

RIGHT TO REPATRIATION OF ABANDONED SEAFARERS: A STUDY IN LIGHT OF MARITIME LABOUR CONVENTION, 2006 AND INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

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Abstract: The abandonment of seafarers is one of the major challenges that seafarers onboard vessels may face. In 2022, 1555 seafarers were abandoned on 113 ships. The port state's role in seafarer abandonment is crucial because it can assist abandoned seafarers by facilitating their repatriation. In practice, however, it has been seen in many cases that the port state of the vessel had restricted the disembarkation of the abandoned crew from the vessel by citing the reason that the vessel cannot be left unmanned. The present study will assess such measures adopted by the port states in light of International Law instruments, including the Maritime Labour Convention, 2006 and the International Covenant on Civil and Political Rights, 1966.

Keywords: Seafarers, repatriation, abandonment, Human Rights, flag state, International Covenant on Civil and Political Rights, Maritime Labour Convention 2006, port state.

1. INTRODUCTION

The abandonment of seafarers is one of the major challenges that seafarers onboard vessels may face. In 2022, 1555 seafarers were abandoned on 113 ships (Richard & Bockmann, 2022), whereas in 2021 total of 1,399 seafarers were abandoned on 94 different ships as per ILO Seafarer Abandonment Database. According to clause 2 of Standard A2.5.2 of the Maritime Labour Convention, 2006 (hereafter referred to as MLC), a shipowner is deemed to have abandoned a seafarer when he unilaterally severs his ties with the seafarer, including failure to pay wages for more than two months or has left the seafarer without the necessary maintenance and support or fails to cover the cost of the seafarers' repatriation.

Seafarer abandonment situation may be result of financial crises faced by shipping company due to which it may cease shipping operations and leave the seafarers stranded and abandoned on ships. (Nifontov, 2014, para 6.31.). For instance, in 2020, the Palmali shipping company experienced a financial difficulty, leading to the abandonment of seafarers on its ships in multiple ports worldwide. (Offshore Energy, 2021). Seafarers wages were unpaid, and they lacked essential provisions such as food, water, and fuel on ship. (Offshore Energy, 2021).

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It has been witnessed in a number of seafarer abandonment cases that the port state of the vessel on which seafarers were abandoned has prevented abandoned seafarers from disembarking from the vessel. As per the information on ILO Database on reported incidents of the Seafarer Abandonment Database, such a situation arose when seafarers got abandoned on vessels MV Theoxenia, Arybbass, Miss Gaunt, GP B1, and AHT Carrier (ILO, n.d.). The problem can be understood through the abandonment of a seafarer on a vessel named Tamim Alder. In June 2019, four abandoned seafarers disembarked from the vessel and left the vessel in one lifeboat, but all of them were later forcibly returned to the vessel by the coastguard when they reached the UAE port (Business and Human Right Research Center, 2019).

Port states usually justify measures preventing the disembarkation of seafarers by citing the reasons that vessels cannot be left unmanned in the port, and it should at all times have the minimum number of crew required to ensure vessel safety. Unmanned vessels may pose a safety threat to the port as they can generate risks like fire or sinking (Asunción LA and Caro Raul Villa, 2018, p. 359). The port state insists that a replacement crew should join the vessel if the abandoned crew have to disembark from the vessel.

As a result, abandoned seafarers get confined within the vessel and are able to go back to their home nation after a delay of several months. On many occasions, even though the country of nationality of the abandoned seafarer or the flag state of the ship or the insurer was willing to bear the cost of the repatriation of the abandoned seafarers (which include travel cost to the country of residence of the seafarer), the seafarer could not be repatriated because the port state did not allow the abandoned seafarers to leave the ship (Arybbas, 2019; GP B1, 2021).

The present study will assess the measures adopted by the states whereby it prohibits the disembarkation of abandoned seafarers from the vessel in its port in light of provisions of the Maritime Law treaties, including MLC. As many seafarer abandonment cases get reported from states that have not ratified MLC, the analysis in the present chapter has also been undertaken in light of Human Right treaties including ICCPR. ICCPR is one of the most widely ratified treaties, with 173 ratifications to date (United Nations Treaty Collection, n.d.). Data on seafarer abandonment in ILO Seafarer Abandonment Database for 2020 demonstrate that in 33% of cases, the ports where seafarers were abandoned were situated in one of the four countries- UAE, Saudi Arabia, Turkey, and Yemen. None of these four countries has ratified MLC (NORMLEX, n.d.).

