AN INTERNATIONAL PROPOSAL TO ENSURE THE FAIR TREATMENT OF SEAFARERS

Professor Hilton Staniland
Institute of Maritime Law
University of Southampton

Abstract

The fair treatment of seafarers in the event of a maritime accident remains an urgent priority for the international maritime industry, the International Maritime Organization ("IMO") and the International Labour Organization ("ILO"). Following a series of notorious criminal cases in different jurisdictions over two decades, the unfair treatment of seafarers came to the fore, the cases drawing sharp criticism from commentators and especially the international maritime industry. There were great expectations that the resulting Guidelines on fair treatment of seafarers in the event of a maritime accident ("the Guidelines") would ensure the fair treatment of seafarers. But as this paper demonstrates, the expectations have not been fulfilled, and the rights in the Guidelines are often theoretical and illusory, rather than practical and enforceable.

This paper breaks new ground in four major respects. First, in 2012, a survey of 3480 seafarers, constructed by the author, found that 81% of seafarers who had faced criminal charges considered that they were treated unfairly. Second, the paper reports the responses of member states of the IMO to another survey designed by the author which shows that state practice on the implementation of the Guidelines is widely divergent. Third, guidance for member states on the implementation of the Guidelines is proposed for the first time, heretically eschewing an orthodox model law and advocating instead discretionary implementation by reference to the Guidelines. Possible counter-contentions to the guidance are raised and rejected in detail. Fourth, as a judgment handed down by the author indicates, the Guidelines can be applied by courts without implementing legislation; but this approach is not advocated. Instead, the guidance aims to facilitate the most convenient and expeditious implementation of the Guidelines, ensuring their widespread promulgation and implementation and reversing the incidence of unfair treatment of 1.5 million seafarers around the world.

Introduction

Seafarers are experiencing unfair treatment and states are adopting divergent state practices towards the implementation of the Guidelines. The aim of this paper is to consider the extent of the unfair treatment of seafarers, to determine the degree of divergent state practices, and to propose guidance on the implementation of the Guidelines so that an international framework of legal certainty and good practice can be achieved to ensure that the approximately 1.5 million seafarers of the world are treated fairly following a maritime accident and that their human rights are not violated. But first it is necessary to contextualize the issues.

Allegations of unfair treatment of seafarers in a series of notorious criminal cases over the last two decades, occurring in different jurisdictions around the world and not restricted to any specific region of the world, provoked intense national and international debate and concern,

especially at the IMO and the ILO of the United Nations. The names of the cases are infamous and require no rehearsal. And, for the purposes of this paper, it would be a work of supererogation to recount and re-evaluate the very sharp criticisms that the cases drew from various commentators, and especially the broader international maritime industry and some individual industry leaders.[1] Nor is it necessary to make a legal evaluation of the judgments in respect of each case.

It suffices to mention, in very brief and general terms, the main criticisms: namely, that seafarers were sometimes detained for inordinately long periods; that bail was sometimes set at excessively high levels; that the detention of some seafarers as suspects or witnesses was in breach of international law and their human rights; that the commencement of some trials was unduly delayed; that the legal basis for some allegations and charges were uncertain; that criminal intent was being wrongly attributed to accidental behaviour; that some custodial sentences violated the United Nations Convention on the Law of the Sea 1982 ("UNCLOS"); that coastal states sometimes deflected criticism away from their own failings, scapegoating seafarers for political purposes to satisfy public demands for severe punishment while using seafarers as bargaining chips in liability and compensation proceedings. Given such notorious cases, young people, it was feared, would be discouraged from pursuing careers as seafarers.

The view was frequently expressed that unfair treatment of seafarers and criminalization of seafarers was a growing trend. But unfair treatment of seafarers and criminalization of seafarers are not interchangeable terms: fair treatment may nonetheless result in criminal charges and conviction, while unfair treatment may not invariably result in criminal conviction. So, reference to criminalization, especially given its highly charged pejorative connotations, is generally not appropriate; but the term does aptly describe the growing trend towards the creation of new crimes - especially environmental crimes - in respect of acts or omissions by seafarers where none previously existed. Responding to the criticisms of the notorious cases and adopting the language of unfair treatment, the IMO and ILO urgently sought to produce a code of best practice for application where seafarers may be detained by public authorities in the event of a maritime accident. It is to the genesis of that code, subsequently styled as the Guidelines, to which attention is now directed.

Genesis of the Guidelines

The 29th session of the ILO Joint Maritime Committee ("JMC"), in January 2001, noted with deep concern that, in the event of maritime accidents, some administrations had placed

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[1] See for example: E.E Mitropoulos. Criminalization in shipping. Human pawns in political and legal games. Seventh Cadwallader Annual Memorial Lecture, London, 6 October 2004; Gard News 177, 01 February 2005. "The criminalisation of seafarers – From master mariner to "master criminal" at http://www.gard.no/web/updates/content/53568/the-criminalisation-of-seafarers-from-master-mariner-to-master-criminal; Edgar Gold "The Fair Treatment of Seafarers" (2005) 4 *WMU Journal of Maritime Affairs* 129-130; (2006) 37 *J Mar L & Com* 219; Edgar Gold "Fair Treatment of Seafarers in the Event of a Maritime Accident: New International Guidelines" in *Law of the Sea, Environmental Law and Settlement of Disputes* (Ndiaye and Wolfrum eds Martinus Nijhoff 2007) 405-420; Bruce Pasfield Elise Rindfleisch "Finding the Magic Pipe: Do Seamen have Constitutional Rights when a U.S. Coast Guard Boarding turns Criminal?" (2009-210) 22 *USF Maritime Law Journal* 23; Olivia Murray Fair Treatment of Seafarers – International Law and Practice (2012) 18 *JIML* 150. As to the rights of seafarers generally see: Fitzpatrick and Anderson: Seafarers' Rights (Oxford University Press 2005); and A D Couper *Voyages of abuse: Seafarers, human rights and international shipping* (Pluto Press 1999).

seafarers, in particular the master, under arrest, before any investigation had taken place and while the seafarers concerned were still in a state of deep distress. The JMC requested the Director-General of the ILO to bring the issue to the attention of member states and advise the Secretary-General of the IMO of the action taken.[2]

At the 88th session of the Legal Committee of the IMO in April 2004, a group of sponsors comprising member states and non-governmental organizations[3] proposed that guidelines on the fair treatment of seafarers be developed, or that other appropriate measures be considered, based not only on the principles of UNCLOS, but also on the fact that unwarranted detention was a violation of basic human rights. The Committee agreed to include as a new, independent item on its work programme, the development of guidelines on the fair treatment of seafarers and endorsed the proposal to establish a joint IMO/ILO Working Group.[4]

The Joint IMO/ILO Ad Hoc Expert Working Group on Fair Treatment of Seafarers in the Event of a Maritime Accident[5] held its first session from 17 to 19 January 2005 at the IMO headquarters and finalised its terms of reference. The Group prepared a draft resolution for submission to the Legal Committee, and for adoption by the 24th IMO Assembly and by the ILO Governing Body. On 1 December 2005, the IMO Assembly expressed it serious concern by way of a resolution,[6] stating that it was aware that there had been:

> ...a number of recent incidents in which seafarers on ships ... have been detained for prolonged periods ... [that there was] the need to ensure the fair treatment of seafarers in view of the growing use of criminal proceedings against seafarers after a maritime accident ... that seafarers should not be held hostage pending the resolution of a financial dispute ... that, in some cases, the grounds for such detention have not been clear to the seafarers being detained or to the international maritime community ... that in some cases the detained seafarers have been subject to conditions in which their basic human rights appear not to have been fully respected ... [and] that these cases have an adverse impact on the morale of seafarers, on the attraction of recruitment of young people into the seafaring profession, and on the retention of current seafarers in the profession ...

