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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**AN ANALYTICAL REVIEW OF THE  
TREATMENT OF SEAFARERS UNDER THE  
CURRENT MILIEU OF THE  
INTERNATIONAL LAW RELATING TO  
MARITIME LABOUR AND HUMAN RIGHTS**

by

**MARIA ROWENA S. BUENA-HUBILLA**

**Philippines**

A dissertation submitted to the World Maritime University in partial fulfilment  
of the requirements for the award of the degree of

**MASTER OF SCIENCE**

**in**

**MARITIME AFFAIRS**

**(MARITIME LAW AND POLICY)**

2009

## DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The content of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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## ACKNOWLEDGEMENTS

First and foremost, I am offering my prayer of gratitude to Almighty God, the source of infinite wisdom and truth, my guiding strength and my refuge during unbearable times.

My deep gratitude to my family, for their unconditional love, support, patience, and understanding during the entire 17 months of my studies at the World Maritime University (WMU).

In the same way, I would like to extend my profound gratitude to Dr. Yohei Sasakawa, my benefactor, whose kindness and unparalleled generosity made my study at WMU possible. A gesture of appreciation is also given to Mr. Eisuke Kudo and the rest of the people behind the “Friends of WMU Japan”, Ocean Policy Research Foundation (OPRF), for making a global network of friends and international cooperation of WMU Sasakawa Fellows.

I am extremely grateful to my supervisor, Dr. Maximo Q. Mejia, Jr., for lending me his valuable insights, knowledge and expertise and for painstakingly assisting me through the completion of my dissertation. A special tribute also to Dr. Proshanto K. Mukherjee, a great mentor with a kind heart, whose teachings are of immense value to the students.

Likewise, I am particularly indebted to my friend and colleague in the profession, Atty. Jabeth Sena Jephath A. Dacanay, whose valuable inputs and unselfish assistance tremendously helped me in my dissertation.

Thank you also to a great lady, Cecilia Denne, for patiently assisting me in obtaining the reference materials needed for my research.

My heartfelt appreciation for the camaraderie and friendship, fun of learning and memorable experiences shared with my friends and classmates at WMU, more particularly to the MLP Class of 2009, a class known for combining learning with leisure and pleasure. Kudos to you all!

This acknowledgement will not be complete without expressing my gratitude to the Tito's and Tita's and their families, whose homes were opened to us. Their warm hospitality somehow lessened our feeling of homesickness, especially during the bitter cold months of winter.

To the rest of the Filipino community at WMU, including my fellow Filipino WMU students of Class 2009, 2008 and 2010, thank you for the friendship, shared laughter, tears and memories.

Finally, to my officemates in the Maritime Industry Authority (MARINA), particularly my colleagues and staff at the Maritime Legal Affairs Office (MLAO), my special thanks for their unwavering support and belief to my capabilities.

## ABSTRACT

Title of Dissertation : **An Analytical Review of the Treatment of Seafarers Under the Current Milieu of the International Law Relating to Maritime Labour and Human Rights**

Degree : Master of Science (MSc)

The humane treatment of seafarers has been a long standing issue synchronic with the evolution of seafaring. Their categorisation as a special group of maritime workers was borne out of the distinctive nature of their work on board the ship.

The far reaching expanse of the sea made them isolated and inaccessible from the protection of a legal system that normally cease or change at every border of a territorial State. This is where the seafarer's human rights and welfare becomes vulnerable, in the face of legal complexities and uncertainties.

Having in mind the disadvantaged position of the lowest members in the shipping society, and the rampant violation of their rights brought about by the rising trend in the criminalisation of seafarers in the event of maritime accident, denial of shore leave and abandonment of seafarers, various international laws and legal instruments were formulated and instituted by the different international bodies and entities to address the above stated problems. This paper will, therefore, undertake a critical analysis of the different legal regimes that are relevant to the rights of seafarers, for the purpose of determining their efficacy in protecting the rights and interests of the seafarers.

This is in the light of the fact that among the numerous international instruments existing today, nothing ever dealt specifically at protecting the seafarer's human rights and welfare while at the same time the violation and disregard of their fundamental rights continue. The inevitable effect from the unrelenting ill-treatment of seafarers is being manifested by the occurring shortage of ship officers and the waning interest in the seafaring career which will undoubtedly hamper the efficiency of the world's fleet that is being manned and operated through the unrivalled skills of the seafarers.

Keywords: treatment of seafarers, protection of human rights and welfare, international instruments, criminalisation of seafarers in the event of maritime accident, shore leave rights, abandonment

## LIST OF ABBREVIATIONS

IMO	-	International Maritime Organization
ILO	-	International Labour Organization
UN	-	United Nations
UDHR	-	United Nations Declaration of Human Rights
UNCLOS	-	United Nations Convention on the Law of the Sea, 1982
STCW	-	The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended
ISM	-	The International Management Code for the Safe Operation of Ships and for Pollution Prevention, 1993 (ISM Code)
MARPOL	-	The International Convention for the Prevention of Pollution From Ships, as modified by the Protocol of 1978 (MARPOL 73/78)
SOLAS	-	International Convention for the Safety of Life at Sea
ISPS	-	The International Code for the Security of Ships and Port Facilities Code
SID	-	Seafarer's Identity Document
EU	-	European Union
US	-	United States
ITLOS	-	International Tribunal for the Law of the Sea
ITF	-	International Trade Union Federation
MLC	-	Maritime Labour Convention
ICC	-	International Criminal Court
HRC	-	Human Rights Council
FOC	-	Flag of Convenience
CMI	-	Comite Maritime International
UNCTAD	-	United Nations Conference on Trade and Development

- ICCPR - International Covenant on Civil and Political Rights
- ICESCR - International Covenant on Economic, Social and Cultural Rights
- ICTR - International Criminal Tribunal for Rwanda
- IHCR - International Human Rights Commission
- UNSC - United Nations Security Council



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## CHAPTER I : INTRODUCTION

*“The punishing treatment meted out to seafarers, on whom international sea trade and the prosperity of nations depend, not only was disrespectful, wrong, unfair and unjust, but also contrary to international law.”*

- E.E. Mitropoulos, IMO Secretary General -

### 1.1 Background

The origin of seafaring started from the time, when man in his struggle for survival, learned to conquer the sea in his quest for livelihood and adventurism. It remained one of the most dangerous professions where toiling amidst the harsh elements and perils of the sea becomes a way of life.

Hence, seafaring meant “danger, isolation and restriction” where the protection of legal system is not easily accessible to seafarers.<sup>1</sup> While there are some informal terms or references purposely for seafarers, nothing close to a “code of law governing their rights and duties” exist and any reference to seafarers is more often than not “limited, scanty and somewhat obscure”.<sup>2</sup>

The isolation effect of working onboard a ship has its own legal consequence. Inaccessibility or non-accessibility to legal system occurs when legal jurisdiction ceases at the end of the territorial state. The so-called legal isolation occurs because laws or any regulation governing the seafarers on board the ship changes within the ship community while on high seas. What takes place is the “custom of the sea”<sup>3</sup> that evolved and transferred from one ship to another through word of mouth.

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<sup>1</sup> Deirdre Fitzpatrick & Michael Anderson, *Seafarers’ Rights*, Oxford University Press, 2005 at p. 3.

<sup>2</sup> *Ibid.* at p. 4.

<sup>3</sup> *Ibid.*

Notwithstanding the recognized limits of customary rights and obligations which the seafarers have accepted, they were able to know the difference between a reasonable and abusive enforcement and application of rules on board the ship. Numerous instances showed that seafarers would usually oppose any form of ill-treatment against them and this is shown by their unwillingness to work efficiently, by staging mutiny or by jumping ship or desertion or physical aggressiveness or retaliation. Furthermore, whatever bad experiences they had on a particular ship is undoubtedly spread throughout every port of call where the ship docks, to warn prospective seafarers.<sup>4</sup>

In *The Minerva (1825)*<sup>5</sup> case, Lord Stowell, the leading British Admiralty judge has this to say about merchants and seafarers:

*“...on the side are gentlemen possessed of wealth and intent, I mean not unfairly, upon augmenting it, conversant in business and possessing the means of calling in the aides of practical and professional knowledge. On the other side is a set of men, generally ignorant and illiterate, notoriously and verbally reckless and improvident, ill provided with the means of obtaining useful information and almost ready to sign any instruments that may be proposed to them; and on all accounts requiring protection, even against themselves.”*

The foregoing premise was borne out of the belief that seafarers are naturally reckless and belongs to the disadvantaged class of society where they seldom enjoy and exercise employment bargaining rights. Most often than not, the laws that is formulated for seafarers regard them as “objects of protection rather than as rights bearing legal person with legitimate claims and expectation”.<sup>6</sup> “Objectification in its simplest form is treating a person as a thing.”<sup>7</sup> It allows the “objectifier” to deprive the humanity of the “objectiffee” thereby justifying the maltreatment of the

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<sup>4</sup> *Ibid.* at pp. 4-5.

<sup>5</sup> 1 Hagg Adm 347 (1825).

<sup>6</sup> *Supra*, footnote 4 at pp. 18-19.

<sup>7</sup> Caroline Graham, *Maritime Security and Seafarer’s Welfare: Towards Harmonization*; WMU Journal of Maritime Affairs, (2009) Vol. 8, No. 1, at p. 77, citing Pribram E.D. *Female Spectators*. In S. Jackson, et. al. *Women’s Studies: Essential Readings*, New York: New York University Press, 1993.

“objectiffee”.<sup>8</sup> This is the reason why there is a raging debate currently rising on the issue of ill-treatment and violation of seafarers’ human rights because seafarers are continually seen and used as objects rather than as human beings with rights and feelings.

Treatment of seafarers, whether fair or unfair, was for sometime, dictated by the socially and financially advantaged “superiors”.<sup>9</sup> Some authorities say that the behaviour or actions taken against seafarers does not *per se* constitute “fair or unfair treatment”, but it is in the manner of implementing, applying or not complying with various law or international rules and regulations which tantamount to unfair or fair treatment. Under the law, the guilt or innocence of seafarers is not really the issue but whether or not the requirement of “due process of law and the principles of human rights” was complied at all.<sup>10</sup>

## 1.2 Objectives

The objective of this research is to present and identify the most common forms of violation of seafarers’ rights in terms of their work and living conditions on board, by making a thorough discussion of the prevalent issues relating to the treatment of seafarers. It aims to undertake a comparative analysis of how the human rights aspect of seafarers are treated by the society and the maritime sector as a whole and to determine if the measures and remedies that are currently being undertaken or proposed to be undertaken will ultimately address the allegations of unfair treatment of seafarers that leads to the violation of their human rights. Likewise, the purpose of this paper is to undertake a critical analysis of the applicable and existing international legal frameworks adopted by the ILO and IMO including the proposed legal measures

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<sup>8</sup> *Ibid.*

<sup>9</sup> See Laszlo J. Kovats, Ind Mem, *From Fair Treatment to Human Rights*. This is an excerpt from a presentation given to the CMMC Conference on Security of Ships, Ports and Coasts, Halifax: Canada, September 2005, IFSMA Newsletter-The International Shipmaster Link, No. 47 issue, September 2005, pp. 4-7.

<sup>10</sup> Esther Mallach, *The Fair Treatment of Seafarers*; Dabelstein & Passehl Rechtsanwälte, Hamburg: Leer, [http://195.178.246.26/maritime/FairTreatmentofSeafarers\\_02072008.pdf](http://195.178.246.26/maritime/FairTreatmentofSeafarers_02072008.pdf), July 14, 2008, retrieved on June 17, 2009.

and instruments, to determine their efficacy and effectiveness in promoting and advancing the interests of seafarers in terms of protecting their basic human rights as an individual maritime worker. Finally, to arrive to a defined conclusion based on the analytical study of the issues at hand, for the purpose of recommending sound measures and to provide an avenue for debate on the humane treatment of seafarers.

### **1.3 Scope and Limitations**

This paper will cover a discussion of the most recent issues relating to the treatment of seafarers which affects not only their working and living conditions on board the ship but on the seafaring profession as a whole. The specific focus of the discussion will be on the interface of the maritime and labour laws that leads to the human rights regime governing the seafarers. However, this paper will undertake to proceed with the study through an objective analysis of the various issues at hand and does not intend to categorize the treatment of seafarers as either “fair or unfair” despite the intermittent mention of said terms. And while it is recognized that the issue on the treatment of seafarers encompasses a whole gamut of topics which may begin from the time of their training and pre-employment processes until their separation and/or dismissal from the service, the present study will, however, emphasize more on the focal issues presently affecting the seafarers such as the criminalisation of seafarers in the event of maritime accidents, including other related issues such as abandonment, repatriation and right to shore leave.

### **1.4 Methods and Materials**

The research focuses on the identification of different issues relating to the treatment of seafarers, by utilising the qualitative method in understanding and examining the different perspectives and aspects of the issues at hand. The primary source of the research and analysis will be pertinent sections and provisions of the labour, maritime and human rights law, both within the purview of domestic and international area of jurisdiction including but not limited to relevant international conventions and applicable treaties and other international instruments as well as case laws and jurisprudence. This was done through conduct of library research on various reference



books that deals with the topic or has relevance thereto. However, in view of the limited number of books on the topic, resort to secondary sources was undertaken to further the research. Secondary sources includes a compilation of past and present journals, articles, editorials, dissertations and written communications from relevant national and international agencies and bodies. Again, by reason of limited resource materials available in the library, recourse to internet research was done particularly utilising the official websites of the ILO and IMO. The other forms of information gathering included direct interaction with the actual subject, the seafarers, thru the conduct of personal interviews for the purpose of obtaining first hand information on the issue based on the actual experiences of the seafarers. The personal interview of Filipino and Myanmar crew was conducted on board *MV Morning Glory*, a Swedish owned ship car-carrier docked along Malmo Harbour. Further, excerpts from public lectures of people known as experts and authorities in the particular field of discipline was considered as additional source of information and verification due to their varying points of view and differences in opinion which effectively generate fresh ideas and alternative approaches necessary to arrive to a conclusion. But for the purpose of emphasising an in-depth explanation, discussion and understanding of the pertinent issues at hand, a possible integration of the quantitative mode of research maybe undertaken by means of assessment, evaluation and comparative analysis of the different surveys and other statistical data available which will be incorporated to give support and justification to the study.

## CHAPTER II: PERTINENT ISSUES AFFECTING THE EXERCISE OF THE RIGHTS OF SEAFARERS

### 2.1. Criminalisation of Seafarers in the Event of Maritime Accident

A sector of the international community within the economic world of shipping which the domestic law jurisdiction cannot fully extend its protection to their members' human rights is the world's shipping manpower or the seafarers.<sup>11</sup>

The "criminalisation of seafarers" is the focal point of issue prevailing within the shipping manpower industry today, where the general direction is to treat maritime accidents resulting in marine pollution as crimes and the pre-judged culprits are the seafarers particularly if the maritime accident involved intentional discharge of oily wastes.<sup>12</sup>

Some cases reported of ship masters and their crew being arrested and detained for an indefinite period of time in different kinds of criminal law jurisdictions and proceedings, where the very basic rights of due process including right to counsel and self-incrimination are deprived or not given to them. More often than not, the seafarers are unreasonably forced to act as "material witness" or be themselves charged or accused of having caused the ensuing maritime accident that resulted to marine pollution. This kind of practice being tolerated despite evidence that the seafarers in question exercised good seamanship and there was no finding of fault on the part of the seafarers.<sup>13</sup>

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<sup>11</sup> *Supra*, footnote 9.

<sup>12</sup> See CMI 2006 Abstracts, Kim Jefferies, Senior Claims Executive, Legal Adviser, Gard A.S., excerpt of the précis entitled *The Fair Treatment of Seafarers: A Marine Insurance Perspective*, presented during the panel discussion on 'The Fair Treatment of Seafarers in the Event of a Maritime Accident', February 13, 2006.

