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SAVE OUR SHIPS: HOW U.S. NATIONAL SECURITY INTERESTS AFFECT THE HUMAN RIGHTS OF STRANDED SEAFARERS AS A RESULT OF SHIPPING BANKRUPTCIES

INTRODUCTION

Before its financial downfall in 2016, Hanjin Shipping Company (“Hanjin”) was the world’s seventh largest shipping company.¹ Established in 1977, the South Korean company was the shipping leader in South Korea for nearly four decades.² In South Korea, Hanjin dominated as one of the country’s *chaebol*³ companies, which are largely run by family members. The company was founded in the 1970s, when the country was experiencing an economic boom, largely attributable to such family-owned conglomerates.⁴ Traditionally, these conglomerates were seen as “too big to fail” and structurally and economically too viable to ever experience financial downfalls.⁵

In general, however, the global shipping industry had been operating at a loss since 2015.⁶ Beginning largely in 2016, Hanjin also began experiencing financial strain attributed to the oversupply of ships without proper demand, as well as an overall economic downturn.⁷ Nearing bankruptcy, in January 2016, Hanjin sought assistance from its creditors for financial assistance to

1. *The Fall of Hanjin Shipping*, HELLENIC SHIPPING NEWS (Dec. 15, 2016), <http://www.hellenicshippingnews.com/the-fall-of-hanjin-shipping/>.

2. *Id.*

3. Emily Cashen, *The collapse of Hanjin Shipping makes waves in South Korea’s business culture*, WORLD FIN. (Sept. 29, 2016), <https://www.world-finance.com/markets/the-collapse-of-hanjin-shipping-makes-waves-in-south-koreas-business-culture>. In Korean, the term *chaebol* refers to large family groups that control many of South Korea’s major industries. Carlos Tejada, *Money, Power, Family: Inside South Korea’s Chaebol*, N.Y. TIMES (Feb. 17, 2017), at B2. Some of these groups are becoming household names, even outside of South Korea, such as Samsung, Hyundai, LG, and Kia. *Id.*

4. Cashen, *supra* note 3.

5. *Id.*

6. Sohee Kim and Kyunghye Park, *Hanjin’s Ghost Ships Seek Havens With Food and Water Starting to Dwindle*, BLOOMBERG (Sept. 6, 2016, 7:30 AM), <https://www.bloomberg.com/news/articles/2016-09-06/hanjin-s-ghost-ships-seek-havens-as-food-water-start-to-dwindle>.

7. *Id.*

keep business operations running.⁸ An estimated 1.3 trillion won⁹ was needed for the company to stay afloat, but none of its major creditors offered enough money to support the operation.¹⁰

By the summer of 2016, Hanjin scrambled to raise its liquidity, looking to its creditors for assistance in efforts to rehabilitate its debt.¹¹ Specifically, Hanjin sought help from two of its major creditors, Korea Development Bank and Korean Airlines.¹² In responding to questions about Hanjin's financial state, Korea Development Bank chairman, Lee Dong-geol, commented that "it's like pouring water into a bottomless pit. Any new loans will be spent to cover its overdue debt owed to foreign creditors, rather than being used to boost its corporate value."¹³ For a company on the verge of bankruptcy, the first step is to attempt a rehabilitation plan that will ask creditors for cash for the company to stay afloat. When it became apparent that the Korean government and Hanjin's largest creditors were not enthusiastic about the company's rehabilitation efforts to raise funds, Hanjin filed for receivership in South Korea on August 31, 2016.¹⁴ Subsequently, Hanjin sought bankruptcy protection in forty-three countries, where Hanjin vessels were waiting, idly anchored out at sea for the next course of action.¹⁵ The ability for the crew members aboard Hanjin vessels to come ashore would normally have been granted through temporary shore leave provisions set by international regulations and conventions. The United

8. *The Fall of Hanjin Shipping*, *supra* note 1.

9. This is approximately \$1.1 billion USD.

10. *The Fall of Hanjin Shipping*, *supra* note 1; Kim & Park, *supra* note 6.

11. Xiaolin Zeng, *Hanjin Submits Plan to Raise Cash, May Sell More Assets*, JOC.COM (Aug. 25, 2016, 10:19 AM), http://www.joc.com/maritime-news/container-lines/hanjin-shipping/hanjin-submits-plan-raise-cash-may-sell-more-assets_20160825.html.

12. *Id.*

13. Jhoo Dong-Chan, *Creditors Reject Lifeline For Hanjin Shipping*, KOREA TIMES (Aug. 30, 2016, 1:50 PM), http://www.koreatimes.co.kr/www/news/biz/2016/08/123_213050.html.

14. *The Fall of Hanjin Shipping*, *supra* note 1; Jon Chesman and Laura Crawford, *Stormy Waters for the Shipping Industry?* LEXOLOGY (Nov. 2, 2016), <http://www.lexology.com/library/detail.aspx?g=7e24ad65-a6ef-4c15-a268-67be0c0388c5>. Receivership provides creditor protection. Costas Paris and In-Soo Nam, *Move by South Korea's Hanjin Shipping Roils Global Trade*, WALL ST. J. (Aug. 31, 2016, 3:12 PM), <http://www.wsj.com/articles/troubled-hanjin-shipping-to-sell-healthy-assets-to-rival-1472611190>. It gives the filing party the chance to restructure while undergoing bankruptcy proceedings. *Id.*

15. Kim & Park, *supra* note 6.

States, however, refuses to grant shore leave without proper crew member visas.¹⁶ Specifically for Hanjin ship docked in U.S. waters, crewmembers remained anchored and were denied shore leave due to national security policies.¹⁷

An estimated six hundred billion won was needed to cover fuel and food for the crews.¹⁸ A typical Hanjin vessel carries around twenty-four crew members and provisions intended to last for several weeks.¹⁹ Food and other provisions are allocated according to the length of the voyage, with emergency provisions in case of emergency.²⁰ These emergency provisions are not, however, expected to last beyond several weeks.²¹

Some crewmembers aboard vessels, such as the *Scarlet* and the *Vienna*, which were docked off of the coast of British Columbia, had employment contracts that were ending and did not know the fate of their future on board these stranded vessels.²² By December 2016, the vessels' supplies were running low and the holiday season was approaching without an update on how much longer the crew would need to stay on the anchored ship.²³ The crews aboard the *Scarlet* and *Vienna* were fortunate enough to benefit from the care packages and provisions provided by local unions and interest groups that ventured out to the vessels to bring holiday cheer to the crew.²⁴ The majority of the crewmembers, however, remained on board because their shore leave was denied.²⁵ In such an air of uncertainty, crewmember morale sunk, as they ran out of ways to keep themselves occupied, and provisions began to dwindle.²⁶

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Amy Smart, *An Early Christmas for Hanjin Crew, Facing an Uncertain Future*, *TIMES COLONIST* (Dec. 21, 2016, 5:00 AM), <http://www.timescolonist.com/news/local/an-early-christmas-for-hanjin-crew-facing-an-uncertain-future-1.5109240>.

23. Matt Meuse, *Hanjin Scarlet Crew to Receive Carols, Holiday Care Packages*, *CBC NEWS* (Dec. 14, 2016, 2:03 PM), <http://www.cbc.ca/news/canada/british-columbia/hanjin-scarlet-crew-care-packages-1.3896703>.

24. *Id.*

25. *Id.*

26. Sam Dawson and Jeff Engels, *ITF: Refusal of Shore Leave to Hanjin Crews 'A Denial of Human Rights'*, *INT'L TRANSPORT WORKERS' FED'N* (Sept. 28,

Embedded within the company's financial crisis was a problem that Hanjin seemed to be ignoring.²⁷ Amidst Hanjin's bankruptcy crisis was this strange and much more personal and human issue of crew members who were stuck on their ships, unable to return home or set foot on land in order to replenish their food and water supplies or even seek medical attention. When a shipping company with over eighty ships files for bankruptcy protection, the ripple effects go as far as the crewmembers that work to deliver cargo from one point to the next. There is a need for solutions that directly address the reality that human beings were stranded at sea while the company fights over assets in bankruptcy proceedings.²⁸ There are several issues to be aware of with respect to the Hanjin bankruptcy, with a focus here on the crews that were stranded along the coasts of the United States.²⁹ In contrast with the United States visa requirements are the international labor regulations enforced by institutions, such as the International Maritime Organization (IMO) and the International Labour Organization (ILO). Accordingly, there are local regulations in the United States that are in conflict with various international conventions and regulations, and that the Hanjin crewmembers needed to be granted temporary shore leave in such a situation where the restructuring of Hanjin was uncertain.³⁰ Specifically, the United States adopted regulations that require seafarers to have visas in order to come ashore at any one of its ports.³¹ Given the severity of the issue, the fact

2016), <http://www.itfglobal.org/en/news-events/press-releases/2016/september/itf-refusal-of-shore-leave-to-hanjin-crews-a-denial-of-human-rights/>. At the time of publication, the Hanjin Scarlet crew was finally able to return home after months at sea despite the ship remaining anchored and still for sale because of Hanjin's bankruptcy. The twenty-two-person crew reported that they were ecstatic to return to their homes in South Korea and the Philippines after four and a half months. Sarah Petrescu, *Hanjin Scarlet Crew Preparing to Go Home This Week*, BUS. VANCOUVER (Jan. 16, 2017), <https://www.biv.com/article/2017/1/hanjin-scarlet-crew-preparing-go-home-week/>.

