

Trapped at Sea in a Pandemic: International Law's Impact on Seafarers' Rights

Ryan Schubert

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mjil>



Part of the [International Law Commons](#)

Recommended Citation

Ryan Schubert, *Trapped at Sea in a Pandemic: International Law's Impact on Seafarers' Rights*, 36 Md. J. Int'l L. 112 (2022).

Available at: <https://digitalcommons.law.umaryland.edu/mjil/vol36/iss1/10>

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Trapped at Sea in a Pandemic: International Law's Impact on Seafarers' Rights

RYAN SCHUBERT[†]

I. INTRODUCTION

During the COVID-19 Pandemic, tens of thousands of seafarers were trapped aboard merchant vessels at sea as nations scrambled to lockdown their countries and counter the spread of COVID-19.¹ While these measures were necessary to control the rapidly spreading pandemic, nations had no plan of how to handle the large numbers of ships at sea who would need to disembark at some point and conduct crew changes.² This was not only a great humanitarian crisis, as seafarers were trapped aboard their ships without access to medical care, but it was also a supply chain crisis since more than 80% of trade by volume, including much needed food and medical supplies, is transported aboard these merchant vessels.³ Though the situation

© 2021 Ryan Schubert.

[†] J.D. Candidate (2021), University of Maryland Francis King Carey School of Law. The author thanks the Editorial Board of the Maryland Journal of International Law for their assistance with this article.

1. Huileng Tan, *Thousands of Seafarers are Stranded as Coronavirus Shuts Down Borders That Could Hurt Trade*, CNBC (June 24, 2020), <https://www.cnbc.com/2020/06/24/thousands-of-seafarers-are-stranded-at-sea-amid-coronavirus-shutdown.html>; Jackie Northam, *'Sea Prison': COVID-19 has Left Hundreds of Thousands of Seafarers Stranded*, NPR (Jan. 29, 2021), <https://www.npr.org/2021/01/29/959626340/-sea-prison-covid-19-has-left-hundreds-of-thousands-of-seafarers-stranded> (noting that at its peak, 400,000 seafarers were trapped at sea aboard their ships).

2. Tan, *supra* note 1 (noting that while stakeholders lobbied for crew changes aboard ships, many were still stuck at sea).

3. *Crew Changes: A Humanitarian Safety and Economic Crisis*, INT'L MAR. ORG. [IMO], <https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx> (last visited Mar. 15, 2021); Paul J. Bauer, *The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights or an Impediment to True Reforms*, 8 CHI. J. INT'L L. 643, 643 (2008) ("Around 80 percent of world trade involves

would eventually begin to stabilize as governments responded, seafarers aboard these vessels would quickly discover the substantial challenges they face in bringing claims against their employers as a result of international maritime law.⁴ While the legal challenges these seafarers face were present long before the pandemic, the pandemic quickly brought these legal issues to light and solutions are needed in order to prevent this type of humanitarian crisis in the future.⁵

II. INTERNATIONAL MARITIME LAW

The United Nations Convention on the Law of the Sea (“UNCLOS”) is the best articulation of current international maritime law.⁶ While not all states have ratified this Convention, even states that have declined to ratify the Convention, such as the United States, contend that it is an articulation of customary international law in the maritime arena.⁷ Consequently, UNCLOS will be referenced as a reflection of the current status of international maritime law.⁸

A. *Maritime Zones Under International Law*

According to UNCLOS, the seas are defined into various different maritime zones that give coastal states a decreasing amount of control as the distance increases from their shores.⁹ The high seas are defined as those waters not included in the exclusive economic zone, territorial and internal waters, or the archipelagic waters of a

ocean shipping . . .”).

4. *Standing up for Stranded Seafarers on UN Human Rights Day*, INT’L MAR. ORG. [IMO] (Dec. 10, 2020), <https://www.imo.org/en/MediaCentre/PressBriefings/pages/45-Human-Rights-Day.aspx> (identifying some of the legal challenges seafarers face).

5. *Id.* (noting the various human rights issues faced by seafarers on the high seas).

6. *See generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter “U.N. Convention”].

7. *Law of the Sea Convention*, U.S. DEP’T OF STATE, <https://www.state.gov/law-of-the-sea-convention/> (last visited Mar. 15, 2021) (noting that “the United States will accept and act in accordance with the provisions of the Convention relating to traditional (non-seabed) uses of the ocean . . .”).

