

PROPOSAL for GUIDELINES on the FAIR TREATMENT of SEAFARERS

Submitted by IFSMA

Executive Summary: This proposal is based on IMO Assembly Resolution A 987(24). The International Federation of Shipmasters' Associations (IFSMA) offered a draft document to the Correspondence Group with the aim and object to assist in formulating guidelines on the fair treatment of seafarers who are connected to a maritime accident as defined therein.

From the feedback received, the consensus appears to be that many delegations support the content of that document, but IFSMA has been led to believe that the structure of the proposal [IMO/ILO/WGFTS 3/??] submitted by ICS, ISF and NCFTU might be more acceptable to members of the Joint Working Group.

Recognising the importance of moving forward with the Guidelines for Fair Treatment of Seafarers in this 2nd Session of the Joint Working Group, IFSMA supports [IMO/ILO/WGFTS 3/??] as being based on the following text from IMO Assembly Resolution A 987(24): "RECOGNISING ALSO that the issue of fair treatment of seafarers is the direct responsibility of the port or coastal States, flag States and the State of the nationality of the seafarer, shipowners and seafarers."

IFSMA believes that relevant issues of significance had been omitted from [IMO/ILO/WGFTS 3/??] and IFSMA would wish to present all the important principles on which the Guidelines should be based.

To describe and explain those principles, IFSMA's draft document, (referred to in the first paragraph above) is attached for reference as Annex 1 to this submission.

Action to be taken: See paragraph 9

Related documents: IMO Resolution A. 987(24), A 24/10, LEG 90/WP 3, IMO/ILO/WGFTS 1/11, IMO/ILO WGFT 2/...

1. Principles of importance to IFSMA, and upon which the Guidelines should be based, are (a) the prompt release of seafarers and to preclude unwarranted constraints on their freedom consequent on a maritime incident or accident, and (b) the shared responsibility of shipowners and States, severally and jointly, for the welfare of seafarers (and their families) involved in maritime inquiries, investigations or examinations.
2. IFSMA acknowledges that the discharge of responsibilities outlined above will involve costs/expenditure. The parties' respective responsibilities as to how these costs are met should be clearly defined in the Guidelines. Fair treatment of seafarers in need of protection (and to provide assistance to their families) can only be accomplished through shared administrative, legal and financial responsibility of shipowners/ employers and their insurer/s, on the one part, and of States that are connected to the seafarer and/or to his/her ship, on the other part
3. IFSMA strongly supports the need to carry out investigations to help prevent further accidents and acknowledge the rights of States to conduct and process inquiries, investigations or examinations into the cause/s of maritime accidents. However, special protection is required by seafarers in those circumstances.
4. Furthermore, IFSMA wishes to keep maritime inquiries, investigations or examinations, and subsequent proceedings, on levels of maritime administration without involving the State's criminal law procedures and/or sanctions. Annex 1 contain request to States to accord fair treatment by conducting marine related investigations, inquiries and examinations connected to seafarers by administrations on levels below judicial and particular criminal law involvement wherever that is achievable without prejudice to applicable law operating in the State affected. Low level diplomatic exchanges between States are being suggested when dealing with seafarer required as witnesses in subsequent proceedings.
5. Annex 1 is based the format of IMO Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention (Annex to IMO Assembly Resolution A. 680(17) adopted 6.November 1991). The annex contains in Section 3.7.1 - 3.7.19, an adapted version of United Nations General Assembly resolution 43/173 of 9th December 1988: Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment
6. IFSMA attaches Annex 2 which identifies the international instruments that were referred to in submissions to, and in reports, relevant to the 1st Session of Joint

IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment of Seafarers. It also contains the names/numbers of sections from the draft ILO Consolidated Maritime Labour Convention referred to in paragraphs 1.3.1 - 1.3.5 of Annex 1.

