



HUMAN RIGHTS AT SEA



Human rights apply at sea,
as they do on land

Human Rights at Sea
Insight Briefing Note

Stateless Vessels A Commercial Legal Review

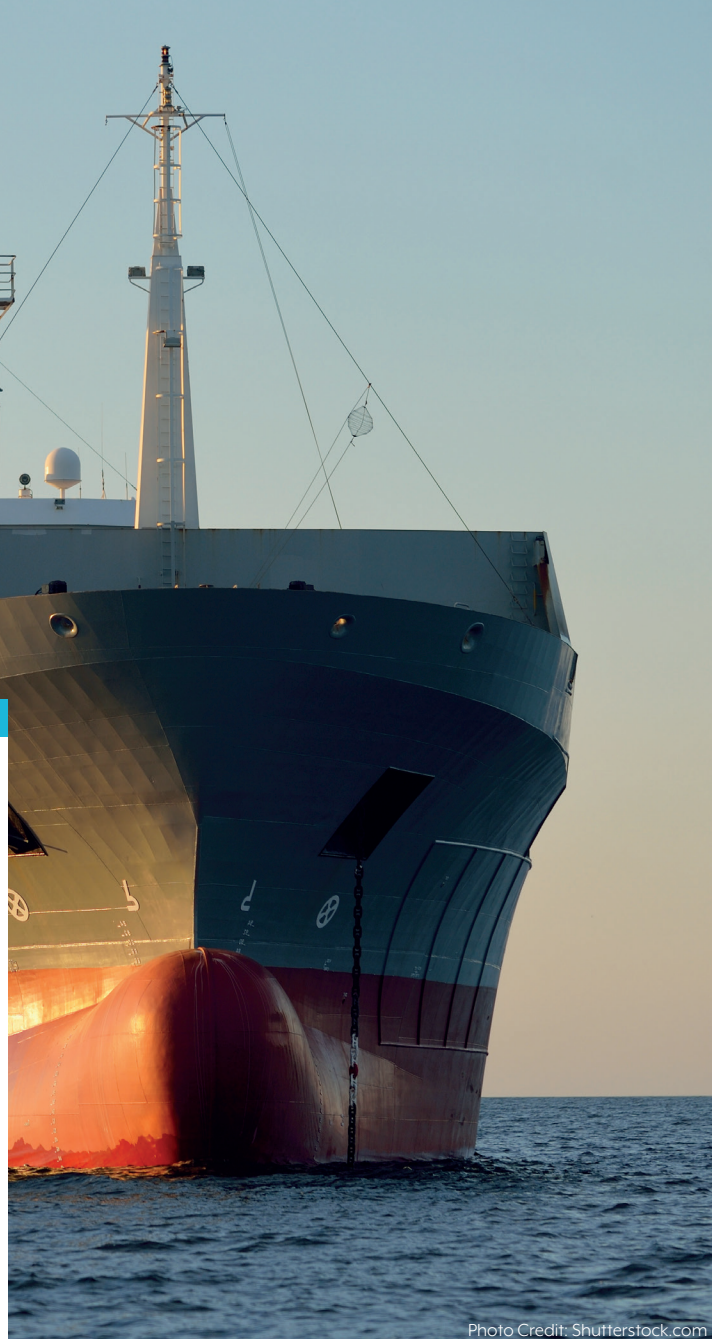


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In Partnership with Reed Smith LLP and Counsel of Quadrant Chambers, London.

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Stateless Vessels

This note discusses the concept of a ‘stateless’ vessel (hereinafter a ship) and refers to the “SEA PRINCESS” as a case study.



Introduction

1. On land, the law of the land protects human rights. This protection extends to seafarers on a ship that has been entered on the register of ships administered by that country. When registered, the ship is entitled to fly the flag of that country (known as the 'Flag State'). The ship will be subject to the laws of the Flag State, which is then said to have 'jurisdiction' over the ship, as discussed below.
2. As the name suggests, a stateless ship is one without national identity. Statelessness arises when the ship is not registered in any State and is not entitled to fly the flag of any State.
3. Statelessness arose in the case of the SEA PRINCESS¹ when she was removed from the Cook Islands register whilst on the high seas and en route to Alang in India for demolition. Following the SEA PRINCESS' removal from the register, she was no longer entitled to fly the Cook Islands' flag.
4. Entitlement to flag is important as it allows the ship to possess a 'national character' and gives certain rights to the seafarers on board under the laws of the Flag State, regardless of the ship's geographical location.
5. Therefore, seafarers on board a stateless ship are deprived of rights that they would have otherwise been entitled to under the Flag State law. However, as discussed below, there are other States (and other entities) capable of assisting seafarers on board stateless ships.