<sup>13</sup> See CMI 2006 Abstracts, Edgar Gold, AM, CM, QC, Marine and Shipping Law Unit, TC Beirne School of Law, University of Queensland, excerpt of the précis on the Overview of the Session, presented during the panel discussion on *The Fair Treatment of Seafarers in the Event of a Maritime Accident*, February 13, 2006.

### 2.1.1 Scapegoating the Seafarers

Criminalisation of seafarers and making them as human pawns in the event of maritime accidents is reprehensively unfair. Recently the shipping industry is disturbed by the act of coastal states in harassing, arresting and detaining for unreasonably long period of time without filing any complaint or charge against the ship master and crew members of the vessel involved in maritime accidents that caused marine pollution.<sup>14</sup>

However, some authorities claim that the criminalisation of seafarers is politically motivated or done for the purpose of collecting revenue. Regardless of the motives for the imposition of criminal liability against seafarers, there is no denying of the fact that seafarers are continuously and unjustly being made scapegoats for any major maritime accidents, as reported in some of the recently and widely published cases of maritime incidents or accidents. Take the case of Captain Apostolos Mangouras who was the master of the oil tanker *Prestige* which, after having denied a place of refuge to undertake salvage operations, sank off the west coast of Spain in November 19, 2003, where it broke in two after its hull plates failed in the prevailing rough seas, causing massive oil pollution in the area. Captain Mangouras was held in Spain for almost two (2) years without trial and reports of his first three (3) months in prison showed that he was kept in high security and denied access to legal assistance or communication from people attempting to assist in his plight. He was only transferred from prison to a detention centre after a P&I club bailed him out.<sup>15</sup>

Similarly, in the case of Captain Karun Sunder Mathur, master of the tanker *Erika* which after breaking in two, sunk along the vicinity of the French Coast in December 1999, due to bad weather condition. Captain Mathur was arrested and charged by the French authorities for allegedly endangering lives and causing marine pollution. He was imprisoned for an indefinite period and was released only after pleas of intervention from different maritime sectors and concerned associations. He was

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<sup>14</sup> Edgar Gold, *The Fair Treatment of Seafarer*, WMU Journal of Maritime Affairs, Vol. 4, No. 2, , 2005, pp.129-130.

<sup>15</sup> Rodger MacDonald, FNI, Secretary General, International Federation of Shipmasters' Associations, *Criminalisation in Shipping*; Seaways Journal, March 2005, p. 5.

finally able to return to India, his home country, in February 2000. On the other hand, the French courts did not attempt to hold liable the classification society responsible for ensuring and certifying the vessel's seaworthiness on the ground that they represent a sovereign state. In the case of the *Tasman Spirit*, the ship's master, officers and some crew as well as the salvage master were held in custody in Pakistan in 2004 and were only released from prison after the intervention of no less than the Secretary General of the IMO and other European maritime sectors.<sup>16</sup>

The most recent case involves the master of the tanker *Hebei Spirit*, where Captain Jasprit Chawla and his chief officer Syam Chetan were held guilty and sentenced to jail by a South Korean Court in December 2008. An out of control crane barge hit their anchored ship, causing an oil spill after the collision. In June 2008, the Korean court cleared Chawla and Chetan of responsibility for the collision resulting to pollution, however, they were continuously detained pending the hearing and resolution of the appeals court which rendered the guilty charge in December 2008. They were released from jail sometime in January 2009 by virtue of a bail while the final decision is pending before the Korean Supreme Court against their conviction for alleged negligence.<sup>17</sup> After 18 months of detention in South Korea, the so-called "Hebei Two", Captain Chawla and Mr. Chetan were finally allowed to return to their home country, cleared of all criminal charges.<sup>18</sup>

In their speeches at the CMI International Working Group on the Fair Treatment of Seafarers in February 2006, Professor Proshanto Mukherjee and Professor Edgar Gold summarized the frequently encountered violations committed against seafarers that lead to the so-called 'unfair' treatments, to wit:

- Breaches of UNCLOS under Art. 230 imposing penalties against foreign seafarers in territorial waters without an indication of the required wilful and serious act of pollution;

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<sup>16</sup> *Ibid.* at p. 6.

<sup>17</sup> The Sea, news article entitled *Gratitude for Maritime Community Support: Hebei Spirit pair released from jail*, March/April 2009 issue, p. 3.

<sup>18</sup> Seaways Journal, news article entitled *A Form of Justice*, July 2009 issue; p. 1; WMU Library and Information Service, week 28; July 3-10, 2009; p.18.

- Failure to investigate the MARPOL, Rule 11 a/b Annex 1 exemption;
- Infringements of human rights, i.e. the presumption of being innocent until proven guilty, by incarceration without charge;
- Criminal action is filed against seafarers involved in maritime accidents which are beyond their control for reason that in most maritime accidents there is a likelihood of a presence of human error factor or emission which does not necessarily involve those working on board the ship (the master, officers and crew). Other factors such as unseaworthiness of the ship (improperly constructed or repaired ship) and adverse weather conditions which is also beyond the control of the seafarer, are some of the reasons that may have caused the accident;
- Seafarers are also unreasonably held or detained even if there is no finding of fault against them because they are used or forced to become “material witnesses” for the maritime accident case;
- Access to legal assistance or counsel is denied;
- No due process is afforded to the seafarers because charges or criminal complaints are filed against them but they are not given the opportunity to make their proper defence;
- Bail is set to unreasonably high amount even if there is no finding of fault against the seafarer (breach of Art. 292 UNCLOS);
- Denial of other humanitarian assistance such as interpreter services and lack or absence of communication while in confinement, which further isolates the seafarer;
- Instances where seafarers are instructed and forced to defy the law for fear of dismissal from work and loss of income to support their families.

### 2.1.2 European Union (EU) Directive Imposing Criminal Sanctions for Ship Source Pollution

The European Parliament overwhelmingly approved sometime in March 2005 the Directive which criminalises seafarers in the event of accidental pollution.<sup>19</sup> The EU Directive imposes criminal sanctions for ship source pollution if the discharges of polluting substances are committed with intent, recklessly or by serious negligence. Clearly, the EU Directive is uncertain as to what kind of discharge can be considered criminally liable. It must be stressed that oil pollution may be caused either through operational discharge or through accidental oil spill. Operational discharge is considered intentional because it was done knowingly and purposely as part of the ship operation. This is where criminal liability attaches if the element of wrongful intent and knowledge is present. *Mens rea* is defined as a “guilty mind”; a guilty or wrongful purpose; a criminal intent. *Mens rea* refers to an individual’s state of mind when a crime is committed. Criminal status employ terms such as knowingly, wilfully, intentionally and purposely to describe the state of mind one must have in order to possess “a guilty mind”.<sup>20</sup> Criminal intent is an intent to commit an *actus reus* without any justification, excuse, or defense.<sup>21</sup> In other words, oil discharge can only be considered a criminal offence if the requisite “*mens rea*” or element of wrongful intent or other fault is proven. The general principle being based on the maxim *actus non facit reum nisi mens sit rea* which basically means that only a guilty mind makes an act criminal.<sup>22</sup>

On the other hand, oil pollution may result through accidental oil spill which usually occur during maritime accidents. By the word “accident” it could mean an unforeseen, fortuitous, or unexpected event. And according to Professor Gold, the best definition of “maritime accident” may be:

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<sup>19</sup> Proshanto K. Mukherjee, *Criminalisation and Unfair Treatment: The Seafarer’s Perspective*, The Journal of International Maritime Law, 12(1), 2006, pp. 1-12.

<sup>20</sup> Calvin J and Coleman S., 2004, *American Law and Legal Systems*; Fifth Edition, New Jersey: Pearson Education Inc.

<sup>21</sup> Garner, Bryan A., *Black’s Law Dictionary Deluxe*, 8<sup>th</sup> Ed., West Publishing Co., USA, p. 825.

<sup>22</sup> *Supra*, footnote 19 at pp. 1-2

*“any unforeseen contingency that is connected with the sea and in particular with the navigation and handling of ships, and the documents, equipment, machinery, material, cargo or persons on board such ships.”*<sup>23</sup>

Hence, accidental oil spill cannot be considered as criminal in nature because there is no intent or prior knowledge to cause oil pollution through maritime accident. The accident being unforeseen, fortuitous and unexpected could not in any way be considered to be deliberate and negligent. The EU Directive is, therefore, in clear contravention of the basic tenets of criminal law because it considers accidental oil spill as a criminal offence, whereas for criminal liability to occur, there must be present the element of “mens rea” or the intent and prior knowledge to commit any act of crime. The basic requirement in criminal law is that the so-called “mens rea” or intent to commit the crime must be proven and established beyond reasonable doubt before the accused is held guilty of a crime. In the case of seafarers unjustly detained without trial for the alleged criminal act of causing the accidental oil pollution, he is inexplicably and unjustly treated as criminal even before he was found guilty of the criminal charge. Undeniably, this is a clear violation of his fundamental human right to due process and right to liberty.

The EU Directive is in violation of the MARPOL Convention because it clearly provides therein that the basis for liability is when the “damage resulted from their personal act or omission committed with the **intent to cause such damage and with knowledge that such damage would probably result.**”(emphasis provided). Hence, liability will only attach when the damage was done with intent **and** with knowledge that it would probably result as it is. Absent the requisite knowledge, there would be no liability from the occurring damage even if the damaging act was done intently. Whereas the EU Directive is formulated in such a way that the basis for liability exist when the damage is committed with **intent, knowledge or serious negligence.** (emphasis provided). It means, therefore, that the presence of any of the 3 above-mentioned factors such as intent, knowledge or serious negligence, will be considered

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<sup>23</sup> Gold, Edgar, paper submitted at the First Working Group Report, CMI International Working Group on the Fair Treatment of Seafarers, January 2006

as basis for the liability of the accused. Dr. Mensah<sup>24</sup> himself cannot help but opined that a State member of the European Union that gives effect to the EU Directive “would be in breach of its obligations to other state for a discharge that results solely from serious negligence.”<sup>25</sup>

## 2.2 Abandonment of Seafarers

When a seafarer is away from home and financially constrained due to unpaid wages, the worst abuse he can get is being abandoned by his employers, left at the mercy of the elements of the sea and faced by abusive port state authorities. As in any case of abandonment, the crew were unexpectedly deserted by the employer in a country where they do not know or understand the language and they were forced to fend for themselves without any sufficient money due to unpaid wages. With dwindling supplies and ship provisions running out, their uncertain future looked dimmer with each passing day while no support and assistance is being extended by the shipowner/employer or the flag State or port State authorities concerned.<sup>26</sup>

The reasons why abandonment of seafarers occur, varies depending on the attending circumstance prevailing at the time. Some shipowners do not care at all about the welfare of their crews and what matters for them is money and the business side of shipping. Hence, when bad business occurs and they encounter financial difficulties, shipowners and employers do not hesitate to abandon the ship’s crew despite knowing they are in a foreign port away from their home countries and without any fuel, food, water, means of communication and worst, unpaid wages. Sometimes, the shipowners opt to just abandon the crews because he can save financial costs by not paying the crews wages and the ship’s fuel and other supply provisions. This usually happen when the ship is already old and nearing the end of its sea life and usefulness. The shipowners would sometimes realise that the value of the ship is less than the cost it would take to pay the crews wages and his creditors. Hence, the decision to abandon

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<sup>24</sup> Retired president and judge of the International Tribunal for the Law of the Seas (ITLOS)

<sup>25</sup> *Supra*, footnote 19, citing footnote Sandra Speares, *EU criminalisation rules rapped by Law of the Sea judge* Lloyd’s List, 6 October 2005 at p.2. This write up is a report on the Cadwallader memorial lecture at the London Shipping Law Centre

<sup>26</sup> Couper, A.D. with Walsh, C.J., Stanberry, B.A. and Boerne, G.L., *Voyages of Abuse: Seafarers, Human Rights and International Shipping*, Pluto Press, London, Sterling, Virginia, 1999, pp. 42-43.



the ship becomes the most practical way of cost avoidance. Finally, it is the general observation in the shipping industry that incidents of abandonment of seafarers occur at its highest when the freight rates drop and shipping companies encountered difficulties in staying afloat in the business.<sup>27</sup> This is a trend that expectedly happens in a commercial world such as shipping where every facet of the business is dictated by the global economic condition.

One such reported incident of abandonment is the case of *Obo Basak* where 31 Turkish crew of the bulk oil carrier was abandoned by the shipowner Marti Shipping of Turkey. The ship was arrested in the French port of Dunkirk in July 1997 by virtue of a joint action filed by the creditors of Marti Shipping. Among those not paid for the previous nine (9) months were the 31 Turkish crew of the *Obo Basak*. And money was not the only shortage but also food and fuel oil for heating the ship. After repeated and ignored requests to Marti Shipping and with food supply running out on board the ship, the seafarers were finally forced to appeal on French television network for help from the community in order to survive.<sup>28</sup>

The *Obo Basak* clearly illustrate a simple case of claims for unpaid crew wages which became complicated and muddled in a legal mumbo jumbo because of the varying jurisdiction of the flag States and port States involved. But what is more significant with the *Obo Basak* case is that it emphasized the limited immigration rights of abandoned seafarers where they were treated as illegal immigrants and therefore cannot be repatriated in the ordinary way notwithstanding their undue dismissal from the work and being a recipient of merciful offer of repatriation from people and entities who came to know of their plight. Finally, the *Obo Basak* case highlights the main issues attendant in the abandonment of seafarers such as repatriation, claims for unpaid wages and welfare issues of the crew during the pendency of the abandonment case, all of which has no corresponding or existing international instruments to address the problems.<sup>29</sup>

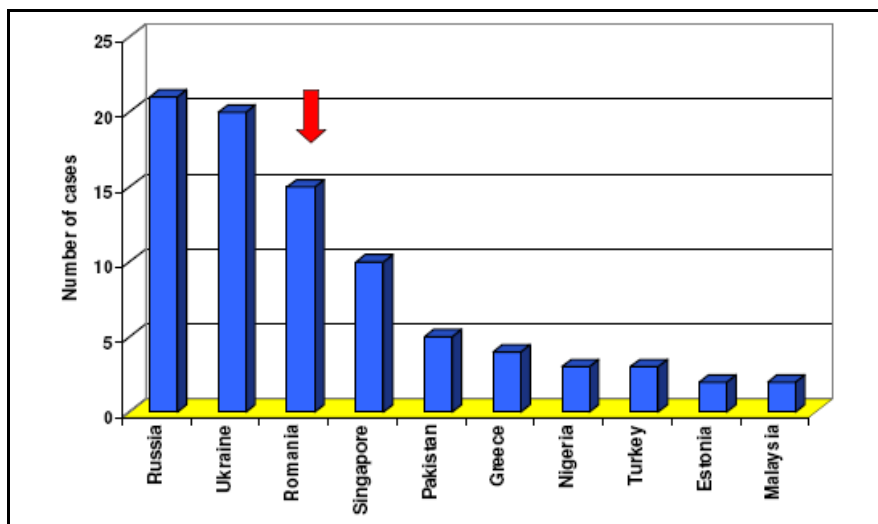
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<sup>27</sup> ITF Seafarers: Your port of call online, A news article entitled *Abandoned Seafarers*, ITF Publications, ITF House, 49-60 Borough Road, London SE1 1DR; [mail@itf.org.uk](mailto:mail@itf.org.uk), retrieved on July 17, 2009.

<sup>28</sup> Kahveci, E., *Abandoned seafarers: The case of Obo Basak*, In: Seafarers International Research Centre (SIRC) – Proceedings of the Seafarers International Research Centre's 4<sup>th</sup> International Symposium, Cardiff University, SIRC, July 2005, ISBN 1-900174-26-X

<sup>29</sup> Ibid.