- 7 IFSMA would particularly wish to draw attention to Section 3.7 - 3.7.19 of Annex 1 which serves as principles to apply for the protection of seafarers under any form of detention or constraint being an adaptation of the UN General Assembly resolution referred to paragraph 5 above. These principles are intended to safeguard the inherent dignity and inalienable human rights of seafarers in all relevant circumstances and in particular when they are being dealt with in the State's criminal law system.
- 8 Seafarers' welfare in circumstances envisaged in the guidelines is of paramount importance and Annex 1 in paragraph 3.12.1 contains six different solutions for discussion, any one of which singly or in combination with other/s, could offer a solution to the problem.
9. The Working Group is requested to consider and discuss this submission and attached annexes with a view to formulating agreed guidelines on the fair treatment of seafarers.

ANNEX 1

INTRODUCTION

- 1.1 The purpose of these Guidelines is to provide those responsible for the treatment of seafarers in the course of investigations, inquiries or examinations into maritime accidents (as defined in paragraph 3.2.below) with a framework for the fair treatment of seafarers who are involved in, or affected by, such investigation, inquiry or examination.
- 1.2 The objectives are prompt release of seafarers from detention, the restoration of their freedom of movement, the removal of obstacles to depart from the state where the investigation, inquiry or examination is being conducted, and to avoid the contingency of holding seafarers as human instruments in order to induce or force compliance of obligation/s due from their employer, the owner, charterer or insurer of their ship and/or her cargo.
- 1.3 Seafarers are a special category of maritime workers who deserve special consideration when in contact with State authorities. Seamen are exposed to public law sanctions and risk being stranded in foreign ports. Seamen are entitled to fair employment agreement that should encompass, by necessary implication, fair treatment. Detention or denial of freedom to move and depart from a country, which is not the seafarer's own, is a modern form of shipwreck in today's security and environment conscious world.
- 1.3.1 Article IV of the draft **ILO Consolidated Maritime Labour Convention** provides for employment and social rights of seamen as the shared responsibilities of shipowners and States.

- 1.3.2** Title 2 deals with condition of employment and title 4 with both on-board and onshore matters. The latter addresses access to and financial responsibility for medical care (broadly defined), health protection, welfare onshore and social security protection.
- 1.3.3** Matters that are to be included in all seafarers' employment agreements are the seafarers' entitlement to repatriation when they are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances
- 1.3.4** Seafarers should be entitled to repatriation in the event of shipwreck. The costs to be borne by the shipowner for repatriation under Standard A2.5 should include passage to the destination selected, accommodation and food, pay and allowances and States should give every possible practical assistance to seafarers stranded in foreign ports
- 1.3.5** The purpose of Regulation 42. - Shipowners' Liability - is to ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment or arising from their employment under such agreement. The sickness or injury to seafarers occurs during their engagement and the shipowner's liability is for the economic consequences (cost of care and payment of wages) of that event. Detention or denial of seafarers' freedom is a consequence of a service-related accident, that is the maritime accident as defined in paragraph 3.2 of these Guidelines, when the shipowner has a clear liability.

APPLICATION

- 2.1** These Guidelines are intended for all sectors of maritime administrations, judicial authorities and law enforcement agencies conducting marine or maritime related investigations, inquiries or examinations and do not seek to interfere with any State's domestic criminal or civil law processes. It is assumed that in all States the legal and administrative processes conform to laws and practices compatible with human rights and to all relevant international instruments
- 2.2** These Guidelines are expressed in clear terms in order to command widespread observance and application. Different levels of the investigative programmes and their particular legal and administrative processes should obtain information from these Guidelines on the fair treatment of seafarers involved or affected by the investigation, inquiry or examination. These guidelines have relevance in particular in that:
- 2.2.1** Port and Coastal States (where the seafarer is detained) should ensure that marine and marine related investigations, inquiries and examinations are conducted in a fair and expeditious manner, that decisions taken are consistent with the provisions of the United Nations Convention on the Law of the Sea, and that decisions taken pursuant to the International Convention on Prevention of Pollution from Ships (MARPOL 73/78) are consistent with the provisions of Annex 1 (Regulations for the prevention of pollution by oil), Regulation 11 (Exceptions) and that the obligations of the Vienna Convention on Consular Relations are promptly fulfilled.
- 2.2.2** Flag States should co-operate with States, shipowners and seafarers (including their representative organisations) and fund the repatriation of seafarers, following a maritime accident in instances where the shipowners fail to fulfil their responsibility to repatriate.