27. Dawson & Engels, *supra* note 26.

28. See Andreas Illmer, 'We Don't Have a Future'—Hanjin Crews Return to Uncertain Fate, BBC NEWS (Oct. 14, 2016), <http://www.bbc.com/news/business-37604082>.

29. *Id.*

30. Seafarers' Identity Documents Convention (Revised) (No. 185), June 19, 2003, 2304 U.N.T.S. 121 [hereinafter ILO 185].

31. U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-195, MARITIME SECURITY: FEDERAL AGENCIES HAVE TAKEN ACTIONS TO ADDRESS RISKS POSED BY

that the crew members were eventually allowed to return home does not make the original denial of shore leave a lesser concern for the international community. The original obstacle, the United States visa requirement, still remains in effect and until the United States loosens these requirements, seafarers will be unable to exercise their rights to come ashore in the event of such uncertain situations as a complete collapse of their employer.

Part I of this Note will provide a primer on abandoned vessels and seafarers' basic rights. This Part will explain the problems that crewmembers aboard Hanjin vessels were faced with as the company filed for bankruptcy protection in South Korea and then across the world. As a direct result of the bankruptcy proceedings, all Hanjin ships were unable to dock in their destination ports and were forced to anchor in open water to avoid seizure of their cargo, which made crewmembers unable to leave the ships. Further, the United States denied these crews shore leave, leaving them stranded on their vessels. Part II will then analyze the law related to the rights of seafarers, both from a customary law and international law perspective. This Part will introduce the Seafarers' Identity Documents Convention ("ILO 185"), which codifies shore leave and directly conflicts with the U.S. visa requirement for foreign seafarers. ILO 185 is crucial to the changes needed in the United States, as it requires identity documents that have biometric readings. Part III will then discuss the impact of the United States' strict stance on seafarer rights. Presently, the United States is the only nation that imposes a visa requirement for seafarers seeking temporary shore leave through one of its ports. This Part will also highlight different interest groups, including the International Transport Workers' Federation ("ITF"), that have shed light on the impracticality of the U.S. visa requirement. Finally, Part IV will offer solutions that the United States should implement, including getting rid of its visa requirement, adopting ILO 185 because of the overwhelming international response to the Hanjin ship arrests and the treatment of shipping bankruptcies in the future in order to achieve conformity with international regulations and conventions, and implementing the seafarer identity documents that ILO 185 has established.

I. HANJIN BANKRUPTCY PROCEEDINGS AND SHIP ARREST

After Hanjin filed for receivership in Seoul, South Korea, the company's vessels became immediately vulnerable to seizure by creditors seeking to collect unpaid bills and other assets.³² Ports in the United States and the rest of the world refused entry of Hanjin ships out of concern that the ships would not be able to pay port fees or that their cargo would be seized by Hanjin creditors.³³ Additionally, ports in the United States are unwilling to grant crews from coming ashore without prior authorizations in the form of visas.³⁴ In the post September 11th world, national security became a top priority and certain rules and regulations, to be discussed in this Part, became law despite their incongruence with international agreements.³⁵

Hanjin was struggling to keep its head above water for a few years prior to filing for bankruptcy protection.³⁶ The company felt the brunt of major issues in the shipping industry, likely due to its sheer size and presence in the industry.³⁷ The downturn of the shipping industry can be attributed to its failure to adapt to the post-financial crisis economy.³⁸ Companies have continued to grow their fleets and purchase newer and better ships despite the decrease in demand for shipping, while other methods of transport such as overnight air freight become more popular for its speed.³⁹ Hanjin was one such shipping giant that suffered the long-term effects of these business decisions.⁴⁰

Before discussing the severity of these denials of entry, it is important to understand how this situation arose. This Part will first describe the Hanjin bankruptcy proceedings, detailing

32. *Hanjin Shipping Is Trying to Stop Its Ships From Being Seized*, FORTUNE (Sept. 4, 2016), <http://fortune.com/2016/09/05/hanjin-shipping-ships/>.

33. Kim & Park, *supra* note 6. For perspective on how much these fees can be, Sohee Kim and Kyunghye Park reported that a ship carrying eight thousand cargo boxes would have to pay \$35,000 USD in port fees alone. *Id.*

34. *Id.*

35. Douglas B. Stevenson, *The Burden That 9/11 Imposed on Seafarers*, 77 TULANE L. REV. 1407, 1407 (June 2003).

36. *Id.*

37. *Id.*

38. Michael Murray, *Explainer: Why Hanjin's ships are stranded around the globe*, ABC NEWS AUS. (Sept. 15, 2016, 12:35 AM), <http://www.abc.net.au/news/2016-09-15/explainer-why-hanjin-ships-are-stranded-around-the-globe/7847626>.

39. *Id.*

40. *Id.*

background information on ship arrests, what they are, why they occur, and how they applied to the Hanjin story. This Part will then describe the unique psychological and emotional issues plaguing seafarers while they are out at sea and away from society, including an isolated environment without consistent contact with their loved ones and a skewed sense of reality while surrounded by their colleagues for an extended period of time.

A. Hanjin Ship Stranded and Background on Ship Arrest

In United States' waters, the Hanjin Marine was stranded off the port of Seattle with twenty-four crewmembers aboard.⁴¹ When the United States denied the crew shore leave, the international community, through trade unions and watchdogs, created an uproar, exclaiming that the human rights of the crewmembers were being violated.⁴² Before discussing these rights, however, it is crucial to understand the context and players involved in a shipping bankruptcy, including how Hanjin arrived at this point.

Sensing trouble in the company, in 2016, Hanjin creditors began to act, even before the official bankruptcy filing, obtaining

41. MarEx, *Stranded Hanjin Crew Denied Shore Leave*, MAR. EXECUTIVE (Oct. 5, 2016, 1:16 PM), <http://www.maritime-executive.com/article/stranded-hanjin-crew-denied-shore-leave-in-seattle>.

42. *Id.* To illustrate the continuing complexity of shipping bankruptcies, it may be helpful to consider other crews stranded off of the shore of the United Arab Emirates, although the scope of this Note focuses on the United States' denial of seafarer shore leave. As of July 5, 2017, the Indian Consulate of the UAE reported that there were at least 100 seafarers stranded across twenty-two different merchant vessels, most of which belong to smaller shipping companies that do not garner as much media attention as Hanjin. *FOCUS: Hundreds of Seafarers Held Captive Off UAE Coast*, HELLENIC SHIPPING NEWS (July 5, 2017), <http://www.hellenicshippingnews.com/focus-hundreds-of-seafarers-held-captive-off-uae-coast/>. The crews were stranded on their ships without adequate supplies of food and water, while continuing uncertainty remained about lost wages for several months. While some captains and higher-ranked crewmembers were repatriated to their home countries, mainly back to India, the remaining crew members have been stranded for months. The story explains that the fragmented nature of employment in a shipping company complicates efforts to help the stranded seafarers. Since most of the crew members were hired through shipping companies in their home countries and then contracted to work on other vessels, it is sometimes difficult to even determine who to contact.

warrants for ship arrests across the world.⁴³ Maritime claims are unique in the fact that ships themselves are constantly moving through waters and can be hard to secure and preserve in time and space.⁴⁴ Maritime law allows for a maritime lien to be placed on the vessel itself, which enables the party to file a suit against the named ship.⁴⁵ The lien allows creditors to bring lawsuits directly against the vessels for unpaid bills.⁴⁶ The fear for the company is that its vessels become vulnerable to lawsuits by any and potentially all of its creditors.⁴⁷

The easiest and most effective way for a creditor to secure a ship in place for purposes of establishing jurisdiction in a lawsuit is to arrest the ship.⁴⁸ Arresting the ship prevents it from leaving port.⁴⁹ Specifically, a creditor can have a court marshal board the vessel and attach the arrest warrant to the ship's cabin, effectively preventing the ship from traveling.⁵⁰ The vessel will be anchored wherever it is located at the time of the arrest and must remain there until the resolution of the court proceeding that initiated the arrest.⁵¹ In the United States, a U.S. Marshal will go aboard the ship and physically take charge of it by posting a notice of arrest on the vessel.⁵² Once this occurs, the owner loses control of the vessel, which is why ship owners try tirelessly to avoid ship arrest.⁵³

43. See *19 Crew Members Still On Board Arrested Hanjin Ship*, ASIA ONE (Oct. 1, 2016), <http://news.asiaone.com/news/singapore/19-crew-members-still-onboard-arrested-hanjin-ship-0> (discussing creditors' actions to arrest ships in Singapore even before Hanjin filed for bankruptcy protection in South Korea).