2. RIGHT OF REPATRIATION OF ABANDONED SEAFARER IN THE LIGHT OF MLC

Seafarers are protected under many ILO instruments (Papanicolopulu, 2014, p .515). MLC is one of the most important treaties highlighting the rights of seafarers and their working and living conditions on vessels (Doumbia-Henry, 2020, p. 280). This treaty specifically recognises the right to repatriation of seafarers. Under clause 1 of Standard A2.5.1 of MLC, a seafarer is entitled to be repatriated without any cost to themselves in some specific circumstances. The first is when the employment contract of seafarers expires. The second is when the employment contract is terminated by the seafarer or

shipowner for a valid reason. The third is when the seafarer becomes incapable of working on the vessel or cannot be expected to continue work in light of specific circumstances.

The important question is whether, in all the cases where seafarers are abandoned by the shipowner, the right to repatriation accrues to the seafarers. MLC Standard 2.5.2 highlights three situations when a seafarer is deemed to be abandoned; these are first, when the shipowner fails to repatriate a seafarer when the right to repatriation accrues to the seafarer, second, when wages of the seafarer of at least two months become pending, third is when the shipowner fails to supply necessities onboard the vessel.

As is seen above, denial of repatriation is itself one of the grounds for the situation being described as abandonment. However, an important issue is whether, for the remaining two grounds (i.e., when abandonment takes place due to non-payment of wages or denial of necessity), the right to repatriation accrues to seafarers. One of the criteria mentioned in clause 1 of Standard A2.5.1 of MLC when seafarers are entitled to be repatriated is when they cannot be expected to continue work on the vessel. This ground is wide enough to bring within its ambit the situation of seafarer abandonment due to non-payment of wages or non-supply of necessities. By not providing wages and denying the supply of necessities, the shipowner breaches his fundamental obligations towards the seafarers under the seafarer employment contract; therefore, in such circumstances, the seafarer cannot be reasonably expected to perform their duties onboard the vessel. Thus, in case of abandonment due to non-payment of wages and denial of necessity, the right to repatriation will automatically accrue to seafarers.

Furthermore, the non-binding Guideline B2.5.1, cl 1 b (iii) of MLC specifically mentions that repatriation right accrues to a seafarer where the shipowner is unable to fulfil their contractual or legal obligations as an employer of the seafarers due to reasons of insolvency or any other similar reason. This head is sufficiently broad to cover the situation where the shipowner abandons the seafarers and stops fulfilling legal obligations of paying regular wages and providing necessities onboard to seafarers.

From the discussion, we can infer that in all cases of seafarers abandoned as per MLC, the right of repatriation accrues to abandoned seafarers. Below portion highlights that under MLC, who has the obligation to do the repatriation once such right accrues to the seafarers?

2.1. Who should repatriate an abandoned seafarer?

2.1.1. Shipowner

MLC mentions in clauses 1 and 3 of Standard A2.5.1, that flag states should impose the primary responsibility of repatriation of seafarers on the shipowner through its domestic laws. The shipowner may not come forward to arrange the repatriation of the abandoned seafarer, as it was because of the shipowner's fault that the abandonment happened in the first place. However, there have been plenty of cases where shipowners, after initially abandoning the seafarer, later resolved the issue by taking measures such

as paying outstanding wages of seafarers and arranging seafarer repatriation (Qian Tai 1, 2021; Ali B3, 2021; Medi Hakata, 2021; Sea Wave, 2022). A good example could be seafarer abandonment onboard Comoros flagged vessel Sea Wave (Sea Wave, 2022). On this vessel, seafarer abandonment was reported to ILO on 7 January 2022, when its seven Filipino crew were unpaid for six months, and one crewmember was unpaid for seven months. After the flag state Comoros intervention, the vessel owner paid the pending wages to the seafarers and arranged the repatriation.

