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Report of the IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

Note by the IMO Secretariat

SUMMARY

Executive summary:	Attached is the report of the IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers which met from 11 to 15 October 1999 at the Headquarters of the International Maritime Organization (IMO).
Action to be taken:	Paragraph 11.6, page 20 of the report.
Related documents:	LEG 77/11, paragraphs 46 to 48, annex 2, LEG 78/11, paragraphs 47 to 48, LEG 79/11, paragraph 45 and LEG 80/11, paragraphs 67 and 68.

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INTERNATIONAL MARITIME ORGANIZATION

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JOINT IMO/ILO *AD HOC* EXPERT
WORKING GROUP ON LIABILITY AND
COMPENSATION REGARDING CLAIMS
FOR DEATH, PERSONAL INJURY AND
ABANDONMENT OF SEAFARERS
1st session
Agenda item 11

IMO/ILO/WGLCCS 1/11
22 October 1999
ENGLISH ONLY

REPORT OF THE WORKING GROUP

1 Opening of the session

1.1 The Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers met from 11 to 15 October 1999 at the Headquarters of the International Maritime Organization (IMO). The list of participants is given at annex 1.

1.2 In welcoming the participants on behalf of the Secretary-General of the International Maritime Organization (IMO), Mr. Gaetano Librando, Senior Legal Officer, Legal Office, Legal Affairs and External Relations Division (IMO), recalled that, when considering the question of liability and compensation in connection with crew claims, the IMO Legal Committee, at its seventy-seventh session in April 1998, agreed to ensure, through the operation of appropriate international instruments, the rights of crew members/seafarers to adequate compensation for loss of life, personal injury and abandonment. The Committee, recognizing the complementary role of IMO and ILO on these issues, indicated its support for the establishment of a Joint IMO/ILO *Ad Hoc* Expert Working Group to channel consultations between both Organizations. Having been approved by the IMO Council and the Governing Body of the ILO, the Joint Expert *Ad Hoc* Working Group was established under the relevant provisions of the Agreement of co-operation between the Organizations. He recalled that the IMO Legal Committee, at its seventy-ninth session in April 1999, had endorsed the nomination of eight IMO representatives: Cyprus, France, Ghana, Greece, the Philippines, the Republic of Korea, the United Kingdom and the United States. The Committee also agreed that participation in the Joint Working Group would be open to all delegations, as observers. Mr. Librando stressed that, in accordance with the terms of reference for the Joint *Ad Hoc* Working Group, as approved by the IMO Legal Committee and the Governing Body of ILO, the Group had an important task to perform in assessing and evaluating the extent of the potential problems relating to liability and compensation in connection with crew claims for death, personal injury and abandonment as well as the adequacy and effectiveness of existing applicable international instruments. The Joint *Ad Hoc* Expert Working Group should also formulate suitable recommendations to the IMO Legal Committee and the Governing Body of the ILO, as appropriate.

1.3 Ms. Cleopatra Doumbia-Henry, Principal Legal Officer, Office of the Legal Adviser (ILO), welcomed participants on behalf of the Director-General of the International Labour Office. She noted that following receipt of a letter from the Secretary-General of the IMO concerning the proposal by the Legal Committee to establish the Joint *Ad Hoc* Expert Working Group, the Director-General had submitted this request to the 273rd Session (November 1998) of the Governing Body of

the ILO, which subsequently approved the suggested terms of reference and nominated four shipowner and four seafarer representatives. The four Shipowner representatives were Captain K. Akatsuka, Mr. D. Lindemann, Mr. J. Lusted and Mr. G. Koltsidopoulos, and the four Seafarer representatives were Mr. A. Buckman, Captain G. Oca, Mr. B. Orrell and Mr. A. Tselentis. She also noted that the International Christian Maritime Association (ICMA) and the International Committee on Seafarers' Welfare (ICSW) also participated as non-governmental organizations. She referred to the paper prepared by ILO Secretariat which examined relevant existing international instruments and other relevant arrangements covering the issues to be addressed by the Working Group. The report of the Working Group would be considered at the next session of the Governing Body of the ILO and, following a request by the ILO's Shipowner and Seafarer members, would also be included on the agenda of the 29th Session of the Joint Maritime Commission to be held in January 2001.

2 Election of the Chairman and two Vice-Chairmen

2.1 Mr. Jean-Marc Schindler (Member Government – France) was elected as Chairman and Captain K. Akatsuka (Shipowner representative) and Mr. B. Orrell (Seafarer representative) were elected as Vice-Chairmen of the Joint *Ad Hoc* Expert Working Group, hereinafter referred to as "Working Group".

3 Adoption of the Agenda

3.1 The Working Group adopted the provisional agenda contained in document IMO/ILO/WGLCCS 1/1. The agenda for the session is given at annex 2.

4 Opening views of IMO and ILO participants

4.1 The Working Group had before it two documents submitted by the International Confederation of Free Trade Unions (ICFTU) (IMO/ILO/WGLCCS 1/6/1 and IMO/ILO/WGLCCS 1/6/2) containing its position with regard to personal injury and death as well as abandonment of crew members/seafarers, respectively. It also had before it one document submitted by the International Shipping Federation (ISF) (IMO/ILO/WGLCCS 1/6) containing its views on personal injury and death as well as abandonment. A background document prepared by the ILO Secretariat (IMO/ILO/WGLCCS 1/7) (hereinafter referred to as the "ILO submission") reviewed the relevant international instruments on the issues.

4.2 Concerning the issue of abandonment, the Shipowner representatives recalled that, during the ILO Preparatory Maritime Technical Conference in 1986, and the Maritime Session of the International Labour Conference in 1987, the issue of repatriation had been discussed at great length, resulting in the adoption of the Repatriation of Seafarers Convention (Revised), 1987 (No. 166).[1] They considered that it was important to look into the reason this Convention had not been well ratified. Though initially not fully convinced of the extent of the problem, the Shipowners, after reviewing a paper on this issue prepared by the International Transport Workers' Federation (ITF) in 1999, accepted that the number of cases described and the hardships suffered by the crew members/seafarers concerned called for close examination and this was already the subject of informal discussions with ITF. They added that the cases reported by the ITF generally involved only a limited number of countries. Indeed, many countries had systems in place for addressing

[1] Annex 3 contains a list of all the Conventions referred to in this Report, and the organizations within which they were adopted.

repatriation issues, and these systems should be examined. The problem should be tackled where it existed, and creating a fund to be financed by those who met their obligations would not be the appropriate response.

4.3 Concerning the issue of compensation in respect of personal injury and death of crew members/seafarers, the Shipowners noted that many countries dealt with this issue through social security regimes, but in other countries this was covered by employment contracts. Problems might have arisen in some countries when shipowners did not live up to their obligations or were unable to pay insurance premiums and lost coverage. However, other countries had régimes in place which should not be jeopardized by new international requirements.

4.4 The Seafarers stated that the task of the Working Group was to initiate a process that would finally resolve the issue of abandonment of crew members/seafarers and the difficulty of securing proper compensation for them and their next of kin in the event of personal injury and death. They cited a book entitled *'Voyages of Abuse - Seafarers, Human Rights and International Shipping'* which *inter alia* described the collapse of a shipping company which accounted for 25% of the cases highlighted in the ICFTU's submission. Contrary to what some shipowners had stated, this collapse was not a "singularly uncommon event" as illustrated by several other major company failures. Reference was made to several other cases, one of which involved the same shipowner who had previously become insolvent and had received support to commence new operations which led to the abandonment of other crews. The continuation of such abuses could not be tolerated. These issues had to be addressed now.

4.5 Credit was given to the IMO and ILO for reacting speedily to requests to convene this Working Group. The Seafarers noted the positive submission of the Shipowners and looked forward to working with them to find solutions that were both workable and effective. Though they hoped that substantial progress could be made, they doubted that some of the issues, particularly that of wages, could be resolved at this session. They would support any proposal for further IMO/ILO meetings to continue considering these important issues.

4.6 The delegation of the Philippines welcomed the convening of the meeting as a significant step towards providing a clear and reliable remedy for the issues being discussed. As a major supplier of maritime labour, the Philippines had in place national policies, laws and regulations to protect their crew members/seafarers. It stated that there was a need to strengthen the existing international instruments in order to address the current problems particularly at a time when the seafarer was required to meet higher international standards of competence. The meeting should identify steps which would eliminate the abuses by those who, in order to advance personal and professional interests, capitalized on the misfortune of the seafarer.

4.7 The delegation of Greece considered that irrespective of its magnitude as a problem, the issues of abandonment of crew members/seafarers and of compensation in respect of personal injury and death of crew members/seafarers should be addressed and realistic action should be taken in a forum where seafarers and shipowners participated equally.

