

# An Assessment of the Role of Port State in Protecting Abandoned Seafarers

Mohit Gupta


The abandonment of seafarers onboard vessels by shipping companies continues to persist in the shipping industry. More than 1,676 seafarers were abandoned in 2023, 1,555 seafarers onboard 113 ships were abandoned in 2022, while a total of 1,399 seafarers onboard 94 different vessels were abandoned in 2021. This study is an attempt to establish the scope of the obligation of a vessel's port state to protect abandoned seafarers. The prescribed scope of protection of abandoned seafarers by port states has been determined by examining the provisions of the Maritime Labor Convention (MLC), 2006, the United Nations Convention on Law of the Sea, 1982 (UNCLOS) and International Human Rights treaties. This study found that the MLC can be interpreted to impose an obligation on port states to take measures to protect abandoned seafarers. Furthermore, even if a port state has not ratified the MLC, it still has certain obligations towards abandoned seafarers under the UNCLOS, Human Rights and IMO treaties. The conclusion is that although the MLC does not expressly prescribe the duties of port states in the event of seafarer abandonment, it indirectly requires them to take measures to protect abandoned seafarers. Moreover, the obligation of port states to protect abandoned seafarers also stems from certain other international law instruments.

## KEYWORDS

- ~ Port state
- ~ Shipping
- ~ Abandonment
- ~ Ship
- ~ Seafarers

Gujarat National Law University, Gandhinagar, Gujarat, India  
e-mail: [guptamohit830@gmail.com](mailto:guptamohit830@gmail.com)  
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## 1. INTRODUCTION

The abandonment of seafarers onboard vessels by shipping companies continues to persist in the shipping industry. More than 1,676 seafarers were abandoned in 2023<sup>1</sup>, 1,555 seafarers onboard 113 ships were abandoned in 2022, while a total of 1,399 seafarers onboard 94 different vessels were abandoned in 2021.<sup>2</sup> The Maritime Labor Convention, 2006 has defined Seafarer Abandonment as a situation where the ship owner<sup>3</sup>

- fails to repatriate a seafarer<sup>4</sup>, or
- fails to provide necessary sustenance, such as food, fuel, or water to a seafarer onboard a vessel<sup>5</sup>, or
- has severed its ties with the seafarer, including by defaulting on wages for at least two months<sup>6</sup>.

One of the reasons for seafarer abandonment is the poor financial standing of shipping companies, preventing them from continuing shipping operations, and the resulting abandonment of the ship and seafarers onboard.<sup>7</sup> The position of a ship abandoned by a shipping company is comparable to the abandonment of land-based work centers by the employer, with the significant difference that in the latter case, employees are not as vulnerable as in the former situation. In the former scenario, seafarers are confined on a vessel in foreign waters, sometimes even without sustenance.<sup>8</sup>

The port state of a vessel is the country in which that vessel performs shipping operations, including cargo loading and unloading. As opposed to the port state, the vessel's flag state is the state in which the ship is registered. The vessel's flag state remains the same until the vessel is registered in another country, while the port state keeps changing depending on the location of the vessel.

In the event of seafarer abandonment, the port state of the vessel can play an important role in protecting abandoned seafarers. Two broad ways in which port state authorities can assist abandoned seafarers are, first, providing sustenance to ensure the survival of seafarers onboard and, second, facilitating the speedy repatriation of seafarers onboard. As far as the latter is concerned, in some instances, port states do not allow abandoned seafarers to disembark<sup>9</sup> due to their unwillingness to have an unmanned foreign vessel in port, which may pose safety and security concerns. As a result, seafarers get confined on the vessel, in spite of not being paid by the ship owner, often without access to necessities for survival.

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<sup>1</sup> International Transport Workers Federation, 'Seafarer abandonment figures for 2023 a cause for concern' accessed from <https://www.itfseafarers.org/en/news/seafarer-abandonment-figures-2023-cause-concern#:~:text=19%20January%202024%2C%20London%20%E2%80%93%20The,%E2%80%93%20an%20increase%20of%2010.92%25.>

<sup>2</sup> International Transport Workers' Federation, 'Analysis of incidents of abandonment for the period 1 January to 31 December 2021', (LEG 109/4(a)/1, IMO Legal Committee 14 January 2022) para 2.

<sup>3</sup> MLC Regulation 2.5 para 2.

<sup>4</sup> Under the Maritime Labor Convention, 2006, MLC standard A2.5.1, cl 1., ship owner should repatriate the seafarer to his place/country of residence on occurrence of certain events which included, expiry of seafarers' employment contract, termination of the employment contract with seafarer by ship owner; termination of the employment contact with ship owner for justified reasons by the seafarer; when the seafarers become incapable of performing their duties under their employment agreement or they can't be expected to perform duties in the specific circumstances.

<sup>5</sup> Maritime Labor Convention, 2006, requires the states to ensure through domestic laws that the ship owners of their registered vessel provide necessities required by seafarers to survive on vessel. The MLC incorporates standards relating to food (Regulation 3.2), accommodation (Regulation 3.1) and medical care (Regulation 4.1)

<sup>6</sup> Under MLC, 2006, standard A2.2, state parties should ensure that the ship owner of their flagged vessels pay wages to seafarers on a monthly basis.