44. *Hanjin Shipping Collapse Timeline, And All The Latest News On the Crisis*, SEATRADE MAR. NEWS (Sept. 7, 2016), <http://www.seatrade-maritime.com/news/americas/hanjin-shipping-collapse-timeline.html>; Murray, *supra* note 38.

45. *Hanjin Shipping Collapse Timeline, And All The Latest News On The Crisis*, *supra* note 44.

46. Murray, *supra* note 38.

47. *Id.*

48. *Arrest of Ships*, SEAFARERS' RTS. (Feb. 20, 2015), <http://seafarersrights.org/seafarers-fact-file-ship-arrest/>.

49. *Id.*

50. Murray, *supra* note 38.

51. *Arrest of Ships*, *supra* note 48.

52. *Maritime Practice & Procedure, Arrest of Vessel*, MAR. L. CENTER, http://www.maritimelawcenter.com/html/arrest_of_vessel.html (last visited Aug. 17, 2017).

53. *Id.*

Ship arrest is governed largely by the International Convention Relating to the Arrest of Seagoing Ships (“1952 Convention”), which was signed in 1952 and established uniform rules surrounding ship arrest.⁵⁴ The 1952 Convention was signed by seventy-seven countries, including both South Korea and the United States.⁵⁵ The 1952 Convention set rules for when a state has the authority to prevent a ship from moving or unloading cargo until the resolution of the claim or court proceeding in question.⁵⁶

When a ship is arrested, the crew remains on board to protect the cargo and to carry on their duties as employees. The arrests of the Hanjin ships, however, were controversial because, pending bankruptcy proceedings, the ships and their crews were anchored for months without shore leave, causing concern amongst the international community.⁵⁷ Hanjin creditors quickly sought warrants to arrest Hanjin ships when the company filed for bankruptcy protection in South Korea.⁵⁸ Since it was apparent that Hanjin was low on cash, creditors arrested Hanjin vessels to collect their money, as it allowed them to have a legal claim to other sources of assets, such as the ship’s mortgage, that would be valuable enough to pay off the large bills owed.⁵⁹

B. The Psychological Effects of Being Stranded at Sea

Amidst the bankruptcy proceedings and the legal battles that Hanjin was enduring, the dozens of Hanjin shipping vessels remained at sea, waiting to hear their next orders from the corporation.⁶⁰ Aboard the ships, thousands of crewmembers would soon learn that they would have to remain on their ships indefinitely, to no fault of their own.⁶¹ The shipping industry encompasses more than 1.2 million seafarers, all of whom are subject

54. See International Convention Relating to the Arrest of Seagoing Ships, May 10, 1952, 439 U.N.T.S. 6330.

55. *Arrest of Ships*, *supra* note 48.

56. Soumyajit Dasgupta, *Ship Arrest Under Maritime Law: Reasons, Procedure, and Precautions*, MARINE INSIGHT (July 21, 2016), <http://www.marineinsight.com/maritime-law/ship-arrest-under-maritime-law-reasons-procedure-and-precautions/>.

57. Dawson & Engels, *supra* note 26.

58. *Id.*

59. See *id.*; see also *19 Crew Members Still On Board Arrested Hanjin Ship*, *supra* note 43.

60. *19 Crew Members Still On Board Arrested Hanjin Ship*, *supra* note 43.

61. See *id.*

to the unique nature of their employment, including the sociological and psychological particularities of being out at sea for extended periods of time.⁶² Sociological studies surrounding the nature of seafaring employment describe the mental state of a seafarer as one who is cut off from society and enclosed within the steel structure of the vessel.⁶³ During the seafarer's employment, he or she is limited to experiencing life, social situations, and personal emotions within the vessel.⁶⁴ Studies show that even with the advent of technology and the ease of global communication, the seafaring profession remains just as psychologically and emotionally challenging.⁶⁵

The problems of the shipping industry are constantly discussed by scholars and practitioners alike. Conferences such as the Ergoship 2016, hosted by the Australian Maritime Safety Authority and the Australian Maritime College, sought to provide an international forum for the discussion of the human factors within the maritime context.⁶⁶ At this particular conference, presenter Johan Smith from the University of Cape Town concluded in his studies that human beings are not able to survive at sea.⁶⁷ He noted that "we are inseparably attached to the shore for our every need" and that the shipping industry has continued to operate without properly addressing the human factor and this connection to the shore.⁶⁸ He added that the industry fails to realize that their most valuable asset are the human beings

62. Iliana Christodoulou-Varotsi, *Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives*, 43 J. MAR. L. & COM. 467, 481 (Oct. 2012).

63. Johan Smith, *Wellness at Sea: A New Conceptual Framework for Seafarer Training*, ERGOSHIP 2016, at 3, http://eprints.utas.edu.au/22788/1/Ergo%20Ship%20Wellness%20at%20Sea%20Paper_Johan%20Smith.pdf.

64. *Id.*

65. *Id.* at 1.

66. Ergoship 2016—Maritime Human Factors Conference, NAUTICAL INST., <http://www.nautinst.org/en/events/index.cfm/Ergoship2016> (last visited July 23, 2017). Specifically, the conference focused on different methods of applying these maritime human factors principles to ship design, ship operations, and research. *Id.*

67. Smith, *supra* note 63.

68. *Id.* Further, Smith opines that, "while seafarers' unique environment separates them from others, the common humanity we as people share unites them. Thus, not only will the uniqueness of their environment influence a new conceptual framework, but also the everyday humanness of them having ideas, feelings, emotions, needs and values." *Id.*

aboard their vessels who are responsible for carrying out the actual deliveries of goods.⁶⁹ When a crew is out at sea, he argued that the constructs of their social space attempt to mimic the spaces that humans have on land.⁷⁰ The problem lies in the fact that the crew members work together all day on the ship and continue to live and socialize with each other.⁷¹ On land, however, the average employee is able to escape their work environment and switch over to different social spheres, such as home and family or other communities.⁷²

Despite the social difficulties of being out at sea, there is a high demand for seafarer jobs, creating competition within the profession to secure their own employment contracts regardless of health or personal issues.⁷³ Yet, seafarers live and work aboard the vessel on which they are employed for extended periods of time.⁷⁴ This connection to the vessel, without shore leave, affects the mental health and wellness of a seafarer, who may be less diligent in his or her duties, potentially leading to a major accident at sea.⁷⁵ The competitive seafarer industry, however, provokes seafarers to evade the truth about their medical histories, fearing rejection from a possible job prospect.⁷⁶

Reports from Hanjin vessels attest to the grueling nature of being out at sea. The Hanjin Rome was anchored off the coast of Singapore for over a month,⁷⁷ where the crew told reporters that they were nervous and uncomfortable.⁷⁸ A student aboard the ship as a part of his apprenticeship told reporters that “mentally, I felt trapped.”⁷⁹ A *Bloomberg* article reported that Hanjin denied requests for food and water made by ship captains, though

69. Smith, *supra* note 63, at 2.

70. *Id.* at 4.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See *How To Achieve Health and Well-being If You Are A Seafarer*, CREWTOO, <http://www.crewtoo.com/uncategorized/health-and-well-being-if-you-are-a-seafarer/>.

76. Wendy Laursen, *Keeping Watch on Seafarer Health*, MAR. EXECUTIVE (Nov. 11, 2013, 10:26 AM), <http://www.maritime-executive.com/magazine/maritime-rx-maintaining-seafarer-wellness>.

77. *19 Crew Members Still On Board Arrested Hanjin Ship*, *supra* note 43.