4.8 The delegation of the United States, supported by the delegation of the United Kingdom, recognized that a large number of crew members/seafarers were abandoned, injured or died with serious consequences for their families. It stressed that the Working Group should examine the lack of timely compensation, the need for a clear system of accountability, problems of enforcement of international instruments and the vulnerability of crew members. The human element should also borne in mind as well as serious economic consequences placed on port States, Governments and private entities which regularly dealt with these issues.

4.9 The delegation of France stated that, as a large port State, it recognized that abandonment of crew members/seafarers was clearly an important problem because of the related human

consequences and the judicial, technical, financial and safety issues. France had set up a working group to review different international instruments and national regulations. It was prepared to play a positive role in the discussions of the Working Group and supported the ratification of the Repatriation of Seafarers Convention (Revised), 1987 (No. 166) and proposals for the establishment of an international fund or insurance coverage.

4.10 The delegation of Cyprus indicated that their approach to these matters would be guided by the public obligations and the public duties of each State *vis-à-vis* its own citizens and *vis-à-vis* the citizens of any other State who might find themselves within the jurisdiction of that State. The Working Group should seek to identify practical and pragmatic solutions to deal with these issues in the immediate future and should explore mechanisms or arrangements which could be put into place so that these occurrences could be phased out in the long run.

4.11 The delegation of Cyprus expressed the view that the issues should be approached with foresight. The information which ICFTU had listed in their submission had occurred during the last four years. It was however necessary to recognise the changes which had occurred since the adoption of the Repatriation of Seamen Convention, 1926 (No. 23) and which were on-going in the structure and modus operandi of the shipping industry. In particular, the last few years had witnessed the appearance of many States providing registration services to the shipping industry. The vast majority was developing countries. In addition, in a number of cases, these services were not operated by the State itself but by legal entities operating as concessions or under contract and based in various parts of the world. Usually the revenue from such services was not collected by the State but by the legal entities which reimbursed only part of the actual fees to the State.

4.12 The observer delegation of Singapore indicated that, as a major maritime nation, the well-being of crew members/seafarers was of great importance to it and, in this regard, it had established a fund called the Singapore Stranded Seafarers' Fund which had received contributions from the Maritime and Port Authority of Singapore (MPA), the Singapore Maritime Officers' Union (SMOU) and the Singapore Organization of Seamen (SOS). The purpose of the fund was to reduce the hardship faced by crew members/seafarers on board Singapore-registered ships stranded in Singapore or overseas.

4.13 There was consensus within the Working Group that the problem of abandonment was real and had a significant human and social dimension.

5 Review of the terms of reference

5.1 At the invitation of the Chairman, the IMO Secretariat introduced document IMO/ILO/WGLCCS 1/5 containing information on the background leading to the establishment of the Joint IMO/ILO Working Group and, in particular, the terms of reference of the Group adopted by the IMO Legal Committee and approved by the Governing Body of ILO.

5.2 Concerning its agenda, the Working Group agreed to consider separately the issue of abandonment of crew members/seafarers from the issue of compensation for personal injury and death. As a result, agenda items 6, 7, 8 and 9 were considered sequentially with regard to abandonment as well as for personal injury and death.

6 Assessment of the extent of the problem

7 Examination of relevant IMO (including those elaborated under the joint auspices of the United Nations and IMO), ILO and other applicable international instruments (which should be listed)

8 Evaluation of the adequacy and effectiveness of the above

9 Formulation of suitable recommendations to the IMO Legal Committee and/or the ILO Governing Body, as appropriate

ABANDONMENT

Assessment of the extent of the problem

6.1 On the question of abandonment of crew members/seafarers, the Working Group had before it a paper submitted by the ICFTU (ILO/IMO/WLGCCS 1/6/2) which stated that although the total number of abandoned crew members/seafarers was not known, the problem was clearly a major one. The ITF had been notified of 212 cases of abandonment involving over 3,500 crew members between July 1995 and June 1999. The ICFTU noted that these cases usually occurred following arrest, shipwreck, grounding, sinking, detention, bankruptcy or insolvency resulting not only in the stranding of the crew, but also creating extreme hardship for their families since often wages went unpaid for months prior to abandonment. The ICFTU further considered that the cases listed were only the tip of the iceberg.

6.2 The document recalled that in spite of obligations under relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS), many States lacked the political will to intervene in cases of abandonment. Reference was made to human rights guarantees under the International Covenants on Economic, Social and Cultural Rights, and Civil and Political Rights and the right to "remuneration" (including repatriation) and the obligation for States to take positive measures to protect life. It reviewed the adequacy and relevance of the 1993 International Convention on Maritime Liens and Mortgages (MLM) and the 1999 International Convention on the Arrest of Ships as well as relevant ILO instruments. It concluded that none of the instruments adequately addressed the problems related to abandonment. In particular, there was no clear mechanism for determining when the shipowner was deemed to have failed in his duty to repatriate, thus activating the responsibility of the flag State.

6.3 The International Shipping Federation (ISF) in its submission (IMO/ILO/WGLCCS 1/6) stressed that the overwhelming majority of shipping companies made proper provision to repatriate crew members/seafarers after their periods of service. For this reason, ISF considered that solutions must target existing problems and not penalize the industry as a whole. While exact figures concerning this problem were not easily obtainable, the 57 ships to which the ICFTU submission referred corresponded to approximately 0.13% of the world trading fleet and an average of 1,000 abandoned crew members/seafarers per year (0.08% of world seafarer population). According to those statistics, most often abandoned crew members/seafarers were Russian, Ukrainian, Burmese or Romanian nationals.

6.4 The ISF submission stated that ISF members accepted their responsibility for repatriating crew members/seafarers and that in cases of abandonment due to insolvency or for other reasons in which the shipowner had failed to perform his obligations, the flag State should repatriate crew members/seafarers irrespective of nationality according to the ILO Repatriation of Seamen Convention, 1926 (No. 23), with flag States recovering these costs. Shipowners requested the IMO and ILO to collect information concerning repatriation arrangements established in many States as guidance regardless of whether they were parties to the relevant ILO Conventions.

6.5 Commenting on these issues, the Shipowners noted that the question of the repatriation of crew members/seafarers was covered by a modern international instrument, the ILO Repatriation of Seafarers Convention (Revised) 1987, (No. 166). However, it had received few ratifications. It had revised and improved the earlier Repatriation of Seamen Convention, 1926 (No. 23). A Shipowner

was obliged to repatriate crew members/seafarers, failing which it was the responsibility of the flag State. The issue of a fund or guarantee had been discussed, but such requirements had not been included in the final text of the Repatriation of Seafarers Convention (Revised), 1987 (No. 166), which adequately regulated the problem. The question concerns poor ratification, the reasons for which should be sought.

6.6 The Seafarers referred to the data contained in the ICFTU submission and to the ILO submission which had noted that in cases of abandonment crew members/seafarers were no longer treated as such but as unemployed aliens with no right of entry into the port State. While good shipowners should not be expected to pay the costs incurred by bad operators, under these circumstances there was no other solution. If the ILO instruments had been adequate, the problem would not exist today.

6.7 A Seafarer representative placed the problem in its historical context, in particular recalling the Resolution Concerning the Protection of Wages and Stranded Seafarers adopted by the 26th Session of the Joint Maritime Commission (JMC) in 1991, a copy of which is attached at annex 4. The operative paragraph of that resolution recommended that Member States adopt legislation and practical measures to protect the wages and other entitlements of crew members/seafarers when a shipowner/manager became insolvent and especially where crew members/seafarers became stranded in an outport.

6.8 The Seafarers also referred to the fact that the crew members'/seafarers' claims did not have the highest priority among maritime liens. Most States had provisions for financial security for non-payment of wages to land-based workers and although this involved a breach of contract, posed no problem. They reiterated that the right to repatriation should be considered a basic human right.

6.9 The representative from the International Christian Maritime Association (ICMA) pointed out that, while States continued to debate who should pay for maintaining and repatriating abandoned crew members/seafarers, it was the charities who continued to cover these costs. He further noted that, in some cases, the situation of the crew members/seafarers was such that they were reduced to selling ship's equipment simply to pay for food to survive.

6.10 The delegation of the Philippines indicated that concerns about underwriting repatriation costs might be one reason why some States had not ratified the Repatriation of Seafarers Convention (Revised), 1987 (No. 166). As a port State and a major supplier of crew members/seafarers, the Philippines held the manning agencies employing crew members/seafarers primarily responsible for repatriation and payment of wages. When the manning agencies failed in their obligation to repatriate, a government agency (the "Overseas Workers Welfare Administration" of the Department of Labour and Employment) stepped in. This solution was workable and enforceable.

6.11 A representative from the International Shipping Federation (ISF) considered it was necessary to study the arrangements established at the national level to deal with abandonment, such as in Norway and Singapore, and at regional level in the European Union. Flag States should be encouraged to make provision to recover the costs of repatriating stranded crew members/seafarers in a manner appropriate to national circumstances. The IMO and ILO should collect information concerning the arrangements established in many States to ensure that stranded crew members/seafarers were repatriated and that this information should be published as guidance for States which failed to repatriate crew members/seafarers left stranded by vessels flying their flag.

