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TRAPPED AT SEA: AS SEAFARERS' RIGHTS ERODE DURING COVID-19 PANDEMIC, ARBITRATION MECHANISM MAY OFFER A PATH FOR REDRESS

*by Shannon Quinn**

Human rights abuses against laborers at sea are notoriously difficult to monitor and even more difficult to remedy. The global COVID-19 pandemic has presented additional challenges for seafarers: since March 2020, hundreds of thousands of cargo ship laborers have been unable to return home due to travel restrictions.¹ In many cases, these workers have been stranded at sea for months, working well beyond the expiration of their contracts in shocking conditions likened by seafarers and advocates to modern slavery.²

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¹ See, e.g., 'My Children Ask Me When Am I Coming Home': Stranded Seafarers Share Their Frustrations, U.N. NEWS (July 19, 2020), <https://news.un.org/en/story/2020/07/1068651>.

² See *Coronavirus Makes 'Modern Slaves' of Ship Crews*, UN Told, DW (Sept. 25, 2020), <https://www.dw.com/en/coronavirus-maritime-bubble/a-55047956>.

The economic importance of the shipping industry³ and power imbalance between transportation corporations and laborers create conditions ripe for violations of labor-based human rights. Under maritime law, states under which vessels are registered—known as “Flag States”—are responsible for regulating, policing, and enforcing international law on board.⁴ However, ships often register under “flags of convenience,” taking advantage of open registries established by countries that have few domestic regulations, cheap registration fees, and limited resources for enforcement.⁵ This compounds the difficulty of protecting seafarers' rights, allowing for limited oversight of the shipping industry. In the COVID-19 era, this limited oversight has led to a loosening of regulations on contract term limits and the disintegration of onboard conditions.⁶

One organization, Human Rights at Sea,⁷ advocates for the accountability of all actors in the maritime industry and is working to develop a human rights-based model of arbitration that could provide an alternative or additional forum for redress for seafarers.⁸ Under this model, the state responsible for

³ The shipping industry is the cornerstone of global trade, accounting for more than eighty percent of trade movement worldwide. See Press Release, U.N. Sec. Gen., Statement Attributable to the Spokesman for the Secretary-General on the Repatriation of Seafarers (June 12, 2020), <https://www.un.org/sg/en/content/sg/statement/2020-06-12/statement-attributable-the-spokesman-for-the-secretary-general-the-repatriation-of-seafarers>.

⁴ U.N. Convention on the Law of the Sea art. 217, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994)[hereinafter UNCLOS].

⁵ See *Flags of Convenience*, INT'L TRANSP. WORKERS' FED'N, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> (last visited Oct. 18, 2020).

⁶ See *Coronavirus Makes 'Modern Slaves' of Ship Crews*, UN Told, *supra* note 2.

⁷ HUMAN RIGHTS AT SEA, <https://www.humanrightsatsea.org/> (last visited Oct. 18, 2020).

⁸ See David Hammond et al., *Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea*, SHEARMAN & STERLING: HUM. RTS. AT SEA (2020) [hereinafter *Arbitration White Paper*], https://hrasarb.com/wp-content/uploads/2020/07/20200324-HRAS_Shearman-LLP_Arbitration_Human_Rights_White_Paper-UPDATED_20200505-ORIGINAL-SECURED.pdf

redressing these abuses would be a key player.⁹ The mechanism would be similar to that of investor-state arbitration, in which a state would articulate an offer to arbitrate with victims — whether through an international instrument or domestic legislation — and the individual would accept by initiating proceedings.¹⁰ Among the multitude of difficulties in redressing human rights abuses at sea is a lack of power to compel effective remedies like monetary damages; by leveraging the widespread adoption of the New York Convention on the Enforcement of Arbitral Awards, arbitration would enable victims to seek monetary compensation.¹¹ A key challenge, however, will be securing consent of states to arbitrate claims by individuals, as this mechanism would rely on states extending the offer. One potential avenue is to pressure Flag States to do so by singling out those with poor rights enforcement records.¹²

The COVID-19 pandemic offers a timely opportunity for non-governmental organizations and maritime stakeholders to pressure Flag States to opt into the development of this mechanism. According to the International Transport Workers' Federation (ITF), hundreds of thousands of seafarers are trapped at sea and there are increasing reports of crew members contemplating suicide.¹³ Crew member contracts typically run four to six months, and the Maritime Labour Convention imposes an eleven-month maximum.¹⁴ Restrictions on disembarking due to the pandemic have made it difficult to facilitate crew changes.

⁹ *Id.* at 8.

¹⁰ *Id.*

¹¹ *Id.* at 4-5.

¹² *Id.* at 9.