78. *Id.*

79. *Id.*

it was not clear why.⁸⁰ The captain, who declined to use his name, stated that “there should be measures to secure the safety of sailors.”⁸¹ He added that they did not know how long they would be waiting at sea for assistance or for further directions.⁸²

II. THE LAWS ON SEAFARER RIGHTS

Knowing that seafaring was traditionally dangerous and unpredictable, states moved to codify and regulate the profession.⁸³ The origins of these rights were contemplated long before any of these international organizations came into being. For as long as there was ocean travel, people have looked out for the interests of seafaring individuals. This Part will discuss the different laws and organizations that specifically address seafarer safety and security, starting with the customary international law, which recognized temporary leave for seafarers. This Part will then describe the international organizations that have created an enforcement regime addressing maritime security and safety, specifically the International Maritime Organization and the International Labour Organization. In detailing these organizations, this Part will discuss the origins of the International Maritime Organization and how it serves to protect the rights of maritime workers through conventions and international enforcement of regulations, as well as the creation of the International Labour Organization, which is equally as crucial to the protection of seafarers' rights.

A. Customary International Law

Seafaring was always unique in that the crews would be aboard these vessels for extended periods of time, unable to touch land for months at a time. Originally, the right to temporary leave from the vessel was recognized by old maritime customs through the Laws of Wisby in the sixteenth century and

80. Kim & Park, *supra* note 6.

81. *Id.*

82. *Id.*

83. *History of Safety at Sea*, INT'L MAR. ORG., <http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/Historyof-SafetyatSea/Pages/default.aspx>.

the Code of Oleron.⁸⁴ Carrying the weight of customary international law, these ancient admiralty codes laid out rules for when seafarers would be granted shore leave.⁸⁵ The codes presume that shore leave will be provided to seafarers as a part of maritime life.⁸⁶ Specifically, Article XX of the Code of Oleron allowed seafarers to go ashore to eat, rest, and breathe the air on the land.⁸⁷ In a field of work that carries so much history, seafarers and the global community have looked back to ancient traditions to establish their rights.

B. International Law of Maritime Safety and Seafarer Rights

The international arena has largely recognized the need for protection of seafarers' rights. Carrying over the traditions of customary international law, conventions were held to discuss and codify seafarer rights. This Subpart will introduce the international organizations that have created an enforcement regime addressing maritime security and safety, specifically the convention that created seafarer identification document standards that strive to unify the shipping industry's shore leave standards.

1. International Maritime Organization

One organization targeted toward seafarers' rights is the IMO, which was established through convention by the United Nations in 1948 as the first international body devoted solely to

84. See Stevenson, *supra* note 35, at n.3; see also The Laws of Wisby arts. XXXIII, LIV, reprinted in Alexander Justice, *A General Treatise of the Dominion of the Sea and a Competent Body of the Sea-Laws* 182, 187 (3d ed. 1710).

85. Stevenson, *supra* note 35.

86. *Id.*

87. *Id.* Specifically, the language of the article reads as follows:

When a vessel arrives at Bordeaux, or any other place, two of the mariners at a time may go ashore, and take with them one meal of such victuals as are in the ship, therein cut and provided; as also bread proportionably as much as they eat at once, but no drink: and they ought very speedily, and in season, to return to their vessel, that thereby the master may not lose his tide; for if so, and damage come thereby, they are bound to make satisfaction; or if any of their company be hurt for want of their help, they are to be at such charge for his recovery, as one of his fellow mariners, or the master, with those of his table shall judge convenient. THE RULES OF OLERON, ADMIRALTY L. GUIDE, <http://www.admiraltylawguide.com/documents/oleron.html>.

maritime issues.⁸⁸ Much of the IMO's focus revolves around maritime safety, specifically the shipping industry and its technicalities at sea, such as fire protection of ships, radio technology, and carriage of dangerous goods.⁸⁹ Especially during the Industrial Revolution, as the international commerce industry was booming, the need for uniform standards on shipping, specifically shipping safety, became increasingly necessary.⁹⁰

Structurally, the IMO currently has 170 Member States and three Associate Members, who run it as a technical organization and carry out its objectives through committees and sub-committees.⁹¹ The IMO has its own Secretary-General who is appointed by the organization's Council, with approval by its Assembly.⁹² Since its existence, the organization has adopted 50 conventions and protocols with over 1,000 codes and recommendations, all concerning maritime safety and security.⁹³ The IMO's committees are tasked with discussing developments in shipping and identifying issues that should be addressed in amendments to existing conventions or codified in new conventions.⁹⁴ When seeking to enter one of these conventions into force, the IMO must obtain approval and acceptance from its individual Member State governments.⁹⁵ A convention becomes binding on all governments that ratify it.⁹⁶ Enforcement of IMO conventions depends on the Member States and their individual governments by establishing infringement penalties and appropriate remedies according to guidance in the conventions.⁹⁷ In

88. See INT'L MAR. ORG., IMO: WHAT IT IS 2, http://www.imo.org/en/About/Documents/What%20it%20is%20Oct%202013_Web.pdf. For a list of IMO Member States, see *id.* at 22.

89. *Id.* at 5.

90. *Adopting a Convention, Entry Into Force, Accession, Amendment, Enforcement, Tacit Acceptance Procedure*, INT'L MAR. ORG., <http://www.imo.org/en/About/Conventions/Pages/Home.aspx> (last visited July 23, 2017) [hereinafter *Adopting a Convention*].

91. INT'L MAR. ORG., *supra* note 88, at 2.

92. *Id.* at 3.

93. *Id.* at 5.

94. *Adopting a Convention*, *supra* note 90.

95. *Id.*

96. *Id.*

97. *Id.*

some instances, the conventions can be enforced on a much more micro level, by the officer of the ship itself.⁹⁸

At its inception, the IMO was made responsible for conventions that were already in force, including the original International Convention on Safety of Life at Sea (“SOLAS”), adopted in 1914.⁹⁹ The first conference held by IMO was progressive in immediately recognizing the need for safety measures and minimum safety standards of seafaring vessels after the sinking of the Titanic.¹⁰⁰ The convention stands as one of the pillars of the international regulatory regime for quality shipping because it is one of the foundations of safety regulations at sea.¹⁰¹

The current iteration of SOLAS, which was promulgated in 1974, specifically aims to further codify the rights and protections regarding health and safety of crewmembers on board the vessel through its adoption of a tacit acceptance procedure.¹⁰² The new procedure provides that an amendment shall enter into force automatically on a specific date, unless objections are submitted from an agreed upon number of parties.¹⁰³ With this new procedure, the IMO and SOLAS have gained a stronger reputation as an enforcement power in the international community.¹⁰⁴ The provisions, known as “port state controls,” allow Member States to inspect ships of other Member States if there are clear grounds to believe that the ship is not meeting any of the SOLAS standards.¹⁰⁵

98. The SOLAS Convention of 1974 allows “the officer carrying out the control [to] take such steps as will ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew.” *Adopting a Convention*, *supra* note 90.

99. *International Convention for the Safety of Life at Sea (SOLAS), 1974*, INT’L MAR. ORG., [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx) (last visited July 23, 2017).

100. *Id.*

101. Charris Chryssanthakopoulos, *A Student Perspective: The Four Pillars of the International Regulatory Regime For Quality Shipping And The Greek Paradigm*, GREENWICH MAR. CENTRE BLOG (Apr. 14, 2014), <https://maritimeat-greenwich.wordpress.com/2014/04/14/a-student-perspective-the-four-pillars-of-the-international-regulatory-regime-for-quality-shipping-and-the-greek-paradigm/>.

102. INT’L MAR. ORG., *supra* note 88.

103. *International Convention for the Safety of Life at Sea (SOLAS), 1974*, *supra* note 99.