8. 2 VED P. NANDA ET AL., LITIG. OF INT’L DISPUTES IN U.S. COURTS. § 10:29 (last updated December 2020) (“[A]lthough the United States is not a signatory to UNCLOS, this country recognizes the treaty’s place as an accurate reflection of customary international law.” (quoting *United States v. Beyle*, 782 F.3d 159, 167 (4th Cir. 2015))).

9. U.N. Convention, *supra* note 6, at art. 86 (identifying the high seas as the parts of the sea not included in the exclusive economic zone, territorial sea, archipelago waters, or internal waters of any state); *id.* at art. 3–4 (identifying the territorial sea); *id.* at art. 33 (identifying the contiguous zone); *id.* at art. 55–56 (identifying the exclusive economic zone).

state.¹⁰ When it comes to maritime disputes, the only jurisdiction that applies aboard a vessel on the high seas is the jurisdiction of the state a vessel is registered in and authorized to fly its flag.¹¹ Even in the other zones, the laws most applicable to seafarers, such as labor, tort, and contract law, will be governed by the flag state as well under international law.¹²

B. *Flag States and “Flags of Convenience”*

While at sea, the nationality of a vessel, and thus, the applicable law aboard a vessel, is that of the State whose flag it is authorized to fly.¹³ Flag states are expected to exercise jurisdiction and control over matters that occur on vessels flying its flag.¹⁴ While this serves as a function to ensure that there is legal jurisdiction aboard maritime vessels at all times, this provision has led to maritime companies seeking registration with states that have the least labor and safety regulations and/or lack of enforcement.¹⁵ Furthermore, this principle of maritime law has led to a “race to the bottom” when it comes to maritime companies and vessel owners seeking out registration in flag states with the most relaxed or favorable law to them as well as states decreasing regulation to attract vessel registrations, usually at the expense of the seafarers aboard these vessels.¹⁶

III. CURRENT LEGAL ISSUES FACED BY SEAFARERS

A. *Jurisdictional and Contractual Issues*

As noted earlier, the jurisdiction that applies to a vessel and its crew while at sea is the state that registers and authorizes the vessel

10. *Id.* at art. 86.

11. *See infra* Section II.B.

12. U.N. Convention, *supra* note 6, at art. 33 (noting that in the contiguous zone, coastal states can only take actions to enforce customs, fiscal immigration, and sanitary laws); *id.* at art. 55 (noting that in the exclusive economic zone, the coastal state has the right to exercise enforcement over natural resources).

13. *Id.* at art. 91 (“Ships have the nationality of the State whose flag they are entitled to fly.”); *Id.* at art. 92 (articulating that vessels are only permitted to fly one flag).

14. *Id.* at art. 94 (“Every State shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.”).

15. Bauer, *supra* note 3, at 645–46 (observing that ship owners take advantage of the “flag of convenience” system in order to gain various advantages to include “lax legal standards.”).

16. Peter Link, *One Small Step for the United States, May be a Giant Leap for Seafarers’ Rights*, 33 HOFSTRA LAB. & EMP. L.J. 167, 179 (2015) (noting that there is a “race to the bottom mentality” amongst countries seeking to increase maritime registrations).

to fly its flag.¹⁷ This leaves seafarers aboard a vessel, regardless of their own individual nationality, at the mercy of the labor, tort, and contract law of the flag state when it comes to disputes arising out of matters aboard the vessel while at sea.¹⁸ Additionally, this leads to confusion among seafarers who are sometimes unable to determine which nation has jurisdiction over a legal issue that occurred on a maritime vessel.¹⁹ A seafarer can be in a position where they are a citizen of one nation, the vessel is flagged in another nation, and the ship owner has their headquarters or place of business in yet another country.²⁰ This kind of confusion creates a situation where it is extraordinarily unclear which jurisdiction will govern a seafarer's dispute or their employment contract without the support of an experienced attorney who is well versed in these types of disputes involving maritime law.²¹

B. *Health and Safety*

An additional issue that seafarers face is the health and safety hazards of the occupation.²² As seafarers have one of the most dangerous occupations in the world, adequate regulation is required to provide for their safety at sea, where there is limited, if any, access to medical care and supplies.²³ Accordingly, seafarers depend on shipowners to provide and ensure their health and safety throughout their time aboard the vessel.²⁴ The crew change crisis, as a result of COVID-19, has greatly intensified health and safety problems as crew members are trapped aboard ships without access to medical

17. *See supra* Section II.B.

18. *See supra* Section II.B.

19. Link, *supra* note 16, at 179 (“[T]he FOC system has created a scenario for seafarers where discerning their legal rights or the proper jurisdictions where these rights may be enforced has become increasingly difficult.”).

