

FAIR TREATMENT OF SEAFARERS IN THE EVENT OF A MARITIME ACCIDENT

Submitted by the Comité Maritime International, The International Group of P&I Clubs, BIMCO, The International Chamber of Shipping, the International Shipping Federation, The International Transport Workers' Federation and INTERTANKO.

SUMMARY

Executive summary: At its ninety-first session, the Committee adopted resolution LEG.3(91) introducing the Guidelines on the Fair Treatment of Seafarers in the Event of a Maritime Accident ("the Guidelines"). These were also adopted by the ILO Governing Body at its 296th session on 12 June 2006, and subsequently circulated by IMO as Circular letter No.2711 dated 26 June 2006. This document observes that, in addition to the apparent failure of certain States to comply with the Guidelines, many States are also failing to comply with their binding treaty obligations under International Law – notably Article 230 of The United Nations Convention on the Law of the Sea (UNCLOS).

Strategic direction: 6

High-level action: 6.3.1 / 6.3.2

Planned output: 6.3.1.1

Action to be taken: Paragraph 14 below.

Related documents: Resolution LEG.3(91); Circular letter No.2711, dated 26 June 2006, and Circular letter No. 2825, dated 7 November 2007.

1. At its ninety-first session, the Committee adopted resolution LEG.3(91) introducing the Guidelines. These were also adopted by the ILO Governing Body at its 296th session on 12 June 2006, and subsequently circulated by IMO as Circular letter No.2711 dated 26 June 2006.
2. In a number of cases giving rise to fair treatment of seafarer issues, a fundamental point has been noted, the significance of which has not been widely recognised. In addition to the failure of certain States to comply with the Guidelines, the CMI has observed that many States are apparently also failing to comply with their binding treaty obligations under International Law – notably Art. 230 of The United Nations Convention on the Law of the Sea (UNCLOS). In essence, there have been occasions where the possibility of a custodial penalty should have been ruled out under international law (Art. 230 of UNCLOS) with the result that there was inadequate justification for preventing the defendants from leaving the jurisdiction, let alone detaining them in any form of custody. However, in an attempt to circumvent the provisions of Article 230 of UNCLOS, seafarers have been seen to be vulnerable to other artificially brought "holding" charges which are unrelated to pollution but which carry a custodial sentence. As such, the CMI invites the Legal Committee to consider raising awareness of the provisions of Art 230, highlighting its effect and importance to those countries which are party to UNCLOS and encouraging compliance with countries' obligations under international law.

Safeguarding the Rights of the Individual – International Law

3. International law contains provisions to safeguard the rights of the individual. The Universal Declaration of Human Rights provides that everyone has the right to leave any country and return to his own. It is therefore normally difficult to justify withholding of a passport, let alone hotel arrest or detention in custody, on the mere ground that the individual has been charged with an offence, unless there is at least a reasonable possibility that he could, if convicted, be punished by a term of imprisonment.
4. In the context of pollution cases, the particular vulnerability of seafarers to extended detention has been recognised. For example, the Guidelines provide *inter alia* that a port or coastal state should “use all available means to preserve evidence to minimize the continuing need for the physical presence of any seafarer.” Furthermore, Chapter 12 of the IMO Casualty Investigation Code (which entered into force in January 2010) provides mandatory standards in relation to obtaining evidence from seafarers. The Code provides *inter alia* that where a marine safety investigation requires a seafarer to provide evidence, this evidence “shall be taken at the earliest practical opportunity” and that the “seafarer’s human rights shall, at all times, be upheld.”
5. There are also specific safeguards set out in UNCLOS Art. 230 which constitute an internationally agreed balance between public concerns about pollution on the one hand and, on the other, the recognised rights of the accused including the liberty of foreign seafarers.

Art. 230 provides: -

“Monetary penalties and the observance of recognized rights of the accused

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction, and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.

3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.”

