requiring administrations to submit to the Secretary-General detailed information concerning administrative procedures taken by them to ensure compliance with the Convention, and by giving the MSC the task of adopting the White List, IMO has been given a watchdog role in the implementation process which represents an important new function for the Organization. **3.47**

Tacit acceptance amendment procedure

Another aspect of IMO procedures that goes towards ensuring compliance and enforcement is the tacit acceptance amendment procedure employed in certain IMO Conventions. This procedure began to find its way into new Conventions of the IMO in the 1970s. By that time, it was becoming increasingly apparent that with rapid changes in technology, the technical content of Conventions adopted was lagging behind not only technology, but also the will of the international maritime sector. Procedures for getting Conventions into force were stringent, and it was difficult to get governments to conduct the necessary review of the proposed amendments to the Convention, to respond positively in support of the amendments, and to enact those in national law. In view of this, it was realized that what was required was a formula whereby amendments to the technical provisions could be made by a more streamlined process. The new formula was known as the tacit acceptance amendment procedure, whereby amendments would enter into force on a specific date contained in the amendment unless a certain specified number of States objected to the provisions. In other words, silence would be deemed acceptance and no further action would be required if a State approved the new measures. The amendment does not enter into force with respect to a party which has objected to the amendment. **3.48**

⁶⁸ STWC Code A – I/7 (5).

⁶⁹ STWC Code A – I/7 (8).

⁷⁰ For details of parties included on the White List, see: http://www.imo.org/InfoResource/mainframe.asp?topic_id=67&doc_id=1026. National audits must be communicated to the IMO at five yearly intervals to ensure ongoing compliance.

⁷¹ The fact that a party is not on the White List does not, however, invalidate certificates or endorsements issued by that party, as nothing in the Convention prevents the employment of any seafarer who holds a valid certificate or endorsement issued by a party.

- 3.49** Thus, for example, the International Convention for the Safety of Life at Sea 1974 as amended, and Protocols thereto (the SOLAS Convention) also contains provisions for its amendments. This Convention has relatively brief Articles with the main body of the technical provisions being contained in Annexes containing several chapters. In this Convention, amendments to the Articles or to Chapter I of the Annex (containing general provisions) require explicit acceptance, but amendments to the Annex other than Chapter I can be accomplished by the tacit amendment procedure. In fact, whole new chapters can be added by the tacit amendment procedure. This was the case with 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. Also, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 as amended contained provisions for explicit acceptance of amendments to the Articles of the Convention, but allows for the tacit acceptance of the Annex to the Convention. In the 1995 amendments to the Convention, the Annex was completely rewritten, although the Articles remained the same. Thus, the separation of the technical and non-technical components of recent Conventions allows the technical provisions to be amended by tacit acceptance and thus allows the Convention to remain up to date.

Safety management system under the International Management Code for the Safe Operation of Ships and for Pollution Prevention 1993 (ISM Code)

- 3.50** A further aspect of compliance and enforcement in IMO instruments is the safety management system required under the provisions of the ISM Code. As seen in Chapter 2, the purpose of the ISM Code is to provide an international standard for the safe management and operation of ships, and for pollution prevention. In pursuance thereof, the ISM Code provides that the ship should be operated by a Company⁷² which has been issued with a Document of Compliance (DOC) (or Interim DOC), valid for a period not exceeding five years. Further, a ship must be issued a Safety Management Certificate (SMC) for a period not exceeding five years. The DOC can be withdrawn by the administration or, at its request, by the Contracting Government which issued the document if, inter alia, there is evidence of non-conformities with the Code.⁷³

⁷² Defined in Section 1.1.2 of the ISM Code.

⁷³ Cyprus was one of the first flag States to suspend the DOC of a large shipping company, and to give an ultimatum to another shipping company, for non compliance relating to the payment of wages to seafarers. It was considered that if seafarers did not receive wages on time, they became demotivated, and that amounted to non-compliance with the ISM Code.

(4) *Regional systems for human rights enforcement*

Council of Europe system

At European level, there are two principal mechanisms for enforcement of human rights for seafarers: the European Court of Human Rights, whose function is to supervise the implementation by contracting States of the rights and freedoms enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR);⁷⁴ and the system of enforcement under the European Social Charter 1961 (ESC) and Protocols thereto and the European Social Charter (Revised) 1996 (Revised ESC). **3.51**

European Court of Human Rights

The European Court of Human Rights (the European Court) has jurisdiction to deal with both inter-State complaints⁷⁵ and individual complaints.⁷⁶ Any contracting State may refer to the European Court any alleged breach of the provisions contained in the ECHR by another contracting State.⁷⁷ Individual complaints can be brought by any person, non-governmental organization or group of individuals claiming to be a victim of a violation of the rights and freedoms recognized by the ECHR. However, the individual must have exhausted all domestic remedies first.⁷⁸ Third party intervention is provided for in the ECHR, Article 36, which allows the State of which the applicant is a national to submit written comments and to take part in hearings; and further enables the President of the Court to invite any other contracting State, or any person concerned who is not the applicant, to submit written comments or take part in hearings. **3.52**

Cases submitted to the European Court are distributed among a Committee of three judges, Chambers of seven judges and a Grand Chamber of 17 judges. The three-judge Committee deals with admissibility. Once a case is considered admissible, the Committee will attempt to obtain a settlement of the matter. If this is not possible, the case proceeds to a hearing on the merits which is dealt with by a seven-judge Chamber. If there is a special matter arising that affects all of the Court's earlier jurisprudence, the Grand Chamber may, with the consent **3.53**

⁷⁴ Note also that there is a European Convention for the Prevention of Torture and Inhuman and Degrading Treatment but it does not include an individual complaints mechanism. It is overseen by a Committee for the Prevention of Torture comprised of independent experts.