20. *Id.* (“It is not unusual for a seafarer to work on a vessel registered in a foreign country, sailing on the high seas and calling at ports in countries other than that of her flag, owned by citizens of yet other countries, insured in other countries, perhaps chartered by interests in other countries, managed by a company in another country, and carrying cargo owned by citizens of other countries.” (quoting Douglas B. Stevenson, Book Review, 36 J. MAR. L. & COM. 567, 567 (2005))).

21. *Id.* at 180 (“With so many vessels registered in different countries, various international laws sporadically ratified and implemented by different countries, and crews coming from all across the globe, there is no wonder why any seafarer may not understand his or her rights.”).

22. *Id.* at 176 (“[S]tudies have shown that seafaring is one of the more hazardous occupations in the world, exposing seafarers to toxic materials and other physical hazards, higher death rates from work-related accidents compared to shore-based workers . . .”).

23. Bauer, *supra* note 3, at 644 (noting that seafarers don't have access to hospitals and all medical care has to be provided aboard the ship).

24. *Id.*

care, and many are facing the expiration of essential prescriptions.²⁵ Without action on this issue, seafarers will continue to suffer negative health outcomes, serious illness, and even death, especially in times of a health crisis such as COVID-19.²⁶

C. *Lack of Adoption and Enforcement of the Maritime Labour Convention (MLC)*

In 2006, the Maritime Labour Convention (MLC) was concluded.²⁷ The Convention seeks to provide a guarantee of basic rights for seafarers, to include health protections and fair conditions of employment.²⁸ Most notably, the MLC provides additional rights and protections such as the right of repatriation for seafarers and mandatory protections for health and safety in employment agreements.²⁹ While this Convention is certainly a step in the right direction to help seafarers who are stuck at sea, the MLC necessarily requires ratification and enforcement by member states in order to be effective.³⁰ This is problematic during a crisis, such as the COVID-19 pandemic, because not all states have ratified the MLC and, even if they have ratified the Convention, many states with a reputation as a “flag of convenience” are notoriously relaxed on enforcement of MLC provisions aboard vessels flying their flag.³¹ As a result, whether the MLC has been ratified by a state or not, there is a strong likelihood that its provisions are not being enforced and seafarers are

25. *Resolution Calls for Government Action on Crew Change Crisis*, INT’L MAR. ORG. [IMO] (Sept. 22, 2020), <https://www.imo.org/en/MediaCentre/PressBriefings/pages/29-MS-Ex-Session-seafarer-resolution.aspx>; *Allow Crew Changes to Resolve Humanitarian Crisis, Insists IMO Secretary-General*, INT’L MAR. ORG. [IMO] (Sept. 8, 2020), <https://www.imo.org/en/MediaCentre/PressBriefings/Pages/26-Allow-crew-changes.aspx>.

26. *Resolution Calls for Government Action on Crew Change Crisis*, supra note 25; *Allow Crew Changes to Resolve Humanitarian Crisis, Insists IMO Secretary-General*, supra note 25.

27. Maritime Labour Convention, Feb. 23, 2006, 2952 U.N.T.S. 3, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202952/Part/volume-2952-I-51299.pdf>.

28. Iliana Christodoulou-Varotsi, *Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives*, 43 J. MAR. L. & COM. 467, 471 (2012).

29. *Id.* at 477–79.

30. Jeffrey A. Brauch, *What Every Lawyer Should Know About International Law*, 78 DEC. WIS. LAW. 12, 14 (2005) (noting that for a document to be a treaty, it must be signed, ratified, and adhered to).

31. William Tetley, *The Law of the Flag, “Flag Shopping”, and Choice of Law*, 17 TUL. MAR. L.J. 139, 173–74 (1993) (stating that vessel owners use a “flag of convenience” for economic reasons to avoid taxes and avoiding international conventions); *Maritime Labour Convention*, UNITED NATIONS, <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028006822e> (last visited Mar. 15, 2021) (displaying a list of all nations that have ratified the MLC).

not able to utilize protections they desperately need. This has been most evident during the pandemic when many seafarers were at sea far beyond the eleven-month limit identified in the MLC.³² Furthermore, a committee of the International Labour Organization noted that all ratifying states failed to comply with major provisions of the MLC during the COVID-19 pandemic.³³ The Committee identified that as a result of these compliance failures, 400,000 seafarers have been trapped at sea and denied access to medical care, rights of repatriation, and shore leave.³⁴ As a result, even with ratification by member states, it will still be a challenge to ensure states enforce the provisions of the MLC.³⁵

