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The Maritime Labour Convention 2006: A Frozen Revolution in the Realisation of Social Justice for Seafarers?

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Abstract

Realising social justice has been one of the central goals of the International Labour Organisation since its inception. Yet today the unique environment and dangers associated with working at sea make the world's 1.2 million seafarers a particularly vulnerable group, both in terms of their physical safety and mental wellbeing, and concerning the realisation of social justice.

Social justice is a somewhat abstract term, taken to refer to the “fair” balance of power and benefits between different groups in society. Central to this notion of “fairness” is the respect for liberties and human dignity. However, international maritime law has traditionally focused on political and economic considerations rather than the social needs of the seafarer. This problem has been exacerbated by the advent of globalisation and an increasing tendency within the industry for shipowners to seek out flags of convenience, allowing them to legitimately subvert the international labour standards developed by the ILO with the intention of cutting operational costs. Seafarers have become commodified, seen as objects of the industry rather than subjects of the law who are entitled to rights and protections.

This thesis examines how the innovations contained in the 2006 Maritime Labour Convention are likely to combat these problems and influence the realisation of social justice for seafarers when they come into effect in August 2013.

While not revolutionising the content of the rights and protections afforded to seafarers during the course of their employment, this thesis identifies several innovations concerning implementation and enforcement where the MLC has broken new ground and looks set to revolutionise the realisation of social justice for seafarers.

Consolidation of the previous plethora of maritime labour conventions into a single instrument seems set to increase the accessibility and understanding of rights for seafarers while also providing a focal point through which to incorporate maritime labour considerations into international maritime law – achieving so-called “Fourth Pillar” status for the MLC. In addition, a global legal space for maritime labour rights looks set to be created, working within the jurisdictional framework already established by maritime labour law to strive towards the universalization of seafarers’ rights and foster the ability to human rights forum shop to gain access to justice. Finally, the MLC has provided, for the first time, a legal foundation backed by an enforcement mechanism embedded in competition norms for corporate social responsibility, turning the flag of convenience system on its head and seeking to hand the competitive advantages to those shipping companies who respect and adhere to international labour standards.

The thesis concludes by reflecting recognising that the MLC has therefore made considerable strides towards the substantive realisation of social justice but tempers this by acknowledging the need to monitor and evaluate how these provisions are interpreted and applied in practice when the Convention comes into effect.

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Abbreviations

ATCA	Alien Tort Claims Act
CSR	Corporate Social Responsibility
ECHR	European Convention of Human Rights
HTWG	High-level Tripartite Working Group on Maritime Labour Standards
ILC	International Labour Conference
ILO	International Labour Organisation
IMO	International Maritime Organisation
ISO	International Organisation for Standardization
ISPS Code	International Ship and Port Facility Security Code
ITF	International Transport Workers' Federation
ITUC	International Trade Union Confederation
JMC	Joint Maritime Commission
MARPOL	International Convention for the Prevention of Pollution from Ships
MLC	Maritime Labour Convention
MOU	Paris Memorandum of Understanding on Port State Control
OECD	Organisation for Economic Cooperation and Development
OECD Guidelines	Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises
PTMC	Preparatory Technical Maritime Conference
SOLAS	International Convention for the Safety of Life at Sea

STCW

International Convention on Standards of
Training, Certification, and Watchkeeping for
Seafarers

UNCLOS

United Nations Convention on the Law of the
Sea

1 Introduction

1.1 Background

On 23rd February 2006 the Tenth Maritime Session of the International Labour Conference (hereafter: ILC) adopted the Maritime Labour Convention 2006¹ (hereafter: MLC). It is set to enter into force on 20th August 2013 having been ratified by forty-three States representing 69% of the world's gross tonnage of ships.² The MLC seeks to provide comprehensive rights and specialised protections at work for the world's estimated 1.2 million seafarers.³

Today between 80 and 90% of world trade is carried by shipping.⁴ The importance of this industry in an increasingly globalised world cannot be underestimated. Nor should the importance of adequate welfare for seafarers if the maritime industry is to continue to sustain a motivated and healthy workforce which can help shipping continue to grow and prosper.⁵

Yet the reality is that, for many people, seafarers are out of sight and out of mind, with the pivotal role they play in the global economy going unappreciated.⁶ Seafarers are often forced to accept sub-standard protections and conditions during their employment or to take unreasonable risks while carrying out their tasks.⁷ This exploitation by employers has been facilitated by a maritime system still very much adherent to increasingly dated principles of jurisdiction and an international labour system which previously lacked the clarity and universal enforcement potential to make an industry wide impact.⁸

Part of the cause of these problems is that the nature of shipping has changed considerably with the advent of globalisation, which has served to heighten international competition and thus increase pressure to cut costs, including those expended on labour standards.⁹ Moreover, there has been a

¹ *Maritime Labour Convention 2006*; ILC 94th Session, 23 February 2006

² <http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm> (accessed 22/5/13)

³ [http://unctad.org/en/Pages/Publications/Review-of-Maritime-Transport-\(Series\).aspx](http://unctad.org/en/Pages/Publications/Review-of-Maritime-Transport-(Series).aspx)

⁴ See: [http://unctad.org/en/Pages/Publications/Review-of-Maritime-Transport-\(Series\).aspx](http://unctad.org/en/Pages/Publications/Review-of-Maritime-Transport-(Series).aspx) & <http://www.ics-shipping.org/shippingfacts/home/> (accessed 22/5/13)

⁵ ILO; *The Global Seafarer*; 2004 International Labour Office Geneva, p189

⁶ Stevenson, Douglas; *The Burden that 9/11 Imposed on Seafarers*; 77 Tul. L. Rev. 2002-2003 p1407

⁷ International Commission on Shipping; *Inquiry into Ship Safety, Slavery and Competition*; 2000 p21

⁸ Blanck, John; *Reflections on the Negotiation of the Maritime Labour Convention 2006 at the International Labour Organisation* (hereafter: *Reflections*); 31 Tul. Maritime Law Journal 2007 p36

⁹ Lafond, Genevieve; *Dignity at Work: Why is International Law fit for the job?*; 24 Rev. quebecoise de droit int'l 2011-2012 p121

considerable change in the fabric and make-up of shipping crews brought on by this increasingly globalised world. In the mid-Twentieth Century, most of the world's seafarers were citizens of the nations represented by their ships' flags.¹⁰ Yet today the majority work on board a ship flagged to a State which is not their own, weakening the role of social actors at national level in the seafarer's country of origin concerning the promotion and protection of labour standards.¹¹ The international nexus has simply become far more complicated and seafarers, through the nature of their employment, often come under the auspices of a myriad of jurisdictional regimes and their corresponding laws. This has led to confusion and inconsistencies in the application of international labour standards as the previous system lacked universality, partially deriving from the varying levels of ratifications of the multitude of conventions on the issue.

The complexities brought on by the increasing globalisation of the industry also brought about the exploitation of the traditional jurisdictional rules of maritime law, with companies seeking to register their vessels under the flag of a State which has poor or non-existent labour requirements, cutting operational costs and gaining economic advantages over their competitors. This serves to act to the detriment of the seafarer, forcing them to endure substandard living and working conditions while on board vessels and creating inconsistencies in the obligations and the enforcement of labour rights from State to State, company to company and worker to worker. Akin to labour abuses in the supply chain, the continued willingness of many shipping companies to register under flags of convenience to lower the applicable labour standards on their vessels has become a clear symbol for the failure of neoliberalism in the maritime industry.

The common scenario forwarded to illustrate the complexities of the maritime industry is that:

A Seafarer may be a national of State A, recruited in State B, working on a ship owned by a company registered in State C but flagged under the jurisdiction of State D, docked in a port in State E and about to sail to State F on a trade voyage which began in State G.

It is easy to see how confusion can arise for seafarers as to the rights they have during employment in this industry. This confusion is often compounded by the fact that the labour rights and protections of seafarers have been scattered across a plethora of international instruments contained in one body of international law while the laws of the sea which govern jurisdiction and the largest part of the operation of shipping companies are contained in another.¹²

¹⁰ ILO; *The Global Seafarer*; 2004 International Labour Office Geneva, p1

¹¹ McConnell, M; Devlin, D & Doumbia Henry, C; *The Maritime Labour Convention 2006: A legal primer to an Emerging International Regime* (hereafter: *A Legal Primer*); 2011 Koninklijke Brill NV p44

¹² Stevenson, Douglas; *Book Review* (Reviewing Fitzpatrick & Anderson Eds.; *Seafarers' Rights*); 36 J. Mar. L. & Comm. 2005 p567

The International Maritime Organisation (hereafter: IMO) is a specialised agency of the United Nations system which has the responsibility to encourage the adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation. This stands in contrast to the International Labour Organisation's (hereafter: ILO) concern for the improvement of labour conditions in general and in the maritime sphere for seafarers' conditions of employment and working conditions.¹³

Indeed, from a legal and institutional perspective, the labour and social rights of seafarers somewhat uncomfortably straddle both shipping and labour expertise and consequently risk falling into an unfocused and muddled legal space between the two fields.¹⁴ This can, in part, be attributed to the different focus of the maritime and labour legal regimes. The former operates within the system of the international law of the sea and the idea of Flag and Port State responsibilities while the latter, even when implementing the standards found in international conventions, tends to look more to national practice and territorial jurisdiction.¹⁵

Previously, the IMO has made attempts from a maritime law perspective to remedy concerns surrounding safety and welfare by adopting the core conventions of: the International Convention for the Safety of Life at Sea (hereafter: SOLAS),¹⁶ the International Convention for the Prevention of Pollution from Ships (hereafter: MARPOL)¹⁷ and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (hereafter: STCW).¹⁸ But these lacked a central focus on the welfare of the seafarer and turned their attention more to the nature of the industry and the standards of ships themselves rather than looking to incorporate a more individual and humanistic element to the legal framework of protections.

The MLC has been lauded as the “Fourth Pillar” of this area of international shipping standards and is designed to place labour protections on the same legal and practical footing as the existing regime for minimum standards for ship safety and security.¹⁹ It is hoped that it will stand alongside the existing conventions to bridge the gap between the often divergent areas of international maritime law and international labour law, focusing attention

¹³ ILO Committee of Experts; *General Survey of the Reports on the Merchant Shipping (minimum Standards) Convention (No. 147) and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155), 1976* (Hereafter: *General Survey Convention 147*); International Labour Conference, 77th Session, 1990 para 16

¹⁴ McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p4

¹⁵ Ibid. p4

¹⁶ *International Convention for the Safety of Life at Sea*; IMO 1 November 1974

¹⁷ *International Convention for the Prevention of Pollution from Ships*; IMO 1973

¹⁸ *International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers*; IMO 7 July 1978

¹⁹ McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p4

on the needs and rights of the seafarer and adding a much needed “human element” to the maritime industry. In doing so, it should make labour standards more visible²⁰ while simultaneously seeking to ensure favourable outcomes for all stakeholders in the international maritime industry.²¹

1.2 Purpose of Thesis

The ILO has stated that the MLC aspires to be “globally applicable, easily understandable, readily updatable and uniformly enforced.”²² It is thus the premise of this thesis to examine the workability of such a proposal and how this ambition is to be translated into reality. The critique of this goal shall be conducted against the backdrop of the standards needed to effectively realise social justice, both formatively and substantively, for seafarers. The analysis of the theory and practice behind a socially just society will enable us to develop criteria and minimum standards which must be met for the maritime industry to be considered “socially just” and to gauge whether the MLC has been successful in working towards these standards or whether it has merely codified the existing problems for the foreseeable future.

The research has led to the conclusion that while the MLC has not revolutionised the legal landscape in either the labour or maritime law regimes, it has served to innovatively introduce and adapt several measures and approaches from across these two legal fields in a manner which specifically acts towards the realisation of social justice for seafarers. These have centred primarily, although not exclusively, on the translation of labour rights from theory to practice through effective enforcement. This thesis contends that such measures may yet come to be considered as revolutionary steps in this respect.

1.3 Outline of Structure

The current introductory chapter will detail the focus and limitations of the thesis while also providing an overview of the MLC through an examination, in particular of the *travaux préparatoires*, which will provide a detailed backdrop to the development and aims of the Convention.

Chapter 2 will provide a brief analysis of the jurisprudence behind the theory of social justice and descriptively build a perspective of this centred on maritime labour considerations. To do so, this chapter takes the work of John Rawls as the departure point and uses critiques of his *Theory of Justice* to build an internationally applicable set of criteria. These are then adapted to the labour field and, specifically, the maritime labour field using a variety

²⁰ Ibid. p4

²¹ Grey, Michael; *The Maritime Labour Convention – Shipping’s “Fourth Pillar”* available at: <http://www.seafarersrights.org/seafarers-subjects/maritime-labour-convention-mlc/> (accessed 22/5/13)

²² <http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm> (accessed 22/5/13)

of primary materials from the ILO and scholarly articles and texts from leading academics and professionals.

Hereafter, Chapter 3 employs a traditional legal dogmatic methodology to investigate the international maritime legal framework, with a particular focus on the nuanced exercise of jurisdiction in the United Nations Convention on the Law of the Sea which governs this area of international law and its surrounding discourse. It will then discuss how this has served to create problems in the realization of social justice for seafarers, particularly in relation to the objectification of the seafarer and the legitimisation of the flag of convenience phenomenon leading to pre-emptive forum shopping on the part of shipping companies seeking ways to bypass international labour protections.

Chapter 4 provides a temporal analysis of the enforcement and implementation methods contained within previous ILO conventions on maritime labour law, seeking to illuminate the path of the MLC into the international framework of maritime labour protections. It will then shift the focus to the substantive provisions and innovations of the MLC, using this convention as the core document and supplementing our understanding of it through reference to various textbooks, academic papers, conference notes, speeches and official websites.

The critical legal analysis conducted in Chapter 5 will partly be based on a legal assessment of the MLC and the overarching systems of maritime and labour law which will have been examined in previous chapters. It will also draw on the principles and norms of jurisdiction, access to justice, universality and corporate social responsibility, among others, to assess the potential impacts of the MLC on the realisation of social justice for the often isolated and marginalised community of international seafarers and determining the scale and nature of changes that the MLC is set to usher in.

In the Conclusion I will give a short summary of the impact that the innovations of the MLC are likely to have on realising social justice for seafarers before providing some final remarks about the revolutionary nature of these changes.

1.4 Delimitations

Despite their interest and relevance towards the realisation of social justice, spatial constraints dictate that this thesis will be unable to examine alternatives to promoting better standards for seafarers such as: the possibility of creating additional IMO conventions, international law reform to combat flags of convenience or trade considerations such as the insertion of social clauses into bilateral trade agreements between States. Instead, I will demonstrate specifically how the MLC and the provisions it is set to introduce, could impact the realisation of social justice for seafarers.

Neither will this thesis seek to analyse the standards of international protections afforded to workers in the fishing industry as this is the subject of a separate area of international labour law.

It should also be acknowledged that much of the discussion and the conclusions drawn are largely hypothetical in nature as the MLC does not come into effect until 20th August 2013, three months after this thesis was to be submitted. Thus many of the innovations which it is believed will lead to a more substantial realisation of social justice for seafarers cannot, yet, be linked to definitive practical outcomes.

1.5 Towards a Single Convention for Maritime Labour: Background and Context

This section will present a summary of the negotiation of the MLC, noting the focus of the drafters and the participants at the various stages to attempt to establish a basic understanding of what it was that the MLC was designed to achieve.

The vision for the MLC began with the adoption of a resolution by the Joint Maritime Commission (hereafter: JMC) – a bipartite standing body consisting of shipowner and seafarer members which provides advice to the ILO Governing Body on maritime issues²³ - in 2001 concerning the review of relevant ILO maritime instruments.²⁴ Commonly referred to as the “Geneva Accord,” it expressed a common understanding between shipowners and seafarers about what should be the next step in evolving the existing ILO maritime standards.²⁵

The idea to negotiate towards the Geneva Accord actually came largely from the impetus of the shipowners. They felt that the uneven ratification of the previous multitude of ILO conventions on maritime labour had resulted in chequered and cumbersome obligations and competitive advantages to shipowners from non-ratifying States who did not need to comply with the same labour standards.²⁶ While the Geneva Accord did not call into question the validity of existing maritime labour standards, both the shipowners and seafarers groups expressed serious concern at the continuing failure of these

²³ http://www.ilo.org/global/industries-and-sectors/shipping-ports-fisheries-inland-waterways/WCMS_162320/lang--en/index.htm (accessed 22/5/13)

²⁴ ILO Joint Maritime Commission (29th Session): Final Report; 2001 Geneva; JMC/29/2001/14 p28-29 available at: <http://www.ilo.org/public/english/dialogue/sector/techmeet/jmc01/jmcfr.pdf> (accessed 22/5/13)

²⁵ Politakis, George; *Breathing Life into the MLC, 2006: Moving from Ratification to Implementation* (hereafter: *Breathing Life*); Speech 27 September 2012; Maritime Human Resource Solutions and the MLC 2006

²⁶ Blanck, John; *Reflection*; 31 Tul. Maritime Law Journal 2007 p39

standards to have any significant “on the ground” benefit to the rights and working conditions of seafarers.²⁷

In light of this, the Seafarers group – the maritime equivalent of the workers’ group in the tripartite ILO - voiced the opinion that a new regulatory mechanism was essential to the protection and realisation of basic labour rights within this globalised industry.²⁸ The two groups went on to conclude that the best means of addressing these problems was to develop a new single framework convention on maritime labour standards to consolidate and update the existing body of ILO conventions on this industry and to introduce new methods of compliance centred on Port State control.²⁹ Through these statements, the JMC clearly favoured and tried to steer the development of international labour law in the maritime context towards a system of international as opposed to national regulation, moving towards a bridging of the gap and seeking more complementarity between the maritime and labour regimes.³⁰

At its session in March 2001, the ILO’s Governing Body accepted the JMC resolution and established the High-level Tripartite Working Group on Maritime Labour Standards (hereafter: HTWG)³¹ with a composition of twelve Government representatives, twelve Shipowner representatives and twelve Seafarer representatives.³² The HTWG was designed to consider and draft a single international convention consolidating, as far as reasonably practicable, the substance of all of the previous international maritime labour standards that were up to date and relevant to the shipping industry today while addressing the issues raised by the JMC.³³

The negotiations which followed worked in line with the conclusions of the Geneva Accord and so did not question the existing international labour standards, which were recognised as both comprehensive and adequate. Instead, the focus remained on the fact that these standards had failed to equate to any real and significant improvement to the working conditions of seafarers and how to remedy this situation.³⁴ From an early stage then, the

²⁷ Christodoulou-Vartosi, I & Pentsov, Dmitry; *Maritime Work Law Fundamentals: Responsible Shipowners, Reliable Seafarers* (hereafter: *Maritime Fundamentals*); 2008 Springer-Verlag Berlin p12

²⁸ JMC; *Final Report JMC*, 29th Session, Geneva, 22-26 January 2001; ILO Doc. No. JMC/29/2001/14 para 23

²⁹ JMC; *Final Report JMC*, 29th Session, Geneva, 22-26 January 2001; ILO Doc. No. JMC/29/2001/14 paras 23 & 35

³⁰ McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p49

³¹ Preparatory Technical Maritime Conference; *Consolidated Maritime Labour Convention: Commentary to the Recommended Draft* (hereafter: *MLC Commentary*); PTMC/04/2 p1 available at: <http://www.ilo.org/public/english/standards/relm/ilc/ilc94/ptmc/pdf/cmlc-comment.pdf> (accessed 22/5/13)

³² ILO; *Record of Proceedings 94th Session 2006*; 2007 ILO Office Geneva p1/6

³³ McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p51-52

³⁴ Bolle, Patrick; *The ILO’s new Convention on maritime labour: an Innovative Instrument* (hereafter: *An Innovative Instrument*); 145 Intl. Lab. Rev. 2006 p138

MLC was never designed as a revolutionary tool in terms of the specific content of labour rights of seafarers. The drafters instead sought ways in which to mainstream maritime labour standards within the international maritime law regime while working towards the *de facto* and universal realisation of the content of these rights.

The five year drafting process of the MLC involved intense and often strained negotiations at both a formal and informal level.³⁵ These included: four meetings of the HTWG between December 2001 and January 2005;³⁶ two meetings of a Special Tripartite Subgroup;³⁷ an *ad hoc* meeting of a tripartite group of social security experts; the submission of a draft to a Preparatory Technical Maritime Conference (hereafter: PTMC) who would review and make recommendations on this in September 2004; and a Tripartite Intersessional Meeting to Follow up on the work of the PTMC in April 2005 as well as numerous meetings between shipowner delegations and seafarer delegations before the ILC adopted the final version in 2006.³⁸

During the formal negotiations, the Seafarers representatives were particularly keen to avoid the dilution of the rights that persons working on board vessels currently enjoyed, adamant that there could be no backwards step in the attempts to develop better maritime labour in practice. Meanwhile, the Shipowners representatives focused their attention on ensuring widespread ratification and clarity in the text of the convention itself as this would help to combat the unfair competition which had become embedded in the system.³⁹ As a means of compromise, it was agreed that the inclusion of what has come to be termed a “Seafarers’ Bill of Rights”⁴⁰ would be tempered by the need to omit some of the excessively detailed obligations from previous conventions. In addition, other obligations were moved to a non-binding section of the treaty in order to increase the ratification levels.⁴¹ This also incorporates notions of the progressive realisation of rights, enabling States to take the most appropriate measures within their own national legal systems to make the core provisions of the MLC a reality.

Based on this, the final version of the MLC introduces a new format to the ILO’s convention system. It comprises three different parts – Articles,

³⁵ McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p59

³⁶ First meeting 17-21 December 2001; second Meeting 14-18 October 2002; third meeting 30 June-4 July 2003 and final meeting 19-23 January 2004. Available at: http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_153447/lang--en/index.htm (accessed 22/5/13)

³⁷ 24-28 June 2002 and 3-7 February 2003

³⁸ Reports from these various meetings and discussions can be found at: http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_153447/lang--en/index.htm http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_153447/lang--en/index.htm (accessed 22/5/13)

³⁹ McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p57

⁴⁰ See Below p51

⁴¹ Preparatory Technical Maritime Conference; *MLC Commentary*; PTMC/04/2 p3

Regulations and the Code – with some provisions being binding and others non-mandatory and largely advisory in nature. This new structure was developed with a specific focus on achieving a firmness on the application and interpretation of the rights themselves, contained in the Articles and Regulations, and a degree of flexibility concerning implementation, the Code.⁴²

In terms of developing universal standards for all seafarers, the MLC seeks to “level the playing field” for the working and living conditions on board ships by moving beyond *de jure* standard setting to *de facto* implementation. It has done so first by extending the convention’s applicability to non-ratifying States through the principle of “no more favourable treatment” in ports,⁴³ while also introducing a simplified amendment procedure⁴⁴ in an attempt to create a living document able to keep pace with the rapid changes in the industry. The drafters have sought to provide “teeth” to the compliance measures through the introduction of a certification scheme borrowed from the maritime industry and adapted to function under a labour specific system, a measure which may also serve to bring together the previously divergent legal regimes of the maritime and labour systems.

As illustrated by this overview, the MLC was never intended to develop a new human and labour rights regime for seafarers. Instead, the drafters were tasked with developing an instrument to bring together as much of the existing body of ILO instruments as possible and making the existing rights and protections more applicable in practice. Focus was on compliance, implementation and developing a regime which could function alongside and within the parameters of maritime law and on universalising the labour standards applied in the industry. It is against the backdrop of these aims and negotiations that our analysis of the MLC should be conducted, with the new international standards on implementation and enforcement needing to respond to the primary demands of social justice if they are to be deemed adequate.

⁴² Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John’s, Newfoundland

⁴³ *Maritime Labour Convention 2006* Article V(7)

⁴⁴ *Maritime Labour Convention 2006* Article XV

2 Defining Social Justice

Before analysing the state of international maritime law and the effect that the MLC has on access to social justice for seafarers, it is necessary to provide an overview of the theoretical understanding of what constitutes the idea of “social justice” which shall be utilised in this paper and how it has been adapted and dealt with by the ILO.