2.1.2. Financial Security Provider

A Financial Security System for protecting abandoned seafarers and providing them assistance in repatriation was developed through the 2014 Amendment to MLC. Provisions related to Financial Security System can be found in standard A2.5.2. of MLC. As per the provisions, the state parties to MLC must ensure that their flagged vessels maintain financial security for aiding the seafarers when they are abandoned. On getting abandoned onboard a vessel, the seafarer can directly approach the financial security provider for prompt assistance. As per standard A2.5.2, clause 9, the assistance provided should be sufficient to provide necessities on board the vessel, repatriation costs, and pending wages of the seafarers for up to four months.

From the time the Financial Security System for abandonment evolved in 2014, the financial security providers have assisted many abandoned seafarers by arranging their repatriation. For instance, in the recent case of Panama-flagged vessel GP B2, seafarer abandonment was reported to ILO on 27th January 2021 because shipowners had not paid the crew (GP B2, 2021). This matter got resolved when the P&I Club, which was the financial security provider of the vessel, paid the pending wages of 4 months and repatriated the crew on 11th February 2021 (GP B2, 2021).

2.1.3. Vessel's flag state

As per Standard A2.5.1 clause 5(a) of MLC, when the shipowner does not discharge his obligation, the flag state of the vessel should come forward to repatriate the seafarers. There have been many instances where a vessel's flag state has arranged the repatriation of abandoned seafarers from their vessels. For example, when on a Togo-flagged vessel, Jolly Lizzy seafarers of Ghanian nationality were abandoned, flag state Togo arranged the repatriation of the seafarers (Jolly Lizzy, 2020).

3. DUTY OF PORT STATE TO FACILITATE REPATRIATION IN LIGHT OF MLC

It is important to note that clause 7 of Standard A2.5.1 of MLC, imposes an obligation on the port state to facilitate the repatriation of seafarers onboard vessels calling at its port. For instance, if the flag state of the vessel or country of nationality of the seafarer or financial security provider for the vessel is willing to arrange the repatriation of the abandoned seafarer, then the port state should facilitate such repatriation by allowing disembarkation of the seafarer from the vessel and permitting them to use the territory of the port state for transit. MLC Standard 2.5.1, clause 8, clarifies that state parties shall not

prevent repatriation to any seafarers due to the financial condition of the shipowner or due to reason of the unwillingness or inability of the shipowner to replace the crew.

There have been many instances where although the vessel's financial security provider for abandonment came forward to do repatriation of all the abandoned crew, repatriation was impeded because the port state prevented the abandoned crew from disembarking from the vessel (Captain Nagdaliyev, 2020; Kenan Mete, 2020; GPB1, 2021; Bourbon, 2020; Arybbas, 2019; Ptolemeos, 2019). The port state disallows disembarkation in seafarer abandonment situations because it doesn't want to keep the unmanned vessel in port as it may cause safety issues. As per SOLAS Chapter v, Regulation 14, all vessels should have the minimum number of crew at all times to ensure their safety; this is referred to as the minimum safe manning requirement of the vessel. The minimum safe manning certificate of a vessel incorporates how many minimum numbers of seafarers need to be present on the vessel to operate the ship and keep it safe. The vessel's flag state issues such a certificate. An important question which arises is: whether the duty to facilitate repatriation will continue to apply on the port state of the vessel in circumstances where the sign-off of an abandoned seafarer from the vessel in port may breach the minimum safe manning requirement of the vessel. The below portion discusses this question.

4. ASSESSMENT OF PORT STATE MEASURES PREVENTING DISEMBARKATION OF ABANDONED SEAFARERS FROM VESSELS IN THE LIGHT OF MARITIME LAW TREATIES

As pointed out earlier, there have been many instances where the port state, which has ratified MLC, has disallowed the disembarkation of an abandoned seafarer from a vessel in port by citing reasons related to the minimum safe manning requirement of the vessel. One such case is of seafarer abandonment on vessel Arybass (Arybass, 2019). On this vessel, seafarers were abandoned in the port of Djibouti on 15th September 2019. Twelve seafarers were repatriated within a few months of abandonment on 7th November 2019, with the expense being borne by the P&I Insurer of the vessel. There were 9 Filipino crewmembers who remained onboard the vessel. P&I, the insurer of the vessel, was willing to arrange the repatriation of the remaining seafarers as well from the vessel but was unable to do the same because the port state did not give permission for the sign-off of the crew. The port state mentioned that seafarers could not leave the vessel until the replacement crew joined the vessel (Arybass, 2019).