¹³ See ITF and JNG Joint Statement: On Seafarers' Rights and the Present Crew Change Crisis, INT'L TRANSP. WORKERS' FED'N (Oct. 5, 2020), <https://www.itfseafarers.org/en/news/itf-and-jng-joint-statement-seafarers-rights-and-present-crew-change-crisis> (demonstrating the ITF's sustained advocacy sounding the alarm on this crisis); Aurora Almendral, *Trapped by Pandemic, Ships' Crews Fight Exhaustion and Despair*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/business/coronavirus-sailors-cargo-ships.html>.

¹⁴ Maritime Labour Convention, Feb. 23, 2006, 2952 U.N.T.S. 3 [hereinafter MLC] (entered into force Aug. 20, 2013).

This crisis has enabled employers to coerce seafarers into extending their already-expired contracts, with some laborers reporting that they fear being black-listed if they refuse to continue work, which would cut off their means of survival.¹⁵ In August, Australian authorities investigated the cargo ship *Unison Jasper* based on accusations that the Burmese crew on board had been forced into extending expired contracts.¹⁶ Conditions on board are often bleak, requiring performance of complex, dangerous work in shifts up to twelve hours per day, seven days per week.¹⁷ As one Egyptian seafarer reported: "I think I will commit suicide because of the stress of the long contract. I feel that there is no meaning to life."¹⁸

This situation implicates an intersecting web of international agreements, including the Maritime Labour Convention (MLC) and the Forced Labour Convention (FLC). Under the UN Convention on the Law of the Sea (UNCLOS), Flag States are responsible for enforcing international laws on the vessels that are registered under the state, but states are failing to meet their obligations.¹⁹ When abuses are uncovered, developing an arbitral mechanism as an additional route for redress would create a path toward accountability for these Flag States.

¹⁵ See Almendral, *supra* note 13.

¹⁶ See Almendral, *supra* note 13.

¹⁷ See 'My Children Ask Me When Am I Coming Home,' *supra* note 1; see also FAQ on Crew Changes and Repatriation of Seafarers, INT'L MAR. ORG. (last visited Oct. 18, 2020), <http://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>.

¹⁸ See Mia Jankowicz, 'I Think I Will Commit Suicide': Cargo Ship Workers Have Been Trapped at Sea for Months Because of COVID-19, Banned from Ports, and Predict 'Anarchy' If Things Don't Change, BUS. INSIDER (Aug. 2, 2020), <https://www.businessinsider.com/cargo-ship-workers-trapped-sea-predict-anarchy-not-sent-home-2020-7> (documenting an increase in crew member suicides as a result of on-board conditions).

¹⁹ See UNCLOS, *supra* note 4, at article 217(1) ("States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards . . . [f]lag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.").

I. AN INTERLOCKING WEB OF HUMAN RIGHTS STANDARDS AT SEA

Flag States have a duty to “ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards.”²⁰ Several legal instruments directly implicate the responsibility of Flag States to protect seafarers’ rights.

The Maritime Labour Convention, for example, establishes a comprehensive set of requirements pertaining to the working conditions for seafarers, including maximum working hours, a minimum number of rest hours, and a maximum contract length of eleven months.²¹ Often referred to as the “Seafarers’ Bill of Rights,” the MLC has been ratified by ninety countries, accounting for “more than 91% of the world’s shipping fleet.”²² Significantly, the top three Flag States — Panama, Liberia, and the Marshall Islands — are all party to the MLC.²³

The current situation also implicates the Forced Labour Convention. Article 1(1) of the FLC expressly requires each signatory state to suppress the use of forced or compulsory labor.²⁴ The FLC defines forced or compulsory labor as “work or service which is exacted from any person under the menace of any penalty and for which that said person has not offered himself voluntarily.”²⁵ Many major Flag States, including Panama, are signatories to both the FLC and the MLC.²⁶ Given the relationship between

labor, contracts, and compensation, the rights enshrined in these Conventions are particularly amenable to redress with monetary damages that could be awarded under an arbitral mechanism.

II. APPLYING HUMAN RIGHTS STANDARDS TO THE CURRENT CRISIS

As the situation at sea becomes increasingly dire, seafarers’ rights have steadily eroded. With their obligation to regulate and enforce international laws, Flag States have a responsibility to address these conditions.²⁷ Flag States, such as Panama, have permitted contracts to extend well beyond the MLC’s eleven month maximum.²⁸ Additionally, Flag States have not enforced MLC limitations on work hours or requirements imposed on employers to accurately log work hours, with some seafarers reporting being forced to work up to eighteen hours per day.²⁹ The failure to adapt to the challenges presented by the pandemic after nearly a year illustrates the severe under-enforcement of key labor protections enshrined in the MLC.³⁰

Contract extensions implicate protections against forced labor. Fred Kenney, Director of Legal and External Affairs at the International Maritime Organization, emphasized “that many overly fatigued seafarers have *no choice* but to continue working.”³¹ Similarly, the case of the *Union Jasper* shows that, most likely, some companies are physically forcing seafarers to sign extensions and subsequently subjecting them to prolonged abusive conditions.³²

²⁰ UNCLOS, *supra* note 4, at art. 217(1).