<sup>7</sup> Denis Nifontov et al, 'Seafarer Abandonment Insurance: A System of Financial Security for Seafarers' in Jennifer Lavelle (ed), The Maritime Labor Convention 2006: International Labor Law Redefined (Informa Law from Routledge 2014) para 6.31.

<sup>8</sup> Asuncion Lopez, Raul Villa, "Abandonment of Ships: Consequences for the Crew and the Ship", A Vega Saenz et al (eds.), Proceedings of the 25th Pan-American Conference of Naval Engineering (Springer Nature, 2019) at 350

<sup>9</sup> ILO Seafarer Abandonment Database, abandonment of seafarers on vessel *MV Theoxenia*, *Arybbass*, *Miss Gaunt*, *GP B1*, *AHT Carrier*, <[https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p\\_lang=en](https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p_lang=en)> accessed 21 July 2022.

The existing literature on seafarer abandonment does not address the role of the vessel's port state in the protection of abandoned seafarers specifically. However, there is some literature on related aspects, such as seafarer abandonment insurance<sup>10</sup>, the liability of the ship owner for abandonment<sup>11</sup>, the role of the flag state in an abandonment situation<sup>12</sup>.

This paper aims to determine the scope of the obligation of the vessel's port state to protect abandoned seafarers in accordance with International law. The first part of the paper primarily deals with this issue with respect to the provisions of the Maritime Labor Convention, 2006. This analysis is important because the Maritime Labor Convention, 2006 does not contain any express provisions requiring any state to assist abandoned seafarers or to prevent seafarer abandonment on vessels in ports. The discussion will examine whether this Convention indirectly imposes such obligations on the state. The scope of assistance states are required to render to abandoned seafarers onboard foreign vessels in its ports in accordance with the UNCLOS and Human Rights treaties is discussed in the second part. The third part of the paper gives several suggestions for granting protection to abandoned seafarers from the perspective of the port state. The last part is the conclusion.

## **2. PORT STATE OBLIGATIONS WITH RESPECT TO SEAFARER ABANDONMENT UNDER THE MLC**

The Maritime Labor Convention, 2006 (hereinafter referred to as MLC) prescribes various standards relating to working conditions of seafarers. The treaty is also sometimes referred as the seafarers bill of rights<sup>13</sup> and has been ratified by 108 countries.<sup>14</sup> MLC incorporates Standards and Guidelines, the former being binding and the latter hortatory.

The MLC recognizes the important role of a vessel's port state in aiding and addressing the grievances of seafarers onboard vessels in ports. The MLC does not prescribe any specific port state obligations with respect to protecting abandoned seafarers or preventing seafarer abandonment. However, many obligations have been imposed on vessel port states which may potentially protect abandoned seafarers or prevent seafarer abandonment.

### **2.1. General obligation of port states to implement the MLC**

The MLC stipulates that all state parties to the Convention should prohibit the violation of Convention requirements.<sup>15</sup> State parties should adopt a regimen of sanctions and prescribe remedial measures to discourage violations.<sup>16</sup> Furthermore, the treaty specifically stipulates that all states must cooperate to ensure the effective implementation and enforcement of the Convention.<sup>17</sup> These obligations are imposed on all states, including vessel port states. The MLC contains various requirements which may be violated in case of seafarer abandonment, including that seafarers should be paid wages on a regular basis,<sup>18</sup> seafarers should have access to food and other necessities onboard vessels,<sup>19</sup> and seafarers should be repatriated without any cost to them in certain situations.<sup>20</sup>

As port states, which have ratified the MLC, are required to ensure compliance with MLC provisions, they should take measures to ensure that there is sufficient deterrence among ship owners. For example, a port state can prohibit vessels without financial security coverage to enter its ports. In case of seafarer abandonment, the port state should come forward to resolve it so that MLC provisions are implemented. The port state should take all possible measures to assist seafarers, and coordinate with stakeholders to find a solution in line with MLC provisions.

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<sup>10</sup> Basurko, Olga Fotinopoulou. "The Abandonment of Seafarers and Their Protection through Private Insurance via P&I: a Vision from Spain." *Cuadernos Derecho Transnacional* 10 (2018): 409.

<sup>11</sup> Jing, Hu. "Study on the Liability of Ship owners for the Protection of the Abandoned Seafarers under the Maritime Labor Convention." *Science of Law Journal* 2.11 (2023): 33-39.

<sup>12</sup> Gupta, Mohit, and S. Shanthakumar. "Seafarer Abandonment and Vessel's Flag State Role Analysis." *Transactions on Maritime Science* 11.01 (2022): 260-269.

<sup>13</sup> Nautilus International, 'THE SEAFARERS BILL OF RIGHTS A guide to the ILO Maritime Labor Convention, 2006' at 1 accessed from <[https://www.nautilusint.org/globalassets/public-resources/pdfs/nautilus\\_guide\\_to\\_maritime\\_labor\\_convention.pdf](https://www.nautilusint.org/globalassets/public-resources/pdfs/nautilus_guide_to_maritime_labor_convention.pdf)>

<sup>14</sup> ILO NORMLEX, accessed from

<[https://normlex.ilo.org/dyn/nrmlx\\_en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312331](https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312331)>

<sup>15</sup> MLC art v, cl 6.