- 2.2.3 Seafarer's Resident State to fund repatriation of their nationals and of those having right of residence in that State following a maritime accident in the event that neither the shipowner nor the Flag State will perform their respective obligations in this regard.
- 2.2.4 All States should ensure, as relevant to their respective and appropriate obligations under international and national law and customary practice, that seafarers are informed of the basis on which the investigation, inquiry or examination is being conducted, in particular monitor whether the investigation is in accordance with IMO Code for Investigations of Maritime Casualties and Incidents (Resolution A.849(20) as amended by Resolution A.884(21)), or pursuant to similar national procedures and that the general principles of exclusive flag State jurisdiction in matters of collision or other incident of navigation as contained in the 1952 Convention on Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, and in the United Nations Convention on the Law of the Sea 1982, in particular Article 97 are complied with.
- 2.3 These Guidelines are in a recommendatory form only; however, efforts should be made to apply them to the extent set out herein below.

IMPLEMENTATION

General

3.1 Fair treatment of seafarers is integral to observance of human rights. That can be achieved only as a result of structured State policy as reflected in domestic legal, administrative and law enforcement processes. Unbiased decision making at all levels of those processes is vital as it affects seafarers' physical and mental health no less than the constitutional or statutory duties and obligations all personnel connected to maritime or marine related investigations, inquiries or examinations.

3.2 The object of investigation, inquiry or examination into a '*maritime accident*' is to discover facts relating to the appearance and cause of the contingency constituting the *maritime accident*, that is defined for the purposes of these Guidelines 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 on board*'

3.3 The discovery and finding of those facts, or sufficient number of them, may or may not disclose a *prima facie case of culpability* on the part of one or more individual seafarer. The degree of value or the judicial importance of the *prima facie* case, if any, should determine the future treatment of the individual seafarer.

Where no prima facie case exist

3.4 In the event of the investigation, inquiry or examination finds no *prima facie* case of culpability on the part an individual seafarer, that seafarer should be released forthwith from

detention, if any, and his/her freedom of movement restored and his/her departure to his/her country of residence actively facilitated.

Where a prima facie case exist

3.5 In the event of the investigation, inquiry or examination does find prima facie case of culpability on the part of an individual seafarer, the evidential value of that prima facie case in subsequent proceedings, if any contemplated, should be determined at the administrative level of the investigation, inquiry or examination without executive or political interference and without prejudice to liaison with judicial authorities.

3.6 The decision on the existence or absence of the prima facie case of culpability on the part an individual seafarer having been made at the administrative level of the investigation, inquiry or examination, the involvement of criminal proceedings including that of the formal prosecuting authority of the State should be avoided having due regard to customary and legal obligations on the part of the investigator or examiner to consult with judicial authorities on any subsequent handling of the case in respect of the individual seafarer.

Principles to apply for the protection of seafarers under any form of detention or constraint

3.7 These principles of human rights apply for the protection of seafarers under any form of detention following a marine accident as defined in paragraph 3.2 of these Guidelines:

3.7.1 All seafarers under any form of detention or imprisonment or who suffer restriction of freedom of movement should be treated in a humane manner and with respect for the inherent dignity of the human person.

3.7.2 Arrest, detention or imprisonment or restriction of freedom of movement should only be carried out strictly in accordance with provisions of the law and by the competent officials or persons authorised for that purpose.

3.7.3 There should be no restriction upon or derogation from any of the human rights of seafarers as individual persons under any form of detention or imprisonment or restriction of freedom of movement recognised or existing in any State pursuant to law, conventions, regulations or custom on the pretext that these principles do not recognise such rights or that it recognises them to a lesser extent.