6.12 The delegation of Cyprus expressed the view that the issue of abandonment was not a question of statistics. In its opinion, the maintenance and support of abandoned crew members/seafarers as well as their repatriation were humanitarian issues which States had an obligation to address. While the responsibility lay and continued to lie with the owner or operator of

the ship, States had an obligation, in the context of Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS), to establish a mechanism to deal with these matters when all other arrangements failed. However, the establishment of such arrangements should not give the wrong signals to unscrupulous owners. The approach to the matter should be to make shipowners responsible actors and not to encourage operators who could easily walk away from their obligations with the knowledge that States would deal with the consequences. Any solutions or arrangements a shipowner would be expected to put in place should be such that they secured the availability of funding to cover costs which arose following the abandonment of crew members/seafarers. Such arrangements should be in place independently of the existence of the shipowner or his ability to meet the costs involved. Charitable institutions should not bear the responsibility and solutions should be sought in a more systematic manner.

6.13 Concerning the situation in national law and practice, the delegation of Cyprus informed the Working Group that since 1963 Cyprus had made provisions in its legislation for payment by the Government of the cost of repatriation of abandoned crew members/seafarers in Cyprus and for their support pending repatriation. In addition, on ratification of the ILO Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), Cyprus had established a specific budgetary appropriation through which it could fund the repatriation of any abandoned seafarer employed on a ship flying the flag of Cyprus, irrespective of the nationality of the seafarer or the place of abandonment. It was of the view that where all arrangements failed, it was appropriate for the State to deal with the matter and to provide the necessary funds. However, while the funds for repatriation might be available and the Government was willing to organize repatriation, it could not do so until the cases had been brought to its attention.

6.14 The observer delegation of Norway stated that Norway had a system to deal with abandoned crew members/seafarers in case of shipping companies' bankruptcy. Under Norwegian legislation, shipowners were held responsible for repatriation of crew members/seafarers and payment of wages. To be registered in the Norwegian International Ship Register (NIS), every shipowner had to provide a guarantee that the crew members/seafarers would be repatriated and eight weeks of their wages would be paid. A ship which failed to meet these requirements was removed from the register. The cost of the system was not high.

6.15 The delegation of the Republic of Korea explained that Korea had a system for repatriating Korean crew members/seafarers or foreign crew members/seafarers on Republic of Korea flag ships. However, it had difficulty finding remedies for the other aspects of the problem and felt there was a need for a new system.

6.16 The delegation of the United States stated that the United States had laws and regulations concerning repatriation of US crew members/seafarers, but that it did not have similar provisions concerning foreign crew members/seafarers stranded in the United States. Reference was made to a recent roundtable discussion convened by the Center for Seafarers' Rights of the Seamen's Church Institute (New York). It commended the study, entitled: "There's No Place Like Home: Repatriating the Industry's Seafarers" to the Working Group, as a useful reference on the subject.

6.17 The delegation of France stated that his country had no provisions dealing with repatriation of foreign crew members/seafarers except in its Maritime Labour Code which provided for the responsibility of the shipowner. It was preparing to ratify the ILO Repatriation of Seafarers Convention (Revised), 1987 (No. 166).

6.18 The delegation of Ghana noted that under Ghanaian law the responsibility for repatriation was placed on the shipowner. However, in circumstances where the shipowner was insolvent, the State assumed the responsibility for repatriating the seafarer but this created an enormous financial burden on it.

6.19 The Seafarers considered that the system applied in Norway was commendable: no ship was entered on the register unless a guarantee was provided for crew members/seafarers' wages. Reference was made to Annex 3 of the ICFTU submission, which included a list of some of the flag States with the worse abandonment records. The question was raised as to whether a State should be allowed to operate a register if it did not meet certain minimum requirements. Concerning the system applicable in the Philippines, it was pointed out that the system did not cover wages of the crew members/seafarers and in certain circumstances the crew member/seafarer refused repatriation until his wages had been paid. It was also noted that part of the fund came from crew member/seafarer contributions.

6.20 The delegation of Greece said his country had ratified the ILO Repatriation of Seamen Convention, 1926 (No. 23) but that it had not ratified the ILO Repatriation of Seafarers Convention (Revised), 1987 (No. 166). It was reluctant to ratify the latter Convention until other traditional maritime countries had done so. The issue of abandoned crew members/seafarers was governed by national legislation in force which provided for a special committee. The committee had the power to authorize the repatriation of crew members/seafarers and the payment of wages.

6.21 The delegation of Cyprus pointed out that the IMO had for some time embarked on a process aimed at stressing and re-enforcing the obligations, responsibilities and accountability of flag States. In this context, all efforts should aim at involving the flag State as soon as an event occurred. This process might be made easier by asking States to designate focal points assigned to deal with these matters. Information on focal points should be communicated to IMO and ILO which would draw up relevant lists to be circulated to all their member States.

6.22 The delegation of Cyprus, supported by the delegation of the United Kingdom, stated that the issue of abandonment had several components: repatriation, immigration status, support for the crew member/seafarer and wages. The immigration issue, i.e. the deportation of crew members/seafarers and their treatment as unemployed aliens, required particular attention by the Member Governments. In the opinion of the delegation of Cyprus, it was unfair to any crew member/seafarer to be refused landing, necessary visas or be deported in situations which arose through no fault of the individual. This situation stigmatized the crew members/seafarers and affected their future employment prospects. The issue of wages, due at the time of abandonment and thereafter, was complex and related to contracts of employment. States might hesitate to underwrite the payment of such wages as this could interfere with employment arrangements and might result in operators abandoning crew members/seafarers knowing the State would pay.

6.23 The Working Group noted that the issue of abandoned crew members/seafarers had been discussed over a considerable number of years, including by the Joint Maritime Commission which had adopted a resolution on the protection of wages and stranded crew members/seafarers. There was general acceptance that the problem of abandoned crew members/seafarers was a serious one which required urgent remedial action. It considered that UNCLOS established a general duty on flag States to exercise effective control over vessels flying their flags, including labour and social aspects, thus recognizing the importance of the human element. It also recognized that the issues arising from the problems of abandonment included the following: repatriation, support for crew members while stranded, immigration status and the question of payment of outstanding remuneration.

Examination of relevant IMO/ILO instruments

6.24 The Shipowners observed that there was a significant number of ILO instruments which were relevant to the problem of abandoned crew members/seafarers although they had not been successful in eliminating the problem. They referred to the 1993 International Convention on Maritime Liens and Mortgages which had provisions concerning crew members/seafarers' claims when the

shipowner became insolvent. They questioned why existing instruments had not been ratified, and stressed that the ILO Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) provided for minimum labour standards which were enforced through port State control regardless of whether the flag State had ratified the Convention. Concerning the relevant instruments, they felt that the problem of non-ratification had to be addressed first.

6.25 The Seafarers observed that no instrument of any Organization dealt specifically with abandoned crew. While recognizing that the 1993 International Convention on Maritime Liens and Mortgages provided for securing unpaid wage claims and was often more favourable than national legislation, it did not deal with the immediate problems of abandoned crew and, like the 1999 International Convention on the Arrest of Ships (neither of which was yet in force), was not the answer. Often there was no equity in the vessel to arrest and access to the legal system by the crew member/seafarer was daunting. The remedy for abandonment was not the arrest and forced sale of ships.

6.26 With regard to ILO Conventions, the Seafarers noted that the Repatriation of Seamen Convention, 1926 (No. 23), despite its 45 ratifications since 1926, did little to solve the problem of abandonment. Although establishing the crew members/seafarers' right to repatriation, it failed to specify who was to pay. They noted that the Repatriation of Seafarers Convention (Revised), 1987 (No. 166) was a new, important and useful instrument in that it expressly placed the responsibility on the shipowners. The problem, however, was that in cases of abandonment the shipowner had disappeared and recovery of expenses advanced by the port State or the country of the crew members/seafarers' nationality was unlikely. Consular authorities and port State authorities could intervene, but were not required to do so.

6.27 The Seafarers stated that while the Recruitment and Placement of Seafarers Convention, 1996 (No. 179) was relevant, it was soft and did not require the placement agencies to repatriate. They considered that the subject matter of the Shipowners Liability (Sick and Injured Seamen) Convention, 1936 (No. 55) was only partially relevant. With regard to the Protection of Wages Convention, 1949 (No. 95) and the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173), which covered all workers, employees ranked as privileged creditors but the Conventions did not ensure that crew members received all their wages and in any case the process took time. It would be ineffective as a remedy in cases of abandonment. The Seafarers noted that although the ILO had expended considerable efforts for the plight of abandoned crew, the results might be judged as only a partial success.

