Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea

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1. Introduction

1. The United Nations (UN) defines human rights as "rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status."[1] The philosophy of human rights at sea builds on this basic definition to add the following four core principles: that human rights apply at sea to exactly the same degree and extent that they do on land; that all persons at sea, without any distinction, enjoy human rights; that there are no maritime-specific rules allowing derogation from human rights standards; and that all human rights established under treaty and customary international law must be respected at sea.

2. At present, these fundamental principles are not being adequately respected, complied with or enforced. Widespread and systematic human rights abuses continue to occur at sea, including slavery, abandonment, sex trafficking, sexual assault and deprivation of basic labour rights.

3. That these issues have persisted and even worsened notwithstanding the existence of a well-established body of international human rights law indicates clearly that human rights abuses at sea require special attention. This is especially true of human rights violations on the high seas, where the policing and enforcement of human rights violations is all the more difficult.

4. A concomitant of the chronic state of impunity and lack of accountability for human rights abusers at sea is the lack of effective remedy for victims. Despite the existence of a number of well-developed human rights mechanisms at the international, regional and domestic levels, the reality is that victims of maritime human rights abuses are not accessing these existing fora in any significant numbers. The vast majority therefore are left without a remedy.

5. An arbitration-based mechanism of redress for human rights abuses at sea would address both the procedural and the substantive dimensions of a victim's right to a remedy. It would do so by providing: (i) a neutral and visible forum in which human rights issues could be resolved; (ii) a procedure that is both efficient and financially accessible to victims; (iii) an adjudicative process that is highly specialised and tailored to the sensitivities of human rights issues as well as to the particularities of the maritime space; and (iv) binding arbitral awards that would be enforceable internationally.

2. Existing Mechanisms Fail to Ensure Adequate Redress for Human Rights Abuses at Sea

6. International and regional human rights protections. Various multilateral instruments impose duties on States to take certain acts, or to refrain from taking certain acts, in order to respect,

[1] *See* United Nations Website, Human Rights, https://www.un.org/en/sections/issues-depth/human-rights/.

protect and fulfil human rights, both generally[2] and in the specific maritime context.[3] Many of these standards have the status of customary international law, meaning that they bind even States who are not parties to the relevant agreement. A State is, moreover, bound by its human rights obligations wherever it exercises its jurisdiction, including at sea. This well-established corpus of substantive law is accompanied by a number of different bodies at both the international and regional levels empowered to hear complaints against States that are alleged to have failed to comply with their human rights obligations.

7. The European Court of Human Rights (ECtHR), applying the European Convention on Human Rights (ECHR), has recognised that, "as regards the exercise by a State of its jurisdiction on the high seas, . . . the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction."[4]

8. Domestic human rights protections. The vast majority of States also have adopted constitutional provisions and other laws protecting human rights and freedoms, as well as laws and regulations on labour standards and protections. These laws bind all legal entities and individuals under the State's jurisdiction.

9. Pursuant to the international law of the sea, the activity aboard any vessel is, moreover, subject to the jurisdiction and laws of the vessel's country of origin (the "flag State").[5] Pursuant to UNCLOS, such jurisdiction expressly includes "social matters" and "safety at sea", notably with

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[2] In addition to the founding pillars of international human rights law, the UN Charter (1945) and the Universal Declaration of Human Rights (1948), there are nine core international instruments imposing human rights obligations on States: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (adopted 1965, entered into force 1969); the International Covenant on Civil and Political Rights (ICCPR) (adopted 1966, entered into force 1976); the International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 1966, entered into force 1976); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 1979, entered into force 1981); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (adopted 1984, entered into force 1987); the Convention on the Rights of the Child (CRC) (adopted 1989, entered into force 1990); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (adopted 1990, entered into force 2003); the Convention on the Rights of Persons with Disabilities (CRPD) (adopted 2006, entered into force 2008); and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) (adopted 2006, entered into force 2010).