⁷⁵ ECHR, Article 33.

⁷⁶ ECHR, Article 34.

⁷⁷ To date, no such complaints have been brought.

⁷⁸ ECHR, Article 35.

of both parties, be called upon.⁷⁹ The Grand Chamber also provides advisory opinions.⁸⁰

- 3.54** The ECHR obliges contracting States to secure the rights and freedoms set forth in Article 1 of the Convention to everyone within their jurisdiction. This means that, when on the flag ship of a State party to the ECHR, or in the port or territorial waters of a contracting State, the seafarer will enjoy the rights set forth in the ECHR irrespective of his nationality.⁸¹ The European Court can award damages to the injured party provided that the internal law of the State involved does not allow full reparation.⁸²
- 3.55** However, despite what is considered to be the success of the European Court system, several shortcomings for seafarers are obvious. The scope of application of the ECHR is limited to contracting States (members of the Council of Europe)⁸³ yet a large number of these States are not maritime States. It is also restricted to civil and political rights and does not include, for example, the right to work or to safe and healthy working conditions. Finally, as with most international human rights complaints mechanisms, recourse to the European Court can only be gained once remedies available under national law are exhausted. This effectively entails long delays which may be impractical for seafarers seeking immediate relief by way of a court order.

System of enforcement under the ESC

- 3.56** The ESC⁸⁴ guarantee fundamental social and economic rights. The regular system of enforcement of States' parties' obligations under the ESC⁸⁵ is through a system of State reporting. Thus, every year, the States' parties submit a report indicating how they implement the Charter in law and in practice. States' reports are first examined by the European Committee of Social Rights, a Committee of 13 independent, impartial members elected by the Council of Europe Committee of Ministers. The Committee examines the reports and

⁷⁹ One of the parties may also request leave for referral to the Grand Chamber. This request for leave is judged by a five-judge Chamber.

⁸⁰ ECHR, Article 47.

⁸¹ See the discussion in Ch 4 below.

⁸² ECHR, Article 41 refers to 'just satisfaction'.

⁸³ Note that the coverage of the ECHR is quite separate from anything to do with the European Union although some of the ECHR contracting States may also be a party to the European Union.

⁸⁴ The Revised ESC embodies in one instrument all rights guaranteed by the ESC and the Additional Protocol to the ESC 1988, and adds certain new rights. It is gradually replacing the ESC. The Charter website can be accessed at <http://www.coe.int> (21 June 2004).

⁸⁵ Enforcement of the Revised ESC is submitted to the same system of control as the ESC as developed by the Protocol amending ESC 1991 and Additional Protocol ESC 1995 providing a system of collective complaints.

Table 3.7 Council of Europe

Mechanism overview	Judicial procedure before the European Court of Human Rights (the European Court) pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR)
What it covers	Enforcement of rights set forth in the ECHR
Of interest to seafarers	<ul style="list-style-type: none"> • Right to life • Right not to be subjected to torture or to inhuman or degrading treatment or punishment • Right not to be held in slavery or be required to perform forced or compulsory labour • Right to liberty and security of the person • Right to a fair trial • Right to respect for private and family life • Freedom of expression • Freedom of assembly and association • Right to be free from discrimination
Type of procedure	<p>Judicial involving</p> <ul style="list-style-type: none"> • Committee of judges dealing with admissibility • Chamber of judges dealing with merits • Grand Chamber dealing with special matter
Who can bring a case	<ul style="list-style-type: none"> • Contracting State to the ECHR • Any individual, non-governmental organization or group of individuals claiming to be the victim of a violation of a right set forth in the ECHR
Admissibility requirements	<ul style="list-style-type: none"> • Defendant State must be a contracting State to the ECHR • Domestic remedies must be exhausted • Time limit of six months from the date on which the domestic courts took the final decision • Application must not be substantially the same as a matter already examined by the Court or submitted to another procedure of international investigation or settlement unless the application contains relevant new information • Application must not be incompatible with the provisions of the ECHR • Application must not be manifestly ill founded or constitute an abuse of the right of application
Procedure	<p>Nature: Judicial Structure: Inquisitorial Hearing: Public Appeal: Referral to the Grand Chamber Intervention of third parties: Allowed</p>
Remedies	<ul style="list-style-type: none"> • Judgment of the court • Damages can be awarded
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> • Direct access to the court for private persons and groups • Publicity of the hearings • Judgment is final and binding • Supervision of the execution of judgments by the Committee of Ministers at the Council of Europe • Potential of submitting <i>amicus curiae</i> briefs

Table 3.7—continued

	<p>Disadvantages</p> <ul style="list-style-type: none">• Exhaustion of domestic remedies amounting to an admissibility requirement• Limited (territorial and substantive) scope of application• The system is overburdened and backlogged and cases can take up to five years
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decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as conclusions, are published every year. If a State takes no action on a Committee decision (to the effect that it does not comply with the Charter), the Committee of Ministers addresses a recommendation to that State asking it to change the situation in law or in practice. Some commentators suggest however that the recommendations are of little effect in practice as some governments have been found to be in regular breach, and have made little or no effort to change their practices.⁸⁶