2.1 A Legal Theory of Social Justice

In *A Theory of Justice*, John Rawls wrote that the subject of justice concerns “*the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.*”⁴⁵ Building on this, David Miller has stated that social justice, broadly speaking, can be understood as “*how the good and bad things in life should be distributed among members of a human society.*”⁴⁶ He further considered that, when we criticise a system or a set of laws as being socially unjust, “*we are claiming that a person, or more usually a category of persons, enjoys fewer advantages than that person or group of persons ought to enjoy.*”⁴⁷

In essence, social justice can be read as a determination and analysis of the rights and obligations enjoyed by different entities within society. It is about whether, in law and practice, this division creates a system whereby the power, burdens, rights and benefits of social cooperation are distributed in a fair and equal manner between the different groups and entities.⁴⁸ Another way of looking at this same formula is to consider whether the laws and regulations in place allow differently positioned persons, entities or groups within the social order to further their own ends, simultaneously placing another group under a systematic threat of exploitation or deprivation of basic human and labour rights.⁴⁹

Power, in the sense of social justice, is not owned, but exercised: a flowing and dynamic force.⁵⁰ The power aspect of, for example, the employment relationship, is not a consequence of the relationship, but amounts to its very nature. It is this nature and the balance of this power and the benefits, whether social, political or economic, which derive from it that social justice seeks to regulate. Imbalances in power often result in those who cannot

⁴⁵ Rawls, John; *A Theory of Justice*; 1971 Harvard University Press, p7

⁴⁶ Miller, David; *Principles of Social Justice*; 1999 Harvard University Press, p1

⁴⁷ Miller, David; *Principles of Social Justice*; 1999 Harvard University Press, p1

⁴⁸ Hendrick, Frank; *Foundations and Functions of Contemporary Labour Law (hereafter: Foundations)*; 2012 European Law Journal Vol.3 p116

⁴⁹ Young, Iris Marion; *Global Challenges: War, Self-Determination and Responsibility for Justice (hereafter: Global Challenges)*; 2007 Polity Press, p170

⁵⁰ Brand, John; Lötter, Casper; Mischke, Carl & Steadman, Felicity; *Labour Dispute Resolution*; JUTA Law 2007 p5

exert influence being placed in a subordinate position when it comes to claiming and protecting their rights.⁵¹ Thus the notion of limiting the excessive use of power to prevent it acting to the detriment of human rights has to be considered as a basic principle of law and of social justice.⁵²

At the core of this power struggle between the different groups in society is a need to respect human dignity⁵³ and ensure equality and fair treatment for those who are discriminated against, vulnerable or socially excluded within the societal framework in which they operate.⁵⁴ Above all else, according to Rawls, every person in a society is to have “*an equal right to the most extensive total system of equal basic liberties.*”⁵⁵ All must enjoy the liberties associated with a society, in the context of this thesis: all workers must enjoy the basic liberties associated with labour rights. This introduces the ideas of universality and equality into the discussions of social justice: without the universal enjoyment of rights and liberties for workers, the international regime cannot be considered socially just. This close connection between justice and equality is illustrated by the fact that many of the great historical struggles for social justice have centred on demands for equal rights: the struggle against slavery, the disenfranchisement of the lower and middle classes and the disenfranchisement of women, colonialism and racial oppression.⁵⁶

Each society, in adopting its laws, has to make a choice on how to balance the benefits which derive from these laws in as fair and equal a way as possible.⁵⁷ Rawls formulated a principle of justice which sought to deal with these concerns surrounding this distribution of benefits, including both economic and human rights considerations, stating that social and economic inequalities should be arranged so that they are “to the greatest benefit of the least advantaged.”⁵⁸ Thus, departures from the notion equality of treatment by the law is only permitted where the regulation improves the position or enjoyment of rights and benefits for the least advantaged groups within the society.⁵⁹

⁵¹ *Enhancing Access to Human Rights*; International Council on Human Rights Policy 2004 p31 available at: http://www.ichrp.org/files/reports/44/123_report_en.pdf (accessed 22/5/13)

⁵² Davidov, Guy; *The Principle of Proportionality in Labor Law and its Impact on Precarious Workers*; 34 *Comp. Lab. Law & Policy Journal* 2012-2013 p63

⁵³ Shestack, Jerome; *The Philosophical Foundations of Human Rights*; in Symonides, Janusz (Ed.); *Human Rights: Concept and Standards*; Dartmouth Publishing Co. Ltd. & UNESCO 2000 p46

⁵⁴ Davies, Anne; *Perspectives on Labour Law*; 2009 Cambridge University Press 2nd Ed. p17

⁵⁵ Rawls, John; *A Theory of Justice*; 1971 Harvard University Press p60

⁵⁶ Vlastos, Gregory; *Justice and Equality*; in Waldron Jeremy (Ed.); *Theories of Rights*; 1984 Oxford University Press p41

⁵⁷ Moorhead, Thomas; *U.S. Labour Serves Us Well* in Gross, James (Ed.); *Workers' Rights as Human Rights*; 2003 Cornell University Press p138

⁵⁸ Rawls, John; *A Theory of Justice*; 1971 Harvard University Press p83

⁵⁹ Croucher, Richard; Kelly, Mark & Miles, Lilian; *A Rawlsian Basis for Core Labour Rights*; 33 *Comp. Labour Law & Policy Journal* 2011-2012 p305

Since all forms of work can, if they are regulated and organized in an adequate manner, be a source of personal wellbeing and social integration,⁶⁰ it is possible to conclude that the norms of social justice can be applied, relatively easily, within the bounds of labour law to workers in general or to specific groups of workers, such as seafarers.

However, it has been argued by some legal theorists that the notions and obligations of social justice hold only between groups living under a “common constitution” within a single political community,⁶¹ binding notions of social justice to that of the individual State.⁶² But in designating general principles for the ordering of the basic structures of society, with no particular society or form of government in mind, theories of social justice have arguably left space for an international society to come under these principles as well.⁶³ Such an interpretation would better reflect the reality of the modern, globalised world where an individual often does not live their whole life in the State-bound society into which they are born and where the social relations which connect individuals, groups and entities are not confined by the physical or jurisdictional borders of a single State.⁶⁴ As Charles Beitz has written:

“If the societies of the world are now to be conceived as open, fully independent systems, the world as a whole would fit the description of a scheme of social cooperation, and the arguments for [social justice] would apply, a fortiori, at global level.”⁶⁵

The very nature of the maritime industry under consideration in this paper is illustrative of this point. The industry has led to the creation of an integrated and multi-national global labour market where the crewing of ships allows employers to hire workers from around the world to engage in trans-national transportation and trade.⁶⁶ Consequently, any internationally applicable

⁶⁰ Rogers, Lee, Swepston & Daele; *The ILO and the Quest for Social Justice, 1919-2009*; ILO 2009 p7

⁶¹ In contrast to this jurisprudential approach, the ILO has dealt with social justice as being a concept applicable on an international level since its founding. See, for example, the ILO Constitution’s Preamble which reads: “Whereas universal and lasting peace can be established only if it is based on social justice” and the discussion below at p...

⁶² See, for example: Rawls, John; *A Theory of Justice*; 1971 Harvard University Press p7: “I shall not consider the justice...of the law of nations and of relations between states.”; Rawls, John; *A Theory of Justice Revised Edition*; 2003 Harvard University Press 6th Ed. p401: “the boundaries of these schemes are given by the notion of a self-contained national community” & Miller, David; *Principles of Social Justice*; 1999 Harvard University Press pp11-17 where Miller makes reference only to internal organs of individual States when discussing his “basic structure” of a society.

⁶³ Skubik, Daniel; *Two Models for a Rawlsian Theory of International Law and Justice*; in Koskenniemi, Martti (Ed.); *International Law*; 1992 Dartmouth Publishing Company Limited p233-234

⁶⁴ Young, Iris Marion; *Global Challenges*; 2007 Polity Press p163

⁶⁵ Beitz, Charles; *Political Theory and International Relations*; 1979 Princeton University Press p132

⁶⁶ Winchester, Nik & Bailey, Nicholas; *Making Sense of ‘Global’ Social Justice: Claims for Justice in a Global Labour Market* (hereafter: *Making Sense*); 2012 Sociological Research Online, p3

theory of social justice must be developed to account for this movement between jurisdictions and maintain the importance of the rights of the individual worker, irrespective of what society they are in, if it is to be used as an evaluative tool in the analysis of this thesis.⁶⁷

Therefore, in terms of equality and fairness of human and labour rights, it cannot be a valid defence that location is more important than the circumstances, with social justice, from a labour rights perspective, needing to be understood as a universal and not territorial concept.⁶⁸ Indeed, any systematised attempt to promote an equal and fair legal code could be looked at as a socially just system, whether or not it works within the jurisdictional confines of a State.⁶⁹ Beitz has accounted for this by arguing that there exists an international “society”, consisting of global and regional processes of public decision making, even in the absence of a comprehensive political entity to regulate this process and incorporate accountability.⁷⁰

Yet it is permissible, and will be done here, to argue that the ILO forms such a comprehensive socio-political entity with regard to the labour rights and obligations of the global workforce. Such an entity should exist in a system of interdependencies among different groups and individuals and be capable of transposing the concepts of justice, rights and duties from the metaphysical world of legal theory into practical reality.⁷¹

The ILO is a global organisation which has developed to regulate the relationships among States, employers and workers, with its tripartite structure creating a sub-society among the three groups at an international standard setting level. This tripartite nature of the ILO system as a whole was also designed with the realisation of social justice in mind: seeking to reconcile the divergent interests concerned in employment and labour issues in a fair and mutually beneficial manner rather than authoritatively creating a pre-determined product.⁷²

The ILO also lends a practical global application to the labour rights standards which they produce, having organs which actively engage in capacity building, creating standards for specific sub-groups of workers and complaints and monitoring mechanisms as some of the most fundamental aspects of this global society. In addition, they have incorporated the notion

⁶⁷ Buchanan, Allen; *Rawls' Law of Peoples: Rules for a Vanished Westphalian World* (hereafter: *Vanished World*); 2000 Chicago University Press Vol. 110, p698

⁶⁸ UN; *Social Justice in an Open World: The Role of the United Nations*; 2006 New York p12

⁶⁹ O'Manique, John; *The Origins of Justice: The Evolution of Morality, Human Rights and Law*; 2003 University of Pennsylvania Press p134

⁷⁰ Beitz, Charles; *Cosmopolitanism and Global Justice*; 2005 Journal of Ethics Vol. 9, p25

⁷¹ McCarthy, Leo; *Justice, the State and International Relations*; 1998 MacMillan Press Ltd. P133-134

⁷² Maupin, Francis; *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience* in Alston, Philip; *Labour Rights as Human Rights*; 2006 Oxford University Press, p89

of social justice to these core functions: perceiving it to be “based on equality of rights for all people and the possibility for all human beings without discrimination, to benefit from economic and social progress everywhere.”⁷³ This provides the idea of social justice with a practical and workable meaning within the confines of their international society.

While the ILO can come under the auspices of a regime working towards social justice, it is also important to consider to whom else the obligations for the realisation of social justice may extend.

The social connection model of injustice developed by Iris Young states that “all agents who...by their actions...contribute to injustice have responsibilities to work to remedy these injustices.”⁷⁴ This account of the obligations which arise when striving for social justice advances the notion of including not only the State and the group in question, in our case seafarers, but also the intermediaries who directly affect the realisation of the principles of fairness and equality which are so fundamental to social justice. Within the ILO’s international society, these intermediaries include not only the governments of the States, but also the employers’ organisations and the employers themselves. Through accepting this analysis, we are able to incorporate the shipping companies - the employers in our societal microcosm of maritime labour - into our evaluation of whether the MLC positively contributes to the realisation of social justice and what obligations and criticisms can be assigned to these commercial entities for social injustices which exist within the international community of seafarers.

2.2 The ILO and Social Justice

Social justice is a fundamental aspect of international labour law.⁷⁵ The work of the ILO has been intrinsically tied to the realisation of social justice since its creation, with the first line of the ILO Constitution’s preamble stating that: “*universal and lasting peace can be established only if it is based upon social justice.*”⁷⁶ The Preamble concludes by saying: “*the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.*”⁷⁷ This concluding sentiment recognises how poor labour protections or attempts to avoid their implementation can challenge not only the realisation of social justice for workers under the jurisdiction of the specific State, but those in other countries as well as they engage in a so-called “race to the bottom” in an attempt to gain a competitive advantage

⁷³ ILO; *The International Labour Organization and Social Justice*; February 2011 available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_151740.pdf (accessed 22/5/13)

⁷⁴ Young, Iris Marion; *Global Challenges*; 2007 Polity Press, p159

⁷⁵ Hendrick, Frank; *Foundations*; 2012 European Law Journal Vol.3 p115

⁷⁶ *Constitution of the International Labour Organisation*; Preamble, para 1

⁷⁷ *Ibid.* para 2

over others. Such an analysis universalises the failures and labour rights abuses of one State as being detrimental to the collective efforts of all.⁷⁸

Building on this, the 1944 Declaration of Philadelphia introduced principles such as “*labour is not a commodity*” (which itself is strongly linked with the idea of human dignity),⁷⁹ “*poverty anywhere constitutes a danger to prosperity everywhere*” and “*a just share of the fruits of progress to all*”.⁸⁰ These notions have since become the bedrock principles of the notion of social justice which the ILO has pursued and form a key part of any practical realisation of the idea of social justice for seafarers.⁸¹

Many of the ILO’s modern concerns about the challenges to social justice are embodied in the Declaration on Social Justice for a Fair Globalisation (hereafter: 2008 Declaration)⁸² which expresses the contemporary vision of the ILO’s mandate on achieving social justice in an era of globalisation.⁸³ It also stresses that the violation of labour rights, such as collective bargaining, and standards, such as effective labour inspection systems, cannot be legitimised by references to “comparable advantage[s]”⁸⁴ such as attempting to increase corporate profits.⁸⁵ In essence, employers are not permitted to use their power over workers in the international labour society to purely further their own ends where this benefit comes at the expense of the basic rights of the worker. This establishes a floor level consideration for the socially just distribution of powers and benefits in the international labour regime.

The 2008 Declaration sought to establish a foundation to promote the practical realisation of social justice through the Decent Work Agenda and its four pillars of employment, social protection, social dialogue and fundamental rights and principles at work.⁸⁶ Decent work is applicable to all sectors in the global economy⁸⁷ and this framework therefore serves to lend practical and measurable benchmarks to the content of social justice. This, in turn, allows us to evaluate how socially just a legal framework is which

⁷⁸ Smit, Nicola; *Towards Social Justice: An Elusive and Challenging Endeavour*; 2010 J.S.Afr.L. p3

⁷⁹ Hendrick, Frank; *Foundations*; 2012 European Law Journal Vol.3 p114

⁸⁰ *Declaration Concerning the Aims and Purposes of the International Labour Organisation*; Annex to the *Constitution of the International Labour Organisation*; 1944 Chapter I

⁸¹ ILO; *The International Labour Organization and Social Justice*; February 2012

⁸² *ILO Declaration on Social Justice for a Fair Globalisation*; International Labour Conference (97th Session), Geneva, 10 June 2008

⁸³ http://www.ilo.org/global/resources/WCMS_099766/lang--en/index.htm (accessed 22/5/13)

⁸⁴ *ILO Declaration on Social Justice for a Fair Globalisation*; International Labour Conference (97th Session), Geneva, 10 June 2008; Chapter I(A)(iv)

⁸⁵ Harrington, Alexandra; *Corporate Social Responsibility, Globalization, the Multinational Corporation, and Labor: An Unlikely Alliance*; 75 Alb. Law Review 2011-2012 p500

⁸⁶ *ILO Declaration on Social Justice for a Fair Globalisation*; International Labour Conference (97th Session), Geneva, 10 June 2008; Chapter I(A)

⁸⁷ McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p42

operates within the international labour system and how it benefits the persons who come under its jurisdiction. Only through equality, social protection and dialogue, the ability to benefit from economic progress and the fundamental rights of the worker enumerated in the 1998 Declaration on Fundamental Principles and Rights at Work⁸⁸ can social justice be arrived at for workers when examined from the perspective of international labour law.

Justice, according to Rawls, is the first virtue of social institutions.⁸⁹ The ILO has recognised this and has sought to create a sustainable labour system built on equality and which offers a fair chance at prosperity for everyone.⁹⁰ This quest for social justice is not seen as an alternative or a replacement for the proper protection of human rights. Rather, social justice is one of the foundational principles necessary for this protection and for the maintenance of peace and security.⁹¹ Consequently, any claims directed towards the realisation of social justice should not be considered valid from a labour law perspective if they challenge or invalidate international human rights norms or seek to unfairly disadvantage or discriminate against the worker.

2.3 Working Towards Social Justice for Seafarers

Having established that the jurisprudential philosophies on social justice can be extended to apply to international labour law and that the ILO has adopted this terminology as one of the fundamental goals of the organisation, it is now necessary to determine the content of social justice from the specific perspective of seafarers. This will allow us to establish criteria and a threshold which must be met for the effective realisation of social justice in this industry and to gauge whether the MLC has been successful in working towards this.

The maritime sector presents particular challenges to the international labour regime and to the effective realisation of social justice for seafarers.⁹² The unique nature and circumstances which accompany working at sea such as the temporary nature of employment and being isolated at sea for extended periods of time without access to resources, such as hospitals and lawyers, or recourses, such as courts and mediators, necessitate the development of a tailored labour standards system specifically for

⁸⁸ *ILO Declaration on Fundamental Principles and Rights at Work*; International Labour Conference (86th Session), 18 June 1998

⁸⁹ Rawls, John; *A Theory of Justice*; 1971 Harvard University Press p7

⁹⁰ <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/need-for-social-justice/lang--en/index.htm> (accessed 22/5/13)

⁹¹ Rogers, Lee, Swepston & Daele; *The ILO and the Quest for Social Justice, 1919-2009*; ILO 2009 p3

⁹² McConnell, M; Devlin, D & Doumbia Henry, C; *A Legal Primer*; 2011 Koninklijke Brill NV p35

seafarers.⁹³ The realisation of the ILO's Decent Work Agenda in relation to seafarers thus requires respect for fundamental rights but also an acknowledgment and incorporation of specifically tailored rights entitling seafarers to: good living conditions, regular communications with their home, regular pay, adequate medical care, repatriation and social security, welfare benefits and a specific occupational health and safety regime.⁹⁴

Yet even with the existence of tailored standards, another major problem is the fact that it is often very difficult to establish to what extent these labour rights and protections exist or are applicable given the continuing jurisdictional changes which seafarers experience during the course of their employment. This problem is exacerbated by the fact that, as we shall see below, the previous maritime labour protections were scattered across numerous conventions with varying levels of ratification by Flag States or questionable relevance to the industry today.⁹⁵ This has resulted in uneven and patchy implementation of the core maritime labour standards from convention articles to reality on a global or industry wide level.⁹⁶ The relations between the different actors in our international labour society clearly cannot be fairly or universally regulated if the labour protection regime in place is unevenly implemented in practice. Indeed, this uneven implementation actually serves to widen the inequalities and solidify their existence in the normal functioning of the maritime system. Such a reality clearly stands against the fair and equal distribution of advantages in our international maritime society.

Furthermore, there is a lack of equivalence between the shipping company as a corporate entity and the seafarer as a private individual in the shipping society we have identified.⁹⁷ The shipping companies are able to evade international standards through registering their vessels to Flag of Convenience States, leaving these companies free to determine for themselves their own levels of professional standards.⁹⁸ By contrast, the seafarer must accept these standards or risk losing their jobs, facing jurisdictional confusion or a lack of understanding over the content of their rights to access any meaningful notion of justice through the judicial or tribunal remedy procedures.

Deriving from this obvious inequality in the bargaining power of the parties, shipping companies have been able to engineer situations where the social goods and benefits in the employer-worker relationship are distributed in a manner which suppresses the rights and dignity of the seafarer to improve the situation for the employer, most often for increased profitability. It is not the uneven distribution of benefits between the social actors here which acts

⁹³ Bauer, Paul; *The Maritime Labour Convention: An Adequate Guarantee of Seafarer Rights, or an Impediment to True Reforms?* (hereafter: *An Adequate Guarantee?*); 8 Chi. J Intl. Law 2008 p644

⁹⁴ Grey, Michael; *The Maritime Labour Convention – Shipping's "Fourth Pillar"*

⁹⁵ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p645

⁹⁶ Bolle, Patrick; *An Innovative Instrument*; 145 Intl. Lab. Rev. 2006 p138

⁹⁷ ILO; *The Global Seafarer*; 2004 International Labour Office Geneva, p190

⁹⁸ See below p31

contrary to the principles of social justice, indeed, an uneven distribution of benefits is a normal function of society. Rather, the clear unfairness manifests itself in how these benefits are distributed with shipping companies exploiting legal loopholes to further their own cause while acting to the detriment of the human rights and dignity of the seafarer. Attempts must therefore be made to redress the balance if we are to have effective access to social justice for seafarers. Clarity of rights and access to justice for seafarers through a system specifically tailored to the unique workplace and jurisdictional issues of the maritime industry are necessary if there is to be any realistic chance of achieving this fairness and equality in relations.

But the need for equality and fairness extends beyond the employment relationship to the comparable standards enjoyed between individual seafarers. The realisation of social justice also requires the creation of a social cohesion between the world's seafarers: basic liberties must be held equally.⁹⁹ The current global regulatory regime could hardly be described as socially just if there existed unequal treatment in law and practice between seafarers who are fortunate enough to find themselves working under the jurisdiction of a State which has ratified and adhered to maritime labour conventions and principles and those who have not. Consequently, for fairness and equality to be able to permeate the industry, the tailored standards must be made uniform and harmonised on a global scale through maximising ratification levels, effective monitoring, continued development of standards to keep pace with changes in the industry, and adequate implementation and enforcement.¹⁰⁰

Thus, for a socially just international maritime regulatory regime to be realised in practice, all seafarers must equally have access to the rights and protections afforded to them and have available appropriate remedies should these rights be violated. After all, how can a socially just maritime regime be arrived at without the formulation of universal criterion for protection and empowerment?¹⁰¹ Methods which impose standards lower than the international floor level must not be allowed in this international society if it is to be considered "just".

Progress towards the realisation of social justice thus requires action in many specific fields.¹⁰² In the maritime labour sector this will be seen to largely centre on, first, the setting of effective and universally applicable standards which focus on the empowerment and protection of the seafarer as a subject of international human rights and labour law – taking the four pillars outlined in the 2008 Declaration as the basis for this. The second shall focus on the fair and effective implementation of these standards into

⁹⁹ Shestack, Jerome; *The Philosophical Foundations of Human Rights*; in Symonides, Janusz (Ed.); *Human Rights: Concept and Standards*; Dartmouth Publishing Co. Ltd. & UNESCO 2000 p49

¹⁰⁰ Grey, Michael; *The Maritime Labour Convention – Shipping's "Fourth Pillar"*

¹⁰¹ Pogge, Thomas; *World Poverty and Human Rights*; 2008 Polity Press 2nd Ed. p40

¹⁰² Rogers, Lee, Swepston & Daele; *The ILO and the Quest for Social Justice, 1919-2009*; ILO 2009 p8

reality within the existing maritime legal system, focusing on monitoring compliance and enforcement.

It will thus be argued that the realisation of social justice for seafarers falls into two categories - albeit categories which are part of the same spectrum rather than warranting consideration as separate notions. These are the formal and substantive realisation of social justice. In simplified terms, the formal realisation of social justice requires the recognition of the key principles of equality and fairness in the law itself, since access to a legal system does not necessarily equate to that legal society being socially just in nature. We will take substantive social justice to refer to the practical realisation of the underlying principles of social justice for the seafarer while working on board vessels. Both must be fulfilled for social justice to have been truly realised and it is against both of these aims which the MLC shall be gauged in Chapter 5.

3 Maritime Law and its Challenges to Social Justice

3.1 Jurisdictional Overview of International Maritime Law

3.1.1 Jurisdiction in Maritime Law

It is commonly held that:

*“...the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power...in the territory of another State... [Jurisdiction] cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”*¹⁰³

Like virtually all international human rights and labour law, the general regulation of maritime activities traditionally depends on what authority States have in a particular maritime area, or over a particular vessel or structure at sea.¹⁰⁴ In this sense, sovereignty and jurisdiction provide the basis upon which international maritime law is founded and have been “moulded and melded” over time to reflect the increasing complexity of the current use of the seas by States.¹⁰⁵

3.1.2 Flag State Jurisdiction

A long-standing and generally uncontested premise of international maritime law is that every country should have access to the sea and should have jurisdictional control over ships flying its flag.¹⁰⁶

This notion has manifested itself in Article 92(1) of the United Nations Convention on the Law of the Sea (hereafter: UNCLOS) which provides: *“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”*¹⁰⁷

¹⁰³ *The Case of the S.S. Lotus*; PCIJ, Series A.-No. 10, 7 Sept. 1927 p18-19

¹⁰⁴ Klein, Natalie; *Maritime Security and the Law of the Sea* (hereafter: *Maritime Security*); 2011 Oxford University Press; p62

¹⁰⁵ Evans, Malcolm; *International Law*; 2010 Oxford University Press 3rd Ed. p651

¹⁰⁶ See eg. *The Case of the S.S. Lotus*; PCIJ, Series A.-No. 10, 7 Sept. 1927 at p25

¹⁰⁷ *United Nations Convention on the Law of the Sea* (Hereafter: *UNCLOS*); 10 December 1982 Article 92(1)

This Flag State jurisdiction is universal in nature and vested in the nationality principle whereby a State has jurisdiction, both prescriptive and enforcement, which can be exercised over vessels by the State's legislature, enforcement agencies or courts wherever in the world the ships may be.¹⁰⁸ This is of particular interest when it comes to regulating the conduct of shipping companies flagged to the State but operating, by the nature of their industry, overseas. Home States do not normally have any legislative power or control when their corporate citizens operate across the borders of nation states as the result of the territoriality principle.¹⁰⁹ Yet this is not the case with Flag States and their vessels, opening up an avenue whereby overseas corporate conduct can be regulated by the Flag State. The universality in the maritime jurisdictional framework with regard to Flag States can thus be seen to leave a certain scope for the incorporation of obligations on Flag States to also exert control over the human rights violations of their flagged vessels when overseas, perhaps opening the door to corporate social responsibility issues of control across borders.