[3] For example, in 2013, the International Labour Organization (ILO)'s Maritime Labour Convention (adopted 2006) came into force. Known as the "seafarers' bill of rights", it sets out the rights of all seafarers to decent work and living conditions. This was followed by the entry into force in 2017 of the ILO's Work in Fishing Convention No. 188 (adopted 2007) (also known as the "Fishing Labour Convention"), focusing on securing decent work conditions, both at sea and ashore, for the millions of workers worldwide in the fishing sector. The International Maritime Organization (IMO) likewise has enacted a number of instruments relevant to the protection of human rights at sea. They include the International Convention for the Safety of Life at Sea (SOLAS) (adopted 1974, entered into force 1980), the International Convention on Maritime Search and Rescue (the SAR Convention) (adopted 1979, entered into force 1985), and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention) (adopted 1988, entered into force 1992). Certain provisions of the United Nations Convention on the Law of the Sea (UNCLOS) also are relevant to protecting human rights in the maritime context. Most notably, Article 98 UNCLOS imposes on States a duty to require the master of a ship flying its flag to render assistance to persons distressed at sea.

[4] *Hirsi Jamaa and others v. Italy*, ECtHR, Judgment of 23 February 2012, para. 178. *See also Case of Medvedyev and others v. France*, ECtHR, Judgment of 29 March 2010, para. 81.

[5] UNCLOS Convention, Articles 91, 92, 94.

regard to "labour conditions",[6] and the prevention and punishment of the transport of slaves.[7] In fact, each State has a positive duty under UNCLOS to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[8]

10. The inadequacy of existing protections for victims of human rights abuses at sea. Despite the existence of well-established international, regional and domestic law systems protecting human rights, the reality is that very few human rights at sea claims are ever raised by victims. Among the possible obstacles to note are the following:

- *Identification of abuses*. In practice, it is very difficult for a coastal State to enforce its laws on a vessel that is merely passing through that State's territorial waters, or for a flag State to monitor behaviour on its vessels spread far and wide across the seas without effective means of enforcement;

- *Identification of abusers*. The identity of the party or parties with ultimate responsibility for human rights abuses occurring at sea is not always clear-cut. For example, a bulk carrier navigating from Shanghai to Rotterdam may fly a Marshall Island flag, be owned by a company registered in Greece, be managed by a shipping company registered in Norway, employ a crew of Poles and Filipinos and engage a Chinese security force dispatched by a firm operating from Canada and registered in Djibouti;

- *Lack of accessibility and partiality of existing fora*. Human rights violations often occur within the jurisdiction of places where the national courts are dysfunctional, corrupt, or politically influenced. Such bias, or appearance of bias, not only discourages victims from pursuing human rights claims in the first place, but also reduces victims' chances of obtaining redress in any proceedings that are actually brought;

- *Practical barriers*. National judges may lack the training, expertise and resources necessary to deal with human rights issues. A victim may also be confronted with the need to interact with a legal system with which he or she is not familiar, and in a language that he or she does not understand. These issues, as well as a lack of resources and geographical distance, may prevent victims from ever raising their claims;

- *Procedural hurdles*. At the international level, the admissibility of individual claims is subject to a number of procedural requirements. For example:

    - Individual claims often are not permitted unless the Respondent State recognises the competence of a given treaty body, or is a party to the protocol allowing individual claims before these bodies;[9]

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6 UNCLOS Convention, Articles 94(3).

7 UNCLOS Convention, Article 99.

8 UNCLOS Convention, Article 94(1).

9 Such is the case, for example, with those treaty bodies set up to monitor compliance with the core UN human rights treaties, and the African Court of Human Rights (save for citizens of the nine countries that have made an optional declaration recognising the competence of the Court to receive cases from non-governmental organisations and individuals).

- Often, the individual claimant must first have exhausted his or her domestic remedies.[10] This requirement reflects the belief that a State must first be afforded the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be invoked. Typically, this entails a lengthy, resource-intensive process before domestic courts (with all the potential shortcomings referred to above);

- Absent exhaustion of local remedies, the individual claimant must often offer proof that no adequate and effective domestic remedy was available.[11] Depending on the forum, this may entail e.g. a showing of lack of due process rights, or unreasonable delay. Such a showing must be made before the substantive complaint can be heard; and

- *Lack of effective remedy*. International venues for redress often lack the power to order an effective remedy, such as monetary damages, or to enforce their decisions. Many fora, such as the Inter-American Court of Human Rights, depend uniquely on State compliance.

11. In short, a victim's path to redress of human rights at sea violations is currently marred by numerous practical and legal hurdles, which puts any chance of an effective remedy far outside the victim's reach, while at the same time fostering a climate of impunity.