When ILO intervened in the matter, the port state (Djibouti) informed that the unmanning of the vessel and the repatriation of the seafarers could not be authorised because of port security reasons and non-conformity with the minimum safe manning requirement. As per the Djibouti government, the possible solution to the matter is the judicial sale of the ships. On the other hand, P&I Insurer was of the view that this issue could have been resolved promptly, but because of non-cooperation on the part of the port state, the seafarers could not be timely repatriated. P&I Club opined that the port state has frustrated the repatriation of the abandoned seafarer and made unjustifiable demands for a replacement crew in order to release abandoned seafarers from the vessel; this amounts to a hostage exchange. Nine abandoned crew were finally repatriated on 23rd November 2020

by the P&I Insurer of the vessel when the ship was auctioned to the new owner by Djibouti authorities (Arybass, 2019).

In an abandonment situation, it is seen that the port state does not reject the call for facilitating repatriation outrightly, but it demands that a replacement crew should join in so that the abandoned crew can leave the vessel. However, it is never easy to get a replacement crew. In the above-discussed case, some of the abandoned seafarers had to remain on board the vessel for months as no one was ready to arrange the replacement crew. This is so because the shipowner is not available to bear the cost of crew change and replacement crew in such a situation. Furthermore, MLC doesn't require the financial security provider to arrange a replacement crew (Eugene Cheng Jiankai, 2020, p. 17, 18).

If we assess the above practice of port states, few observations can be made in light of the MLC. MLC recognises in Standard A2.5.1, clause 7, that the port state should facilitate the repatriation of Seafarers. It does not identify any exception to the obligation of the port state to facilitate the repatriation of Seafarers from the foreign ship in its port. On the contrary, Standard A2.5, clause 8 of MLC states that the state should not deny the right of repatriation to any seafarer because of the inability or unwillingness of the shipowner to replace the crew.

Now, if we focus on International Law related to the safe manning requirement of the ship, SOLAS, Chapter V Regulation 14 flag state of the vessel has an obligation to take measures to ensure that all its vessels are sufficiently manned. Flag state issues to its vessel the safe manning document, which mentions the number of seafarers which should be on the vessel. IMO, Resolution A1047(27) gives guidance to the states for deciding the minimum manning level for its vessel (IMO, 2011). Adequate manning of the vessel is required in order to ensure its safe navigation, safety and security of the vessel and safe operations in the port. It also prevents injury to human or loss of life, ensure the welfare of crew by avoidance of fatigue and prevent damage to the marine environment. The MLC also in Standard A2.7 mentions that flag states should require all their vessels to be adequately manned.

It is important to note that, in the above-mentioned legal instruments, it is the vessel's flag state which has the obligation under the above treaties to take measures to ensure that its vessels are adequately manned; the port state has no such duty. If the port state prevents the abandoned seafarers from disembarking from the foreign vessel in port, it cannot justify its conduct on the basis of International Law related to safe manning as has been discussed above. However, the port state may inspect the foreign vessel and can detain it if the safe manning requirements fixed by the flag state are not satisfied.

Furthermore, abandoned seafarers cannot be considered as seafarers for the purpose of the minimum manning requirement of the vessel. This is because the seafarer employment contract between the shipowner and seafarer will be deemed to be terminated when the shipowner commits a fundamental breach of the employment contract by abandoning the seafarer. A fundamental breach of contract refers to a situation

where one of the parties to the contract commits a breach of the fundamental term of the contract (Stephen J Leacock, 1975, p. 182). A fundamental term is a stipulation that constitutes a central obligation or essence of the contract (Stephen J Leacock, 1975, p. 182). A fundamental breach of contract may be considered to be a ground for the aggrieved party to terminate the contract (Stephen J Leacock, 1975, p. 182). In the seafarer abandonment situation, the shipowner breaches the core obligations under the employment contract, such as payment of wages to seafarers on a monthly basis, furnishing necessities to seafarers' onboard vessel, doing repatriation of the seafarers etc. Thus, the situation constitutes a fundamental breach of contract on the basis of which the contract may be terminated.