National Character

6. Whilst the United Nations Convention on the Law of the Sea ('**UNCLOS**') does not require a ship on the high seas to have a Flag State, it is customary that she must possess national character to be allowed to use the high seas freely.
7. Thus, a ship sailing on the high seas when not under the jurisdiction of a Flag State is not sailing without risk or consequence. UNCLOS provides authority² for a warship of any State to board a ship that is sailing on the high seas without apparent nationality i.e. not under the flag of any State.
8. However, upon determining a ship as stateless, further actions open to intervening States are the subject of academic debate. Unhelpfully to this debate, there have been very few legal cases where a competent court has decided (known as an '**authority**') what actions an intervening State can take.
9. Nonetheless, our view is that a relevant consideration is whether the intended action amounts to legitimate intervention³ by a State that is not the Flag State (since there is no Flag State). Legitimacy in this regard requires a discussion on jurisdiction.

Jurisdiction

10. Whilst some scholars⁴ of international law are of the view that the intervening State has no further authority (beyond boarding and inspection to determine whether the ship possesses national character), others⁵ make the case that it is legitimate for a State to intervene more broadly.
11. However, there are competing theories on the justification for broader intervention. These theories are known respectively as 'The Any State Theory' and 'The Nexus State Theory'.

¹ An asphalt tanker built in 1993 with IMO number 860734

² At Article 110(d)

³ I.e. Action that a State is entitled to take

⁴ E.g. Bennett

⁵ E.g. Churchill and Lowe

The Any State Theory

12. The premise of the Any State Theory is that any State is authorised to exert jurisdiction over a stateless ship because, otherwise, an unregistered ship would be immune from any interference by any State, potentially leading to disorder and anarchy on the high seas (including any nature of human rights violation).
13. Critics of this theory raise the two following possible problems:
 - firstly, there is no general principle of international law that entitles a State to interfere with a ship on the high seas merely by virtue of it being stateless; and
 - secondly, it ignores the prospect of another State intervening on the basis of the Nexus State Theory (explored below) i.e. that it has a connection with the stateless ship, such as the crew being citizens of the intervening State (and which therefore could be said to cut across interference by another State operating under the 'Any State Theory').

The Nexus State Theory

14. In support of a State exerting jurisdiction, the Nexus State Theory requires a connection or link (a 'nexus') between that State and the stateless ship. As noted above, this could be the crew on board being citizens of the intervening State, which might be said to provide the legitimacy and justification of the intervention.
15. A point raised in support of the Nexus State Theory is the requirement under Article 91 of UNCLOS that there "must exist a genuine link between the State and the ship." However, Article 91 of UNCLOS relates to the registration of ships and therefore does not apply to the connection between the State and an unregistered stateless ship.
16. Whilst international law (i.e. UNCLOS), therefore, does not require a connection between an intervening State and a stateless ship on the high seas, proponents of the Nexus State Theory prefer it because it can be said to add a layer of justification to the intervention.
17. It is also relevant that a State having a legitimate interest in the ship and/or persons or cargo on board only allows (but does not compel) that State to intervene. Accordingly, this may result in a State not taking action (where entitled to do so) to the detriment of another State wanting to take action (but being precluded from doing so).
18. In the absence of any general principle or custom to its exclusion, we consider that the better of the academic views is that the Any State Theory is to be preferred, making it open to any State to intervene to ensure that a stateless ship complies with international regulation, thereby maintaining order on the high seas.
19. Under the Nexus State Theory, whilst a State would still be entitled to intervene on the basis of a connection with the stateless ship on the high seas, the viability of any such intervention would likely be governed by the proximity of a vessel flagged in the intervening State. If no such vessel was available it may be impracticable for that State to intervene. In other words, a stateless ship could slip through the net, and this could be to the detriment of those on board.
20. Nonetheless, as a wider point of principle, we would conclude that highly technical and academic jurisdictional considerations ought not operate as a bar to the legitimacy of State intervention which seeks to safeguard seafarers' rights.