3. How Arbitration Could Fill the Gaps and Provide Victims a More Effective Mechanism for Redress

12. An international arbitration system tailored for human rights at sea claims offers several advantages that can alleviate some of the challenges to impunity that weigh on this field:

- Neutrality. Arbitration offers a neutral forum where traditional State-based mechanisms (judicial or non-judicial) are not always effective or trusted. An international arbitration system would not be associated with any particular foreign State, and would thus be less likely to appear vulnerable to political or strategic pressure. This would increase trust by States and private companies;

- Flexibility. The arbitration process is significantly more flexible than court proceedings. Agreements between the parties or decisions by arbitrators (who have the power to decide many procedural matters) may help to overcome practical hurdles, such as geographical distance between the parties (e.g. victim's home country and shipping company's home office). For example, arbitral hearings may be held anywhere in the world, or even virtually. Language barriers may also be minimised by selecting as the language of the proceedings a second language common to both parties, or the language of the victim, with translators and interpreters used for written evidence or oral testimony. In making such decisions, arbitral tribunals are concerned to ensure equality of arms between the parties;

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[10] Such is the case, for example, with those treaty bodies set up to monitor compliance with the core UN human rights treaties, the Human Rights Council, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights.

[11] Such is the case, for example, with those treaty bodies set up to monitor compliance with the core UN human rights treaties, the Human Rights Council, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights.

- Familiarity. The widespread use of arbitration among States and businesses would further foster effective implementation and use. A notable recent development was the publication of the Hague Rules on Business and Human Rights Arbitration, "a set of procedures for the arbitration of disputes related to the impact of business activities on human rights."[12] The Hague Rules are substantially based on the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), with specific provisions tailored for use within the human rights context, e.g. on the gathering of evidence and witness protection;[13]

- Specialisation. Unlike in the domestic court systems of many States, where judges are rarely (if ever) specialised in human rights matters, the parties to a human rights at sea arbitration would have the opportunity to select arbitrators with specific expertise in international human rights and/or maritime matters;

- Compliance and risk management strategy. For companies, consenting to international arbitration of human rights at sea matters offers an effective human rights compliance and risk management strategy, and can assist companies to meet their responsibilities under the 2011 UN Guiding Principles on Business and Human Rights both to respect human rights (Pillar II) and to provide a remedy to victims of human rights abuses by businesses (Pillar III). Likewise, for States, encouraging, facilitating or even prescribing arbitration of human rights at sea disputes offers a means of compliance with duties assumed under international instruments;[14]

- Deterrence. For victims as well as for international society, the (publicised) availability of a neutral forum would encourage and promote denunciation of human rights abuses, thereby improving reporting, diminishing impunity, incentivising compliance with human rights and labour standards, and strengthening the exercise of enforcement jurisdiction by States; and

- Enforceability. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention"), is widely regarded as among the greatest advantages of international arbitration insofar as it provides for the recognition and enforcement of arbitral awards in national courts worldwide.[15] There is a risk, however, that human rights at sea arbitral awards may be exempt from enforcement as a result of the so called "commercial" reservation set out in Article I(3) of the New York Convention (by which

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12 City of the Hague and Center for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration*, December 2019, Introductory Note, p. 3.

13 *See* City of The Hague and Center for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration*, December 2019, Preamble, Article 6(f).

14 This includes, for example, ILO Member States' duties under the Maritime Labour Convention, which requires each Member to ensure that its laws or regulations provide avenues for victims to seek redress for breaches of their Convention rights. *See* Maritime Labour Convention, Article V.1 ("Each Member shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction."); Article V.6 ("Each Member shall prohibit violations of the requirements of this Convention and shall, in accordance with international law, establish sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations."). Another example is the Fishing Labour Convention, Article 17 (requiring ILO Member States to adopt laws, regulations or other measures regarding, *inter alia*, "the means of settling disputes in connection with a fisher's work agreement.").

15 *See* 1958 New York Convention Guide, available at http://newyorkconvention1958.org/.

a State may agree to apply the New York Convention only to disputes "arising out of legal relationships . . . considered as commercial under the national law of the State making such declaration").[16] Yet, such a concern should not be overstated. Of the 163 State parties to the New York Convention, only 45 have made such a declaration.[17] National courts have, moreover, interpreted "commercial" to encompass a wide range of legal relationships,[18] in keeping with the New York Convention's "pro-enforcement bias."[19]

13. Human rights at sea arbitration is not a silver bullet: detailed discussion with all stakeholders and rigorous analysis are required to calibrate the system optimally, including as regards transparency levels. Two central challenges pertain to securing the necessary stakeholders' consent to arbitration and to the cost burden, as arbitration in its classic form rests on party consent and is privately funded by its users. Further, while human rights arbitration is meant to address a gap in access to remedy for rights holders, it should not be considered a substitute for the existing mechanisms. Against this background, we proceed to our recommendations for a new system for arbitration of human rights at sea disputes.