IV. POSSIBLE SOLUTIONS

A. *Universal Adoption of the Maritime Labour Convention*

The most immediate solution the nations of the world could enact to prevent this type of crisis in the future is to universally adopt the Maritime Labour Convention (“MLC”).³⁶ The MLC provides a set of rights for seafarers that member nations are expected to enforce aboard vessels flying their flag.³⁷ These rights cover employment, health, safety, and conditions aboard the ship.³⁸ Additionally, the MLC provides a series of regulations that cover more specific requirements for shipowners and member states.³⁹ These regulations provide much more detail as to what is required in areas such as health care and safety, accommodations, liability, enforcement and numerous other topics related to the rights of seafarers.⁴⁰ Universal adoption of the MLC by all flag states would provide seafarers with a

32. *Standing up for Stranded Seafarers on UN Human Rights Day*, *supra* note 4 (noting that some seafarers had been at sea for eighteen months in violation of the MLC).

33. *General Observations on Matters Arising from the Application of the Maritime Labour Convention, 2006, As Amended (MLC, 2006) During the COVID-19 Pandemic 2*, INT’L LAB. ORG. [ILO] (Dec. 2020), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_764384.pdf.

34. *Id.* at 2–3.

35. *Id.*

36. Maritime Labour Convention, *supra* note 27; Link, *supra* note 16, at 204 (noting that for the Convention to succeed, it needs ILO states to ratify it and that, as ratification grows, support for seafarers’ rights will grow with it).

37. Maritime Labour Convention, *supra* note 27, at 10 (“Each Member shall ensure, within the limits of its jurisdiction, that the seafarers’ employment and social rights set out in the preceding paragraphs of this article are fully implemented . . .”).

38. *Id.*

39. *Id.* at Title 1-5 (outlining the regulations that shipowners are expected to follow under the MLC).

40. *Id.*

clear set of enforceable rights and put all shipowners under a common set of regulations to follow.⁴¹ Such strong protections would be useful during situations such as the COVID-19 pandemic and would provide seafarers with a clear understanding of the claims they could bring against employers or states who do not provide for their safety during a crisis.

B. Flag State Enforcement and Implementation of MLC Requirements

While adopting the MLC and ensuring stronger protections for seafarers would be a strong step in the right direction, such protections will only be successful if properly enforced by flag states.⁴² The provisions of the MLC depend on the enforcement by flag states who are responsible for setting the applicable laws and regulations aboard a vessel flying their flag.⁴³ These provisions, such as the right to repatriation, if properly enforced, could have gone a long way toward resolving the crew change crisis caused by the COVID-19 pandemic.⁴⁴ For example, according to the MLC, seafarers have a right to be repatriated at no cost to them when they are no longer working or are unable to work.⁴⁵ If the shipowner fails to repatriate the seafarers, the member state where the vessel is registered (“flag state”), or alternatively, the state that the seafarer is to be repatriated to (with the flag state reimbursing) is required to ensure proper repatriation at no cost to the seafarers.⁴⁶ It is clear, based on the large number of seafarers stranded at sea during the pandemic, that flag states failed to comply with this provision and ensure proper enforcement.⁴⁷ Rather, had flag states sought to properly comply with the MLC during the pandemic, they would have been expected to develop and implement a plan to safely

41. Link, *supra* note 16, at 204 (noting that the MLC seeks to serve as a “seafarer’s bill of rights” which will be successful if ILO member states ratify it).

42. *General Observations on Matters Arising from the Application of the Maritime Labour Convention, 2006, As Amended (MLC, 2006) During the COVID-19 Pandemic*, INT’L LAB. ORG. [ILO] (Dec. 2020), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_764384.pdf (highlighting that the 2006 MLC contains a robust system for enforcement of its provisions).

43. *Lauritzen v. Larsen*, 345 U.S. 571, 584 (1953) (“Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it.”).

44. Maritime Labour Convention, *supra* note 27 at 37 (discussing repatriation rights for seafarers under Regulation 2.5: “Seafarers have a right to be repatriated at no cost to themselves . . .”).