States were urged to develop the Guidelines "as a matter of urgency". On 27 April 2006, after lengthy discussions, the Guidelines were adopted by the IMO Legal Committee at its 91st session.[7] Member governments were invited to implement the Guidelines as from 1 July 2006

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[2] The Governing Body of ILO, at its 280th session in March 2001, endorsed these requests.

[3] Cyprus, Greece, the Philippines, Poland, the International Chamber of Shipping (ICS), the International Shipping Federation (ISF), the International Confederation of Free Trade Unions (ICFTU), BIMCO, the International Federation of Shipmasters' Associations (IFSMA), the International Salvage Union (ISU), the International Association of Independent Tanker Owners (INTERTANKO) and the International Association of Dry Cargo Shipowners (INTERCARGO).

[4] LEG 88/12 and LEG 88/13 para 192. The IMO Council at its 92nd session in June 2004 noted "the inclusion of a new item in the [Legal] Committee's work programme and its agenda for the next session to develop guidelines on the fair treatment of seafarers; endorsed the [Legal] Committee's action to establish a Joint IMO/ILO Working Group on this matter. IMO C 92/D, paragraph 6.3(viii). The Legal Committee of IMO, at its 89th session in October 2004 agreed on terms of reference for the Group and the Governing Body of the ILO at its 291st session in November 2004 also approved the terms of reference of the Joint Working Group.

[5] The working group was composed of eight Government experts nominated by IMO (China, Egypt, Greece, Nigeria, Panama, Philippines, Turkey and the United States), as well as four Shipowner and four Seafarer experts nominated by ILO.

[6] Resolution A 987(24).

[7] Resolution LEG 3(91) and Circular letter No.2711 26 June 2006.

and where appropriate "to consider amending their national legislation to give full and complete effect to the Guidelines."[8] The issue of the fair treatment of seafarers remained on the agenda of the Legal Committee and on 30 November 2011, the IMO Assembly adopted a Resolution on the promotion as widely as possible of the application of the Guidelines.[9] Given the great expectations aroused by the Guidelines the question arose as to their efficacy, which is next considered.

Survey of fair treatment of seafarers

In 2011, five years after the Guidelines were adopted by the member states of the IMO and the ILO, a group of inter-disciplinary experts, led by the author, designed a questionnaire to survey seafarers on their experiences and perceptions of the risks and consequences of facing criminal charges in connection with their work.[10] The survey was piloted at the port of Bristol seafarers' centre, and after slight adjustments to the draft, the final version of the questionnaire, containing six parts and employing both closed and open-ended questions[11] was distributed in seafarers' centers around the world by an independent legal research centre, Seafarers' Rights International ("SRI"). To increase the response rate, administered surveys were conducted with seafarers in the Philippines and in some of the major seafarers' training institutions in the United Kingdom. The survey was conducted in eight languages (Chinese, English, Japanese, Portuguese, Russian, Spanish, Tagalog and Turkish). There were 3480 valid questionnaires returned from seafarers of 68 different nationalities from 18 countries: Belgium, Brazil, Canada, China, France, Germany, India, Indonesia, Japan, Malaysia, Norway, Philippines, Russia, Spain, Turkey, Ukraine, the United Kingdom and the United States of America. concerning their experiences of facing criminal charges.

To achieve a random and representative survey, the responses to the questionnaire were weighted by an independent statistician using the same country proportions of seafarers as contained in the BIMCO/ISF Manpower 2005 Update. The preliminary weights of the survey sample were then adjusted through a process of post-stratification to incorporate new observations as contained in the BIMCO/ISF Manpower 2010 Update. The results reported were the weighted data sets where appropriate. As a demographically weighted sample, the survey results can be treated as a random and representative sample of seafarers from the whole world.

The survey found that 8% of seafarers and 24% of masters had faced criminal charges. Furthermore, seafarers generally showed a high degree of apprehension about facing criminal charges, 85.04% being concerned about criminal charges being brought. The single most significant finding of the survey was that 81.25% of seafarers who had faced criminal charges considered that they had not been treated fairly. Taken in isolation, this alarmingly high percentage might, it is arguable, be discounted (at least to some extent) on the basis that the

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[8] The Guidelines were also adopted by the ILO Governing Body at its 296th session on 12 June 2006.

[9] IMO A 27/Res.1056/Rev.1.

[10] See also BIMCO's "Study of recent cases involving the International Practice of Using Criminal Sanctions towards Seafarers" which revealed 37 cases of alleged unfair treatment of seafarers in the period 1996 to 2006, which was updated in 2009 with only a few additional cases and presented to the Legal Committee at its 95th session, see LEG 95/5; LEG 97/6 and LEG 97/INF.3. See also the undated publication "Criminalization of Seafarers" by Nautilus International and the work done by the Comité Maritime International's Working Group on the Fair Treatment of Seafarers established in October 2004.

[11] The six parts were: section 1, respondents' background information; section 2, facing criminal charges; section 3, witnesses in a criminal prosecution; section 4, colleagues facing criminal charges; section 5, seafarers' views; and section 6, seafarers' suggestions.

seafarers themselves may lack objectivity in assessing whether they were accorded fair treatment. Nonetheless, the percentage, when read in the context of the other findings, is corroborated to some extent, especially by findings that were related to: searches, legal representation, interpretation services, explanation of rights, and intimidation.

Of the seafarers in the survey, 44.28% said that their vessels were searched without warrants and 63.75% said that their cabins were searched without warrants; 90.21% who faced criminal charges said that they did not have legal representation; 91.20% who needed interpretation services were not provided with interpretation services; 88.60% did not have their legal rights explained to them; and 80.00% felt they were intimidated or threatened.

It was therefore not surprising to find that 46.44% of seafarers in the survey stated that they would be reluctant to cooperate fully and openly with casualty inquiries and accident investigators, a finding that has seriously negative implications for investigations conducted pursuant to the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident ("Casualty Investigation Code"), which entered into force in 2010.[12]

Fundamental questions regarding the Guidelines

Since the survey shows that seafarers consider their unfair treatment to be real and widespread across many jurisdictions, it is to the meaning, implementation and enforcement of the Guidelines that attention is now directed.

