

## **MARITIME LABOUR CONVENTION 2006: IMPLICATIONS FOR SEAFARERS AFTER A DECADE\***

### **Abstract**

*The protection of seafarers and the enforcement of their rights under national and international law has been an issue of great concern in recent years. This paper examined whether the current legal framework provides sufficient support for seafarers and to assess potential options for reform. In carrying out this study, the primary international legislation which is the Maritime Labour Convention (MLC) 2006 was considered and focus was on two jurisdictions, Panama and Philippine, which are of significant importance to the maritime world. The use of relevant journals and texts contributed to the discourse and opinions of key researchers in maritime law and practice was helpful in the analysis. This study found out that there are in existence some elements of protection available for the seafarers in the Maritime Labour Convention 2006. However, these provisions have suffered from poor implementation and inadequacy. It is acknowledged that steps have been taken to amend some of these provisions; however it is important that regular and consistent amendments should be effected as concerns are being raised by the seafarers as regards improvements in their rights and obligations.*

**Key words:** *Seafarers, Maritime Labour Convention, Ships, Abandonment*

### **1. Introduction**

The Life of a Seafarer has been compared to the conditions attributed to slaves. This is as a result of the poor quality of treatment that has continually been given to them by some of the ship owners and employers of labour in the maritime space. This condition is aptly described by the International Commission on Shipping where it was noted that ‘for thousands of today’s international seafarers, life at sea is modern slavery and their workplace is a slave ship.’<sup>1</sup> The commission painstakingly highlighted several issues that are affecting seafarers while they perform their duties on board and notes that there is the need to put in place positive measures to combat the agonizing pains and sufferings that they constantly face at sea. There are lots of abuses that have been inflicted upon them and a vast number of their rights have been trampled upon. However, while all these problems exist, vessels that have serious problems are not in the majority. Notwithstanding this fact, there is still the need to address the relevant issues under this theme.

This paper will however focus on four key rights that affect the seafarers which include; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; the elimination of discrimination and; the right to health and medical care. The concentration on these four rights does not however, eliminate the fact that other areas are of lesser importance but it has been selected due to the constraint of space and research limitations This paper aims to review the rights of the seafarers and to consider whether the current regulatory regime has sufficiently addressed the issues. The development of this research outlines the merits of the regulatory regime, discusses the inadequacies and makes suggestions for reforms.

### **2. The Legal Framework**

The International Labour organization (ILO) which was set up in 1919 is the main body responsible for the setting of standard at the international level for the welfare and protection of seafarers. Thus, the ILO which currently has 185 member states has adopted various instruments<sup>2</sup> which include series of Conventions, Protocols and Recommendations which are all estimated at 398 (with the Conventions numbering 189, Protocols numbering 6 while Recommendations are 203) for the purpose of setting labour standards specifically for the maritime sector.<sup>3</sup> The other relevant international agency is the International Maritime Organization (IMO) which is a specialized agency under the United Nations. It

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<sup>1</sup> International Commission on Shipping. *Ships, Slaves and Competition (Inquiry into Ship Safety)* (2000) p. 3

<sup>2</sup> <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO::> accessed on 29<sup>th</sup> August 2014

<sup>3</sup> D Fitzpatrick and M Anderson. *Seafarers Rights 2005*. Oxford University Press. p. 39

is noted<sup>4</sup> that seafarers have rights under the international regime, regional regime and different national regimes. In this regard, the rights of seafarers are variously embedded in human rights instruments and also in various laws that relates to the protection of workers both locally and internationally. Thus, the rights of seafarers cannot be considered in isolation from other bodies of international law. It must be viewed in the context of international human rights law,<sup>5</sup> ILO instruments<sup>6</sup>, IMO standards<sup>7</sup> and the International Law of the Sea. Interestingly, Fitzpatrick and Anderson note that IMO conventions are conceptually different from both ILO and human rights treaties. In this sense, it is perceived that both human rights treaties and ILO conventions intend to create rights for individuals. This can be asserted against the state in domestic courts. IMO conventions on the other hand do not and are not intended to create rights of this kind but are to impose obligations on states, a number of which have the effect of creating benefits (rather than rights) for seafarers.<sup>8</sup>

The International Maritime Organization (IMO) was established by governments as a specialized agency under the United Nations in 1948 for the purpose of providing machinery for intergovernmental cooperation for the regulation of ships engaged in international trade.<sup>9</sup> The responsibility of IMO is seen in the global regulation of all facets pertaining to international shipping. It also has a key role in ensuring that lives at sea are not endangered and that the environment is not polluted by ships' operations as noted in the IMO's mission statement: Safe, Secure and Efficient Shipping on Clean Oceans.<sup>10</sup>