6.28 The delegation of Cyprus agreed with the Seafarers and the Shipowners that all the relevant international instruments were those listed in the ILO submission. However, these instruments only addressed some aspects of the problem and did so in a fragmented manner. In addition some of these instruments were more than 70 years old and did not entirely address current global shipping needs. Furthermore, the most recent ones were not yet in force and it could not be estimated when these would enter into force. As a result, their impact on the issues and in particular the impact of the 1993 International Convention on Maritime Liens and Mortgages and of the 1999 International Convention on the Arrest of Ships could not be assessed.

6.29 The delegation of Greece drew attention to the immigration aspect of abandonment and the status of abandoned crew members/seafarers as illegal aliens. It referred to the Seafarers' Identity Documents Convention, 1958 (No. 108), which provided that the identity document could be used as an entry document for the purpose of repatriation. It considered this instrument pertinent and requested that it be added to the list of relevant instruments.

6.30 The delegation of Cyprus expressed the view that it was reasonable to expect States to provide for medical care, maintenance and support for stranded crew members/seafarers, for their

repatriation when other arrangements failed and to address the issues relating to the immigration status of abandoned crew members/seafarers. With regard to the ILO Protection of Wages Convention, 1949 (No. 95) and the ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173), the delegation considered that it would be difficult for States to undertake responsibility to pay crew member/seafarer wages from public funds. Alternative arrangements need to be explored to ensure that the crew member/seafarer received any remuneration due to him.

6.31 The delegation of Cyprus reiterated that pragmatic solutions should be explored in the short-term while long-term solutions were studied. It supported the inclusion in the report of the Working Group of all recommendations and suggestions.

6.32 The Working Group agreed on a list of relevant international instruments concerning the issue of abandonment, which is given at annex 3.

Evaluation of the adequacy and effectiveness of relevant instruments

6.33 The Shipowners considered it necessary for Governments of the Working Group to give some indication as to the reasons for the low level of acceptance of relevant ILO maritime Conventions. They observed that the Repatriation of Seafarers Convention (Revised), 1987 (No. 166), adopted in 1986, was one of the recent and up-to-date instruments. The Shipowners recalled the circumstances under which the Repatriation of Seafarers Convention (Revised), 1987 (No. 166) was drafted and in particular the rather accidental manner in which the question of abandonment was raised. The intention was not to deal exhaustively with the flag State obligations in cases of abandonment, and this explained why the final text failed to set out a detailed mechanism for payment or recovery of expenses. There was no shortage of international instruments on the subject of repatriation. There was certainly room within the constitutional mandate of the ILO to further promote the ratification of existing instruments and enquire into the difficulties which continued to inhibit Member States from envisaging wider acceptance.

6.34 The Seafarers noted that there could be several reasons underlying a government decision not to proceed to ratification, such as considerations of cost, political priorities or the existence of national legislation already in place. With respect to evaluation, the Seafarers maintained that none of the existing instruments made direct remedies available to crew members/seafarers apart from the possibility of bringing a civil action. It was unrealistic to expect stranded crew members/seafarers to be able to afford the expenses of legal action in a foreign country. Existing instruments clearly spelt out the obligations of the flag State concerning repatriation but they lacked an activating mechanism. On the other hand, the port State as well as the State of the crew member's/seafarer's nationality could take some action but they were often reluctant to intervene in abandonment cases. The Seafarers concluded that the current system was not effective and favoured a solution which would not require ratification.

6.35 The delegation of France stated that, based on the recommendations of a Working Group established by the Government to examine the problem of abandoned crew members/seafarers, France had initiated the ratification process of the Repatriation of Seafarers Convention (Revised), 1987 (No.166) and intended to promote the ratification of that Convention at the European level when it assumed the presidency of the EU in the second semester of 2000.

6.36 Referring to the 1993 International Convention on Maritime Liens and Mortgages and the 1999 International Convention on the Arrest of Ships, the delegation of the Philippines stated that its Government had amended its ship mortgage law to make it consistent with the International Convention on Maritime Liens and Mortgages, although the main objective for amending the law

was to encourage ship financing. The delegation noted that the International Convention on Maritime Liens and Mortgages gave liens for crew wages lower priority than other.

6.37 In reply to a question concerning studies undertaken by the ILO regarding the low level of ratification of maritime Conventions, the representative of the ILO Secretariat referred to the ongoing work of the Working Party on the Policy on the Revision of Standards set up by the Governing Body of the ILO to conduct a thorough review of ILO Conventions adopted prior to 1985 and to assess the need for their revision. Concerning Conventions which had a low level of ratification and which were considered to be up to date, Governments were requested to provide information on the reasons for non-ratification or on obstacles to ratification.

6.38 Concerning the question of the ratification of instruments the delegation of Cyprus referred to the IMO experience, and to the cost/benefit analysis which the State had to make. It observed that IMO instruments of a technical nature had been accepted by more that 100 States which was more than double the rate for those of a purely legal nature (e.g. treaties dealing with limitation of liability and compensation). This was explained by the requirement for ships to have various certificates in order to operate in the global market. States are therefore compelled to ratify these instruments without which their ships would have serious difficulties in trading. In addition the current regime of port State control established under these instruments, required that ships carry these certificates. As compared with the acceptance of other ILO maritime instruments, the wide acceptance of the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) stemmed from the fact that it was made mandatory and enforced under the Paris Memorandum of Understanding on Port State Control.

6.39 The IMO Secretariat briefly highlighted the principles governing the international liability and compensation regimes for oil pollution damage based on the 1969 Civil Liability Convention and the 1971 Oil Pollution Fund Convention: the Civil Liability Convention, subject to few exceptions, provided for strict liability of the shipowner for oil pollution damage. Under certain conditions, the owner was entitled to limit his liability. The owner of a tanker carrying more than 2,000 tonnes of persistent oil as cargo was obliged to maintain insurance to cover his liability under the Convention. Tankers had to carry a certificate on board attesting to insurance coverage. Under the Fund Convention, victims of oil pollution could be compensated for damages exceeding the level of the shipowner's liability. Contributions to the Fund were paid by any person who had received more than a certain quantity of oil in a calendar year in a State party to the Fund. This regime was amended in 1992 by two Protocols.

6.40 The Working Group concluded that although there were a considerable number of international instruments which dealt with certain aspects of the problems under review, none of them adequately addressed the problems in a comprehensive manner.

Formulation of recommendations

6.41 The Shipowners considered that the drafting of a new international instrument addressing all the elements identified as being relevant to the problem of abandonment could not be advanced as a short-term solution. This would necessarily take time and the outcome was not likely to be successful. It would be preferable to explore the possibilities of strengthening existing instruments. The Shipowners emphasized that, based on the evidence produced before the Working Group, abandonment was a complex issue not limited to the problem of repatriation. They referred to the study published by the Center for Seafarers' Rights which was considered to be excellent. They stressed the need for further study and expert analysis on a cluster of issues including the status of the abandoned seafarer as an illegal immigrant. They referred to the shared responsibility of the shipowner, flag State, port State and State of nationality of the seafarer. Labour supplying countries had an obligation under Article 3 of the ILO Merchant Shipping (Minimum Standards) Convention,

1976 (No.147) to warn their crew members/seafarers on the dangers of signing on sub-standard ships. In addition, the Shipowners recalled their main recommendations as reflected in their submission, namely the need for systematic collection of information, the launch of an ILO survey of existing national arrangements, and the initiation by the ILO of information gathering as to the reasons which had prevented member States from ratifying the relevant Conventions.

6.42 The Seafarers stated that, at this stage, finding out the reasons for the unsatisfactory state of ratification of the relevant instruments would be an unproductive exercise. The real issue was enforcement and the political will to do so. Ideally, the solution could take the form of an instrument which would not require the ratification by States to become applicable. What was needed was an innovative mechanism, such as an international fund, national funds, or compulsory insurance. The 1971 Oil Pollution Fund Convention was an interesting precedent and should be given careful consideration. They considered that abandonment of crew was considered to be a violation of basic human rights. A sharing of the obligation was necessary and sometimes the good had to pay for the bad. The political will to create the pressure to comply, to name and shame would contribute to the enforcement of a higher moral and social right. The Working Group's report should go further than attesting to the seriousness and complexity of the problem and should include the three proposed solutions.

6.43 The Seafarers reiterated their position that the inadequacy of existing instruments stemmed not only from the low level of ratification but also from inadequacies inherent in the Conventions themselves. On one hand, certain Conventions might be widely ratified but did not cover the problem, and on the other hand, better drafted instruments failed to attract wide acceptance. One of the possible solutions was the establishment of an international fund. In order to be effective the fund would have to be compulsory, meaning that an instrument would need to be ratified. Ratification would not be necessary if a voluntary fund were to be established. In this respect, the use of crew members/seafarers' wages to finance part of those contributions would be unacceptable. A second option would be the establishment of national funds and a third option would be the introduction of a compulsory insurance scheme. In the latter case, the role of Protection and Indemnity (P&I) Clubs should be reviewed as some of their standard rules, such as the "pay to be paid" principle, seem incongruous in the case of abandoned crew members/seafarers.