Here, six fundamental questions arise. First, how are the Guidelines to be interpreted? Second, what other international instruments are part of the Guidelines and how are they implemented? Third, how have member states of the IMO and the ILO implemented the Guidelines? Fourth, can the Guidelines be implemented by means of a "model law"? Fifth, what are the principles underlying the implementation of the Guidelines? And sixth, what guidance can be given to member states regarding the implementation of the Guidelines?

Although the questions and the answers are ultimately inextricably intertwined, they are conveniently considered separately and seriatim.

How are the Guidelines to be interpreted?

Since the Guidelines are readily available, it is not necessary to repeat their provisions. But their interpretation and meaning calls for commentary, since this directly impacts member state practice in the implementation of the Guidelines. Of overriding importance to the interpretation and meaning of the Guidelines is the fact that they are only recommendatory, clearly importing member state discretion in their implementation. Whether the proper discharge of that discretion is absolute or attenuated, requires analysis, often critical of the composition of the Guidelines.

The tone and import of the language employed throughout the Guidelines may be characterized as being strongly aspirational and exhortatory, and neither peremptory nor mandatory. There are actions in the Guidelines (including steps to be taken, co-operation to

[12] The Code is contained in the Annex to Resolution MSC 255(84). The Code came into effect on 1 January 2010 pursuant to resolution MSC 257(84).

be undertaken, and services to be ensured) that "should" be taken by port and coastal states, flag states, seafarer states, shipowners and seafarers. In an Assembly resolution, these actions are in effect "recognised" as the "direct responsibility of port states or coastal States, flag States, the State of nationality of the seafarer, shipowners and seafarers."[13] But nowhere in the Guidelines do the words "shall" or "must" appear. Also, much of the language employed in the Guidelines is loosely textured and not drafted in the conventional style of an IMO convention or national legislation. Although there are some definitions in the Guidelines, the list is short, leaving uncertainties, and worse still, creating some internal inconsistencies - and even apparent contradictions - not only within the Guidelines themselves but also within the IMO resolutions that make direct and explicit reference to the Guidelines. So, what approach to the construction of the Guidelines should be adopted? And, what are the proper aids to the interpretation of this recommendatory IMO instrument?

To apply national and traditional rules of statutory or contractual interpretation, to the interpretation of the Guidelines would result in divergent interpretations and not be suitable or appropriate for the purpose of providing guidance on the implementation of the Guidelines. Instead, it is argued below that the Guidelines should be read as a whole, without exclusive or undue emphasis on any individual provision, as often happens when it is sought to impose a narrow and restricted construction on the Guidelines. Furthermore, all the IMO resolutions that make direct and explicit reference to the Guidelines should also be considered, since these resolutions can be fairly regarded as the IMO's interpretation of the Guidelines. Interpretation of the Guidelines should ultimately aim to achieve consistency, cohesion and coherency across the Guidelines, the resolutions, and the national legislation of member states implementing the Guidelines. Such an approach would, it is argued, best "establish a framework of legal certainty and consistent good practice" in accordance with a resolution of the Assembly[14].

What other international instruments are part of the Guidelines and how are they implemented?

Member states of the IMO are party to the international instruments that are either referred to in the IMO resolutions accompanying the Guidelines, or explicitly or implicitly referred to in the Guidelines themselves. The resolutions include references to: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights ("ICCPR"); the International Covenant on Economic, Social and Cultural Rights ("ICESCR"); UNCLOS, articles 97, 228, 230, 232, 292[15] and 230; MARPOL 73/78 Annex I, Regulation 11 and Annex II, regulation 6; the Vienna Convention on Consular Relations 1963, article 36; and the ILO Maritime Labour Convention 2006 ("MLC 2006").[16] The Casualty Investigation Code[17] is, in particular, an important part of the Guidelines. The application of the Code (except for Part III) is mandatory for states party to the Safety of Life at Sea Convention 74/78 ("SOLAS"). How, then, are these international instruments implemented? To the extent that they are

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[13] A 27/Res.1056/Rev.1.

[14] A 24/Res.987.

[15] This provision has been the subject of case law at the International Tribunal for the Law of the Sea; see, in particular, the judgment of 1 July 1999 in *M/V "Saiga" (No.2), (Saint Vincent and the Grenadines v Guinea),* recognising that extended detention of crew members may give rise to a violation of UNCLOS and an obligation to release the crew promptly, failing which a claim for reparation may be made.

[16] A 24/Res.987 and Resolution LEG.3(91).

[17] Resolution MSC.255(84).

already effectively implemented these parts of the Guidelines will of course require no further implementation.

Ships are, it is very well known, subject to flag state implementation and port state control in respect of SOLAS 74/78, MARPOL 73/78 and MLC 2006 and this requires no elaboration. What is not generally known is that, in addition, member states that are parties to SOLAS 74/78 and MARPOL 73/78 (and some other international mandatory instruments) have been, since 2016, subject to mandatory audit by IMO auditors in terms of the IMO Instruments Implementation Code ("III Code")[18] in accordance with an IMO Council approved schedule of audits, which commenced in February 2016 and will continue until the end of 2022.[19] The schedule is subject to review and update.[20] Regarding these international mandatory instruments, member states, once audited, will know whether they are giving full and complete effect to the instruments or whether on the basis of audit findings corrective action must be taken.

The implementation of MLC 2006 is very effectively ensured by the ILO on the basis of "article 22 reports". The article 22 report form for compliance with the MLC 2006 has been approved by the Governing Body of the ILO, in accordance with article 22 of the ILO Constitution, which reads as follows: "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

Human rights conventions are implemented by various mechanisms. With regard for instance to the ICCPR, there is, for example, an obligation on state parties to submit reports to a Human Rights Committee on measures adopted to give effect to the rights;[21] there is also a complaints procedure[22] and an *ad hoc* Conciliation Commission;[23] but no judicial or quasi-judicial determination In contrast, the European Convention on Human Rights ("ECHR") expressly provides for judicial determination of complaints of violations of rights derived from the ECHR.[24] Article 41 provide that if the Court finds that there has been a violation of the Convention or the protocols, and if the internal law of a contracting party allows only partial reparation, the Court may afford just satisfaction to an injured party.

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[18] A 28/Res.1070.

[19] C116/6 of 9 May 2016. In terms of Part I, article 6 of the III Code, the audit "seeks to address those aspects necessary for a Contracting Government or Party to give full and complete effect to the provisions of the applicable international instruments to which it is a Contracting Government or Party, pertaining to: .1 safety of life at sea; .2 prevention of pollution from ships; .3 standards of training, certification and watchkeeping for seafarers; .4 load lines; .5 tonnage measurement of ships; and .6 regulations for preventing collisions at sea. The scope of this audit therefore covers SOLAS 74/78 and MARPOL 73/78.

[20] C118/6 of 5 June 2017.

[21] Article 40 provides that state parties must provide reports within one year of entry into force of the covenant for the state party concerned and thereafter whenever the Committee requests.

[22] Article 41 ICCPR.

[23] Article 42 ICCPR.