The most recent incident of abandonment of seafarers occurred in the early part of 2009 which involves the crew of the Russian owned general cargo ship *Stalingrad*. The owner, SakhalinMor Trans LLC of Russia abandoned the crew after the ship *Stalingrad* was arrested by the shipowner’s creditors, leaving unpaid crew wages consisting of more than four (4) months with no provisions for food, water, fuel for heating and cooking, while the ship was stranded in Liverpool port in England. What is more reprehensible is the owner’s attempt to convince the unfortunate crew to evade and prevent the arrest of the ship by surreptitiously sailing the ship despite a standing court order of ship detention. However, the crew remain adamant and refused to listen to the shipowner. Concerned labour unions subsequently intervened by requesting the Russian Embassy in England for the repatriation of the abandoned crew but unfortunately the embassy refused to extend their assistance despite calls and request from various sectors for alleged reason that the crew can pay for their own repatriation when they finally receive their unpaid wages. Presently, the abandonment case is still pending resolution before the courts and the sale of the ship may still take years, which means that the abandoned Russian crew of *Stalingrad* will have to remain in waiting until the abandonment case has been decided before they can claim for their unpaid wages.<sup>30</sup>



**Figure 1 Top 10 Flag of Ships Involving Abandoned Seafarers (1995-2000)**

<sup>30</sup> The Sea; news article entitled *Russians abandoned in UK*, Issue # 198, March/April 2009, p. 4.

Figure 1 indicated a study over the past years where it shows the top 10 flag of ships involved in the growing increase in the abandonment of ships and its crew, which causes significant impact to the seafarers and his family in terms of economic drawbacks.<sup>31</sup> For a period of more than four (4) years, the International Trade Union Federation (ITF) has attended and intervened to more than 210 cases of abandoned crew members involving an approximate number of 3,500 seafarers.<sup>32</sup> Database on reported incidents of abandonment of seafarers indicates that there are a total of 65 cases during a six (6) year period from 2004 to 2009, thirty (30) of which were already resolved, and the remaining 35 still pending resolution and seven (7) of which are fishing vessels.<sup>33</sup>

Another factor which may brought about abandonment of seafarers is in the event of shipwrecked when the shipowners attributes the destruction of the ship to the fault of the crew, thereby refusing to repatriate them or assist them after surviving the ordeal of the ship accident.

### **2.3 Right to Repatriation**

The initial statutory enactment on the repatriation of seafarers was originally contained under the category of “distressed seamen”.<sup>34</sup> While it is a separate issue in itself, repatriation<sup>35</sup> is a problem that stems from the abandonment of seafarers. At the end of every contract, the seafarer expects to be repatriated, but this is not always the case because in reality the contracts entered between the seafarer and the employer

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<sup>31</sup> Barsan, E., *Social Aspects of the Seafarers Integration on the Maritime Jobs Market*, 4th IAMU General Assembly, Constantza Maritime University, 104 Mircea cel Batran Street, Constantza 8700, Romania.

<sup>32</sup> International Commission on Shipping [ICONS], *Inquiry into Ship Safety, Ships, Slaves and Competition*, Australia, 2000, p. 52; citing the Submission No. 17, NUMAST, UK, p. 16.

<sup>33</sup> ILO website, *Summary of the database of reported incidents of abandonment of seafarers*, <http://www.ilo.org>, retrieved on June 24, 2009.

<sup>34</sup> Wong, S.L.H., excerpt from the Article entitled *The Legal Rights of Seafarers From Engagement to Discharge* as presented in the Conference on “The Legal Rights of Seafarers”, St. David’s Hall Cardiff, organized by The Nautical Institute and The Centre for Maritime Law and Policy, The University of Wales Institute of Science and Technology, p.52.

<sup>35</sup> See Chapter III, Item 3.3 of this paper for an exhaustive discussion on the subject of the right of repatriation, particularly Repatriation of Seafarers Convention (Revised), 1987.

are already made (pro-forma contracts) and is considered as one-sided contract because the terms are formulated by the manning agents and shipowners to favour the employer. This kind of contract usually includes a clause stating that the seafarer will shoulder his own repatriation cost and a possible extension of the contract for a month or two in case repatriation cannot be effected immediately due to exigency of the operational activities on board the ship. There are also instances wherein at the end of the contract, there is no immediate repatriation of the seafarer for alleged reason of being in an “inconvenient port” or the trading route cannot easily facilitate repatriation proceedings due to money or communication problems. Most often, the employer will require the seafarer to wait for the next port nearest to his home in order to save on the cost of the repatriation.<sup>36</sup>

Under the Repatriation of Seafarers Convention (Revised), 1987,<sup>37</sup> the principal responsibility of repatriation is placed on the shipowner, but the problem is that in the event of financial crisis and insolvency, the shipowner tends to disappear and abandon its seafarers. According to this Convention, when the shipowner failed to exercise its responsibility to repatriate, the flag State will assume the responsibility of repatriating the abandoned seafarers. Further, in the event that the Flag State also fails to exercise its obligation, then it is the seafarer’s country of origin or the country where the seafarers are stranded who will assume the responsibility of the repatriation. According to a survey conducted by the Center for Seafarer’s Rights, most countries have placed the responsibility of repatriation to the shipowners but there is no clear mechanism for determining when the shipowner is deemed to have failed in its duty to repatriate.<sup>38</sup>

## **2.4 Right to Shore Leave**

A glimpse of the history of shore leave can be seen in several articles in the ancient admiralty codes such as Article XVII and XXX of the Code of Wisby where it was

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<sup>36</sup> *Supra*, footnote 25 at pp. 44-45.

<sup>37</sup> As comprehensively discussed under Chapter III, Item 3.3 of this paper.

<sup>38</sup> Alderton, T., Bloor, M., Kahveci, E., Lane, T., Sampson, H., Thomas, M., Winchester, N., Wu, B. and Zhao, M., *The Global Seafarer, Living and working conditions in a globalized industry*, International Labour Office in collaboration with the Seafarers International Research Centre, International Labour Office, Geneva, 2004, p. 183.

stated that shore leave is a fact of life. Article XX of the Code of Oleron specifies that “when a vessel arrives in port, seafarers can go ashore, two at a time and also take one meal (but no drink) from the ship with them.”<sup>39</sup>

Alexander Justice, in referring to Article XX, opined that the reason for the law:

*“was to keep the seamen in health and vigor, for by encouraging them to go ashore, two at a time, when their attendance was not necessary aboard, the master gave them the opportunity to refresh themselves at land, which is the best remedy in the world for scurvy, contracted a ship board by living on salt meats and dry bisket and being crowded up in a close place for a considerable time, their eating fresh provisions and breathing the free air at land makes them strong and better able to go through their business.”*<sup>40</sup>

Denial of shore leave to seafarers who looks forward to stepping and walking on land after spending several weeks and months at sea is undeniably a violation of the basic human rights. In recent times, security threats among states became a primary concern in the aftermath of the September 11, 2001 terroristic attack in the US. Expectedly, the brunt of security measures implementation fell heavily on the lowest members of the shipping echelon, the seafarers, who unknowingly became the object of suspicion and speculation of security sabotage. Ironically, the ship itself is not considered as security risk and therefore allowed to freely enter the ports. Rather, it is the individual seafarers of certain nationalities who are restricted, discriminated and viewed as threat and risks to national security.

In the case of *Aguilar v. Standard Oil Company*,<sup>41</sup> the United States Supreme Court in deciding the issue on shore leave opined that:

*“The assumption is hardly sound that the normal uses and purposes of shore leave are ‘exclusively personal’ and have no relation to the*

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<sup>39</sup> Douglas B. Stevenson, Director, Center for Seafarers’ Rights, Seamen’s Church Institute of New Jersey, New Jersey, a presentation given at Marine Log’s Maritime and Port Security 2005, *Restriction on Shore Leave: Any Movement on this Issue?*, Washington, D.C., February 2, 2005.

<sup>40</sup> *Ibid.*

<sup>41</sup> 318 US 724, 87 L Ed 1107, 63 S Ct 930, 143 AMC 451, *Supra*, footnote 38.

*vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary...to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."*

As can be seen in Figure 2 below, which is a result of a survey taken in 2008 by the Seamen's Church Institute of New York and New Jersey, it shows that 41% of seafarers that are detained and was not allowed to go on shore leave came from the Philippines. This is not surprising considering that the Philippines is by far the biggest supplier of ship manpower in the world fleet today (approximately providing 230,000 Filipino seafarers),<sup>42</sup> majority of them works on board tanker and cruise ships and the remaining percentage are spread out to other types of vessels. But what is very obvious and appalling on the result shown in Figure 2 is that most of the seafarers detained in the US, either for lack of visa requirements or for any other reason, came from the third world countries. This only shows the glaring irony in the security measures adopted by various port States where in their attempt to strengthen the security implementation, they lose sight of the fact that 'if security is to be realised there needs to be harmonisation and balancing of security concerns with the seafarer's welfare concern'.<sup>43</sup>

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<sup>42</sup> *Supra*, footnote 37 at p. 47.

<sup>43</sup> Graham, Caroline, *Maritime Security and Seafarer's Welfare: Towards Harmonization*; WMU Journal of Maritime Affairs, Vol. 8 (2009), No. 1, 71-87, p.83.

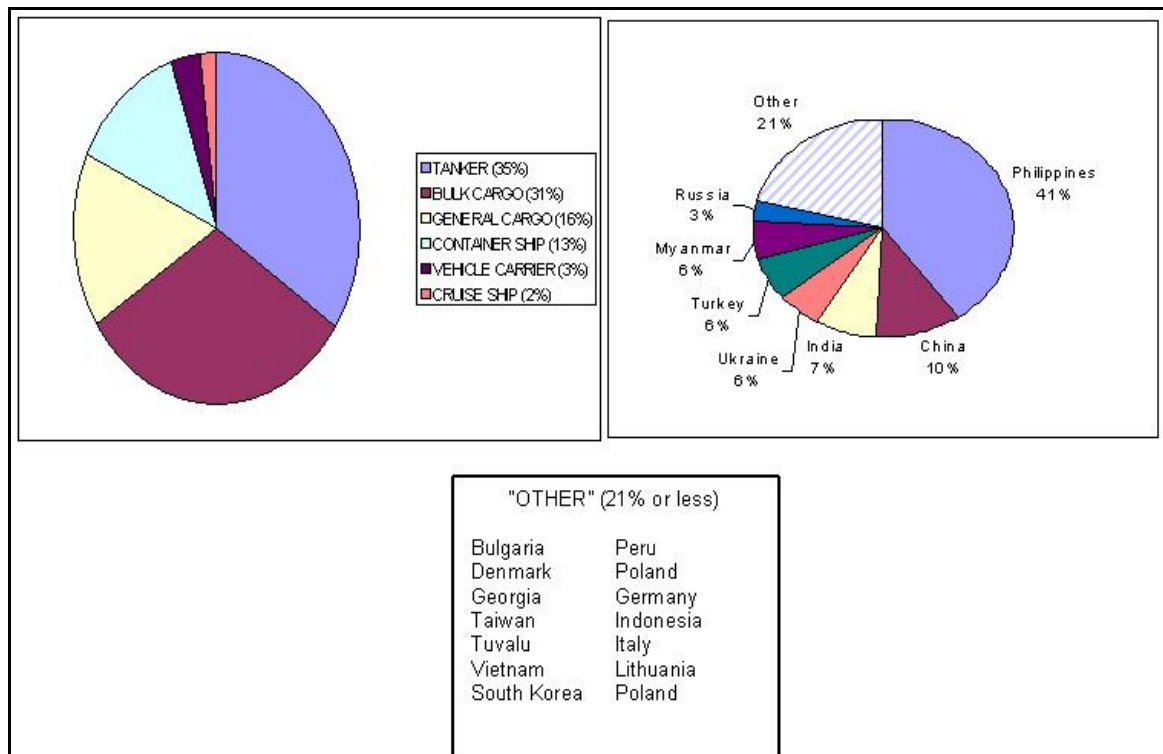


Figure 2 <sup>44</sup>2008 Survey of Detentions based on Nationality and Type of Vessels

Seafarers play an important role in the implementation of the security plan outlined under the ISPS Code. “Maritime security relies on seafarers to serve as the eyes and ears on merchant ships and in seaports, as they are uniquely qualified to recognize suspicious situations...”<sup>45</sup> As one author would lament, seafarers at one moment is important in the anti-terrorism drive and subsequently he suddenly becomes a terrorist threat.<sup>46</sup>

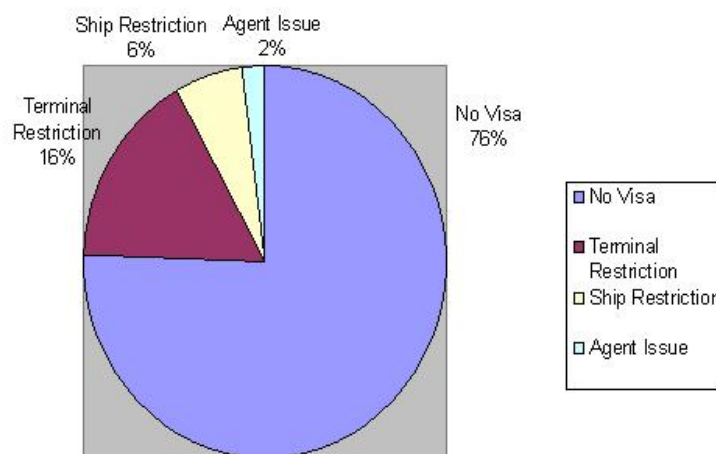
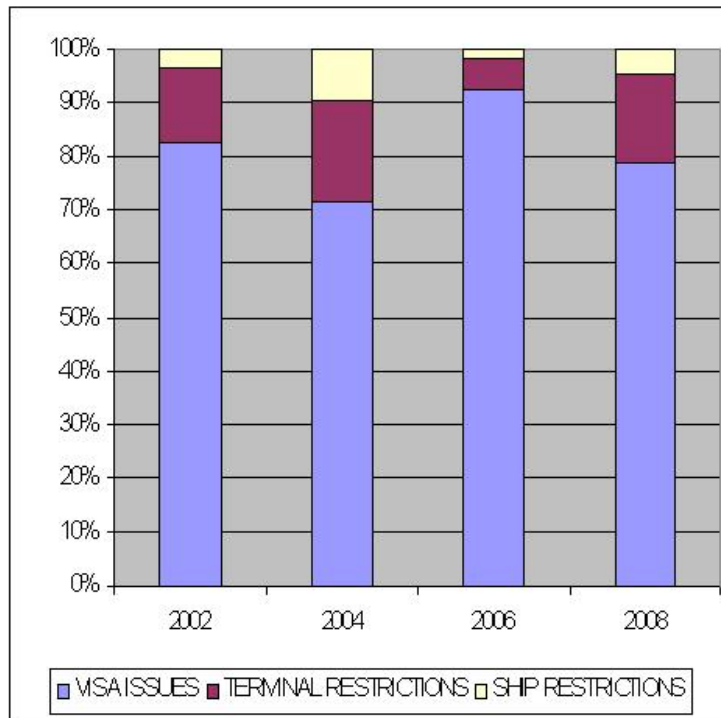
Nowadays, some port or coastal state authorities may refuse a seafarer to enter into the country for security reasons and certain states like the United States (US) have even required visa on seafarers of particular nationalities, leaving no option for the seafarers who failed to comply with the requirements, but stay and remain on board

<sup>44</sup> Excerpt from the Article entitled *Seafarer Issues: Are We Making Progress? Crew Treatment/Access to Ports* The Seamen's Church Institute of New York and New Jersey, 241 Water Street, New York, New York 10038.

<sup>45</sup> Blanchard, D.G. *Recruiting and retaining seafarers: Are security requirements and criminal prosecutions counter-productive?* Paper presented at the International Symposium on Selected Issues in Maritime Security, World Maritime University, Malmo, Sweden, November 10-12, 2008, p.3.

<sup>46</sup> Joshi, R., *When security on shore compromises safety at sea.* Lloyd's List, Wednesday, April 28, 2004.

the ship. Figure 3 below is a result of a study taken in 2008 by the Seamen’s Church Institute of New York and New Jersey which shows that 76% comprised the ground for the denial of shore leave in the US due to lack of visa requirements, the occurrence of which reached up to 90% in 2006. Terminal restrictions of crew comprises 16% the occurrence of incident reaches 30% in 2004.<sup>47</sup>



**Figure 3 <sup>48</sup>2008 Snapshot Reasons for Shore Leave Denials & Crew Detentions**

<sup>47</sup> *Supra*, footnote 43.