Moreover, ensuring that the ship is adequately manned is the shipowner's responsibility and not of the crew. Seafarers, including the vessel Captain, cannot be forced to stay onboard merely because the shipowner does not arrange their replacement. Abandoned seafarers cannot be forced to stay onboard the vessel by citing minimum safe manning requirements because the port state has an obligation to facilitate the repatriation of seafarers under MLC. From the discussion, it can be said that the approach of a few port states in resisting the repatriation of seafarers is not in conformity with MLC provisions.

The below portion will now assess the measures adopted by the states whereby it prohibits the disembarkation of abandoned seafarers from the vessel in its port in the light of provisions of ICCPR and several other Human Right treaties.

5. ASSESSMENT OF PORT STATE MEASURES PREVENTING DISEMBARKATION OF ABANDONED SEAFARERS FROM VESSELS IN THE LIGHT OF HUMAN RIGHTS TREATIES

As many states have not ratified MLC, it is crucial to discuss the duty to facilitate repatriation on the port states in light of human rights treaties like ICCPR. Article 2 of ICCPR mentions the scope of application of the ICCPR. The provision says that state parties are obligated to grant protection, as mentioned in the treaty, to all the individuals who are 'within its territory' and are 'subject to its jurisdiction' (Galani, 2017, p. 38). It is important to note that two phrases in Article 2- 'within its territory' and 'subject to its jurisdiction', are connected through 'and' not 'or'. Human Rights Committee, however, has given a disjunctive understanding to Article 2, implying that to benefit from ICCPR, individuals need not fulfil both requirements (Human Right Committee, 2004, para 10). In other words, to bring an individual within the protective ambit of ICCPR, it will be sufficient to show that either individual is within the state party's territory or is within the state party's jurisdiction. ICJ in Wall Advisory Opinion has also supported such an interpretation of the provision (ICJ, 2004, para 108. 109). Thus it can be stated that the obligations of the state party under ICCPR may apply with respect to individuals who are, although outside the territory of the state party but within its jurisdiction.

Tanaka (2015, p. 80) and ICJ in Nicaragua v. United States of America (1986, para. 213) have stated that the sovereignty of a state extends to its ports. Pertaining to

this sovereignty, abandoned seafarers on a foreign vessel in port can be said to be within the de jure jurisdiction of the port state. De jure jurisdiction can be described as a power vested in a state to legislate, enforce, or adjudicate (Papanicolopulu, 2014, p. 519). It can be inferred, based on the scenario arising, that if the port state has ratified the ICCPR, it is obligated to respect and ensure Covenant rights to abandoned seafarers on the foreign vessels in its port; below portion analysis of some of the substantive provisions of ICCPR which are relevant in a seafarer abandonment situation.

Article 6(1) of ICCPR states that every individual has the inherent right to life, and such right has to be protected by law. By virtue of the provision, state parties should respect and grant protection to the lives of all persons located on marine vessels in port and of every individual who is in a situation of distress at sea (Human Right Committee, 2019, para 63). In fulfilment of its duty to take positive measures to protect the right to life under Article 6, the port state should come to the immediate assistance of such seafarers and should allow the disembarkation of abandoned seafarers. This is because the right to life of abandoned seafarers on the vessel is breached because they get cramped within the vessel without having ample supplies of necessities and without being paid wages.

Under Article 6, not only is there a responsibility on the state to take positive measures to protect the right to life but also, the state should not take any measure which may unjustifiably impair the right to life of a seafarer. The measure imposed by the port state to prohibit the abandoned crew from disembarking from the vessel in its port can violate Article 6 as confining a person in the vessel where he is not being paid wages nor having access to sufficient necessities amounts to arbitrary deprivation of life.

Article 7 of ICCPR mentions that no individual should be exposed to inhuman, cruel or degrading treatment. The purpose of the provision is to protect the dignity and the mental and physical integrity of every person (Office of High Commissioner of Human Rights, 1992, para 2). When the port state does not allow the abandoned seafarer on the foreign vessel to disembark, the vessel becomes a floating prison for the seafarers. As seafarers are not paid any wages nor do they have access to sufficient necessities, seafarers undergo enormous mental trauma. Article 7 prohibits not only acts that lead to physical pain but also acts which result in mental suffering (Office of High Commissioner of Human Rights, 1992, para 5); this is why any such measure of the port state which prohibits abandoned seafarers from disembarking from the vessel may contradict Article 7 of ICCPR.