[24] Article 19 establishes the European Court of Human Rights. Article 32 of the ECHR gives the Court jurisdiction to consider all matters concerning the interpretation and application of the ECHR and the protocols. Article 33 allows any contracting party to refer to the Court any alleged breach of the ECHR by another contracting party. Article 34 enables the court to receive applications from individuals, claiming to be a victim of a violation by one of the contracting parties under the ECHR. Pursuant to Article 46 the contracting parties undertake to abide by the judgment of the Court.

Regarding the implementation of the international instruments, it is therefore clear that no further action is required in respect of those parts of the Guidelines. Notwithstanding these international instruments, many provisions in the Guidelines are not found elsewhere and are expressly and precisely tailored to ensure the objective that seafarers are treated fairly following a maritime accident and during any investigation and detention by public authorities and that detention is for no longer than necessary.

How have States implemented the Guidelines?

Since the member states of the IMO are for all practical purposes party to the same international instruments, it might have been expected that they would adopt the same or similar approaches to the implementation of the Guidelines. But a survey conducted by SRI in 2013, also constructed by the author, unexpectedly showed that state practice as concerns implementation of the Guidelines in national laws is widely divergent.

The survey was conducted on an anonymous basis and that anonymity is respected in this paper. However, the respondent member states to the survey[25] fell into three groups of roughly equal size.[26] The first group of member states enacted the Guidelines into their national laws by express reference to the Guidelines, by providing, for example, that in an investigation, "account shall be taken of the Guidelines"; or that an inspector "must take into account the provisions of the IMO guidelines"; or that "all authorities dealing with ... shipping accidents ... shall, within the general framework of the legislation take into account the relevant provisions of the ... guidelines ...". Within this group of countries, the Guidelines have been enacted mostly by means of secondary legislation (including, for example, regulations, circulars and marine notices). The application of such secondary legislation, being subordinate to primary legislation, is often discretionary rather than mandatory.

The second group of respondent member states considered that their existing laws already adequately protect the human and other legal rights of seafarers contained in the Guidelines and that there was no need to enact the Guidelines into national law. These member states have generally ensured that the legal principles contained in the Guidelines are applicable not only in the event of investigations into marine casualties and incidents conducted under the Casualty Investigation Code, but also in all other legal circumstances – including criminal investigations and proceedings – where seafarers might be detained. The legal protections are to be found in primary national laws; sometimes enshrined to some extent in constitutions and therefore subordinate to no other law. The application of these constitutional legal principles and primary national laws is not discretionary but mandatory.

The third group of member states stated that they have not yet implemented the Guidelines and they requested assistance with the interpretation, meaning and implementation of the Guidelines and/or indicated that the Guidelines are still under consideration.

The reasons for these different approaches would appear to include: different interpretations by member states as to the relationship between the Guidelines and the Casualty Investigation Code; different gap analyses revealing that the legal principles contained in the Guidelines

[25] 26% of States replied to the survey.

[26] See reports of fair treatment and the survey in LEG 101/4/1; LEG 101/12; LEG 102/4; LEG 102/12; LEG 103/5; C110/10; C112/7; A28/11; A27/10; UNCTAD Review of Maritime Transport 2013, 119; UNCTAD Review of Maritime Transport 2015, 95 to 96; UNCTAD Review of Maritime Transport 2016, 95.

already exist to greater or lesser degrees in the national laws of member states; different legal systems and legislative drafting traditions between member states; and different government ministries and/or independent legal entities within member states that implement, administer and/or enforce the Guidelines.[27]

Can the Guidelines be implemented by means of a model law?

It is conventional wisdom, taught and revered and now to some extent established orthodoxy, that for every mandatory instrument of the IMO, there is a model law to govern its national implementation. That heresy will be the subject of another paper. But here - strictly as concerns implementing the Guidelines - a detailed model law dealing with every provision in the Guidelines would not be helpful: it would be a model for disaster. For the purposes of the Guidelines, a model law as traditionally understood would attempt to cater for the different legal systems of the world and to encompass a legislative blueprint setting out in defined, precise and consistent terms, all the rights, obligations, duties and remedies that are explicit or implicit in the Guidelines for any notional member state of the IMO and the ILO. This would be very difficult to achieve and would not prove to be helpful. Each individual member state would, within its own legislative framework, have to clarify the nature and scope of the rights and duties covered by the Guidelines, and to determine the extent to which gaps need to be filled in the legislation to give the Guidelines complete and full effect. This arduous "gap analysis" would almost invariably yield unique findings for each member state. So, in the result, the model law would have to be very substantially adapted to the unique results of the gap analysis for each member state and to the national laws and legal system of each member state.

What principles should inform the implementation of the Guidelines?

From the answers to the fundamental questions considered above, certain principles to inform the implementation of the Guidelines can be discerned. In the first instance, the Guidelines should not seek to interfere with the sovereign role and independence of the judicial authorities of member states. Therefore, implementation of the Guidelines into national law is most conveniently facilitated by express reference to the Guidelines in either primary or secondary legislation, rather than by means of full and detailed provisions based on a comprehensive gap analysis in relation to every provision in the Guidelines. The judicial authorities in member states would then interpret and apply the Guidelines in accordance with, and subject to, the national law of the member state and in relation to the facts and circumstances of each maritime casualty.

Of prime importance also is whether the Guidelines should be applied not only to "no-blame" investigations under the Casualty Investigation Code, but also to any other investigations, including especially criminal investigations. At the eighty-ninth session of the Legal Committee,[28] it was "noted that the terms of reference [for the production of the Guidelines] did not extend to treatment of seafarers following incidents committed with criminal intent"; and at the ninety-first session of the Legal Committee, the USA submitted that "there should be a clear statement that the guidelines were not intended to apply following incidents committed with criminal intent, as previously decided by the Committee at its eighty-ninth

[27] IMO C110/10 paras 7 onwards; IMO C112/7 paras 10 onwards; IMO A28/11 para 3; IMO A27/10 para 3; UNCTAD Review of Maritime Transport 2013, 119; UNCTAD Review of Maritime Transport 2015, 95 - 96; UNCTAD Review of Maritime Transport 2016, 95.
[28] LEG 89/16 para 195.

session."[29] And this statement does seem to be supported by provisions in the Guidelines that refer to "a maritime accident," thereby apparently implying an absence of criminal intent. Furthermore, "maritime accident" is defined in the Guidelines to mean "any unforeseen occurrence or physical event connected to the navigation, operations, manoeuvring or handling of ships, or the machinery, equipment, material, or cargo on board such ships which may result in the detention of seafarers". The references to "accident" (as opposed to an incident), and to an "unforeseen" occurrence or physical event together appear to imply an absence of criminal intent. Therefore, it might be argued that the Guidelines should only be applied to "no-blame" investigations under the Casualty Investigation Code[30] and not to criminal investigations.