3.7.4 Any form of detention or imprisonment or restriction of freedom of movement and all measures affecting the human rights of seafarers under any form of detention or imprisonment or restriction of movement should be ordered by, or be subject to the effective control of, a judicial or other authority.

3.7.5 The authorities that arrest a seafarer, keep him under detention or restrict his/her freedom of movement or investigate the incident should exercise only the powers granted to them under the law and the exercise of these powers should be subject to recourse to a judicial or other authority.

3.7.6 No seafarer should be detained in the territory of any State beyond a reasonable number of days from the date of the maritime accident as defined in paragraph 3.2 in these Guidelines. During that period the competent authorities of that State may take voluntary statement from seafarers relating to the maritime as defined in paragraph 3.2 in these Guidelines and collect from the ship the relevant evidence into the circumstances surrounding it.

3.7.7 During the period when the seafarer is being prevented by the authorities to leave the country, he or she may only be confined on board his/her ship, provided always it is safe to do so, in appropriate accommodation and living conditions or in a hotel or guest house of comparable standard of amenities and from where the seafarer's freedom of movement is assured.

3.7.8 The cost of accommodating the seafarer during the period, referred to in principles 3.7.6 & 7, should be borne by the seafarer's employer and the administrative or judicial authorities of the State where the presence of the individual seafarer is required.

3.7.9 The seafarer who does not adequately understand or speak the language used by the authorities responsible for restricting his/her movements in any State is entitled to receive promptly in the language which he/she understands the information relating to the maritime accident, and to have the assistance, free of charge if necessary, of an interpreter in connection with any legal or investigative proceedings subsequent to restricting his/her of movements.

3.7.10 The seafarer whose freedom of movement is restricted should be promptly informed of his right to communicate by appropriate means with a consular post or diplomatic mission of the State of which he/she is a national or which otherwise entitled to receive such communication in accordance with international law or with representative of any competent international organisation or trade union or seamen welfare organisation or employer. No obstacle or delay should be occasioned or allowed by the authorities in restricting the seafarer's freedom of movement to effect such notification.

3.7.11 The seafarer who is detained, imprisoned or whose freedom of movements are being restricted by the authorities should be entitled to communicate and consult with his legal counsel or representative of his/her employer or that of a trade union or seamen welfare organisation and should be allowed adequate time and facilities for consultation with his/her legal counsel and any of the other persons without delay or censorship and in full confidence.

3.7.12 The detained or imprisoned seafarer or whose freedom of movement is restricted should have the right to correspond, in particular, with members of his family and should be given adequate opportunity to communicate with the outside world.

3.7.13 It should be prohibited to take advantage of the situation of a detained or imprisoned seafarer or whose freedom of movement is being restricted for the purpose of compelling him/her to incriminate himself, his/her employer or to testify against any other person. No detained or imprisoned seafarer or whose freedom of movement is being restricted should be subject to violence, threats or methods of interrogation which impair his/her capacity of decision or judgement.

3.7.14 The duration of any interrogation of a detained or imprisoned seafarer or whose freedom of movement is being restricted and of the intervals between interrogations as well as the identity of the official who conducted the interrogation and any other persons present should be recorded and certified in such form may be prescribed by law.

3.7.15 A proper medical examination should be offered to the detained or imprisoned seafarer or whose freedom of movement is being restricted as promptly as possible after his admission to the place of detention or imprisonment or allotted residence and thereafter medical care and treatment should be provided whenever necessary. This care and treatment should be provided free of charge.

3.7.16 The detained or imprisoned seafarer or whose freedom of movement is being restricted should have the right to be heard before disciplinary action is taken against him/her, and should be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his/her detention or restriction being placed upon his/her movement in order to obtain his/her release or lifting of the restriction without delay.

3.7.17 A detained or imprisoned seafarer or whose freedom of movement is being restricted or his/her counsel or any other person who has knowledge of the case should have the right to make a request or complaint regarding the seafarer's treatment to the authorities responsible for the admission of the place of detention or allotted residence and to higher authorities and, when necessary, to international or domestic appropriate authorities vested with reviewing or remedial powers. Every request or complaint should be promptly dealt with and replied to without delay.