3.57 Under a Protocol opened for signature in 1995, which came into force in 1998,⁸⁷ a new system of collective complaints was introduced. To an extent, this has gone some way towards adding new vigour to the ESC. The system allows collective complaints to be brought concerning general non-compliance with the rights under the ESC by non-governmental organizations with consultative status with the Council of Europe and workers and employers' organizations in the country concerned.⁸⁸ Individuals cannot lodge complaints. Complaints are examined in the first instance by the European Committee of Social Rights to decide admissibility. Once the complaint has been declared admissible, a written procedure is set in motion with an exchange of memorials between the parties. The Committee then makes a report to the Committee of Ministers which is made public within four months of it being forwarded. Finally, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the State concerned take specific measures to bring the situation into line with the Charter.⁸⁹

⁸⁶ See KD Ewing, 'Social Rights and Human Rights: Britain and the Social Charter: the Conservative Legacy', 2 (2000) EHRLR 91.

⁸⁷ Additional Protocol to the ESC providing for a System of Collective Complaints (9.11.1995).

⁸⁸ Article 3 of the ESC provides that only NGOs with a particular relevant competence may bring complaints, and a list is created enumerating accredited NGOs. Also where States agree, national NGOs can lodge a complaint.

⁸⁹ There have been 25 complaints received under this procedure as at 10 March 2004.

Table 3.8 Example of collective complaint

<p><i>Complaint No. 7 of 2000 by the International Federation of Human Rights v Government of Greece</i></p> <p>This Complaint concerned two allegations of violation of the prohibition on forced labour (Article 1 (2) ESC) specifically in relation to Articles 205, 207 (1), 208, 210 (1) and 222 of the Code of Public Maritime Law (Legislative Decree No 187 of 1973) and Article 4 (1) of Act No 3276 of 1944 on collective agreements in the merchant navy.</p> <p>These laws provide for penal sanctions against seafarers who refuse to carry out their duties, even when the safety of the vessel and the lives and health of those on board are not endangered.</p> <p>Following examination of the complaint, the European Committee of Social Rights recommended that these measures be abolished and the Council of Europe Committee of Ministers adopted a Resolution.</p>

European Court of Justice

Human rights have become one of the pillars of the European Union even though they did not originally form part of the European framework under the Treaty of Rome.⁹⁰ The Maastricht Treaty, which created the European Union,⁹¹ provides that the ECHR is the foundation of human rights protection in the European Union, along with national constitutional traditions. Although individuals cannot take cases directly to the European Court of Justice (ECJ), and must commence proceedings in a national court, increasingly the ECJ is being called upon to interpret matters concerning human rights and has relied on the ECHR in order to interpret European Community law. It does so through referral of cases by national courts to the ECJ under Article 177 of the Treaty of Rome. Although case law has not touched upon the human rights of seafarers specifically, there has been some case law dealing with the free movement of seafarers as workers within European Union member States.⁹² 3.58

Inter-American system

The inter-American human rights system was born with the adoption of the American Declaration of the Rights and Duties of Man in 1948.⁹³ In 1969, the American Convention on Human Rights (ACHR) was adopted and entered into force in 1978. Promotion and protection of human rights in the system is 3.59

⁹⁰ The Treaty of Rome dealt with human rights in a limited way only. Article 6 prohibits discrimination between EU citizens. Article 48 establishes the right to freedom of workers in the Community; and Article 119 establishes the principle of equal pay for equal work.

⁹¹ The Treaty on European Union, known as the Maastricht Treaty, was signed at Maastricht, the Netherlands on 7 February 1992.

⁹² The first case to decide this was *Case 167/73, The Commission v France* (1974) ECR 359.

⁹³ This is similar in content to the Universal Declaration of Human Rights 1948.

Table 3.9 ESC collective complaint procedure

Mechanism overview	Collective complaint procedure pursuant to the Additional Protocol to the ESC 1995
What it covers	Enforcement of rights set forth in the ESC
Of interest to seafarers	<ul style="list-style-type: none"> • Right to work • Right to just conditions of work • Right to safe and healthy working conditions • Right to fair remuneration • Right to organize • Right to bargain collectively • Right to strike • Right to vocational training • Right to protection of health • Right to social security
Type of procedure	<p>Special complaint procedure involving two stages:</p> <ul style="list-style-type: none"> • European Committee of Social Rights considers admissibility and produces report • Report considered by the Committee of Ministers which issues recommendation or resolution
Who can bring a case	<ul style="list-style-type: none"> • Non-governmental organizations with consultative status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee • Employers' organizations and trade unions in the country concerned • If the State agrees, national NGOs
Admissibility requirements	<ul style="list-style-type: none"> • <i>Locus standi</i> of the complainant • Complaint must be in writing and make reference to a breach of the ESC
Procedure	<p>Nature: Quasi-judicial Structure: Relevant bodies enjoy wide discretion in procedural matters Hearing: Possible in principle (at discretion of Committee) Appeal: None Intervention of third parties: Not explicitly authorized</p>
Remedies	<ul style="list-style-type: none"> • Recommendation of the Committee of Social Rights addressed to State concerned which then must report regarding implementation of the Recommendation • Resolution of the Committee of Social Rights which concludes procedure
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> • Availability to NGOs and trade unions • No victim requirement • No need to exhaust local remedies • No exclusion of matters brought before other national or international procedures <p>Disadvantages</p> <ul style="list-style-type: none"> • Non-binding report • No individual complaints • Demands minimal commitment from States in that they can denounce the Protocol at any time • Maintains close links with a political body—the Committee of Ministers • Procedure can take around two years

dealt with by two entities: the Inter-American Commission on Human Rights, created in 1959,⁹⁴ and the Inter-American Court of Human Rights.⁹⁵