## 2.1 The International Regime

The current legal framework<sup>11</sup> at the international scene for the protection of seafarers is the Maritime Labour Convention (MLC) 2006 which is a major new maritime labour instrument that was adopted by the ILO on 23<sup>rd</sup> of February 2006.<sup>12</sup> It is the fourth pillar of the international maritime regulatory regime which both fills a gap in the 1982 United Nations Convention on the Law of the Sea and complements the International Maritime Organization's core Conventions on ship safety and security, training and pollution prevention.<sup>13</sup> It also represents the first ILO convention to consolidate<sup>14</sup> nearly an entire sector of older ILO Conventions, and as a result it has been deemed a 'superconvention'.<sup>15</sup> In the words of Ariadne Abel, the MLC is an accomplishment and a novelty in its own right which provides a comprehensive codification of seafarers' rights, as well as health, safety and employment standards. It

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<sup>4</sup> Ibid p. 40

<sup>5</sup> The most important human rights treaties adopted by the UN organizations relevant to Seafarers are International Convention on the Elimination of All Forms of Racial Discrimination 1965 (CERD), International Covenant on Civil and Political Rights 1966 (ICCPR), International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and Convention on the Elimination of All Forms of Discrimination against Women CEDAW.

<sup>6</sup> Fitzpatrick and Anderson suggest that the unique feature of the ILO is its tripartite structure which provides for representation of governments, employers and workers in all ILO deliberative bodies and activities, including drafting Conventions and Recommendations.

<sup>7</sup> International Convention for the Safety of Life at Sea 1974 as amended and protocols thereto (the SOLAS convention); the International Convention on Standards of Training, Certification and Watch keeping for Seafarers 1978 as amended (the STCW convention; and the International Management Code for the safe Operation of Ships and for pollution Prevention 1993 (ISM Code)

<sup>8</sup> D Fitzpatrick and M Anderson (n 3) p. 48

<sup>9</sup> IMO. Note by the International Maritime Organization to the thirty-fourth session of the Subsidiary Body for Scientific and Technical Advice (SBSTA 34). Agenda item 6(b) - Emissions from fuel used for international aviation and maritime transport. Progress made on technical, operational and Market-Based Measures within the IMO (2011). <http://unfccc.int/resource/docs/2011/smsn/igo/126.pdf> Accessed on 29<sup>th</sup> August 2014.

<sup>10</sup> Ibid

<sup>11</sup> The regimes that were in operation prior to the MLC 2006 were those under the ILO and IMO bodies with distinct operational focus and applicability.

<sup>12</sup> M McConnell, D Devlin and C Doumbia-Henry. *The Maritime Labour Convention, 2006: A Legal Primer to an Emerging International Regime*. Martinus Nijhoff Publishers. 2011. p. 3

<sup>13</sup> Ibid. Introductory note.

<sup>14</sup> The idea behind this consolidation is to create equity for the practice in relation to the working and living conditions on board ships, which would benefit all stakeholders in the maritime sector.

<sup>15</sup> John Isaac Blanck Jr. 'Reflections on the Negotiation of the Maritime Labour Convention 2006 at the International Labour Organization'. *31 Tulane Maritime Law Journal*. p. 36 (2006)

further sets up enforcement and monitoring mechanism and an innovative amendment procedure.<sup>16</sup> This instrument was expected to take approximately five years to achieve the ratifications that were necessary to bring it into force. Thus, the MLC 2006 by virtue of Article VIII<sup>17</sup> entered into force on 20<sup>th</sup> August 2013 for the first 30 member States whose ratifications were registered by 20<sup>th</sup> August 2012. In this regard, as at 28<sup>th</sup> July 2014, there were 63 members of the ILO who have ratified the instrument with the government of Ireland being the latest to join on the 21<sup>st</sup> of July 2014.<sup>18</sup> It is important to point out that the scope of the MLC which is broad<sup>19</sup> is delineated in article 2, paragraphs 2 to 6. Article I (1) (f),<sup>20</sup> defines seafarer in a broad sense to mean any person who is employed or engaged or works in any capacity on-board a ship to which the MLC applies. This implies that the seafarer includes the captain of a ship as well as comedians or singers employed on a cruise ship. It also applies to 'all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks.'<sup>21</sup>