<sup>48</sup> *Ibid.*



There is a growing concern among seafarers today that their ‘right’ to shore leave is being curtailed and continuously reduced to a ‘privilege’ in view of the prevailing practice in different port States of requiring them to obtain visas and other bureaucratic requirements before being allowed to disembark from the ship and go ashore.<sup>49</sup> It is very unfortunate, indeed, for the seafarers who cannot comply with the aforementioned requirements because they have no option but to stay confined inside the ship until it sails again to another port where it is hope that he can be granted a shore leave without the necessary requirement of visa.

Figure 4 below represents a graph showing the number of ships detained in different US ports where seafarers are detained due to failure to obtain US visa. The graph indicates that the port of Houston in Texas is the prevalent area where most seafarers are detained or denied shore leave due to visa problems.

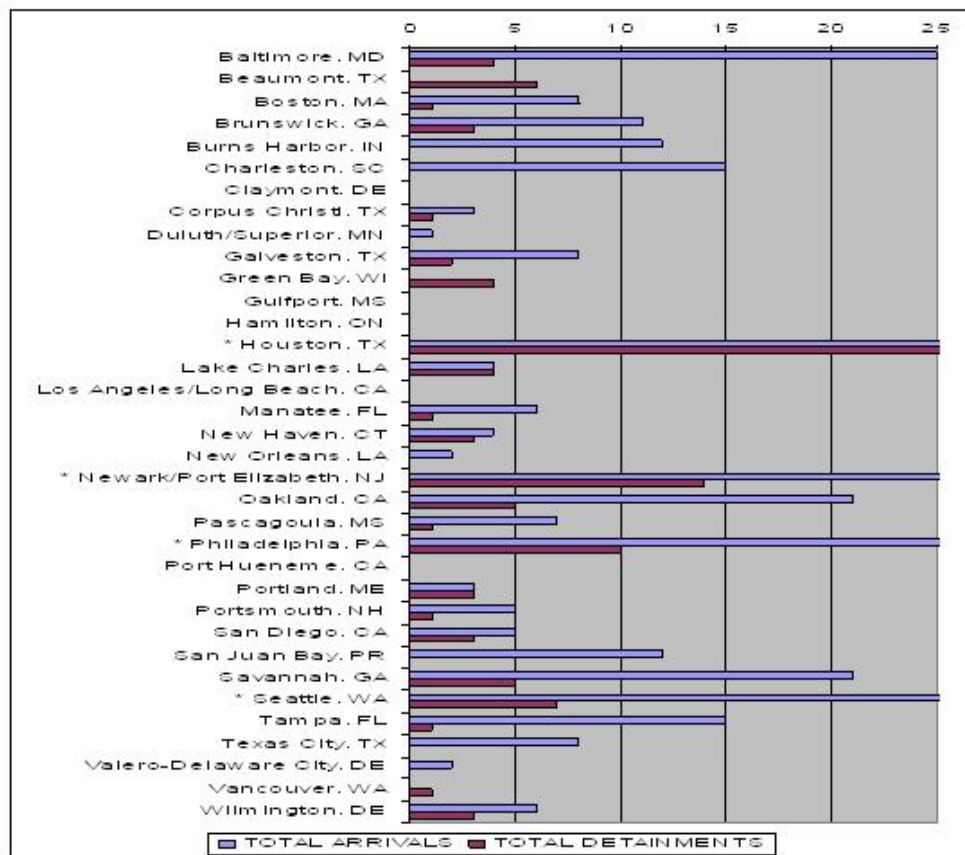


Figure 4 <sup>50</sup>Number of Ships where Seafarers were detained due to Visa issues by Port

<sup>49</sup> Lloyd’s List, *A case for minority rights*, No. 59 issue, 601, 01 February 2008, p. 8.

<sup>50</sup> *Supra*, footnote 47.

Again, it may be worthy to stress at this point that “*security concerns are legitimate but must be dealt in harmony with human element issues, taking into account seafarer’s rights as human being as well as peculiar rights enjoyed by them as a result of their seafaring activities...*”<sup>51</sup>

Access to port is “an ancient and cherished” right of a seafarer that is inherently demandable under compelling reasons which will impede the efficient and safety operations of the ship. While conditions for granting shore leave have become more restricted as a result of current maritime security concerns, it is not a valid reason to say that it ceases to be a seafarer’s right. Shore leave is one of the fundamental rights of the seafarers and denial of such right is inimical to his well being. It is like a slow death for seafarers for every moment of deprivation of this precious and eminent right. Hence, the law allows shore leave for the purpose of maintaining the seafarer’s good disposition and sanity on board the ship. The seafarer’s right to shore leave has existed for a long period of time as can be seen in customary maritime law before it was written and codified into law in the middle ages<sup>52</sup> and it shall remain and should remain as long as the seafaring profession exists, to be passed on to the future generations to come.

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<sup>51</sup> *Supra*, footnote 42 at p. 83, citing Mukherjee and Mustafar, 2005, *The International Ship and Port Facility Security (ISPS) Code and human element issues*, p. 284.

<sup>52</sup> *Supra*, footnote 38.

### CHAPTER III: LEGAL REGIME RELEVANT TO SEAFARERS' RIGHTS

It is conceded that the “nature of seafaring has made seafarers a politically, legally and economically weak group in society” which sets them distinctly apart from other group of workers<sup>53</sup> It has, therefore, become crucial and incumbent to provide special protection to seafarers given the unique hazards attendant to the particular nature of their maritime employment,<sup>54</sup> and one important way of giving such protection is to enact laws and regulations which safeguards their human rights and welfare. To date, numerous international conventions and other instruments covering a variety of issues relating to seafarers have been adopted thru the initiative of different international bodies and entities such as the Comite Maritime International (CMI), the International Maritime Organization (IMO), International Labour Organization (ILO), and different subsidiary bodies of the United Nations (UN) such as the United Conference on the Law of the Seas (UNCLOS), and the United Nations Conference on Trade and Development (UNCTAD), to name a few. However, while these international conventions and instruments have been put in place, the effective implementation is hindered by the lack of support manifested by their non-ratification.. As espoused by K.X. Li and J.M. Ng, “there is clearly a gap between aspiration and implementation when it comes to maritime conventions”.<sup>55</sup> Nevertheless, it is necessary to mention and give a focused overview of some of the existing international conventions and instruments relative to the human rights aspect, labour and maritime standards for seafarers, for the purpose of determining whether or not the existing legal frameworks effectively protects and safeguard the welfare and human rights of the often neglected maritime labour workforce.

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<sup>53</sup> K. X. Li and J.M. Ng; Article entitled *International Maritime Conventions: Seafarers' Safety and Human Rights*; 33 JMARLC 381; Journal of Maritime Law and Commerce, Jefferson Law Book Company, July 2002.

<sup>54</sup> *Supra*, footnote 1 at p. 39.

<sup>55</sup> *Supra*, footnote 52.

### 3.1 The United Nations Declaration of Human Rights (UHDR)

The “Declaration of Human Rights” adopted by the General Assembly of the United Nations in December 10, 1948<sup>56</sup> set in place for all UN member states a general standard that will provide rights to be enjoyed by the workers as human beings. These rights includes, among others, the right to be free from discrimination, the right to life, liberty and security of the person, the right to be free from torture or inhuman and degrading treatment or punishment, the right to a legal remedy, the right to a fair trial or public hearing, the right to free expression, the right to social security, the right to just and favourable remuneration, the right to work, the right to free choice of employment, the right to protection against unemployment, the right to join trade unions, the right to rest and leisure, and the right to a standard of living adequate for the health and well being of the person and his family.<sup>57</sup>

On the other hand, the **United Nations General Assembly Resolution (1988)** that deals with fair and lawful treatment of all persons in detention or under arrest in any country has three (3) principles that have special relevance to seafarers. These provisions provide partly that:

1. No seafarer shall be detained in territory of any state beyond seven days from the date of the accident or incident or dispute alleged to have adverse consequences in that state during the period when the seafarer is being prevented by the authorities to leave the country, he or she may only be confined onboard his/her ship, provided it is safe to do, in appropriate accommodation and living conditions or in a hotel or guest house of comparable standards and from where the seafarer’s freedom of movement is assured ...
2. The cost of accommodating the seafarer during the period referred to (above) shall be borne by the seafarer’s employer...

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<sup>56</sup> See full text of Resolution 217A (III), U.N. Doc A/810 at 71 [1948], WMU Library and Information Service

<sup>57</sup> *Supra*, footnote 53 at pp. 44-45.

3. On expiry of the period of the period (during which he/she is not allowed to leave the country) the seafarer shall be repatriated to the country whose passport he or she hold and into personal care of that country's head of state, acting as agent of that state, and who will undertake to produce the seafarer at any subsequent legal or administrative proceedings in any country where the presence of the seafarer is required...

Other international instruments adopted under the auspices of the United Nations which may find relevance to the issue on the treatment of seafarers include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both of which relate to the rights of those who may be detained for the purpose of assisting in the investigation of a crime, a civil offence, or even in the event of a maritime casualty or incident.<sup>58</sup>

However noble the intent and purposes of some, if not all, of the international instruments issued by the different international bodies of the UN, they are found to be too general in scope and application which does not conform to the special nature of the seafarers working condition. Hence, the provisional measures laid therein may not be practically applicable for this distinct group of maritime workers. While some principles may well be formulated to specially apply to seafarers, such as the one contained under the United Nations General Assembly Resolution (1988), the same are not known or properly disseminated to the beneficial subjects (seafarers) and even the implementing authorities may not be even aware of the existence of such provisions. Like other numerous international laws, regulations and instrumentations, they become useless and lost to oblivion because they are not vigorously promoted and implemented by concerned Parties by reason of ignorance, neglect or lack of interest or concern.

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<sup>58</sup> See Appendix 1 –Terms of Reference for the Joint IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment of Seafarers in the Event of a Maritime Accident; International Labour Office, Governing Body, Committee on Sectoral and Technical Meetings and Related Issues, 292<sup>nd</sup> Session, Geneva.

### 3.2 United Nations Convention on the Law of the Sea (UNCLOS), 1982

The “Constitution of the Sea” or otherwise known as the United Nations Convention on the Law of the Sea (UNCLOS) specifically sets down the responsibility and jurisdictions of flag States, coastal States and port States in relation to the use of the sea. Although its principles is limited in application to States and other entities having international personality, it somehow finds a direct significance for individuals like the seafarers who were arrested within coastal waters for causing marine pollution.<sup>59</sup> The relevant provisions under UNCLOS which may be applicable to seafarers are found under **Article 230**<sup>60</sup> which provides for the monetary penalties and the observance of recognised rights of the accused. Article 230 provides, to wit:

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.
2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.
3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.

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<sup>59</sup> Churchill, R.R., Lowe, A.V., *The Law of the Sea*, 3<sup>rd</sup> Edition, Melland Schill Studies in International Law, Juris Publishing, Manchester University Press, 1999, p.1.

<sup>60</sup> Copied from the text of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), WMU Library and Information Service

Paragraph 3 is the pertinent provision which may apply to seafarers, requiring the observance of the recognised rights of the accused in a proceeding involving a violation by a foreign vessel. The 'recognised rights' being referred here is the right of the seafarer as may be provided for under the local jurisdiction where the foreign vessel committed the violation as well as his basic rights as may provided under the international law.<sup>61</sup>

Another UNCLOS provision that may be applicable to protect the rights of seafarers is found under Article 292 in so far as it provides the procedure for the prompt release of vessels and crews. Article 292 provides as follows:

1. Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under Article 287 or to the International Tribunal for the law of the Sea, unless the parties otherwise agree.
2. The application for release may be made only by or on behalf of the flag State of the vessel.
3. The court or tribunal shall deal without delay with the application for release and shall deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew. The authorities of the detaining State remain competent to release the vessel or its crew at any time.
4. Upon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply

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<sup>61</sup> *Supra*, footnote 19.

promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

Further, Article 97 of the UNCLOS, which provides protection to the shipmaster and other crew members, specifies that:

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag state or the State of which such person is a national.
2. In disciplinary matters, the State which has issued a master's certificate of competence or license shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state.

Article 97 of the UNCLOS establishes the extra-territorial jurisdiction of the flag State where the penal law or disciplinary proceedings of the state or country where the seafarer is a national shall apply and prevail. This is one of the exceptional circumstances recognised under the international law wherein the penal jurisdiction of a certain country or State is extended beyond its territorial waters to cover the gap created by the absence of law governing the crew complement of the ship while on the high seas. It bears stressing that there is nothing in the aforementioned provisions of UNCLOS which authorizes the coastal states to prosecute or detain the master/crew of a vessel in question in the event of maritime accident that threatens the coastlines of a state.

Given all the relevant provisions of UNCLOS which may have bearing with seafarers' rights and welfare, the Convention itself is not spared with the general opinion that it lacks the required mechanism to compel its member States to comply with their



obligations or to employ sanction in the event of non-compliance.<sup>62</sup> Except for wilful and serious acts of pollution in the territorial sea, the sanction that may be imposed under UNCLOS is only limited to monetary penalties. In fact, an over all perusal of the Convention would indicate that all the regulations and policies set therein can appropriately be considered as mere guiding principles laying down the responsibilities and jurisdictions of flag States, coastal States and port States. But the entirety of the Convention undoubtedly lacks a mandatory mechanism that will ensure the compliance by State parties. It is not surprising, therefore, that all of the afore-cited provisions of UNCLOS relating to the protection and welfare of seafarers are often ignored and unimplemented because they are just considered as mere procedures, the enforcement or non enforcement of which depend solely upon the discretion and political will of the member States.

### **3.3 International Labour Organization (ILO)**

Since its establishment in 1919, the International Labour Organization, which is the first specialized agency of the United Nations, supervises and implement the working conditions of the entire work force. ILO is a unique intergovernmental organization in the UN body which is tripartite in function, allowing not only governmental delegates but also employers and workers from the private sector to attend and participate in all ILO meetings, conferences and committee deliberations.<sup>63</sup>

For the past seventy years of its existence, the ILO has adopted more than fifty (50) conventions that cater specifically to the welfare and needs of the seafarers<sup>64</sup> and other forms of instruments which may not directly address the seafarers but nevertheless benefits them. The pertinent ILO conventions specifically constituted for

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<sup>62</sup> *Supra*, footnote 31 at p. 110.

<sup>63</sup> Bjorn Klerck Nilssen, *Maritime Labour Law and International Conventions*, Conference on the Legal Rights of Seafarers, St. David's Hall, Cardiff, University of Cardiff, United Kingdom, 5-6 June 1985, p. 1.

<sup>64</sup> *Supra*, footnote 52.

seafarers comprised a fragmented set of minimum labour standards which have been ratified and are in force.<sup>65</sup>

Recognizing the unique nature of the living and working conditions of seafarers, the ILO deemed it necessary to separately deal with maritime related issues thru the special maritime sessions regularly held, which constituted some forms of maritime labour standards relating to the employment and working condition of the seafarers and in the maritime sector, with special emphasis to protecting the seafarers as an individual worker or as a member of a working group engaged in a hazardous occupation. Some of the standards set to benefit the seafarers are those pertaining to recruitment practices and contract agreements, including the facilitation of identity documents, as well as the manning standards and hours of work, crew accommodation and medical treatment, among others.<sup>66</sup>

However, due to the low level of ratification of the ILO conventions, the difference between the goal and the enforcement becomes realistically wide, where the implementation remains the prerogative of the ratifying state, depending entirely on its political will to enforce it. It is a sad reality knowing that all the efforts in formulating these international conventions are deemed futile because of the indifference and lack of support among member states. According to Leary (1996)<sup>67</sup>, while many critics argue that the ILO lacks enforcement powers and that some member States give little attention to its efforts to protect labour rights, no international body, with the exception of the United Nations Security Council (UNSC), has enforcement powers in the sense of national legal enforcement. In protecting and promoting human rights, Leary argues that certain essential tasks are being effectively achieved by the ILO, and among them, is to define rights and obtain an international acceptance of these definitions, and the ILO has done well here both through adopting Conventions and through interpreting them with its monitoring

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<sup>65</sup> Paul K. Chapman, *Trouble on Board: The Plight of International Seafarers*; School of Industrial and Labor Relations Press; Cornell University, Ithaca, New York; 1991, p. 104.