Inter-American Commission on human rights

The Commission is an autonomous body of the Organization of American States (OAS). Its mandate is found in the OAS Charter⁹⁶ and in the American Convention on Human Rights (ACHR).⁹⁷ Complaints can be made to the Commission by individuals, non-governmental organizations legally recognized in one or more member States of the Organization,⁹⁸ or a State party.⁹⁹ Domestic remedies must be exhausted first and the complaint must be lodged within six months of the final judgment.¹⁰⁰ The complaint must state facts that indicate violation of a protected right; it must give details of the person lodging the complaint; it must not be groundless; and it must not be pending before another international proceeding.¹⁰¹ The Commission carries out an investigation in the first instance.¹⁰² If it finds a violation, the Commission draws up a report setting out the facts and stating its conclusions.¹⁰³ The report is then sent to the States concerned, including such proposals and recommendations as the Commission thinks fit.¹⁰⁴ **3.60**

Decisions of the Commission are not legally binding and it cannot order a State to pay compensation, release a detainee or take specific action. Otherwise, the primary result of the process is the publication of the case in the Annual Report of the Inter-American Commission to the General Assembly of the OAS. **3.61**

Inter-American Court

The Inter-American Court, set up under the ACHR,¹⁰⁵ hears cases referred by States' parties or the Inter-American Commission.¹⁰⁶ Thus, upon completion of the procedures before the Commission, the Commission or the State concerned can submit the case to the Court, if the State has accepted the court's **3.62**

⁹⁴ The Commission has its headquarters in Washington DC.

⁹⁵ The court is located in San Jose, Costa Rica.

⁹⁶ Charter of the OAS, Chapter XV.

⁹⁷ ACHR, Chapter VII.

⁹⁸ ACHR, Article 44.

⁹⁹ ACHR, Article 45. This procedure will not be considered here, as it has never been used.

¹⁰⁰ ACHR, Article 46. This does not apply if domestic legislation does not afford due process of law for the right, if access to remedies has been denied, or if there has been unwarranted delay in rendering a final judgment.

¹⁰¹ ACHR, Articles 46 and 47.

¹⁰² ACHR, Article 48.

¹⁰³ Most of the decisions of the Commission focus on Latin America and few involve the US or Canada.

¹⁰⁴ ACHR, Article 50.

¹⁰⁵ ACHR, Articles 52 to 60.

¹⁰⁶ ACHR, Article 61.

jurisdiction.¹⁰⁷ The jurisdiction of the court concerns the interpretation and application of the provisions of the ACHR.¹⁰⁸ Where the court finds that there has been a violation of a protected right or freedom, it can order the situation to be remedied and award compensation.¹⁰⁹ The court's decisions are binding¹¹⁰ but there is no analogue to the European Committee of Ministers to oversee the judgment.

African system

- 3.63** The African human rights system is the youngest of the regional systems. The supervisory body under the African Charter on Human and Peoples' Rights 1981 (AC), is the African Commission on Human and Peoples' Rights (the African Commission), established within the Organization of African Unity.¹¹¹ The function of the African Commission is, among others, to exercise control over contracting Parties on the effective protection of human rights as set forth in the AC.¹¹²

African Commission

- 3.64** States, individuals or non-governmental organizations can commence a procedure by filing or delivering to the Commission a communication alleging a breach of human rights on the part of one of the contracting States. However, communications by States on the one hand,¹¹³ and by other entities on the other hand, are treated differently. In particular, complaints from individuals and non-governmental organizations (referred to as 'other communications'¹¹⁴) are subject to certain admissibility requirements, broadly similar to those provided for in the ECHR and the ACHR.¹¹⁵
- 3.65** The powers of the Commission in the fact-finding process are widely framed and are inquisitorial in nature.¹¹⁶ Thus the Commission has actively

¹⁰⁷ Many cases do not go beyond the level of the Commission.

¹⁰⁸ ACHR, Article 62(3).

¹⁰⁹ The court's jurisprudence on compensation is well developed and has included non-monetary relief awards as well. See DL Shelton, 'The Inter-American Human Rights System' in H Hannum, *Guide to International Human Rights Practice*, (3rd edn, 1999) 133.

¹¹⁰ ACHR, Article 68 states that States' parties undertake to comply with the judgment of the court in any case to which they are parties.

¹¹¹ AC, Article 30. The 1998 Protocol to the African Charter establishing the court has yet to come into force.

¹¹² Rights under the AC apply to seafarers wherever they find themselves within the territory of a State party to the Convention

¹¹³ This procedure will not be examined here.

¹¹⁴ AC, Articles 55 to 59.

¹¹⁵ AC, Article 56. For example, domestic remedies must be exhausted and be submitted promptly, and must not be anonymous.

¹¹⁶ Article 46 enables the Commission to resort to any appropriate method of investigation, which effectively allows the Commission broad powers of investigation.