In the view of Bauer, the Convention represents a serious advance over the current amalgamation of international laws regarding seafarer rights.<sup>22</sup> He further notes that it provides only a modest benefit to seafarers because its mandates are incomplete, largely discretionary, and potentially unenforceable. However, this opinion is not shared by Christodoulou-Varotsi who emphasizes that the new system is anticipated to remedy the limitations that were seen in the old regime that were formally in operation.<sup>23</sup> Thus, it sets updated maritime labour standards; it reflects an adjusted methodology which was inspired to a great extent by the work of the International Maritime Organization, and it provides a comprehensive framework of reference for the industry. He observes further that one could note that the structure chosen by the international legislature covers the subject matter in a comprehensive manner by means of a single instrument as it clearly distinguishes rights and recommendations, and reserves a special place for compliance and enforcement related provisions.<sup>24</sup> In this manner, while it is acknowledged that the new legislation is comprehensive and covers a wide area of issues relating to seafarers, it is important to point out that the possibility of regular updates is an innovation that will easily allow the imputation of necessary and important reforms into the new regime. These will take care of issues that are crucial to seafarers in the course of time. The MLC 2006 is comprehensive and sets out, in one place, seafarers' rights to decent working conditions. It covers almost every aspect of their work and life on board including: minimum age, seafarers' employment agreements, hours of work or rest, payment of wages, paid annual leave, repatriation at the end of contract, on-board medical care, the use of licensed private recruitment and placement services, accommodation, food and catering, health and safety protection, accident prevention and seafarers' complaint handling.<sup>25</sup> The Convention is designed to be applicable globally, easy to understand, readily updatable and uniformly enforced.

### 3. The Protection and Enforcement of Seafarers' Rights

In the realm of seafarers' lives are enshrined many fundamental rights that have gained status based on the negative working and living conditions they have been subjected to by their employers. This position is validated by Bauer who observes that 'the greatest difficulty faced by seafarers is the fact that their

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<sup>16</sup> Abel Ariadne. 'The Maritime Labour Convention 2006 in the European Union' in Lavelle Jennifer (ed.), *The Maritime Labour Convention 2006: International Labour Law Redefined*. 2013. p. 1

<sup>17</sup> It states that this convention shall come into force 12 months after the date on which there have been registered ratifications by at least 30 members with a total share in the world gross tonnage of ships of at least 33 per cent.

<sup>18</sup> Maritime Labour Convention 2006 accessed on 05/08/2014 at [http://www.ilo.org/global/standards/maritime-labour-convention/WCMS\\_250355/lang--en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_250355/lang--en/index.htm)

<sup>19</sup> It applies to all seafarers unless it expressly provides otherwise.

<sup>20</sup> MLC 2006

<sup>21</sup> J I Blanck Jr (n 15) p. 43

<sup>22</sup> P J Bauer. 'The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms?' 8 *Chi. J. Int'l L.* 643 2007-2008. p. 644

<sup>23</sup> Iliana Christodoulou-Varotsi. Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: Limitations and Perspectives, *Journal of Maritime Law & Commerce*, Vol. 43, No. 4, October, 2012 p. 470.

<sup>24</sup> Ibid p. 472

<sup>25</sup> Maritime Labour Convention 2006 accessed on 05/08/2014 at [http://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/WCMS\\_219665/lang--en/index.htm](http://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/WCMS_219665/lang--en/index.htm)

legal rights are often hard to discern, as are the jurisdictions in which these rights can be enforced.<sup>26</sup> The reason for the above deduction is that seafarers are usually engaged on vessels that may be registered in a foreign country and while sailing, they will call at ports of countries that do not carry her flag. In certain circumstances, the vessel is owned by citizens of other countries; carries cargo owned by citizens of other countries and may have been insured and chartered by interests in other countries.<sup>27</sup> The problem of rights identification and enforcement is also aggravated in situations where seafarers are hired through recruiting agencies which is usually not located in the home country of the seafarers and as such, the law of another nation will become applicable to them in the circumstances.<sup>28</sup> It has also been a major problem prior to the ratification of the MLC 2006 that the rights of seafarers were spread throughout numerous related but distinct agreements which may or may not have been ratified by the relevant country or countries.<sup>29</sup>

The scope of their protection and rights are now covered by the Maritime Labour Convention (2006) which has consolidated all the conventions earlier ratified by different countries. This new regime embodies the various rights of seafarers which are provided under articles III and IV of the MLC 2006. The rights under article IV are directly under the responsibility of member states and as such, they must ensure that the rights are implemented fully in relation to the principles and requirements of the MLC.<sup>30</sup> In this perspective, it is observed that while their rights will be subject to Flag and Port State inspection, the manner in which the rights are to be implemented provides for flexibility as they can be carried out through national laws or regulations, collective bargaining agreements, practice or measures that are necessary in the circumstances.<sup>31</sup> The fifth title provides for the mode of compliance and enforcement of the provisions of the convention. This will require that 'ships carry a maritime labour certificate which certifies compliance, provides that each individual nation will be responsible for enforcing these provisions over all ships that sail under their flag, grants certain protections to whistle-blowers, and allows member nations to perform inspections of ships from other member nations that enter their ports to ensure compliance.'<sup>32</sup>

### **3.1 Elimination of All Forms of Forced or Compulsory Labour**

The MLC 2006 art III (b) provides that each member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to the elimination of all forms of forced or compulsory labour. The law, places the obligation on the ratifying state to ensure that its local laws are in conformity with the principles set down in the convention as it relates to forced or compulsory labour. It is noted that this is also a principal aim of the ILO<sup>33</sup> and as such, ILO C29, art2 (2) defines forced or compulsory labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.<sup>34</sup> The scope of forced or compulsory labour can be viewed in circumstances where there are refusals by ship owners to repatriate seafarers. In some cases, it is viewed as refusal to pay or withholding of wages or payment for overtime which tends to restrict the means of transportation of workers to their homes.<sup>35</sup> These are situations where violations of this right are usually experienced. It is believed that with the introduction and ratification of the MLC 2006, this injustice will be remedied adequately.