Yet it does not follow that the jurisdiction of Flag States is unfettered. Rather, the ability of Flag States to regulate ships flying their flags is subject to conditions imposed by UNCLOS¹¹⁰ and, as stated in Article 92(1) itself, by other international treaties when they expressly provide as such.

A Flag State acquires certain duties under Article 94 UNCLOS to exercise jurisdiction over each ship flying its flag which extends not only to when that ship is in the Flag State's waters, but also when it is on the high seas and within the territorial waters of another State.¹¹¹ Article 94(1) provides that every Flag State is obligated to "*effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*"¹¹²

Article 94(5) of UNCLOS also makes clear that a Flag State does not have total discretion over the standards that it prescribes for ships flying its flag. Any rules or regulations must conform to international standards, procedures and practices. This rule of reference therefore incorporates international standards relating to the construction, equipment and seaworthiness of ships, use of signals, environmental standards and, significantly for the issue of social justice under consideration in this thesis, the manning of ships, training of crews and standards on board vessels.¹¹³ Such emphasis on internationally accepted standards is of practical

¹⁰⁸ Sohn & Noyes; *Cases and Materials on the Law of the Sea*; 2004 Transnational Publishing p157

¹⁰⁹ Vytopil, Louise; *Contractual Control and Labour Related CSR Norms in the Supply Chain: Dutch Best Practices*; 8 Utrecht L. Rev. 2912 p156

¹¹⁰ Harrison, James; *Making the Law of the Sea: A Study in the Development of International Law (hereafter: Making of the Law of the Sea)*; 2011 Cambridge University Press p166

¹¹¹ Rothwell, Donald & Stephens, Tim; *The International Law of the Sea*; 2011 Hart Publishing p17

¹¹² UNLCOS Article 94(1)

¹¹³ Harrison, James; *Making of the Law of the Sea*; 2011 Cambridge University Press p167

necessity; it would be simply chaotic if shipping standards varied wildly or were simply incompatible with each other and act to the severe detriment of the work of organisations such as the ILO who seek to establish uniform labour standards for the benefit of the human rights and dignity of seafarers.¹¹⁴

Article 94's other paragraphs prescribe further duties on Flag States including: maintaining regular checks on the seaworthiness of ships, holding enquiries into shipping casualties, effectively exercising jurisdiction and control over ships, maintaining a register of ships, and taking measures to ensure safety at sea, the manning of ships, labour conditions, the use of signals and the prevention of collisions.¹¹⁵

In addition to this, the formulation in Article 94(3) that “*every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to [the following measures]*”¹¹⁶ indicates that the enumerated responsibilities and obligations form part of a non-exhaustive list.¹¹⁷ This, therefore, leaves room for other, more expansive or detailed obligations on Flag States to be applied from additional international treaties,¹¹⁸ including labour standards from the ILO conventions.

It is the Flag State who bears the duty to comply with international law with ships and their crews primarily deriving their rights and obligations from the State whose flag they sail under.¹¹⁹ This is because ships and the companies that operate them are not themselves subjects of international law.

Thus, under international maritime law, the Flag State has traditionally had the responsibility to ensure that everything on the registered ship is in accordance with the generally accepted international standards. It has, however, often proven ineffective in practice with a lack of capacity or unwillingness to adopt and enforce said standards severely hampering attempts to universalise and ensure the application of international labour standards.¹²⁰

The financial incentives at stake in the maritime industry have also been pointed to as a reason for the receding willingness of Flag States to fully

¹¹⁴ Churchill, R & Lowe, A; *The Law of the Sea*; Manchester University Press 3rd Ed. 1988 p265

¹¹⁵ UNCLOS Article 94

¹¹⁶ Ibid. Article 94(3)

¹¹⁷ Norman & Mansell, *An Analysis of Flag State Responsibility from a Historical Perspective: Delegation or Derogation?* 2007 University of Wollongong (available at: <http://ro.uow.edu.au/theses/742> accessed 22/5/13) p90

¹¹⁸ Zwinge, Tamo; *Duties of Flag States to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to do so (hereafter: Duties of Flag States)*; 10 J Intl Bus. & Law 2011 p301

¹¹⁹ Ibid. p298

¹²⁰ Baird, Richard; *Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence (hereafter: Unregulated Fishing)*; 5 Melb. J Intl. Law 299, 2004 p314

embrace their duties in relation to their vessels.¹²¹ But this failure of Flag States to effectively protect the rights of workers on board their vessels can be seen as a motivating factor for the development of enforcement procedures which grant Port States powers over these vessels in certain, restricted situations.¹²²

3.1.3 Port State Jurisdiction

States exercise sovereignty over their ports, defined in UNCLOS as “*the outermost permanent harbour works which form an integral part of the harbour system.*”¹²³ Practically, Port States will not normally exercise jurisdiction over matters essentially internal to the ship and which do not affect the interests of the Port State.¹²⁴ Nonetheless, they retain the authority and right to enforce the laws of their territory over vessels in their ports under UNCLOS Article 25(2), which provides that:

*“In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.”*¹²⁵

Deriving from this sovereignty is the right of the Port State to control what vessels enter its ports and under what conditions.¹²⁶ In prescribing conditions for entry, Port States are entitled to regulate their ports consistent with the protection of various interests of the State¹²⁷ and may even close their ports to foreign vessels flagged to a particular State without concern that such closure is discriminatory in practice.¹²⁸

There are, of course, restrictions imposed on a State’s application of its laws to vessels in its ports relating to the applicability of local labour laws and situations when a ship enters the port in distress.¹²⁹

Traditionally, Port States only exercise enforcement jurisdiction at the request of another Coastal or Flag State where there is evidence to suggest that an infringement of Coastal State or Flag State laws have taken place.¹³⁰

¹²¹ Klein, Natalie; *Maritime Security*; 2011 Oxford University Press; p64

¹²² *Ibid.*; p64

¹²³ UNCLOS Article 11

¹²⁴ Klein, Natalie; *Maritime Security*; 2011 Oxford University Press; p68

¹²⁵ UNCLOS Article 25(2)

¹²⁶ Klein, Natalie; *Maritime Security*; 2011 Oxford University Press; p66

¹²⁷ Oliver, John; *Legal and Policy Factors Governing the Imposition of Conditions of Access to and Jurisdiction Over Foreign Flag Vessels in US Ports*; 2009 5 South Carolina Journal of International Law and Business, p246-315

¹²⁸ Klein, Natalie; *Maritime Security*; 2011 Oxford University Press; p67

¹²⁹ Kaye, Stuart; *The Proliferation Security Initiative in the Maritime Domain*; 2005 Israel Yearbook of Human Rights; p210-211

¹³⁰ Rothwell, Donald & Stephens, Tim; *The International Law of the Sea*; 2011 Hart Publishing p17

Despite enforcement jurisdiction being left largely in the hands of the Flag States, UNCLOS does make inroads into providing jurisdictional support where the Flag State is unwilling or unable to fulfil its obligations under international law. Article 228(1) states that if the Flag State “*has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels,*” then the Port State may initiate its own proceedings against a specific vessel. This serves to provide an, albeit weak, support for the realisation of social justice and the protection of labour standards in international law. But perhaps more importantly, it illustrates an implicit understanding within the international community that the best interests of the legal system and protection of legal standards, including access to social justice, may be best served by breaking the jurisdictional monopoly that Flag States may otherwise have enjoyed over their vessels.

The idea of Port States holding jurisdiction over vessels has also been touched on and developed in the SOLAS Convention.

The SOLAS Convention is a key maritime law convention which deals with the seaworthiness of vessels and defines standards for fire-safety measures, the carriage of navigational equipment and the construction of ships and life-saving equipment.¹³¹ In setting these standards, SOLAS, like the vast majority of international maritime law, places the primary obligations for compliance, implementation and enforcement on the Flag States themselves.¹³² However, there are also provisions allowing for Port State control, essentially enforcement jurisdiction for Port States, through an early version of the MLC’s certification and inspection regime, discussed below. Although it should be noted that SOLAS does prescribe limitations to this control by stating that inspections “*are normally limited to checking certificates and documents*”¹³³ and that a more detailed inspection can only be carried out where there exists clear grounds for believing the condition of a ship to be below international safety standards.¹³⁴

Building on this notion of Port State enforcement jurisdiction, in 2006 the High Seas Task force advocated for the universal acceptance of the concept of a “responsible port State”. This responsible Port State would be committed, to the fullest extent possible, to utilising its jurisdiction under international law to not only further its own rights and interests, but those of the international community as a whole:

¹³¹ Churchill & Lowe; *The Law of the Sea*; 1999 Manchester University Press 3rd Ed. p266

¹³² Zwinge, Tamo; *Duties of Flag States*; 10 J Intl Bus. & Law 2011 p302

¹³³ IMO; *A summary of IMO Conventions* 2001p17 available at:

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CDgQFjAB&url=http%3A%2F%2Fwww2.uca.es%2Fgrup-invest%2Ftrans-maritimo%2Fimo-conventions.pdf&ei=xMhnUcOuCsXjtQaEj4GgCA&usg=AFQjCNHYQbkWikH_a17sNVZpVIeRPADHcg&sig2=85ZNMWqwStdt7qtoxmVv8A&bvm=bv.45175338,d.Yms

(accessed 22/5/13)

¹³⁴ *Ibid.* p6

*“Once a vessel is in one of its ports, the port state needs to be able to act decisively. To do this, effective domestic legislation must be in place as well as cooperative mechanisms to coordinate action with other ports states, flag states and market states.”*¹³⁵

Overall, Port State powers can be seen to serve to complement and not replace Flag State powers and should be linked to measures which have been agreed on at either a regional or global level to be applicable in the area of the suspected violation.¹³⁶

The jurisdictional bounds of international maritime law are thus imbued with context-specific characteristics. It is akin to extraterritorial jurisdiction as the domestic law of a Flag State is applied over a vessel and the persons on board, even when it is in the territory of another State or in international waters. This said, the very fact that a ship is a moving object and can enter another State’s territory also means that the jurisdiction of the State into which the vessel in question sails will also be applicable. This overlap in jurisdiction presents opportunities to place legal obligations concerning the protection of maritime labourers on several parties, a notion which has been picked up on by the ILO, particularly in relation to the development of enforcement provisions for the MLC.¹³⁷

3.2 Flags of Convenience and their Challenge to Labour Rights

3.2.1 Registration of Vessels and the Need for a Genuine Link

Under international law, each State is permitted to independently determine the requirements to which ships must adhere to before being allowed to register their vessel under the flag of the State in question. This generally accepted principal was first recognized in the *Muscat Dhows Case* where it was held that *“generally speaking it belongs to every foreign sovereign to decide whom he will accord the right to fly his flag and to prescribe the rules governing such grants.”*¹³⁸

UNCLOS has codified this ruling into hard treaty law, setting forth the rules governing the process of registering a ship to an individual State. Article 91 recognises the capacity of every State to assign the conditions for granting the right of a ship to fly the State in question’s flag and thus give the ship

¹³⁵ Report of the High Seas Task Force: *Closing the Net: Stopping Illegal Fishing on the High Seas*; 2006

¹³⁶ Anderson, David; *Modern Law of the Sea: Selected Essays*; 2008 Koninklijke Brill NV, Leiden p285

¹³⁷ See Below p59

¹³⁸ *Muscat Dhows (Fr. v. Gr. Brit.)*, Hague Ct. Rep. (Scott) 93, 96 (Perm. Ct. Arb. 1916).

the nationality of the State in question. The only condition imposed by Article 91 is that there should exist “*a genuine link between the State and the ship.*”¹³⁹ This mirrors of the general principle of public international law concerning the assignation of nationality, as espoused by the International Court of Justice in the *Nottebohm* case.¹⁴⁰ The need for a genuine link has been restated in the 1986 United Nations Convention on Conditions for Registration of Ships.¹⁴¹

One of the major challenges in this area of international law has been assigning a definition to the phrase “genuine link” between a State of registration and a ship to incorporate broadly uniform standards among the various States of the international community.¹⁴² Unfortunately, there is currently no conclusive and universally accepted definition assigned to the term “genuine link” under international maritime law, meaning that States - and the international community in general - have traditionally refrained from challenging any link between a State and a ship.¹⁴³

This lack of definition and the overall general nature of Article 91 thus contrive to make the creation of any benchmark against which the exercise of Flag State responsibility, and the legitimacy of flagging vessels to a particular State can be gauged, extremely difficult.¹⁴⁴ Similarly, it is also difficult to prove the absence of any genuine link or of effective Flag State control in practice, meaning States essentially have free reign to permit the registration of ships to their flag without any valid legal challenge from the international community.

This process of registering and flagging ships according to the divergent requirements of different States is ripe for exploitation. This threat to the realisation of social justice for seafarers has manifested itself in the notion of flags of convenience. This phenomenon presents one of the biggest obstacles to the realisation of social justice and protection of seafarers’ rights.¹⁴⁵

¹³⁹ UNCLOS Article 91(1)

¹⁴⁰ *Nottebohm (Liechtenstein v Guatemala) (second phase) [1955]*, ICJ Rep 4

¹⁴¹ *United Nations Convention on Conditions for Registration of Ships*; Doc. TD/RS/CONF/19, 7 Feb. 1986 Article 1

¹⁴² Rothwell, Donald & Stephens, Tim; *The International Law of the Sea*; 2011 Hart Publishing p159

¹⁴³ Zwinge, Tamo; *Duties of Flag States*; 10 J Intl Bus. & Law 2011 p298

¹⁴⁴ Baird, Richard; *Unregulated Fishing*; 5 Melb. J Intl. Law 299 p315

¹⁴⁵ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p651

3.2.2 The Phenomenon of Flags of Convenience

The birth of the flags of convenience, or open registries, can be traced to businesses and entrepreneurs in developed countries seeking innovative ways to exploit loopholes in the law and avoid the strict and costly regulations for registering vessels in those developed countries.¹⁴⁶ The problems raised by this practice have occupied the ILO since as early as 1933.¹⁴⁷

Flags of Convenience States permit shipping companies to register their ships at low costs, pay lower taxes or to register sub-standard ships that would not comply with the more stringent safety and labour standards of other registries.¹⁴⁸ Linked to this, it is often the case that companies registering their vessel to a flag of convenience will be able to take advantage of the lack of unionisation in many Flag of Convenience States. This can further reduce labour costs and limit the capacity for future labour related problems arising within their workforce.¹⁴⁹ Registering with flags of convenience thus frees ship owners from legal and normative restraints and gives them scope to determine for themselves their own levels of professional standards.¹⁵⁰

In addition to this ability to seek out the lowest and cheapest standards, it is relatively easy for shipping companies to move the registration of their ship from one State to another, less stringent, State's registry should any issues concerning costs or the raising of standards arise.¹⁵¹ This process is known as "re-flagging" and its permissibility serves as yet another obstacle to the implementation and protection of international labour standards.

Re-flagging essentially enables companies to jump between jurisdictions, national laws and labour regulations. The traditional legal manifestation of the ILO's labour standards and protections through treaty ratification, then, may not be able to keep seafarers under the protections of labour conventions if the ship re-flags to a non-ratifying State.¹⁵² By threatening to undermine the effective operation of Flag State jurisdiction over their vessels, shipping companies can effectively force the hand of States to retain

¹⁴⁶ Anderson, Edwin; *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*; 21 Tul. Mar. L.J 1996 p158

¹⁴⁷ ILO Committee of Experts; *General Survey Convention 147*; International Labour Conference, 77th Session, 1990 para 13

¹⁴⁸ Zwinge, Tamo; *Duties of Flag States*; 10 J Intl Bus. & Law 2011 p299

¹⁴⁹ Baker, Brian; *Flags of Convenience and the Gulf Oil Spill: Problems and Proposed Solutions (hereafter: Gulf Oil Spill)*; 34 Hous. J. Intl. Law 2011-12 p697

¹⁵⁰ ILO; *The Global Seafarer*; 2004 International Labour Office Geneva, p190

¹⁵¹ ILO Committee of Experts; *General Survey Convention 147*; International Labour Conference, 77th Session, 1990 para 14

¹⁵² Bronstein, Arturo; *International and Comparative Labour Law: Current Challenges*; ILO Geneva 2009 p25

low costs and low levels of labour protections,¹⁵³ lest they wish to lose the often very high levels of income generated by shipping.¹⁵⁴ The ease of re-flagging vessels also creates fluctuations in the percentage of ships coming under the various ILO maritime labour conventions, making it difficult to establish how extensive and effective the coverage is of maritime labour protections.

In any case, Flag of Convenience States have a reputation for taking little or no interest in the affairs or standards of their ships and often fail to uphold international or domestic standards designed to ensure the safety and security of the ship and its crew.¹⁵⁵

Thirty-two States have been identified as Flag of Convenience States by the International Transport Workers' Federation's (hereafter: ITF) Fair Practice Committee,¹⁵⁶ a joint committee of ITF seafarers' and dockers' unions which runs the organisation's campaign against Flag of Convenience States.¹⁵⁷

Standing in stark contrast to UNCLOS' requirement of a genuine link to exist between ship and Flag State, many ships registered under flags of convenience have never even been to the country where they are registered.¹⁵⁸ Based on this reality, the ITF has argued that "*there is no genuine link in the case of flags of convenience registries,*"¹⁵⁹ raising questions as to the legitimacy of this aspect of international maritime law. It also leaves a loophole in the protection systems for the realisation of social justice which allows companies to seek out registries which give them a competitive advantage over their rivals through reducing labour standards and the additional costs associated with them.

However, with the lack of definitional clarity and consensus concerning the genuine link requirement, coupled with the lack of any express prohibition concerning flag of convenience registries, the phenomenon has been allowed to exist and grow unabated in the international maritime legal system.

Indeed, in an advisory opinion of the International Court of Justice on the Constitution of the Maritime Safety Committee of the Inter-Governmental

¹⁵³ Goodman, Camille; *Flag State Responsibility in International Fisheries Law – effective fact, creative effective fact, Creative Fiction, or Further Work Required?*; 23 Austl. & NZ Mar. L.J. 2009 p159

¹⁵⁴ Frawley, Shayna; *The Great Compromise: Labour Unions, Flags of Convenience and the Rights of Seafarers*; 19 Windsor Rev. Legal & Soc. Issues 2005 p90

¹⁵⁵ Rothwell, Donald & Stephens, Tim; *The International Law of the Sea*; 2011 Hart Publishing p158

¹⁵⁶ ITF; *Defining FOCs and the Problems they Pose*; available at: <http://www.itfseafarers.org/defining-focs.cfm>

¹⁵⁷ Baker, Brian; *Gulf Oil Spill*; 34 Hous. J. Intl. Law 2011-12 p690

¹⁵⁸ Baker, Brian; *Gulf Oil Spill*; 34 Hous. J. Intl. Law 2011-12 p695

¹⁵⁹ ITF; *What Are Flags of Convenience?*; available at: <http://www.itfglobal.org/flags-convenience/sub-page.cfm>

Maritime Consultative Organisation (what is now the IMO), the court actually affirmed the legal standing of open registries. They did so by refusing to exclude the Flag of Convenience States of Panama and Liberia from an election of the world's largest shipping registries. The court noted instead that registration with a State was sufficient to qualify a ship under said State's flag.¹⁶⁰ Consequently, the legality of open registries, as they now stand, is not subject to direct challenge.¹⁶¹

It is important to note at this juncture that it should not be assumed that all ships that fly a flag of convenience are, by this fact, abusing the labour rights of their workers at sea. Rather, the fact that they are flying under this flag risks the legitimate avoidance or undermining of international labour rights. Nonetheless, this practice creates significant legal challenges with respect to maritime regulation and enforcement of international standards.¹⁶²

3.2.3 Flags of Convenience: Forum Shopping or Forum Selection?

Before condemning the flag of convenience system outright, it is only prudent to examine why it sits so morally at odds with the human and labour rights system and why this process, which, lest we forget, works within the confines of international maritime law, should be so detrimental to the realisation of social justice for seafarers.

In general legal discussions, "forum shopping" simply refers to a party's desire to have a case heard in the venue which affords the greatest chance of prevailing in the lawsuit in question.¹⁶³ Domestic forum shopping occurs when a plaintiff chooses between two or more courts in a country's legal system while transnational forum shopping is when a plaintiff makes a choice between the courts of two or more country's legal systems.¹⁶⁴

However, the expression has come to take on negative connotations, particularly in the human rights arena. Here it has become synonymous with States, companies and persons seeking to side-step and avoid compliance with international human rights standards and public policy considerations based on legal technicalities rather than the merit of the circumstances.¹⁶⁵

The question before us, therefore, is whether registering a vessel under a flag of convenience amounts to legitimate and necessary "forum selection," or whether it goes beyond this, seeking to negate the values of equality and

¹⁶⁰ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150 at 157

¹⁶¹ Baker, Brian; *Gulf Oil Spill*; 34 Hous. J. Intl. Law 2011-12 p707

¹⁶² Rothwell & Stevens, *The International Law of the Sea*; Hart Publishing 2010, p159

¹⁶³ Petrossian, Emil; *In Pursuit of the Perfect Forum*; 40 Loy. L.A.L. Review 2007 p1263

¹⁶⁴ Whystock, Christopher; *The Evolving Forum Shopping System*; 96 Cornell Law Review 2011 p485

¹⁶⁵ Maloy, Richard; *Forum Shopping? What's Wrong With That?*; 24 QLR 2006 p27

fairness, to obtain a favourable outcome for shipping companies simply by ensuring a specific jurisdiction is utilised.¹⁶⁶

It is only natural that a legal person or corporation who has a choice between two or more fora would opt for the one which is most advantageous to them, whether through saving costs or the likelihood of success in a case.¹⁶⁷ Indeed, a lawyer is required to seek the result which is most beneficial to their client, and choosing a Flag of Convenience State to register a company's vessels with could be argued to simply be part of this legitimate process and thus amount to a valid manifestation of forum selection.¹⁶⁸

However, this paper will adopt the position that registration of vessels under flags of convenience goes beyond mere forum selection and should be considered forum shopping designed to enable shipping companies to avoid potentially costly litigation against sub-standard labour and welfare conditions.

It has been written that the two principal points that distinguish forum selection from forum shopping are (i) taking unfair advantage of another party¹⁶⁹ and (ii) lack of efficiency.¹⁷⁰

The threshold for "unfairness" can be said to be crossed when an action seeks to defeat the very core ideas of social justice that advantages should be distributed equally. Through the flag of convenience system, shipping companies seek out the jurisdiction offering the lowest costs through sub-standard health and safety regulations and labour laws, forcing employees to endure poor working conditions. The employees, for their part, are largely unable to challenge these conditions as they have no recourse in the national law of the Flag State and risk losing their job and means of supporting their family by voicing concerns. Clearly this is a system which places the employer at an unfair advantage over the worker, endangering their life and welfare and providing no remedial course of action for the seafarer to better their conditions.

This problem is made worse by the fact that Flag of Convenience States generally have inefficient, poorly funded or under-developed courts and inspections systems. They are therefore unable to effectively and efficiently monitor and enforce what labour protections may exist based on a lack of

¹⁶⁶ Petrossian, Emil; *In Pursuit of the Perfect Forum: Transnational Forum Shopping in the United States and England (hereafter: In Pursuit of the Perfect Forum)*; 40 Loy. L.A.L. Review 2007 p1265

¹⁶⁷ Petsche, Markus; *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of a Controversial Practice (hereafter: What's Wrong)*; 45 International Lawyer 2011 p1006

¹⁶⁸ Maloy, Richard; *Forum Shopping? What's Wrong With That?*; 24 QLR 2006 p25

¹⁶⁹ Maloy, Richard; *Forum Shopping? What's Wrong With That?*; 24 QLR 2006 p28

¹⁷⁰ Petsche, Markus; *What's Wrong*; 45 International Lawyer 2011 p1112

capacity or potential corruption.¹⁷¹ Based on this, companies can be seen to be attempting to block any future action against them by creating legal ties to the Flag State's jurisdiction which represents the lowest protections for potential claimants and, correspondingly, the best chances of defending any cases and the easiest way of lowering costs and increasing profitability.

Based on the driving motivations of cutting costs through the lowering and sometimes complete avoidance of fundamental and basic international labour standards, from a human rights perspective it is only possible to conclude that registering ships under flags of convenience engages in a process designed to limit the potential access to social and remedial justice for workers. By utilising flags of convenience, shipping companies abstain from conducting themselves as responsible members of a socially just legal system,¹⁷² seeking instead to put profitability above considerations about the welfare of their workers.

This is a variant on the traditional form of forum shopping and sees companies essentially forum shopping pre-emptively, blocking any notion of effective access to justice before a situation even arises for a maritime worker.