Table 3.10 Inter-American Commission on Human Rights and Inter-American Court of Human Rights

Mechanism overview	Complaint to the Inter-American Commission on Human Rights (and possible further referral to the Inter-American Court of Human Rights) by a non-State entity
What it covers	Enforcement of rights set forth in the ACHR within the inter-American system of human rights
Of interest to seafarers	<ul style="list-style-type: none"> • Right to life • Right to be free from inhuman and degrading treatment • Freedom from slavery and involuntary servitude • Right to a legal remedy • Right to freedom of thought and conscience • Right to freedom of assembly • Right to freedom of association • Right to family life • Right to judicial protection • Trade union rights • Right to work • Right to social security
Type of procedure	<p>Commission Quasi-judicial/non-binding procedure leading to recommendations</p> <p>Court Judicial procedure if case is referred to the Court by either the Commission or the State concerned</p>
Who can bring a case	<p>Commission</p> <ul style="list-style-type: none"> • Any person or group of persons, or any NGO legally recognized in at least one member State of the OAS • State party <p>Court</p> <ul style="list-style-type: none"> • Commission • State concerned
Admissibility requirements	<ul style="list-style-type: none"> • Domestic remedies must be exhausted • Time limit of six months from the date on which the domestic courts took the final decision • Complaint must not be anonymous • Complaint must not be substantially the same as a matter pending in other international settlement proceedings • Complaint must indicate violation of a guaranteed right
Procedure	<p>Nature: Quasi-judicial (for the Commission) Judicial (for the court)</p> <p>Structure: Inquisitorial</p> <p>Hearing: Public</p> <p>Appeal: None after court's decision</p> <p>Intervention of third parties: Commission welcomes <i>amicus curiae</i> briefs.</p>
Remedies	<p>Commission</p> <ul style="list-style-type: none"> • If the State has not taken measures, a report on the Commission's investigations can be made public • Can make a recommendation to remedy a situation, but it is not binding <p>Court</p> <ul style="list-style-type: none"> • Can issue temporary injunctions and preventative measures • Monetary compensation is available

Table 3.10—continued

	<ul style="list-style-type: none"> • The Court can provide an advisory opinion • Final judgment is binding on the State and not subject to appeal
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> • Direct access to the Commission for individuals • Proactive and independent role of the Commission in protecting human rights • Remedies are available to foreign nationals present within the contracting States' jurisdiction • Court can award monetary compensation to victims • Court's decisions are binding • Court's advisory opinions advance and develop human rights law • High degree of State compliance with decisions of the court <p>Disadvantages</p> <ul style="list-style-type: none"> • Limited (territorial and substantial) scope of application • Commission is part of a political organization, the OAS, and most decisions emanate from the Commission • Commission's recommendations are non-binding • Commission cannot award monetary compensation • Backlog of cases at Commission level (cases can take between six to eight years). Cases at the court can take up to three years • There are very few decisions of the court • Only States or the Commission can submit a dispute to the court, not individuals

collaborated with African and non-African NGOs, with many having observer status at the Commission. However, they are not in theory entitled to participate in hearings of the Commission for individual complaints.

3.66 As far as non-State complaints are concerned, the Commission appears not to have any power to take action, or make recommendations to the State concerned. However, if the Commission finds that one or more communications reveal the existence of 'a series of massive violations of human and peoples' rights', the Commission can refer the matter to the Assembly of Heads of State and government.¹¹⁷ The Commission can, at the request of the General Assembly, undertake 'an in-depth study of these cases' and draw up a report accompanied by 'final observations and recommendations'.¹¹⁸ The Assembly will publish a report on the Commission's activities and enquiries after consideration.

¹¹⁷ AC, Article 58(1).

¹¹⁸ AC, Article 58 (2).

Table 3.11 African Commission

Mechanism overview	Complaint to the African Commission on Human and Peoples' Rights pursuant to the African Charter on Human and Peoples' Rights 1981 (AC) by a non-State entity
What it covers	Enforcement of rights set forth in the AC
Of interest to seafarers	<ul style="list-style-type: none"> ◦ Right to freedom from slavery, torture, cruel, inhuman or degrading treatment ◦ Right to free association ◦ Right to assemble freely with others ◦ Right to work under equitable and satisfactory conditions and to receive equal pay for equal work
Type of procedure	<ul style="list-style-type: none"> ◦ Fact-finding ◦ Referral to Assembly of Heads of State and government in certain circumstances
Who can bring a case	<ul style="list-style-type: none"> ◦ Any person or group of persons, or any NGO, legally recognized in at least one member State of the OAU ◦ State parties
Admissibility requirements	<ul style="list-style-type: none"> ◦ Domestic remedies must be exhausted ◦ Application must be made with 'reasonable time' of decision of domestic court ◦ Application must identify complainant and victims (complainant need not be the victim or member of victim's family) ◦ Application must not be substantially the same as a matter pending in other international settlement proceedings
Procedure	<p>Nature: Individual complaint Structure: Inquisitorial Hearing: Public Appeal: None Intervention of third parties: Allowed, but the confidentiality of the proceedings must be respected</p>
Remedies	<ul style="list-style-type: none"> ◦ Non-binding recommendations ◦ Publication of the Commission's report
Advantages and disadvantages	<p>Advantages</p> <ul style="list-style-type: none"> ◦ Direct access to the Commission for individuals, with broad interpretation of <i>locus standi</i> to include any individual who can provide sufficient details to enable its investigation ◦ Relaxed application of exhaustion of domestic remedies requirement and of time limits ◦ Urgent and provisional measures are available <p>Disadvantages</p> <ul style="list-style-type: none"> ◦ Obscurity and opaqueness of the text of the AC ◦ Confidentiality of the proceedings ◦ Rules and procedures of the Commission are unclear ◦ Limited (territorial and substantial) scope of application of the AC ◦ Non-binding nature of the recommendation ◦ Complaint can take between one and six years

(5) Other courts

International Court of Justice

- 3.67** The International Court of Justice (ICJ),¹¹⁹ which sits at The Hague in the Netherlands, is the principal judicial organ of the UN and a very highly respected body.¹²⁰ It acts as a world court and has a dual role: first, to settle disputes of a legal nature submitted to it by States in accordance with international law; and secondly, to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. Since the role of the ICJ for the enforcement of seafarers' rights is limited, it will be considered briefly only here.