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<sup>26</sup> P J Bauer. 'The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms?' 8 *Chicago Journal of International Law*. p.645 (2007-2008)

<sup>27</sup> D B. Stevenson, *Book Review*, 36 *J Marit L & Comm* 567, 567 (2005) (reviewing Fitzpatrick and Anderson, eds, *Seafarers' Rights* (cited in note 3)).

<sup>28</sup> P J Bauer (n 26)

<sup>29</sup> *Ibid*

<sup>30</sup> Art. IV(5), at 4.

<sup>31</sup> D Fitzpatrick and M Anderson (n 3) p.46

<sup>32</sup> P J Bauer (n 26) p.647

<sup>33</sup> D Fitzpatrick and M Anderson (n 3) p.55. Both ILO C29 and ILO C105 are recalled in the Declaration of Fundamental Rights of the ILO and are the only international instruments that set out the definition of forced labour.

<sup>34</sup> Notably, it is not all forms of forced labour that are prohibited under the two ILO Conventions as such the exemptions lies in the activities that form part of the civic activities of a country such as military service.

<sup>35</sup> D Fitzpatrick and M Anderson (n 3) p. 55

### 3.2 Abolition of Child Labour

Article III (c) of the MLC 2006 posits that ‘each member shall satisfy that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to the effective abolition of child labour’. This provision has further qualifications as set out under Title 1 of the MLC 2006 which stipulates the minimum requirements for seafarers to work on a ship. Thus, regulation 1.1 whose purpose is to ensure that no under-age persons work on a ship stipulates the minimum age of work to be 16 and notes that no person below the stipulated age shall be employed or engaged or work on a ship.<sup>36</sup> Specifically, it expressly prohibits the above under Standard A1.1 (1) and goes further by expressly prohibiting night work<sup>37</sup> of seafarers under the age of 18 with exceptions to situations where effective training of the seafarers are concerned. Also, in circumstances where the work is likely to jeopardize the health or safety of persons under the age of 18, such are prohibited from employment or engagement as a seafarer.<sup>38</sup> There is also a guideline to the effect that ‘when regulating working and living conditions, members should give special attention to the needs of young persons under the age of 18.’<sup>39</sup> The above provisions can be observed to have taken care of issues that are related to the child which will serve to prevent any form of child labour. It is important to point out that there are other international instruments in this regard that protects children from economic exploitation.<sup>40</sup> There are other notable conventions dealing with the child under the ILO which has been adequately revised by the MLC 2006 under article X<sup>41</sup> and as such the age policy stipulated under those conventions will now be in accordance with the one stipulated in the MLC 2006.

### 3.3 Elimination of Discrimination

The MLC 2006 under Article III (d) provides that ‘each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to the elimination of discrimination in respect of employment and occupation’. The meaning of discrimination is considered by CERD<sup>42</sup> to mean: ‘...any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.<sup>43</sup>

The above international instrument is seen to prohibit discrimination on a variety of grounds as such complementing the provisions stipulated under the MLC 2006. Furthermore, discrimination is prohibited in other international instruments like the UN charter<sup>44</sup>, the UDHR<sup>45</sup>, the CCPR<sup>46</sup> and the CESC<sup>47</sup>. In a more specific focus, the Convention to eliminate all Forms of Discrimination against Women (CEDAW) protects all women from sex discrimination and obliges states to take positive measures to ensure the prohibition of sex discrimination.<sup>48</sup> All these instruments are set out to help in the protection of individuals working on the sea and in addition to the direct protection offered by the MLC 2006, seafarers can also gain from the scope of the other legal instruments if such is interpreted broadly. However it is noted that the practice is that multinational crews are prevalent in the shipping industry today and substantial number of state legislations allow discrimination in pay as regards

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<sup>36</sup> MLC 2006, Regulation 1.1 (1) and (2).

<sup>37</sup> In this context, night is defined in accordance with national law and practice and shall cover a period of at least nine hours starting no later than midnight and ending no earlier than 5a.m

<sup>38</sup> MLC 2006 Standard A1.1 (4).

<sup>39</sup> MLC 2006, Guideline B1.1

<sup>40</sup> Convention on the Rights of the Child (CRC), Article 32; the CESC, Article 10 (3) and also the ESC and revised ESC, Articles 7 and 17.