<sup>66</sup> *Supra*, footnote 1 at pp. 43-45.

<sup>67</sup> Leary, V.A, *The paradox of workers' rights as human rights*, in L.A. Compa and S.F. Diamond (eds) *Human Rights, Labor Rights and International Trade*, Philadelphia: University of Pennsylvania Press, 1996, p. 22.

bodies.<sup>68</sup> Also there is a general opinion that ILO's labour rules are vague and difficult to interpret and apply and an urgent call was made for the review and consolidation of its fragmented maritime treaties and other instruments particularly on seafarers' welfare and working conditions and to push for a stronger port State control regulation to facilitate enforcement policies.<sup>69</sup> Moreover, there is a developing awareness in the ILO secretariat that its numerous Conventions are solely based on the "flag State" concept, resulting in the continuous neglect of seafarers.<sup>70</sup>

The Convention on the Repatriation of Seafarers, Revised 1987, stipulates that any seafarer who is dismissed or made to disembark during the pendency of his employment contract or upon its expiration, shall be entitled to be returned or sent home to his country of origin or to the port where he embarked or joined the crew, as will be determined by the national law of the seafarer. While the primary obligation to arrange the repatriation proceedings for seafarers initially lies on the shipowner, the latter cannot require any kind of advance payment to cover the cost of repatriation or to undertake deductions from the wages of the seafarers to reimburse the repatriation expenses. In the event that the shipowner fails to exercise his obligation under this Convention, it is incumbent upon the flag State to facilitate the repatriation of its seafarers, a right explicitly set out under the international law.<sup>71</sup> In the event that both the shipowner and the flag State fail to meet their obligations then the State of which the seafarer is a national shall facilitate for their repatriation and shall be entitled to recover the cost of repatriation from the flag State and latter can recover from the shipowner. In real practice however this never happen<sup>72</sup> while more incidents of abandonment of seafarers take place. This kind of violation of basic human rights continue unabatedly despite the existence of the Convention on the Repatriation of Seafarers. The dilemma is that despite the measures laid down under the said ILO convention, the human exploitation of this kind is still taking place and there is

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<sup>68</sup> Mehmet, O., Mendes, E. and Sinding, R., *Towards a Fair Global Labour Market, Avoiding a new slave trade*. Routledge, London and New York. 1999. p.77; citing *Ibid*.

<sup>69</sup> Ships, Slaves and Competition, International Commission on Shipping [ICONS], Inquiry into Ship Safety, NUMAST, UK, 2000, p. 35.

<sup>70</sup> *Ibid*. at p. 123.

<sup>71</sup> *Supra*, footnote 53 at pp. 77-78.

<sup>72</sup> *Supra*, footnote 35 at p.148.

unclear reason given for not implementing the Convention on the Repatriation of Seafarers.

Evidently, there is no deficiency of international instruments on the subject of repatriation of seafarers. But efforts must be taken to trace the root of the implementation or non-implementation problem. Relative to the general observation that abandonment of seafarers occurs on ships registered under Flags of Convenience (FOCs), this does not mean that these FOC registries failed to incorporate the concerned ILO instruments into their national legislations. In fact they have done by so-called “creative legislating” where the only and most basic provisions of the ILO Convention was enacted, leaving a number of good provisions as a way of avoiding to effectuate the ILO minimum standards for the purpose of attracting shipowners. This is a common practice of FOCs where their legislation is dictated by economy and commerce, not for the purpose of advancing the interest of the seafarers but for the sole benefit of their registries. They create unreasonable rules that will benefit and lure shipowners to register under their flag at the expense and disadvantage of the seafarers under employ of dubious shipowners.<sup>73</sup>

In other words, the system in place under the Convention on the Repatriation of Seafarers is deemed ineffective in view of an insufficient activating mechanism. The provisions of the same Convention merely laid down the procedures for the repatriation and set out the obligations of the implementing parties, but it failed to provide immediate remedies to the stranded and abandoned seafarers apart from bringing a civil action which is very impractical and unrealistic under the given circumstance. Abandoned seafarers are not financially positioned to initiate a legal action in a foreign country.<sup>74</sup> The matter of immediate repatriation of seafarers is not so much an issue of compassion but rather a matter of strategic and practical move.<sup>75</sup>

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<sup>73</sup> *Ibid.* at p.149.

<sup>74</sup> See Joint ILO/IMO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers; International Labour Organisation, Sectoral Activities Programme, JMC/29/2001/4, ISBN 9221122387, p. 10.

<sup>75</sup> *Supra*, footnote 72 at p.150.

### 3.4 International Maritime Organization (IMO)

The IMO was instituted in 1948 for the purpose of fostering safety at sea, covering all technical aspects of maritime safety as embodied in more than 40 International Conventions and Protocols, which include some implementing standards that warrants the protection of seafarers in their working environment, in the absence of any other remedy available under the ILO by reason of non-ratification of conventions.<sup>76</sup>

However, there is an overall concern that the member States of IMO does not possess the political will to implement its mandatory requirements nor is IMO prepared to sanction the non-complying member States. Also, it is observed that too much regulation policies generated by the IMO is becoming too onerous for maritime administrations, shipping companies and crews and they are saddled with too much policies to even assimilate and implement them effectively. The general opinion being that IMO should concentrate on the basic requirements of safe shipping with specific emphasis on human aspects and management systems.<sup>77</sup> As what some sectors would imply, there is no need to come up with various agendas and deliberations for new regulations in order to maintain the existence of the different committees comprising the IMO. Rather, the need to strengthen and improve the existing conventions and other instruments for an efficient and effective implementation should be the order of the day.

Notwithstanding the foregoing criticisms, the IMO is generally regarded as having performed an important role as a global source of technical standards in instituting conventions and policies necessary to regulate the international shipping.<sup>78</sup> The main role of the IMO lies in setting up technical policies relating to the safety of life and property at sea and protection of the marine environment. The principal international conventions of the IMO relevant to the interests and rights of seafarers are the following:

- The International Convention for the Safety of Life at Sea (SOLAS) 1974;

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<sup>76</sup> *Supra*, footnote 54.

<sup>77</sup> *Supra*, footnote 69 at p. 16.

<sup>78</sup> *Ibid.* at p. 112; citing Submission No. 45 Indian National Shipowners Association (INSA), No. 96 ICS/ISF

- The International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
- The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) 1973 and the Protocol of 1978;
- International Ship and Port Facility Security Code (ISPS);
- Convention on the Facilitation of International Maritime Traffic, 1965 (FAL Convention).

Recently, it has acknowledged the great influence of human factors in shipping incidents and undertook to develop proper standards relating to human behaviour, through the enactment of measures such as the STCW and the International Safe Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code).

#### **3.4.1 International Convention for the Safety of Life at Sea (SOLAS), 1974 as amended**

The SOLAS Convention, as amended was adopted on November 1, 1974 and entered into force on May 25, 1980. It is generally regarded as “the most important treaties of all treaties concerning the safety of merchant ships”. It is adopted for the purpose of providing a defined minimum standards for the construction, equipment and operation of ships, in consonance with their safety. An important obligation was given to flag States in ensuring that ships registered under their flag must comply with the requirements under the SOLAS, as can be shown in the certificates issued by them.<sup>79</sup> Flag States has the responsibility under the SOLAS Convention to ensure that shipowners comply with the international Conventions in eradicating sub-standards ships and this responsibility at certain times is shared or delegated to the classification societies or the insurers. However, we should not forget the fact that the main responsibility of maintaining the condition of the ship should primarily lie with the

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<sup>79</sup> See main page of IMO website on the Article entitled *International Convention for the Safety of Life at Sea (SOLAS), 1974*, mentioning some notes on the technical provision of the Convention. [www.imo.org/TCP/mainframe.asp?topic\\_id=250](http://www.imo.org/TCP/mainframe.asp?topic_id=250), retrieved on July 20, 2009.

shipowner himself who has the interest over the ship. More often than not, in the event of maritime accidents, the fault finding finger instinctively point towards the flag States or the classification society and more particularly to the shipmaster and crew that manned the ship, without taking into account that the bigger responsibility rests with the sub-standard shipowner who is the principal operator of the ship. The SOLAS Convention is trying its earnest effort to improve the safety of the ship by introducing minimum standards for ship construction and operation but it became so technical and vague to be easily understood and properly implemented.

### **3.4.2 The International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code)**

One of the most important instrument instituted by the IMO is the ISM Code which was later incorporated in the SOLAS as Chapter IX. So much expectation was given to the ISM Code to give a significant effect on seafarers' interest and welfare in general, especially after coming into force in 1998 where it became a mandatory requirement for all types of ships.<sup>80</sup>

ISM Code came out after a series of serious maritime accidents occurring in the late 1980's where it was found to have been caused by human errors, particularly pointing to management shortcomings as one of the main contributing factor for the accidents. Lord Justice Sheen<sup>81</sup> himself, did not mince words when in the course of his inquiry into the loss of the *Herald of Free Enterprise* he described management failure as the "disease of sloppiness".<sup>82</sup>

The ISM Code aims to ensure safety at sea, prevent human injury or loss of life and prevent occurrence of damage to property and the marine environment in particular.<sup>83</sup> ISM Code requires the institution of safety – management objectives and requires a

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<sup>80</sup> Fairplay, Article entitled *ISM: The Bulb That Failed to Bloom*, Feb. 22, 2001.

<sup>81</sup> Wreck Commissioner in the formal investigation of the case of MV Herald of Free Enterprise. July 29, 1987, Her Majesty's Stationery Office, 1987, report of Court No. 8074. ISBN 0 11550828 7.

<sup>82</sup> As appearing in the main page of IMO website discussing the topic of Safety Management: Development of the ISM Code and [www.imo.org/HumanElement/index.asp?topic\\_id=182](http://www.imo.org/HumanElement/index.asp?topic_id=182), retrieved on June 28, 2009.

<sup>83</sup> Research information on International Safety Management (ISM) Code by the Makhdoom International Management Center. [home.pacific.net.sg/~makhdoom/ismcode.html](http://home.pacific.net.sg/~makhdoom/ismcode.html), retrieved on August 4, 2009.

safety management system (SMS) to be put in place by the “Company” a term referring to the shipowner or any person representing the owner or management such as the manager or bareboat charterer who assumed responsibility in operating the ship. The “Company” is then required to institute and employ a procedure to attain their objectives, which may include utilizing necessary resources and shore-based support. It is further required under the ISM Code for every “Company” to “designate a person or persons ashore having direct access to the highest level of management”. Finally, it is also required that the plan of procedure being implemented by the “Company” be documented and compiled in a Safety Management Manual, a copy of which should be kept on board for reference.<sup>84</sup>

The ISM Code can be considered as one of the more effective instruments issued by the IMO. Its successful implementation depends primarily on the competence, attitude, commitment and motivation of the individuals involved in the application of the system. While it has its own share of negativism in view of the tremendous paperwork involved in its implementation, ISM Code is, nevertheless, an effective and efficient international mechanism which improves the safety and condition of the ship. The beauty of the ISM Code lies in the fact that when it is applied and implemented accordingly by the appropriate individuals such as the shipowner/ship management, the Master and the crew, the benefits of the system will be reaped and realized during the occurrence of an unfortunate event such as a maritime accident. ISM compliance will serve as the best defence in showing the exercise of due diligence in the management and operation of the ship. This is where the real gain in making the ISM efficiently work in practice. Therefore, in the criminalisation of seafarers in the event of a maritime incident, the elements of ISM Code and the Safety Management System adopted and implemented on board the ship will provide a very relevant evidence that the particular maritime incident that may have resulted to a pollution, did not arise out of a ‘sloppy system’ that was undertaken on board the

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<sup>84</sup> *Supra*, footnote 81.



ship.<sup>85</sup> In other words, the ISM Code has its own beneficial effect in safeguarding and protecting the human rights interest of the seafarers in the event of maritime incidents.

### **3.4.3 The International Convention for the Prevention of Pollution from Ships (MARPOL), 1973, as modified by Protocol of 1978**

The second convention that concerns safety at sea, but which more directly concerns protection of marine environment from pollution is the International Convention for the Prevention of Pollution from Ships (MARPOL).<sup>86</sup> The Convention contains rules against the discharge of pollutants and importantly, Rule 11 (b) in Annex 1 thereof provides that an owner or master can be exempted from liability for pollution caused as a result of damage to the ship or her equipment or for the safety of life or limb provided all reasonable precautions were taken after the occurrence of the damage, “unless the damage resulted from their personal act or omission committed with the intent to cause such damage and with knowledge that such damage would probably result”.<sup>87</sup>

The aforementioned provision of MARPOL 73/78 is the liability basis for penalizing ship source pollution. But on a positive side, it provides an instance where seafarers can invoke the defence of due diligence and exercise of good seamanship to extricate themselves from possible liability that may be incurred in the event of maritime accident resulting to marine pollution, by proving that the occurrence of damage was not caused with intent or reckless knowledge that the damage will probably result.

Hence, ship-source pollution is punishable under MARPOL, which violation was incorporated and transformed into offences in the national legislation of some coastal States for the purpose of penalizing future violators. But the problem lies in the different liability basis by which these coastal States have been imposing on any ship-source pollution committed within their territorial waters. A famous example is the

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<sup>85</sup> Phil Anderson, Interspill 2006 Conference; *The ISM Code and its impact on the prosecutions during shipboard pollution incident*, The Nautical Institute, ConsultISM Ltd. Retrieved on Aug. 12, 2009, [www.ismcode.net](http://www.ismcode.net).

<sup>86</sup> Kopacz, Z., Morgas', W. and Urbanski, J., *The Maritime Safety System, its Main Components and Elements*, The Institute of Navigation and Hydrography Naval Academy in Gdynia, *Journal of Navigation*, 54:2, Cambridge University Press, Vol. 54, 2001, p. 200.

<sup>87</sup> *Supra*, footnote 10.

one adopted by some European countries as contained in the EU Directive, where it provides that criminal liability for “infringement when committed with intent, recklessness or by serious negligence”<sup>88</sup> shall be imposed upon the master or crew of a ship which discharges oil while inside the territorial water. But there is clear delineation between operational discharge and accidental oil spill. The latter cannot be considered as criminal liability because it was not done thru acts of serious negligence.

Moreover, in the same EU provision, it was stated that MARPOL defence is not available when the offence or violation is committed within the territorial water. This is their justification for the imposition of a different basis of criminal liability for ship-source pollution by saying that MARPOL defence is not applicable inside the territorial water. Ironically, after ‘adopting’ the liability basis under the MARPOL and setting it in a different way which is contrary to the said Convention, the EU Directive suddenly asserts that the MARPOL defence is not applicable within territorial waters.<sup>89</sup> This to me seems to be no more than an innovative way of circumventing a Convention.

On the other hand, MARPOL Annex VI (Regulation for the Prevention of Air Pollution from Ships) may present a looming problem for shipowners, operators and seafarers, where they must learn to comply with the records keeping requirements under Annex VI and prepare themselves for port state enforcement. Annex VI contains a provision which allow prosecution in case of non-compliance of its provisions, and with the US Government’s propensity for using criminal law to enforce MARPOL, shipowners and seafarers alike must be warned to observe and maintain carefully the records mentioned under Annex VI because failure to comply

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<sup>88</sup> Excerpt from the Preamble of the Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements; This EU Directive took effect on January 10, 2005. [eurlex-helpdesk@publications.europa.eu](mailto:eurlex-helpdesk@publications.europa.eu), retrieved on June 19, 2009.