Dispute settlement

- 3.68** The ICJ can only hear disputes between two or more States.¹²¹ Private interests can only form the subject of proceedings in the ICJ if a State, exercising the right of diplomatic protection, takes up the case of one of its nationals. However, diplomatic protection is a right and not a duty, and the individual cannot insist upon his State exercising diplomatic protection on his behalf. Today, the court is open to practically every State in the world.
- 3.69** A case can only be submitted to the court with the consent of the States concerned.¹²² This may be by virtue of a bilateral agreement between the parties; where a treaty or Convention in force confers jurisdiction on the court; or through the reciprocal effect of declarations made by States, whereby each has accepted the jurisdiction of the court as compulsory in the event of a dispute with another State having made a similar declaration. In cases of doubt, the court itself will decide whether it has jurisdiction to determine a dispute.¹²³

Advisory opinions

- 3.70** The advisory procedure of the ICJ is open to certain organs and agencies of the UN only. At present, these are 22 in number, including the ILO and the IMO.¹²⁴ On receiving a request, the Court decides which States and organizations might

¹¹⁹ Before 1945, its predecessor was the Permanent Court of International Justice.

¹²⁰ The inaugural sitting of the ICJ was on 18 April 1946. See Statute of the ICJ at: <http://www.icj-cij.org/ijcwww/basicdocuments/basictext/basicstatute.htm> (21 June 2004).

¹²¹ Statute of the ICJ, Article 34.

¹²² Statute of the ICJ, Article 36.

¹²³ Since 1946, the court has delivered 76 judgments on disputes concerning inter alia; land frontiers and maritime borders, territorial sovereignty, the non-use of force, non-interference in the internal affairs of States, diplomatic relations, hostage-taking, the right of asylum, nationality, guardianship, rights of passage and economic rights.

¹²⁴ The circumstances in which each agency can avail itself of the court's advisory jurisdiction are specified either in its constitution, statute or other constitutive act.

provide useful information and gives them an opportunity of presenting written or oral statements. The court's advisory procedure is otherwise modelled on contentious proceedings but, in principle, its advisory opinions are consultative in character and are therefore not binding on the requesting bodies.

Since 1946, the court has given in the region of 24 Advisory Opinions. In 1960, in the *IMCO Case*,¹²⁵ the ICJ was asked for an advisory opinion on the question of whether the Maritime Safety Committee of the IMO had been constituted in accordance with Article 28 of the Convention of the Intergovernmental Maritime Consultative Organization (as the IMO was then known). The Court held that the Committee had not been validly constituted and that the phrase 'largest shipowning nations' should be read in its ordinary and natural meaning. 'Largest' meant the largest tonnage: this was the only practical form of measurement.¹²⁶ **3.71**

International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea (ITLOS), established under Annex VI of the UN Convention on the Law of the Sea 1982 (UNCLOS), is primarily concerned with the settlement of disputes between States' parties to UNCLOS, and concerning interpretation of the Convention's provisions.¹²⁷ Additionally, the Tribunal can perform judicial functions in respect of disputes that do not arise directly from UNCLOS, and the court can be used for disputes arising out of any other agreement, provided that agreement clearly allows for it, and provided that the agreement is related to the sea.¹²⁸ **3.72**

Of the cases so far decided by ITLOS, the prompt release procedure provided in Article 292 of UNCLOS has particular relevance for seafarers. Article 292 places an obligation on States to promptly release vessels detained in their ports upon the posting of a reasonable bond or other financial security.¹²⁹ The first **3.73**

¹²⁵ Advisory Opinion on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization [1960] ICJ Rep 150.

¹²⁶ The court's judgment has been open to criticism on various grounds. See, for example, KR Simmonds, 'The Constitution of the Maritime Safety Committee of IMCO', (1963) 12 *International and Comparative Law Quarterly* 56, 83–87.

¹²⁷ Article 288 of UNCLOS states that the tribunal shall have jurisdiction 'over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention which is submitted to it in accordance with the agreement.'

¹²⁸ The Statute of ITLOS, Article 20, provides that access is open to 'entities other than States Parties in . . . any case submitted to it pursuant to any agreement conferring jurisdiction on the Tribunal . . .'

¹²⁹ The article refers to the prompt release of the crew as well as the vessel.

such case of the Tribunal was the *Saiga No. 1*.¹³⁰ The facts concerned an oil tanker, registered in Saint Vincent and the Grenadines, which was forcibly seized and detained by the Guinean authorities on 28 October 1997.¹³¹ The crew were detained onboard the ship and two of them suffered physical injuries. The flag State made an application to ITLOS seeking prompt release of the ship. The Tribunal rendered judgment on 4 December 1997 and ordered the release of the ship and her crew in exchange for the flag State posting a bond. Three aspects of this judgment are of particular note. First, it was held that only the flag State has *locus standi* with respect to the prompt release procedure, although the remedy may also be sought in the interest of the crew. Secondly, it was held that the procedure need not be confirmed in a subsequent action on the merits of the case. Thirdly, as indicated expressly in Article 292, it was stated that release is subject to the posting of a bond 'or any other appropriate security'.