But that would be a fundamental error, striking substantially at the essence of the Guidelines and setting at nought the very reasons for their introduction. The Guidelines should be interpreted to cover criminal investigations. This is because the objectives of the Guidelines are stated, *inter alia*, to ensure that seafarers are treated fairly following a maritime accident and during "any" investigation and detention by public authorities;[31] that seafarers are informed of the basis on which the investigation is being conducted (i.e. whether it is in accordance with the Casualty Investigation Code or pursuant to "other national procedures);"[32] and that investigations are promptly concluded and, if necessary, the port or coastal state "charge seafarers suspected of criminal actions."[33] The Guidelines also provide that port or coastal states should ensure that seafarers "are advised of their right not to incriminate themselves;"[34] that shipowners should protect the right of seafarers "to avoid self-incrimination."[35] Recourse to IMO resolutions fortify this interpretation. An Assembly resolution directed at the Guidelines expresses the concern of the IMO about "the growing use of criminal proceedings against seafarers after a maritime accident" and recognizes the rights of states to "prosecute ... those accused of criminal behaviour."[36]

What guidance can be given to member states regarding the implementation of the Guidelines?

Drawing on these underlying principles, the following guidance for member states on the implementation of the Guidelines (with alternative proposals in square brackets), is proposed:

> The [public authorities/investigating authorities] [in accordance with/subject to/consistent with] national legislation [as amended] [shall/must] [take into account/take into consideration/ have regard to] the relevant provisions of the Guidelines [as amended] where seafarers may be detained by public authorities [in the event of a maritime accident/when investigating maritime casualties].

To stipulate that the Guidelines shall be taken into account is not the same as stating that the Guidelines shall apply. This stipulation may not therefore necessarily result in the application of the Guidelines. But it will ensure that attention must be directed at the Guidelines. Where, for example, a gap in the national law regarding a relevant provision of the Guidelines is

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[29] LEG 91/12 para 152. For further explanation, as to the position of the USA, see also LEG 91/5/2.
[30] See, for example, the position of the United States in IMO LEG 91/12, para 151.
[31] See article I 2 of the Guidelines.
[32] See article III 9.8 of the Guidelines.
[33] See article III 9.16 of the Guidelines.
[34] See article III 9.7 of the Guidelines.
[35] See article VI 12 of the Guidelines.
[36] A 24/Res. 987.

identified then, consistent with the wording of the Assembly Resolution,[37] to that "extent" it may be "possible" and "appropriate" to give effect to the Guidelines. Furthermore, such an approach does not necessarily require that a prior gap analysis be conducted in relation to the national law of a member state and the provisions of the Guidelines in advance of enactment by reference. This is a great advantage. Many provisions in the Guidelines are not found elsewhere and are expressly and precisely tailored to achieve fair treatment. To conduct a gap analysis in respect of these provisions across all the national laws of any member state, comparing and contrasting all national laws with similarly but differently worded provisions in the Guidelines, would as mentioned above be an intense labour, involving many judgments that would freeze the implementation of the Guidelines in relation to the national laws as at that time, ensuring the incipient decrepitude of the enactment.

Instead, enactment by what may be termed an ambulatory reference to the national laws *as amended* and the Guidelines *as amended* appears to be consistent with article 1.6 of the Guidelines, which states that the Guidelines "do not seek to interfere with any State's domestic, criminal, or civil law processes [which must include amendment of those laws], nor the full enjoyment of the basic rights of seafarers, including those provided by international human rights instruments, and the seafarers' right to humane treatment at all times". In this way, the Guidelines and the national laws would, so to speak, ambulate side by side hand in hand. But if a relevant and current provision in the Guidelines when "taken into account" in relation to the particular investigation, appears to "interfere" with the current national law of the member state, it would not to that "extent" be "appropriate" to apply the Guidelines.

Playing devil's advocate with the guidance

There are however some conceivable counter-arguments to this proposed guidance. It might be argued that, given Resolution LEG.3 (91) inviting member states "to consider amending their national legislation to give full and complete effect" to the Guidelines, they should be applied in their entirety. And, continues the argument, merely to take the Guidelines into account is not to give the Guidelines "full and complete effect", since their application would be based on an administrative and/or judicial discretion that could attenuate or even negate the rights in the Guidelines. And, the exercise of such a discretion would not only leave the law uncertain, but would also be contrary to the Assembly Resolution stating that it is convinced that the Guidelines "are an appropriate means of establishing a framework of legal certainty and consistent good practice to ensure that, in connection with maritime accidents, seafarers are fairly treated and their rights are not violated".[38]

While it cannot be gainsaid that the guidance would, to some extent, render the practical enforcement of the law uncertain, the uncertainty is more apparent than real. It amounts to no more than the usual uncertainty which occurs when counsel press the court with countervailing arguments as to the law to be applied, which can of course occur in a wide range of different legal fields and in different jurisdictions.[39] Furthermore, the discretion could

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[37] A 27/Res.1056/Rev.1.

[38] Resolution A. 987(24).

[39] For example, in s 6 (1) of the South African Admiralty Jurisdiction Regulation Act 105 of 1983 it is stipulated that English law "shall" apply in the South African Admiralty Court in certain circumstances and "in so far as that law can be applied". The reconciliation of these apparently inconsistent words is clear enough: English statutes do not apply where there already exists relevant South African legislation. This is because, in the absence of express wording to the contrary, s 6(1) cannot be taken to have impliedly repealed all South African legislation dealing with maritime claims so as to clear the way for the application of English statutes. And, even where is no South African law, English statutes will not apply in South Africa where there is no bureaucratic or

not be exercised to remove existing human rights enshrined in national laws that are already applicable to marine accident investigations and/or any parallel or subsequent criminal proceedings. This is because the Guidelines "shall" be applied "in accordance with/subject to/consistent with" national laws so that the national laws are not in any way attenuated or negated.

There could also be a counter-argument based on the principle of equal treatment of all individuals before the law. This argument is formidable. Why, it may be argued, should seafarers be accorded any preferential treatment, accorded rights that are not accorded to other persons subject to investigation under the national laws of a member state? Are we all not equal before the law? The answer is twofold. Equal treatment in respect of the investigations of different categories of persons can - in itself - be unfair. In the Guidelines, "seafarers are recognised as a special category of worker and, given the global nature of the shipping industry and the different jurisdictions that they be brought into contact with, need special protection, especially in relation to contacts with public authorities"[40]. Although to this it may be said that the Guidelines, being recommendatory, are no authority under international law for the recognition of seafarers as a special category of worker, the same cannot be said of the MLC 2006. This Convention revises and consolidates as many as 36 other ILO conventions[41] and at the time of writing has the force of law in 84 states, representing 91% of the worlds tonnage. In its Preamble, the MLC 2006 states that "given the global nature of the shipping industry, seafarers need special protection" and provides for mandatory inquiries into serious maritime casualties. The special categorisation and protection of seafarers can also be found elsewhere. A close conspectus of civil cases over a period of centuries shows that it has been considered fair and just to treat seafarers as favoured litigants. In England, for example, courts have over the centuries treated seafarers as a special category, acted "out of tenderness for the interests of the seaman,"[42] treated them with "partiality"[43] and as a "favourite" of the

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state mechanism to given them practical effect. Similarly, in the proposed guidance the Guidelines are applicable only where there is no inconsistent national law and there is a bureaucratic mechanism to given them practical effect.