Maritime Labour Convention, 2006 (MLC)⁶

21. The MLC serves the purpose of listing seafarers' rights in one document and creating obligations on State signatories to protect these rights. These rights include entitlement to wages and to repatriation.
22. In accordance with the MLC, seafarers are entitled to be repatriated when they "are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in specific circumstances".⁷
23. Furthermore, if "a ship owner fails to make arrangements for or to meet the cost of repatriation of seafarers who are entitled to be repatriated"⁸ (as the owner of the SEA PRINCESS failed to do) then, ordinarily, the competent authority of the Flag State (if a signatory to the MLC) is obliged to make the arrangements or meet the costs.
24. If the Flag State fails to do so (or does not exist, as was the case in respect of the SEA PRINCESS), "the State from which the seafarers are to be repatriated or the State of which they are a national may arrange for their repatriation...".⁹
25. The need for intervention by such States has been the subject of recent IMO publications¹⁰ arising from the coronavirus pandemic. If any further justification is required, our view is that the humanitarian need, cited in these publications, would legitimise intervention by these States even where they are not signatories to the MLC.
26. However, just because a State can make a legitimate intervention, it is not obliged to do so if it has not signed up to the MLC. Hence, we set out below what might be the most practicable next step in terms of assisting the seafarers on a stateless ship (again, with reference to the SEA PRINCESS to illustrate).

Next Steps

27. First, the previous Flag State (here the Cook Islands), might agree to cover the cost of repatriating the crew in lieu of the defaulting owners. Whilst the Cook Islands is not a signatory to the MLC, and could not be compelled to cover the costs even if it had remained the Flag State, it is conceivable that, as the most recent Flag State, it might elect to assist the seafarers, if requested to do so.
28. Second, alerting the competent authorities of the Port State (that is, the State whose territorial waters a stateless ship might enter), or the nearest State (if not within the territorial waters of any State), could result in the provision of assistance particularly if any such State considers the situation to pose a risk to navigation or of marine pollution.
29. Third, Labour Supplying State(s) of the seafarers or their national States (if different) might be prepared to assist on the basis of their interest in the seafarers on board.
30. The seafarers could potentially receive assistance in two further scenarios, as set out below.

⁶ As amended

⁷ MLC, Standard – Repatriation: 1(c)

⁸ As above, see para 5

⁹ As above

¹⁰ https://www.ilo.org/global/standards/maritime-labour-convention/WCMS_741024/lang--en/index.htm

Insurance

31. When a ship is removed from the registry of its Flag State, or otherwise loses entitlement to fly the flag of its Flag State, it typically loses insurance cover if it does not immediately find an alternative.
32. Depending on the terms of the insurance policy and the circumstances of the case, the policy might continue for the benefit of the seafarers. If so, the insurers might be bound, or elect to cover, the cost of the seafarers' repatriation. In practice, however, this may only be a viable course of action when replacement seafarers are not required e.g. if the ship is to be put into cold lay-up or, as was the case with the SEA PRINCESS, demolished.

Warship Intervention

33. If a stateless ship is outside the territorial waters of any State, the warship of any State could intervene (possibly on request) on the basis that the ship lacks national identity.
34. It is conceivable that any warship intervention that is made, or planned, close to the territorial waters of another State, could encourage that other State to assist and/or cooperate to safeguard the rights of the crew on board the stateless ship.

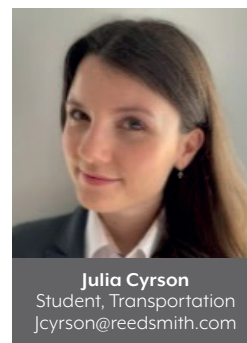
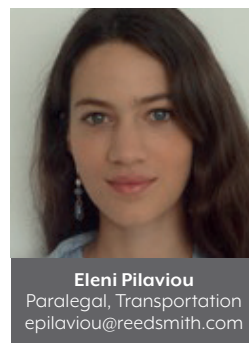
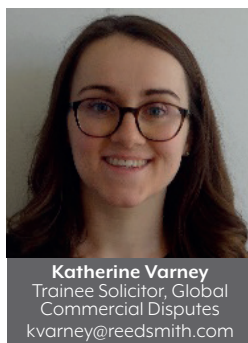
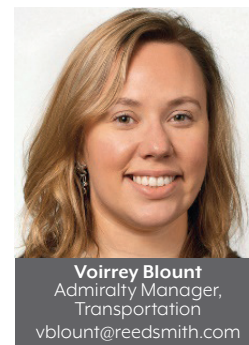
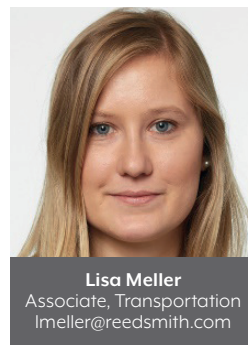
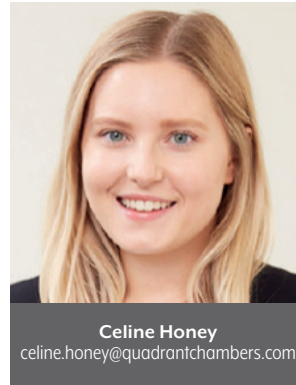
Conclusion

35. If a ship is or becomes stateless, and the ship is not within an MLC Port State jurisdiction, there appears to be no mechanism of law by which a State might be compelled to assist the seafarers on board.
36. However, as discussed above, there are a number of States (and other entities) that could elect to assist either under the 'Any State' principle or on the basis that they have a connection with the ship or an interest in the seafarers on board (the 'Nexus' principle).
37. Furthermore, the legitimacy of intervention on the basis of humanitarian grounds is unlikely to be challenged and thus any such intervention, if made, is likely to succeed.