- 3.74 There then followed *Saiga No. 2*¹³² in which the flag State claimed damages for breach of UNCLOS, including damages for the crew for unlawful detention onboard the ship, physical injuries, medical expenses, pain and suffering.¹³³ The tribunal dealt with the claim for damages due to members of the crew at length. Amongst its findings, the court held that if a ship has been unlawfully arrested, the flag State may bring an action for compensation for damages suffered by members of the crew, irrespective of whether local proceedings had been exhausted in the courts of the defendant State.¹³⁴ Secondly, the court found that a State may bring a claim for damages in respect of members of the crew of a ship flying its flag even if they are not nationals of that State. The tribunal stated as follows:

... the Convention considers a ship as a unit, as regards the obligation of the flag State with respect to the ship and the right of the flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under Article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.¹³⁵

Further, the tribunal interpreted the meaning of damages suffered as a consequence of the unlawful arrest broadly enough to include any damage sustained

¹³⁰ *St. Vincent and the Grenadines v Guinea, (m/v Saiga)* (1998) 37 ILM 360. Available at the ITLOS website at: <http://www.un.org/Depts/los/ITLOS/Judgment-Saiga.htm>.

¹³¹ According to the application ITLOS, Guinea had not sought any bond or financial security in respect of the vessel, or advised any interested party of the reasons for its actions.

¹³² *St. Vincent and the Grenadines v Guinea, (m/v Saiga)* (1999) 38 ILM 323.

¹³³ Compensation was claimed on the basis of UNCLOS, Article 111, para 8 and under international law applicable by virtue of UNCLOS, Article 304.

¹³⁴ *St. Vincent and the Grenadines v Guinea (m/v Saiga)* (1999) 38 ILM 323, paras 89 to 102.

¹³⁵ *ibid*, para 106.

by the crew. As a result, the ITLOS awarded the crew damages for unlawful detention onboard the ship, personal injury, medical expenses, suffering and pain.¹³⁶

Whilst the obvious limitations for seafarers under ITLOS is that the proceedings must be initiated by a State, these decisions appear to indicate scope for expanding the international dispute settlement systems and raise the question of what place seafarers might have therein.¹³⁷ 3.75

D. Case Study

The scope of international remedies for seafarers remains largely untested. 3.76 Despite the limitations of international mechanisms, more use might be made of remedies available on the international plane for enforcement of international standards. Such remedies could include individual applications against flag States under human rights treaties that permit individuals to bring complaints of non-compliance;¹³⁸ individual and representative procedures under the ILO machinery;¹³⁹ collective complaints under the ESC;¹⁴⁰ and inter-State complaints under human rights treaties¹⁴¹ and relevant ILO machinery.¹⁴² Inter-State actions do not give the seafarer any direct rights, but they can provide indirect access to a remedy. The possibility might also be explored of one State party to UNCLOS bringing an action against a recalcitrant flag State for a breach of Article 94 (failure to exercise effective jurisdiction over its ships in technical and social matters), by employing the system of dispute settlement set out in Part XV of UNCLOS. The State concerned would have to have *locus standi*, namely have some right or interest that has been damaged by the flag State's breach of Article 94.

¹³⁶ *ibid*, paras 172, 175 and Annex.

¹³⁷ See TA Mensah, 'Potential Role of ITLOS in Settling Maritime Law Disputes' (1999) BIMCO Bulletin, Vol 94, No 2 and AE Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction', (1997) 46 ICLQ 37.

¹³⁸ CCPR, First Optional Protocol; CAT, Article 22; CERD, Article 14; CEDAW, Optional Protocol; ECHR, Article 34; ACHR, Article 44; AC, Articles 56–59. See C. International Institutions and Enforcement Mechanisms above.

¹³⁹ ILO Constitution, Articles 24, 25 and 26. See C. International Institutions and Enforcement Mechanisms above.

¹⁴⁰ Additional Protocol to the ESC Providing for a System of Collective Complaints, 09.11.95, ETS No. 158. See C. International Institutions and Enforcement Mechanisms above.

¹⁴¹ CCPR, Article 41; CERD, Article 11; CAT, Article 21; MWC, Article 76; and ECHR, Article 33.

¹⁴² ILO Constitution, Article 26.

Table 3.12 Case study: Examples of possible remedies

A vessel flying the flag of a Central American country calls into a port in Europe where port State control declare the ship unsafe and detain it for serious safety violations. The crew, which consists of East European officers and Asian ratings, is refused shore leave by immigration authorities. The crew manage to contact a local seafarers' mission. It emerges that the crew have not been paid for five months, and that previous attempts of some of the crew to contact a trade union and to join the union had been met with threats from the Master. Apparently, following one argument over wages, the Master repeatedly hit a vocal crew member with a length of steel pipe, causing a limp and hearing loss. The crew reported this assault to the consul of the flag authorities in the previous port, but they have taken no steps to investigate the matter. Shortly after contacting the local seafarers' mission, the crew learn that the owner of the ship cannot be traced and the ship-owning company has been dissolved. The crew hire a lawyer but at the first application to the court, their claim is thrown out as being outside the jurisdiction of the court. The judge indicates that the crew should seek recourse in the flag State. The owner then abandons the ship, and crew supplies of food, water, medical materials and cleaning/washing products run out. The crew are stranded and, with no help from either flag, port or crew State, they have to rely on charity.