It is thus permissible to conclude that international maritime law, through the continued existence of flags of convenience, has allowed shipping companies to hinder or prevent access to social justice for seafarers through pre-emptive forum shopping.

3.3 Objectification of the Seafarer

3.3.1 What is Objectification?

A further challenge to accessing and realising social justice for maritime labourers, which derives directly from the general body of international maritime law, is the objectification of seafarers.

The German legal philosopher Emanuel Kant developed a theory of morals based on the intrinsic value of every human being and condemned the use of other humans as mere tools.¹⁷³ Based on this, Margaret Radin has considered that certain qualities of personhood should be considered inalienable in the economic marketplace if we are to avoid the

¹⁷¹ OECD; *Regulatory Issues in International Maritime Transport*; p39 available at: <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDEQFjAA&url=http%3A%2F%2Fwww.oecd.org%2Fdataoecd%2F0%2F63%2F2065436.pdf&ei=o89nUamOMsfEsgbtnoGYAg&usg=AFQjCNFh3qDxsp0YIGasuXMZVX5pCHJ4ew&sig2=zOPzuE7Z-er6EUvtwOHllg&bvm=bv.45175338,d.Yms> (accessed 22/5/13)

¹⁷² Maloy, Richard; *Forum Shopping? What's Wrong With That?*; 24 QLR 2006 p61

¹⁷³ Kant, Emanuel; *The Metaphysics of Morals*; 1991 Cambridge University Press

commodification of workers,¹⁷⁴ which, lest we forget, is a core aim of the ILO. To view an individual as merely a tool, she contends, converts them from a subject and moral agent of the law, into a non-person, an object, removing the considerations of human dignity so central to the realisation of social justice.¹⁷⁵

Yet objectification, in its simplest form, does just that. It treats a person as a “thing” to enable the “objectifier” to deny the humanity of the “objectified”. This serves to legitimise the ill-treatment and denial of human and labour rights of the latter.¹⁷⁶ Thus, instead of being treated as a subject of the law, where the rights and protections afforded are essential to the maritime legal system’s successful development and application, seafarers, it has been argued, have found themselves in situations whereby they are denied this subjectivity and the protections which derive from it. Instead, they are being considered by the shipping industry as merely parts within the commercial machinery of shipping and trade.¹⁷⁷

3.3.2 Objectification of the Seafarer in International Maritime Law

It is natural that an area of the law as complex and of such fundamental importance as the law of the sea focuses on a broad spectrum of issues, including some which fall out with the labour law context. However, an analysis of the development of the law of the sea indicates a focus on issues of political and economic importance to the States and a consequent neglect of human rights and labour issues as seafarers often failed to be considered as being of significance as subjects of the law.

This is evident when analysing the attitudes of States during the drafting of UNLCOS. During these negotiations, Third World countries focused their attentions to the development of the exclusive economic zone. This provides coastal States with extensive rights over a 200-mile area beyond their territorial sea, to protect their economic interests in the sea’s resources from exploitation by the technologically more advanced Western States.¹⁷⁸ In contrast, Western States were more concerned with protecting their navigation and trade routes by objecting to any weakening of the principle of freedom of passage through international straits.¹⁷⁹

The common theme which joins these two opposing stances was the focus on economic and political issues which affect the States and shipping

¹⁷⁴ Radin, Margaret; *Contested Commodities*; President and Fellows of Harvard College, 1996 p16

¹⁷⁵ Radin, Margaret; *Reflections on Objectification*; 65 S. Cal. L. Rev. 1991-1992 p345

¹⁷⁶ Graham, Carolyn; *Maritime Security and Seafarers’ Welfare: Towards Harmonization* (hereafter: *Harmonization*); 2009 WMU Journal of Maritime Affairs Vol.8, p77

¹⁷⁷ *Ibid.*, p78

¹⁷⁸ Shaw, Malcolm; *International Law*; 2003 Cambridge University Press 5th Ed. p492

¹⁷⁹ Shaw, Malcolm; *International Law*; 2003 Cambridge University Press 5th Ed. p492

companies with relatively little consideration afforded to how the law may impact seafarers themselves – they were simply not considered as subjects whom the law of the sea, as it was being developed and codified, would affect.

The result of this failure to adequately consider the human and labour rights of seafarers can be seen as a contributing factor to the lack of welfare protections within the international maritime system with no one fighting the cause of the worker. Based on this, it is perhaps understandable how the phenomenon of flags of convenience has been allowed to subsist and even thrive even in an age of increasing human rights awareness and protections. The focus of international maritime law has thus become distorted, weighted in favour of economic and political issues and against human rights.

A profound illustration of this continued objectification of seafarers by the general body of international maritime law can be seen with the increasing trend to justify the denial of shore leave, one of the fundamental rights and requirements for the health and wellbeing of seafarers,¹⁸⁰ based on security issues.

The basis for this restriction is found in the IMO's International Ship and Port Facility Security Code (hereafter: ISPS Code) which was developed in response to the perceived threat to ships and port facilities in the wake of the September 11 attacks on the USA and contains measures which are designed to enhance the security of ships and port facilities.¹⁸¹

Under ISPS, seafarers are treated by the law and the port authorities as being part of the threat to security, in essence objects of threat which must be restricted and contained rather than persons who themselves have rights and liberties which are in need of protection.¹⁸²

Actions such as the denial of shore leave clearly indicate that seafarers' rights and welfare are not among the fundamental considerations in international maritime trade and commerce. This reinforces the notion that they are merely objects to be utilised towards increased profitability for shipping companies or controlled and contained by Port State authorities.

But it is not just the actions of States in their creation and application of maritime law which has contributed to the objectification of the seafarers. Shipping companies too have traditionally weighted their policies and decisions towards economic gains and failed or actively chosen to neglect considerations concerning the welfare of their workers. These approaches measure the value of the seafarer as an economic resource, acting contrary to the conceptions of human dignity, which instead focus on the intrinsic

¹⁸⁰ Graham, Carolyn; *Harmonization*; 2009 WMU Journal of Maritime Affairs Vol.8 p75

¹⁸¹ <http://www.imo.org/ourwork/security/instruments/pages/ispscode.aspx> (accessed 22/5/13)

¹⁸² Graham, Carolyn; *Harmonization*; 2009 WMU Journal of Maritime Affairs Vol.8, p72

value of the human being,¹⁸³ and losing sight of the basic premise that labour is not a commodity that can be negotiated for the highest profit or the lowest price.¹⁸⁴

The beginning of the twenty-first century saw an increasingly smaller number of global shipping firms own more and more of the world's liner trades.¹⁸⁵ This concentration of vessels into corporations whose primary aim is to maximise profits thus naturally sees the interests of the seafarer generally subjugated under those of trade and profitability. The seafarer is not the central concern of these companies and is increasingly viewed instead as a tool with which to work towards greater profits and higher market shares, deemed replaceable and non-essential like a piece of shipping equipment.

3.4 Achieving Social Justice for Seafarers

3.4.1 Flags of Convenience and their harm to Social Justice

The practice of registering ships under flags of convenience creates significant legal challenges to the realisation of social justice for seafarers by legitimising and institutionalising inequalities in the distribution of social goods within the maritime legal regime. The current system can be viewed as an unfortunate manifestation of the so-called “race to the bottom” in terms of labour rights and social protection, with no avenue for accessing justice or improving standards available to seafarers while flag of convenience vessels continue to ignore or undermine the maritime labour system to increase their competitive advantages and reduce operational costs.¹⁸⁶

The challenge to overcome flags of convenience and the threats they pose to the realisation of social justice is multi-faceted and without a single, definitive answer. Perhaps the central concern is developing a labour rights system to work within the confines of the existing maritime legal system and universalise the labour protections afforded to seafarers, both in theory and in practice. This is especially so given the large numbers of shipping companies tied by an extremely questionable link to a Flag of Convenience State which, coupled with the ease of re-flagging to avoid undesirable new laws, make it extremely difficult to pass universal standards for labour

¹⁸³ Barroso, Luis; *Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*; 35 B.C. Intl. Comp. L. Rev. 2012 p360

¹⁸⁴ Veldman, Albertine; *The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR*; 9 Utrecht L. Rev. 2013 p105

¹⁸⁵ ILO; *The Global Seafarer*; International Labour Office, Geneva, 2004 p10

¹⁸⁶ Klien, Natalie; *Maritime Security*; 2011 Oxford University Press p64

protections into practice.¹⁸⁷ Unless labour law, like the maritime industry itself, can implement a transnationally effective regulation and enforcement system, seafarers' rights and fundamental goal of achieving social justice will continue to be put at risk.¹⁸⁸

It is the shipping companies that hold the power to circumvent the international labour protections in place, creating an unfair distribution of rights between seafarers working under a flag of convenience and those working on board vessels flagged to a jurisdiction which has more stringent labour requirements. Indeed, this inequality extends beyond the distribution of rights to seafarers, also decreasing competition and fairness between the shipping companies themselves, again a notion which acts contrary to the principles of fairness and a fair distribution of benefits between the different actors in a socially just society.

Some of the drawbacks and dangers posed to social justice by the concept of exclusive Flag State jurisdiction have been tempered by the assiduous incorporation of Port State obligations and control in the maritime law sector. But these powers and obligations bestowed on Port States have generally been restrictive in scope and lack a specific focus on human and labour rights issues, at least from the stance of general international maritime law.¹⁸⁹

Indeed, there is a tension created by flags of convenience concerning the enforcement of labour standards by Port States since the Flag State is still generally considered to have primary jurisdiction over their vessels. Attempts to ensure labour standard compliance may well run against the interests of the Flag State and the notion of Flag State jurisdiction.¹⁹⁰ Yet for rights to be accessible and for governments to be able to realise their international obligations, the extent of these obligations should be capable of being ascertained and developed in a manner where they are mutually beneficial instead of serving to undermine other principles of the law.¹⁹¹ There is thus a need to balance the distribution of enforcement powers between the respective States as well.

¹⁸⁷ Frawley, Shayna; *The Great Compromise: Labour Unions, Flags of Convenience and the Rights of Seafarers*; 19 Windsor Rev. Legal & Soc. Issues 2005 p91

¹⁸⁸ Bronstein, Arturo; *International and Comparative Labour Law: Current Challenges*; ILO Geneva 2009 p25

¹⁸⁹ As we shall see below, Port State control has increasingly been utilized by the ILO as a means of expanding and enforcing the international labour standards afforded to seafarers, particularly Convention 147

¹⁹⁰ Klein, Natalie; *Maritime Security*; 2011 Oxford University Press; p64

¹⁹¹ Khalfan, Ashfaq; *Division of Responsibility among States*; in Langford, Malcolm; Vandenhole, Wouter; Scheinin, Martin & van Genugten, Willem; *Global Justice, State Duties*; 2013 Cambridge University Press p300

3.4.2 Dangers to Social Justice Posed by Objectification

*“There is a growing feeling that the dignity of work has been devalued; that it is seen by prevailing economic thinking as simply a factor of production – a commodity – forgetting the individual, family, community and national significance of human work.”*¹⁹²

Objectification of the seafarer, or any worker for that matter, stands in stark contrast to one of the ILO’s central principles established by the Declaration of Philadelphia that labour is not a commodity.¹⁹³ The maritime legal system can never be tailored to the needs and rights of the seafarer if it fails to consider the seafarer as a central consideration and subject whom the law directly impacts.

The denial of subjectivity effectively removes the seafarer from the consideration of the law and its protections. This enables both States – through the flag of convenience and security systems – and shipping companies – through substandard labour and safety conditions – to deny the existence of labour standards or justify their poor enforcement and monitoring in the maritime context because seafarers are not the focal point of this area of the law.

Seafarer’s welfare and rights must be seen as central to the shipping industry and these rights enforced effectively if there is to be any kind of practical realisation of social justice for these labourers. The primary, and possibly only, means through which this will happen is if seafarers come to be regarded as persons in need of protection and empowerment from the law, treated as being central to the shipping industry rather than tools towards profitability or drains on economic resources for the companies.¹⁹⁴ This comes through acknowledging their humanity and making them the subjects of international maritime law, not objects, tools or even not considering them at all as has been the trend in this area of international law.

As set out below, the ILO have already made the subjectification of the seafarer, and the centralisation of their labour rights, the focus of a specific area of international labour law and standards. The remaining challenge, therefore, is to incorporate these standards and this perception of the seafarer as a direct subject of the law and bearer of rights as a fundamental consideration in the functioning of the international maritime regime. Only by doing so can the power imbalances which have developed between the shipping companies and seafarers be addressed to direct the legal regime towards a more socially just distribution of benefits between its actors. Centralising the seafarer in the maritime regime will also work towards

¹⁹² Juan Somavia; *Preface: Report of the Director General: Changing Patterns in the World of Work*; 95th International Labour Conference 2006, ILO Geneva, Report I(C) pV

¹⁹³ Herdrick, Frank; *Foundations*; European Labour Law Journal, Volume 3 (2012) p111

¹⁹⁴ Graham, Carolyn; *Harmonization*; 2009 WMU Journal of Maritime Affairs Vol.8 p74

combatting situations such as that concerning the ISPS Code where the rights and welfare of the seafarer were simply ignored to make room for the political concern of States.

4 The Development of Maritime Labour Law

4.1 The ILO and Maritime Labour Protection

The labour rights of seafarers under the auspices of ILO conventions developed largely in line with other groups of workers. Fundamental rights such as a minimum age, the abolition of forced labour, non-discrimination and fair remuneration have been central themes over the past century, alongside issues of safety and security and specialised training to take account of the unique nature of the seafarer's workplace. These rights originate in natural law and have already been recognised by the majority of States in both ILO conventions and international and regional human rights treaties.

However, as outlined above, the major problem the MLC's drafters perceived within the maritime labour system was a lack of application and enforcement. This led to sub-standard labour conditions and the thriving of flags of convenience within the boundaries of the international maritime legal system; it is this aspect which will be analysed here.

4.1.1 Temporal Analysis of the Enforcement Mechanisms of Maritime Labour Law

The earlier enforcement mechanisms attached to ILO conventions on maritime labour law can generally be described as "toothless," requiring very little of States.

The 1920 *Minimum Age (Sea) Convention*¹⁹⁵ merely stated at Article 8 that: "*Each Member which ratifies this Convention agrees to bring its provisions into operation...and to take such action as may be necessary to make these provisions effective*"

The general wording of this provision, which focused solely on assigning obligations to Flag States, as was the traditional international law approach at this time, was echoed in the 1920's Conventions on Unemployment Indemnity,¹⁹⁶ Placing of Seamen,¹⁹⁷ and Medical Examination of Young Persons at Sea.¹⁹⁸

¹⁹⁵ *Minimum Age (Sea) Convention*; Convention No.7, 9 July 1920

¹⁹⁶ *Unemployment Indemnity (Shipwreck) Convention*; Convention No.8, 9 July 1920

¹⁹⁷ *Placing of Seamen Convention*; Convention No.9, 9 July 1920

¹⁹⁸ *Medical Examination of Young Persons (Sea) Convention*; Convention No. 16, 11 November 1921

However, as the ILO's maritime conventions began to include much more detailed and far-reaching provisions concerning the labour rights and protections afforded to seafarers as the Twentieth Century progressed, so too did the enforcement provisions increase in strength and creativity.

For example, while initially containing the same wording as the above conventions, the *Seamen's Articles of Agreement Convention 1926*¹⁹⁹ goes on to state several areas of labour law that national legislation "shall" address in Articles 3, 8, 9, 11 and 12, requiring that:

*"National Law shall provide the measures to ensure compliance with the terms of the present Convention."*²⁰⁰

In 1946 a group of conventions brought into effect the targeted manner of bringing a labour treaty into force which would later become central to the ambitions of the MLC.²⁰¹ These conventions were the first to require both a specified number of ratifications and a minimum gross tonnage of ships registered with the ratifying States before the conventions entered into force, thus seeking to effect as large a portion of the world's seafarers as possible and not be considered merely rights on paper. This reflected the understanding, which persists to this day, that effective governance of maritime labour issues can only be conducted with the support and willingness of the major maritime nations to ensure a universal understanding and application of terms, and the ability to positively impact as many seafarers as possible.

However, the merits of this targeted approach, whereby major shipping nations were singled out as being pivotal to the success of raising and implementing maritime labour standards and rights, was tempered by the fact that enforcement obligations were still focused exclusively on Flag States.²⁰²

But it was not long before the ILO system began to look for innovative alternatives to exclusive Flag State jurisdiction and obligations towards

¹⁹⁹ *Seamen's Articles of Agreement Convention*; Convention No. 22, 24 June 1926

²⁰⁰ *Ibid.* Article 15

²⁰¹ See: *Food and Catering (Ships' Crews) Convention*, Convention No.68, 1946, Article 15(2); *Certification of Ships' Cooks Convention*, Convention No.69, 1946, Article 8(2); *Social Security (Seafarers) Convention*, Convention No.70, 1946, Article 12(2); *Paid Vacations (Seafarers) Convention*, Convention No.72, 1946, Article 13(2); *Medical Examination (Seafarers) Convention*, Convention No.73, 1946, Article 11(2); *Accommodation of Crews Convention*, Convention No.75, 1946 Article 21(2); *Wages, Hours of Work and Manning (Sea) Convention*, Convention No.76, 1946, Article 26(2) and *Certification of Able Seamen Convention*, Convention No.74 Article 6(2)

²⁰² See: *Food and Catering (Ships' Crews) Convention*, 1946 Article 1; *Certification of Ships' Cooks Convention* Article 1; *Social Security (Seafarers) Convention* Article 7; *Paid Vacations (Seafarers) Convention* Article 1; *Medical Examination (Seafarers) Convention* Article 1; *Accommodation of Crews Convention* Article 1; and *Wages, Hours of Work and Manning (Sea) Convention* Article 2(1)(b)

seafarers, with their *Wages, Hours of Work and Manning (Sea) Convention (Revised)*²⁰³ stating, in 1949, that:

*“For the purpose of giving mutual assistance in the enforcement of this Convention, every member which ratifies the Convention undertakes to require the competent authority in every port in its territory to inform the consular or other appropriate authority of any other such Member of any case in which it comes to the notice of such authority that the requirements of the Convention are not being complied with in a vessel registered in the territory of that other Member.”*²⁰⁴

Here we see, for the first time, the extension of obligations to monitor and report labour standards to the Port State through the expression “*every port in its territory*”. Undoubtedly, this provision still leaves the largest burden of obligations resting with the Flag State and would appear to oblige Port States to act only if the infringing ship in question is registered to the flag of a ratifying State of the *Wages, Hours of Work and Manning Convention*. Nonetheless, it represents a considerable shift, not just in labour law enforcement, but also in our consideration of the broader applicability of human rights obligations in an area previously considered the sole concern of the Flag State.

A continuation of this theme can be identified in Article 4 of the *Accommodation of Crews (Supplementary Provisions) Convention 1970* (hereafter: Convention 133)²⁰⁵ which states that each Member undertakes obligations which include providing “*for the maintenance of a system of inspection adequate to ensure effective enforcement*”.²⁰⁶

The terms of Convention 133 do not expressly identify Port States as having these obligations of inspection and enforcement. However, by remaining ambiguous, the ILO was able to depart further from the traditional approach in maritime law of expressly assigning the majority of obligations specifically to Flag States, thus seemingly opening up the possibility of developing the human rights and labour law enforcement provisions to parties beyond simply the Flag State.

The placing of obligations on Port States as well as Flag States was an approach continued by the ILO through the adoption of later maritime conventions, seeking to gradually create a nexus of obligations within the community of maritime States which had, at their core, the protection and empowerment of the seafarer.²⁰⁷

²⁰³ *Wages, Hours of Work and Manning (Sea) Convention (Revised)*; Convention No.93 18 June 1949

²⁰⁴ *Ibid.* Article 23

²⁰⁵ *Accommodation of Crews (Supplementary Provisions) Convention*; Convention No.133, 30 October 1970

²⁰⁶ *Ibid.* Article 4(2)(d)

²⁰⁷ See, for example: *Seafarers’ Annual Leave with Pay Convention*; 1976 (C146), Article 13; *Seafarers’ Welfare Convention*; Convention No. 163, 1987, Article 6 and *Health Protection and Medical Care (Seafarers) Convention*; Convention No. 164, 1987 Article 4

Progressing on from incorporating both Port and Flag State obligations within the maritime labour standards, the ILO then set out to specifically recognise the notion of the exercise of Port State control. This provided Port States with the express power to detain vessels flagged to another State where infringements of a convention have been found and requiring their rectification before the ship is allowed to leave port. This revolutionary notion, in terms of labour rights enforcement, can be found in the *Merchant Shipping (Minimum Standards) Convention*, 1976 (hereafter: Convention 147) Article 4:

*“If a Member which has ratified this Convention and in whose port a ship calls...receives a complaint or obtains evidence that the ship does not conform to the standards of this Convention...may take measures necessary to rectify any conditions on board which are clearly hazardous to safety of health.”*²⁰⁸

However, Port States need only act on the receipt of a complaint or on specific evidence that a particular ship does not conform to the standards set out in the Convention.²⁰⁹ Thus, the right of complaint of the seafarer was crucial for the proper application of Convention 147 because it activated Port State control over vessels which had inadequate social or labour conditions on board. In addition, the power to take measures to rectify situations on board foreign vessels is partially qualified in Article 4(b) with no unreasonable detention or delay of the ship in question being permitted.²¹⁰ Despite these restrictions, Convention 147 recognises the important contribution other actors, aside from the Flag State, can have on the labour and human rights protections on board vessels.

Linked to this, in 1982 thirteen States that had ratified Convention 147 were part of a group of fourteen with valuable port industries which came together to create the *Memorandum of Understanding on Port State Control*²¹¹ (hereafter: MOU). The MOU aims to ensure the inspection of twenty five per cent of foreign vessels entering State Parties’ ports with the intention of utilising these inspections to uphold the international standards set out in various IMO treaties as well as Convention 147.²¹² Of particular relevance to our discussion, the MOU stipulates that the inspections should be carried out without considerations of the flag which the ship in question is flying. This is to guarantee that “no more favourable treatment” is given to the ships of States who disregard the standards outlined in Convention 147²¹³ - which we can take to include ships flying flags of convenience.

²⁰⁸ *Merchant Shipping (Minimum Standards) Convention*; Convention No.147, 29 October 1976 Article 4(a)

²⁰⁹ *Ibid.* Article 4(a)

²¹⁰ *Ibid.* Article 4(b)

²¹¹ *Paris Memorandum of Understanding on Port State Control*; available at:

http://www.parismou.org/Organization/2010.12.27/Memorandum_of_Understanding.htm

²¹² *Ibid.* para 2.1 for a list of the relevant instruments

²¹³ *Ibid.* para 2.4

This provides evidence of international support for the generally increased powers of Port State control developed by Convention 147 and of the ILO's attempts, in conjunction with the general body of international maritime law at the time, to move beyond the notion of exclusive Flag State jurisdiction when addressing the enforcement of international standards.²¹⁴

Convention 147 built on Convention 133, opening up the maritime arena to the possibility of increased Port State obligations in relation to human and labour rights. It created a solid foundation which not only acknowledges such obligations, but engages an element of control and practical implementation to the enforcement procedures.²¹⁵

Furthermore, Convention 147 set out to mainstream the idea of substantial equivalence in the international maritime labour regime. It did so by including in its Appendix a list of fifteen previous ILO conventions and, under Article 2(a), set out that a ratifying State should “*satisfy itself that the provisions of such laws and regulations are substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to this Convention, in so far as the Member is not otherwise bound to give effect to the Conventions in question.*”

The notion of "equivalence" may be traced first to Paragraph 1 of the *Seafarers' Engagement (Foreign Vessels) Recommendation*, which referred to conditions in vessels registered in some countries not being “*generally equivalent*” to those traditionally observed under collective agreements and social standards in other countries.²¹⁶ Understood more generally, the substantial equivalence approach is designed to prevent the national legislation of ratifying States acting contrary to the overarching aims and purposes of the general body of ILO work on maritime labour protections.²¹⁷ However, it stops short of requiring States to adhere to the precise terms of the Conventions in question,²¹⁸ instead requiring laws or regulations which “*have in all material respects an effect corresponding*” to the requirements of the Appendix conventions.²¹⁹ Standard equivalence, then, sets out the minimum standard accepted under these provisions.²²⁰

²¹⁴ ILO Committee of Experts; *General Survey Convention 147*; International Labour Conference, 77th Session, 1990 para 10

²¹⁵ ILO; *Rules of the Game: A Brief Introduction to International Labour Standards*; Geneva, 2009 p69

²¹⁶ *Seafarers' Engagement (Foreign Vessels) Recommendation*; Convention No. 107, 1958 para 1

²¹⁷ ILO; *MLC 2006 FAQs*; 2012 Online Revised Addition p7 available at: http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_177371/lang-en/index.htm

²¹⁸ Christodoulou-Varotsi, Iliana; *Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organisation: Limitations and Perspectives (hereafter: Review of MLC)*; 2012 Journal of Maritime Law and Commerce p6

²¹⁹ ILO Committee of Experts; *General Survey Convention 147*; International Labour Conference, 77th Session, 1990 para 71

²²⁰ *Ibid.* para 73

Yet while Convention 147 sought to incorporate the terms of previous maritime labour conventions through their reference in the appendix and the substantial equivalence doctrine, it did not revise these previous conventions, nor close them to future ratification. Thus, Convention 147 actually served to add to the already substantial body of treaties on maritime labour law.

