# From Fair Treatment to Human Rights

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## *Introduction*

Seafarers have always had rights but have seldom had fair treatment. Throughout the history of commercial seafaring, the rights seamen had were given to them by the society to which they belonged. The rights an individual possessed were part and parcel of his or her status in the hierarchy of production until quite recently in human history. What you did for a living mattered more than what you were born although having been born into a particular family brought with it social standing that tied the individual to property of some kind. Seamen, like soldiers, were from the poorest strata of societies, ancient or modern, European or Asian. African communities had more sense than to separate people into haves and have-nots - at least until colonial times.

Fair or unfair treatment of seamen, until some one hundred years ago, were matters of personal control by their economically and socially superiors. In only one period of commercial seafaring's history did seamen enjoy approximate equality of status if not of income. In 10th -13th century Europe seamen could be real shareholders in the maritime venture of seagoing merchants. They shared in the profits of the enterprise and were protected from arbitrary punishment. Their pay, food rations and medical welfare were enshrined in a number of sea codes from the Mediterranean to the Baltic.

## *Labour Laws And Human Rights*

However, you did not come here to hear me talk about the history of seafaring. Lives and the work of seamen were always special in the physical and psychological sense, but our collective traditions accumulated over the years no longer serve as compass points. On the other hand, the social, political and economic changes around us contain the seeds of modern seafaring in which fair treatment and human rights of seamen must play major roles.

In a world where everyone is made to work (except the very rich who make money while they sleep - as the late Francois Mitterand used to say) the relationship between labour laws and laws relating to human rights are intimately connected. This is especially so in case of seamen whose work and living conditions onboard ships represent a sizeable part of their existence as human beings.

The laws, rules and regulations under which seamen in every part of the world worked and were treated related to employment, food rations and discipline. Many of these laws, rules and regulations confirmed established customary behaviour and found their way on to the statute books of many nations. The concept of universal rights, rights that were recognised in every nation and across state boundaries were slower to develop. The cry for freedom, equality and fraternity of the American and French revolutions did not start to translate into human rights until the turn of the 19th century into the 20th. The positive law doctrine of state sovereignty and the supremacy of domestic jurisdiction hampered efforts to formulate human rights either in the national or international context.

The horrors of the First World War induced the international community to set up the League of Nations as a treaties based organisation of states to guard the "sacred trust of civilisation". The International Labour Organisation (ILO) was created in 1919, and expanded in 1946, after yet another World War even more devastating and inhuman than the First. The political response from societies across the globe was the demand for human rights - rights that an individual can enforce against all comers even against his own government. The human rights discourse conducted by sociologists and academic lawyers had arrived and started to infiltrate judicial processes in many countries. The political impetus towards internationalising the issue through declarations, covenants, treaties obliging states to legislate for, and implement, human rights in their territories, came with the establishment of the United Nations system.

However, the progress of human rights in legislatures and courts is not plain sailing. The universal menace of terrorism inevitably lead to considerations of protecting populations by employing policy and security measures that often conflict with human rights. There is also judicial reluctance to support open-ended human rights lawmaking. The legal mind likes certainty and is more comfortable with positive law principles or arguments. Denial of the very existence of human rights comes easily to lawyers -especially those who are briefed by governments - who would like to recognise no law except that enacted in accordance with their own state's constitution. In their eyes, the law gives and takes away all the rights individuals may have. That is not to say, of course, that judges or legislators are impotent or unwilling to formulate human rights propositions in their respective spheres; some try harder than others.

Perhaps the greatest, obstacle to enforcement of universal human rights across the globe is the rule of international law making via sovereign states. The old Soviet Union was ready to, and did, sign up to almost all human rights convention agreed in the UN, but insisted that only states have the right to enforce those rights. Many other states possess similar mindsets for a variety of cultural or ideological reasons that obstruct uniform and universal applications of human rights provisions.

One society of the international community in our globalised economic world that cannot avail itself to the luxury of domestic law jurisdiction in protecting their members' human rights is the world's maritime workforce - seamen who work on merchant ships. The discourse about their human rights must begin with demand for fair treatment by public authorities of states, big and small. Fortunately, the issue is on the ILO and IMO agenda, and we are some way along the road to formulating a set of guidelines to be promulgated by both organisations to states for their maritime administrations to observe.

## *Fair Treatment at the IMO*

There is now the Joint IMO/ILO *Ad Hoc* Expert Working Group on the Fair Treatment of Seafarers that had its first meeting in January of this year. The term of reference came from the ILO's Governing Body and asked the joint working group to "examine the issue of fair treatment of seafarers in the event of a maritime accident." We did not like the narrowness of the contingency that might be followed by unfair treatment being restricted to a 'maritime accident' but had to accept it. Neither could we enlarge it in the Legal Committee, so we have to find another way to broaden the scope of events faced by seamen in the course of their employment. There is certainly a call from many delegations to find a comprehensive definition for 'maritime accident' in the guidelines.