Note: These facts are purely hypothetical and are in no way intended to impugn the conduct of any State.

Examples of possible remedies

Parties/Mechanism	Forum	Issues	Ratification requirements
NGO v Flag State <i>Submission in connection with State report</i> Seafarer or representative v Flag State <i>Individual complaint</i>	Human Rights Committee	That the flag State has failed to secure the rights of the crew under the CCPR: For example, safety violations on substandard ship, physical assault, lack of food, water and medical supplies, abandonment (Refer CCPR, Articles 6, 22)	Flag State is party to CCPR and First Optional Protocol (in case of complaint)
NGO v Flag State <i>Submission in connection with State report</i>	Committee on Economic, Social and Cultural Rights	That the flag State has failed to secure the rights of the crew under the CESCR: For example, safety violations on substandard ship (refer CESCR, Article 7(b)); unpaid wages (refer CESCR, Article 7(a)); refusal to allow contact with trade union (refer CESCR, Article 8); lack of food, water and medical supplies, and abandonment (refer CESCR, Article 12)	Flag State has ratified CESCR

D. Case Study

Parties/Mechanism	Forum	Issues	Ratification requirements
<p>Workers' organization v Flag State <i>Submission in connection with State report</i></p> <p>Workers' organization (or member State of ILO) v Flag State <i>Representation</i></p> <p>Port or Crew State (or ILC delegate) v Flag State <i>Complaint</i></p>	<p>ILO Committee of Experts</p> <p>ILO Governing Body</p> <p>ILO Governing Body</p>	<p>That the flag State has failed to secure effective application of ILO Conventions:</p> <p>For example, safety violations on substandard ship (refer ILO C147); refusal of shore leave (refer ILO C29 and ILO C108 and ILO C185); unpaid wages (refer ILO C95); refusal to allow contact with trade union (refer ILO C87 and ILO C98); lack of food, water and medical supplies (refer ILO C55, ILO C56, ILO C68, ILO C69, ILO C147, ILO C164); abandonment (refer ILO C23 and ILO C166)</p>	<p>That the flag State has ratified relevant ILO Conventions</p>
<p>Workers' organization (or member State of ILO) v Flag State <i>Special complaint</i></p>	<p>Committee on Freedom of Association</p>	<p>That the flag State has failed to secure effective application of ILO C87 and ILO C98</p>	<p>That the flag State is a member of ILO</p>
<p>Seafarer or non-governmental organization (or contracting State to ECHR) v Port State <i>Adjudication</i></p>	<p>European Court of Human Rights</p>	<p>That the port State has failed to secure the rights of the crew under the ECHR:</p> <p>For example, lack of food, water and medical supplies (refer ECHR, Article 2); refusal of shore leave (refer ECHR, Article 5); dismissal of case by court (refer ECHR, Article 6)</p>	<p>Port State must be party to ECHR and member of the Council of Europe</p>

Table 3.12 —continued

Parties/Mechanism	Forum	Issues	Ratification requirements
Seafarer or NGO (or State party to ACHR) v Flag State <i>Complaint</i>	Inter-American Commission	That the flag State has failed to secure the rights of the crew under the ACHR: For example, safety violations on substandard ship, physical assault, lack of food, water and medical supplies, abandonment (refer ACHR, Article 4); refusal to allow contact with trade union (refer ACHR, Articles 15 and 16); lack of legal remedy (refer ACHR, Article 25)	Flag State must be a member of the OAS
Port or crew State v Flag State <i>Adjudication</i>	ITLOS	That the flag State has failed to conform with Article 94 of UNCLOS and in particular with regard to labour conditions and other internationally acceptable standards	Both States are parties to UNCLOS and have agreed to refer the case to ITLOS

E. Conclusion

3.77 The mechanisms outlined in this chapter highlight the difficulties involved in securing the enforcement of international human rights and labour standards. First, enforcement of treaty obligations interferes in the internal matters of sovereign States which still, to some extent, abide by the view that how a State treats its own inhabitants is its own business. Secondly, because international human rights law and international labour law promote human values rather than State values, some degree of internal adjustment is required on behalf of ratifying States within its own borders, and with respect to the people within them.¹⁴³ The fact that this causes challenges is perhaps illustrated by the relatively successful implementation of IMO standards, which do not deal so directly with individuals but rather with ship safety, and appear to attract a greater level of State compliance.

3.78 States engage in a political process when negotiating treaties and attending international meetings. Whether it be State reporting procedures under ILO mechanisms, or judicial procedures like the ECHR, the publicity surrounding

human rights or labour law violations is paramount because it affects the international reputation of the State concerned. In fact, the 'mobilisation of international shame' against States is in many cases the best means of ensuring State compliance.

Since international standards rely heavily on implementation at the national level, and require States to provide adequate remedies for persons concerned, the most effective way to implement standards is often through national legal mechanisms. What then of domestic legal systems? Are they readily available to the average international seafarer travelling from one port to another on a ship that may never return to its flag State? These and other issues arising in the context of seafarers' claims will be considered in Chapters 4 and 5. **3.79**

¹⁴³ See L. Henkin, 'International Law and Politics, Values and Functions' in 216 *Collected Courses of the Hague Academy of International Law* 13 (Vol. IV, 1989) 251.