Disclaimer

This Insight Briefing Note has been published by Human Rights at Sea following instructed desk-top research by lawyers at Quadrant Chambers and Reed Smith LLP. The contents have been checked as thoroughly as possible for accuracy by the authors at the time of writing. Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Neither Human Rights at Sea, Quadrant Chambers nor Reed Smith LLP is liable in any way whatsoever in any jurisdiction for the contents of this Insight Briefing Note, which has been published in good faith in support of the charity's objectives. All text and images have been acknowledged where possible. Any stated opinions, perspectives and comments are solely those of the authors. Any omissions or factual inaccuracies should be immediately alerted to Human Rights at Sea by writing to: enquiries@humanrightsatsea.org.

The Team



Quadrant Chambers Summary

Quadrant Chambers is one of the leading international commercial disputes sets. Quadrant Chambers holds a pre-eminent international position in shipping, commodities, energy, insurance, aviation, travel, banking and international arbitration.

The members of Quadrant Chambers combine excellence as advocates and advisors with a thorough knowledge of the business sectors in which they work. Highly attuned to commercial considerations and priorities, as much as legal requirements, of instructing solicitors, in-house lawyers and lay clients and Quadrant prides itself on providing a client-focused service, working as part of a legal team to achieve a common goal. As a chambers practising across the globe its members strive to understand and take account of different commercial and legal cultures so that they can properly understand their clients and effectively advise and represent them.

Shipping and maritime matters are at the heart of Quadrant Chambers. In the 60s, Quadrant was first a pre-eminent maritime wet-set before developing and expanding its capabilities. Today, shipping still represents about half of the work its members undertake, indicating Quadrant's strength and influence in the industry.

Quadrant Chambers, with the participation of James M. Turner QC and Stephanie Barrett, has in the past provided legal aid and support to HRAS: a successful partnership, and encouraging work for "state-level policy and legislative change for the long-term sustainability of welfare facilities on behalf of seafarers and their welfare providers in New Zealand" (David Hammond).

Reed Smith Summary

Reed Smith LLP is a dynamic international law firm dedicated to helping clients move their businesses forward. Our belief is that by delivering smarter and more creative legal services, we will not only enrich our clients' experiences with us, but also support them in achieving their business goals. Our long-standing relationships, international outlook and collaborative structure, make us the go-to partner for the speedy resolution of complex disputes, transactions and regulatory matters.

Reed Smith's transportation practice has advised the industry for nearly a century. Our transportation group cover the full spectrum of legal needs for transportation companies, dealing with marine casualties, navigating cargo claims or charter problems, dealing with all aspects of ship arrest in ports around the world and managing shipbuilding disputes or other shipping related roadblocks, such as sanctions violations or regulatory/competitive issues.

At Reed Smith, we believe that the practice of law has the ability to drive progress. We are honest, ethical, equitable and authentic. We do the right thing because it is the right thing to do.

Our pro bono partnership with the charity Human Rights at Sea (HRAS) began in January 2021 and we look forward to continuing to work together closely moving into the future.

Who We Are

BACKGROUND

Human Rights at Sea was established in April 2014. It was founded as an initiative to explore issues of maritime human rights development, review associated policies and legislation, and to undertake independent investigation of abuses at sea. It rapidly grew beyond all expectations and for reasons of governance it became a registered charity under the UK Charity Commission in 2015.

Today, the charity is an established, regulated and independent registered non-profit organisation based on the south coast of the United Kingdom. It undertakes **R**esearch, **A**dvocacy, **I**nvestigation and **L**obbying specifically for human rights issues in the maritime environment, including contributing to support for the human element that underpins the global maritime and fishing industries.

The charity works internationally with all individuals, commercial and maritime community organisations that have similar objectives as ourselves, including all the principal maritime welfare organisations.

OUR MISSION

To explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.



STAY IN CONTACT



We welcome any questions, comments or suggestions. Please send your feedback to:
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Human Rights at Sea is a Registered Charity in England and Wales No. 1161673. The organisation has been independently developed for the benefit of the international community for matters and issues concerning human rights in the maritime environment. Its aim is to explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.



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