[40] Article I (2) of the Guidelines.

[41] The MLC 2006 revises 36 ILO conventions and 1 protocol: Minimum Age (Sea) Convention, 1920 (No. 7); Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8); Placing of Seamen Convention, 1920 (No. 9) Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16); Seamen's Articles of Agreement Convention, 1926 (No. 22); Repatriation of Seamen Convention, 1926 (No. 23); Officers' Competency Certificates Convention, 1936 (No.53); Holidays with Pay (Sea) Convention, 1936 (No. 54); Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55); Sickness Insurance (Sea) Convention, 1936 (No. 56); Hours of Work and Manning (Sea) Convention, 1936 (No. 57); Minimum Age (Sea) Convention (Revised), 1936 (No. 58); Food and Catering (Ships' Crews) Convention, 1946 (No. 68); Certification of Ships' Cooks Convention, 1946 (No. 69); Social Security (Seafarers) Convention, 1946 (No. 70); Paid Vacations (Seafarers) Convention, 1946 (No. 72); Medical Examination (Seafarers) Convention, 1946 (No. 73); Certification of Able Seamen Convention, 1946 (No. 74); Accommodation of Crews Convention, 1946 (No. 75); Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76); Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91); Accommodation of Crews Convention (Revised), 1949 (No. 92); Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No.93); Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109); Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No 133); Prevention of Accidents (Seafarers) Convention, 1970 (No. 134); and Continuity of Employment (Seafarers) Convention, 1976 (No. 145); Seafarers' Annual Leave with Pay Convention, 1976 (No. 146); Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147); Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147); Seafarers' Welfare Convention, 1987 (No. 163) Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164); Social Security (Seafarers) Convention (Revised), 1987 (No. 165); Repatriation of Seafarers Convention (Revised), 1987 (No. 166) Labour Inspection (Seafarers) Convention, 1996 (No. 178); Recruitment and Placement of Seafarers Convention, 1996 (No. 179); Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180).

[42] *The Fairport (No 2)* [1966] 2 Lloyd's Rep 7, 12.

law,[44] adopting a "rather benevolent attitude to seamen's claims."[45] Some of these principles have even been enshrined in the Merchant Shipping Act 1995: for example, section 39 (1) which protects seafarers by providing that: "A seaman's lien, his remedies for the recovery of his wages, his right to wages in case of the wreck or loss of his ship, and any right he may have or obtain in the nature of salvage shall not be capable of being renounced by any agreement."

The comparison of seafarers as a special category in respect of civil claims with their special category status under the Guidelines might, it is conceded, be countered as a false comparison if the investigations contemplated under the Guidelines are characterized as administrative, inquisitorial, no-blame or criminal proceeding. But such a characterization is a common error, since the Guidelines do, in effect, also cover claims for wages, suitable accommodation, food and medical care,[46] compensation for wrongful, unreasonable or unjustified acts or omissions,[47] and the repatriation of seafarers.[48]

Can the Guidelines be implemented without amending legislation?

The Assembly of the IMO assumes that implementing legislation is required, since it resolved that member states should "consider amending their national legislation to give full and complete effect to the Guidelines".[49] Nonetheless, since the resolution is not binding, the question may possibly persist. The first possibility is that shipping notes, marine notices, circulars or the like directed at the national maritime industry are sufficient to implement the Guidelines; and the second possibility concerns judicial law-making giving effect to the Guidelines.

The first possibility can be despatched quickly. No matter that a maritime administration may bring the Guidelines to the notice of shipowners, ship managers, ship operators, masters and officers, this "promulgation" does not, contrary to some views, give the force of law to the Guidelines, unless the maritime administration is delegated by virtue of specific and express legislation to promulgate international recommendatory instruments (such as the Guidelines) and the promulgation is *intra vires* the specified legislation. The misapprehension appears to linger in some maritime administrations (and indeed in some other sectors of the maritime industry), that mere publication of the Guidelines is enough to implement the Guidelines.

The second possibility calls for much closer critical comment. In this respect, two rights in the Guidelines are of particular importance to seafarers: the opportunity to be considered for bail; and the right to independent legal advice and legal representation.

Bail

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[43] *The Elizabeth* (1819) 2 Dods 403, 407.

[44] *The Minerva* (1825) 1 Hag Adm 347, 358. See, also, Kay *The law relating to shipmasters and seamen* (2 ed by Mansfield and Duncan, London: Stevens and Haynes 1894), 330 para 465 where it is stated that "[T]he Court of Admiralty always sought to protect them [ie seafarers] against circumvention, oppression and injustice and even against misapprehension and error and was anxious that they should not be harassed with litigation and that the question of wages should be speedily settled;" and Pritchard *Digest of admiralty and maritime law* (London: Butterworths, 1887) 11.

[45] *The Arosa Star* [1959] 2 Lloyd's Rep 396, 400.

[46] Article III 9.5, article IV 10.5 and article VI 12.7 of the Guidelines.

[47] Article III 9.17 of the Guidelines.

[48] Article IV 10.8, article V 11.3 and article VI 12.6 of the Guidelines.

[49] Resolution A. 1056(27).

Foreign seafarers being held in a port or coastal state without a fixed abode or any other ties of whatsoever nature to the state concerned may well be deemed to be a "flight risk" and denied bail. So, in the Guidelines it is provided that port or coastal states should "insofar as national laws allow, ensure that a process is arguable for posting a reasonable bond or other financial security to allow for release and repatriation of the detained seafarer pending resolution of any investigatory or judicial process".[50] The aim of this provision is to ensure that seafarers are not arbitrarily deprived of their liberty. But in practice this right has often appeared to be illusory.

Take, for example, the very well-known facts of the loss of the *Prestige,* which require no rehearsal, save to say that on arrival on shore Captain Mangouras, the master of the vessel, was immediately arrested and escorted to a police station in handcuffs. He was then taken to a high security prison and bail was set at three million euros, which appears to have been the highest bail security ever set in the history of Spanish criminal proceedings. Unable to afford bail, the master remained in jail for 83 days and was released only when the ship's insurers volunteered to cover the bail. Even then, the master was required to remain in Spain and only allowed to return to his home in Greece after two years.

Captain Mangouras challenged the level of bail imposed through the Spanish Courts to the highest national court possible (the Constitutional Court), and then before the European Court of Human Rights[51] on the basis that the sum set for bail was excessive and had been fixed without his personal circumstances having been taken into consideration. He relied on article 5 (3) of the European Convention of Human Rights, which provides that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

In 2010, the Grand Chamber ruled by a majority of ten votes to seven votes that there had been no violation of article 5 (3) even though the bail of three million euros was recognised by the Court as being far beyond the financial means of Captain Mangouras. The majority decision emphasised two aspects of the case: first, the gravity of the alleged offence and the growing concerns in Europe and elsewhere in relation to environmental damage which was referred to as the "new realities" to be taken into account in interpreting article 5 (3). Secondly, the majority took the view that the Spanish courts in setting the bail had taken into account the "professional environment," which may be interpreted as covering the relationships between Captain Mangouras, the shipowners and the P & I Club. The Court noted that the bail had been paid "as a one-off, spontaneous humanitarian gesture" by the London P & I club.