45. *Id.*

46. *Id.*

47. Tan, *supra* note 1 (noting that tens of thousands of seafarers were stranded).

repatriate stranded seafarers when it became apparent that shipowners could not do so as a result of quarantine measures around the world.⁴⁸

C. *Make Seafarers Essential Workers*

Another action states could take to address the crew change crisis is to declare seafarers to be essential workers under their domestic law. In fact, the United Nations has called upon all nations to formally designate seafarers as essential workers.⁴⁹ Failure to do this is one of the primary reasons that seafarers have been unable to disembark from their ships, and have found themselves trapped on the vessels far in excess of their contracts.⁵⁰ By declaring seafarers to be “essential workers,” disembarkation and by extension, much needed crew changes, will be possible allowing the maritime trade system to continue to function even in the face of lockdowns or other measures to contain the spread of COVID-19.⁵¹

D. *Making Legal Representation Readily Available*

Last but not least, while adopting the MLC and increasing enforcement is useful in preventing a humanitarian crisis at sea, disputes will inevitably arise and seafarers’ rights will go unenforced without adequate legal representation. Ensuring seafarers have proper legal representation against their employers will serve as an additional layer of protection for seafarers and ensure they are properly protected and compensated for any damages. Exercising their legal rights by bringing lawsuits against their employers was a substantial challenge for seafarers even before the pandemic.⁵² This problem is also worsened by the fact that many seafarers are subject

48. Maritime Labour Convention, *supra* note 27, at 37 (Reg. 2.5 (Repatriation)).

49. Stephane Dujarric, *Statement Attributable to the Spokesman for the Secretary-General on the Repatriation of Seafarers*, INT’L MAR. ORG. [IMO] (June 12, 2020), <https://www.un.org/sg/en/content/sg/statement/2020-06-12/statement-attributable-the-spokesman-for-the-secretary-general-the-repatriation-of-seafarers>.

50. *Id.* (articulating that the Secretary-General of the IMO calls on governments to implement recommended protocols to allow seafarers to repatriate and conduct crew changes).

51. *IMO Urges Keyworker Exemptions for Crew Changes and Repatriations*, INT’L MAR. ORG. [IMO] (April 1, 2020), <https://www.imo.org/en/MediaCentre/PressBriefings/Pages/09-seafarers-COVID19.aspx>.

52. Scott Tong, *Filipino Ship Worker Heads Home After 6-month Crew Change Delay*, MARKETPLACE (Nov. 2, 2020), <https://www.marketplace.org/2020/11/02/filipino-ship-worker-heads-home-after-6-month-crew-change-delay/> (noting that union representatives and others have said that stranded seafarers are reluctant to speak up due to fear of retaliation and industry blacklisting); Link, *supra* note 16, at 178 (highlighting that some seafarers find it impossible to bring claims under contracts that require arbitration in countries where the seafarer would incur “insurmountable debt” in order to arbitrate their disputes).

to arbitration clauses that would compel expensive arbitration in a far-off nation that many seafarers cannot afford.⁵³ Increasing access to legal representation for seafarers and the opportunities for litigation with the support of legal counsel would go a long way towards enforcing the rights of seafarers and ensuring their proper compensation during a crisis.⁵⁴

V. CONCLUSION

While the nations of the world have taken some preliminary steps to address the issue of seafarers trapped at sea during the COVID-19 pandemic, substantial reforms are needed to prevent this type of crisis in the future and ensure seafarers rights are adequately protected.⁵⁵ Reforms and enforcement of maritime labor regulations by nations who register vessels could ensure that seafarers have a safe working environment and are able to quickly return home at the completion of their contracts.⁵⁶ Furthermore, these maritime labor reforms are more important than ever as more than 80% of global trade by volume is carried aboard these vessels.⁵⁷ By taking these substantial steps, a future humanitarian crisis could be prevented and the nations of the world can avoid having tens of thousands of seafarers trapped at sea again.⁵⁸

53. Link, *supra* note 16, at 178; Lucy M. Anderson, *Mandatory Arbitration Within Cruise Ship Employment Agreements: Without Global Change, The Disparity of Power Continues to Expand*, 14 LOY. MAR. L.J. 335, 372 (2015) (“Simply put, arbitration agreements create undue hardship for cruise ship workers that seek to hold their employers accountable for personal injury liability.”).

54. Jaime Christy, *The Almost Always Forgotten, Yet Essential Part of our World: An Examination of the Seafarer’s Lack of Legal and Economic Protections on Flag of Convenience Ships*, 32 U.S.F. MAR. L.J. 49, 76 (2020) (noting that the International Transport Federation has helped seafarers sue shipowners and during the 2011–13 period recovered over \$103 million in lost wages on behalf of seafarers).

55. *See supra* Section IV.

56. *See supra* Section IV.

57. *Crew changes: A humanitarian safety and economic crisis*, *supra* note 3; Bauer, *supra* note 3, at 643 (“Around 80 percent of world trade involves ocean shipping . . .”).

58. Tan, *supra* note 1 (noting tens of thousands of seafarers were trapped at sea during the crisis); Northam, *supra* note 1 (noting that at its peak, 400,000 seafarers were trapped at sea aboard their ships).