Convention 147 was supplemented by the *Merchant Shipping (Improvement of Standards) Recommendation 155* 1976 (hereafter: Recommendation 155).²²¹ Recommendation 155 also attaches eight conventions, one recommendation and one IMCO/ILO document to its Appendix but goes further than Convention 147 as it requires national provisions which are “at least equivalent” both to the instruments appended to Convention 147 and to the Recommendation itself.²²²

The incorporation through reference utilised in both Convention 147 and Recommendation 155 thus cast a wide minimum maritime standards net for ratifying parties.²²³ It also applied the notion of Port State control as a means of dealing with problems of substandard ships - including those registered under flags of convenience in the widest sense of the term - when the State of registration has not itself dealt with them.²²⁴

In addition to the progressive efforts to improve implementation and enforcement of international labour standards in the maritime industry, the ILO also set about making strides to further clarify and unite the various strands of labour rights and best practices which emerged over the past century.

The *Seafarers’ Welfare Convention* (hereafter: Convention 163)²²⁵ was the first effort on the part of the ILO to create and bring into practice a single, comprehensive international legal document on the overall welfare of workers at sea, albeit within a limited subject area.

Convention 163 requires States to “ensure that adequate welfare facilities and services are provided for seafarers both in port and on board ship”²²⁶ while defining welfare facilities and services to include: “welfare, recreational, and information facilities and services.”²²⁷

Thus not only is the temporal progression of imposing obligations directly on Port States as well as Flag States retained, but actually expanded. Under

²²¹ *Merchant Shipping (Improvement of Standards) Recommendation (Recommendation No. 155)*; Geneva, 62nd ILC Session 29 October 1976

²²² *Merchant Shipping (Improvement of Standards) Recommendation (Recommendation No. 155)*; 62nd ILC Session, 29 October 1976; Annex

²²³ ILO Committee of Experts; *General Survey Convention 147*; International Labour Conference, 77th Session, 1990 para 6

²²⁴ *Ibid.* para 276

²²⁵ *Seafarers’ Welfare Convention*; Convention No.163, 8 October 1987

²²⁶ *Ibid.* Article 2(1)

²²⁷ *Ibid.* Article 1(1)(b)

Convention 163 Port States are required to “*ensure that the necessary arrangements are made for financing the welfare facilities and services provided.*”²²⁸ This serves to impose positive obligations on the Port State concerning their own implementation of welfare rights for seafarers who come into their ports, theoretically expanding on the levels of protection afforded to seafarers’ welfare and linking the maritime labour and welfare rhetoric to that of general international human rights law.

As an aside, it is interesting to note with regard to Convention 163 that there was also an attempt made to include fishing vessels and fishermen, traditionally the subjects of a separate line of development within ILO standard setting, within the ambit of the Convention by urging ratifying States to apply the provisions of Convention 163 to commercial maritime fishing as well.²²⁹

4.1.2 The ILO Standards in Perspective

It can be concluded from the brief analysis above that the traditional framework utilised by the ILO was drafted in a manner which focused far more on setting the labour standards than on implementation and enforcement, as evidenced by the somewhat incoherent compliance procedures which were in place.²³⁰

Yet this focus on the diverse rights of the seafarer, in itself, can be said to be of benefit to the realisation of social justice for seafarers. It does what general international maritime law has failed to do by placing the seafarer as the central subject of the legal systems. Through operating using the same jurisdictional terms, rules and rhetoric of international maritime law, the ILO have sought to incorporate this subjectification to be seen as an intrinsic part of maritime law and not a separate, purely labour law consideration.

Furthermore, the development from an initial toothlessness, through to an increasing acceptance and willingness to place obligations on Port States as well as Flag States, demonstrates a developing understanding on the part of the ILO of the importance of sharing obligations and creating some kind of jurisdictional support system, operating within the existing laws and principles of international maritime law. This holds the aim of counteracting the otherwise unrestricted labour abuses which are allowed by the flag of convenience system. The inclusion of Port State control in the enforcement mechanisms of Convention 147 was also revolutionary and a key development in allowing seafarers to access social justice, adding practical

²²⁸ Ibid. Article 2(2)

²²⁹ Ibid. Article 1(3)

²³⁰ Christodoulou-Varotsi, Iliana; *Review of MLC*; 2012 Journal of Maritime Law and Commerce p2

means with which to challenge the flag of convenience system to go along with the obligations on paper.

However, there are still clear shortcomings within this system with regard to the effective realisation of social justice for seafarers. The conventions previously in play lacked a legal mechanism for enacting changes to their procedures or content, making the maritime labour legal landscape extremely resistant to the periodic revision necessitated by this continually evolving industry.²³¹ Even amendments of minor technical details called for resort to costly revision procedures which required the full consideration at the Maritime Session of the International Labour Conference and needed several years to enter into force for a significant number of countries.²³² Deriving from these problems, revision took on the form of new conventions, which came with no guarantee that the ratifying States of previous conventions would accept and ratify the new incarnations, continually growing the hard law within this field and making it more and more difficult to be understood or utilised by seafarers themselves.

This created the situation whereby the plethora of rights and labour standards stretching across numerous conventions and spanning the best part of a century remained unevenly ratified, let alone enforced.²³³ The existing fragmented regime imposed different levels of enforcement and standards for implementation, further hampering efforts towards a universally applicable system of maritime labour protection, which is a prerequisite for our international maritime society's legal system to be considered socially just. The varying levels of ratification for the numerous conventions in force also created a situation of unfair competition between ships whose Flag State had ratified a convention and those whose Flag State had not. This can even be seen to strengthen the appeal of flags of convenience, actively working against the universal and socially just application of maritime labour standards for seafarers by promoting what has been explained to be one of the biggest dangers to their realisation among shipping companies.

In addition, the disjointed nature of ratifications, and the content and enforcement mechanisms of each different convention made it exceedingly difficult to promote the ILO's maritime labour standards as a coherent ensemble.²³⁴ The resultant international patchwork of divided labour rights and obligations served to undermine the universality and enforceability of standards drafted by the ILO over the years. This, in turn, made it difficult to create ownership of the international human rights standards among the world's seafarers, which is of fundamental importance if the various conventions and the standards contained therein are to be converted from paper to practice by workers demanding and seeking judicial redress to ensure that their rights are fulfilled.

²³¹ Bolle, Patrick; *An Innovative Instrument*); 145 Intl. Lab. Rev. 2006 p138

²³² Ibid. p138

²³³ Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John's, Newfoundland

²³⁴ Ibid.

Therefore, despite their relevance and validity to the maritime industry, the ILO's various – but fragmented and disparate – maritime conventions were having significantly less impact on the industry than the other, more widely ratified and all-encompassing conventions of the maritime sector addressing the issues of ship safety and environmental protections.²³⁵

The principles of social justice of fairness and equality are actually very identifiable in the ILO's maritime standard system. They have developed and increased the rights and liberties of seafarers on paper while also seeking to incorporate methods to transpose this equality into practice. However, the fact remains that the international maritime regime still permits flags of convenience, which undermine equality in practice as well as distorting the power relationships between worker and employer to defeat the ends of social justice pre-emptively. Similarly, through creating a series of conventions which form part of the international labour regime without having a tangible impact on the maritime regime, the result is a maritime system distinct from labour law and which fails to adequately consider the social implications and benefit distributions of its laws and development, as evidenced by the continuing objectification of the seafarer.

The main necessities today are to enhance enforcement, to universalise the rights afforded to seafarers and centralise labour considerations within the maritime legal regime itself.

4.2 The Maritime Labour Convention in Focus

4.2.1 Content of the MLC

The MLC has been divided into three parts: the Articles, the Regulations and the Code. The Articles and Regulations set out the rights of seafarers and the obligations and principles that must be adhered to by ratifying States. The Code provides details on how to effectively implement the Regulations with both mandatory standards and optional guidelines for how these standards should be operated in practice.²³⁶

The Regulations and Code are organised into five general titles which provide specific details on obligations and implementation procedures. These are: minimum requirements for seafarers to work on a ship; conditions of employment; accommodation, recreational facilities, food and catering; health protection, medical care, welfare and social security protection and, compliance and enforcement.

²³⁵ Bolle, Partick; *An Innovative Instrument*; 145 Intl. Lab. Rev. 2006 p140

²³⁶ *Maritime Labour Convention 2006*; Explanatory Note paras 3 & 4

However, it is the substantive articles of the MLC that will provide us with the foundation for our analysis concerning its effectiveness as a means of ensuring access to social justice for seafarers. It is these which shall be considered here.

Article II lists the definitions for the MLC. “Seafarer” is defined as “*any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies.*”²³⁷ While “ships” are defined as: “*a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply.*”²³⁸

Articles III and IV can be read together to form the Seafarers’ Bill of Rights.²³⁹ Article III states that the fundamental rights protected by the MLC as: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labour; the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation.²⁴⁰ This Article mirrors the 1998 ILO Declaration on Fundamental Principles and Rights at Work,²⁴¹ allaying any notion that the most fundamental rights for seafarers should be in any way different from those of general workers.

Building on this outline of fundamental rights, Article IV details the seafarer’s employment and social rights, namely: a safe and secure workplace, the right to fair terms of employment, right to decent working and living conditions on board ship and the right to health protection, medical care, welfare measures and other forms of social protection.²⁴² For these rights, Member States must ensure implementation in accordance with the requirements of the MLC,²⁴³ specifically tailoring them for the unique nature and problems created by working life at sea. However, the manner of implementation expressly provides for flexibility to take account of the various legal systems at play among ratifying countries.²⁴⁴ Implementation may thus be through national laws or regulations, through applicable collective bargaining agreements, or through other measures or in practice.²⁴⁵

Article V adds some of the more unique features to the MLC and creates the basis for the jurisdictional safety net and CSR in practice discussed below.²⁴⁶ It reads:

²³⁷ *Maritime Labour Convention 2006*; Article II(1)(f)

²³⁸ *Maritime Labour Convention 2006*; Article II(1)(i)

²³⁹ Blanck, John; *Reflections*; 31 Tul. Mar. L.J. 2007 p45

²⁴⁰ *Maritime Labour Convention 2006*; Article III

²⁴¹ *ILO Declaration on Fundamental Principles and Rights at Work*; International Labour Conference, 86th Session, 18th June 1998.

²⁴² *Maritime Labour Convention 2006*; Article IV(1-4)

²⁴³ *Maritime Labour Convention 2006*; Article IV(5)

²⁴⁴ Blanck, John; *Reflections*; 31 Tul. Mar. L.J. 2007 p46

²⁴⁵ *Maritime Labour Convention 2006*; Article IV(5)

²⁴⁶ See Below p59

Article V

1. *Each Member shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction.*
2. *Each Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws.*
3. *Each Member shall ensure that ships that fly its flag carry a maritime labour certificate and a declaration of maritime labour compliance as required by this Convention.*
4. *A ship to which this Convention applies may, in accordance with international law, be inspected by a Member other than the flag State, when the ship is in one of its ports, to determine whether the ship is in compliance with the requirements of this Convention.*
5. *Each Member shall effectively exercise its jurisdiction and control over seafarer recruitment and placement services, if these are established in its territory.*
6. *Each Member shall prohibit violations of the requirements of this Convention and shall, in accordance with international law, establish sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations.*
7. *Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any State that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it.*²⁴⁷

The above lays down enforcement and compliance obligations on three types of State: Flag States, Port States and Labour Supplying States, with the emphasis seemingly shifting from the predominant focus on Flag State jurisdiction to a system of obligations which incorporates as many of the State actors in the maritime industry as possible.

The enforcement provisions under Article V are built around a system of certification adapted from the IMO and their general enforcement provisions for international maritime law.²⁴⁸ Under Article V, the Flag State is required to issue both a Maritime Labour Certificate to certify that its vessel has been inspected, and a Declaration of Maritime Labour Compliance explaining how the MLC is applied on board.²⁴⁹ The Certificate and Declaration will be taken as *prima facie* evidence of compliance with the requirements of the MLC. This should give ships carrying them a significant advantage over those which do not when coming into a Port State as they will only have to have these documents inspected and not be subjected to a more rigorous

²⁴⁷ *Maritime Labour Convention 2006*; Article V

²⁴⁸ Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John's, Newfoundland

²⁴⁹ *Maritime Labour Convention 2006*; Article V(1)-(3)

inspection of the vessel and the applicable standards on board and the delays which come with that process.²⁵⁰

Strengthening this inspection system, the MLC has incorporated the “no more favourable treatment” principle first developed by the MOU in 1982 into hard treaty law with a labour specific focus.

By virtue of this underlying principle, Port States are required to ensure the universal protection of maritime labour rights to all maritime labourers who come under its jurisdiction – including those working under the flag of a non-ratifying State while they are in the port of the ratifying State. In essence, all visiting vessels must be treated equally, whatever flag they fly.²⁵¹ This potentially extends the practical reach of the MLC to all vessels and all seafarers, whether or not their Flag State has ratified the Convention.

Thus vessels not in possession of valid certification, whether or not their Flag State has ratified the MLC, will be liable to thorough port inspections in ratifying Port States.²⁵²

It should be stressed that Port States are under no obligation to inspect ships entering their ports.²⁵³ However, a detailed inspection *must* be carried out if the “*working and living conditions believed or alleged to be defective could constitute a clear hazard to the safety, health or security of seafarers or where the authorised officer has grounds to believe that any deficiencies constitute a serious breach*” of the MLC.²⁵⁴ Should deficiencies be found, the Port State inspector may bring them to the attention of the ship’s master or to the appropriate seafarers’ or shipowners’ associations.²⁵⁵ In cases of extreme labour violations, the authorities may exert Port State control over the vessel in question and prevent it from sailing.²⁵⁶

This application of the principle of Port State control from Convention 147 should serve to give the enforcement procedures “teeth” out-with a court or tribunal setting.²⁵⁷ This shows a willingness on the part of the ILO to continue the positive developments to strengthen the labour rights considerations within the overall maritime law boundaries.

Building on this, under an additional access to justice principle of the MLC, States Parties are required to establish procedures for registering seafarers’ complaints regarding violations of their rights.²⁵⁸ The MLC requires that all ships have an on board procedure for the fair, expeditious and effective

²⁵⁰ *Maritime Labour Convention 2006*; Regulation 5.2.1(2)

²⁵¹ Grey, Michael; *The Maritime Labour Convention – Shipping’s “Fourth Pillar”*

²⁵² *Maritime Labour Convention 2006*; Article 5(4) and (7)

²⁵³ *Ibid.* Article 5(4)

²⁵⁴ *Ibid.* Standard A5.2.1(1), p86

²⁵⁵ *Ibid.* Standard A5.2.1.4

²⁵⁶ *Ibid.* Standard A5.2.1.6

²⁵⁷ *Ibid.* Standard A5.2.1 para 6

²⁵⁸ *Ibid.* Regulations 5.1.5 & A5.2.2

handling of complaints by seafarers.²⁵⁹ Complaints under this procedure can be made directly to the ship's master as well as to external authorities.²⁶⁰ Additionally, Port States are also required to have onshore procedures for registering complaints made by seafarers.²⁶¹ The right of complaint thus becomes an important tool for the protection of seafarers' rights as, when appropriately exercised, it can activate Port State control to hold ships accountable for their social and labour standard failures. These complaints systems should then apply to all seafarers, whether or not they are at sea, and thus lends a transnational quality to the effects of the MLC, extending a reporting system to seafarers working under the flag of another State and bringing about the possibility of inspection and detention of vessels for labour rights violations.

Article V(5) also extends obligations to a third type of State: the Labour Supplying State. Under this provision, a State party must exercise its control and jurisdiction to ensure that recruitment carried out within its territory complies with the rights and protections established in the MLC. This serves to further extend the transnational nature of the obligations States Parties owe to seafarers and provides for further opportunities for access to justice in a third State if a maritime labourer has their rights infringed through an action which originated in the Labour Supplying State.

Article VI provides for a distinction between the mandatory Regulations and Part A of the Code and the optional details that form Part B of the Code, further engraining the dual notion of rigid rights and compliance on a flexible plain. Significantly, Article VI also refers to the doctrine of substantial equivalence previously discussed.²⁶² Article VII reinforces the tripartite nature of this ILO convention, despite its superficial structural differences, by requiring any derogation, exemption or other flexible application of the MLC to be undertaken only after consultation with ship-owners' and seafarers' organisations.

Article VII continues the idea of targeted implementation first seen in the ILO's conventions from 1946, once again reinforcing the notion that the world's major shipping powers, and the influence which they can exert over trade and policy issues, are of fundamental importance for the success of the international labour rights regime for seafarers. In conjunction, Article VIII governs the Convention's entry into force, recognising the importance of securing the support of the major maritime nations by retaining the targeted implementation doctrine first developed in 1946. It requires 30 ratifications and that no less than 33% of the world's gross tonnage of ships be registered to the ratifying States.

Article IX provides details for how a State Party may denounce the MLC while Article X lists the previous ILO conventions which are revised by the

²⁵⁹ Ibid. Regulation 5.5.1

²⁶⁰ Ibid. Standard A5.1.5.2

²⁶¹ Ibid.; Regulation 5.2.2

²⁶² Ibid. Article VI(3)

MLC. While non-ratifying countries will still be bound by their obligations under these older conventions, the conventions themselves will be closed to further ratification to focus the attention of States on the ratification and adoption of the MLC.²⁶³ It should be noted the MLC does not subsume the Seafarers' Identity Document Conventions, the Seafarers' Pension Convention 1946 or the Minimum Age (Trimmers and Stockers) Convention 1921,²⁶⁴ the last of which, in any case, is no longer relevant to the shipping industry.²⁶⁵

Articles XI and XII simply provide details of the depository procedures for ratification.

Aligned to the enforcement procedures of Article V is Article XIII, which will seek to monitor compliance in practice through the establishment of a Special Tripartite Committee whose primary function is to “*keep the working of [the MLC] under continuous review*”.²⁶⁶ However, while the Committee is set to review the MLC's operation and effect, it has not been expressly granted the authority to penalise a State which has violated the provisions of the Convention.²⁶⁷

Article XIV provides for the procedures to amend the central provisions of the MLC, which must be carried out in accordance with the traditional revision process found in Article 19 of the ILO Constitution.

Uniquely, Article XV then provides for a simplified amendment procedure for Part B of the Code. Under Article XV, an amendment, approved by the General Conference of the ILO, shall be considered valid unless, by the end of the prescribed period: “*formal expressions of disagreement have been received by the Director-General from more than 40 per cent of the Members which have ratified the Convention and which represent not less than 40 per cent of the gross tonnage of the ships of the Members which have ratified the Convention.*”²⁶⁸

4.2.2 Unique Features of the MLC

Through consolidating the vast majority of legal material on maritime labour law into a single instrument, the ILO has sought to create an almost

²⁶³ ILO; *MLC 2006 FAQs*; 2012 Online Revised Addition

²⁶⁴ *Seafarers' Identity Documents Convention*, Convention No. 108; ILC, 29 April 1958; *Seafarers' Identity Documents Convention (Revised)*, Convention No. 185; ILC 91st Session, 19 June 2003; *Seafarers' Pensions Convention*, Convention No. 71; ILC 6 June 1946 & *Minimum Age (Trimmers and Stokers) Convention*, Convention No. 15; ILC 3rd Session, 11 November 1921.

²⁶⁵ Christodoulou-Varotsi, Iliana; *Review of MLC*; 2012 Journal of Maritime Law and Commerce p2

²⁶⁶ *Maritime Labour Convention 2006* Article XIII(1)

²⁶⁷ Bauer, Paul; *An Adequate Guarantee*; p649

²⁶⁸ *Maritime Labour Convention 2006* Article XV(7)

all-encompassing international treaty which can form the “Fourth Pillar” of the international regulatory regime for quality shipping.²⁶⁹

While continuing to focus on the rights and central importance of the seafarer in the maritime industry, the MLC has broken from previous ILO conventions by placing a great deal of emphasis on enforcement and monitoring procedures to attempt to ensure the Convention’s practical effectiveness, further evidenced by “compliance and enforcement” having its own Regulations and Code.

The MLC also breaks with the ILO’s traditional approach to enunciating labour rights and standards by abandoning the practice of adopting a binding Convention accompanied by a non-binding Recommendation. Instead, the MLC introduces the innovative format of Articles, Regulations and Code. This system was devised to work towards a firm stance and certainty concerning the rights contained in the Articles and Recommendations, while incorporating a degree of flexibility regarding implementation.²⁷⁰ This was done by taking into account the different capacities of Flag States and giving a degree of leeway designed to prevent States being discouraged from ratification by overly burdensome or specific requirements for implementation. It is the rights and their *effective* implementation and enforcement which matters, not the system of implementation.

A further novel feature introduced into the ILO system by the MLC is the simplified amendment procedure under Article XV. This tacit acceptance process has its roots in the IMO²⁷¹ and, while the ILO cannot claim paternity over its creation, it has had to evolve and develop the notion to fit with the special characteristics of the organisation, most notably with its tripartite structure.

This process of tacit amendment incorporates a degree of flexibility to the actual application of the MLC with the intention of facilitating technical updates to remain up to date with the functions and nuances of the maritime industry without compromising the integrity or fundamental strength of the MLC’s core labour provisions.

There is also the considerable innovation, in human rights discourse, of the MLC’s article on compliance and enforcement and the creation of the Special Tripartite Committee to monitor the MLC’s implementation and impact in practice. The compliance and enforcement provisions of the MLC are built around a system of certification and inspection, again a concept which has been adapted from the IMO’s legal system, to ensure coherence between the two bodies of law and facilitate their overlap and the

²⁶⁹ Bolle, Patrick; *An Innovative Instrument*; 145 Intl. Lab. Rev. 2006 p140

²⁷⁰ Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John’s, Newfoundland

²⁷¹ Christodoulou-Varotsi, Iliana; *Review of MLC*; 2012 Journal of Maritime Law and Commerce p6

consideration of maritime labour law as central aspect of the normal functioning of international maritime law.²⁷²

Intrinsically linked to this advancement in the compliance and enforcement system is the principle of “no more favourable treatment” as the primary means to secure a level playing field in the maritime industry. The basic premise of this principle’s inclusion is to dispel any notion that there can be a competitive advantage to be gained by States and shipping companies which seek to keep themselves out with the scope of international labour standards.

The drafters of the MLC have thus produced a uniquely structured ILO treaty which has sought to consolidate, for the first time in an industry,²⁷³ a general body of labour rights from a particular industry into a single, easily accessible document. The increased flexibility for implementation and revision are designed to add longevity to the terms of the MLC and keep the provisions as relevant as possible to the daily lives of the world’s seafarers, which, by corollary, will ensure the terms have the most beneficial impact possible. Finally, the specific and extensive focus on enforcement and monitoring through Articles V and XIII bring together the various developing strands of previous ILO treaties on maritime labour while also utilising enforcement ideas from general international maritime law to seek to bridge the gap between these two bodies of law. All of this is designed to improve access to social justice for the global seafarer, and the following chapter will analyse whether this is likely to be the case.

²⁷² Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John’s, Newfoundland

²⁷³ Although note that the ILO’s Convention Concerning the Minimum Age for Admission to Employment (*Minimum Age Convention*, Convention No. 138, 26 June 1973) has previously carried out this consolidation exercise concerning the “activity” of child labour.

5 Critical Legal Analysis of the MLC and the Voyage Towards Social Justice

For an equitable and just social system to be created within the maritime industry, it is clear that the dangers posed to labour rights by the phenomenon of flags of convenience should be counteracted and a labour system put in place which prevents the exploitation of legal loopholes in the maritime industry. But this is only part of the process. Social justice also requires the protection of the seafarer to be a central consideration within the maritime industry, for obligations and power to be distributed in a manner which does not give one party within the social structure the scope to exploit and subjugate another, and for the principles of fairness and the empowerment of seafarers to be realised on a universal level. This chapter will evaluate in what ways the MLC has made progress towards the realisation of these prerequisites of social justice.

5.1 The creation of a Jurisdictional Safety Net

5.1.1 Working within the Bounds of Maritime Law to Realise Social Justice

Rules and regulations which are not enforced are not only ineffective, but through consistent non-enforcement serve to weaken the entire regulatory system.²⁷⁴ The MLC has sought to prevent this weakening of the maritime labour regime through the creation of what I will term a “jurisdictional safety net.” This safety net sees overlapping obligations of protection and enforcement rest with several parties under Article V, seeking to ensure that the convention and its provisions are effective and complied with in practice, not just on paper.²⁷⁵

This safety net system has been built to work within the regulatory system already in place in international maritime law.²⁷⁶ This is an important aspect of the convention when we recall that the MLC aims to become the “Fourth Pillar” of the maritime regulatory regime on safety and health. Only if it can function within the already established legal bounds of maritime law can the

²⁷⁴ Anderson, David; *The Roles of Flag States, Port States, Coastal States and International Organisations in the Enforcement of International Rules and Standards Governing the Safety of Navigation and the Prevention of Pollution from Ships under the UN Convention on the Law of the Sea and other International Agreements*; Singapore Journal of Intl. & Comparative Law 1998 p560

²⁷⁵ Boulle, Patrick; *An innovative instrument*; 145 Intl. Labour Law Review 2006 p141

²⁷⁶ Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John’s, Newfoundland.