6. Art. 230, therefore, bars coastal states from imprisoning foreign seafarers for any pollution offence beyond their territorial waters, or for one within those waters unless involving a wilful and serious act of pollution. However, it has become apparent that these restrictions have not always availed the defendant.
7. In particular there have been instances where prosecutors, opposing the repatriation of defendants, have framed their charges in such a way that the acts of which the defendant is accused allegedly constitute offences other than (or in addition to) pollution offences. These other ‘holding’ charges have sometimes appeared to be of a somewhat artificial nature, brought for the purpose of contending that they are non-pollution offences, and so fall outside the safeguards of UNCLOS Art. 230.

8. To determine whether or not this argument is justified in a particular case, the following question can usefully be asked: would the Court still be contemplating imposing a custodial sentence had there been no pollution? If the answer is 'no,' and a custodial sentence would not have been imposed *but for* the pollution, it follows that it is the pollution, not the technical form of the charges, which accounts for the proposed penalty. In such circumstances, given that Article 230 provides for monetary penalties only in respect of pollution from foreign ships, save in the case of wilful pollution in the territorial sea, this should preclude a custodial sentence.
9. When it is recognised that it is generally the pollution, as opposed to other offences, that provokes public outrage, it can be appreciated how such a situation has developed and why seafarers' rights under Article 230 have become so vulnerable. The difficulty, of course, is how to protect seafarers from charges that have been artificially created. It may be considered that the first step is to raise awareness of this situation within countries that are party to UNCLOS. In so doing, it is hoped that those defending seafarers and seeking to rely upon UNCLOS Art. 230 may be more alive to the problem and pre-empt and address any unjustified attempt to circumvent its restrictions.
10. It should also be noted that even in states not parties to UNCLOS, the Convention may be considered applicable being part of customary international law and therefore precedential in cases of detention following marine casualties.
11. By examining what happens in practice in the aftermath of a pollution casualty, the particular vulnerability of seafarers can more readily be understood. In this regard, reference can usefully be made to the updated study on treatment of seafarers by BIMCO dated 3 September as submitted to the IMO (LEG 97/INF.X).

Summary of Information

12. The safeguards under UNCLOS Art. 230 reflect a recognition of the vulnerability of seafarers. The frequency of unjustified criminalisation of seafarers has become, in practice, an unfortunate reality, particularly so in the aftermath of a large scale pollution incident. Inevitably, there will be heightened political tension given the likely public and media reaction to such events. The intensity of public reaction to a particular incident may be exacerbated by a lack of appreciation of the well established and internationally agreed compensation regimes for many such incidents (such as the CLC/Fund Conventions in the case of oil pollution from tankers). The reasons behind what have sometimes been termed 'political' responses to such incidents are, therefore, understandable. There will be immense political pressure felt by local authorities and, in many cases, real hardship endured by those suffering loss as a result of an oil spill. However, it is unfortunate that such responses tend to be prejudicial to the seafarers and a balance must be maintained between the legitimate concerns of authorities in such circumstances and the human rights of the individual.
13. In a number of cases giving rise to fair treatment of seafarer issues, the CMI has observed that in addition to the failure of certain States to comply with the Guidelines, many States are apparently also failing to comply with their binding treaty obligations under International Law – notably Art. 230 of UNCLOS. In practice, there have been occasions where the possibility of a custodial penalty should have been ruled out under Art. 230 but where seafarers have become detained on artificial "holding" charges designed to circumvent the Art.230 safeguards. Such charges will typically be unrelated to pollution, carry a custodial sentence but would not have been brought

'but for' the pollution. As such, the CMI invites the Legal Committee to consider raising awareness of the provisions of UNCLOS Art. 230 and highlighting its effect and importance to those countries which are party to UNCLOS and encouraging compliance with their obligations under international law.

Action requested of the Legal Committee

14. The Legal Committee is invited to consider the information in this document relating in particular to UNCLOS Art 230, its effect and importance. In particular it is invited to consider how best the proper application of UNCLOS Art. 230 can be promoted in order to discourage other, artificially brought, "holding" charges as described herein.