IFSMA, India and Brazil made written submissions to the Legal Committee which were passed by that committee on to the joint working group for consideration. IFSMA's document, and its annex, contained legal justification, under international law, for the fair treatment of seafarers and a proposal for a body of principle for the protection of seafarers under any form of detention following a marine accident or maritime incident or commercial dispute involving their ship and/or her cargo. India's submission urged the creation of an international instrument to deal with the fair treatment issue while Brazil's document drew attention to cases of possible criminalisation of seafarers serving on board an abandoned ship that may cause damage to persons, property or to the environment. The working group received additional submissions that were duly discussed at its first meeting but without conclusions as to the shape and form of the guidelines.

The 90th session of the Legal Committee (April 2005) had not much time to deal with the fair treatment issue. The report of the joint working group was noted and the draft resolution approved. IFSMA submitted three further papers to Legal Committee: One asked it to expand the term of reference to include contingencies within public and private law domains encountered by seafarers, shipmasters in particular, in the course of their employment. This was in line with our earlier submission because we believe that the restriction of the terms of reference to 'maritime accidents' was inadequate in the real world of shipping today.

Our second paper dealt with the open issues thrown up during discussions in the working group. The most important of which is possible legal and procedural mechanisms of prompt release from detention or other form of restriction on the seafarer's movement within the state conducting the investigation or inquiry. The third paper informed the Legal Committee of the five key resolutions passed at IFSMA's two days conference in February on the criminalisation of seafarers. No action was taken by the Legal Committee on these submissions.

Henceforth, the real work will have to be done by the intersessional correspondence group (agreed by the working group at its fist meeting) where every interested delegation may contribute. IFSMA set up a dedicated web-site (http://www.ifsma.org/fairtreatment> and e-mail address for comments, etc. to be collected. There is a five days meeting of the working group scheduled for March 2006. The correspondence group will have done its job by then and at that meeting a set of guidelines will be formulated and agreed. In the spring of 2006 the Legal Committee of the IMO and the ILO's Governing Body will have to approve the guidelines in order for them to be promulgated to states. If that happens as planned, we have done well.

## *Guidelines*

IFSMA is the first to submit draft guidelines to the correspondence group. They follow the format of a previous IMO guidelines relating to oil pollution. There is an introduction outlining the purpose and objectives of the guidelines and the special position of seafarers. The next section deals with application of the guidelines and addresses maritime administrators, investigators, etc. who might be in contact with seamen in those circumstances. The section on implementation is the longest and most important. '*Maritime accident'* is defined as *any unforeseen contingency that is connected with the sea and shipping and in particular with the navigation and handling of ships, her documents, equipment, machinery, material or cargo onboard.*

We concentrate attention on establishing whether a *prima facie* case does or does not exist against the individual seafarer. From that finding of fact or facts should follow all

subsequent treatment of the seafarer. If he is detained or dealt with summarily by a court or administrative tribunal, the accepted principles of protecting prisoners should be complied with. If he is allowed his freedom, issues of preserving and giving evidence and securing appearance at a later date arise. Provided we can find the verbal means to keep the investigative proceedings on the level of administration without involving prosecutors or magistrates, fair treatment would be obtained with less difficulty. In order to secure the seafarers' attendance on a later occasion, an administrative exchange of person between jurisdictions is proposed as in the European arrest warrant that dispenses with interference by the executive in the extradition process.

An important point of our guidelines is the inclusion of a section on welfare and accommodation of seafarers who are not allowed leave the country of investigation. There is a section listing basic international instruments with which maritime administrators and magistrates of all states should be familiar. The appendices, if any, are matters for discussions, but in our view relevant extracts for the ILO consolidated maritime labour convention should be included.

## *Consolidated Maritime Labour Convention*

Should the fight for justice stop at Fair Treatment? The ILO's 'super- convention' on maritime labour is due to mount its final hurdle in February 2006, contains many provisions, the compliance of which would go a long way to vindicate seamen's human rights. Much of the public health and factory legislation at the end of the 19th century, for example Prohibition of Night Work for Women in Industrial Employment and Prohibition of the Use of White Phosphorus in the Manufacture of Matches, can be regarded as improvements in human rights. The Regulations and Guidelines in the 'super-convention' may be accepted as applications of human rights also. There is a fine line between labour laws and laws relating to human rights, but we should not quibble about the distinction, especially in case of seamen most of whose working lives revolve around the justice of employment and living conditions on board their ships.