6.44 The delegation of Cyprus suggested that discussions should not be confined to ILO instruments but should also include other legal texts such as the International Convention on Maritime Liens and Mortgages and the International Convention on the Arrest of Ships. The recommendations in the Working Group’s report should include the following: a review of national legislation and practice as well as solutions which may be already in place; the need for an exchange of information among national administrations, industrial organizations, and the IMO and ILO Secretariats, possibly through the designation of focal points; the deliberations of the Joint IMO/ILO Working Group might provide valuable input to the work of the ILO Working Party on the policy regarding the revision of standards and should thus be taken fully into account; the possible creation of funds, bearing in mind that the implementation of an international fund might be complicated and might only be a long-term solution. From a policy perspective, work should be focused on implementing existing obligations and liability regimes rather than providing for fall-back arrangements. Finally, the recommendations to be submitted to the IMO and ILO executive bodies should not propose specific or limited arrangements but simply outline the various methods and tools available.

6.45 The delegation of the Philippines, referring to the Overseas Workers Welfare Administration, explained that crew members/seafarers and shipowners are levied a certain fee out of which substantive benefits are provided such as repatriation. Regarding the proposal to set up a fund, several questions should be asked, for instance the need to introduce certification to be verified

through port State control. The delegation of Korea considered that the problem under review could not be easily resolved by merely drawing upon existing systems.

6.46 The delegation of France expressed support for recommendations which would call for collection of information, establishment of a fund, and further pursuit of the debate. The delegation of Norway opposed the creation of an international fund considering that most governments might be unwilling to assume additional financial obligations in a matter where the prime responsibility lay with the shipowner, and especially the case of flag States which already had a system of repatriation.

6.47 An observer from the International Group of P&I Clubs stated that the clubs covered most - but not all - of the shipowner's legal liabilities, and that as a matter of long-standing principle bankruptcy was not covered.

6.48 The delegation of Greece suggested that national funds and compulsory insurance schemes could be more expedient mechanisms for the prompt resolution of repatriation cases as opposed to an international fund which would probably involve a heavier and much slower organizational machinery.

6.49 The Seafarers, commending the apparent consensus in the Working Group to consider appropriate action in order to tackle the problem of abandoned crew members/seafarers, proposed that a joint IMO/ILO statement could be drafted containing the points on which a consensus had been already reached. While the Shipowners endorsed the proposal, the delegation of Cyprus raised some concern as to whether the adoption of such a resolution would be compatible with the IMO's constitutional mandate and the Working Group's terms of reference. On the initiative of the Chairman, it was agreed that a small group should discuss this matter informally with a view to proposing an acceptable solution.

6.50 The Working Group concluded that the obligation for repatriating crew members/seafarers lay with the shipowners, but where the shipowner failed to meet his obligations there was a primary obligation on the flag State to do so under relevant international instruments. It also considered that there were a number of possible solutions and it was important that the system functioned effectively and covered all the crew members irrespective of their nationality. It was also proposed that flag States should ensure that such a mechanism was in place before they entered a ship in their register.

LIABILITY AND COMPENSATION REGARDING CLAIMS FOR PERSONAL INJURY AND DEATH

Assessment of the extent of the problem

6.51 The Working Group had before it an ICFTU submission (IMO/ILO/WGLCCS 1/6/1) which addressed the issue of claims in respect of personal injury and death. The submission recalled the high risk of injury and death inherent in the seafaring profession and stressed both the international and mobile character of maritime employment which often gave rise to complex legal and jurisdictional problems. It referred to the problems inherent in maritime insurance practice (protection and indemnity, P&I) which did not require any coverage for crew claims, citing an estimated 5% of uninsured vessels worldwide. The principle of reimbursement of claims settled by the shipowner ("pay to be paid") was regarded as a significant obstacle to payment of claims by P&I Clubs in addition to other provisions of the P&I rules. It cited practices by the P&I Clubs and their representatives who pressurized financially desperate claimants to accept low-level settlements in return for a release of claims. In addition, they raised unnecessary legal challenges to claims and also required claimants to provide security before a claim could be pursued.

6.52 The ICFTU submission also referred to the maritime lien provision for crew claims in the 1993 International Convention on Maritime Liens and Mortgages and considered that it could benefit

crew members/seafarers. The Convention was not yet in force. The remedies related to the arrest of ships could not constitute a sufficient protection mechanism since the value or equity in the ship often could not satisfy the claims. The arrest was costly and gave rise to further expenses such as port charges. The ILO instruments were potentially relevant although they did not deal with the specific issue of compensation for injury, as opposed to payment of medical expenses and wages during periods of sickness or injury.

6.53 The International Shipping Federation (ISF) in its submission (IMO/ILO/WGLCCS 1/6) noted that many crew contracts contained scales of compensation for disability and death. In addition to contractual benefits, national legislation in some countries provided for remedies in tort for negligence. In most cases prudent shipowners contracted cover for crew claims relating to injury and death through P&I Clubs.

6.54 The Seafarers stated that, in spite of shipping being one of the most hazardous occupations, shipowners were under no obligation to contract insurance against the risk of death or injury of crew members, while P&I coverage equally failed to provide adequate protection. An estimated 5% of the world's fleet was uninsured which could give rise to social problems of sizeable proportions. Among the most objectionable practices of P&I Clubs were the retroactive withdrawal of coverage, the "pay to be paid" rule which was probably the most significant obstacle to obtaining compensation, the lack of direct access by crew members/seafarers, and the offer to crew members/seafarers and/or their families of compensation lower than that provided for in employment contracts.

6.55 The delegation of Cyprus recalled that the areas of competence of the IMO and the ILO were different and that the IMO could not deal with this issue of claims for personal injury or death or engage in meaningful debate without specific instructions from the Organization, but this did not prevent the Governments from listening.

6.56 The Seafarers recalled that the terms of reference dealt with the provision of financial security and it was therefore within the IMO's mandate. The discussion was not about social security but about financial security. It was for the Working Group to take a view on the reality of the problem, adding that there was no international system guaranteeing financial security and that the international system as a whole was failing to protect crew members/seafarers.

6.57 The delegation of Cyprus considered the issue of compensation for death or injury to be more complex than that of abandonment. There were various elements to be examined: the legal framework at the national level dealing with compensation for injury; the security of crew claims in excess of the shipowners' coverage; the introduction of modern practices such as crew management companies or crew agencies, and their impact on existing systems imposing liability on the shipowner; the obstacles preventing broader ratification of the ILO Social Security (Seafarers) Convention (Revised), 1987 (No.165). In any event, there should be no doubt that crew members/seafarers were entitled to minimum benefits in case of injury, and compensation for their families in case of death, irrespective of flag and/or nationality.

6.58 An observer from the International Group of P&I Clubs acknowledged that many P&I Clubs excluded crew cover, but this was only due to the fact that national social security laws were extremely diverse and fragmented. In addition, many countries provided that insurance had to be taken locally.

6.59 The Seafarers emphasized that the real issue was the failure of a system to provide effective financial security for crew claims. Due to the lack of action from industry and the compelling need to develop solutions, this subject had been under discussion within the IMO Legal Committee for the last four years and had been linked to the revision of the Athens Convention, the draft Wreck

Removal Convention, the draft Bunker-Oil Convention and the draft Guidelines on Shipowners responsibility in respect of maritime claims. The Seafarers deplored the practices of P&I Clubs exerting pressure in order to lower settlements. Examples were given where such settlements had been obtained notwithstanding contractual provisions to the contrary. They proposed bilateral discussions with the shipowners with the assistance of the IMO and ILO Secretariats.

6.60 The Shipowners considered that, unlike the discussion on abandonment where data was provided, the extent of the problem relating to claims for death and injury was simply unknown. In several countries, no provision was to be found in the employment contracts because the matter was covered by statutory provisions. Furthermore, shipowners also experienced cases where crew members/seafarers submitted false or misleading claims for compensation. It was suggested, therefore, that discussions involving the P&I Clubs should continue outside the framework of this Working Group, and that the outcome of those discussions should be reported to the Working Group. However, the Shipowners, referred to the ISF submission (IMO/ILO/WGLCCS 1/6, paragraph 3), which stated that contractual benefits should be paid promptly, and in full, when the facts of the case were not in dispute, irrespective of whether or not a claim for damages had been lodged. However, compensation provided under the provisions of a contract should be offset against any damages which might subsequently be awarded.

6.61 The delegation of the United Kingdom thought that although social and related issues were generally matters primarily for the ILO, the IMO did have a legitimate interest in the issue. While the UK was reluctant to get involved in a detailed debate on matters which were properly for contracts of employment, the sorts of employers who abandoned crew and/or left them without pay were likely to be those who ignored the importance of properly trained and motivated crew and in other ways were associated with substandard shipping. Good employers, mindful of their obligations and liabilities, would have insurance to cover crew claims. Compulsory insurance offered a potential solution and the UK supported its inclusion in the proposed discussions between crew representatives, shipowners and P&I Clubs.