MLC be considered an essential and fundamental part of the current system and hope to change the *status quo* which has been so detrimental to social justice.

The problems of Flag State jurisdiction facilitating the development of flags of convenience is more likely to be tackled effectively by developing internationally agreed standards on the issue.²⁷⁷ The expansive jurisdictional scope of the MLC may do just that. Through focusing on enforcement and implementation rather than simply re-defining maritime labour standards, the drafters of the MLC were able to target the most problematic area with regard to the effective realisation and access to a socially just maritime labour regime.

Under the MLC, the primary responsibility for ensuring compliance with labour standards on board vessels still lies, as it always has in the maritime industry, with the Flag State itself. This is important for aligning the MLC with the previous and current international treaties on maritime law as it would be virtually impossible in practice to develop a functioning convention which breaks from the core principles of the entire corpus of international and domestic legal regimes on the matter. It also serves to reaffirm the importance which the ILO and international labour community place on Flag States and the central role they play in the effective realisation of social justice for seafarers.

Beyond Flag State jurisdiction, it has been observed that compliance with international standards in the maritime industry has been enhanced by the pressure applied by socially and legally responsible Port States.²⁷⁸ Based on this, the ILO has continued with its trend of granting progressively more expansive powers of Port State control and increasing scope for Port State jurisdiction under the MLC. The powers of inspection and detention serve to give the MLC “teeth,” backing up the obligations placed on Flag States with a monitoring, punitive and corrective process to require compliance in practice if ships are to be allowed to continue their voyage and normal functions.

The extensive scope for Port State jurisdiction and inspections under the MLC should serve the purpose of combatting any concerns over Flag States acting in their own self-interests and ignoring violations of the MLC by their flagged vessels with the intention of increasing business for their own fleet.²⁷⁹ This is because these vessels will no longer be able to operate solely on their own terms or those of their Flag State. Instead, they will also have to conform to the laws and regulations of the Port States into which they enter or face the penalties and sanctions associated with these violations from port state authorities or judicial mechanisms if these are used by

²⁷⁷ Goodman, Camille, *Flag State Responsibility in International Fisheries Law – effective fact, creative Effective fact, Creative Fiction, or Further Work Required?*, Aus. & N.Z. Mar. L.J. 2009 p163

²⁷⁸ Zwinge, Tamo; *Duties of Flag States*; 10 J Intl Bus. & Law 2011 p310

²⁷⁹ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p649

seafarers. A key to enforcement, then, is ensuring that Port States take their responsibilities seriously: there is thus a need in all countries for responsible officers to have the backing of clear legislation empowering them to take action in respect of labour standards on foreign-registered ships, and for them to be fully aware of their powers and duties in this respect.²⁸⁰

The aspect of responsibility for Labour Supplying States is a novel addition to the maritime labour responsibilities placed on States.²⁸¹ The primary role of Flag States and even Port States for ensuring adequate labour conditions on board ships is not challenged or in any way watered down by the inclusion of this third State in our jurisdictional safety net. Rather, this adds a new, prior level of protection to the international maritime labour regime by requiring that States ensure the fair treatment and prevent the exploitation of nationals or other persons within their territory regarding the recruitment of seafarers. This is a measure which, if monitored and enforced properly, should help to prevent seafarers finding themselves recruited to vessels where labour standards are inadequate as recruitment organisations should no longer be permitted to operate in an exploitative manner within the territory of ratifying States. Such a measure potentially extends important obligations concerning maritime labour even to States who have not traditionally been associated with the industry. Where flags of convenience have tended to pre-emptively undermine social justice and labour rights, the obligations on Labour Supplying States attempt to pre-emptively protect these ideas.

This safety net and the sharing of obligations also partly addresses the problem that a lot of Flag of Convenience States and smaller States lack the economic means to properly police and regulate the often vast number of ships under their jurisdictional authority.²⁸² Obligations still rest firmly on the shoulders of Flag States but the success or otherwise of the MLC in practice has not been placed solely in their charge. The ILO has drafted a convention which spreads the obligations among various State actors in the international maritime society and the duties among the three social groups of States, employers and workers – creating an inclusive maritime society where all actors work individually and collectively towards the realisation of a socially just system.

By doing so, the ILO has sought to increase the chances of effective enforcement as substandard labour conditions now have to be ignored by two or more States to be allowed to continue unabated. If the ratifying States remain committed to the MLC, then the jurisdictional safety net should ensure that its provisions will be upheld through a system of self-enforcement within the international community and that individual

²⁸⁰ ILO Committee of Experts; *General Survey Convention 147*; International Labour Conference, 77th Session, 1990 para 275

²⁸¹ Christodoulou-Varotsi, Iliana; *Review of MLC*; 2012 Journal of Maritime Law and Commerce p19

²⁸² Baker, Brian; *Gulf Oil Spill*; 34 Houston J. Intl. Law 2011-2012 p698

seafarers can find a forum through which to gain access to justice to remedy any violations which they have suffered.²⁸³

The main premises of the international law of the sea – that every country should have access to the sea and should have jurisdictional control over its own ships – have not been challenged by the creation of the MLC’s jurisdictional safety net. The MLC has not, then, revolutionised the jurisdictional boundaries of maritime law in this regard. Instead, it has created a system of multiple jurisdictional responsibilities, designed to work within the confines of the existing international legal system to engrain labour considerations as one of the very fundamental aspects of maritime law’s safety and health regime.

What the safety net seeks to do is move away from the jurisdictional legal concept based solely on flag terms. “No more favourable treatment” can be seen as a bridge between the notion of Port State jurisdiction and universal jurisdiction concerning international labour standards. When looking at this, it is important to make a distinction between legal and functional universality. Legal universality refers to the legal obligation under international law of all States to respect certain basic standards on the treatment of human beings. Functional universality focuses more on the application of universal principles in operation and practice.²⁸⁴

International law, and by relation the international labour law of the ILO, is not promulgated from a specific territory, but is applied over territory and property primarily through treaty ratification and occasionally customary international law. In line with this, the ILO have utilised their specialised expertise and legal standing in the field of international labour law to create an almost *erga omnes* protection system for seafarers, one which transcends the traditional boundaries of State territories (in this case ships flagged to a particular State) to achieve the idea of functional universality for the provisions of the MLC over all ships. The power of the ILO in this field to create such a system derives from the fact that members of the international community of States have accepted the ILO as the eminent authority on labour matter in the international arena.²⁸⁵

The functional universality of the MLC lends itself to the specific provisions contained in the Seafarers’ Bill of Rights. These provisions have at their core the empowerment and subjectification of the seafarer. This, coupled with the aspirations of achieving “Fourth Pillar” status for the MLC, should make strides towards embedding the idea of seafarers as subjects of the law rather than objects or commercial tools within the very fabric of the

²⁸³ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p649

²⁸⁴ Kjeldsen, Camilla; *Legal and Functional Universality*; in Hastrup, Kirsten (Ed.); *Human Rights on Common Grounds: The Quest for Universality*; 2001 Kluwer Law International p40

²⁸⁵ Van Dijk, Pieter; *The Law of Human Rights in Europé: Instruments and Procedures for a Uniform Implementation*; in Academy of European Law (Ed.); *Collected Courses of the Academy of European Law*; 1997 Kluwer Law International p29-30

maritime regulatory regime, furthering one of the ILO's core principles on social justice: that labour is not a commodity.²⁸⁶ This universalization of the practical scope of the MLC can be justified by the fact that undermining the MLC system carries with it the potential for all seafarers to be harmed, both those who work under the flag of a ratifying State and those who do not, thus acting contrary to the notion of progressivity in the entire maritime society which this thesis is examining.

It is not then the legal scope of the MLC's jurisdictional coverage which has been universalised - as has been stated this still operates within the traditional maritime framework - but the practical applicability of the protections afforded to seafarers.

5.1.2 Forum Shopping for Human Rights

This increase in the jurisdictional coverage of the MLC can be said to represent a swing in the forum shopping criticisms which provided the backdrop for our flag of convenience analysis. While setting out to eliminate what is effectively pre-emptive forum shopping by shipping companies, the MLC has also implemented a system which maximises the opportunities for judicial redress for seafarers who have had their rights violated. This, in turn, essentially promotes a system of human rights forum shopping whereby seafarers can choose which State to hold accountable, or in which jurisdiction to bring claims against the shipping company for whom they worked, depending on the likelihood of gaining an outcome which remedies the violation - or a "just" outcome from the perspective of labour rights.

Yet given the earlier criticisms of forum shopping, should this human rights version be a legitimate and desirable outcome? The earlier discussion identified the fundamental components which made forum shopping undesirable in the legal field to be the taking of unfair advantage of another party and a lack of efficiency.

Dealing first with the issue of taking unfair advantage of parties, the MLC does not create a framework which is designed to exploit or take advantage of shipping companies. Instead, it has created a framework which is designed to reduce the inequalities which have become so prevalent in the international maritime industry through its inability and unwillingness to take measures to counteract the flag of convenience phenomenon. This distinction must be made clear: the MLC does not introduce an unfair system, it seeks to rebalance the current unfair system by introducing jurisdictional measures to remove some of the power from shipping companies and redistribute it between States and seafarers in a more equitable manner. This works towards the goal of preventing these shipping

²⁸⁶ *Declaration Concerning the Aims and Purposes of the ILO* (Declaration of Philadelphia) 1944 Article I(a)

companies circumventing the legal protections in place to undermine the principles of social justice.

In the absence of this latent unfairness, Maloy contends that forum shopping can actually be a good thing, strengthening a legal regime by providing “*more and more adequate recourses*” for victims of legal infringements.²⁸⁷ In addition, the availability of jurisdictional alternatives should be seen as a good thing for the international legal system in seeking to uphold and enforce labour standards.²⁸⁸ It provides additional avenues to work towards the practical realisation of fairness and equality in outcome when the first available forum may be so clearly inadequate or unsatisfactory that it offers no remedy to the victims at all.

At face value, the lack of efficiency argument may have some standing. It is clearly more obvious and potentially efficient to hold the State to account on board whose vessel your rights were infringed or to bring a claim against a shipping company in the legal jurisdiction in which their vessel is flagged.

However, bringing a claim against a shipping company in the jurisdiction of a Port State for violations of labour laws that occurred while the ship was in the port, and thus territory, of said State actually works towards legal efficiency. It is far easier for the courts of a Port State to obtain and examine the relevant evidence than it would be for the Flag State in this instance, actually reducing the time spent on fact finding and ultimately increasing the accuracy of any findings as well.²⁸⁹ Furthermore, claims against recruitment companies are clearly more closely linked to the jurisdiction of the Labour Supplying State than to the Flag State itself. Finally, Flag, Port and Labour Supplying States all have their own obligations under the MLC and it is entirely justifiable for a seafarer to bring a claim against any of these parties where they have breached these obligations.

The scope for human rights forum shopping introduced by the MLC does not purport to open up a global jurisdictional “buffet” for seafarers. Rather it develops a framework whereby seafarers, afforded the proper assistance as necessitated in a rule of law system, can select between jurisdictions which are all materially linked to the facts of the case based on considerations of which one offers the best chance of enforcing the principles of social justice. In essence, it hopes to protect seafarers from any exploitation while offering additional access to remedies should this not be the case, protecting both the fairness and equality of the law and strengthening the ability of seafarers who have had their rights infringed to access the law.²⁹⁰

In allowing this limited form of forum shopping for human rights, the MLC actually promotes social and judicial dialogue on issues of maritime labour

²⁸⁷ Maloy, Richard; *Forum Shopping? What's Wrong With That?*; 24 QLR 2005-2006 p25

²⁸⁸ Petsche, Markus; *What's Wrong*; 45 Intl. Lawyer 2011 p1010

²⁸⁹ Ibid. p1118

²⁹⁰ Conklin, William; *Whither Justice – The Common Problematic of Five Models of Access to Justice*; 19 Windsor YB Access Just. 2001 p297

law rather than allowing them to be pre-emptively dismissed by companies flagging their vessel to a Flag of Convenience State. This dialogue should serve to strengthen the realisation of social justice for seafarers as normative notions of applying and interpreting the rights enshrined by the MLC are explored in a legally binding setting, better establishing their content within national legal systems and the equitable distribution of advantages between the parties in our maritime legal society.²⁹¹ Therefore, far from weakening the human and labour rights regime and the realisation of social justice, the MLC's scope for human rights forum shopping should actually benefit them. It fosters dialogue and redresses the imbalances in the distribution of fairness and equality which had become ingrained in the maritime labour system, while also providing access to justice for seafarers who have had their rights infringed.

5.1.3 Cutting through the safety net: Challenges to the MLC's jurisdictional safeguards

5.1.3.1 The Scope for Port State Exploitation

The importance of Port States to the enforcement of the MLC is evident. However, this importance also puts Port States and Port State Authorities in a powerful position regarding any actions which may undermine the MLC and the jurisdictional safety net.

Michael Grey has written that there may be some concern that the capacity for Port State control may be exploited by corrupt Port State officials who set out to conduct "fishing expeditions" to find reasons to fine the ship or company for their own financial gain.²⁹² However, the creation of the Special Tripartite Committee to monitor the effects of the MLC in practice, coupled with the obligations on States to regularly report to the ILO should bring a certain level of transparency to the system in practice.

A further risk to the realisation of social justice posed by the greater role played by Port States in the enforcement system of the MLC is the potential for the development of "open ports" or "ports of convenience". Vessels that would be subject to inspections or enforcement action under the MLC in certain ports may well simply divert to others that do not threaten comparable responses in light of the economic advantages to be gained from increased port activity.²⁹³ Similarly, it is permissible that two States may seek to form a bilateral trade understanding whereby they ignore the other's MLC violations in order to continue to trade as before.

²⁹¹ Helfer, Laurence; *Forum Shopping for Human Rights*; 148 University of Pennsylvania L.R. 1999 p400

²⁹² Grey, Michael; *The Maritime Labour Convention – Shipping's "Fourth Pillar"*

²⁹³ Klien, Natalie; *Maritime Security*; Oxford University Press 2011, p73-74

Available infrastructure, or the funds to create it, is a relevant factor to be taken into consideration when analysing the likelihood of ports of convenience coming to pass. Ports are increasingly unable to exist in isolation; they must become “*linked and integrated logistical platforms*” with effective access to road, rail and river transport infrastructure if they are to be able to cope with the high levels of goods which ships deliver in a timely and economically efficient manner.²⁹⁴ To create this infrastructure, high levels of capital would be needed and the simple reality is that only a handful of States today would be able to afford to create this infrastructure.²⁹⁵

Indeed, even if States were able to create suitable infrastructure, they are still likely to be defeated by the fact that the world’s major shipping routes and hub ports are firmly established along with institutionalised trade routes which serve to connect the world’s major ports.²⁹⁶ The world’s ports are intrinsically linked to each other and altering these trade patterns may actually increase the voyage and turnaround time for the delivery of goods. Reduced efficiency increases costs for the shipping companies and they may actually lose out competitively by seeking to foster a system of ports of convenience acting in competition to the established order.

The commercial and competition stakes, key motivating factors in the port and shipping industries,²⁹⁷ are still weighted firmly towards the traditional ports and trade routes and thus the reality of a port of convenience system developing to undermine the MLC seems very unlikely at this stage.

The latter of the problems, that of bilateral anti-labour trade agreements, should, hopefully, also be curtailed by the increased monitoring powers of the Special Tripartite Committee. Any such flagrant violations of the principles of international treaty law would be quickly picked up. Following this, the negative publicity generated in the international community and among workers and businesses should exert the kind of social and political pressure which so often dictates the flow of State foreign policy and bring the States in question back into compliance lest they face international trade and economic repercussions from other areas in the international community.

²⁹⁴ Report of the Committee of Experts on the Application of Conventions and Recommendations; *General Survey of the Reports Concerning the Dock Worker Convention (No. 137) and Recommendation (No. 145), 1773*; International Labour Conference, 90th Session 2002, Report III (Part 1B) para 177

²⁹⁵ *Ibid.* para 178

²⁹⁶ International Transport Workers’ Federation; *Port Reform: Fact Sheet 2: Changing Patterns of Global Maritime Trade*; available at:

<http://www.itfglobal.org/education/ports.cfm> (accessed 22/5/13)

²⁹⁷ Report of the Committee of Experts on the Application of Conventions and Recommendations; *General Survey of the Reports Concerning the Dock Worker Convention (No. 137) and Recommendation (No. 145), 1773*; International Labour Conference, 90th Session 2002, Report III (Part 1B) para 178

5.1.3.2 The Challenges Posed by Inspection

The new requirements for inspections necessitate a new body of rules and procedures as well as standardised training to be put in place. While the ILO have been active in developing such universal procedures and standards and disseminating information concerning them,²⁹⁸ there still remains the danger that smaller Flag of Convenience States - such as the Marshall Islands - who have amassed a fleet proportionately huge when compared to their national resources - may be simply unable, through lack of finances or capacity, to effectively inspect and monitor their entire fleet. This leads to the danger that many substandard vessels are liable to slip through the inspection system by obtaining certification without going through the same rigours as others.

To counter this threat and work with smaller States to manage their fleets properly, David Cockroft, General Secretary of the International Transport Workers' Federation, has previously indicated that his organisation may provide the role of an independent body conducting ship inspections and reporting their finding to the international community. This would ensure that all standards are being complied with and seafarers are aware of their rights.²⁹⁹

Another potential solution is for independent bodies such as the International Organisation for Standardisation (hereafter: ISO) to develop a certification system for the maritime industry, although there is, as yet, no evidence that measures have been taken towards this. However, any enthusiasm for this option should perhaps be tempered by the fact that the ISO and ILO have not previously engaged in any such meaningful cooperation towards issues of this type. A further option lies in outsourcing the inspection system to companies, a practice already common among many smaller Flag States and Flag of Convenience States.³⁰⁰ Indeed, this practice is specifically permitted by UNCLOS.³⁰¹

If no action is taken to cover these potential – and for the moment that is all they are – gaps in the inspection system, there remains the risk that no one is then monitoring the monitors. This calls into question the legitimacy of such a practice where companies may be unwilling to be particularly strict or harsh with their inspections out of fear of generating no new business from the States in question.³⁰² In the end, this is an issue where any problems and

²⁹⁸ For ILO guidance on Port State Control Officers see:

http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_101787/lang--en/index.htm. While there has also been a leaflet published detailing guidance for Flag State inspections by the ILO available at: http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_101787/lang--en/index.htm (accessed 22/5/13)

²⁹⁹ <http://www.ipsnews.net/2007/09/qa-shipping-still-at-sea/> (accessed 22/5/13)

³⁰⁰ Froomkin, Dan; *Gulf Oil Spill: Rig Owner's Avoidance of US Jurisdiction Angers House Panel*; Huffington Post (17 June 2010) Available at: http://www.huffingtonpost.com/2010/06/17/gulf-oil-spill-rig-owners_n_616390.html (accessed 22/5/13)

³⁰¹ UNCLOS Article 153

³⁰² Baker, Brian; *Gulf Oil Spill*; 34 Houston J. Intl. Law 2011-2012 p698

additional bars to accessing social justice will more clearly manifest themselves once the MLC comes into force.

James Harrison has suggested that the IMO and ILO should cooperate to develop harmonised inspection procedures which will still ensure an effective system of enforcement while reducing the burden placed on States by the overlapping requirements of convention obligations which derive from the respective organisations.³⁰³ Such measures would also benefit the MLC's aims to become shipping's "Fourth Pillar" as they would unquestionably tie the labour inspection practicalities with the general inspections required by the treaties associated with the IMO.

The reality is that any mixture of these options, if conducted in a transparent manner and adheres to the principles of the MLC, would be acceptable to practically monitor compliance. This is where the flexibility of the MLC becomes a strength as it is less concerned with specific processes and more with the actual outcome and realisation of the principles of social justice. The Special Tripartite Committee is in place to monitor how various inspection regimes develop and the simplified amendment procedure is able to adapt and deal with types of inspection which, once the MLC comes into effect, seem to be undermining efficiency of effectiveness of its principles.

5.1.3.3 Achieving Adequate Levels of Ratification

The obvious danger is that if Flag of Convenience States choose not to ratify the MLC, they could hold an even greater attraction to companies engaged in shipping. This is based on the reasoning that, while the costs to ship owners sailing under the flags of ratifying States will increase because of the new requirements they have to meet, costs for Flag of Convenience ship owners – already significantly lower – will remain static.³⁰⁴

However, this seems unlikely for two main reasons:

Firstly, there is no indication that Flag of Convenience States are refusing to ratify the MLC. Indeed, of the thirty-two States with recognised Flag of Convenience registries,³⁰⁵ seven have already ratified the MLC, including some of the largest in terms of fleet size such as Panama, the Marshall Islands and Liberia³⁰⁶ who actually became the first nation to ratify the MLC in 2006.³⁰⁷

³⁰³ Harrison, James; *Current Legal Developments International Labour Organisation*; The International Journal of Marine and Coastal Law 23 (2008) p130

³⁰⁴ Bauer, Paul; *An Adequate Guarantee?*; p651

³⁰⁵ ITF Seafarers; *Defining FOCs and the problems they pose*; available at: <http://www.itfseafarers.org/defining-focs.cfm> (accessed 22/5/13)

³⁰⁶ ILO; *List of ratifications of MLC*; available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300_INSTRUMENT_ID:312331 List of ratifications (accessed 22/5/13)

³⁰⁷ Bauer, Paul; *An Adequate Guarantee?*; p651

The support of Flag of Convenience States for the MLC is also perhaps an implicit recognition of changing times and the changing face of the maritime industry to become more socially responsible. By leading the way with the implementation and monitoring of the MLC, these States may hope to retain the size of fleet which they currently have and the income which accompanies them.

Secondly, even if Flag of Convenience States refuse to ratify the MLC, the Convention's provisions can still be enforced against them through Port States' utilisation of Article V and the jurisdictional safety net which it creates.

This presents a scenario whereby the high and far reaching human and labour rights protections afforded to seafarers under the MLC will be, in practice, extended to cover even non-ratifying States and shipping companies – including those who have pre-emptively forum shopped for the jurisdiction with the lowest available labour standards. Thus the overlapping jurisdictions of the maritime industry establish a universalization of the rights contained in the MLC, even over seafarers working in non-ratifying States. This is done not by imposing obligations on non-ratifying States, but by creating a system whereby these non-ratifying States must accept the standards and processes which this Port State is bound to under international law or decide to cease operating within the territory and ports of these ratifying States.

5.2 Corporate Social Responsibility in the MLC

5.2.1 The International Legal Regime on CSR

Corporate Social Responsibility (hereafter: CSR) is a concept whereby companies integrate social and human rights concerns into their business operations on a voluntary basis.³⁰⁸ It has been defined by the ILO as “*a way in which enterprises give consideration to the impact of their operations of society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors.*”³⁰⁹ Meanwhile, the European Commission has described it as “*a concept whereby companies integrate social and environmental concerns into their business operations and in their interactions with stakeholders on a voluntary basis.*”³¹⁰

³⁰⁸ European Commission; *Implementing the Partnership for Growth and Jobs: Making Europe a pole of excellence on CSR*; COM (2006) 0136

³⁰⁹ ILO Governing Body; *In Focus Initiative on Corporate Social Responsibility*; GB./295/MNE/2/1 295th Session, Geneva, March 2006 p1

³¹⁰ European Commission; *Promoting a European Framework for Corporate Social Responsibility*; Green Paper, Brussels 2001

CSR can thus be viewed as a means of evaluating and controlling the relationship between businesses and society at large: distributing benefits fairly and curtailing the power imbalances that threaten to allow companies to violate the human and labour rights of their workers almost at will.³¹¹

The essence of CSR, then, lies in the social obligations which a corporation owes the society in which it operates.³¹² By this definition, the development of CSR is intrinsically linked to the realisation of social justice as it seeks to monitor, regulate or influence the social interactions among the different actors within our maritime society.

The three main sources of CSR initiatives of an international nature are: the UN Global Compact, the Organisation for Economic Cooperation and Development (hereafter: OECD) Guidelines for Multinational Enterprises (hereafter: OECD Guidelines) and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (hereafter: Tripartite Declaration). These are supplemented by the ISO 26,000 and the principles developed by John Ruggie in his capacity as United Nations Special Representative for Business and Human Rights.