> 83. The Court is conscious of the fact that the amount set for bail was high, and is prepared to accept that it exceeded the applicant's own capacity to pay. However, it is clear from the foregoing that in fixing the amount the domestic courts sought to take into account, in addition to the applicant's personal situation, the seriousness of the offence of which he was accused and also his "*professional environment*", circumstances which, in the courts' view, lent the case an "exceptional" character.....

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[50] Article III 9.18 of the Guidelines.

[51] *Case of Mangouras v Spain* (Grand Chamber Application no. 12050/04) 28 September 2010.

> 92. … the Court considers that the domestic courts, in fixing the amount of bail, took sufficient account of the applicant's personal situation, and in particular his status as an employee of the ship's owner, his *professional relationship* with the persons who were to provide the security, his nationality and place of permanent residence and also his lack of ties in Spain and his age. In view of the particular context of the case and the disastrous environmental and economic consequences of the oil spill, the courts were justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant.

With great respect, "professional environment" and "professional relationship," are somewhat portentous, obscure and misleading utterances. It was a fact that bail had been put up by a P & I Club as "a spontaneous, one-off humanitarian gesture".[52] And, as the minority judgment pointed out:

> … at no stage prior to the applicant's release was any inquiry made by the national courts as to the legal obligations, if any, owed by the owners to post bail or as to the relevant insurance arrangements which existed between the owners and their insurers. In particular, there appears to have been no investigation of the question whether the insurers had any responsibility to indemnify the shipowners in respect of the bail bond of a ship's Master who had been detained by the maritime authorities in the circumstances of the present case. Indeed, according to the undisputed evidence of the third-party interveners, there was no such legal obligation under the 1992 Convention and neither the shipowners nor their insurers had any legal responsibility in the matter of bail, whether by custom, practice or contractual arrangement.[53]

In the minority judgment, the approach of the Spanish courts in fixing the applicant's bail was held not to be compatible with the principles established by the Court under article 5(3). Some comments are apposite. To set bail far beyond the reach of a seafarer where no other party is under any enforceable obligation to raise the bail is to render illusory the entitlement of a seafarer under article 5(3) to secure release pending trial. And, had the Guidelines been determinative of the issue, it is hard to imagine how bail of three million euros could have been regarded as "a reasonable bond," far exceeding the capacity of the master to pay. The authority of the Court is, with respect, at its best when its judgments are based on legal and not moral obligations; and the majority judgment - in itself - creates no legal obligation on P & I Clubs to pay bail for masters.

Legal representation

The right of seafarers to legal advice and legal representation also merits special attention. The right of an accused person to legal representation is a right explicitly recognised in many international instruments (including the ICCPR,[54] the African Charter on Human and Peoples' Rights,[55] the American Convention on Human Rights,[56] the Standard Minimum Rules for the

[52] *Case of Mangouras v Spain* (Grand Chamber Application no. 12050/04) 28 September 2010 para 59.
[53] *Case of Mangouras v Spain* (Grand Chamber Application no. 12050/04) 28 September 2010 para 6.
[54] Article 14 (1) (b) "To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" and article 14(1)(d) "To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it …".
[55] Article 7 "Every individual shall have the right to have his cause heard. This comprises: … (c) the right to defence, including the right to be defended by counsel of his choice; ..."

Treatment of Prisoners,[57] and the ECHR);[58] as well as in many national constitutions, and in much case law[59] where it has been described as a right of "paramount importance"[60] that "must ... lie near the "heart" of a fair trial.[61]

The precise nature and extent to the right to legal representative for seafarers varies from jurisdiction to jurisdiction, and even states party to conventions may give different effect to the right. The European Court of Human Rights, for example, gives to the contracting states considerable freedom in choosing the means of ensuring that the Convention rights are secured in their judicial systems;[62] and, if the national law is obscure, uncertain or open to different interpretations, the ECHR will interpret the national law in the manner that most closely corresponds with the Convention.[63] The Convention rights are designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective." [64] It is central to the concept of a fair trial that an accused is not denied the opportunity to present his case effectively before the court and that he is able to enjoy equality of arms with the opposing side.[65]

The right of a seafarer to free legal representation raises additional issues. Under the ECHR, for example, the institution of a legal aid scheme constitutes one of the means that a state may employ to guarantee the rights enshrined in the Convention.[66] Here, a seafarer might have the right to free legal assistance provided the seafarer does not have sufficient means to pay for legal assistance and the interests of justice require that he be given legal representation.[67] The right to free legal assistance under that Convention is therefore subject to limitation and is not

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[56] Article 8(2) "... During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel." The Inter-American Court of Human Rights in an Advisory Opinion OC-18/03 of 17 September 2003 requested by the United Mexican States opined that: "The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question."

[57] "For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official."

[58] Article 6(3) "Everyone charged with a criminal offence has the following minimum rights: ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...".

[59] See, for example, the *Case of S v Switzerland* in the European Court of Human Rights of 28 November 1991 (Application no. 12629/87; 13965/88).

[60] *Case of John Murray v The United Kingdom* in the European Court of Human Rights 8 February 1996 (Application no. 18731/91) para 66.

[61] *Cadder v Her Majesty's Advocate* [2010] UKSC 43 para 93.

[62] *Case of Quaranta v Switzerland* 24 May 1991 (Application no. 12744/87) at para 30; *Case of Rybacki v Poland* (Application no. 52479/99) 13 January 2009 para 54.

[63] See the partly dissenting opinion of Judge Foighel in *Case of Benham v United Kingdom* (Application no. 19380/92) 10 June 1996.

[64] *Artico v Italy* (A/37) (1980) 3 EHRR 1 at para 33 cited, for example, in *Imbrioscia v Switzerland* (1994) 17 EHRR 441.

[65] *Case of Steel and Morris v United Kingdom* (Application no. 68416/01) 15 February 2005 para 59.

[66] *Case of Steel and Morris v United Kingdom* (Application no. 68416/01) 15 February 2005 para 60 there are other means of guaranteeing the implementation of Convention rights such as simplifying the applicable procedure.