<sup>16</sup> *ibid*.

<sup>17</sup> *Ibid* art i, cl 2.

<sup>18</sup> *ibid* reg 2.2, para 1.

<sup>19</sup> *ibid* reg 3.2, para 2.

<sup>20</sup> *ibid* reg 2.5, para 1.

One way to remedy seafarer abandonment and deter ship owners is to allow abandoned seafarers access to port state courts to request the judicial arrest of the vessel. The concept of ship arrest has been recognized by many countries where seafarers can request the competent port state court to arrest the vessel in order to recover their outstanding wages and repatriation costs.<sup>21</sup> If the vessel's owner does not appear before the court after the ship is arrested, the ship can be auctioned off to settle the outstanding amount.

Port states can develop an accessible regime for ship arrest for seafarers. Although the MLC does not prescribe that port states must allow seafarers access to its judiciary to request ship arrest, arresting the vessel on which seafarers are abandoned will ultimately be a corrective measure to discourage the violations of MLC pursuant to Article V(6) of the MLC and will deter ship owners from violating the MLC. Some scholars have proposed a future MLC Amendment that would expressly recognize the right of seafarers to access the courts of member states.<sup>22</sup>

## 2.2. Establishing an inspection mechanism

Regulation 5.2.1 of the MLC stipulates that states may inspect vessels arriving in their ports to check compliance with the MLC.<sup>23</sup> It is important to point out that this provision uses the word 'may', which implies that port states have discretion in deciding whether to inspect a particular vessel calling at their port. Additionally, port states may often be reluctant to inspect vessels to address seafarer issues because port states want the business and economic benefits that arise out of port usage. Nevertheless, if Regulation 5.2.1 is read with the duty of states to prohibit the breach of Convention requirements<sup>24</sup> and the duty of states to cooperate in order to ensure effective implementation of the MLC,<sup>25</sup> it appears that state parties should have in place an inspection mechanism for foreign vessels arriving in their ports, which could lay down the criteria for deciding whether a particular vessel needs to be inspected.

Conducting inspections on vessels calling at ports is an important tool for preventing MLC violations<sup>26</sup> as it helps identify ships which do not comply with MLC requirements. Similarly, the inspection of foreign vessels by the state is also a crucial element of the duty of states to cooperate with one another to ensure compliance with MLC requirements.<sup>27</sup> Today, many states have given their flag to vessels that rarely call at their ports.<sup>28</sup> Monitoring and control over these vessels will be difficult without the cooperation of port states.

The MLC stipulates that if vessel inspection establishes that the provisions of MLC 2006 are not complied with, the port state official should notify the ship master thereof, and set a remediation deadline.<sup>29</sup> Where non-compliance is significant, or came to the attention of the port state due to a complaint, the seafarer and ship owner organization in the port state should also be informed. In addition, the port state may also notify the flag state and the next port of call.<sup>30</sup>

The port state may impose penalties, such as vessel detention in case of serious non-compliance. The MLC mentions that if the inspection finds that the conditions onboard are clearly hazardous to the health, security, and safety of seafarers or there is significant non-compliance with the MLC, the port state may stop the vessel from proceeding to sea.<sup>31</sup>

To facilitate MLC-related inspections, ILO has issued guidelines for ports.<sup>32</sup> ILO Guidelines for port state inspections stipulate that multiple unpaid wages and the poor quality and quantity of provisions are grounds for vessel detention.<sup>33</sup>

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<sup>21</sup> see Admiralty Act 1988 (Australia) section 4(t); also see Admiralty Act, 2017(India) section 4(1)(o); also see Admiralty Jurisdiction Act (No. 40 of 1983) (Sri Lanka) section 4(1)(n)

<sup>22</sup> Gang Chen & Desai Shan, 'Seafarers access to jurisdictions over labor matters' (2000) 77 Marine Policy 1, 2.

<sup>23</sup> MLC reg 5.2.1, cl 1.

<sup>24</sup> *ibid* art v, cl 6.

<sup>25</sup> *ibid* art i, cl 2.

<sup>26</sup> *ibid* art v, cl 6.

<sup>27</sup> *ibid* art i, cl 2.

<sup>28</sup> Marbun, Hanna Friska Luciana, 'Wages of Seafarers: Legal Rights, Protections, and Remedies under the Perspectives of International Conventions' (Master Thesis, University of Oslo, 2018) 1, 22 <<https://www.duo.uio.no/handle/10852/67259?show=full>> accessed 05 January 2022..

<sup>29</sup> MLC standard A5.2.1, cl 4.

<sup>30</sup> *ibid* standard A5.2.1, cl 4.

<sup>31</sup> *ibid* standard A5.2.1, cl 6.

<sup>32</sup> ILO Guidelines for Port State Control Officers Carrying Out Inspections under the Maritime Labor Convention, 2006, as amended (2021).