²¹ *FAQ on Crew Changes and Repatriation of Seafarers*, *supra* note 17.

²² *Introduction to the Maritime Labour Convention*, SEAFARER’S RTS. INT’L, <https://seafarersrights.org/introduction-to-the-maritime-labour-convention/> (last visited Oct. 18, 2020).

²³ *See Top 10 Flag States 2019*, LLOYD’S LIST: MAR. INTEL. (Dec. 3, 2019), <https://lloydslist.maritimeintelligence.informa.com/LL1129840/Top-10-flag-states-2019>; MLC, *supra* note 14.

²⁴ Convention concerning Forced or Compulsory Labour (ILO No. 29), June 28, 1930, 39 U.N.T.S. 55 [hereinafter FLC].

²⁵ *Id.* art. 2(1).

²⁶ *See* FLC, *supra* note 24; *Rule 94. Slavery and Slave Trade*, INT’L COMM. RED CROSS: CUSTOMARY IHL DATABASE, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule94 (last visited Oct. 17, 2020).

²⁷ *See* UNCLOS, *supra* note 4, at art. 217(1).

²⁸ *See* Christiaan De Beukelaer, *The Hundreds of Thousands of Stranded Maritime Workers Are the Invisible Victims of the Pandemic*, JACOBIN MAG. (Oct. 11, 2020), <https://jacobinmag.com/2020/10/maritime-workers-seafarers-coronavirus-stranded>.

²⁹ *See Beyond the Limit: How Covid-19 Corner-Cutting Places Too Much Risk in the International Shipping System*, INT’L TRANSP. WORKERS’ FED’N (Sept. 20, 2020), <https://www.itfglobal.org/en/news/covid-corner-cutting-will-lead-deaths-environmental-catastrophe-new-shipping-report>.

³⁰ *Id.* at 5.

³¹ ‘*My Children Ask Me When Am I Coming Home*,’ *supra* note 1 (emphasis added).

³² *See* Almendral, *supra* note 13.

Stephen Cotton, secretary-general of the ITF, stated that “some crews had become ‘forced labor.’”³³ These laborers fear that they might lose their livelihoods if they fail to agree to the contract extensions, despite the danger presented by working on a vessel beyond the MLC’s maximum limits. By failing to act, Flag States are violating the FLC because the Convention requires under Article 1(1) that signatories take action to suppress forced labor.

Flag States that have signed on to these Conventions have an obligation to address these violations.³⁴ In the short term, Flag States must enforce regulations by disallowing continued contract extensions, closely scrutinizing requests that would lead to understaffed ships, and complying with MLC obligations to monitor hour logs. These first steps are necessary to establish safer conditions for seafarers during and beyond the current pandemic.³⁵

These violations of both the MLC and FLC also present an opportunity to persuade Flag States to offer arbitration as an alternative route to redress for the victims. Given the widespread nature of the violations coupled with the lack of an effective remedy under the usual system, state-backed arbitration of these claims can open the door for seafarers to receive monetary compensation.³⁶ Non-governmental organizations and other maritime stakeholders, such as the FTC, can shine a spotlight on this issue to convince these states to “buy in” to creating this new mechanism. This arbitral process would not entirely displace other avenues for seafarers to find justice in other fora, but the monetary compensation for the labor, contract and hours-related violations under the MLC and FLC could be readily tailored to the violations. The COVID-19-related abuses thus offer a particularly suitable opportunity to push for the establishment of

this alternative form of accountability for seafarers, which could be subsequently utilized beyond this immediate crisis.

While seafarers have worked to keep global supply chains running in the midst of the global pandemic, Flag States have not met their obligations to protect these laborers. Working conditions have deteriorated, and the long contracts that seafarers are being forced to carry out have serious mental and physical ramifications. Given the difficulty of redressing these abuses, it is well past time to think outside of the box on enforcement, and the arbitration initiative proposed by Human Rights at Sea does just that. The plight facing seafarers today offers a powerful example of why effective accountability mechanisms are needed in the maritime space and may create a path forward to pressure Flag States comply with their obligations under international law.

³³ *Coronavirus Makes ‘Modern Slaves’ of Ship Crews, UN Told*, *supra* note 2.

³⁴ UNCLOS, *supra* note 4, at art. 217(1).

³⁵ See Megan Scudellari, *How the Pandemic Might Play Out in 2021 and Beyond*, NATURE (Aug. 5, 2020), <https://www.nature.com/articles/d41586-020-02278-5>.

³⁶ See Arbitration White Paper, *supra* note 8, at 5.