[67] *Case of Quaranta v Switzerland* 24 May 1991 (Application no. 12744/87) para 27.

an absolute right.[68]

There are other limitations. The right of a seafarer under article 6(3)(c) of the ECHR to "defend himself ... through legal assistance of his own choosing" does not, despite its imprecision, connote a right to an unlimited number of legal representatives; [69] instead, its purpose is to ensure that the seafarer's case is heard by giving the seafarer - as necessary - the assistance of an independent legal professional.[70] The right to legal representation is further limited by, for example, the state's right to regulate the appearance of lawyers before the courts; the obligation of the lawyer not to transgress the professional ethics governing his profession;[71] and the obligation of the lawyer not to support any criminal activity by the seafarer.[72]

Nonetheless, the right to free legal representation can be invoked where, for example, the potential sentence is severe; or a wide range of different options are available to the court; or the personal circumstances of the seafarer are complicated; or legal assistance is required for the adequate presentation of the case for the seafarer;[73] or the case is generally complex;[74] or the relevant law and procedure is complex;[75] or what is at stake is of high importance;[76] or the seafarer does not have capacity to present himself.[77] In short, the right to legal advice and legal representation is not absolute and can be complex.

Against that international background, consider the judgment of a Court of Marine Enquiry in South Africa (as yet an unreported decision into the loss of the *MFV Kingfisher* which sank with the loss of 14 lives over which the author presided) where the skipper of the vessel who was the subject of the enquiry was without legal advice and representation for lack of funds. Was the Court of Marine Enquiry to proceed nonetheless? Would the constitutionally enshrined rights of an accused person to legal representation apply in a Court of Marine Enquiry exercising jurisdiction and powers very similar[78] to those exercised by Lord Mersey who presided over the Formal Inquiry into the loss of the *Titanic*? Courts of Marine Enquiries (although differently styled in different jurisdictions), remain a common type of investigation to which seafarers may be subjected. These courts answer questions posed by the relevant authority concerning the maritime casualty; and they can, for example, cancel or suspend a master's certificate of competency; and make recommendations to prevent as far as possible a

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[68] *Ensslin, Baader, and Raspe v Federal Republic of Germany* (Application no. 7572/76, 7586/76 et 7587/76 para 20; *Case of Rybacki v Poland* (Application no. 52479/99) 13 January 2009 para 54.

[69] *Ensslin, Baader, and Raspe v Federal Republic of Germany* (Application no. 7572/76, 7586/76 et 7587/76 para 20.

[70] *Ensslin, Baader, and Raspe v Federal Republic of Germany* (Application no. 7572/76, 7586/76 et 7587/76 para 20.

[71] *Ensslin, Baader, and Raspe v Federal Republic of Germany* (Application no. 7572/76, 7586/76 et 7587/76 para 20.

[72] *Ensslin, Baader, and Raspe v Federal Republic of Germany* (Application no. 7572/76, 7586/76 et 7587/76 para 20.

[73] *Case of Quaranta v Switzerland* 24 May 1991 (Application no. 12744/87) paras 33 - 37.

[74] *Case of Benham v United Kingdom* (Application no. 19380/92) 10 June 1996.

[75] *Case of Steel and Morris v United Kingdom* (Application no. 68416/01) 15 February 2005 para 61

[76] *Case of Steel and Morris v United Kingdom* (Application no. 68416/01) 15 February 2005 para 59.

[77] *Case of Steel and Morris v United Kingdom* (Application no. 68416/01) 15 February 2005 para 61.

[78] As to the great similarity between the jurisdiction and powers of the South African and English courts see, for example, H Staniland "The enduring and evolving legal legacy of the Titanic: an enquiry into marine casualty investigations and self-incrimination" *Journal of Business Law* 4 (2012) 299-318; and for a discussion of real and fictional enquiries see, for example, H Staniland "Admiralty law and imaginative precision in Lord Jim" *Journal of International Law and Technology* 8(4) (2013) 298-315.

recurrence of such casualties. In the case of the *MFV Kingfisher*, the Court of Marine Enquiry explained its approach to legal representation as follows:

> [15] The opening of the Court was delayed for some hours because Skipper Douglas Campbell did not have legal representation due to lack of funds. His position was more fully explained in a letter that he handed to the Court. The Court was concerned to ensure that the right of Skipper Douglas Campbell to a fair enquiry was facilitated. At the invitation of the Court, the legal representation of Skipper Douglas Campbell was discussed with the parties in chambers. After consultation with Captain Nigel Campbell of SAMSA [the South African Maritime Safety Authority], funds were urgently secured from the Maritime Fund to cover the costs of legal representation for Skipper Douglas Campbell. The Court expresses its appreciation and thanks to Captain Nigel Campbell and to SAMSA.

And, after delivering its judgement, the Court of Marine Enquiry then went on to make several recommendations, including a recommendation relating to the Guidelines:

> [234] But for the provision of funds by SAMSA, Skipper Douglas Campbell would have been without legal representation. The importance of legal representation is recognised internationally in the Guidelines on Fair Treatment of Seafarers in the Event of a Maritime Accident ("the Guidelines") adopted by the Legal Committee of the IMO and the Governing Body of the ILO. The Guidelines have the objective of ensuring that seafarers are treated fairly following a maritime accident. According to the Guidelines, port or coastal states should: ".7 ensure that seafarers are, where necessary, … provided access to independent legal advice… [235] Although the Guidelines are recommendatory, they have been enacted into the laws of some maritime states, and there are growing exhortations from the IMO for more states to give effect to the Guidelines. The Court recommends that the Director-General considers the extent to which the Guidelines should be given effect in South Africa.

While it is not appropriate for the author to comment on his own judgment, a few generalised remarks are permissible. It may be that in some courts in some jurisdictions, the Guidelines can as a matter of judicial discretion be taken into account by the court and/or recommended to the legislature. Whether that is possible or not will depend on the facts of each case and may vary between courts and within different jurisdictions. Around the world some courts conducting inquiries into casualties are expressly enjoined to make recommendations,[79] which could include recommending the implementation of the Guidelines.

But to leave the implementation of the Guidelines in the hands of such courts cannot be advocated. Implementation by judicial law making or recommendation would not be consistent, would almost certainly never be complete and would not be permissible in some jurisdictions. Instead, the approach of the IMO, calling for legislative amendment, is the only feasible approach.

Conclusion

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[79] The report from the Formal Inquiry into the loss of the *Titanic* was handed down on 30 July 1912. On 20 January 1914, SOLAS was adopted by 16 states. Many articles in the 1914 version of SOLAS were closely related to the circumstances, findings and recommendations set out in the report of the Formal Inquiry. SOLAS, as updated, is regarded as the single most important convention concerning the safety of ships.

The decision of the member states of the IMO and the ILO to address the unfair treatment of seafarers is for the reasons advanced in the SRI survey clear and compelling. The unfair treatment of seafarers is best addressed by the implementation of the Guidelines into the national laws of the member states. For the member states of the IMO and ILO, the theoretical and academic notions on the implementation of the Guidelines that are contested in this paper are unlikely to be of any utility. Implementation by judicial means would be neither practical nor possible. Instead, the guidance as adopted and adapted from state practice and proposed in this paper, which has already received endorsement at an international workshop held at the IMO, is the most readily applicable means of giving effect to the various resolutions of the IMO exhorting the widespread application of the rights of seafarers contained in the Guidelines. This should ensure that the often theoretical and illusory rights in the Guidelines become more practical and enforceable around the world for the benefit of the 1.5 million seafarers.