<sup>33</sup> *ibid*

The rigorousness of foreign vessel monitoring by port states varies from port to port because it depends on financial resources and capacity which individual port states have at their disposal.<sup>34</sup> In this regard, the port state Memorandum of Understanding (hereinafter referred to as MoU) is important. It is a mechanism of cooperation between countries on a regional basis. Under the terms of the MoU, when a vessel is inspected by any member state of the MoU, it is required to share inspection findings with other members of the MoU, so that a vessel recently inspected by a member of the MoU need not be inspected again. Different MoUs apply in different parts of the world, including the Paris MoU 1982, the Tokyo MoU, 1993 and the Indian Ocean MoU, 1998. For instance, the Indian Ocean MoU stipulates that its parties should regularly inspect vessels arriving at their ports.<sup>35</sup> The Indian Ocean MoU lists treaties compliance with which must be checked during the inspection.<sup>36</sup> One of the treaties on the list is the MLC.

Port state inspection regime is also crucial for identifying vessels with expired financial security. The 2021 report of the Paris MoU states that inspections of vessels calling in ports found deficiencies related to Financial Security Certificates for abandonment in 109 instances, and two vessels were detained on this ground.<sup>37</sup> The 2020 report of the Paris MoU shows that in 34 instances, deficiencies related to Financial Security Certificates for abandonment were observed on vessels upon inspection, with one vessel being detained on this ground.<sup>38</sup>

The Paris MoU data indicate that the non-availability of a Financial Security Certificate for abandonment onboard is not taken very seriously as there is less chance of the ship getting detained (only two vessels were detained in 2021, in spite of deficiencies of this type being found on 109 vessels). There is a need for states to be stricter to vessels without financial security cover for abandonment; detention of such vessels would deter ship owners who would be discouraged from not meeting MLC requirements pertaining to financial security.

### 2.3. Establishment of the complaint resolution procedure

The MLC relies on port states to ensure the implementation of Convention standards onboard vessels. Under the MLC, port states are required to establish a complaint procedure for seafarers that would allow seafarers to file a complaint to the port authorities for violation of the MLC.<sup>39</sup> For instance, if a seafarer is considered abandoned due to the non-payment of wages, he can lodge a complain with the port state authorities (the MLC stipulates that seafarers should be paid wages regularly on a monthly basis). A report from the Australian Maritime Safety Authority (hereinafter referred to as AMSA) shows that in 2015-2019, AMSA received 744 complaints related to MLC non-compliance from vessels, 39% out of which were wages-related issues.<sup>40</sup> A port state officer should look into all complaints<sup>41</sup>, and may conduct a detailed inspection.<sup>42</sup> The port state may prevent the vessel from heading out to sea if the inspections finds a deficiency which constitutes a grave violation of the Convention or is clearly detrimental to the crew's safety, security and health.<sup>43</sup>

It is important to highlight that only a few port states have implemented stringent measures, other than detention, against vessels found by inspection, conducted in pursuit of a complaint by seafarers, not to have paid out their wages. One of such measures is banning the ship from coming into port for a certain time period. For instance, the Australian Maritime Safety Authority banned the entry of two foreign vessels into its waters for several years in 2019 because the wages of seafarers were knowingly and deliberately withheld.<sup>44</sup>

<sup>34</sup> Gang Chen & Desai Shan, 'Seafarers Access to Jurisdictions over Labor Matters' (2000) 77 Marine Policy 1.

<sup>35</sup> Memorandum of Understanding on Port State Control for the Indian Ocean Region, 1998, sec 1, para 1.2.

<sup>36</sup> *ibid* s 2, para 1.1.

<sup>37</sup> 'Port State Control Getting Back on Track, Annual Report 2021' (Paris Memorandum of Understanding 2021) <<https://www.parismou.org/sites/default/files/Annual%20Report%202021%20Paris%20MoU.pdf>>

<sup>38</sup> 'Port State Control Dealing with the Pandemic, Annual Report' (Paris Memorandum of Understanding 2020) <[https://www.parismou.org/sites/default/files/TBB\\_Jaaverslag%20Paris%20MoU%202020\\_totaal\\_HRlos.pdf](https://www.parismou.org/sites/default/files/TBB_Jaaverslag%20Paris%20MoU%202020_totaal_HRlos.pdf)> accessed 22 July 2022.

<sup>39</sup> MLC reg 5.2.2, cl 1.

<sup>40</sup> 'Maritime Labor Convention 2019, Annual Report', (Australian Maritime Safety Authority 2019) 10 <<https://www.amsa.gov.au/vessels-operators/port-state-control/maritime-labor-convention-2019-annual-report>> accessed 01 April 2022.

<sup>41</sup> MLC reg 5.2.2, cl 2.

<sup>42</sup> *ibid*.

<sup>43</sup> *ibid* cl 4.

<sup>44</sup> 'Maritime Labor Convention 2019, Annual Report', (Australian Maritime Safety Authority 2019) 15 <<https://www.amsa.gov.au/vessels-operators/port-state-control/maritime-labor-convention-2019-annual-report>> accessed 01 April 2022.

The following chapter highlights the role of the port state in the repatriation of abandoned seafarers onboard foreign vessels in light of the provisions of the MLC.