6.62 The delegation of the United States expressed a strong commitment to the IMO/ILO Joint Working Group and this process. It recognized that there was a problem that needed to be addressed. It referred to the document prepared by the Center for Seafarers' Rights of the Seamen's Church Institute and the impact these problems had in the US where there was no domestic legislation and no clear mechanism in place to deal with these questions.

6.63 The delegation of France stated that all possibilities should be examined, including compulsory insurance.

6.64 The Working Group concluded that there was a problem but that further studies were required to examine all aspects of the problem.

Examination and evaluation of relevant IMO/ILO instruments

6.65 The Working Group considered the main provisions of IMO and ILO instruments and other international arrangements which cover, in varying degrees, the issue of liability in respect of death, personal injury and abandonment of crew members/seafarers, dealt with in the ILO submission (IMO/ILO/WGLCCS 1/7).

6.66 During the debate, the Shipowners stated that the problem of crew claims arising out of death or injury fell primarily within the ILO field of competence. They stated the traditional system where crew members/seafarers primarily worked on ships of their own nationality no longer existed. Today, more than 50% of vessels used flags of convenience and employed multinational crews. Many countries did not have a social security system, and the problem was with the countries which

left personal injury and death coverage to the discretion of the shipowner. The complaints in this respect concerned the lack of social security coverage. The shipowners recalled that ILO instruments dealing with social security had traditionally been complex and controversial. Some of the earlier instruments considered obsolete had been placed on the agenda for revision. For many States, the ILO Social Security (Seafarers) Convention (Revised), 1987 (No. 165) contained provisions which posed serious problems for ratification. The Shipowners would, therefore, be ready to review the relevance of those instruments and explore in a constructive spirit possible ways for improvement.

6.67 The Seafarers stated that the IMO Legal Committee was currently preparing three legal instruments dealing with liability issues, namely: (a) a revised text to the Athens Convention on Carriage of Passengers and their Luggage by Sea and of the Protocol of 1990 relating thereto; (b) a new convention on liability and compensation for pollution from ships' bunkers; and (c) a new convention on wreck removal. They also informed the Working Group that the Legal Committee had approved draft IMO Guidelines on Shipowners Responsibilities in respect of maritime claims, which were to be submitted for adoption by the Assembly at its forthcoming session. The aim of the Guidelines was to establish a framework of good practice to encourage all shipowners to take steps to ensure that claimants receive adequate compensation following incidents involving their ships. Accordingly, it was their opinion that IMO had competence in dealing with financial security for crew claims.

6.68 The Seafarers observed that there were no IMO or UN/IMO instruments dealing with personal injury and death. They noted that while the IMO Convention on the Limitation of Liability for Maritime Claims, 1976 did apply to personal injury actions by crew members/seafarers, thus limiting the shipowners' liability, unfortunately it did not offer a quid *pro quo* to the crew members/seafarers such as a régime of strict liability or compulsory insurance. Regarding the 1993 International Convention on Maritime Liens and Mortgages, this Convention provided a mechanism for securing a maritime lien on the vessel, which was an improvement over the legislation of many States which did not provide for a lien for personal injury or loss of life. However, the Convention was not yet in force. The arrest of ships, however, to secure rights was unsatisfactory as this procedure limited recovery to the value or equity in the vessel and required costly legal proceedings.

6.69 With regard to ILO Conventions, namely, the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), the Sickness Insurance (Sea) Convention, 1936 (No. 56) and the Social Security (Seafarers) Convention (Revised), 1987 (No. 165), the Seafarers stressed that these did not deal with compensation but rather with payment of medical expenses, sickness pay, etc. related to personal injury and any attempt to revise these instruments would take some 15 to 20 years. They referred to the entitlement component of contractual claims, as opposed to negligence, and wondered whether it should be necessary to arrest ships in order to enforce a judgement. They noted that there was compulsory insurance to protect the marine environment and concluded that a similar system should apply to crew claims.

6.70 The delegation of the Republic of Korea stressed the close relation between ship safety and crew members/seafarers' welfare, which was linked to the protection of the marine environment. With regard to the Social Security (Seafarers) Convention (Revised), 1987 (No. 165), the Republic of Korea already applied *de facto* most of the provisions and considered that direct action by seafarers warranted further study.

6.71 The delegation of Cyprus agreed with comments made by the Seafarers and the Shipowners that the relevant international instruments, as was the case with abandonment, were those listed in the ILO submission. It also shared the view that these did not cover all the issues which have been brought to the attention of the Working Group. It recalled the fragmented nature of these instruments which date back to the 1930s, when the changes the shipping industry has undergone could not have been contemplated. As in the case of abandonment, it was necessary to address the matter in a

pragmatic manner to ensure uniform, consistent and fair treatment of crew members/seafarers irrespective of where events occurred or the State of origin or domicile of the crew member/seafarer.

6.72 The Working Group endorsed the statement by the Chairman that there was a common understanding on the assessment of the problem, and that existing instruments did not adequately address it. It agreed on a list of relevant international instruments concerning the issue of personal injury and death which is given at annex 3.

Formulation of recommendations on crew claims for death and injury

6.73 The Seafarers held the view that compulsory insurance was the most widespread tool to cover personal injury claims, and that models could be found at the national and international levels. Compulsory insurance did not offer complete protection since in case of shipowner's insolvency, for instance, the "pay to be paid" principle would in practice prevent any recovery by the crew member. What was needed, therefore, was a compulsory insurance scheme coupled with a system of direct access for the seafarer such as that provided in the Direct Action Statute of the State of Louisiana or the Direct Act of Puerto Rico. Another possible solution would be personal accident insurance coverage contracted by the shipowner for all crew members/seafarers. In this case, the right of direct action would be part of the insurance policy. In summary, a system providing for compulsory insurance without direct action would not be a viable solution. Furthermore, the "pay to be paid" in P&I Club rules would need to be changed for any P&I arrangement to be effective.

6.74 The Shipowners considered that the notion of compulsory insurance had to be analyzed in greater depth, taking into account the wide differences between the social security systems and the legal and contractual régimes in different countries.

6.75 The delegation of the United States provided information on the US legislation requiring commercial vessels entering US waters to possess a certificate of financial responsibility for oil pollution clean-up costs. According to that legislation, most vessels had to demonstrate that they had the means (e.g. bonds, insurance guarantee, existence of assets in the US, etc.) to pay for damages caused in the event of an oil spill. These provisions were enforced by US port State control authorities.

6.76 The delegation of Greece suggested that compulsory insurance was an option and that the Seafarers, the Shipowners and the P&I Clubs should meet to discuss all the aspects of the issue.

6.77 The Seafarers suggested that the creation of an international or national fund should also be mentioned in the list of recommendations regarding claims for death and injury, as the case might arise where following the abandonment of a ship an outstanding compensation claim for death or injury would need to be secured. The Shipowners opposed any reference to the idea of an international fund as a possible solution to the personal injury or death problem.

6.78 The delegation of Cyprus expressed the view that apparently there were two associated issues concerning death and personal injury of crew members/seafarers. The first issue was the benefit to which the seafarer and his family or dependants would be entitled and the second involved the compensation to which a seafarer and his family and dependants might be entitled as a result of the contractual relationships. While it was reasonable to expect States to address the first issue, it was difficult for them to address the second one. From the point of view of the State, the delegation of Cyprus suggested that it might be appropriate to identify a minimum list of benefits which a seafarer should enjoy and which shipowners should provide. These benefits should be independent of whether the owner continued to exist or had the ability, on his own, to meet the claims.

6.79 Concerning the proposal made by the Shipowners and Seafarers for possible continuation of discussions outside the Working Group, informal consultations were held. The Working Group took note of the agreement reached between the Shipowners and the Seafarers to hold an ISF/ITF meeting next year with a view to discussing specific issues. The two groups intended to invite representatives from the P&I Clubs as well other international bodies to attend the meeting.

6.80 The Seafarers expressed satisfaction that agreement had been reached on holding bilateral discussions with appropriate attendance. While welcoming the invitation extended to the P&I Clubs to participate in those discussions, governments were also invited to express their views on the appropriateness of including the following subjects on the agenda of those bilateral discussions: P&I rules and the "pay to be paid" principle; delays in settlement of claims; resolution of disputes; lack of direct access of crew members/seafarers to insurance; prior notification of withdrawal of coverage; settlement at undervalued sums contrary to contractual obligations; advisability of introducing compulsory insurance. Following the bilateral discussions, the Shipowners and Seafarers would report back to the Working Group, in particular regarding those areas where progress had been made.