The UN Global Compact is not a regulatory instrument, but rather a voluntary initiative that relies on public accountability, transparency and disclosure to complement regulation.³¹³ Its main aim is to increase global business participation in sustainable and social development through a framework which consists of ten principles covering the areas of: human rights, labour rights, environmental responsibility and anti-corruption.³¹⁴ The Global Compact is directed to businesses and requires the incorporation of the ten principles as integral parts of the business' decision making and business strategies.³¹⁵

The ILO's primary CSR instrument is the Tripartite Declaration, originally adopted in 1977 but revised in 2000 and 2006 to take into account the real world developments to which its policies apply.³¹⁶ The goal of the Tripartite Declaration is to highlight ways in which multinational corporations, such as shipping companies,³¹⁷ can contribute to positive labour practices, while simultaneously emphasising the role of the State in enacting legislation to

³¹¹ Jenkins, Rhys; *Globalization, Corporate Social Responsibility and poverty*; International Affairs 81, 3 (2005) p526

³¹² James-Eluyode, Jide; *The Notion of Collective Human Rights and Corporate Social Responsibility: Issues and Trends in International Law*; 24(5) Intl. Company and Commercial Law. Rev. 2013 p211

³¹³ UN Global Compact: *Corporate Sustainability in the World Economy* p2 available at: http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf (accessed 22/5/13)

³¹⁴ <http://www.unglobalcompact.org/AboutTheGC/index.html> (accessed 22/5/13)

³¹⁵ UN Global Compact: *Corporate Sustainability in the World Economy* p4

³¹⁶ ILO; *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*; Adopted 1st January 2006 Preamble

³¹⁷ Although note that CSR, by definition, applies to *all* businesses and that many shipping companies themselves may not actually be multinational either.

guarantee fundamental human and labour rights to workers within its jurisdiction.³¹⁸

The Tripartite Declaration encourages governments, labour representatives and multinational enterprises to give full observance to domestic labour laws, the labour standards created by the ILO and rights protected under human rights regimes.³¹⁹ It goes on to further require multinational corporations to treat foreign and domestic work forces in the same manner and, importantly, that they will employ no less favourable labour policies abroad than they would in their home country.³²⁰ This latter point can be seen to be mirrored in the “no more favourable treatment” principle of the MLC, creating ties between these two documents and implicitly linking the MLC to the international network of CSR instruments.

The OECD’s membership consists purely of States³²¹ and, unlike the ILO, its participation and standing does not go beyond this to include employers or workers. Thus, the OECD Guidelines are only intended to require the ratifying States to promote the Guidelines among companies from their State.³²² The OECD Guidelines³²³ are intended to create a system to ensure that multinational corporations are held to, at a bare minimum, the legal standards of the Host State in which they operate.³²⁴ The Guidelines add to this the importance of ensuring that multinationals respect human and labour rights protections.³²⁵

The OECD Guidelines also advise that, while multinational corporations should follow local labour laws in the States in which they operate, they should not allow said State to provide legal loopholes which enable them to circumvent the minimum labour standards.³²⁶ Later, they also reinforce the importance of corporate compliance with human right protections, including labour rights.³²⁷ Yet the flag of convenience system clearly stands in stark contrast to these requirements. Flag of Convenience States actively promote the labour gaps and loopholes in their legislation while corporations are

³¹⁸ ILO; *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* paras 2 & 5

³¹⁹ *Ibid.* paras 8, 9, 10 & 12

³²⁰ *Ibid.* para 33

³²¹ <http://www.oecd.org/about/membersandpartners/>

³²² Harrington, Alexandra; *Corporate Social Responsibility, Globalization, the Multinational Corporation, and Labor: An Unlikely Alliance* (hereafter: *An Unlikely Alliance*); 75 *Alb. Law Review* 2012 p500

³²³ This is the primary document of the OECD concerning CSR but they have also produced others, namely: *OECD Principles of Corporate Governance*; *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* and *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.

³²⁴ *OECD Guidelines for Multinational Enterprises* 2011 Edition p13; available at: <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> (accessed 22/5/13)

³²⁵ *Ibid.* p31

³²⁶ *Ibid.* p19

³²⁷ *OECD Guidelines for Multinational Enterprises* 2011 Edition p31

more than happy to dismiss the welfare of their workers to increase profitability.

The International Organisation for Standardization is a worldwide federation of national standards bodies designed to ensure that products and services are safe, secure and reliable.³²⁸ The ISO 26000 provides guidance on how businesses should operate in a socially responsible manner.³²⁹ However, since it is only guidance rather than requirements, it cannot be certified to unlike some other well-known ISO standards,³³⁰ meaning that businesses do not gain official recognition or seal of approval for compliance with the provisions.

The final part of the international CSR system which we shall look at in this overview is the Guiding Principles on Business and Human Rights developed by John Ruggie. Ruggie proposed a policy framework to the UN Human Rights Council designed to work towards a more socially just interaction between businesses and human rights. It rests on three pillars: “*the state duty to protect against human rights abuses by third parties including business; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial.*”³³¹

This framework of Respect, Protect and Remedy has actually persuaded both the ISO and the OECD to include human rights chapters in their respective CSR documents. It can thus be seen, at least partly, to be bridging the gaps between the various instruments at the international level and establishing a semi-unified body of legal theory and soft law on the topic.³³²

5.2.2 Effectiveness of CSR Policies

The prevailing norms of CSR are organised in a largely voluntary fashion, held together by virtually no coercive authority. Consequently, their terms are not binding on States or companies, nor can workers bring a claim before a court based on a breach of CSR obligations.³³³ The above exception to this criticism is the OECD Guidelines which are, in fact, binding on the OECD Member States – but not on companies. The problem with the OECD

³²⁸ <http://www.iso.org/iso/home.htm> (accessed 22/5/13)

³²⁹ ISO 26000 (2010) Available at: <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en> (accessed 22/5/13)

³³⁰ See, for example: ISO 9000 on Quality Management and ISO 14,000 on Environmental Management.

³³¹ Ruggie, John; *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework”*; 21 March 2011 A/HRC/17/31 p4

³³² Ruggie, John; *The Construction of the UN “protect, respect and remedy” framework for Business and Human Rights: The True Confessions of a Principled Pragmatist*; 2011 European Human Rights Law Review p133

³³³ Bronstein, Arturo; *International and Comparative Labour Law*; ILO 2009, p123

Guidelines lies rather in the fact that the Member States are limited in number and generally represent the most economically advanced and developed States with generally higher level of labour protections anyway.

This vacuum of legally binding international instruments on CSR has led to the idea that CSR and the law are somehow distinct.³³⁴ The lack of hard law on the topic which has led to this assumption has been partly attributed to the lack of political will to implement such legal policies in addition to the constantly evolving nature of the global economy. This latter point has arguably created fears that any such hard law instruments will very quickly become outdated, ineffectual and actually act to the detriment of effective CSR in practice.³³⁵

There is also the danger that companies take the minimum standards laid down, such as those in the OECD Guidelines requiring conditions of work to be “*not less favourable than comparable employers in the host State*”³³⁶ as being the maximum. Thus companies can fail to promote rights and development as far as they could be doing. Similarly, some companies have sought to benefit from the positive image that comes from identification with, for example, the UN Global Compact, without also taking measures to improve their human rights record in the workplace.³³⁷ This so-called “blue-washing”³³⁸ exploits the concept of CSR for business without achieving any human rights gains. The fact that the Global Compact lacks any adequate monitoring mechanism only adds to the risk of exploitation.

But what CSR has done effectively is act in the absence of law, going beyond international and national law to make companies aware of, and accountable for, human rights in the workplace.

One prevalent form of CSR in this regard is company codes of conduct whereby a multi-national enterprise sets out its responsibilities concerning the countries in which it operates.³³⁹ This increases the likelihood that the values and standards set are specific and tailored to their industry and thus more effective in protecting human rights in the workplace.³⁴⁰

³³⁴ Buhmann, Karin; *Integrating Human Rights in Emerging Regulation on Corporate Social Responsibility: The EU Case*; 7(2) Intl. J of Law in Context 2011 p141

³³⁵ Ruggie, John; *Business and human rights – Treaty road not travelled*, EC Newsdesk (*Hereafter: Business and Human Rights*), 6 May 2008; available at: www.globalpolicy.org/component/content/article/225-general/32270-business-and-human-rights-treaty-road-not-travelled.html (accessed 22/5/13)

³³⁶ *OECD Guidelines for Multinational Enterprises*; 2011 Update; Part V para 4(a)

³³⁷ International Confederation of Free Trade Unions: Eighteenth World Conference Final Resolution; 2004 p2

³³⁸ Pedamon, Catherine; *Corporate Social Responsibility: a new approach to promoting integrity and responsibility* (hereafter: *CSR: A New Approach*); 2010 Company Lawyer p178

³³⁹ Bronstein, Arturo; *International and Comparative Labour Law*; ILO 2009 p 114

³⁴⁰ Pedamon, Catherine; *CSR: A New Approach*; 2010 Company Lawyer p173

Self-regulation can be criticised as failing to guarantee effective and objective independent monitoring.³⁴¹ Yet it can be seen as a social good where States lack the capacity or will to properly monitor CSR: filling a gap and introducing some degree of accountability whereby companies are held to account by each other and the court of public opinion and taking the pressure off of governments in this area.³⁴² However, the International Trade Union Confederation (hereafter: ITUC) criticised this system of self-regulation by stating that businesses have no political legitimacy to define their own responsibilities to society.³⁴³

The concept of CSR has also mobilised social actors and human rights lawyers to interpret national legislation in line with human rights principles.³⁴⁴ This has led to cases against multinational enterprises for their human rights violations in the workplace in the USA³⁴⁵ and UK³⁴⁶ under the Alien Tort Claims Act (hereafter: ATCA)³⁴⁷ and common law of negligence respectively. It has also led to the development of CSR focused national legislation such as in Section 1502 of the US Dodd Frank Act.³⁴⁸ However, the effectiveness of ATCA has recently been significantly curtailed by the U.S. Supreme Court in the case of *Kiobel v Royal Dutch Petroleum Co.*³⁴⁹ with the court holding that there exists a presumption against its extraterritorial application which had become a central feature of many of the cases.³⁵⁰

CSR has sought to provide a flexible mechanism to raise awareness of human rights in the workplace, mobilise and bring together the relevant actors for their promotion, has sought solutions to problems and presented alternative methods to prevent, monitor and remedy them. However, it is

³⁴¹ Pedamon, Catherine; *CSR: A New Approach*; 2010 Company Lawyer p178

³⁴² Ruggie, John; *Business and Human Rights*, 6 May 2008

³⁴³ International Confederation of Free Trade Unions; *Final Resolution: The Social Responsibilities of Business in a Global Economy*; 18th World Congress 18GA/E/6.7 5-10 Dec. 2004 p3

³⁴⁴ Bronstein, Arturo; *International and Comparative Labour Law*; ILO 2009, p123

³⁴⁵ See, for example, *Doe v Unocal Corporation*; 395F. 3d 932 C.A.9 (Cal.) (2002).

³⁴⁶ See: *Lubbe v Cape Plc*, 4 All E.R. 268; 2000; *Sithole v Thor Chemical Holdings Ltd.*, 1999 T.L.R. 110

³⁴⁷ Although note that the territorial scope and effectiveness of ATCA has been severely limited by the recent U.S. Supreme Court decision in *Kiobel et al v Royal Dutch Petroleum Co. et al*; 621 F.3d 111 (2013). Here it was held that ATCA does not apply extraterritorially and thus requires a considerable factual link to the U.S.A. for the case to be held in a U.S. court (*Kiobel* p3-16). However, the Supreme Court did recognise the continued relevance of their previous ruling in *Sosa v Alvarez-Machain* (*Kiobel* p3-4) which allowed causes of action based on the violation of international law norms which are “specific, universal and obligatory.” (*Sosa v Alvarez-Machain*; 542 U.S. 692 (2004), 331 F.3d 604 at p735-738) Thus the *Kiobel* case limits the territorial scope of ATCA, but not its continued relevance to the transition of CSR into enforceable principles of hard law where appropriate jurisdictional rules are respected.

³⁴⁸ See: Dodd Frank Wallstreet Reform and Consumer Protection Act 2010 Public Law 111-203 s1502 which requires companies to determine whether their products contain conflict minerals and report these findings to the US Securities and Exchange Commission on an annual basis.

³⁴⁹ *Kiobel et al v Royal Dutch Petroleum Co. et al*; 621 F.3d 111 (2013)

³⁵⁰ *Ibid.* p3-14

clear that the concept is weakened by the lack of effective and objective monitoring mechanisms which leaves scope for companies to utilise the positive images of CSR for their own gains.

5.2.3 The MLC: CSR through the back door?

The above illustrates that there are many initiatives that deal with business and human rights. Yet none of these has reached a level to move and dictate to the markets based on human or labour rights terms; they exist as separate fragments that struggle to add up to a coherent system. Ruggie suggests that a major reason for this has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge.³⁵¹ It is my contention to argue that the MLC provides such a focal point, at least in terms of maritime labour rights within a CSR system.

It has done so by utilising the tripartite nature of the ILO to provide the various stakeholders involved in the maritime industry with the opportunity to give input on policy development, bolstering social protections and balances at a time of extensive structural change.³⁵² This system can also be credited with inserting a concern for equality between the social actors in the industry into the decision making process, in turn helping to reconcile economic and social goals.³⁵³ The end result is a binding international convention integrating enforceability and political legitimacy deriving from the tripartite negotiation process of the ILO, with a neoliberal faith in the maritime sector's capacity to self-regulate working in conjunction with the rule of law.

The practical impacts of CSR come into our discussions of the MLC through the Article V provisions for certification and no more favourable treatment. Under this provision, all visiting ships must be treated equally by Port States, whatever flag they fly and whether or not their Flag State has ratified the MLC. The principle of fairness which underpins the entire MLC system thus extends beyond fairness and equality for seafarers alone, imparting a fair system for employers as well.

The MLC's inspection regime combines hard law directed at States with a practical motivation for corporations to operate in a manner which respects human and labour rights. Regardless of the altruistic motives behind CSR, it is the scope to turn a profit and keep shareholders satisfied which primarily motivates most companies today. The MLC has implicitly recognised this, devising a system which works towards increasing competition on a global

³⁵¹ Ruggie, John; *The Construction of the UN "protect, respect and remedy" framework for Business and Human Rights: The True Confessions of a Principled Pragmatist*; 2011 European Human Rights Law Review p129

³⁵² Fraile, Lydia & Baccaro, Lucio; *Blunting Neoliberalism: Tripartism and Economic Reforms in the Developing World*; ILO Publications 2010 p7

³⁵³ *Ibid.* p3

scale for those shipping companies who align themselves to national regimes which best promote and respect the labour rights of seafarers.

The previous absence of uniformity at the international level concerning maritime labour standards and legitimate presence of flags of convenience created the risk, and often reality, of unfair competition.³⁵⁴ The discontent created by this unfair competition can arguably be seen to have manifested itself in the Shipowners Group being a driving force behind the development of the MLC from the outset.

The MLC seeks to flip the flag of convenience system on its head by actually placing Flag of Convenience States and shipping companies that utilise them at a comparative disadvantage to those that do not. This is because vessels registered to States which have not ratified the MLC will be unable to produce the certification required when entering Port States which have ratified the MLC and would therefore be subject to lengthier inspections and delays, increasing the delivery time of their cargo.³⁵⁵ This will, in turn, provide vessels that are able to produce the required certification with the competitive advantage of selling their service at reduced turnaround and delivery times, giving them a competitive advantage over non-compliant vessels and potentially shifting the market share towards ships with adequate and acceptable labour standards for their workers.

This notion follows the rational and economic arguments for CSR.

The rational argument states that corporations should seek to maximise their performance by minimising restrictions on operations.³⁵⁶ Implementing a rational perspective to CSR is a tacit acknowledgement by corporations that it is in their best interests to engage with regulators and work with, rather than oppose, the development of legislation, policies or international norms which will come about, in one way or another, with or without their involvement.³⁵⁷

The certification scheme introduced by the MLC works towards this rationalist theory of CSR as it will clearly impose restrictions on the operations of ships that cannot produce such a certificate, including those registered to a Flag of Convenience State. It is now in the interest of shipping companies to align themselves with a Flag State who has ratified the MLC and respects labour rights. Doing so will allow these companies to simply produce this *prima facie* piece of evidence of compliance rather than be subjected to the operational restrictions entailed in Port State inspections

³⁵⁴ Christodoulou-Varotsi, Iliana; *Review of MLC*; 2012 Journal of Maritime Law and Commerce p2-3

³⁵⁵ Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John's, Newfoundland

³⁵⁶ Werther, William & Chandler, David; *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (hereafter: *Strategic CSR*); 2011 SAGE Publications p17

³⁵⁷ *Ibid.* p18

or, potentially, having the vessel itself detained under the principle of Port State control.

Furthermore, the active involvement of the shipping companies from the outset of the MLC project reveals an understanding that the development of a system which better protects the labour rights of seafarers was actually going to act to their benefit. Shipowners perhaps sensed a turning of the tide against giving companies engaged in transnational business free reign to manipulate labour laws to their own advantages, especially in light of developing national legislation to counter this and the case law being brought in the UK and USA. It was actually in the best interests of the shipowners to contribute to the development of a labour protection system which would directly affect them when it came into practice. Through their involvement, shipowners could and did voice their own concerns and desires for the development of the MLC which can be seen to have resulted in a regulatory system, at least partly, developed on an international level for shipping companies, by shipping companies.

The notion of economic CSR is perhaps more obvious to understand at face value than the rational principle. This justification for CSR arises from the premise that incorporating CSR into a corporation's operations offers a positive differential from their competitors or competitive market advantages over them on which future commercial successes can be built.³⁵⁸ Economic efficiency thrives on legal certainty and all stakeholders in the maritime industry have an interest in seeing ships enter and leave ports without any unnecessary delays or without undergoing burdensome inspections.³⁵⁹

The obvious benefit for shipowners of this CSR system is that they will no longer be undercut by competitors exploiting loopholes in the maritime legal system, fostering fairer competition and the potential for increased profits. Similarly, it is also in the self-interest of ratifying States to ensure that none of its shipping rivals are gaining an advantage by ignoring the MLC's mandates and continuing to offer shipping companies cheap ways to exploit and deny labour rights.³⁶⁰ Indeed, this process is taking place in times when economic competitiveness is becoming increasingly highly valued as a criterion with which legal rules should work and conform and the MLC is thus in line with international legal trends in seeking to incorporate competition principles within a labour rights focused CSR regime.³⁶¹

Those companies which continue to abuse or neglect their role in protecting labour standards for their workers will, it is hoped,³⁶² suffer economic repercussions and be required to embrace a new labour-centred perspective

³⁵⁸ Ibid. p18

³⁵⁹ Blanck, John; *Reflections*; 31 Tul. Mar. L.J. 2007 p48

³⁶⁰ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p650

³⁶¹ Herdrick, Frank; *Foundations*; European Labour Law Journal, Volume 3 (2012) p117

³⁶² Grey, Michael; *The Maritime Labour Convention – Shipping's "Fourth Pillar"*

on the running of the shipping industry to continue to expand and operate. The MLC is thus using market powers to compel labour compliance and enforcement at a corporate level as well as international human rights one.³⁶³

Thanks to the functional universality of the MLC, the globalised nature of the shipping industry can actually serve as a source of improved labour rights for seafarers as shipping companies are required to enter the ports of ratifying States to conduct effective business. In this instance then, it can be said that globalisation, despite the problems it has presented to the rights of seafarers, is acting towards the benefit of social justice.

Therefore, through utilising competition as the driving force behind change, the ILO may have inadvertently succeeded in incorporating principles of CSR into a legally binding international treaty, opening the door to opportunities to hold shipping companies to account for their labour rights violations through the jurisdictional safety net and inspection systems.

The MLC can be seen to introduce strategic CSR with the promotion and protection of labour rights as its focal point. Mutually destructive competition is set to be reduced as the competitive edge now swings to those shipping companies operating higher labour standards. Indeed, distortions in the power balance between the social actors in the maritime industry are also set to be put right by introducing this subtle, legally backed system of CSR as shipping companies can no longer exert pressure on States or workers to accept the abuse or denial of labour standards in practice while maintaining leading positions in the market. This brings a more equitable balance between the notions of labour rights and profitability as they become increasingly related to one another through the certification and inspection regime.

5.3 Don't Underestimate the Power of Consolidation

5.3.1 Benefits of Consolidation

Rather than view the consolidation of the various maritime labour conventions into a single, overarching treaty as a stagnation of standard setting development, it is possible to consider this innovation as actually invigorating the development of maritime labour law and the quest for social justice in this industry.³⁶⁴

³⁶³ Herdrick, Frank; *Foundations*; European Labour Law Journal, Volume 3 (2012) p118

³⁶⁴ Helfer, Laurence; *The Future of the International Labour Organisation*; 101 American Soc'y Intl. Law Proc. 2007 p389

This integrated approach to international labour standards has significantly trimmed the ILO's body of up to date conventions on maritime labour and has served to focus global attention on a single set of standards, rather than spreading it across the multitude of material as previously.³⁶⁵ It brings together many of the previous efforts at standard setting through a consistency in the use of terms and language³⁶⁶ to make all rights and obligations more easily understandable and relatable to each other, creating an interconnected legal system beyond that which previously existed. The simplified and interconnected system should make promotion of labour standards among seafarers easier as they will rely mainly on a single document rather than a plethora of conventions. This, in turn, should breed a sense of ownership of the MLC among seafarers: they know where to find their rights and what the enforcement procedures are for these rights, thus enabling them to focus their attentions on the raising of working standards. The sense of ownership is an essential element in the realisation of social justice as the elements of society to whom rights are extended need to be able to relate to and understand these rights if they are to seek to have them enforced in practice.

The various rights and protections brought together under the MLC also make maritime labour law harder to dissociate from the IMO's general body of treaties on safety and work at sea. Only through the consolidation of the various ILO conventions on maritime labour could a document or body of labour law be created which could fulfil the goal of standing alongside SOLAS, MARPOL and STCW to be recognised as the "Fourth Pillar" of the international maritime system. Smaller, separate conventions would have proven too complicated to be clearly worked into the system of another international organisation and would not have been as clearly understood as being the central and fundamental corpus of rights and obligations governing maritime labour. Conversely, a simplified, consolidated MLC can stand alone in international law as the fundamental and essential treaty for the labour law regime within the maritime system and has a much greater chance of gaining recognition, understanding and respect for its principles within this regime as it is far more authoritative than a spattering of smaller, inter-connected conventions would have been.

Consolidation to a single convention should also encourage ratification as States are now more readily able to locate their obligations with regard to seafarers and labour rights in the maritime industry. Indeed, during the MLC's negotiations, the Seafarers Group supported the idea of consolidation precisely because it offered the opportunity to obtain better ratification rates than currently existed for many of the maritime labour conventions.³⁶⁷

³⁶⁵ Trebilcock, Anne; *Putting the Record Straight About International Labour Standard Setting*; 31 Comp. Lab. Law & Policy Journal 2010 p565

³⁶⁶ Christodoulou-Varotsi, Iliana; *Limitations and Perspectives*; 2012 Journal of Maritime Law and Commerce p4

³⁶⁷ ILO Joint Maritime Commission (29th Session): Final Report; 2001 Geneva; JMC/29/2001/14 p28

Consolidation seeks textual determinacy for the body of international maritime labour standards. That is, to convey a clear message and adopt a degree of transparency which allows rights holders and duty bearers to see through the language to the fundamental meaning and content of the provisions, knowing what is expected of them and what they can expect from the MLC.³⁶⁸ This is beneficial to the realisation of social justice since rules which are readily ascertainable and clear in meaning have a better chance to regulate the conduct of our social actors than those that do not.

5.3.2 Consolidation with an Eye on the Future

The design of the MLC itself and the scope to adapt and reform become significant factors towards the realisation of social justice for seafarers when we consider the fact that the MLC includes specialised provisions designed to facilitate modification of the treaty and, with it, the general body of maritime labour law as a whole.³⁶⁹

Despite the restrictions on the simplified amendment procedure inserted into the MLC by Article XV, it still represents a significant improvement over previous ILO Conventions, which had been heavily criticised for their “*cumbersome revision procedures*” which “*were incapable of enabling the rapid adaption of standards to the special needs of the industry*”.³⁷⁰

Consolidation, coupled with this simplified amendment procedure, allows almost the entire body of maritime labour standards to come under constant consideration for reform to keep in touch with the realities of the shipping industry, unlike previously where any reform or amendment procedure dealt with a separate and distinct part of the standard system. This will speed up the process of any reforms while simultaneously universalising them across the maritime standard regime in practice thanks to the jurisdictional safety net system and the fact that States no longer have to negotiate, adopt and ratify a new convention every time a change is enacted. This appears set to keep the maritime labour laws of the ILO far more in touch with the changing nature of business than other areas of the labour law regime.³⁷¹

In order to sustain social justice, labour law itself needs to become more of a living and fluid matter. Doing so will empower societies to balance views

³⁶⁸ Frank, Thomas; *Legitimacy in the International System*; in Koskenniemi, Martti (Ed.); *International Law*; 1992 Dartmouth Publishing Company Limited p165

³⁶⁹ Harrison, James; *Current Legal Developments International Labour Organisation*; The International Journal of Marine and Coastal Law 23 (2008) p127

³⁷⁰ High Level Tripartite Working Group on maritime Labour Standards, Final Report at para 4. Available at: http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_153447/lang--en/index.htm (accessed 22/5/13)

³⁷¹ Cooney, Sean; Graham, Peter & Mitchell, Richard; *Legal Origins, Labour Law and the Regulation of Employment Relations*; found in Barry, Michael & Wilkinson, Adrian; *Research Handbook of Comparative Employment Relations*; 2011 Edward Elgar Publishing Ltd. p80

and strategies on the employment relationships in different sectors and adapt to changes in the employment market to ensure a just and equitable outcome for both employers and, importantly, workers.³⁷² The innovative reform procedures coupled with the consolidation of the rights of seafarers into a single, understandable document should make strides towards realising this fluidity in the field of maritime labour law and may even represent a viable model for future industry specific ILO conventions if it proves effective in practice.