## 2.4. Facilitating repatriation

Repatriation is one of the most important rights granted to seafarers by the Maritime Labor Law.<sup>45</sup> By virtue of this right, seafarers are entitled to be repatriated at no cost to themselves<sup>46</sup> under certain circumstances.<sup>47</sup> One such circumstance, specifically mentioned in MLC Guidelines, is the inability of the ship owner to meet his obligations towards seafarers due to insolvency, change in vessel registration, its sale or another similar reason.<sup>48</sup> This formulation is broad enough for the situation where a ship owner stops fulfilling some of his legal obligations towards seafarers (like paying regular wages and ensuring sustenance) due to insolvency or another related reason to be considered seafarer abandonment.

The MLC requires flag states to impose the obligation to repatriate seafarers on the ship owner in their national legislation.<sup>49</sup> However, if the ship owner defaults on this obligation, the flag state should come forward and ensure the repatriation of seafarers.<sup>50</sup> In the event of seafarer abandonment, the ship owner might not take steps to ensure seafarer repatriation. Sometimes abandonment itself happens because the ship owner denies repatriation to seafarers.<sup>51</sup> In such situations, the flag state has the responsibility to arrange for the repatriation of abandoned seafarers.<sup>52</sup> The port state has to allow seafarers to sign off from the vessel in the port and make arrangements for their repatriation.

The MLC imposes a general obligation of the port state to facilitate the repatriation of seafarers onboard vessels calling at its ports or passing through its waters, along with crew change.<sup>53</sup> For instance, if the vessel's flag state is making arrangements for the repatriation of abandoned seafarers, the port state should facilitate such repatriation by allowing the sign-off of such seafarers and allowing them to use the territory of the port state for transit.

The situation becomes more complex when the signing off of an abandoned seafarer from the vessel constitutes a breach of the minimum safe manning requirement for the vessel. In this scenario, the port state may not allow the sign-off of the abandoned seafarer unless a new crew member joins the vessel.<sup>54</sup> The port state of the vessel is interested in ensuring that the minimum safe manning requirement of the vessel is complied with, so that the vessel does not pose risks like fire or sinking.<sup>55</sup> There have been occasions where abandoned seafarers were forced to remain onboard the vessel only because a replacement crew could not be arranged.<sup>56</sup>

The obligations of the port state relating to seafarer abandonment under treaties other than the MLC are discussed in the next chapter.

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<sup>45</sup> MLC guideline B2.5.1, cl 1 b(iii).

<sup>46</sup> *ibid* reg 2.5, cl 1.

<sup>47</sup> *ibid* standard A2.5.1, cl 1; There are three circumstances that trigger the seafarer's right of repatriation: the expiry of the seafarer employment agreement, termination of the seafarer employment agreement by the ship owner or by the seafarer for cause, and the incapacity of the seafarer to continue working on the vessel or if a seafarer cannot be expected to carry out work under certain circumstances.

<sup>48</sup> *ibid* guideline B2.5, cl 1(b)(iii).

<sup>49</sup> MLC standard A2.5.1, cl 3.

<sup>50</sup> *ibid* standard A2.5.1, cl 5(a).

<sup>51</sup> *ibid* standard A2.5.1, cl 2(a).

<sup>52</sup> *ibid* standard A2.5.1, cl 5(a).

<sup>53</sup> *ibid* standard A2.5, cl 7.

<sup>54</sup> ILO Database on reported incidents of abandonment of seafarers on vessels MV Theoxenia, Arybbass, Miss Gaunt, GP B1 and **AHT Carrier**, <[https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p\\_lang=en](https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p_lang=en)> accessed 22 July 2022.

<sup>55</sup> Joint IMO/ILO Ad hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers, 'Report of the Working Group' (IMO/ILO/WGLCCS 1/11, IMO 22 October 1999) para 4.9. See also López Arranz Asunción, Raul Villa Caro, José Angel Fraguella Formoso and José Troya Calatayud, 'Abandonment of Ships: Consequences for the crew and the Ship' in Vega Sáenz, A., Pereira, N., Carral Couce, L., Fraguella Formoso, J. (eds.), *Proceeding of the 25<sup>th</sup> Pan-American Conference of Naval Engineering* (Springer Nature, 2018) 349, 359.

<sup>56</sup> ILO Database on reported incidents of abandonment of seafarers on vessels MV Theoxenia, Arybbass, Miss Gaunt, GP B1, and **AHT Carrier** <[https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p\\_lang=en](https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p_lang=en)> accessed 22 July 2022.



### 3. PORT STATE OBLIGATIONS WITH RESPECT TO SEAFARER ABANDONMENT UNDER OTHER TREATIES

In 33% of seafarer abandonment cases reported to ILO in 2020, seafarers were abandoned on the ship in one of the following four countries – UAE, Saudi Arabia, Turkey, and Yemen.<sup>57</sup> None of these four countries has ratified the MLC. The high number of seafarer abandonment cases in port states which have not ratified the MLC raises an important question about the level of protection the port states that have not ratified the MLC are obliged to grant to abandoned seafarers. This issue is discussed in the light of UNCLOS, IMO and Human Rights treaties.