<sup>41</sup> Minimum Age (Sea) Convention, 1920 (No. 7) and Minimum Age (Sea) Convention (Revised), 1936 (No. 58)

<sup>42</sup> International Convention on the Elimination of All Forms of Racial Discrimination. It imposes on member states the obligation not to engage in any racially discriminatory action. Op.Cit no 3. p. 56

<sup>43</sup> CERD, Article 1(1)

<sup>44</sup> Article 1(3)

<sup>45</sup> Article 2

<sup>46</sup> Articles 2 and 26

<sup>47</sup> Articles 2 and 3

<sup>48</sup> D Fitzpatrick and M Anderson (n 3) p. 57

different nationalities of seafarers on their ships.<sup>49</sup> In this aspect, it can be deduced that this is a violation of the fundamental rights and principles of the seafarers which should be urgently addressed through the courts.

### 3.4 Right to Health and Medical Care

This right is guaranteed under Article IV (4) of the MLC 2006 and unlike the earlier discussed rights which are fundamental rights and principles; this right is categorized under the seafarers' employment and social rights. It states that every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection.<sup>50</sup> This is further provided under Title 4 of the MLC 2006 which sets forth requirements related to medical care on-board ships and ashore, ship-owners' liability, health and safety protection, accident prevention, access to shore-based welfare facilities, and social security.<sup>51</sup> Notably, Leary observes that the right to health includes three separate components: the right to safe and healthy conditions; health care freedoms which incorporates the right to control one's body and to seek health care without discrimination; and entitlement to a health care system that provides care on a non-discriminatory basis.<sup>52</sup> It is noted that States provide publicly funded health care on a different number of ways as exemplified in South Africa<sup>53</sup> and India who have recognized it to be a constitutional right. It is believed that the presence of these provisions will serve its purpose by ensuring that the rights of seafarers are duly protected in this regard.

## 4. Implementation and Enforcement

Seafarers' rights can be enforced through national legal apparatus as it is usually the closest point of call when it comes to enforcing legal rights. This is not to say that remedies cannot be sought under international jurisdictions. However, the scope for using international procedures to enforce seafarers' rights remains largely unexplored.<sup>54</sup> It is important to emphasize that standards produced by international bodies such as the International Labour Organization (ILO) and International Maritime Organization (IMO) are minions of international law.<sup>55</sup> Thus, given this background the difference that lies between international law and national law is noted in the fact that traditionally, the former creates rights and duties between states while the latter creates rights and duties involving individuals and companies in the national sphere.<sup>56</sup> The effect of the above position is that international law mainly binds states and in this regard where there has been ratification by a state of an international law, such state has directly signified her intention to be bound by the principles and dictates of the laws codified in such instrument. In this regard, the MLC 2006<sup>57</sup> gives jurisdiction to each member on matters stipulated in the Convention and expressly charges each member to implement and enforce laws or regulations or other measures that it has adopted under the Convention with particular emphasis to ships and seafarers under its jurisdiction.<sup>58</sup> It also puts in place a system that will ensure that there will be full compliance with the requirements of the Convention.<sup>59</sup> The implication of this is that States are charged with the responsibility to use its courts and other state apparatus as mechanisms to ensure that the provisions of the MLC 2006 is implemented and enforced. This process includes the regular inspection of ships with regards to certificate of compliance<sup>60</sup> as required under Article V (3) of the MLC 2006. Furthermore, states are required to exercise its jurisdiction and control over seafarer recruitment and placement services<sup>61</sup> and to also prohibit violations of the requirements of the Convention by ensuring

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<sup>49</sup> Ibid p.57-58

<sup>50</sup> MLC 2006, Article IV (4).

<sup>51</sup> D Fitzpatrick and M Anderson (n 3). p.52

<sup>52</sup> V Leary. *The Right to Health in International Human Rights Law*. (1994) *Health and Human Rights*, Vol 1, No 1; D Fitzpatrick and M Anderson (n 3). p. 74

<sup>53</sup> *Soobramoney v Minister of Health, KwaZulu-natal* (1998) 1 South African Law Reports 765 (CC). The law applies to both nationals and non-nationals.

<sup>54</sup> D Fitzpatrick and M Anderson (n 3) p. 75

<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> Article V provides generally for the implementation and enforcement responsibilities.

<sup>58</sup> MLC 2006, Article V (1)

<sup>59</sup> Ibid, Article V (2)

<sup>60</sup> This refers to a maritime labour certificate and a declaration of maritime labour compliance.

<sup>61</sup> MLC 2006, Article V (5)

that there is in place sanctions and corrective measures under its laws to serve as deterrents to violators.<sup>62</sup> The issue of ‘no more favourable treatment’ is also considered as the Convention notes that ships that have not ratified the Convention should not be accorded more favourable treatment than the ships that fly the flags. Thus, the position is that when a state ratifies a treaty, it undertakes both negative obligations to refrain from actions that violate the terms of the treaty and positive obligations which include taking affirmative action to guarantee that the rights are protected.<sup>63</sup> In this manner, the seafarers can be seen as being protected substantially given the introduction and implementation of the MLC 2006 by countries who form the major stakeholders in the business.