104. *See id.*

105. *See id.*

Chapter XI-2 of SOLAS established the International Ship and Port Facility Security Code (“ISPS Code”), which provides a workable set of security standards in response to the post-September 11th era of security.¹⁰⁶ Members of the IMO were fearful that merchant ships could be used by terrorists to transport weapons or people.¹⁰⁷ The ISPS Code was thus created to establish an international framework that encourages cooperation between contracting governments, government agencies, and local administrations by assessing potential threats to ships and ports and implementing preventative measures to reduce those threats.¹⁰⁸ The ISPS Code provides protection for Member States against security threats to ports and vessels by establishing protocols and security measures that are enforced and practiced by every Member State.¹⁰⁹

The 2002 SOLAS Amendments to the ISPS Code specifically address the human element of seafaring by urging its Contracting Governments to take into the account the need for special protections of seafarers.¹¹⁰ The conference resolution adopted on December 12, 2002 (Conference Resolution 11), encourages Members to consider the global nature of the shipping industry and bring any contrary issues to the attention of the IMO.¹¹¹ The ISPS Code and Conference Resolution 11 define the respite and relief that seafarers need as shore leave.¹¹² Conference Resolution 11 also highlights that seafarers must be allowed ashore when they arrive to port after long voyages.¹¹³

106. *International Convention for the Safety of Life at Sea (SOLAS), 1974*, *supra* note 99; *FAQ on ISPS Code and Maritime Security*, INT'L MAR. ORG., http://www.imo.org/blast/mainframe.asp?topic_id=897#what (last visited Jan. 10, 2017).

107. MarEx, *The ISPS Code and Maritime Terrorism*, MAR. EXECUTIVE (July 17, 2016, 7:39 PM), <http://www.maritime-executive.com/article/The-ISPS-Code-and-Maritime-Terrorism-2014-07-17>.

108. *SOLAS XI-2 And The ISPS Code*, INT'L MAR. ORG., http://www.imo.org/en/OurWork/Security/Guide_to_Maritime_Security/Pages/SOLAS-XI-2%20ISPS%20Code.aspx.

109. *Id.*

110. *International Ship and Port Facility Security Code and SOLAS Amendments 2002*, SOLAS/CONF.5/34 annex 2 at 16, http://www.ubak.gov.tr/BLSM_WIYS/DISGM/tr/HTML/20130304_142647_66968_1_67502.pdf.

111. *Id.*

112. *Id.*

113. *Id.*

2. International Labour Organization

The ILO is also crucial to establishing uniformity with respect to seafarer rights.¹¹⁴ Established in 1919, this tripartite U.N. agency is dedicated to setting labor standards amongst and between employers, workers, and Member States.¹¹⁵ The organization implements international labor standards, which are then enforced through a supervisory system.¹¹⁶ On August 20, 2013, the ILO established the Maritime Labour Convention, which provides minimum working and living conditions for seafarers.¹¹⁷ This convention established the ILO as a supporter of the maritime industry, leading to further agreements and regulations of seafarers' rights.¹¹⁸

One of the most important conventions promulgated by the ILO is ILO 185, which established a new kind of identity document for seafarers that serves as a special kind of passport and includes the person's full name, date of birth, and photo.¹¹⁹ The ILO 185 convention was an addition to a previous convention, the original Seafarers' Identity Documents Convention of 1958 ("ILO 108"), which first recognized the need for a uniform system of identifying seafarers who enter foreign territories during the course of their employment.¹²⁰ Since then, ILO 185 was brought to the ILO during the 91st Session of the International Labour Conference, adopted in 2003, and entered into force on February 9, 2005.¹²¹

114. *About the ILO*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Jan. 10, 2017).

115. *How the ILO Works*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang-en/index.htm>.

116. *Applying And Promoting International Labour Standards*, INT'L LABOUR ORG., <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang-en/index.htm>.

117. *MLC, 2006: What It Is And What It Does*, INT'L LABOUR ORG., <http://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang-en/index.htm>.

118. *See generally id.*

119. GAO, *supra* note 31 at 60.

120. *Id.*

121. *Seafarers' Identity Documents: Background*, INT'L LABOUR ORG., http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/briefingnote/wcms_162322.pdf; *Seafarers' Identity Documents*, INT'L LABOUR ORG., http://www.ilo.org/global/standards/maritime-labour-convention/text/WCMS_162321/lang-en/index.htm (last visited July 23, 2017).

ILO 185 is crucial in the recognition of shore leave as a seafarer right because the convention and the members of the convention address the importance of granting crew members access to temporary respite on land in order to rest, seek medical attention, and even use the Internet.¹²² Most notably, the United States is not a signatory to ILO 185, despite the fact that the Convention originally met to address maritime security concerns in the wake of the September 11th terrorist attacks in the United States.¹²³ In establishing the right for seafarers to have shore leave, Article 6 of ILO 185 highlights that each members of the Convention shall permit the entry of a seafarer into its territory if that seafarer has the appropriate and valid seafarers' identity document.¹²⁴

Following this obligation is part 6 of Article 6, which states that "for the purposes of shore leave seafarers shall not be required to hold a visa."¹²⁵ The ILO 185 convention allows for biometrics and electronic verification of credentials, which have the potential to enhance security even further than what a normal visa could because of the technology involved in maintaining this kind of electronic database.¹²⁶ This, among other more stringent requirements, such as compliance with other international travel regulations, are improvements from the original 1958 convention.¹²⁷ ILO 185 signatories have agreed to comply with the quality-control procedures for seafarer identity documents that

122. *Security, Seafarers' Shore Leave and ILO Convention 185*, INT'L LABOUR ORG., http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_463114/lang-en/index.htm (last visited July 23, 2017).

123. *See Ratifications of C185—Seafarers' Identity Documents Convention (Revised)*, 2003 (No. 185), INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312330 (last visited July 23, 2017). Albania, Azerbaijan, Bahamas, Bangladesh, Bosnia and Herzegovina, Brazil, Congo, Croatia, France, Georgia, Hungary, India, Indonesia, Jordan, Kazakhstan, Kiribati, South Korea, Lithuania (although ILO 185 is not in force), Luxembourg, Madagascar, Maldives, Marshall Islands, Republic of Moldova, Montenegro (Convention will enter into force in October 2017), Nigeria, Pakistan, Philippines, Russian Federation, Spain, Sri Lanka, Tunisia, Turkmenistan, Vanuatu, and Yemen have all ratified ILO 185. *Id.* Noticeably missing are the United States and Canada. *Id.*

124. ILO 185, *supra* note 30, art. 6(4).

125. *Id.* art. 6(6).

126. GAO, *supra* 31, at 44.

127. *Id.* at 60.

require standard issued secured identification numbers associated with seafarers' identity documents (SID), among standards for maintain databases to store all of this information.¹²⁸ The guidance lists these and many more requirements, although it does not go into more detail about how the procedures should take place.¹²⁹ Technical reports prepared by the ILO committees regarding the success of biometric fingerprint databases concluded that the ILO 185 standards were performing very well throughout the world.¹³⁰

During discussions regarding amendments to the ILO in February 2015, representatives from other international organizations, interest groups, and member states reported on their successes in implementing the biometric requirements for seafarer identity documents.¹³¹ Many countries reported that they were transitioning from using their existing documentations, many of which are called seafarers' books or seaman's books, that exist as independent seafarer passports, to the SIDs that are supported by biometric fingerprint data and the electronic databases that manage all of the information.¹³² Other countries reported concerns on budgeting for the expensive technologies and receiving approval from their respective governments.¹³³

A representative for the government of Norway, for example, indicated that his country was processing new identification documents with the cooperation of his government.¹³⁴ He expressed that the identification cards were expensive to produce at around forty euros per card, but highlighted that they were very inexpensive to control and that seafarers could read the cards

128. *See Arrangements Concerning the List of Members Which Fully Meet the Minimum Requirements Concerning Processes and Procedures for the Issue of Seafarers' Identity Documents*, INT'L LABOUR OFF. GENEVA 11–13 (2005), http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_191714.pdf.

129. *See id.*

130. *See id.*

131. *Tripartite Meeting of Experts on the Implementation of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)*, MESIDC/2015/5, INT'L LABOUR OFF. 5 (2015), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_407638.pdf.

132. *See generally id.*

133. *See generally id.*

134. *Tripartite Meeting of Experts on the Implementation of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)*, *supra* note 131 at 7.

themselves on their mobile phones.¹³⁵ A representative from the United States, however, explained that his country still required visas for seafarers, which was the main reason for his country not ratifying ILO 185.¹³⁶ Another representative expressed the concerns surrounding enforcement of the United States Immigration and Nationality Act, which requires all travelers of the United States to hold a valid passport and a valid nonimmigrant visa.¹³⁷ The United States was concerned about its visa requirement despite acknowledgment of the robust identification standards that were being considered by ILO 185.¹³⁸ In response to the United States' concerns, the ILO suggested different possibilities that would allow them to ratify the convention and show progress towards compliance.¹³⁹ First, the ILO suggested that the United States consider using the SID in processing visas for shore leave, which could be implemented through expedited visa issuances without the consular interviews and visa issuances at ports with proof of SID.¹⁴⁰ While the United States still expressed hesitation at these discussions, they agreed to consider the possibility of expedited interviewing schedules for applicants holding SIDs, given that they had ideally met some of the initial eligibility requirements for the United States' C1/D and D crew-member visas.¹⁴¹

III. U.S. POSITION ON SEAFARER SHORE LEAVE

SIDs are intended to be used on their own, without the addition of visas or any further identification credentials.¹⁴² Currently, the United States is the only maritime nation that requires foreign crews to have visas to apply for shore leave.¹⁴³ Hanjin crews that were aboard vessels in U.S. waters were de-

135. *Id.* at 7.