UNCLOS is a widely ratified treaty, with 168 state parties on 2 December 2022.<sup>58</sup> UNCLOS prescribes the obligation of coastal states to render assistance to anyone in distress at sea<sup>59</sup>, in line with the Customary International Law.<sup>60</sup> UNCLOS requires every state to impose an obligation on its flagged vessels to assist anyone in distress at sea.<sup>61</sup> Further, it ensures the ability of coastal states to respond to any distress at sea situation and grant prompt assistance.<sup>62</sup>

Several other treaties, apart from UNCLOS, impose a similar obligation on the states. Regulation 7, Chapter 5 of the SOLAS requires states to ensure that necessary arrangements are in place to rescue persons in distress near their coast. The Search and Rescue Convention, 1979 also imposes similar obligations on state parties.<sup>63</sup> The Convention stipulates that coastal states are required to render assistance to anyone who is in distress in the search and rescue region of the state<sup>64</sup>, irrespective of the nationality or status of a person in distress or circumstances in which they are found.<sup>65</sup> This suggests that the obligation also applies to abandoned seafarers in distress.

The usefulness of Article 98 of UNCLOS and other IMO Treaties mentioned above in case of seafarer abandonment onboard a vessel in the port of any state is discussed in the next paragraph. The crucial question is whether abandoned seafarers can be considered persons in distress under the abovementioned Convention. When seafarers are abandoned onboard a vessel by a ship owner in a foreign port, the seafarers may not have basic necessities for survival, including food, water, fuel etc. Such a situation can constitute distress because life of seafarers is in danger. It will trigger the application of Article 98 of UNCLOS and similar provisions of other IMO treaties requiring coastal states to render assistance to anyone whose life is in danger at sea.

Although all the legal instruments mentioned above impose the duty of coastal states to render assistance to any person in distress at sea, none of them specifies the scope of assistance required to be granted in specific distress situations. Thus, the important question is what scope of assistance port states are required to provide to abandoned seafarers. Such assistance should at least include supplying abandoned seafarers with the basic necessities of life. One crucial issue is whether coastal states are required to make arrangements for the repatriation of abandoned seafarers to their state of nationality. It seems that Article 98 of UNCLOS and similar provisions of IMO treaties discussed earlier do not impose any additional obligations, beyond ensuring basic necessities onboard vessels.

After discussing the application of UNCLOS and several other IMO treaties in seafarer abandonment situations, the role of the port state in seafarer abandonment situations in the light of human rights treaties needs to be examined. The International Covenant on Civil and Political Rights, 1966 (hereinafter referred to as ICCPR) and the International Covenant on Economic Social and Cultural Rights, 1966 (hereinafter referred to as ICESCR) are key human rights treaties widely recognized worldwide. Seafarer abandonment situations often raise several humanitarian issues, as abandoned seafarers may be deprived of sufficient necessities of life, like food, water, fuel, and medicines on board a vessel.

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<sup>57</sup> ILO Database on reported incidents of abandonment of seafarers <[https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p\\_lang=en](https://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p_lang=en)> accessed 03 August 2022.

<sup>58</sup> 'United Nations Treaty Collection' (UN) <[https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtldsg\\_no=XXI-6&chapter=21&Temp=mtldsg3&clang=en#1](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtldsg_no=XXI-6&chapter=21&Temp=mtldsg3&clang=en#1)> accessed 2 December 2022.

<sup>59</sup> UNCLOS, Article 98

<sup>60</sup> Sofia Galani, 'Port Closures and Persons at Sea in International Law', (2021) 70 ICL Quarterly 605, 615.

<sup>61</sup> UNCLOS art 98, cl 1.

<sup>62</sup> *ibid* art 98 (2).

<sup>63</sup> International Convention on Maritime Search and Rescue (adopted on 27 April 1979 entered into force 22 June 1985) annex, ch 2, cl 2.1.1. This provision requires state parties to undertake, "necessary arrangements for the provision of adequate search and rescue services for persons in distress at sea around their coasts."

<sup>64</sup> *ibid* annex, ch. 2, cl 2.1.9.

<sup>65</sup> *ibid* annex, ch. 2, cl 2.1.10.

A very important question is whether the states' human rights obligations extend to foreign vessels in its ports. As a general norm, states' obligations under human rights treaties extend to individuals on state territory or under its jurisdiction.<sup>66</sup> Article 2 of ICCPR mentions the scope of application of the treaty. The provision stipulates that state parties are required to grant protection in accordance with the Covenant to all the individuals on its territory and under its jurisdiction. The question is whether state parties to ICCPR are required to recognize and ensure that abandoned seafarers on vessels in its ports have the rights granted to them by the Convention.

Abandoned seafarers onboard a vessel are not on the land territory of any state, but they are undoubtedly within the territory of the state in whose waters the vessel is stationed (port state), given that the sovereignty of any coastal state extends not only to its land territory but also to its internal waters and territorial sea.<sup>67</sup> Thus, if a port state has ratified the ICCPR, it is required to ensure compliance with Convention rights onboard vessels manned by abandoned seafarers.