### **5. A Brief Consideration of Seafarers’ rights in Two Countries**

In this section, focus will be on Panama<sup>64</sup> which is regarded as the largest register in the world and also the largest employer of seafarers in the world.<sup>65</sup> Attention will also be given to Philippines which remain the forerunner by a considerable margin in terms of the percentage of supply of seafarers to the international market.<sup>66</sup> The general labour laws of Panama and specifically the provisions of the Panama Labour code has until 2009 been the only instrument where the legal rights of seafarers on Panamanian ships were contained.<sup>67</sup> Notably in 1998, there was the enactment of Decree Law No.8<sup>68</sup> which created a legal regime that applies to all seafarers whether national or foreign on Panamanian vessels.<sup>69</sup> There were a lot of controversies surrounding the implementation of this regime because it reduced and also removed certain key elements<sup>70</sup> that were present in the labour code and as such seafarers became less protected by these factors.<sup>71</sup> The current position is that Panama which is the largest flag state in the world, with nearly 25 per cent of the world’s merchant fleet flying its flag, became the fourth major shipping country in the world to ratify the Maritime Labour Convention (2006) in 2009.<sup>72</sup> This brings hope and positive news to seafarers in Panama as the provisions of the Convention is expected to be implemented by the ratification.

The Philippines is another important country in the maritime world as she is a major contributor to international shipping in its capacity as a crewing state.<sup>73</sup> The Philippines, which is the largest source of the world’s seafarers, with nearly 700,000, has nearly half of her workers working overseas.<sup>74</sup> In this manner, the Philippines is regarded as the largest source of the world’s seafaring workforce and the home of nearly one third – 30 per cent – of seafarers working on foreign flag ships.<sup>75</sup> Thus, prior to Panama’s ratification of the MLC 2006 in 2012,<sup>76</sup> the approach to seafarers’ rights has been disparate as there were no specific laws applicable to the unique working conditions of seafarers.<sup>77</sup> Also, despite the availability of labour laws and labour code in the country, the plights of seafarers were not adequately addressed. This had led to the enactment of the Migrant Workers and Overseas Filipinos Act<sup>78</sup> as an addition to the Labour Code in order to give seafarers protection.<sup>79</sup> It is noteworthy to observe that while seafarers’ rights were not adequately protected during the old regime, the right to

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<sup>62</sup> Ibid, Article V (6)

<sup>63</sup> D Fitzpatrick and M Anderson (n 3) p. 89

<sup>64</sup> Panama is a member state of the IMO.

<sup>65</sup> D Fitzpatrick and M Anderson (n 3) p.229

<sup>66</sup> Ibid p.230. It is approximately set at 28.1%

<sup>67</sup> Ibid p.382

<sup>68</sup> DL 8/98

<sup>69</sup> D Fitzpatrick and M Anderson (n 3) p.382

<sup>70</sup> This include right to strike, collective bargaining, minimum wage and compensation schemes for injuries or sickness.

<sup>71</sup> D Fitzpatrick and M Anderson (n 3) p.383

<sup>72</sup> [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_101639/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_101639/lang--en/index.htm) accessed on 09-09-2014.

<sup>73</sup> D Fitzpatrick and M Anderson (n 3) p.408

<sup>74</sup> [http://www.ilo.org/manila/info/public/pr/WCMS\\_187754/lang--en/index.htm](http://www.ilo.org/manila/info/public/pr/WCMS_187754/lang--en/index.htm). Accessed on 09-09-2014.

<sup>75</sup> Ibid. It also has a large domestic fleet, with nearly as many seafarers working on Philippines flagged ships.

<sup>76</sup> Ibid. This made the country to become the 30th member to have its ratification registered and join the group of the ‘first 30’ ILO countries to demonstrate their commitment to ensuring decent work for seafarer.

<sup>77</sup> D Fitzpatrick and M Anderson (n 3) p.409

<sup>78</sup> Republic Act 8042

<sup>79</sup> D Fitzpatrick and M Anderson (n 3) p.409

strike of seafarers was recognised by the Philippine Supreme Court in *Tipolo Shipping Inc. v NLRC*<sup>80</sup> where it observed that a strike *per se* is not a ground for disciplinary action against Filipino seafarers, as the law does not envisage seafarers suffering under unfavourable working conditions for the entire duration of their contract<sup>81</sup> Thus, it is noteworthy that the Philippine government who did not sign<sup>82</sup> some of the earlier ILO Conventions relating to seafarers<sup>83</sup> has taken a positive step by ratifying the new Convention which is a commendable action that will ensure that seafarers are given adequate and substantial protection in the course of their duties while on the sea.