4. Recommendations

14. An arbitration-based system for addressing human rights abuses at sea could be implemented a number of ways and could take a number of different forms. In this Section, we set out our initial views as to how such a mechanism should be designed, including by identifying the essential features that would make the arbitration of human rights at sea issues most effective.

15. In doing so, we have focused on the principal goals driving this project, namely, to provide victims of human rights abuses at sea with access to an effective remedy and to combat impunity for the perpetrators of such abuses. Thus, as a first step, we have identified the key features that a mechanism of redress would need to have in order to serve these goals, taking into account our research on human rights abuses at sea, our assessment as to what is impeding victims' access to an effective remedy and our experience and expertise as international arbitration practitioners.

16. On this basis, we set out below the essential features of our proposal for a new international arbitration system for the resolution of disputes concerning human rights abuses at sea. Our view as to the functioning of this system (including certain of the discrete features described below) is also reflected in the flowchart appended to this White Paper as **Appendix 1**.

a. System users: Victim v. State and Victim v. private entity

17. The first question that arises in the development of a private system of justice is: who are the intended users?

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[16] New York Convention, Article I(3).

[17] *See* http://newyorkconvention1958.org/.

[18] *See* 1958 New York Convention Guide, Article I(3), available at http://newyorkconvention1958.org/.

[19] *See* 1958 New York Convention Guide, Article III, available at http://newyorkconvention1958.org/.

18. Traditionally, only States have been recognised as carrying human rights obligations under international law.[20] However, our assessment of the human rights issues that tend to arise at sea, which include serious labour and other abuses in the seafaring, fishing and shipbreaking industries, also directly implicate businesses active in the maritime space.

19. Thus, to meaningfully address human rights abuses at sea, any mechanism for redress must cater for victims' claims against States as well as against private entities and individuals. The latter is not a novel concept: the idea that an individual can bring claims for human rights violations against a company is currently under development in the emerging field of business and human rights.

b. System users' consent to arbitration

20. As arbitration is traditionally a creature of contract, it generally requires the consent of both parties for a particular dispute or type of dispute between them to be submitted to arbitration. The proposed mechanism must therefore include some modality through which the intended users can express their consent to arbitration.

21. With respect to States, we envisage such consent occurring in a manner similar to that which occurs in investor-State arbitration. Specifically, participating States would extend a clear, well-defined offer to arbitrate to all individuals who may have a claim for breach of a human rights obligation occurring at sea. Such offer to arbitrate could be given in the State's domestic legislation or in an international instrument, including either a treaty or a declaration. An individual can accept such offer simply by commencing arbitration proceedings (i.e. by filing an initiatory pleading).

22. As for private entities, we envisage them providing consent in at least two ways:

- *First*, private entities operating at sea may make offers to arbitrate to individuals they hire or employ, within the applicable contracts; and

- *Second*, private entities operating at sea may include in their bilateral contracts third-party beneficiary clauses (essentially an open offer to arbitrate disputes with third parties such as workers without an employment contract or invitees, which said third parties could accept in the same manner as described above for States' offers).

23. The extent to which States and corporations will be willing to submit to an arbitration system along the lines of what is being proposed is an entirely different question. We have not yet been able to canvass the appetite for such a system amongst expected participants (i.e. key flag and coastal / port States and corporations active in the maritime space). In any event, it is worth

[20] As of June 2014, the Human Rights Council, a UN body, is working on a legally binding instrument intended "to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." Human Rights Council Resolution 26/9 of 26 June 2014, article 1. The open-ended intergovernmental working group has had five sessions so far, with the most recent taking place in Geneva in October 2019. The report of the fifth session is available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/43/55.

exploring other ways to incentivise participation at both the State and private level. For example:

- Intergovernmental or non-governmental organisations could exert pressure on States and / or corporations to participate, for example, by singling out those with a poor human rights record;

- Flag States (in particular, open registries) could condition a private entity's access to their registries on its agreement to participate in the arbitration of human rights at sea system; or

- Similarly (though likely more difficult to implement), port States could make the use of their ports by private entities conditional on the private entity's participation.

c. Sources of substantive human rights protections subject to arbitration

24. The project presented here is focused on the procedure by which human rights victims can access an effective remedy; it does not purport to change or add to existing substantive human rights law, nor would it need to. Human rights are already protected by numerous sources of international law, including the core UN human rights treaties, as well as the body of ILO and IMO instruments setting out specific labour standards.

d. Administration and oversight by dedicated institution

25. We considered whether the arbitration mechanism being proposed should look more like a self-contained system of justice (in the style of investor-State arbitration administered by ICSID), or more like *ad hoc* arbitration to be managed independently by the parties and the arbitrators.