Article 6 of ICCPR stipulates that every person has the inherent right to life, and this right has to be protected by law.<sup>68</sup> By virtue of this provision, states are under an obligation to respect and protect the lives of all people who are in distress at sea.<sup>69</sup> The right to food is inherent to a life with dignity.<sup>70</sup> If a seafarer is abandoned and does not have access to the necessities of life, such as food, water, fuel, and medicines on board a vessel, the seafarer's right to life will be endangered. To meet its obligation to take positive measures to protect the right to life under Article 6,<sup>71</sup> the port state should come to the immediate assistance of such seafarers and ensure they are supplied with necessities. Although in an abandonment situation, the right to life is not jeopardized by any action of the port state, but of the ship owner, the state is required to take measures to ensure the full enjoyment of the right to life by all seafarers.<sup>72</sup>

Like ICCPR, ICESCR also applies to anyone within the territory of the state.<sup>73</sup> Thus, port states have to ensure seafarers onboard vessels in their ports have all the rights granted to them pursuant to ICESCR. Article 11 of ICESCR expressly recognizes the right to adequate food for people.<sup>74</sup> The same provision also refers to "the fundamental right of everyone to be free from hunger."<sup>75</sup>

#### **4. SUGGESTIONS FOR GRANTING PROTECTION TO ABANDONED SEAFARERS FROM THE PERSPECTIVE OF PORT STATES**

##### **4.1. States should lay down guidelines for dealing with abandoned vessels in ports.**

The worst cases of seafarer abandonment occur when the ship owner abandons the vessel along with the seafarers. When a vessel is abandoned, the ship owner severs all his connections with the vessel. Although no international instrument specifies how to deal with abandoned vessels in ports, states have developed standard practice to deal with the issue.

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<sup>66</sup> see the International Convention on Civil, Political and Economic Rights (adopted 16 December 1966 entered into 23 March 1976) (ICESCR) UNGA Res 2200A (XXI) art 2 (1). See also American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 1. See also Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nation Committee on Economic, Social and Cultural Rights' (2011) 11(1), HRL Review 1.

<sup>67</sup> UNCLOS art 2.

<sup>68</sup> ICCPR art 6(1).

<sup>69</sup> Human Right Committee 'General Comment no. 36 Right to Life: Article 6' (3 September 2019) UN Doc CCPR/C/GC/36 para 63.

<sup>70</sup> UN Human Right Office of the High Commissioner for Human Right, 'The Right to Adequate Food' (Fact Sheet No. 34) 5. See also UNCHR, 'General comment No. 6 (1982) on the right to life' (30 April 1982) para 5.

<sup>71</sup> Human Right Committee 'General Comment no. 36 Right to life: Article 6' (3 September 2019) UN Doc CCPR/C/GC/36 para 21.

<sup>72</sup> *ibid* para 18.

<sup>73</sup> Fons Coomans, 'The Extraterritorial Scope of the Cultural Rights in the Work of the United Nation Committee on Economic, Social and Cultural Rights' (2011) 11(1) HRL Review 1.

<sup>74</sup> ICESCR art 11(2).

<sup>75</sup> *ibid* art 11(2). See also Office of High Commissioner for Human Rights, 'CESCR General Comment 12 on the Right to Food, Committee on Economic, Social, and Cultural Rights' (12 May 1999) E/C.12/1999/5 paras 14 and 17. Para 14 states, "Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger. (...) Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger". See also UDHR art 25



Whenever a vessel is abandoned in the port of a country, it is auctioned off in line with national procedures.<sup>76</sup> The money recovered is used to pay seafarer wages, port dues, creditors, etc.

A port state can move the vessel to a location where it can be kept unmanned while waiting to be auctioned off to a new owner. Another option is that the port state allows the disembarkation of all the abandoned crew and place replacement crew on the vessel at its own cost. Eventually, the abandoned vessel can be sold, and the port state can use the proceeds from the sale to recover berthing expenses, and the expenses of the replacement crew.

Seafarers cannot be kept hostage on a vessel when ship owners abandon the ship. The MLC required port states to facilitate the repatriation of seafarers. Furthermore, in cases of ship abandonment, the port state has collateral in the form of a vessel that can be sold to recover port expenses, and the cost of seafarer repatriation. Given that ship abandonment can happen in any port in the world, all countries should be prepared to deal with such situations and lay down guidelines specifying standard operating procedures for dealing with abandoned vessels in ports, which would be helpful for both port authorities and seafarers, who would be informed of the procedure followed by the relevant port state.

#### **4.2. States should facilitate access to their courts**

Although many maritime nations already have specialized courts for Admiralty matters<sup>77</sup>, the problem is that abandoned seafarers often do not have access to legal remedies because they cannot afford costly litigation.<sup>78</sup> States can make arrangements to provide free legal assistance to seafarers. Furthermore, states should modify the deadline by which admiralty courts are required to resolve such cases, particularly where the interest of abandoned seafarers is involved.

The admiralty laws of some states prescribe that a claimant is required to furnish security before a ship can be arrested.<sup>79</sup> This provision is counterproductive in the situation where an abandoned seafarer requests ship arrest. The wages of abandoned seafarers have not been paid, and expecting them to furnish security to arrest the vessel is unjustifiable. Hence, where abandoned seafarers seek assistance from Admiralty courts, the requirement for furnishing security for arrest should be waived.

#### **4.3. States should create a fund to protect seafarers abandoned in ports**

States can create a fund to protect seafarers abandoned on vessels in ports. The fund can be used to support seafarers abandoned on vessels in ports. Such a fund exists in the US. Pursuant to the relevant US legislation, the ship owner or operator are required to compensate the fund for any costs incurred by the fund in connection with providing necessary support, including the cost of seafarer repatriation under certain circumstances.<sup>80</sup> If the vessel owner or operator fails to do so, customs clearance could be withheld or revoked after giving notice. Federal court action can be brought for the recovery of money against the vessel *in rem*.<sup>81</sup> Other countries could introduce a similar fund.