## 6. Conclusion and Recommendations

Traditionally, the rights of seafarers are limited as seen in the case of *Hook v. Cunard SS Co Ltd*<sup>84</sup> where it was accepted for the master to exert power to detain and imprison crew. The situation has however been improved based on the entry into force of the MLC 2006 and its subsequent ratifications by different countries. This will mean that it will be applicable alongside other international Conventions for instance the UN Convention on the Law of the Sea 1982 which prescribes rights and obligations in relation to seafarers.<sup>85</sup> It is noteworthy to point out that on the 11<sup>th</sup> of April 2014 amendments were made to the Code implementing Regulations 2.5<sup>86</sup> and 4.2<sup>87</sup> and appendices of the MLC 2006 which was adopted by the special Tripartite Committee.<sup>88</sup> This will further<sup>89</sup> strengthen the rights of the seafarers and accord them a substantial equal treatment with land based workers. On the 18th day of January 2017, the Maritime Labour Convention (MLC) 2006, amendments of 2014 that is concerned with financial security of seafarers in situations that relate to abandonment (Reg 2.5) and contractual claims for compensation where a seafarer's death or long term disability<sup>90</sup> is in contention, entered into force. The implication of the above is that a certificate or other documentary evidence of financial security must be carried on board by each ship in order to be seen as complying with the new provisions.

There is no doubt that the MLC 2006 represents a success and a significant positive step for the plight of the seafarers as regards their rights. Notwithstanding this value that the Convention possesses, there are inherent weaknesses that have been recognised which need further considerations so as to make the instrument achieve its full purpose and bring about fairness and equity to the concerns of the seafarers. It is arguably true that no institution is perfect, however since the MLC 2006 is not a tree that remains rooted on the spot, it is expected that positive measures will be put in place to ensure that the Convention move forward through regular updating and amendments of its provisions. The road to reform has not always been an easy one for stakeholders. In this perspective, they constantly seek ways to improve the status quo with regards to the existing legal regime and the mode of achieving effective implementation. The major reform in the maritime sector that contributed positively to its development was the entry into force and continuous ratification of the MLC 2006 by different countries. In a bid to allow for future amendments, the Convention<sup>91</sup> made provisions under Articles XIV and XV for both the amendments of the provisions of the Convention and the Code respectively. The MLC 2006 has however not been without criticisms with respect to certain omissions and neglect of certain issues that concern seafarers. In this regard, the right to strike, criminalization of crew members, the abandonment of seafarers and availability of visas for shore leave are areas that have gained substantial prominence and attention in the industry.

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<sup>80</sup> GR 185776-78

<sup>81</sup> This decision was reached by reference to s.2, Rule XII, Book VI of the Rules and Regulations Governing Overseas Employment.

<sup>82</sup> D Fitzpatrick and M Anderson (n 3) p.431

<sup>83</sup> This include the ILO Merchant Shipping (Minimum Standards) Convention 1976 (ILO C147) and its Protocol.

<sup>84</sup> [1953] 1 All ER 1021

<sup>85</sup> In this regard, Articles 72, 230 and 290 are of important consideration.

<sup>86</sup> In the present heading, 'Standard A2.5 – Repatriation', replace 'A2.5' by 'A 2.5.1'

<sup>87</sup> In the present heading, 'Standard A4.2 – Shipowners' liability', replace 'A 4.2' by 'A 4.2.1'.

<sup>88</sup> [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/relconf/documents/meetingdocument/wcms\\_248905.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/relconf/documents/meetingdocument/wcms_248905.pdf).  
assessed on 10-09-2014

<sup>89</sup> The current legal framework provides considerable support for seafarers but this need to be sufficient.

<sup>90</sup> This is due to injury, illness or hazard (Reg 4.2)

<sup>91</sup> MLC 2006

It is observed by Bauer that the Convention did not expressly address the ability of the seafarers to uphold the various rights that have been provided through lawful strikes<sup>92</sup> which is a right that is well established for land based workers.<sup>93</sup> This right which is regarded as the most powerful tool of seafarers<sup>94</sup> can be used to pressurize the implementation of the conditions stipulated by the Convention. Notably, in the United States, the court mooted that a labour union which has signed a contract that includes an arbitration agreement cannot lawfully institute a strike.<sup>95</sup> This creates the problem of ensuring that an arbiter is present on board the vessel and the effect of seafaring contracts not containing such agreements as it may be to the detriment of the seafarers when it comes to the cost of retaining an arbiter.<sup>96</sup> In this regard, it is important that the Convention should address this issue as it has proved to be effective in 2007 where the Russian crew of a cargo ship successfully forced the ship-owner to release three months of unpaid salary to their families by embarking on strike and also in the circumstance where a Filipino crew organized a work stoppage to force its Greek ship-owner to release over a quarter of a million dollars in unpaid wages.<sup>97</sup>