136. *Id.* at 5.

137. *Id.* at 6.

138. *Id.* at 7.

139. *Tripartite Meeting of Experts on the Implementation of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)*, *supra* note 131, at 7.

140. *Id.* at 7.

141. *Id.*; the visas will be discussed in more detail, see discussion, *infra* part III[B].

142. *Tripartite Meeting of Experts on the Implementation of the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185)*, *supra* note 131.

143. Stevenson, *supra* note 35 at 1411.

nied shore leave because they did not have the appropriate visas.¹⁴⁴ The United States has justified the visa requirement with reports and analyses after the September 11th terrorist attacks, citing safety and security concerns.¹⁴⁵ This Part will discuss the history of shore leave in the United States by providing a detailed discussion of *Aguilar v. Standard Oil Co.*, which emphasizes the importance of shore leave for seafarers. This Part will also highlight the measures that the United States has implemented in the aftermath of the September 11th terrorist attacks, such as the visa requirement, detailing the types of nonimmigrant visas issued and the documentation needed before the visas are granted. It will then detail how the United States justifies its visa requirement as a way of ensuring national security. Finally, in response to the United States' visa requirement, this Part will examine the interest groups which work to promote seafarers' rights while out at sea, including the International Federation of Red Cross and Red Crescent Societies, the Seamen's Church Institute, and the International Transport Worker's Federation.

A. The History of Shore Leave in the United States

Shore leave is a time-honored right that seeks to give sailors the rest that is needed after being at sea for extended periods of time.¹⁴⁶ Allowing temporary respite on land was thought of as a way for mariners to literally "get their feet back on the ground again."¹⁴⁷ Historically, shore leave was granted to allow crewmembers to contact their families, as this technology was unavailable onboard the vessels.¹⁴⁸ Although technology has rendered the need for shore leave obsolete, the right remains important with respect to ensuring the physical and psychological wellbeing of crewmembers aboard long voyages.¹⁴⁹ The right to shore leave allows sailors to physically come off of their boats

144. Dawson & Engels, *supra* note 26.

145. Stevenson, *supra* note 35 at 1411.

146. ROBERTO TIANGCO & RUSS JACKSON, HANDBOOK OF RIGHTS AND CONCERNS FOR MARINERS 106 (Cornell Maritime Press, 2002).

147. *Id.*

148. *Security, Seafarers' Shore Leave and ILO Convention 185*, INT'L LABOUR ORG. (Mar. 24, 2016), http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_463114/lang--en/index.htm.

149. *Id.*

and spend time on land in a country where they are not natural citizens.¹⁵⁰

In *Aguilar v. Standard Oil Co.*, the U.S. Supreme Court contemplated the necessity of allowing sailors to go ashore, and in a landmark decision acknowledged the seafarers' right to shore leave.¹⁵¹ In *Aguilar*, the plaintiff was injured while on shore leave.¹⁵² The plaintiff was employed on the Steamship Beauregard, owned by the defendant Standard Oil Company.¹⁵³ The vessel was a part of the trading that occurred between New Orleans and the East Coast and Gulf ports.¹⁵⁴ In this case, the vessel was moored off of Port Richmond, Philadelphia.¹⁵⁵ Plaintiff was granted shore leave and was injured on two different occasions, leading him to bring suit against the defendant for maintenance and cure and wages.¹⁵⁶ The lower courts ruled that shore leave was unrelated to the plaintiff's employment and that the defendant would not be liable for his injuries.¹⁵⁷

While the court struggled to determine the employer's liability to the injured sailor, it discussed the nature of shore leave and what purpose it serves to the seafarer.¹⁵⁸ Because the plaintiff was injured while ashore, the court had to decide whether or not he was acting within the duties of his employment—and thus whether he owed duties to the employer—while he was on land.¹⁵⁹ Ultimately, the court held that not only is shore leave necessary to the nature of seafaring but also that it is inherently a part of the job.¹⁶⁰

The *Aguilar* court thus emphasized the connection between shore leave and the nature of the work in which seamen engage.¹⁶¹ The court emphasized that "relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew out to sea if he could not grant shore leave, and no crew would be taken if

150. *Id.*

151. *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943).

152. *Id.* at 733.

153. *Id.* at 725.

154. *Id.*

155. *Id.* at 726.

156. *Id.*

157. *Id.*

158. *Aguilar*, 318 U.S. at 733.

159. *Id.* at 732.

160. *Id.* at 733.

161. *Id.* at 733–34.

it could never obtain it.”¹⁶² This decision would help shape customary maritime law in the United States and its understanding of shore leave. The *Aguilar* court acknowledged the unique work of seafarers, given the physical risks of being at sea, as well as the mental difficulties of being away from land for a long period of time. The decision cites another case, *Harden v. Gordon*, in which Justice Story opined about the peculiarities of seafarers.¹⁶³ Justice Story observed that seafarers were liable to “sudden sickness from change in climate, exposure to perils, and exhausting labor.”¹⁶⁴ He emphasized the importance of protecting seafarers’ rights because of the unique nature of their labor, noting that it was an important policy consideration to protect this class of citizens.¹⁶⁵ Justice Story also noted that protecting seafarer’s rights was also in the best interests of the merchant owners: that healthier crew would lead to smoother and more frequent voyages at lower wages.¹⁶⁶ Better working conditions would encourage more people to go to sea, despite the obvious perils tied to the job.¹⁶⁷

B. The U.S. Rationale for Requiring Seafarer Visas

The United States Government Accountability Office (GAO)¹⁶⁸ compiled a report in January 2011 that analyzed ILO 185 and its ability to protect the missions of various federal agencies, which aim to protect against potential security risks who may enter the country.¹⁶⁹ The report emphasized the number of foreign seafarers that visit U.S. ports on a yearly basis, estimating

162. *Aguilar*, 318 U.S. at 734.

163. *Aguilar* (citing *Harden v. Gordon*, C.C., 11 F. Cas. 480, 483 (C.C.D. Me. Oct. 1, 1823)).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. The GAO is referred to as the “congressional watchdog” that investigates the federal government’s spending of taxpayer dollars. *About GAO*, U.S. GOVT. ACCOUNTABILITY OFF., <http://www.gao.gov/about/index.html> (last visited July 23, 2017). The agency reports on policy initiatives and investigations that could impact U.S. Congress’s actions. *Id.* The GAO’s January 2011 report is especially important because it provides a thorough analysis and conclusion as to why the United States still insists on upholding the visa requirement for foreign seafarers. *See GAO*, *supra* note 31.

169. GAO, *supra* note 31, at i.

that about five million seafarers entered the ports in 2009.¹⁷⁰ The United States Department of Homeland Security (DHS) requested that the GAO launch this report to look into possible risks that could arise from foreign seafarers entering the United States through ports and the maritime industry in general.¹⁷¹ The report noted that “although there have been no reported terrorist attacks involving seafarers on vessels transiting to U.S. seaports, the Department of Homeland Security (DHS) considers the illegal entry of an alien through a U.S. seaport by exploitation of maritime industry practices to be a key concern.”¹⁷²

1. The Visa Requirement

The United States imposes a visa requirement on any foreign seafarer seeking to enter the United States, even for a short, temporary stay.¹⁷³ There are two types of nonimmigrant visas that are issued by the State Department’s Bureau of Consular Affairs to foreign seafarers: C1/D and D visas.¹⁷⁴ The C1 is a nonimmigrant visa that allows seafarers to be admitted to any port of entry in the United States, including airports, which would then transport them to and from their vessels.¹⁷⁵ The C1 visa is intended for persons in immediate and continuous transit through the United States to another country.¹⁷⁶ A C1 visa for seafarers is most commonly required when the person needs to travel to the United States in order to meet and board their vessel.¹⁷⁷ The D visa by itself, however, only allows seafarers to gain temporary access to the United States if they are arriving by

170. *Id.* at 1.

171. *Id.*

172. *Id.*

173. *Id.* at 8.