<sup>89</sup> Article entitled: *Directive on Criminal Sanctions for Ship-Source Pollution*, Industry Comments On The Council’s Political Agreement; [www.ecsa.be/publications/043.pdf](http://www.ecsa.be/publications/043.pdf), retrieved on Aug. 12, 2009.

therein is presently being used as basis for criminal prosecution, the way it was done under Annex I of MARPOL.<sup>90</sup>

In the case of *United States of America v. Noel Abrogar*,<sup>91</sup> the US Court of Appeals for the Third Circuit issued its decision on 18 August 2006 which for the first time an appellate court considered the sentence of a foreign seaman convicted of violation of the Act to Prevent Pollution from Ships (APPS), the US version of the MARPOL Convention. Mr. Abrogar, a citizen of the Philippines, served as Chief Engineer aboard the *Magellan Phoenix*, a Panamanian flag vessel. Mr Abrogar admitted by plea agreement that he knew those under his command had discharged oily water direct to the sea and admitted also that he made false entries in the vessel oil record book to conceal the violations. The district court judge sentenced Mr. Abrogar to serve one year and a day in federal prison for failure to maintain an accurate oil record book, a crime under APPS. Mr Abrogar appealed the sentence on the ground that the district court had improperly enhanced the criminal penalty, and that should not be applied since the discharge while clearly MARPOL violations, were not violations of US law. In analysing the scope of MARPOL and APPS, the court found that Congress did not make every violation of MARPOL by every person a crime under the US law. Stated differently, a MARPOL violation is only an offence under US law if that violation occurs within the boundaries of US waters or within a US port. This particular decision is important to seafarers charged with or facing charges in the US for MARPOL violation. However, the Third Circuit decision should not be read as implying that seafarers and non-US flag shipowners can avoid penalties simply by correctly recording illegal discharges in the oil record book. Flag states do have jurisdiction to punish MARPOL violations in international waters and are increasingly likely to impose hefty fines for deliberate discharges.<sup>92</sup>

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<sup>90</sup> Winston & Strawn, Maritime and Admiralty Practice, *MARPOL Annex VI Compliance Presents New Challenges for the Maritime Industry*, January 2007, [www.winston.com/siteFiles/publications/MARPOL\\_Annex\\_VI.pdf](http://www.winston.com/siteFiles/publications/MARPOL_Annex_VI.pdf), retrieved on August 12, 2009.

<sup>91</sup> Case No. 06-125 (3d Cir.), [www.ca3.uscourts.gov/opinarch/061215.pdf](http://www.ca3.uscourts.gov/opinarch/061215.pdf), retrieved on August 15, 2009.

<sup>92</sup> Gard News No. 184, Article entitled *US law-MARPOL violation in the US. The Third Circuit Court of Appeals rules in favour of a seaman in a prosecution for MARPOL violations*, Gard A.S., Arendal, Norway, November 2006/January 2007.

#### **3.4.4 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978, as amended**

The 1978 STCW Convention spearheaded the setting down of minimum standards relating to training, certification and watchkeeping for seafarers. And in 1995 it was amended for the purpose of incorporating technical innovations that may enhance the skill and competency trainings of the seafarers, and mandating the maritime administration to supervise and regulate the issuance and endorsement of the certificates of competency for Masters, officers and radio personnel authorized to serve on board the ship, and creating a scheme of common accountability among member States, through the intervention of IMO, for the appropriate implementation of the Convention. The 1995 revision expanded the scope of the STCW Convention to include a wide range of areas relevant to seafarer's welfare, particularly on training and competence. Regulation 1/14 thereof complements the ISM provision requiring maritime administrations to hold shipping companies responsible for the assignment of seafarers who will serve on board the ship, properly certificated and the ship properly manned in accordance with the requirement of the convention.<sup>93</sup>

It is well to point out that Article 22 of the 1978 STCW, as amended, acknowledges the fact that “not only safe operation of the ship and its equipment but also good human relationships between the seafarers on board would greatly enhance the safety of life at sea.” Said provision also “invite governments (1) to establish or encourage the establishment of training programs aimed at safeguarding good human relationships on board; and (2) to take adequate measures to minimize any element of loneliness and isolation for crew members on board ships.” Unfortunately, however, Article 22 has never been implemented despite initial studies taken on the matter.<sup>94</sup>

#### **3.4.5 International Ship and Port Facility Security (ISPS) Code**

The ISPS Code came about as an aftermath of the terrorist attack in the United States in September 11, 2001, where security rules are heightened and new measures taken to safeguard any threats to national security. In the same way, the thrust of the ISPS

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<sup>93</sup> *Supra*, footnote 70 at pp. 51-52.

<sup>94</sup> *Supra*, footnote 64 at p. 108.

Code, through the respective governments is to institute “risk management techniques” to ships and port facilities, which include, among others, security plan and a designated security officer for each vessel in every port, a ship-to-shore alert system on board the ship and an accurate history of the ship to be kept and maintained on board. Moreover, to improve security implementation, the ISPS Code adopts various requirements such as the implementation of ship and port security plans, the designation of ship, company and port security officers and the installation and use of shipboard security equipments. Further, it requires that measures be taken to monitor the movement and control the access of people and cargo to and from the ships while inside the port.<sup>95</sup>

The ISPS Code had a tremendous impact on the human rights of the seafarers because it severely restricted their entitlement to shore leave and they are being subjected to unwarranted security checks and limitation on their freedom of movement. It is reported that in a number of ports in the US, the seafarers were looked upon as a security threat and treated “more or less like a terrorist suspect” where they faced restrictions on movement with reported armed guards on gangways. This problem is most prevalent in US ports where seafarers are required to obtain US visa at their own personal expense and inconvenience in order to be permitted to go ashore or gain access to shore facilities.<sup>96</sup>

Due to limited access to vessels and the crew as a result of stricter control around the ports, human interaction involved in shipping had been reduced and the flow of necessary information was placed at the control of the shipowner. Ironically in this situation, the seafarers are required to perform vessel security watch at the gangway while the ship is docked at the port, the additional tasks of which take a great deal of his extra time that should be devoted to doing other functions on board the ship. Moreover, to make matters more difficult for seafarers, there has been no

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<sup>95</sup> Jim Jump, Article entitled *Access Denied*, ITF Transport International Magazine, Issue # 23, April 23, 2006.

<sup>96</sup> ITF Transport International Magazine, Article entitled *Security Rules Tightened*, Issue No. 11, April 11, 2003.

corresponding promotional increase in crew levels or additional pay for the additional time and workload as a result of the ISPS Code implementation.<sup>97</sup>

Interestingly, ISPS Code which has been adopted and being implemented vigorously by the US, provides in paragraph 11 of its Preamble that:

*“Recognizing that the Convention on the Facilitation of Maritime Traffic, 1965, as amended, provides that foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reason of public health, public safety or public order. Contracting Governments, when approving ship and port facility security plans, should pay due cognizance to the fact that ship’s personnel live and work on vessel and need shore leave and access to shore-based seafarer welfare facilities, including medical care.”*<sup>98</sup>

The dilemma created by the implementation of the ISPS Code left the seafarers wondering why they are being subjected to a strict visa requirement by the US and at the same time expected to perform the onerous duty of maintaining the security of the ship. The security goal of the ISPS Code is being defeated because of the contrary practice of denying the seafarers access to shore or shore facilities in view of the prevailing practice of the US and other countries in requiring the seafarers to first obtain visa before disembarking from the ship and gaining access to shore and shore facilities.<sup>99</sup> Under MSC/Circ. 112 issued on 7 June 2004, the IMO clearly reminded the Contracting Governments of their duty to provide special protection to seafarers particularly the essential right to shore leave. The pertinent Circular has time and again reminded those concerned that seafarers has the foremost duty to implement security measures required under the ISPS Code and therefore should be deemed an

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<sup>97</sup> *Supra*, footnote 93.

<sup>98</sup> Article entitled *Understanding of ISPS Code*, Part A/ISPS – PREAMBLE; Class NK (Nippon Kaiji Kyokai) website, [www.classnk.org.jp/hp/SMD/isps/.../code/.../PREAMBLE.html](http://www.classnk.org.jp/hp/SMD/isps/.../code/.../PREAMBLE.html), retrieved on July 10, 2009.

<sup>99</sup> Excerpt from the paper submitted by TUAC/ITF entitled *Seafarers’ Comments on Relevant Regulatory and Political Developments* during the OECD Workshop on Maritime Transport, Paris, 4-5 November 2004, p. 4, <http://195.178.246.26/maritime/33949593.pdf>

ally and not the enemy in the campaign against potential security threats.<sup>100</sup> It can be said, therefore, that the ISPS Code has overlooked the human aspect of seafarers because it failed to clearly delineate the security measures to be adopted by the port State and the way it is to be implemented with respect to the facilitation of the crew of the ship who intends to undertake shore leave. This is the outcome of the hasty adoption of the ISPS Code as can be inferred from the Resolutions of the Conference where it shows the fast track manner in which the deliberations was undertaken, with the exception of Resolution 11 concerning human element.<sup>101</sup>

### **3.4.6 Convention on the Facilitation of International Maritime Traffic (FAL), 1965**

Ratified or acceded by one hundred ten (110) countries, including the US or 68.31% of the world tonnage,<sup>102</sup> the FAL Convention was generated by the IMO to address the excessive documentary requirements for commercial shipping. It is the objective of the FAL Convention “to facilitate and expedite international maritime traffic and prevent unnecessary delays to ships, persons and property on board by minimizing the formalities, documentary requirements and procedures associated with the arrival, stay and departure of ships and **by seeing the highest practicable degree of uniformity in such requirements and procedures.**”<sup>103</sup>

In so far as the facilitation of seafarers is concerned, the same Convention considers a validly issued Seafarer’s Identity Document (SID) or a passport sufficient to provide the public authorities necessary information as to the seafarer’s arrival to and departure from the ship. Further, states that failed to ratify the SID Convention 1958 but have ratified the FAL Convention are allowed to issue national identity documents to their seafarers. Moreover, a recommended practice under the FAL Convention provides that public authorities should not require seafarers to present

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<sup>100</sup> *Supra*, footnote 38.

<sup>101</sup> Mukherjee and Mustafar, 2005, *The International Ship and Port Facility Security (ISPS) Code and Human Element Issues*, p. 284, as cited in *Supra*, footnote 42.

<sup>102</sup> Rupert Herbert-Burns, Sam Bateman, Peter Lehr; *Lloyd’s List MIU Handbook of Maritime Security*, CRC Press, London, 2008, pp. 238-239;

<sup>103</sup> Convention on Facilitation of International Maritime Transport, 1965, [www.imo.org/Conventions/mainframe.asp?topic\\_id...id](http://www.imo.org/Conventions/mainframe.asp?topic_id...id), retrieved on June 28, 2009.

identity documents or any information supplementing the SID other than what is indicated in the crew list data.<sup>104</sup>

Section 3.44 of the FAL Convention, on the other hand, contains a modern codification of the seafarer's right to shore leave, which provides that:

*Foreign crew members shall be allowed ashore by the public authorities while the ship on which they arrive is in port, provided that the formalities on arrival of the ship have been fulfilled and the public authorities have no reason to refuse permission to come ashore for reasons of public health, public safety or public order.*

The essential right of seafarers to shore leave, as a way to enable them to cross over borders for the purpose of joining or leaving the ship have been officially accepted by the international community. Hence, the facilitating of person was instituted by the IMO under the FAL Convention wherein it was clearly enunciated that seafarers need not secure a visa for the purpose of shore leave.<sup>105</sup>

While it is good that the framers of the FAL Convention considered to include some provisions relating to the facilitation and shore leave rights of seafarers, it is, however, important to draw attention to Article VII of the same Convention which succinctly provides that “any Contracting Government which finds it impractical to comply with a Standard of the Convention or deems it necessary *to adopt regulations differing from such standard*, (emphasis provided) shall inform the Secretary General of the IMO and notify him of the differences between its own practices and the Standard in question. The same procedure applies to new or amended Standards”. And one of the Recommended Practice stated under Article VII provides that “Contracting Governments are urged *to adjust* (emphasis provided) their practices accordingly but are only required to notify the Secretary General of IMO when they

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<sup>104</sup> Section 3, Item 3.10.3 (Recommended Practice), FAL Convention, eliteblacksea.com/files/article/falconvention1965\_2casamended.pdf, retrieved on August 1, 2009.

<sup>105</sup> Excerpt from the paper submitted by TUAC/ITF entitled *Seafarers' Comments on Relevant Regulatory and Political Developments* during the OECD Workshop on Maritime Transport, Paris, 4-5 November 2004, p. 3.



have brought their own formalities, documentary requirements and procedures into full accord.”<sup>106</sup>

Article VII has the tendency to weaken the principles being promoted under the objectives of the FAL Convention. As mentioned under Article VII, the Contracting Government is being given a choice to select or adopt their own form of Standard different from the Standard of the Convention, if in its own findings, the Standard stipulated under the Convention is deemed impractical to comply with. From this premise, it could easily be predicted what Standard will be adopted by the Contracting Government, which expectedly, are those that will conform to their own national Standards. There is, therefore, no point remaining in further discussing the undertaking of the “highest practicable degree of uniformity in such requirements and procedures” because there can never be a uniformity if there are different Standards allowed to be adopted. Surely, from the permissive tenor of Article VII of FAL Convention, we can just expect that different standards will be adopted by the Contracting Governments.

In other words, the uniformity of standards being espoused by FAL Convention is now far from reality. It clearly contradicts the definition of Standards under the FAL Convention which refer to “those measures the uniform application of which by Contracting Governments in accordance with the Convention is necessary and practicable in order to facilitate international maritime traffic.”<sup>107</sup> It is not surprising therefore, that in the implementation of the FAL Convention, there are substantial differences in the Standard of requirements that some State parties have adopted. An example is Argentina which requires that SIDs indicate the gender of the seafarer. In Poland, the permission or visa from the appropriate authority is required before a valid SID is accepted in lieu of a passport. The same practice is also adopted in Thailand. And in India, a SID is accepted as a travel document in lieu of a passport, however, if the seafarer is travelling as a passenger, he is required to present a visa.

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<sup>106</sup> Note from the Presidency to the Working Party on Frontiers/Mixed Committee (EU-Iceland/Norway/Switzerland, Subject: *Incompatibilities between the FAL Convention and EC Law – Results of Questionnaire*, Council of the European Union, Brussels, Sept. 7, 2007; Doc 938/07/FRONT 54 COMIX 454; [www.statewatch.org/.../eu-fal-convention-survey-11577-rev/-07.pdf](http://www.statewatch.org/.../eu-fal-convention-survey-11577-rev/-07.pdf), retrieved on August 5, 2009.

<sup>107</sup> See FAL Convention, [eliteblacksea.com/files/article/falconvention1965\\_2casamended.pdf](http://eliteblacksea.com/files/article/falconvention1965_2casamended.pdf), retrieved on August 1, 2009.

And of course, in some European countries, the visa policy is the Standard policy they adopted before a seafarer is allowed access to their shore and shore facilities. The different State practices mentioned only showed the ineffectiveness of the FAL Convention in so far as the facilitation and exercise of shore leave rights of the seafarers is concerned. Despite clearly stating that a visa will not be required from foreign seafarers for the purpose of shore leave, the FAL Convention cannot prevent State parties like the US or other member of the EU to adopt a visa policy Standard contrary to the said Convention, due to the permissive tenor in which it was formulated. Such is the inefficacy of the FAL Convention against the onslaught of the seemingly more urgent instruments adopted in consideration of the maritime security concerns of the day.

#### **CHAPTER IV: PROPOSED MEASURES TO ADDRESS THE ISSUE ON THE HUMAN RIGHTS TREATMENT OF SEAFARERS**

The previous Chapter indicated clearly that there is no dearth of international instruments which deal with the welfare and human rights concerns of seafarers. However, after careful analysis of enumerated international policies, it shows that none of them adequately address the problems of seafarers in a direct and comprehensive manner. The treaties and various international instruments issued under the umbrella organisations of the UN such as, but not limited to, the United Nation's Declaration of Human Rights (UHDR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) set up the all encompassing general standards aimed at protecting the rights of every human being. These international component mechanisms of the UN provides for monitoring performance and for dispute settlements arising from human rights violations, by access to courts or tribunals, but seldom by individuals, the discussions or negotiations of which are normally between states where individuals may, or may not, be afforded direct access for redress.<sup>108</sup> If and when the individual seafarer decides to assert his right based on the international human rights standards set by the UN, he still needs to course his action through the national legal mechanisms available in his country.