The criminalization of seafarers in the case of a maritime accident is another important area to the shipping industry, stakeholders<sup>98</sup> and seafarers that was not addressed by the Convention.<sup>99</sup> This concern was raised in the European Union (EU) following the occurrence of pollution incidents and in this perspective; the court<sup>100</sup> expressed its opinion on the worrying trend especially in the EU on the criminalisation of the crew and master.<sup>101</sup> The issue of legality of criminalising crew members was put to test in 2008 where the EU Directive 2005/35/EC was challenged.<sup>102</sup> The Directive later faced a modification by Directive 2009/123/EC which led to the elimination of the possibility of imprisonment for unintentional discharge. As regards the position of criminalisation under International law, Professor Edgar Gold<sup>103</sup> observes that wilful and serious negligence must be established.<sup>104</sup> It is hoped that the MLC 2006 will consider this issue which was taken up by the IMO in 2006<sup>105</sup> and inculcate it through an amendment process as it will help in the enhancement of the rights of seafarers.

The abandonment of seafarers has been a major problem in the industry. This issue remained constant as it was reflected in 2013 in ‘the highly publicised case of the crew of the 43,866dwt TMT-linked woodchip carrier *Donald Duckling* where the crew were reduced to surviving by catching fish off the side of the vessel as she lay detained in the port of Tyne’<sup>106</sup> The incidental problems that are associated with the seafarers that are abandoned in a foreign port may include inadequate food and water, accommodation, clothing, safety and security, heating, unpaid wages, repatriation costs, medical and dental care.<sup>107</sup> Furthermore, there is the possibility that the seafarers might suffer detention and deportation which will negatively affect their abilities to travel to that same country or other countries. Therefore, it is the challenge for the maritime industry and lawmakers of national, regional and

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<sup>92</sup> Bauer observes that this right is limited in China, Liberia and the United Kingdom.

<sup>93</sup> P J Bauer (n 26) p. 655

<sup>94</sup> Ibid

<sup>95</sup> *Teamsters Local 174 v Lucas Flour Co*, 369 US 95 (1962).

<sup>96</sup> P J Bauer (n 26) p. 656

<sup>97</sup> Ibid p.657

<sup>98</sup> In 2006, the IMO issued a series of guidelines on the fair treatment of seafarers in the event of a maritime accident. They recognise the need among others, to ensure a fair investigation of the accused and also ensure a fair trial.

<sup>99</sup> MLC 2006

<sup>100</sup> *Mangouras v. Spain* App no 12050/04 (Application No)[2010] ECHR 1364

<sup>101</sup> The court considered whether the sum set for bail in the applicant’s case had been excessive and had been fixed without his personal circumstances being taken into consideration, in breach of Article 5(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>102</sup> *R(on the application of INTERTANKO) v. Secretary of State for Transport* (case 308/06)

<sup>103</sup> Edgar Gold, ‘The Fair Treatment of Seafarers’ (2005) 4:2 WMU Journal of Maritime Affairs at 129-130.

<sup>104</sup> International law is quite clear on what criminal action may and may not be taken against seafarers as a result of a maritime accident on the high seas. The jurisdiction for such criminal action is solely reserved to the flag state and the state of nationality of the persons concerned. Furthermore, within coastal state jurisdiction, states are not permitted to imprison anyone for polluting the marine environment except in cases of wilful and serious negligence.

<sup>105</sup> Op. Cit no 91

<sup>106</sup> *Seafarers’ Rights International. Annual Review 2013.* p.12

<sup>107</sup> Ibid

international regimes to ensure that these legal issues should be resolved by clear and simple uniform laws at no cost to seafarers who represent the victims of abandonment. It is understood that the passing into force of MLC 2006 was significant in this context because it made provision requiring financial security in the case of repatriation.<sup>108</sup> This will be useful in the delivering of a practical working solution for abandoned seafarers as it is aimed at giving substance to the requirement of financial security contained in the original Regulation 2.5 of the MLC 2006. Notably this amendment took place on the 14<sup>th</sup> of April 2014 and it is hoped that the issue of repatriation and abandonment will be positively addressed by the various countries that have ratified the Convention.

The availability of visas for shore leave is very crucial to the implementation of the second Title of the Convention, 'Conditions of Employment' which requires that seafarers be granted shore leave for their own health and well-being.<sup>109</sup> This provision is observed by Bauer to be a step in the right direction but he however notes that the Convention has failed to recognize that the availability of shore leave is sometimes dependent on more than the ship-owner's discretion and as such it becomes crucial that the Convention should make a more concerted effort to ensure that it is provided adequately by the twin efforts of the port countries and the ship-owners.<sup>110</sup>

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<sup>108</sup> Ibid p.13

<sup>109</sup> MLC 2006, Regulation 2.4 (2)

<sup>110</sup> P J Bauer (n 26) p. 653