26. In our view, the ICSID model is preferable, among other reasons, because it would better facilitate a number of the features we have identified as necessary (or at least highly desirable). Most notably:

- The involvement of an institution could help reinforce the **neutrality** of the system, especially where the institution provides additional procedural safeguards to ensure the integrity of the proceedings and the resulting award (e.g. the scrutiny of awards provided by the ICC) (*see* **item (e)** below);

- An institution could facilitate the creation and management of a roster of **specialist arbitrators** with the training necessary to adjudicate the particular types of disputes that would come before them. While this function is not unique to institutional arbitration (indeed, the London Maritime Arbitrators Association offers a roster of specialised arbitrators without institutional arbitration), a true institution usually has more tools at its disposal to train arbitrators and scrutinise their performance; and

- Institutional arbitration is also better equipped to promote **transparency** (*see* **item (i)** below). As a matter of practicality, an institution could be used to manage the collection and publication of case information (including arbitral awards) centrally, while also managing a set of standards for determining when information should be kept confidential.

e. Neutrality

27. As explained above, one of the main advantages international arbitration offers over judicial remedies is neutrality. Neutrality is particularly important in the human rights context given the likely inequality of arms among victims of human rights abuses and the alleged perpetrators. Thus, for arbitration of human rights abuses at sea to be most effective, victims should be able to raise their claims in a neutral venue and before an impartial panel of arbitrators:

- With respect to neutrality of place, we would propose having the legal seat of the arbitration fixed in a location such as Paris, The Hague or Geneva that has significance as an international legal centre, and which has a reputation for neutrality; and

- As for neutrality of the arbitral tribunal, our proposal is for a victim raising a claim concerning human rights at sea to be able to have an equal hand in appointing tribunal members.

28. The typical arrangement in international arbitration is for each party to appoint a single co-arbitrator and for the two co-arbitrators to then agree on a tribunal president (or, failing agreement, for a designated institution or other appointing authority to make the appointment instead). At face value, this approach seems even-handed enough. It must be borne in mind, however, that this approach is only truly even-handed when both parties are operating with substantially the same knowledge. In the commercial or investor-State arbitration context, such equality of knowledge can be expected. The same may not be true where, for example, a seafarer has raised a sexual assault claim against his employer, a global shipping company.

29. Taking into account the inequality of knowledge and bargaining power among the likely parties in the human rights at sea arbitration context, it may be preferable to have either a single arbitrator, or panel of three arbitrators appointed by the institution. This possibility should be explored further, including through case studies from similar contexts, to the extent available.

f. Active roster of specialist arbitrators

30. Arbitrators handling disputes about human rights violations at sea will face a mix of issues that is singularly complex and delicate. The human rights aspect of these disputes will undoubtedly invoke strong public interest and could very well raise exceptionally sensitive issues involving extreme trauma, human suffering and the like. At the same time, the 'at sea' element has the potential of bringing into the mix any number of the distinctly marine issues that have kept maritime arbitration such a highly specialised (and somewhat esoteric) form of dispute resolution.

31. For these reasons, a key component of the human rights at sea arbitration system we are proposing is the development of a deep roster of specialist arbitrators, including those who are trained in some or all of the following disciplines:

- International human rights law;

- International labour law (in particular, in the maritime context); and

- Human psychology, including the possible effects of psychological trauma on a person's ability to participate in legal proceedings.

32. As noted above, we envisage this group of specialist arbitrators being identified (or trained to the extent necessary / possible) and managed by an active arbitration institution akin to ICSID or the ICC.

g. Specialised arbitration rules

33. For similar reasons, the arbitration of disputes concerning human rights at sea should be subject to specially tailored procedural rules that are able to take account of (and cater for) the unique characteristics of the parties and their disputes.