#### **4.4. The MLC should be amended to expressly stipulate that ships should be detained by port states if inspection finds that seafarers' wages have not been paid for a significant time**

The MLC states that where an inspection by the vessel's flag or port state finds that the condition onboard the vessel poses a significant danger to the health, security, and safety of seafarers or constitutes a grave violation of the MLC, the vessel should be prevented from proceeding to sea unless such defect is remedied or there is a plan of action to remedy the defect.<sup>82</sup> Under the MLC, inspecting authorities have the discretion to decide whether the conditions on the vessel

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<sup>76</sup> Kpi Oil Bridge A/S v Tug Miss Gaunt, [01 April 2019] Gujarat High Court, AS 37 of 2018; See also Piraeus Bank v Evangella, [05 October 2020] High Court of Andhra Pradesh, IA No. 18 of 2019 in COMS No. 1 of 2019. See also National Bank of Greece SA v MV Theoxenia (IMO No.9142980), [05 January 2018] Bombay High Court Notice of Motion (L) No.697 of 2017 in Comm. Suit No.792 of 2017.

<sup>77</sup> The United States Code Title 28, part 4, ch 85, s1333. See also Maritime Procedure Law of the People's Republic of China 1999, art 4. See also Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, s 3.

<sup>78</sup> RDML Charles D. Michel & LT Amber S. Ward, "Abandonment of Seafarers: Solving the Problem," (2009) U.S. Coast Guard Proceedings 75, 77

<[https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Proceedings%20Magazine/Archive/2009/Vol66\\_No2\\_Sum2009.pdf?ver=2017-05-31-120604-383](https://www.dco.uscg.mil/Portals/9/DCO%20Documents/Proceedings%20Magazine/Archive/2009/Vol66_No2_Sum2009.pdf?ver=2017-05-31-120604-383)> accessed 01 November 2022.

<sup>79</sup> Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, s 11.

<sup>80</sup> Craig H. Allen, 'United States Establishes Fund for Abandoned Seafarers' (2015) Seaways Journal of Nautical Institute 1.

<sup>81</sup> *ibid*.

<sup>82</sup> MLC standard A5.2.1, cl 6 and standard A5.1.4 para 7(c).

require detainment. In most cases, a subjective inspection will be carried out based on the facts and circumstances of the case. However, it has to be noted that in certain cases, the existence of a defect will, *per se*, pose a danger to the ship or persons on board, and there will be no room for the inspecting authority to exercise its professional judgment. For instance, where the wages of seafarers for six months are pending, the decision whether to detain a ship should not be left to the discretion of the PSCO.

We believe that the MLC should be amended to expressly provide that if seafarer wages are found not to have been paid for three months, the vessel has to be detained. At the moment, as states rely on their discretion, one state might not consider five months worth of pending wages a detainable defect, while another may regard two months worth of pending wages as a detainable defect. Australia, in particular, is a country which routinely bans and detains vessels on the ground of unpaid seafarer wages.<sup>83</sup> Recently, in November 2022, AMSA detained a Panamanian-flagged bulk carrier these grounds.<sup>84</sup>

## 5. CONCLUSION

Seafarer abandonment is a serious problem in the maritime sector. Port state of a vessel manned by abandoned seafarers can play a crucial role in protecting abandoned seafarers and preventing such situations from happening.

The discussion in this paper suggests that although the MLC does not expressly stipulate the duties of port states in case of seafarer abandonment, states are still required to take measures to protect abandoned seafarers. The MLC requires port states to take measures to prohibit the violation of the MLC, establish complaint mechanisms for seafarers, and facilitate repatriation.

Moreover, even if a state has not ratified the MLC, it still has certain obligations towards abandoned seafarers under the UNCLOS, IMO and human rights treaties. The obligation to rescue persons in distress at sea in particular grants protection to abandoned seafarers. The protective regime of human rights treaties, such as ICCPR, also extends to abandoned seafarers where ratified by the port state.

Overall, the issue of seafarer abandonment can neither be addressed, nor resolved without the active cooperation of port states. Port states should actively adopt measures that will ensure they meet their obligations under international law, e.g. establish designated funds to protect abandoned seafarers, and facilitate access to their courts.

## CONFLICT OF INTEREST

The authors declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

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<sup>83</sup> Maritime Labor Convention Annual Report, (Australian Maritime Safety Authority, 2019) <<https://www.amsa.gov.au/vessels-operators/port-state-control/maritime-labor-convention-2019-annual-report>> accessed 01 November 2022. See also ITF, 'Australia bans two ships after ITF alerts on unpaid wages' <<https://www.itfseafarers.org/en/news/australia-bans-two-ships-after-itf-alerts-unpaid-wages>> accessed 01 November 2022.

<sup>84</sup> Sam Chambers, 'Bulk carrier detained in Australia over unpaid wages' Splash, <<https://splash247.com/bulk-carrier-detained-in-australia-over-unpaid-wages/>> accessed 10 November 2022.

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