174. *Id.*; see 8 U.S.C. § 1101(a)(15)(C), (D); *Crewmember Visa*, U.S. DEP’T STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/other/crewmember.html> (last visited July 23, 2017).

175. *Id.*

176. *Transit Visa*, U.S. DEP’T STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/other/transit.html> (last visited July 23, 2017). The State Department defines immediate and continuous traffic as “a reasonably expeditious departure of the traveler in the normal course of travel as the elements permit and assumed a prearranged itinerary without any unreasonable layover privileges.” *Id.*

177. *Crewmembers Traveling to Meet Vessels*, U.S. DEP’T STATE, BUREAU OF CONSULAR AFFAIRS, <https://travel.state.gov/content/visas/en/other/crewmember.html#vessel> (last visited July 23, 2017).

ship.¹⁷⁸ The D visa is a nonimmigrant visa for a seafarer intending to depart the United States on a vessel within 29 days.¹⁷⁹ Thus, the combination C1/D visa allows seafarers to both gain entry into the United States to travel to their vessels no later than 29 days after entry into the country.¹⁸⁰ The application process, with certain requirements varying by country, consists of basic proofs of employment and other paperwork, along with an interview.¹⁸¹ When applying for a C1/D visa, a person will need a letter confirming employment, evidence of a travel itinerary with a ticket showing planned departure from the United States, documentation showing the applicant's significant ties to his or her country of residence and intent to stay there after the trip to the United States, evidence of sufficient funds for travel, the DS-160 nonimmigrant visa application with a photo, a valid passport, and payment of the visa issuance fee.¹⁸² With the nature of employment at sea, many contracts are for twelve months of work with a month or two of vacation time between contracts.¹⁸³ While they are home for these short periods of time, seafarers have found it difficult to schedule interviews at the United States consulate offices because of their extensive visa application backlogs.¹⁸⁴

The United States has been consistently strict about its adherence to its domestic laws that require visas for any seafarer seeking entry into the country.¹⁸⁵ Further, the United States Department of State had previously implemented the use of crew list visas that would process an entire ship's crew on one visa.¹⁸⁶ The State Department eliminated this approach in 2004 in an effort to enhance security in the wake of a post-September 11th national security climate and instead required that every crewmember undergo the visa application process and be issued a

178. GAO, *supra* note 31, at 8.

179. *Crewmember Visa*, *supra* note 174.

180. *Id.*

181. *Crew/Transit: C1/D*, FERMAN LAW, <http://www.fermanlaw.com/Nonimmigrant-Work-Visas/C-1-D-Crewmembers.shtml> (last visited July 23, 2017).

182. *Id.* The application fee for a South Korean citizen is currently \$160 USD. *Crewmember Visa*, *supra* note 174.

183. Stevenson, *supra* note 35, at 1423.

184. *Id.*

185. See *Tripartite Meeting of Experts on the Implementation of the Seafarers' Identity Documents Convention (Revised)*, 2003 (No. 185), *supra* note 131, at 6.

186. *Id.* at 7.

crewmember visa for every temporary visit to the United States.¹⁸⁷

2. National Security

For the United States, the visa requirement serves as a necessary layer of protection to ensure security in the wake of the September 11th terrorist attacks.¹⁸⁸ In its 2011 report, the GAO noted U.S. concerns that crewmember visas could be exploited by extremists seeking entry into the country through ports rather than through airports, which have heightened their security tactics since the September 11th attacks.¹⁸⁹ The GAO, however, concedes that another U.S. agency, the Coast Guard, already assessed the possibility of such exploitation and found that it was unlikely.¹⁹⁰ Essentially, not everyone can be a seafarer because of the nature of the grueling work and seafarers have made it such that the United States should not be so concerned with a threat piercing through by way of the shipping industry. The report, however, fails to delve into further details or analysis surrounding these conclusions.¹⁹¹ Interestingly, in 2009, the United States Coast Guard recognized the ILO 185 identity documents as a legitimate form of identification for foreign seafarers;¹⁹² yet, the GAO reported that ILO 185 did not fully comply with its mission.¹⁹³ The report notes that ILO 185 did not adequately consider the U.S. visa requirement, ultimately leading to the U.S. opposition to the convention.¹⁹⁴

3. Interest Groups

Many interest groups and international organizations keep a watchful eye on labor conditions for seafarers, especially concerning the United States' visa requirement. Groups have created guidance that specifically outlines deadlines and timelines to ensure that seafarers can get their visas on time before their next voyages.

187. *Id.*

188. Stevenson, *supra* note 35 at 1407.

189. GAO, *supra* note 31 at 12.

190. *Id.*

191. *See generally* GAO, *supra* note 31.

192. *Id.*

193. *Id.*

194. *Id.* at 41–43.

Central to the IMO and the ILO is the idea that a seafarer, as an employee of the ship that he or she is chartering, is deserving of a period of rest after being out at sea for an extended period. They all echo the need for the United States to loosen its visa requirement and accept Hanjin crew members into their ports.

The International Federation of Red Cross and Red Crescent Societies (“IFRC”) is an extensive humanitarian network that aims to provide medical and healthcare assistance throughout the world without discrimination.¹⁹⁵ Signatories to this group include domestic and international humanitarian organizations.¹⁹⁶ In 1965, the IFRC enacted the Convention on Facilitation of International Maritime Traffic (“FAL”), which calls for the reduction of formalities and documentary requirements for ships on international voyages.¹⁹⁷ For example, FAL section 3.1 states that “a valid passport shall be the basic document providing public authorities with information relating to the individual passenger on arrival or departure of a ship.”¹⁹⁸ More specifically, the standard in section 3.19.1 highlights that “[c]rew members shall not be required to hold a visa for the purpose of shore leave.”¹⁹⁹ The convention ultimately serves as more evidence that visa requirements and other restrictions on entry for seafarers are a problem amongst shipping companies.²⁰⁰

The Seamen’s Church Institute is an organization that serves to further the interests of mariners and be the voice of those who cannot represent themselves.²⁰¹ They operate the world’s only full-time free legal aid program for merchant mariners.²⁰² The

195. *Our Vision and Mission*, INT’L FED’N OF RED CROSS AND RED CRESCENT SOC’YS, <http://www.ifrc.org/en/who-we-are/vision-and-mission/> (last visited Jan. 10, 2017).

196. *Id.*

197. *Convention on Facilitation of International Maritime Traffic*, INT’L FED’N OF RED CROSS AND RED CRESCENT SOC’YS (Apr. 9, 1965), <http://www.ifrc.org/Docs/idrl/I258EN.pdf>.

198. *Id.* sec. 3.1.

199. *Id.* sec. 3.19.1.

200. *See id.*

201. Johnathan Thayer, *What’s In A Name? A Closer Look at the Seamen’s Church Institute*, SEAMEN’S CHURCH INSTITUTE (May 15, 2013), <http://seamenschurch.org/article/what%E2%80%99s-in-a-name-a-closer-look-at-the-seamen%E2%80%99s-church-institute>.

202. SEAMENS’ CHURCH INSTITUTE, <http://seamenschurch.org/csr> (last visited July 23, 2017).

institute releases an annual report called the "Shore Leave Survey," which outlines statistics regarding the denial of shore leave, along with suggestions and recommendations on how the United States should proceed for the following year.²⁰³ The 2016 Shore Leave Survey reported that a total of 1,061 seafarers on 104 ships were denied shore leave in the United States.²⁰⁴ Specifically, the survey notes that of those 1,061 seafarers, 866 (81.6 percent) of them were denied leave because they did not have visas.²⁰⁵ In the survey, however, it is unclear why the crewmembers failed to carry visas.²⁰⁶ Some possible explanations for crewmembers failing to have visas include that they had no time to obtain the visas, that the shipowners did not provide assistance in obtaining the visas, and that the costs were too prohibitive.²⁰⁷ In order to address the frequent denials, the 2016 Shore Leave Summary, which provides a report of the Seamen's Church Institute's annual findings, emphasizes that the United States needs to adopt ILO 185 to enhance maritime security through the convention's standards for seafarer identification documents.²⁰⁸

The International Transport Workers' Federation ("ITF") is an international federation of transport workers' unions that seeks to represent the broader interests of transport workers, including seafarers.²⁰⁹ In advocating for laborers on shipping vessels, the ITF strongly supports ILO 185,²¹⁰ stating that ILO 185 needs to be followed in order to properly address the human rights and labor standards of the international community because the SIDs would facilitate faster and more effective grants of shore leave.²¹¹ They have spoken out against what they believe to be serious digressions from the treatment of seafarers in other nations.²¹² In effect, the ITF believes that shore leave is a right that

203. See generally 2016 Shore Leave Summary, SEAMEN'S CHURCH INST., <http://seamenschurch.org/sites/default/files/sci-shore-leave-survey-2016.pdf>.