6.81 The delegation of Cyprus welcomed the agreement between the Shipowners and the Seafarers as a positive sign and expressed the hope that P&I Clubs would accept to contribute to this meeting. The list of the proposed subjects was reasonable although some of the discussion items might need to be prioritized.

6.82 An observer from the International Group of P&I Clubs, stated that during an earlier ISF/ITF meeting held in June 1999, P&I Clubs had given their consent to participate in an informal working group. P&I Clubs were thus ready to take part in the proposed meeting on the following conditions: discussions had to be "off the record" and should not be brought to public scrutiny; no observers were to be admitted; the questions of compulsory insurance and direct access for crew members/seafarers would not be addressed.

6.83 The delegation of the United States expressed support for the initiative of the Shipowners and the Seafarers but cautioned that the informal discussion group should be required to report back to the IMO/ILO Joint Working Group.

6.84 In summing up the debate on this point, the Chairman considered that a most interesting proposal had been made and that the discussion group would greatly facilitate the task of the Working Group itself. This informal group would be expected, of course, to report back to the governing bodies of the two Organizations. The Working Group agreed on the following possibilities regarding personal injury and death: (a) compulsory insurance ; (b) an examination of existing instruments to see whether they could be improved; (c) further discussions among industry, crew members/seafarers and insurers.

10 Any other business

10.1 The Working Group discussed and adopted the Joint Statement which is attached at annex 5.

11 Conclusions

11.1 Taking into account the complementary character of the mandates of the two international organizations, the Working Group considered that a joint IMO/ILO approach was the best way to examine the problems and to make appropriate recommendations to their respective parent bodies. Accordingly, the Working Group considered that it should meet again, *inter alia*, to assess the material to be communicated to the IMO and ILO by member States and relevant institutions

concerning existing mechanisms, and to consider possible longer-term arrangements, such as the establishment of an international fund or national measures of comparable effectiveness.

11.2 The Working Group agreed that further information was needed in the context of the conclusions reached by the Working Group with regard to the following:

ABANDONMENT

.1 the reasons for the low rates of ratification of relevant existing international instruments and problems encountered;

.2 existing national schemes and systems dealing with problems of abandonment of crew members/seafarers;

.3 lessons learned from various civil liability regimes and their impact on certification schemes;

PERSONAL INJURY AND DEATH

.4 existing national schemes and systems for dealing with financial security for personal injury and death.

11.3 On the basis of information collected, the Working Group would examine and evaluate possible new approaches for dealing with the issues of abandonment, financial security for personal injury and death of crew members/seafarers, and in particular would examine the following possible solutions the order of which did not indicate any hierarchy:

ABANDONMENT

.1 national funds
.2 an international fund
.3 compulsory insurance
.4 systems based on bank guarantees or similar mechanisms
.5 other proposals

PERSONAL INJURY AND DEATH

.1 compulsory insurance
.2 personal accident insurance
.3 national funds
.4 an international fund
.5 other proposals.

11.4 The Working Group noted the proposal made by the Shipowners and Seafarers to meet informally with representatives of the P&I Clubs to discuss difficulties encountered and explore possible solutions concerning certain rules of P&I Club coverage and to report back to the governing bodies of the two Organizations. The issues to be discussed include, *inter alia*:

.1 the "pay to be paid" principle;
.2 direct access of crew members/seafarers to insurers;
.3 delays in the settlement of claims;
.4 resolution of disputes;

.5 claims handling techniques;
.6 prior notification of withdrawal coverage, including the addressees of the notice; and
.7 undervalued settlement of contractual obligations

11.5 The other conclusions reached by the Working Group were as follows:

1 The problems of abandonment and claims for personal injury and death were real and serious, involving a human and social dimension and required urgent attention;

.2 A considerable number of international instruments addressed selected aspects of the problems under review, but none of these instruments dealt with the problems in a comprehensive manner;

.3 Focal points should be established to facilitate communication and to inform concerned parties, including the flag State as soon as a problem occurred;

.4 The publication of guidance for States on the repatriation of crew members/seafarers.

Action requested of the IMO Legal Committee and the Governing Body of the ILO

11.6 The Working Group invites the IMO Legal Committee and the Governing Body of the ILO to:

.1 note the report of the Working Group, and in particular the conclusions contained in paragraphs 11.1 to 11.5;

.2 note the Statement of the Joint IMO/ILO *Ad Hoc* Expert Working Group which is given at annex 5;

.3 approve the continuation of the Working Group with the proposed terms of reference contained in annex 7 and instruct the Secretariats accordingly;

.4 request Member States and, through the Secretariat, relevant institutions, to provide in due time information on the issues contained in paragraphs 11.2; and

.5 instruct the Secretariats of the IMO and ILO to compile the information received and to submit it to the next meeting of the Working Group.

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ANNEX 1

List of Participants

Chairman: Mr. J.-M. Schindler
(Member Government - France)

Vice-Chairmen: Captain K. Akatsuka
(Shipowner representative)

Mr. B. Orrell
(Seafarer representative)

ILO PARTICIPANTS

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Mr. G. Koltsidopoulos (Greece)
Mr. D. Lindemann (Germany)
Mr. J. Lusted (International Chamber of Shipping)

Advisers

Ms. P.E. Voss (Denmark)
Ms. E. Midelfart (Norway)
Mr. D. Dearsley (International Shipping Federation)

Seafarers' Members

Mr. S. Buckman (Ghana)
Mr. G. Oca (Philippines)
Mr. B. Orrell (United Kingdom)
Mr. A. Tselentis (Greece)

Advisers

Mr. M. Dickinson (International Transport Workers' Federation)
Ms. D. Fitzpatrick (International Transport Workers' Federation)

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Ms. V. Bravo
Mr. A. Cruje
Ms. T. Lora
Ms. B. Pimentel
Ms. M. A. de los Santos

Republic of Korea

Mr. K. Lim
Prof. Yoo Myeong-yoo

United Kingdom

Mr. K. Deadman
Mr. P. M. Parr

United States

Mr. W. L. Chaney
Mr. D. B. Stevenson
Mr. E. A. Cohen
Mr. W. D. Eglington
Ms. K. Metcalf
Mr. R. Lioeanjie

OBSERVERS

Member Governments

Mexico

Captain S. Bandala

Norway

Mr. A. Østre

Singapore

Mr. L.K. Sheri

South Africa

Mr. J. V. D. Westhuizen

Associate Member

Hong Kong, China

Mr. B. B. Rao

Non-Governmental Organizations

International Confederation of Free Trade Unions (ICFTU)

Mr. J. Whitlow
Mr. M. Dickinson
Ms. D. Fitzpatrick
Mr. A. Mutawi
Mr. E. de la Cruz
Mr. J. R. V. Lamug
Mr. H. O. I. Isaksen
Mr. J. Smith

International Group of P and I Association (P and I)

Mr. C. Hume
Mr. D. J. L. Watkins

International Marine Contractors Association (IMCA)

Mr. A. D. Read

International Christian Maritime Association (ICMA)

Rev. J. Harel
Rev. C. K. Peters

International Committee on Seafarers' Welfare (ICSW)

Mr. A. Elliott

JOINT SECRETARIAT

ILO

Ms. C. Doumbia-Henry, Principal Legal Officer
Mr. G. Politakis, Legal Officer
Mr. K. Schindler, Labour Standards Specialist (Maritime questions)
Mr. B. Wagner, Maritime Specialist

IMO

Dr. R.P. Balkin, Director, Legal Affairs and External Relations Division
Mr. G. Librando, Senior Legal Officer, Legal Office, Legal Affairs and External Relations Division
Mr. A. Winbow, Head, STCW and Human Element Section, Maritime Safety Division
Mr. A. Mahapatra, Technical-Officer, STCW and Human Element Section, Maritime Safety Division
Mr. M Fuazudeen, Technical-Officer, STCW and Human Element Section, Maritime Safety Division

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ANNEX 2

AGENDA

Joint IMO/ILO Ad Hoc Expert Working Group
on Liability and Compensation regarding Claims
for Death, Personal Injury and Abandonment of Seafarers

to be held at IMO Headquarters, 4 Albert Embankment
London SE1 7SR, from Monday, 11 October at 9.30 a.m. to Friday, 15 October 1999

1. Opening of the session

2. Election of the Chairperson and two Vice-Chairpersons

3. Adoption of the agenda

4. Opening views of IMO and ILO participants

5. Review of the terms of reference

6. Assessment of the extent of the problem

7. Examination of relevant IMO (including those elaborated under the joint auspices of the United Nations and IMO), ILO and other applicable international instruments (which should be listed)

8. Evaluation of the adequacy and effectiveness of the above

9. Formulation of suitable recommendations to the IMO Legal Committee and/or the ILO Governing Body, as appropriate

10. Any other business

11. Adoption of the report to the IMO Legal Committee and the ILO Governing Body

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ANNEX 3

List of relevant instruments

ABANDONMENT

ILO CONVENTIONS

Repatriation of Seamen Convention, 1926 (No. 23)
Repatriation of Seafarers Convention, 1987 (No. 166)
Seafarers' Identity Documents Convention, 1958 (No. 108)
Recruitment and Placement of Seafarers Convention, 1996 (No. 179)
Seafarers' Welfare Convention, 1987 (No. 163)
*Protection of Wages Convention, 1949 (No. 95)
*Protection of Workers' Claim (Employer's Insolvency) Convention, 1992 (No. 173)
*Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation, 1966 (No. 187)
*Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)
*Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) and Protocol, 1996
Seafarers' Welfare Recommendation, 1987 (No. 173)

DEATH AND PERSONAL INJURY

ILO CONVENTIONS

*Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)
Sickness Insurance (Sea) Convention, 1936 (No. 56)
Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)
Social Security (Seafarers) Convention (Revised), 1987 (No. 165)

IMO CONVENTIONS

Convention on Facilitation of International Maritime Traffic, 1965, as amended
Convention on the Limitation of Liability for Maritime Claims, 1976

OTHER TREATIES

*International Convention relating to the Arrest of Sea-going Ships, 1952
*International Convention on the Arrest of Ships Convention, 1999
*International Convention on Maritime Liens and Mortgages, 1993
*United Nations Convention on the Law of the Sea, 1982

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* Conventions containing provisions relevant to death and personal injury as well as abandonment.