3.7.18 Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles should be compensated according to the applicable rules or liability provided by domestic law.

3.7.19 A detained seafarer or whose freedom of movement is being restricted suspected of or charged with a criminal offence should be presumed innocent and should be treated as such until proved guilty according to law in a public trial at which he/she has had all the guarantees necessary for his/her defence. The arrest or detention of such seafarer pending investigation and trial should be carried out only for the purposes of the administration of justice on the ground and under conditions and proceedings specified by law. The imposition of restriction upon such seafarer which are not strictly required to prevent hindrance to the process of investigation or administration of justice or for the maintenance of security and good order in the place of detention or allotted residence should be forbidden.

3.7.20 Nothing in this code of Principles should be construed as restricting or derogation from any right defined in the International Covenant on Civil and Political Rights and Regulation 10 - 1 in Chapter V of SOLAS: Master's Discretion for Safe Navigation.

Preservation of evidence

3.8 The relevant administrative authorities in control of investigation, inquiry or examination into a maritime accident, as defined in paragraph 3.2. of these Guidelines, should devise arrangements, acceptable to the State's judicial administration, for the preservation of evidence of the individual seafarer. Written or signed deposition under oath and subject to cross examination, video or audio taped statements are accepted as evidence in many domestic jurisdictions. The giving of evidence from a distance through video links are also accepted in many jurisdiction, i.e. from a consular office in the seafarer's country of residence, The object of this paragraph is to render unnecessary the personal appearance of that seafarer in subsequent administrative or judicial proceeding in the State where the investigation, inquiry or examination had taken place, and to assist the judicial authorities of that State to mount and conclude a successful criminal prosecution or civil process against other than the individual seafarer whose evidence is required in that subsequent proceeding.

Administrative exchange of persons between sovereign jurisdictions

3.9 In the event of a prima facie case of sufficient gravity or importance of culpability on the part of an individual seafarer is established to the satisfaction of the investigator, inquirer or examiner

into the appearance or cause of the maritime accident, as defined in paragraph 3.2 of these Guidelines, the degree of that gravity or importance of the culpability should be next considered. If the culpability is minor and is capable of being dealt with summarily on administrative or judicial level, prompt release from detention or restoration of the individual seafarer's freedom of movement should follow without delay on completion of the relevant summary proceedings.

3.10 In the event of summary proceeding against an individual seafarer is not acceptable to the State's administrative or judicial authority, and personal appearance of that seafarer is required in subsequent proceedings, an administrative transfer of that seafarer should be facilitated between the State where the seafarer's personal appearance is required and the State whose passport the seafarer holds, or where he/she has right of residence. Such exchange of seafarers between jurisdiction on administrative levels would lessen the risk of seafarers being kept away from their homes when their culpability in connection to a maritime accident is a minor one. The transfer would be subject to conditions that each State should be able fulfil and find satisfactory and be consistent with their respective obligations to observe human rights and the attainment of justice.

3.11 Seafarers who are required as witnesses only in subsequent proceedings should be released from detention promptly, their freedom of movement restored and should be subject the administrative exchange outlined in paragraph 3.10 above.

Provision of welfare and accommodation

3.12 The costs of welfare and accommodation of seafarers whose presence is required in the country where the investigation, inquiry or examination into a maritime accident, as defined in paragraph 3.2 of these Guidelines, should be the joint financial responsibility of the shipowner and that of the authorities of the State where the seafarers are detained, or their freedom of movement are restricted.