34. However, we do not consider it necessary to develop a new set of arbitral rules entirely from scratch. In our assessment, the recently published Hague Rules on Business and Human Rights Arbitration (the "Hague Rules") provide a promising starting point, as they are specifically designed to address many of the same concerns that arise in the human rights at sea context. This is apparent from the Preamble to the Hague Rules, which refers, among other things, to:

- "The potential imbalance of power" that may arise in business and human rights disputes;
- "The public interest in the resolution of such disputes, which may require, among other things, a high degree of transparency of the proceedings and an opportunity for participation by interested third persons and States";
- "The importance of having arbitrators with expertise appropriate for such disputes and bound by high standards of conduct"; and
- "The possible need for the arbitral tribunal to create special mechanisms for the gathering of evidence and protection of witnesses."[21]

35. Of course, appropriate adjustments and adaptations would need to be made to the draft procedural rules, among other reasons to take account key differences between the type of arbitration contemplated by the Hague Rules and human rights at sea arbitration, in particular, the fact that the latter would involve claims against States as well as private entities.

h. Accessibility of system to victims

36. In order for a mechanism of redress to improve a victim's access to an effective remedy, the mechanism itself must be accessible in at least two respects: it must be visible (i.e. known) to the victim, and it must be possible for the victim to access as a matter of practicality.

37. With respect to visibility and knowledge, we envisage victims of human rights abuses at sea being able to rely on *pro bono* assistance from a non-governmental organisation. As reflected in the flowchart at Appendix 1, this assistance would involve reviewing the victim's complaint to

[21] City of The Hague and Center for International Legal Cooperation, *The Hague Rules on Business and Human Rights Arbitration*, December 2019, Preamble, Article 6.

determine what course(s) of action might be available and then assisting him / her accordingly. The principal aim of such assistance would be to equip the victim with the knowledge he / she will require to pursue his / her rights; it would not be legal counsel, but should at least include advice as to where and how affordable counsel can be obtained.

38. As to the need for access as a matter of practicality, the system being proposed should be efficient and affordable. Optimally, the system would be supported by external donors as well as by counsel, arbitrators, translators, court reporters and other service providers who are willing to donate some of their services on a *pro bono* basis.

39. In any event, the system should be structured such that overall costs are kept to a minimum. To that end, it may be worth considering adopting aspirational / default timelines for the issuance of a final award, page limits on written submissions, procedures for the conduct of virtual / remote hearings, limits on the printing of hard copy documents and other checks on waste, etc.

i. Transparency

40. There is a strong public interest in the resolution of human rights disputes, which militates in favour of information about such disputes (and indeed, the result as reflected in the final award) being made available to the public. Thus, we would propose for the default position in human rights at sea arbitration to be transparency (i.e. that oral hearings and final awards are public unless both parties agree otherwise), subject to any overriding concerns of safety or privacy that may require certain information to be kept confidential.

j. Enforceability of awards

41. As noted above, a possible barrier to use of the New York Convention as a means of enforcing human rights at sea arbitral awards is the so-called "commercial" exception to recognition and enforcement. We would propose to address this difficulty by having it dealt with in States' offers of consent to human rights at sea arbitration, specifically, by having States include in their offers of consent language reflecting their agreement and expectation for the New York Convention to apply. This could result in States being estopped from arguing that the New York Convention cannot apply to human rights at sea arbitral awards. With that said, there would always remain some risk that a court called upon to recognise and enforce such an award could raise the point *sua sponte*.

42. There is at least one other way of dealing with the difficulty posed by the New York Convention's reference to "commercial" arbitration: the need for reliance on the New York Convention could be circumvented altogether by establishing a fully self-contained dispute resolution system like that provided for under the ICSID Convention, in which awards are self-enforceable in any ICSID Contracting State. However, this would involve the conclusion of a multilateral treaty like the ICSID Convention, which we consider to be difficult to achieve in the short- to medium-term (if at all).

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43. While presented at a high level and in preliminary form, it is hoped that the proposals set out above mark the start of a much-needed discussion as to concrete steps that can be taken to

provide victims of human rights abuses at sea with access to an effective remedy. The time for this discussion is now: it is profoundly disturbing that human rights at sea still do not receive anything close to adequate protection despite the well-established body of international, regional and domestic human rights law and mechanisms available to remedy human rights abuses occurring within States' borders.