ANNEX 4

Resolution Concerning the Protection of Wages and Stranded Seafarers

The Joint Maritime Commission of the International Labour Organization.

Having met in Geneva, in its Twenty-Sixth Session, from 17 to 25 October 1991.

Noting that the Repatriation of Seamen Convention, 1926 (No. 23), which has been ratified by 36 States and came into force on 16 April 1928 provides that the expenses of repatriation shall not be a charge on the seaman if he has been left behind by reason of discharge for any cause for which he cannot be held responsible.

Noting also that the public authority of the country in which the vessel is registered shall be responsible for supervising the repatriation of any crew member covered by the said Convention and where necessary for giving him his expenses in advance.

Noting further that the Repatriation of Seafarers Convention (Revised), 1987 (No. 166), provides that in the event of the shipowner not being able to continue to fulfil his or her legal or contractual obligations as an employer of the seafarer, e.g., by reason of bankruptcy, a seafarer shall be entitled to repatriation at the shipowner's expense, or where a shipowner fails to make arrangements to meet the cost of repatriation either the flag State or the port State (in that order) shall meet the cost.

Noting finally that the flag State an port State responsibilities in this regard are also the subject of the Repatriation of Seafarers Recommendation, 1987 (No. 174).

Aware that, notwithstanding the aforesaid provisions and obligations on flag and port States, seafarers are still stranded without recourse to paid repatriation following the abandonment by shipowners of their vessels on account of bad finance or for other reasons and thus become a charge on the already stretched resources of voluntary agencies and charities.

Recognises the problem of stranded seafarers who could be subject to considerable hardships consequent upon the shipowner going bankrupt.

Further recognises that in such situations timely help may not be forthcoming through the medium of the flag State or port State because of bureaucratic delays or because of the absence of ratification or non-entry into force of the ILO Conventions concerned.

Recalling the report or the Joint Maritime Commission's Tripartite Subcommittee on Seafarers' Welfare which made mention of the need for special provisions to cover such situations.

Urges the Governing Body of the International Labour Office to request the Director-General to recommend to member States that legislation and practical measures be adopted to protect the wages and other entitlements of seafarers where the shipowner/manager becomes insolvent, and especially in cases where seafarers are left stranded in an outport.

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ANNEX 5

Statement of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

1 The Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, hereafter referred to as the Working Group, noted that the issue of abandoned crew members had been discussed over a considerable number of years and that in 1991 the 26th session of the ILO Joint Maritime Commission adopted a resolution on the protection of wages and stranded crew members. There was general acceptance that the problem of abandoned crew members was a serious one which required urgent remedial action. The Working Group considered that the United Nations Convention on the Law of the Sea (UNCLOS) establishes a general duty on flag States to exercise effective control over vessels which fly their flag, including social and labour aspects, which are integral to the human element. It was also recognised that the issues arising from problems of abandonment included:

a) repatriation;
b) support for crew members while stranded;
c) immigration status; and
d) the question of the payment of outstanding remuneration

2 The Working Group considered that although there were a considerable number of international instruments which dealt with certain aspects of these problems, none adequately addressed the problem comprehensively.

3 The Working Group concluded that the obligation for the repatriation of crew members/seafarers lay with the shipowners. However, where the shipowner failed in his obligation to repatriate crew members/seafarers, the flag State had a primary obligation to do so under applicable international instruments. There was acceptance of the fact that there were a considerable number of possible solutions and that the key point was that the system should function effectively and that it should cover all the crew irrespective of their nationality. It was also suggested that flag States should ensure that such a mechanism was in place prior to registering ships.

4 It was accepted that different mechanisms may be able to address the problem and that it would be advantageous if information on the various flag State mechanisms which were already in place including national funds and guarantee schemes were communicated to IMO and ILO for further consideration by the Working Group.

5 It was commonly accepted that nothing should be done which would encourage substandard shipping and that compliance with current international instruments was essential.

6 The Working Group considered that:

.1 Flag States should establish real and effective mechanisms to meet their obligations and to ensure that shipowners repatriate their crew members/seafarers and address all aspects of the problem, as identified above.

.2 The ILO should promote ratification of ILO Convention No. 166, evaluate the extent of non-compliance with existing relevant ILO instruments and assess the inherent weakness of their Conventions in this regard.

.3 It should meet again to, *inter alia*, assess the material communicated to IMO/ILO concerning existing mechanisms to address the problems of abandoned crew members/seafarers and to consider possible arrangements for financial security, such as the establishment of an international fund or national measures of comparable effectiveness.

.4 The issues of abandonment, personal injury and death were important matters and that it was urgent to find solutions to address them.

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ANNEX 6

Text of the oral report of the Chairman of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers to the IMO Legal Committee at its 80th session on 13 October 1999

The Working Group was composed of eight Member Governments nominated by the IMO as well as four Seafarers Members and four Shipowners Members. Three IMO Members were represented by observer delegations as well as three non-governmental organizations. The Working Group had six sittings to discuss the issues of financial security for crew members and their dependants with regard to the payment of compensation in cases of death, personal injury and abandonment in accordance with the terms of reference given to it by the IMO Legal Committee and the Governing Body of the ILO. It decided to discuss the issue of abandonment and the issues relating to death and injury separately. With respect to each of these it followed the order of the agenda items, namely:

- assessment of the extent of the potential problem
- examination of relevant IMO, ILO and other applicable international instruments
- the adequacy and effectiveness of existing applicable international instruments
- suitable recommendations to the IMO Legal Committee and the Governing Body of the ILO.

The discussions were positive and fruitful on the examination and extent of both issues and the Working Group agreed that the problems under examination were real, serious and deserved adequate consideration and a search for suitable solutions.

Concerning abandonment, the Working Group identified the need to address several problems including *inter alia*:

- repatriation;
- support for the crew members while stranded;
- immigration status; and
- payment of outstanding remuneration

Concerning the issue of death and personal injury, the Working Group agreed that a number of problems encountered with P & I coverage needed to be further addressed.

The Working Group agreed that further information and studies were required to address a number of subjects, including the reasons for the low rate of ratification of the relevant international instruments as well as an examination of existing national schemes dealing with the problems of abandonment, death and personal injury. Member States and relevant institutions will be requested to provide information on the operation of their systems or arrangements in dealing with the problems encountered and on possible new approaches.

The Report of the Working Group will be available to the Members of the Legal Committee in English on Friday. The Report contains a number of recommendations and proposals for further work. It will be submitted for discussion by this Committee at its 81st Session and to the November 1999 Session of the Governing Body of the ILO.

It is expected that the ILO social partners will meet before the next session of the Legal Committee to explore certain issues which have been identified by the Joint Working Group and will report to the governing bodies as appropriate.

The Working Group considered that the issues were important, and that it was urgent to find solutions.

There was unanimous support from the Working Group. Each partner demonstrated a great sense of responsibility and commitment to solving problems of a human and social nature.

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ANNEX 7

Joint IMO/ILO *Ad Hoc* Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers

Proposed terms of reference for further work of the Working Group

1 The Joint IMO/ILO *Ad Hoc* Expert Working Group should examine the issue of financial security for crew members/seafarers and their dependants with regard to compensation in cases of personal injury and death and abandonment.

2 In doing so, the Joint Working Group should take account of relevant IMO (including those elaborated under the joint auspices of the United Nations and IMO) and ILO instruments.

3 It should continue to study and evaluate the issues of abandonment of crew members/seafarers and compensation in cases of death and personal injury, taking into account all relevant information.

4 It should make suitable recommendations to the IMO Legal Committee and/or Governing Body of the ILO, as appropriate.

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