3.12.1 In view of the importance of providing for the welfare of seafarers whose presence is required in the country where the investigation, inquiry or examination into a maritime accident, as defined in paragraph 3.2 of these Guidelines, the following alternative solutions may be considered:

- (i) dedicated provident or insurance fund to cover the cost of accommodation, subsistence and travel costs incurred at the instance of the authority that is in charge of the proceedings to which seafarers are subject.
- (ii) Contributors to the fund should be shipowners' associations, maritime trade unions, seafarers' welfare organisations, flag and resident States whose connections to ships and seafarer are evident.
- (iii) Managers of the fund may be the P & I insurers of the relevant vessel or a representative body of contributors or a welfare or commercial agency of proven experience and probity in handling matters relating to ships and seafarers.
- (iv) Financial security insurance created anew or existing cover to be extended to welfare costs necessitated by the extraordinary contingency of detention or restriction of freedom of movement encountered by seafarers.

- (v) Arrangements of mutual indemnities between maritime administrations of States, shipowners' associations, maritime trade unions and seafarers' welfare organisations.
- (vi) Marine and seafarer related charities of the marine insurance industry, shipowners, ship managers, the shipbuilding industry, cargo owners, shipbrokers, trade union and general welfare organisations. The management of the welfare fund contributed by these bodies may revolve on to the P& I Clubs, or a joint IMO or ILO ad hoc committee.

3.12.2 The welfare assistance that is the subject of this paragraph would be temporary and limited as to validity in period/s of time and for amount/s expanded in respect of each item of provision.

4 BASIC INTERNATIONAL INSTRUMENTS

4.1 The most important factor in ensuring fair treatment of seafarers who are involved or affected by investigation, inquiry or examination into a maritime accident (as defined in paragraph 3.2 below) are the provisions of international instruments that command universal acceptance on the part of the international community represented by governments of the vast majority of States. The human rights standards set out in those instruments are relevant to the fair treatment of seafarers and in particular those listed in Annex 2.

4.2 Due regard should be paid to instructions and guidance issued by international and national bodies aimed at preservation of basic human rights of seafarers under any form of detention and in particular to the

Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (*approved by the United Nations General Assembly resolution 43/173 of 9th December 1988*)

4.3 Investigators and all personnel performing duties under lawful authority in any State into maritime accidents, as defined in paragraph 3.2 of these Guidelines, should be familiar with the basic contents of conventions, resolution and recommendations listed in this Section and in the Appendix. They should also be familiar with other conventions, resolutions and recommendations which are incorporated in and published as national legislation dealing with all aspects of maritime employment, ship safety and seamen relevant social issues and should be familiar with the implementation of human rights policies and practices by their own government and on the part of flag states relevant to the investigation, inquiry or examination.

APPENDIX 2

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

United Nations Convention on the Law of the Sea, 1982

IMO resolution A. 849(20) as amended by resolution A. 884(21): Code for the Investigation of Marine Casualties and Incidents

IMO resolution A. 443(XI) incorporated into Chapter IX of SOLAS and Regulation 10-1, Chapter V of SOLAS: Master's Discretion for Safe Navigation

International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)

ILO Declaration on Fundamental Principles and Rights to Work, 1998

Settlement of Disputes - Article 287 of UNCLOS, 1982

Liability and Compensation Conventions - Articles 3,9,10 of International Convention on Civil Liability for Oil Pollution Damage, 1992

Vienna Convention on Consular Relations, Article 36

International Convention on Maritime Liens and Mortgages, 1993 - Article 12

International Convention relating to the Arrest of Sea-Going Ships, 1999 - "Maritime Claims"

Extracts from the draft ILO Consolidated Maritime Labour Convention referred to in paragraphs 1.3.1 - 1.3.5

See ILO Doc here <http://www.ilo.org/public/english/standards/relm/maritime/pdf/ptmc-04-4.pdf>

Article 4 - Seafarers employment and social rights

Title 2. - Conditions of employment

Regulation 2.1

Standard A2.1

Regulation 2.5 -Repatriation

Standard A2.5

Guideline B2.5 -Repatriation

Guideline B2.5.1 -Entitlement

Guideline B2.5.2 -Obligation of Members for repatriation

Regulation 2.6 - Seafarer Compensation for the ship's loss or foundering

Standard A2.6

Guideline B2.6

Guideline B2.6.1

Regulation 4.2 - Shipowner's Liability

Standard A4.2