204. *Id.*

205. *Id.* at 2.

206. *Id.*

207. See *id.* at 3.

208. See *id.* at 2.

209. *What We Do*, INT'L TRANSPORT WORKERS' FED'N, <http://www.itfglobal.org/en/about-itf/what-we-do/> (last visited July 23, 2017).

210. GAO, *supra* note 31 at 47.

211. MarEx, *supra* note 107; GAO, *supra* note 31 at 47.

212. MarEx, *supra* note 107.

should be afforded to all seafarers and, by denying Hanjin employees this right, the United States is committing a serious transgression against Hanjin crewmembers.²¹³

Jeff Engels, an ITF inspector, visited the Hanjin Marine that was anchored off the port of Seattle.²¹⁴ Upon his examination, Engels called the United States Customs and Border Protection (CBP) directly, exclaiming that “shore leave [i]s a human right and that the seafarers should not be made to suffer due to the Hanjin situation, which had nothing to do with their simple desire to walk around, smell a tree, and visit the local seafarers’ center.”²¹⁵ With support from the ITF, a dockers’ union protested the actions of the United States from the shore, demanding that Hanjin crewmembers be granted shore leave.²¹⁶ Seeing this protest, ITF President Paddy Crumlin stated that “it should be inconceivable that they [Hanjin crewmembers] are being denied that right. We hope that wiser heads at the CBP [United States Customs and Border Protection] will now prevail and they will be allowed ashore.”²¹⁷

IV. ANALYSIS AND SOLUTION: THE HANJIN BANKRUPTCY AND THE UNITED STATES’ DENIAL OF SHORE LEAVE FOR HANJIN CREW

Given the strong consensus from these interest groups against the United States’ visa requirement, there is a need to provide a solution that protects seafarer’s human rights. This solution is especially crucial, given the decline of the shipping industry. The speed of air freight and other advancing technologies is rendering ocean freight more and more obsolete. The industry will likely continue to suffer losses and situations such as the Hanjin bankruptcy could easily become more common. In that case, there will inevitably be more crew members left stranded on arrested ships that will need to go ashore in the United States. While most of the Hanjin crew members have since been granted shore leave or allowed to return home, the amount of time that they were forced to stay aboard their ships was long enough to deprive them of basic needs. The United States’ refusal to bring the Hanjin crews ashore was to deny them of their rights to

213. Dawson & Engels, *supra* note 26.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

shore leave. Should another shipping giant become bankrupt, the United States must relax the visa requirement and grant the crew leave to come ashore while the companies resolve some preliminary proceedings such as releasing their ships from arrest.

This Part will propose that the United States should implement in order to remedy the problem that the visa requirement has created. A complex problem such as this requires a multistep approach to remedying the issue. Accordingly, the United States should get rid of the visa requirement altogether. Following that, the United States should ratify ILO 185 and accordingly implement the use of its seafarer identity documents. Countries, such as Singapore, have exemplified practical ways to begin accepting crewmembers ashore without visas, and the United States should follow these steps as a start to correcting this problem. In the wake of shipping bankruptcies on the scale such as the Hanjin bankruptcy, this issue will not be going away soon, and the United States must be better equipped to grant crew members shore leave when such a situation does occur.

A. Implementation of ILO 185 by the United States Would Protect Seafarer's Rights

The United States should adopt ILO 185. In a situation where equity demands the protection of labor standards and certain basic human rights, the United States should allow the Hanjin crewmembers to come ashore.²¹⁸ Balancing the interests of the crewmembers against the states to which they are seeking refuge, the interests weigh in favor of the crewmembers because of the nature of their employment.²¹⁹ While multiple international regulations deem that crewmembers do not need visas for entry into their vessel's destination port, the United States continues to be one of the only countries²²⁰ that insists on its visa requirement.²²¹

The United States should get rid of the visa requirement altogether.²²² This solution points to the ability of the ILO to establish uniformity throughout the international community, in

218. See GAO, *supra* note 31, at 60.

219. Dawson & Engels, *supra* note 26.

220. GAO, *supra* note 31, at 60.

221. THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW: VOLUME II: SHIPPING LAW 228 (David Attard et al. eds., 2016) (citing the 2003 revisions to the Seafarers' Identity Documents Convention of 1958).

222. GAO, *supra* note 31, at 44.

which the United States could carve out an appropriate solution within those parameters that will also address the national security concerns of the country.²²³

During the Hanjin bankruptcy, while the United States continued to insist on its visa requirement, countries such as Singapore have exemplified by designating its port as a safe zone for Hanjin ships to unload their cargo without fear of seizure.²²⁴ Since the collapse, almost a dozen Hanjin vessels have unloaded their cargo in the port of Singapore.²²⁵ The U.S. visa requirement does not allow for the flexibility that Singapore has exemplified in the wake of human rights dangers or other emergencies. Instead, the United States has been inflexible and insists that the visa will keep dangerous or undesired foreigners out of the country.²²⁶ The United States should consider this vignette and others that exemplify the treatment of seafarers that are posed in difficult situations such as shipping bankruptcies, which have proven to be uncertain and stressful for the crew members left stranded at sea.

While the visa requirement is still staunchly prohibited in ILO 185, the suggestions made during discussions of ILO 185 amendments do make convincing arguments. In adopting ILO 185, the United States should then implement the SIDs that are used by ILO 185 signatories. The United States should rely on the rigorous standards that ILO 185 has set out and tested that ensure that crew members have submitted compliant documentation, including biometric fingerprinting technology as well as electronic verification of credentials.²²⁷

While the interview procedure as part of the visa applications remains crucial to the United States Department of State, the SID would eventually diminish the need for interviews because the crewmembers would have already gone through an intense vetting process. Removing the interview step in the scope of the visa application process would reduce the total time that it currently takes to issue a visa. If the United States continues to insist on issuing visas, then this would be the best approach to

223. *Id.*

224. MarEx, *supra* note 41.

225. *Id.*

226. Stevenson, *supra* note 35, at 1426.

227. See *Arrangements Concerning the List of Members Which Fully Meet the Minimum Requirements Concerning Processes and Procedures for the Issue of Seafarers' Identity Documents*, *supra* note 128, at 12.

ensure speedier process, especially for those like the Hanjin crew members, who had a special interest in coming ashore as quickly as possible. Hanjin crew members likely did not already have crew member visas because they were never planning on coming ashore in the United States; rather they expected their voyages home to commence immediately after unloading the cargo from their vessels. Regardless, there needs to be a system that allows for seafarers to come ashore especially in the event of an unforeseen circumstance such as a shipping bankruptcy.

CONCLUSION

In 2016, Hanjin, once the world's seventh largest shipping company,²²⁸ faced a bankruptcy crisis. Unfortunately, Hanjin's bankruptcy proceeding was not the biggest issue surrounding their financial downfall. In the background, Hanjin crewmembers were left stranded at sea on their vessels, with no indication of when they would return to land to replenish their food or water, and seek medical attention. This denied the crewmembers the care that they were entitled through ILO 185 and the SOLAS convention of the IMO. This sentiment has been shared by countless interest groups, including ITF, IFRC, and the Seamen's Church Institute. This kind of shipping bankruptcy will likely occur again, since the shipping market continues to decline, making the need to address this issue more important now than ever. The United States' visa requirement, which requires that all foreign seafarers seeking to come ashore in the United States must have a valid visa, will continue to be an obstacle for seafarers on stranded vessels off the United States' coasts, as it does not properly address the seafarers' right to shore leave. To address this issue, the United States should get rid of its visa requirement for seafarers, adopt ILO 185, and implement the SIDs as promulgated by the International Labour Organization, just as many other countries have been doing since the ILO 185's entry into force in 2005. In the grand scheme of international conformity with maritime safety and security regulations, the United States should allow seafarers ashore to rest and recharge when they become small fish in a corporate bankruptcy battle that should not affect their well-being. These human rights violations should not be ignored, and seafarers should be afforded access to the shore. In these extraordinary circumstances, there

228. See *infra* INTRODUCTION.

should be a greater concern surrounding the welfare of the human beings aboard stranded vessels. The United States has failed to properly address the needs of these seafarers, and should look to correct this problem to ensure that they will not leave seafarers stranded at sea for months at a time again.

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