On the other hand, the UNCLOS is another UN initiative treaty which specifically laid down the responsibilities of flag States, coastal States and port States in relation to the different usage of the sea and the marine environment. While one of the significant provisions of the UNCLOS is its long established rule on the penal jurisdiction of seafarers involved in maritime accidents, it does not change the fact that in reality, the said provisions are mere "toothless" mechanisms which lacks the necessary force for effectiveness.

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<sup>108</sup> Supra, footnote 9.

In the same vein, the IMO has been constantly criticised for its inability to implement the mandatory requirements of its international conventions and its indecisiveness in imposing the necessary sanctions to compel compliance of its conventions. A perfect example is the MARPOL where it provided the liability basis for penalizing ship source polluters. However, it does not have its own mechanism to penalize its member States like in the case of the members of the European Union which initiated the issuance of the Directive. The said Directive is contrary and in clear violation of the MARPOL Convention because it considers accidental oil spill as serious negligence, resulting to the detention and criminally charging of the seafarers involved in the maritime accident that caused the oil spill. The MARPOL Convention has no measure which provides for any sanction to any member States that violates or contravenes the obligations set therein. Similarly, the effective consideration of the ISPS Code and the FAL Convention as international mechanisms that will protect the welfare and rights of seafarers is hindered by the absence of balance between the security measures to be implemented by the port States and the protection of the interest of the seafarers while implementing the said security measures required under the Conventions.

Meanwhile, the general observation throughout this research is that the IMO is continuously creating technical standards for safe shipping but in the process has overlooked the important human welfare aspect in safe shipping operation. This is where the seeming ineffectiveness of the SOLAS and STCW Convention can be noted. Both Conventions are very technical in nature but lack the human aspect in the regulations which makes them difficult to understand and much more to implement. The ISM Code, on the other hand, may also be considered a very technical instrument but the efficient way in which the mechanism was laid down for implementation makes it a model instrument for effectively promoting ship and crew safety. The only negative point that was observed in the ISM Code is the tremendous paperwork involved in its implementation.

As regards the ILO Conventions, particularly the Convention on the Repatriation of Seafarers, the only hindrance for the efficient implementation of ILO Conventions is the low level of ratification due to lack of attention and priority from member States. The Convention on the Repatriation of Seafarers is observed to have failed in putting up an activating mechanism for its immediate implementation. When abandonment of

seafarers occurs, there is no mechanism in place which provides for the immediate repatriation of the abandoned seafarers.

Be that as it may, the gaps and limitations may look discouraging in the face of the tireless efforts undertaken by the framers of the Conventions, but despite the seemingly negative attributions to the aforementioned international legal frameworks, there is a comfort in knowing that the same international bodies are still doing their best to deliver better international standards that will improve the human rights condition and welfare of the less advantaged seafarers. Their recent activities yielded the following proposed measures which hopefully will be supported and eventually adopted by the members of the international community:

#### **4.1 Guidelines on Fair Treatment of Seafarers in the Event of Maritime Accident**

This particular Guideline was formulated by the Legal Committee of IMO during its 91<sup>st</sup> session in April 2006 through the efficient endeavour undertaken by the Joint IMO/ILO Ad Hoc Expert Working Group on the Fair Treatment in the Event of a Maritime Accident. It was subsequently adopted by the ILO Governing Body in June 2006. The Guideline duly recognised the seafarers as belonging to a special group of workers and therefore it is strongly recommended therein the observance and application of the Guideline whenever the seafarers are detained by public authorities in the event of a maritime accident.

The main purpose for the adoption of the Guideline is to ensure that seafarers are treated justly during any investigation relating to a maritime accident and to ensure that detention of the seafarer will be avoided or prevented under the circumstance. Furthermore, it sets down the necessary actions to take following the happening of the incident, to the proper channels, namely, the port or coastal State, flag State, or the country of origin of the seafarer, where mutual effort and intercommunication between the parties is the main consideration for the purpose of ensuring that no retaliatory or prejudicial actions be taken against the seafarers by reason of their involvement in the investigation. Due to the growing concern on the criminalisation of seafarers arising from maritime accident, it is the thrust of the Guideline to warrant

the just treatment of seafarers by taking all necessary measures to protect their human rights.<sup>109</sup>

#### **4.2 Draft Guidelines on Abandonment, Personal Injury and Death of Seafarers**

The draft resolutions and guidelines to address the issues on abandonment, personal injury and death of seafarer was formulated under the auspices and initiative of the Joint IMO/ILO Working Group, through the Ad Hoc Expert Working Group on Liability and Compensation relating to Claims for Death, Personal Injury and Abandonment of Seafarers. While there are some facets under various international laws and instruments relating to abandonment, death and personal injury of seafarers, nothing really deals specifically with the said issues.<sup>110</sup>

#### **4.3 Guideline on Provision of Financial Security in Cases of Abandonment of Seafarers**

Abandonment of seafarers is identified as a serious problem that needs immediate attention and solution. The proposed Guideline acknowledges the fact that provisions or measures providing for the payment of remuneration and cost of repatriation be included in the contract of employment entered between the seafarer and the employer and that in cases where the shipowner/employer fails to perform his obligation, safeguards for the protection of the seafarers' statutory rights must be clearly laid down, including measures calling for flag States' intervention in case where the shipowner was unable to perform his responsibility. The form of intervention proposed under the draft Guideline is the possibility of requiring shipowners to create a sound financial security scheme (e.g. bank guarantee, social

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<sup>109</sup> Excerpt in the keynote address by Efthimios Mitropoulos, Secretary General of the International Maritime Organization, Seventh Cadwallader Annual Memorial Lecture on *Criminalization in Shipping: Human Pawns in Political and Legal Games*, London, 6 October 2004.

<sup>110</sup> Excerpt of the deliberation/drafting of resolution and guidelines by the Joint IMO/ILO Ad Hoc Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, 2<sup>nd</sup> meeting on 30 October – 3 November 2000. [www.imo.org](http://www.imo.org), retrieved on July 28, 2009.

security, insurance, or a national fund) to cover their contractual obligation in the event of bankruptcy. In this way, the probabilities of abandonment of seafarers may be avoided and prevented if they are duly covered by a financial security that will guarantee payment of crews wages and cost of repatriations in the most expeditious means.<sup>111</sup>

In a bid to improve the employment condition and to protect the fundamental human rights of seafarers, States are enjoined to impose upon shipowners the obligation of providing sufficient financial security for seafarers in the event of insolvency. The move was borne out of the desire to alleviate if not prevent the occurrence of abandonment of seafarers in foreign ports, the severe difficulties accompanying it in trying to survive the period of abandonment with lack of food and other necessities including medical care and lack of communication, unpaid wages and delay in repatriation. Hence, the pertinent Guidelines provides that shipowners should post a certificate on board seagoing ships engaged in international voyages attesting the financial security scheme taken to cover seafarers in the event of abandonment.<sup>112</sup>

Finally, in consonance with the draft Guidelines on Financial Security in Case of Abandonment of Seafarers, an agreement in principle was reached, in a specially convened Joint ILO/IMO meeting held in Geneva on March 2-6, 2009, providing for an imperative solution to the issue of liability and compensation regarding claims which include among others, the abandonment of seafarers. The proposed solution which is subject to the approval of the IMO Legal Committee and ILO governing body is to amend the new Maritime Labour Convention 2006 after its entry into force, for the purpose of incorporating therein the proposed solution.<sup>113</sup>

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<sup>111</sup> *Ibid.*

<sup>112</sup> Excerpt of the deliberation/drafting of resolution and guidelines by the Joint IMO/ILO Ad Hoc Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers 3rd meeting: 30 April – 4 May 2001. [www.imo.org](http://www.imo.org), retrieved on July 28, 2009.

<sup>113</sup> ISF/ITF [wartsila.com](http://wartsila.com) website, an Article entitled ISF/ITF: *Historic agreement' on abandonment of seafarers*, 12 March 2009, retrieved July 16, 2009.

#### 4.4 ILO Convention No. 185 (Seafarers' Identity Documents [SID] Convention)

The Seafarers' Identity Documents Convention (2003, Revised) of the ILO unequivocally confirmed the seafarers right to shore leave, as clearly stated in its preamble, to wit:

*Being aware that seafarers work and live on ships involved in international trade and that access to shore facilities and shore leave are vital elements of seafarers' general well-being and, therefore, to the achievement of safer shipping and cleaner oceans, ...*

The foregoing statement in the preamble is further reinforced by paragraph 6, Article 6 of the same Convention (ILO Convention No.185).<sup>114</sup> Par. 6 thereof which refers to the Facilitation of Shore Leave and Transit and Transfer of Seafarers provides that:

*“For the purpose of shore leave, seafarers shall not be required to hold a visa. Any Member which is not in a position to fully implement this requirement shall ensure that its laws and regulation or practice provide arrangements that are substantially equivalent.”*

On the other hand, Article 6.5 of the ILO Convention 185 gives an instance where shore leave may not be granted, that is, when there is risk against public health, public safety, public order or national security”.<sup>115</sup> Unlike the ISPS Code, ILO Convention No. 185 attempts to strike a balance between legitimate security concerns and the human rights of seafarers. Some of the salient security features of the SID Convention includes machine readable seafarer's identity document which is a stand alone document, biometrics and comprehensive oversight system. The foremost goal of the SID Convention is to protect the rights of seafarers who work and live on board the ship, by ensuring that they are granted shore leave and gain access to shore facilities,

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<sup>114</sup> ILO website, C185 Seafarers' Identity Documents Convention (Revised) 2003, [www.ilo.org/ilolex/cgi-lex/convde.pl?C185](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C185), [webinfo@ilo.org](mailto:webinfo@ilo.org), retrieved on July 13, 2009.

<sup>115</sup> *Supra*, footnote 98.



thereby promoting their well-being with the end benefit of generally promoting safer shipping.<sup>116</sup>

After the ILO members vigorously campaigned in promoting the SID convention for the purpose of hastening its adoption and enforcement, in a bid to resolve the prevailing crisis on seafarers shore leave, unfortunately there are only four (4) states that have bothered to actually ratify it. So far, however, nothing significant happened to the Seafarer's Identity Document (SID) Convention that was supposed to open the door to easier shore access after 9/11. The scheme appears to have become lost in political apathy and national self-interest. The United States, which pushed for a new, more secure form of identification, appears to have turned its back on the whole idea, and other nations are dragging their feet."<sup>117</sup>

#### **4.5 ILO Consolidated Maritime Labour Convention (MLC)**

Regarded by some sectors as the "super Convention" or the seafarers' "Bill of Rights" because the new Maritime Labour Convention presents an expansive lay out of rules for both the shipowners and seafarers. More importantly, it sets out the general rights of seafarers for a healthy, safe and decent work condition. The MLC incorporates most of the earlier maritime labour standards that were adopted by the ILO since its institution in 1919 and it is seen to become the "fourth pillar of international maritime regulation" alongside the Safety, Training and Pollution standards issued by the IMO. When it enters into force it will be the first ILO convention to be enforced by port states regardless of whether or not the flag state has ratified it.<sup>118</sup>

The distinct novelty of the new MLC is its defined coverage of social conditions of seafarers on board the ship where it attempts to encompass every aspect of maritime labour, including but not limited to, conditions of employment accommodations, recreational facilities, food and catering, health protection, medical care, welfare and

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<sup>116</sup> *Supra*, footnote 103.

<sup>117</sup> Tradewinds, precis of the Abstract on the Article entitled *Opinion: SID needs support*, Vol. 17, No. 3211, August 2006 issue, p. 2.

<sup>118</sup> Dan Mesec, article entitled *Head of Transport Union Discusses Maritime Labor Issue*, February 2, 2009; <http://ins.onlinedemocracy.ca/index.php?name=News&file=article&sid=9755>, retrieved on July 14, 2009.

social security protection. However, while the new Convention resolutely lays down the fundamental rights of seafarers, it also allowed a wide degree of discretion to member States as to the manner of “delivering those rights”, and in the way the standards will be incorporated and implemented within the national legislation. To counteract the flexibility measure granted to the ratifying states, the new MLC provides an overall mechanism for onboard and onshore complaint procedures for seafarers on any matters concerning the shipowners’ and shipmasters’ management and control of the conditions of the ship, including the administration and regulation undertaken by the port State and flag States over their ships.<sup>119</sup> This is again an attempt to strike a balance between effective enforcement of a regulation and protecting the interest and human rights of the seafarers, which, if successfully executed, will redound to the benefit of a socially and economically strong shipping industry.

In other words, to give an overall view of the new Maritime Labour Convention, the following are the summary of its salient features:<sup>120</sup>

- a. It provides a one-stop window. It will replace about 65 existing ILO Maritime Labour instruments:
- b. A firm set of principles and rights for seafarers, with ratifying States being given more discretion as to their implementation;
- c. A simplified amendment procedure, enabling the Convention to be kept up-to-date with the constant changes in shipping operations and technology;
- d. A strong enforcement regime backed by a certification system for compliance with the Convention, and its control by Port State Control systems, which will not only be able to inspect (and arrest if necessary) vessels from a safety or environment point of view but also from a social point of view;

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<sup>119</sup> Larry Kaye, Sea Venture Newsletter, article entitled *The New ILO Consolidated Maritime Labour Convention – Charting Labour Standards For The Future*, San Diego, January 2007 Issue 7.

<sup>120</sup> ILO website, *Proposed Consolidated Maritime Labour Convention 2006: Advantages of the future Convention*; Sectoral Activities Branch (SECTOR); 28 January 2006; [sector@ilo.org](mailto:sector@ilo.org), retrieved on July 8, 2009.

- e. A clause to ensure that a ship flying the flag of a State which has not ratified the Convention will not be treated more favourably than a ship flying the flag of a State that has ratified the Convention. This clause will prevent unfair competition and help achieve the Convention's aim of near universal ratification.

Moreover, the issue on seafarers' right to shore leave was duly incorporated in the consolidated MLC with the hope of further strengthening its enforcement under the over all mechanism set in the new Convention. Regulation 2.4 of the new MLC<sup>121</sup> provides that "Seafarers shall be granted shore leave consistent with their health and well-being and with the operational requirements of their positions."

#### **4.6 Facilitation of International Maritime Traffic (FAL Convention), 1965, as amended**

The amendment to the 1965 FAL Convention was adopted by the Facilitation Committee during its 35<sup>th</sup> session, the first session as a fully institutionalized body of the IMO, and is expected to enter into force on May 15, 2010. The amendatory provisions pertains to the arrival, stay and departure of the ship, arrival and departure procedures, measures to facilitate the clearance of passengers, crew and baggage and the facilitation for ships engaged on cruises and for cruise passengers. To capture the statutory gaps in other related international instruments, the revision will try to consider the possible amendments to SOLAS on maritime security as adopted in 2002 as well as overlooked provisions under the International Ship and Port Facilities (ISPS) Code relating to problems on disembarkation of persons rescued at sea and illegal migrants (including stowaways). More importantly, it aims to address the pressing problems relating to shore leave and other pertinent issues affecting the human rights and welfare of seafarers which occurred during ship-to-shore activities.<sup>122</sup>

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<sup>121</sup> ILO Report I (1B), *Proposed Consolidated Maritime Labour Convention*, International Labour Conference, 94<sup>th</sup> (Maritime) Session, 2006, International Labour Office, Geneva, First published 2005, ISBN 92-2-117917-6, [www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-1b.pdf](http://www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-i-1b.pdf), retrieved on July 18, 2009.

<sup>122</sup> IMO News Magazine, *FAL Convention amendments adopted 35<sup>th</sup> Session*, Issue #1, IMO Publishing, January 12-16, 2009. p. 13.