## *Human Rights at the UN*

Any modern discussion about human rights proper must begin by the Declaration of Human Rights, adopted in December 1948 by the General Assembly of the United Nations. It recognised the "inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world." Some 80 declarations, covenants and treaties came into existence since then that are inspired by the UN and are part of its system, dealing with one or other aspects of human rights, such as civil and political rights, rights of minorities, rights of self-determinations, against torture, genocide, rights of women, of children and of migrant workers. There is protection of human rights on regional basis, in Europe - the European Covenant of Human Rights, in the Americas -The American Convention on Human Rights, in Africa - The Banjul Charter on Human and Peoples' Rights and The Arab Charter on Human Rights. Human rights are also subjects of non-treaty systems. Courts, commissions and expert bodies monitor and report on the progress of human rights in states and regions, each with its own administrative machinery and modus operandi. A number of codes, from these administrative entities, provide for monitoring performance and for dispute settlements by access to courts or tribunals, but seldom by individuals. The discussions are between states where individuals may, or may not, afforded direct access for redress.

## *International Law Making for Ships*

Granted all the professed good will of states to act on human rights principles and to give practical effect to them in their territory, advance on the human rights front continues to be slow. The juridical difficulty faced by the international community to enact laws with *erga omnes* obligations - laws that are uniform and universal and apply to every one everywhere is undoubtedly a handicap. The shipping industry, especially seamen, suffer form the dichotomy of international law making. We are saddled with a world order based upon the sovereignty of states and treaties between them that produces the failed flag state system under which ships' operational safety, managerial transparency and social obligations are at the whim of very diverse administrative consciences or competencies.

On an alternative juridical concept, ships may be categorised as *subjects* of international law so that legally binding rules can be made for them directly by the international community without the legislative involvement of sovereign states. In many jurisdictions, the ship is already a *res* with a procedural life and legal personality of her own. As an artificial, that is legal person, the ship has to appoint natural persons, her owner, master, the crew, manager, etc. to function. These latter persons are to be the objects of international law - to be slightly technical about it.

Therefore, obligations for a ship to be seaworthy and fit for the purpose (and to provide decent employment conditions and a temporary home to seamen) may be placed on the ship directly by the international community. Simultaneously, the unimpeded rights of the ship to engage in the international community's global and local trades as she sails the world's oceans, coastal seas and rivers, enters ports, etc., may also be guaranteed by the international community directly without interposing the states' domestic laws. The freedom of the seas doctrine would be preserved but under a different concept that replaces Grotius' five hundred years old *res communis,* oceans being accessible to all nations, with the seas and oceans being the territorial domains of a secular *universitas humana.*

I deviated to this topic because I do not believe that nation states will ever have the political will or the socio-economic resources to give seamen justice. A much more coherent system of maritime administration operating to uniform and universal standards has any chance to deliver either criminal or social justice to the world's seamen.

But I digress. But before getting back to human rights, may I mention two issues that need to be tackled as follow on to fair treatment: One is the need to formulate legal definitions of maritime crimes: conduct relating to ships and seamen that may be treated as a crime in domestic jurisdictions. Two, to agree on rules of evidence that can distinguish between acts and omissions on the part of those on board ships and those on the part of owners and managers in order to prevent visitation of the shipowner's sins on seamen in courts of law.

Assuming that we are successful on the Fair Treatment of Seafarers issue in the IMO and ILO by producing a set of guidelines acceptable to states and - keeping our fingers crossed - that states will also do their best to apply them, uniform and universal justice for the world's seamen will not have been assured. How to keep human rights issues relating to seamen before the international community, and more to the point, to convince the shipping industry of their importance?

## *Next Step*

The next step, in my humble view, should be to urge and persuade flag states, port states and labour supply states to ratify and implement the ILO's Consolidated Maritime Labour Convention. The convention has a very good claim to global democratic legitimacy because agreement and consensus between employers and employees of an international industry having been reached, and states should not stand in the way of their implementation.

We should also investigate the possibility of plugging into the human rights system of the United Nations and the machinery of the regional human rights conventions as a non-governmental organisation (NGO) to publicise and advocate seamen's human rights concerns. In addition, there is the United Nations Open-ended Informal Consultative Process on the Oceans and the Law of the Sea as a forum to discuss issues of safety and security and labour conditions. References were made (at its last meeting) to human rights of crews and other topic of great interest to shipping industry, especially seamen.

Subject to receiving expert advice on requirement for accreditation and the procedural mechanics of such bodies, let us go for it. There are many telling arguments for treating seafarers fairly and to accord them equivalent human rights as to any other citizen of world. Whether the shipping industry's labour laws and human rights end up in the correct juridical frame of reference in 5-10-20 years time, is anyone's guess. In the meantime, we must do our best to shape the human rights discourse within and outside our industry on behalf of the men and women who are now at sea and the others who are to be there in the future.