44. Above all else, the hope is that the recommendations set out in Section 4 will serve as a foundation for the continued development and, ultimately, implementation of an arbitration-based system for the resolution of disputes concerning human rights abuses at sea. Where there are differences in view as to the best way forward, we are eager to hear them, confident that such dialogue will help steer this project in the right direction, making it stronger and more robust at every turn. To that end, we welcome any questions or comments, which should be sent to the contacts listed below. In the meantime, we look forward to taking this project forward and to announcing the next stages of development as they occur.

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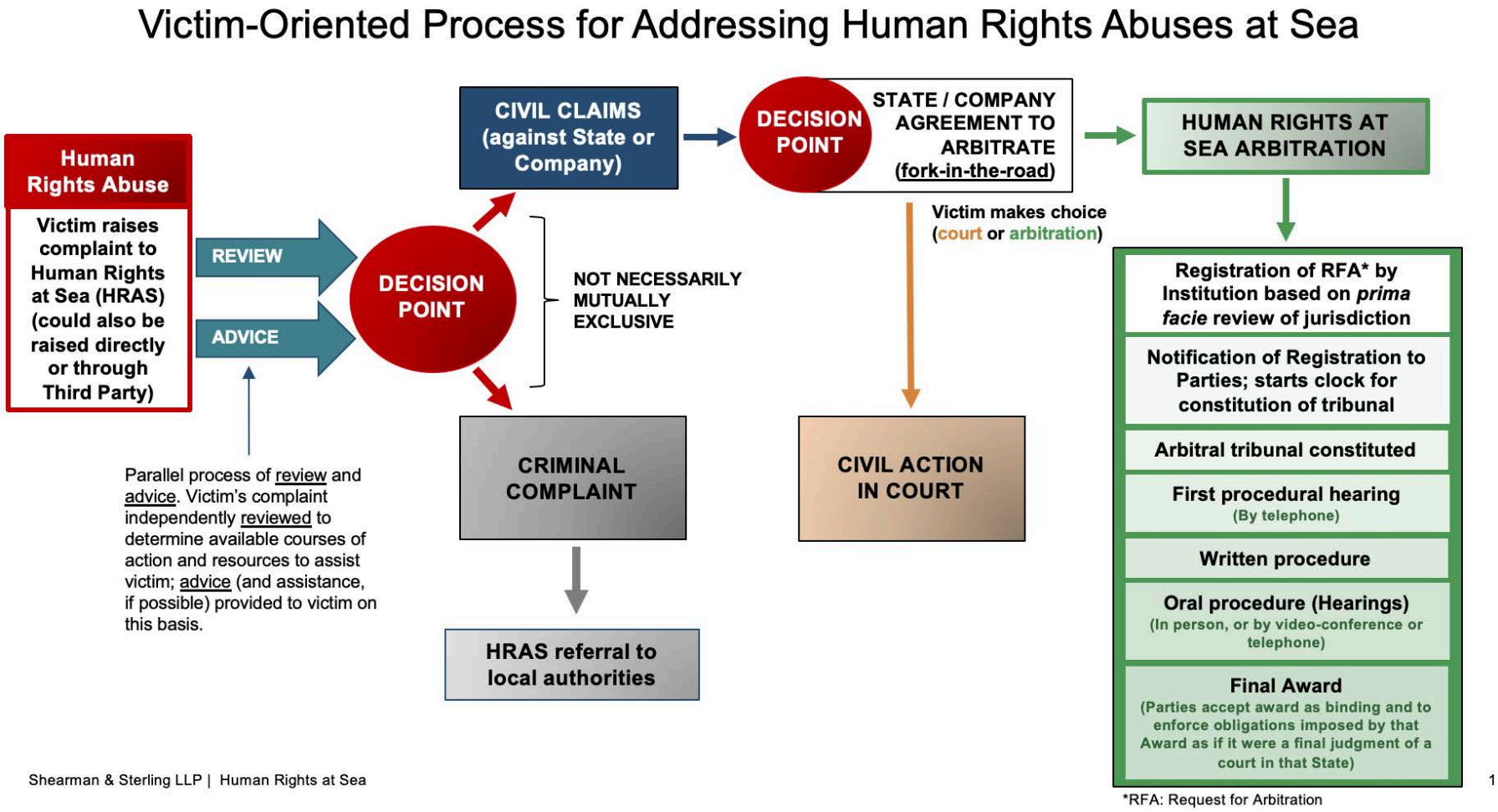
Appendix 1



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