## CHAPTER V

### 5.1 Conclusion

In the modern era, as in the olden times, 'slavery' on ships has transcended into different kinds of maltreatment against seafarers. The reality of the seafaring sector today “involves virtual slavery, appalling living conditions, starvation rations”<sup>123</sup> and other forms of human exploitation and degradation such as abandonment, denial of shore leave and criminalisation of seafarers in the event of maritime accident. These are the few, but most prevalent abuse or violation of seafarers' human rights today.

While it is true that efforts to address the issue on human rights and welfare of the seafarers are continually being undertaken through the adoption or enactment of different laws, legal instruments and other policy measures, both domestic and international, the rampant violation of seafarers' human rights have not yet been fully addressed even up to now. And this is the question that is foremost in the minds of anyone concern in the shipping industry.

A careful analysis of the prevailing situation in the shipping community will indicate that most of the existing laws and international conventions formulated to address and protect the rights of seafarers have been rendered ineffective and toothless due to lack of enforcing power or mechanism. Based on the study of the legal regimes presented in the previous chapters, most of the existing laws and international conventions instituted to address and protect the rights of seafarers have been rendered ineffective because they are merely recommendatory in nature.

One example is the Guidelines on Fair Treatment of Seafarers in the Event of Maritime Accident which was a joint enactment of the ILO and IMO Working Group. This particular Guideline, as the word itself connotes, is in the nature of a

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<sup>123</sup> Supra, footnote 24 at p. 141.

recommendatory measure or instrument where State parties concerned are merely guided on how to approach the problem or issue on unfair treatment of seafarers in the event of maritime accidents. Since it is not a mandatory instrument, the application or implementation of the Guideline only becomes discretionary on the part of the State parties concerned.

In other words, the purpose of addressing the issue of 'unfair treatment' and basic seafarer's human rights is not fully achieved. The possibility of implementation or application of the Guideline tends to become arbitrary on the part of the State parties concerned. As with the numerous measures and international legal instrumentations, which were enacted and adopted with the noble purpose of protecting and advancing the rights of the seafarers, the sad reality is that none of these measures had actually succeeded in really preventing the continuous abuse of and violation of the rights of seafarers. There is no point, therefore, in coming up with more laws and international instruments if the same cannot be effectively implemented because of lack of a strong enforcement regime that will compel and bind concerned State parties.

The existing international conventions and legal instruments are sufficient to protect the interest and rights of seafarers. Institutional reforms and remedies within the ambit of a fair treatment of seafarers is what is needed to address this problem. More importantly, enforcement provisions that are mandatory in nature, coupled with corresponding international sanctions, must be spelled out in law to compel the State parties/entities concerned to genuinely implement the adopted international conventions and instruments.

In fact, notwithstanding the enactment of the Guidelines for the Treatment of Seafarers, there are actually a number of international laws and regulations already in place which safeguard the rights and welfare of seafarers. The United Nations Declaration of Human Rights (UDHR), UNCLOS, ILO and the IMO provide some of such measures which unfortunately are not being applied as the circumstance would call. Indeed, a number of treaties and conventions may be adopted and ratified everyday but such measures would be purposely in vain if the same will not be implemented by the ratifying member States. In reality, even UN treaties and similar international agreements issued by other international bodies, which aimed at

protecting the rights of seafarers, have been ignored by State parties/entities to favor the commercial interests of their shipping sector.

It is important to stress that any discussion on the treatment of seafarers always boils down to the basic issue of human rights, where it encompasses every aspect of seafarers' rights and welfare. And in the discussion of the issue of human rights, it is also important to stress that such matter should not be taken lightly because the rights of every human being is essentially part of his existence and therefore should not in any case be subjected to any compromise. It is non-negotiable and must proceed over the material aspect of commercialism. Therefore, the implementation and application of various conventions and international instruments aimed to protect the infringement of the human rights of seafarers should be done with all sincerity and integrity and not merely for publicity purposes. More often than not, politicians' agenda includes giving false and empty promises to the underprivileged members of society which includes the seafarers, for the purpose of earning votes, but after having been elected to the public office, the policy inclination of the elected politician is to give favorable benefit to shipowners and other economically advantaged sectors of the society who are financially capable of supporting and funding their political ambitions and endeavours.

On the other hand, it is possible that some of the existing laws and instruments may have already been obsolete and no longer applicable under the present circumstance, or the same were rendered ineffective for some other reasons other than the failure to apply and implement it. In which case the enactment or adoption of appropriate measures to address the current issues of unfair treatment and violation of the rights of seafarers is deemed imperative. This brings forth another finding of my study, where it appears that aside from the International Court of Justice (ICJ), there is no international tribunal that really specializes in rendering human rights justice specifically to seafarers. Although there is the Human Rights Council (HRC) which is an intergovernmental body within the UN system, responsible for strengthening the promotion and protection of human rights around the world. The HRC adopted a Complaints Procedure mechanism allowing individuals and organisations to bring complaints of human rights violations to the attention of the Council. However, the HRC merely functions as an advisory body that will assist in promoting and protecting the human rights. It does not render any decision or remedial action to

redress any complaints of violation of human rights. Another is the International Criminal Court (ICC) which came into being after its Statute entered into force in July 2002. Under Article 5 of its Statute, the ICC has jurisdiction to try crimes of genocide, crimes against humanity, war crimes and crimes of aggression. Clearly, criminalization of seafarers do not fall under the crimes which the ICC has jurisdiction. Moreover, lest we forget that the criminalization of seafarers is not really criminal in nature but more of a violation of the seafarer's human rights. But as to whether the violation of human rights can be considered criminal in nature, is another issue that needs to be threshed out in another forum. In the meantime, one important issue remains to be addressed, and that is the imperative need to create a special court or tribunal which specializes on cases involving the special group of maritime workers like the seafarers.

Significantly, the lack of relevant jurisprudence pertaining to the civil rights of seafarers, particularly the right to due process, only shows that seafarers seldom find any recourse, if at all, in any international tribunal for lodging their legal course of action against the violation of their civil rights. The common practice is for seafarers to file their complaints or course of action in the courts of their respective countries or domestic jurisdiction or in the courts where their ships are registered.

Recognizing, further, that like ships, the job or work of seafarers is inherently international in character, their principal employer being a foreigner and the ship they work on are commonly registered in a flag State different from the nationality of the principal employer, which makes any legal actions more complicated because of conflicts of law occurring between and among different jurisdictions. Due to the complexity of the situation, seafarers are in a quandary as to the course of action to be taken and most of the time, they are left without recourse and with no legal access or assistance to pursue their actions. Worst, they are not even aware of their legal rights when circumstance calls for exercising them.

Except for the legal assistance and guidance provided by their respective labour unions, the seafarers are literally left to their own device in resolving the problem. The shipowners/employers and their respective flag States are proven to be unreliable in taking care of their seafarers' plights. This further bolster my analysis that no immediate and available recourse aimed at protecting the seafarer's human rights and

welfare can be found in any particular international tribunal or body, the same entities which allegedly or supposedly caters to protecting the interest of the seafarers.

On the other hand, while it is true that the ILO and IMO issued a number of treaties and conventions for the occupational interest and welfare of seafarers, the perusal of these conventions likewise shows that they pertain mainly to the working conditions of seafarers. Nowhere in the provisions of ILO and IMO conventions as well as other international instruments dealt specifically to protecting the human rights interest of the seafarers. Even the proposed Maritime Labor Convention (MLC) failed to incorporate provisional measures dealing with the seafarers' civil rights. The set of principles and rights for seafarers as provided under the MLC only includes measures relating to the employment accommodations, recreational facilities, food and catering, health protection, medical welfare and social security protection of seafarers.

The MLC's thrust at improving the working conditions of the seafarers is manifested by the proposed institutionalization of enforcement mechanisms such as policy that provides seafarers' an on board and on shore complaint procedures relating to any matters concerning the shipowners' and shipmasters' control and supervision of the operation of the ships, including those that pertains to the port States inspection function and flag States administration and regulation over their ships. However, the apparent but neglected provision that was not included in the formulation of the MLC relates to the most basic and important human rights of seafarers which involves their civil rights and liberty. The basic human rights include, among others, (1) the right to due process; (2) right to self incrimination; and, right to legal access or counsel.

The prevalent issues affecting seafarers today such as criminalization of seafarers, abandonment and denial of shore leave involves the exercise of these civil rights which is part of the broad spectrum of the human rights regime. The new MLC leave a lot of discretion and flexibility to ratifying member States in implementing and delivering the so-called rights of seafarers. This is perceived as "lip serving", a one-sided affair on the part of the implementing bodies or entities which leave a considerable doubt as to the sincerity of the intent in genuinely protecting and advancing the interest of the seafarers.

It is, therefore, erroneous to label the MLC as the seafarers' "Bill of Rights" because not all of the fundamental rights of the seafarers are incorporated therein. In fact, the



most basic right to civil liberty is not addressed in the said Convention. Unless and until it includes provisions covering the basic human rights involving the civil liberty of the seafarers, the MLC may just suffer the same fate of the other international conventions and instruments that is rendered ineffective in addressing the issue on the fair treatment of seafarers.

Finally, having in mind the question forwarded by Peter Morris<sup>124</sup> on “Who will benefit from the misery and pain of the seafarers?”, comes the realization that a time might come when seafaring will become a thing of the past, a mere legend of the sea where only the brave and the strong soul would dare to venture and face its perils. The continuous inhumane treatment and deprivation of seafarer’s rights becomes a disincentive to future generation of seafarers who now opts for a more secure and safer land based career, proof of which is manifested by the current shortage of skilled officers who will command the world’s ship. The ramification for the steady decline of ship officers and the waning interest in seafaring career, undeniably would be the disruption of the efficiency of world commerce where the transportation of 90% volume of the world trade depends entirely on the unrivaled skills of this special group of maritime workers.

## **5.2 Recommendations**

Having laid down the outcome of the analytical study relating to the human rights implication on the treatment of seafarers, the following are the recommendatory counter measures aimed at addressing some of the pertinent issues identified in this study. The first proposal is to strengthen the “Guidelines for the Fair Treatment of Seafarers in the Event of Maritime Accident” by converting it into a treaty or convention that will bind the ratifying State party, and incorporating therein enforcement measures that is coupled with sanctional provisions in case of failure to implement it. The reason for this is that a violation will not be considered a “violation” unless there is a corresponding sanction for a given infraction. An

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<sup>124</sup> Article entitled *International Commission on Shipping: Inquiry into Ship Safety* by the Hon. Peter Morris, excerpt from the conference dinner address on *The Strategic Importance of Seaborne Trade and Shipping: A Common Interest of Asia Pacific*, Australian Maritime Affairs No. 107, Commonwealth of Australia, 2002, p. 27.

alternative action in case the conversion of the Guideline into a treaty or convention is not feasible, would be, to incorporate the provisions of the aforementioned "Guidelines" in the new Maritime Labour Convention (MLC), in a way that its enforcement will be included among the set of instituted mechanisms ensuring the mandatory implementation of the convention aimed in protecting and advancing the rights and welfare of the seafarers.

The second proposed measure pertains to the proposed Guidelines on provision of financial security in cases of abandonment of seafarers. Similar to the Guidelines for the Fair Treatment of Seafarers in the Event of Maritime Accident, this particular Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers should be incorporated in the Maritime Labour Convention, to avail the advantages of being considered a treaty or international convention with the appropriate enforcement mechanism and sanctions that will make its compliance mandatory and binding to ratifying nations. It must be reiterated that the effect of a Guideline, which is in a nature of a "soft law" merely makes it recommendatory and does not generate a compelling reason for compliance. Further, there must be included a provision in the proposed Guideline which impose upon flag States the obligation to require ships registered under its flag to submit as documentary requirement, a bank certificate or any form of proof that the shipowner has obtained a financial security plan or scheme guaranteeing the seafarers' wages and immediate repatriation in the event of the employer/shipowners insolvency. The financial security scheme may be in a form of a bank guarantee, insurance, social security, government fund or a bond. The flag States must specifically indicate in its regulations and polices that the documentary requirement indicating the financial security plan for seafarers is a pre-requisite for the registration of the ship. It must be stressed in this way that the measures pertaining to the human rights of seafarers should be undertaken and implemented in a firm and unwavering manner. Therefore, key personalities and concerned international bodies/entities tasked to formulate international regulations or instruments should ensure that the international conventions or instruments they issue should have the force and effect of a law, otherwise, every aspect of deliberation and drafting of the numerous Guidelines will turn to useless effort if the same will be ignored and not implemented by the party States.

The next proposed measure is to create an international body or tribunal which specializes on cases involving the violation of seafarers' human rights. Various international bodies have long recognized that seafarers belong to a special group of workers due to the unique nature of their work, which is also inherently international in character. It is, therefore, important that a special court or tribunal be created to especially handle cases of seafarers because of the intricacies and complexities involved by reason of conflict of laws. The Special Court for Sierra Leone, or the International Criminal Tribunal for Rwanda (ICTR) which is a subsidiary body of the Security Council of the United Nations and the Extraordinary Chambers in the Court of Cambodia are some of the special courts or tribunals created to handle specific cases involving a particular group of individuals in a particular country. The precedents in creating these special courts or tribunals may be followed by the ILO or the IMO or even the UN in creating the special court or tribunal for a specific group of maritime workers like the seafarers. On the other hand, in lieu of a special court or tribunal, a dispute settlement body may be created to expedite the handling of cases or controversies involving the enforcement of the seafarer's human rights. This is under the earlier premise that violation of human rights may not be considered a criminal cause of action and a dispute settlement body other than a judicial court may be the best venue for such kind of cases. The proposed dispute settlement body maybe created under the umbrella of the International Human Rights Commission but it must exclusively handle cases of human rights violation of seafarers.

Subsequently, considering that the central gravity of seafaring industry is located in Asia where majority of seafarers came from this part of the globe, it is proposed that a cooperation be established or created among the labour supplying countries, like a so-called Asian bloc, similar to the European Union (EU). This will be constituted by the developing countries in the Asian region with the aim of creating a strong presence and impact among developed and economically powerful nations. By forging this kind of cooperation, the Asian bloc will have a unified voice that is strong enough to call for the needed reforms in the social, human rights and welfare aspect of their maritime manpower, the seafarers, whose remittances undeniably helps in generating their additional national capital income. Further, they can effectively push for the implementation of a uniform standard on seafaring employment while at the

same time avoiding or preventing the occurrence of too much cut throat competition among them in terms of labour supply.

Finally, it also proposed that a renewed campaign for the ratification and adoption of the ILO Convention 185 or the SID Convention be undertaken by IMO and the ILO. This particular convention is very relevant in facilitating the shore leave of seafarers. The SID Convention is a good convention with all its detailed security features. It guarantee that the identity document to be issued on seafarers is a valid and stand alone document on top of the passports and visa that are usually required and issued to seafarers. The beauty of the identity document contemplated under the SID Convention is that possession of such documents will facilitate the ship-to-shore activities of the seafarers including the undertaking of the necessary shore leave, without the required visa and without any unnecessary inspection and interrogation as to the identity of the seafarers. Considering, however, the low level in the ratification of the SID Convention, flag States are enjoined to take a second look on the advantages and benefits of the SID Convention for the possibility of adopting it. On the other hand, the SID Convention may be incorporated in the proposed amendment of the 1965 FAL Convention, which is expected to be ratified and enter into force in 2010. Another alternative is to incorporate it in the new Maritime Labour Convention, including its technical features such as biometrics and machine readable identity documents. All avenues must be taken for the sole purpose of addressing and resolving the pertinent issue of denial of shore leave because it is a right that is essential to the well being of seafarers and denial of which will not only affect the seafarers themselves but also the functional operation and safety of the ship.

Having considered all the issues, it is fervently hoped that this study, despite its limits of information, may contribute even in a small way, in addressing the present problems besetting the modern day seafarers. Attention is being called upon the appropriate sectors in the maritime industry to take notice, once and for all, the plight of the unfortunate seafarers whose human rights are continuously being violated and disregarded. It is also hoped that this paper will serve as a wake up call for anyone concern in the shipping industry, so as to prevent the happening of the inevitable obliteration of the seafaring profession brought about by the continuous unfair treatments of seafarers.

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