Furthermore, in Article 9, ICCPR says that all individuals have the right to liberty and security of a person. The liberty of a person implies freedom from confinement, and, it cannot be deprived in an arbitrary manner (Human Right Committee, 2014, para 3, 10). Arbitrariness implies notions like injustice, unreasonableness, etc. (Human Right Committee, 2014, para 12). When the foreign vessel is abandoned along with the seafarers in the port of any state, requiring the crew to stay on the vessel may breach the right to liberty of the seafarers as it is tantamount to arbitrary deprivation of liberty without any sound reason.

Under Article 9, all people also have the right to the security of a person. This right relates to freedom from bodily or mental injury, and it protects all persons against the intentional infliction of bodily or mental injury (Human Right Committee, 2014, para 9). This right is also endangered when the abandoned seafarers are not allowed to disembark from the vessel by port state and thus are forced to remain on the vessel.

Port state authorities may not justify their conduct of preventing the disembarkation of abandoned seafarers from the ship by contending that they have not ratified MLC as the duty to facilitate repatriation also flows from ICCPR, which they might have ratified. In many instances, port states have ratified both ICCPR and MLC. In such cases, if states prevent abandoned seafarers from disembarking from the vessel in port, not only the obligation under MLC upon the port state to facilitate repatriation will be breached, but also the ICCPR provision highlighted above will get violated.

Apart from ICCPR, there are many other human rights treaties which recognise the right of people when they are in the territory of a country other than their nationality. There are specific conventions that deal with the rights of migrant workers. ILO Convention 97, known as the Migration for Employment Convention 1949, is one such Convention, but it excludes seafarers from its protective umbrella in its Article 11 (2).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, is another treaty that grants protection to migrant workers. One of the categories of migrant workers mentioned under Article 2(g) of the Convention is 'specified-employment worker'. The specified category of workers is workers who are sent by or their employer for a defined duration to a state of employment for carrying out a specific assignment. The seafarer can be considered as a specified category of workers for the purpose of this treaty because they enter into port state jurisdiction on the vessel for performing a defined shipping operation. Thus, if the port state of the vessel has ratified the Convention, the seafarers onboard the vessel in port will enjoy the rights under it.

Convention in Article 9 recognises the right to life of migrant workers and states that the same should be protected by law. It also states in Article 10 that migrant workers should not be subjected to any kind of torture or inhuman, cruel, or degrading treatment. The Convention specifically states in Article 11(2) that migrant workers should not be required to do forced or compulsory labour. Convention also recognises in Article 16 that migrant workers shall have the right to liberty and security of persons, and they should not be subjected individually or collectively to arrest in an arbitrary manner or to detention. There is also a UN General Assembly Declaration of 1985 which grants a few basic sets of rights to aliens in the territory of the state where they are present. Art 5.1 (a) of the Declaration mentions the right to life, and grants protection from arbitrary arrest, and detention. All these rights mentioned here are relevant to the seafarer abandonment situation. Port state measures preventing abandoned seafarers from disembarking may breach these human rights obligations arising under Convention.

6. CONCLUSION

From the analysis in the article, it is found that the vessel's port state cannot prescribe crew change as a pre-condition for facilitating the repatriation of abandoned seafarers onboard vessels in its port as the same will violate the MLC and several Human Rights treaties, including ICCPR. In order to allow disembarkation of the abandoned seafarers, the port state can shift the vessel to a location where the vessel can be kept unmanned. Another option for port state is that it can allow the disembarkation of all the abandoned crew and place replacement crew on the vessel at its own cost. Eventually, the vessel can be auctioned, and the port state can recover from the sale proceeds, the charge of berthing the vessel and the cost of supplying personnel for manning the vessel. Finally, it can be said that it is high time now that states should realise that they cannot inflict suffering on the seafarer because of the fault of a shipowner who has left its vessel in waters of a foreign state along with the seafarers.

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