The MLC also makes a “careful yet generous use of flexibility”.³⁷³ This is evidenced through the possibility to utilise the principle of standard equivalence to give practical effect to the mandatory standards contained in Part A of the Code.³⁷⁴ This flexible approach to practical implementation should also facilitate more ratifications as States - who may previously have been concerned about inadvertently violating their obligations deriving from the plethora of previous conventions – feel more secure in their understanding of the duties and obligations imposed on them and thus more confident in their ability to fulfil these obligations.

Much of the success and progress towards social justice will thus depend on how “flexibility” is approached in practice. It can be used as a means to try to avoid directly tackling problems within a State’s maritime labour law system or as a means for ratifying the MLC without the expense of overhauling a national legal system and thus promote more ratifications.³⁷⁵ However, this lack of certainty about the substantive content of obligations may also act to the detriment of social justice as the core rights needed to realise human dignity and liberty could become indeterminate and applied in different ways to varying effects by the international community of States. The success of the MLC, if measured by the universal application of its standards, may then depend on the effectiveness or perceived effectiveness in two areas. Firstly, that of the Port State inspection system and secondly, the general supervision procedures of the ILO to develop and enforce universal base line standards and elaborate on the minimum content of the rights to establish at least some degree of legal certainty.³⁷⁶

The increased incentives to ratify the consolidated convention should also serve to strengthen the MLC’s jurisdictional safety net: the more States that ratify the MLC, the larger the safety net becomes and the harder it is for unscrupulous shipping companies or Flag of Convenience States to operate as before without being severely hindered.

But the comprehensive nature of the MLC can also be argued to have provided some obstacles to ratification as well. The sheer volume of rights

³⁷² Herdrick, Frank; *Foundations*; European Labour Law Journal, Volume 3 (2012) p129

³⁷³ Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John’s, Newfoundland

³⁷⁴ *Maritime Labour Convention 2006* Article VI(3)

³⁷⁵ Grey, Michael; *The Maritime Labour Convention – Shipping’s “Fourth Pillar”*

³⁷⁶ ILC; Report 1(1A) Adoption of an Instrument to Consolidate Maritime Labour Standards; 94th (Maritime) Session 2006 p7

and standards brought under the fold of the MLC and obligations generated for ratifying States may prove one such deterrent with the possibility that a State may have no existing laws in place to cover aspects of the MLC and a lengthy law making process to address these concerns may, at least initially, deter ratification.³⁷⁷ The substantial equivalence provision of the MLC goes a long way to alleviating this fear but can be seen to only be effective in relation to States who already have a generally up to date and adequate system of maritime labour standards in place. It provides no assistance to smaller or financially restricted States who may lack the capacity to properly and quickly enact new laws. It thus falls on the ILO and other social actors to continually promote ratification and to provide the practical help needed to adapt national legal and enforcement systems to attempt to realise, as fully as possible, the various benefits that the MLC could bring to the shipping industry, such as: generating fair competition both between companies and States and enforcing the human and labour rights of seafarers in a universal and practical manner.

5.3.3 A Missed Opportunity for Greater Strides Towards Social Justice?

Simply because of all the hard work, extensive negotiations and the cost entailed to create the MLC, it is unlikely that further radical reforms to the maritime labour system will be welcomed at the negotiating table before the MLC has had a chance to make its mark in practice.³⁷⁸ The level of compromise and the work of all parties involved to reach consensus on the MLC is amicable, especially when we consider the above advances towards a more tangible incarnation of social justice for seafarers. However, it is somewhat lamentable that certain aspects of the nature of seafarers' work, which can have a huge bearing on the realisation and access to social justice in their daily lives, have not been satisfactorily addressed by the MLC.

5.3.3.1 The Right to Strike

The right to strike is an important weapon in the armoury of organised labour in any democratic society. It can be utilised to enhance justice in that society and to protect the legitimate aims and interests of the workers.³⁷⁹ While the MLC sets forth what essentially amounts to a Seafarers' Bill of Rights, it does not address the ability of workers to uphold these rights through lawful strikes.³⁸⁰ The narrow perception of the right to strike is that it is an economic tool only,³⁸¹ but from a labour rights

³⁷⁷ Politakis, George; *Life into the MLC*, Speech Sept. 2012, St John's, Newfoundland

³⁷⁸ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p658

³⁷⁹ Okene, O.V.C.; *The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law*; 5 Afr. J. Intl. & Comp. Law 2007 p59

³⁸⁰ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p655

³⁸¹ Collins, Hugh; Ewing, K.D. & McColgan, Aileen; *Labour Law Texts and Materials*; Hart Publishing 2nd Ed. 2005 p867

perspective it is also an essential element in a system of free collective bargaining,³⁸² albeit one of last resort.³⁸³

Accordingly, it constitutes an invaluable tool in redressing the imbalance in the employment relationship between shipowners and seafarers by providing workers with a collective bargaining tool to exert economic pressure on their employers to accede to the workers' demands. Through redressing this balance of power, the right to strike adds to the equality and fairness in the labour societal structure, sharing privileges and advantages in a manner which intrinsically links it to a Rawlsian theory of social justice and its subsequent realisation in practice.³⁸⁴

Yet the right to strike is not recognised in either the ILO Constitution or in any other subsequent ILO Convention.³⁸⁵ Nevertheless, all of the relevant ILO supervisory bodies have previously considered that the right to strike is a necessary corollary of the right to organise and bargain collectively.³⁸⁶ Indeed, the Committee on Freedom of Association has gone on to stipulate that the right to strike is one of the essential ways in which workers in any industry can promote and defend their economic interests.³⁸⁷

In addition, according to the Committee on Freedom of Association, the right to strike is not only concerned with achieving better working conditions, but also extends to seeking solutions for social policy questions and voicing discontent at social matters which affect workers and their organisations.³⁸⁸ This further serves to link the notion of the right to strike with that of social justice in the context of the ILO.

Furthermore, despite the contention that the right to strike has often received inferior treatment in the international human rights arena,³⁸⁹ it has actually been expressly recognised in various international and regional human rights instruments:

Article 8(d) of the International Covenant on Economic, Social and Cultural Rights recognises the "right to strike, provided that it is exercised in

³⁸² Okene, O.V.C.; *The Status of the Right to Strike in Nigeria: A Perspective from International and Comparative Law*; 5 *Afr. J. Intl. & Comp. Law* 2007 p56

³⁸³ Veldman, Albertine; *The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR*; 9 *Utrecht L. Rev.* 2013 p115

³⁸⁴ Croucher, Richard; Kelly, Mark & Miles, Lilian; *A Rawlsian Basis for Core Labour Standards*; 33 *Comp. Labour Law & Policy Journal* 2011-2012 p299-300

³⁸⁵ Swepston, Lee; *Crisis in the ILO Supervisory System: Dispute over the Right to Strike*; 29 *Intl. J. of Comparative Labour Law* 2013 p200

³⁸⁶ *Ibid.* p203

³⁸⁷ ILO Committee on Freedom of Association; *Digest of Decisions and Principles*; ILO 5th Ed. 2006 para 522

³⁸⁸ ILO Committee on Freedom of Association; *Digest of Decisions and Principles*; ILO 5th Ed. 2006 paras 526 and 530

³⁸⁹ Novitz, Tonia; *International and European Protection of the Right to Strike*; 2003 Oxford University Press p32

conformity with the laws of the particular country.”³⁹⁰ The right to strike is also included in the European Social Charter Article 6(4), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Article 8(1)(b) and Article 27 of the Inter-American Charter of Social Guarantees.

In addition to this international framework, recognition of the existence of workers’ right to strike has now also been incorporated into the human rights catalogue of the European Convention of Human Rights (hereafter: ECHR) through the cases of *Demir*³⁹¹ and *Enerji*..³⁹²

The Grand Chamber in *Demir* recognized for the first time that the right to bargain collectively had become one of the essential elements of Article 11(1).³⁹³ Given that the ILO’s supervisory bodies have repeatedly asserted that the right to strike was a necessary part of this right, *Demir* served to open up the idea that the ECHR included the right to strike.

Building on this, in *Enerji* the Third Section of the Court relied on ILO Convention No.87 and its interpretation by the ILO supervisory bodies to note that the right to strike is an intrinsic corollary of workers’ freedom of association.³⁹⁴ The Court also utilized the European Social Charter to conclude that the right to collective action was protected by Article 11 ECHR. The Court did note that the right to strike was not absolute and could be restricted where necessary in a democratic society or corresponding to a pressing social need but that the category of persons to whom this restriction extends should be construed narrowly to specific groups such as public service workers.³⁹⁵

What is clear from this, then, is that the right to strike has been repeatedly recognised or read into various international human rights instruments – which have been ratified by virtually all countries - to the extent that its existence cannot reasonably be questioned. Indeed, the recognition of the right to strike in international human rights and international labour law extends so far that it is today very permissible to argue that it forms part of international customary law.

Furthermore, the important role which the right to strike plays in the balance of powers in the employee relationship should not be underestimated. The right to strike offers workers the opportunity to challenge labour violations and draw attention to issues surrounding the realisation of social justice in

³⁹⁰ *International Covenant on Economic, Social and Cultural Rights*; General Assembly Resolution 2200(XXI) 16 Dec. 1966

³⁹¹ *Demir and Baykara v Turkey*, ECtHR (Grand Chamber) 12 November 2008, Appl. No. 34503/97

³⁹² *Enerji Yapi-YolSen v Turkey*, ECtHR 21 April 2009, Appl. No. 68959/01

³⁹³ *Demir and Baykara v Turkey*, ECtHR (Grand Chamber) 12 November 2008, Appl. No. 34503/97 para 154

³⁹⁴ *Enerji Yapi-YolSen v Turkey*, ECtHR 21 April 2009, Appl. No. 68959/01 para 24

³⁹⁵ *Ibid.* para 32

their industry³⁹⁶ through courses of action including: traditional strikes where workers remove their labor temporarily; work bans where workers refuse certain kinds of work; boycotts where there is a refusal to deal with certain goods or services; go-slows where work is performed at a slower rate and picketing activities.³⁹⁷

The question thus turns from whether this right exists towards its specific importance and implementation for seafarers working in the maritime industry.

The 2002 ILO Meeting of Experts on Working and Living Conditions of Seafarers on board Ships in International Registers adopted a Consensual Statement which, inter alia, included:

*The experts stress the need for the strongest possible national and international measures to be taken against breaches of international labour standards, including violations of freedom of association and right to organize and collective bargaining, which undermine decent living and working conditions for seafarers.*³⁹⁸

Yet there is an inability for seafarers to seek recourse to any impartial and rapid mechanisms which can be used as alternatives to voicing concerns about working conditions or failures to realise the principles of social justice in practice while at sea. Therefore, once isolated on board a ship at sea, labour is the only real bargaining chip which seafarers possess.³⁹⁹ Based on this reasoning, it would perhaps have been prudent to have included this last resort measure to help ensure fundamental maritime labour rights while seafarers are at sea and unable to access the traditional judicial and non-judicial recourses which guarantee access to justice. Furthermore, since strikes very often represent a spontaneous revolt against unacceptable or exploitative employment conditions,⁴⁰⁰ it acts against the very premise of the right in practice not to recognise it, in some way, for workers at sea who do not have the option to leave their isolated workplace or engage in any other arbitration process to resolve problems.

It is perhaps permissible to argue that the MLC's provisions providing for on board complaints procedures⁴⁰¹ may temper the absence of the right to strike by providing some means for seafarers to voice their concerns and grievances during a voyage. However, the ability to make a complaint is far removed from ensuring measures to rectify any problems are actually carried out. Thus, substantive protections which could have been afforded to seafarers' right to collective bargaining while they are carrying out their

³⁹⁶ Hutchinson, Zoe; *The Right of Freedom of Association in the Workplace: Australia's Compliance with International Human Rights Law*; 27 UCLA Pac. Basin L.J. 2009-2010 p137-138

³⁹⁷ Ibid. p137-138

³⁹⁸ Seafarers' Group paper on article 5 at ILO website.

³⁹⁹ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p657

⁴⁰⁰ Servais, Jean-Michel; *International Labour Law*; Kluwer Law International 2009 p119

⁴⁰¹ See above p54

work at sea are largely absent from the MLC. Instead the issue has been left open and unresolved by the MLC, requiring further action from the ILO supervisory bodies to solidify the manner in which the right to strike applies to seafarers.

The applicability and content of the right to strike is currently a major and contentious issue in the ILO generally. The right to strike has recently become the focus of debates at the ILO with the Employers' Group challenging the content of the right to strike and the right of the Committee of Experts to interpret conventions to read this right into their provisions.⁴⁰² The analysis of this debate is beyond the scope of this thesis, but it remains that the unique nature of shipping raises very specific concerns such as the right to strike while at sea, or the continuation of a voyage out of a port while crew members are on strike. These issues could have been addressed and dealt with in an industry specific manner by the ILO. This would have removed the need to create an overarching precedent and avoided much of the general controversy around this issue.⁴⁰³

Without the right to strike to enforce their labour rights and human standards as a last resort, these isolated work places come very close to forcing labour on seafarers no matter what the standards they have to endure. The failure to adequately address this issue not only calls into question the content of the right, but with the unique nature of employment at sea actually risks legitimising forced labour as prohibited under the Abolition of Forced Labour Convention 1957 Articles 1(c) and (d).⁴⁰⁴ I concede that this is an extreme example and one open to criticism. It is, however, effective in highlighting the inherent unfairness in requiring seafarers to continue to work for the benefit of their employers - by ensuring the voyage continues and the cargo is delivered - while they are being subjected to sub-standard conditions or having their fundamental rights denied by these same employers.

It is only fair to temper the discussions here by also looking at the issues which must be balanced against the right to strike for seafarers. Any unrestricted strike could put the vessel or its occupants at risk from a range of issues such as diminishing supplies or falling sanitary and health conditions on board. This risk to the life or health of other person somewhat recalls the concept of essential services whereby the safety of others can be used as a reason for restricting the right to strike. Consequently, it may be slightly unbalanced – or unjust in our maritime society – to advocate for the right to strike in the same way it applies to other workers. Yet this very criticism can also be used to support the need to establish the content of the

⁴⁰² Swepston, Lee; *Crisis in the ILO Supervisory System: Dispute over the Right to Strike*; 29 Intl. J. of Comparative Labour Law 2013 p214-217

⁴⁰³ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p655

⁴⁰⁴ *Abolition of Forced Labour Convention 1957* (Convention 105) which reads: "Each member of the International Labour Organisation which ratifies this convention undertakes to suppress and not make any use or form of forced or compulsory labour... (c) as a means of labour discipline; (d) as a punishment for having participated in strikes."

right to strike for seafarers more clearly, precisely because their situation is unique in the labour market.

An important aspect of the power balance between workers and employers which is required for the full realisation of social justice for seafarers has thus been omitted from the MLC and international labour law generally. This issue should not be seen as devaluing the entire framework. Far from it since the key innovations of the MLC have, as we have seen, made many strides towards the effective realisation of social justice for seafarers. However, it must still be recognised as a clear area of both formal and substantive social justice which the MLC has failed to address and which should be looked at in the future in a maritime specific context if the ILO is to continue to work towards the full realisation of social justice for seafarers.

5.3.3.2 Shore Leave for Seafarers

*“Men cannot live for long cooped up aboard a ship, without substantial impairment of their efficiency, if not also serious danger to discipline... 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”*⁴⁰⁵

This thesis earlier utilised the example of the potential for denial of shore leave in the IMO’s ISPS Code as evidence of the general objectification of the seafarer and the relegation of their rights below other considerations in the maritime law regime.⁴⁰⁶ Given this discussion, it seems only prudent to also refer to how the MLC has sought to overcome this specific obstacle to the subjectification of the seafarer and the corresponding principles of social justice connected to it.

Shore leave is acknowledged to be crucial to the mental health and wellbeing of seafarers who are confined to a vessel, interacting with a small group of people, for long periods while at sea.⁴⁰⁷ Moreover, shore leave is often the sole opportunity crew members have to purchase necessary goods and services, communicate with family, and seek advanced health care.

Thus the introduction of special visa requirements for seafarers on shore leave in, for example, the United States and Australia has caused considerable concern among seafarer groups.⁴⁰⁸ They fear that restrictions on shore leave may have a detrimental impact on the wellbeing of foreign seafarers.⁴⁰⁹

⁴⁰⁵ *Aguilar v Standard Oil Co.*; 318 US 724 (1943) at p733-734

⁴⁰⁶ See above p38

⁴⁰⁷ International Transport Workers’ Federation; *Out of Sight, Out of Mind: seafarers, fishers and human rights*; (June 2006) p34

⁴⁰⁸ *Ibid.* p33-34

⁴⁰⁹ Devlin, Jennifer; *Modern Day Slavery: Employment Conditions for Foreign Fishing Crews in New Zealand Waters*; 23 *Austl. & N.Z. Mar. L.J.* 2009 p91

Regulation 2.4(2) of the MLC requires that seafarers be granted shore leave for their own health and wellbeing. However, the MLC fails to take adequate account of the fact that shore leave is very often dependent on more than the shipowner's discretion, focusing too heavily on their role rather than bringing in practical responsibilities for Port States as well.⁴¹⁰

It is therefore arguable that, rather than confront the problem within the maritime regulatory regime directly, the MLC has attempted to skirt round the issue when it waded into controversial waters and failing to challenge the supremacy of political interests above those of basic human rights. Subjectification of the seafarer concerning generally agreed on rights and standards was a practice already being conducted by the ILO. Yet challenging the notion of State security coming at the expense of one of the most fundamental aspects of seafarers' mental wellbeing is where this process ended, representing a somewhat disappointing conclusion to the ILO's extensive history in drafting and implementing conventions which increasingly centralise the rights and welfare of the seafarer in the international arena.

Confining seafarers to their vessels acts contrary to social justice's basic principles of liberty and places State security, however vague the perceived threat may be, firmly ahead of the individual and collective rights of the workers in the maritime industry. However, like the right to strike, the right to shore leave is not an absolute right. Instead it must be balanced against other interests such as the vessel's operational schedule, economic efficiency, safety requirements and State security.⁴¹¹

The continued scope for the denial of shore leave on the part of Port States serves as a troubling reminder of the continued risk of objectification of seafarers justified through perceived political or security concerns. It is important, therefore, to ensure that the balancing exercise between the right to shore leave and the other interests at stake is carried out in as fair and impartial a manner as possible. The situation must be closely monitored by the MLC's Special Tripartite Committee, among others, to ensure that seafarers are not unnecessarily or arbitrarily denied their right to shore leave if substantive social justice is to be upheld. Accordingly, this is less an issue which must be addressed formatively, but rather one that must be carefully monitored to ensure fair and just balances are applied.

⁴¹⁰ Bauer, Paul; *An Adequate Guarantee?*; 8 Chi. J Intl. Law 2008 p653

⁴¹¹ Stevenson, Douglas; *The Burden that 9/11 Imposed on Seafarers*; 77 Tul. L. Rev. 2002-2003 p1408

6 Conclusions

6.1 Reflections on Social Justice in the Maritime Industry

This thesis commenced with a discussion of the jurisprudence surrounding the notion of social justice. It identified the key components of a “socially just” legal system to be: the fair balance of powers between the groups in a given society; the fair - although not necessarily equal - distribution of the benefits which derive from the relationships of these groups, both economically and socially; and the central importance of respecting human dignity within these societies on a universal level.

Through designating the International Labour Organisation (ILO) as the overarching political entity which regulates the relations, processes and accountability in the globalised maritime society, this thesis was then able to develop standards to evaluate social justice in practice. Focusing the attention of the maritime industry on the rights, welfare and humanity of the worker was paramount in order to avoid their commodification or treatment as objects of the industry rather than subjects of the law and the consequent denial of dignity which derives from this. Meanwhile, the principles of universality and the need to share the benefits of progress have been transitioned from jurisprudential theory to practically orientated goals of the ILO.

When applying these criteria to the maritime industry, it was noted that special consideration must be had to the particular vulnerability of the seafarer based on the fact that their isolated and often dangerous places of work also double as their home for long periods of time. Tailored standards and rights were thus required. Similarly, a flexible system constructed to work effectively within the existing maritime legal system and the jurisdictional rules which govern it was also needed. This was necessary both from the perspective of universalising and equalising the tailored labour standards applicable to seafarers and ensuring adequate and equal enforcement of these standards.

It was concluded that formal social justice alone is not enough to ensure the protection and empowerment of the world’s seafarers. Instead, there is also a pressing need for substantial social justice: the implementation and enforcement of the rights and protections of seafarers in practice.

Chapter 3 went on to identify the primary challenges to achieving this system of social justice in the maritime industry. These were the phenomenon of flags of convenience and the objectification of the seafarer. Both issues have grown up around a maritime law system which had only considered the special situation of seafarers in the workplace in a piecemeal

manner, stretching across many years, and was thus not well adapted to cover the range of needs for this group of workers.

Objectification challenged the formal realisation of social justice through considering seafarers as merely economic tools of shipping companies or as faceless security threats to States. The lack of focus of the International Maritime Organisation (IMO) and maritime law in general on the seafarer as an individual rights holder was identified as perhaps the central reason for this block on formal social justice. Flags of convenience, meanwhile, enabled shipping companies to pre-emptively forum shop for jurisdictions which offered the weakest labour standards. This enabled these shipping companies to legally disregard the welfare of seafarers in pursuit of economic and competitive gains, limiting access to justice options for seafarers and acting against attempts to develop universally applicable and enforceable labour standards for them, thus posing a threat to social justice from a substantive perspective.

It was with an eye primarily on these two “evils” of the maritime industry that the analysis of the Maritime Labour Convention (MLC) and the gains it offers towards social justice was conducted.

6.2 The MLC: A (Frozen) Revolution in labour protections?

The previously established body of ILO instruments on maritime labour had, between them, already focused on all of the fundamental labour rights designated by the ILO and specifically adapted them to the nature and circumstances of the maritime industry. However, the standards were often difficult to understand and relate to for seafarers because they were set out in complex, uncoordinated and overlapping provisions scattered across various conventions, which may or may not have been ratified by the Flag State under which they sail. This is where consolidation, while not revolutionising the content of the rights, can be seen as having taken significant strides towards their formal universalization by making the general body of rights far more accessible and understandable for seafarers, shipowners and States.

The existing ILO instruments were thus already holding the seafarer as the subjects of rights and protections. Yet this was not enough to counter the objectification of the seafarer outside the specialised legal regime of the ILO. Consequently, there was a need to bridge the gap between international labour law and international maritime law to fully realise the subject status of the seafarer. The MLC sought to achieve this through its ambition of becoming the “Fourth Pillar” of the maritime regulatory system and, supplement the three established pillars of the International Convention for the Safety of Life at Sea, the International Convention for the Prevention of Pollution from Ships and the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers. These previous

treaties had, between them, focused more on environmental issues and ship standards rather than the human and labour rights of the seafarer.

Rather than seek to revolutionise or alter the jurisdictional framework of maritime law or the substantive content of the rights applicable to seafarers to achieve this end, the MLC has worked within this framework to couch its terms and certification requirements in ways familiar to the industry. In addition, consolidation has served to create a single, overarching treaty which is capable of standing alone as the authoritative representative of international labour law in the industry alongside the previous conventions on environmental and ship standards.

The flexibility and increased monitoring found in Articles VI, XIII and XV are necessary to provide a dynamic interpretation of maritime labour rights, ensuring that they provide relevant protections in line with industry developments and are recognised and respected by the social actors in the maritime industry. This ability to adapt to the evolving norms of the industry is an essential requirement if the MLC is to be transformed into a 'living' instrument for the continued protection of seafarers and the maintenance of the principles of social justice. Again, this is hardly a revolutionary approach to law making, but it is certainly revolutionary when it comes to *international* law making. This illustrates an understanding on the part of the drafters of what was actually needed to monitor the provisions of the MLC and maintain their relevance to the substantive realisation of social justice. This flexibility should also serve as a further incentive for more States to ratify the MLC, particularly with the legal space provided by substantive equivalence to interpret existing laws in line with the Convention rather than reform existing national legislation.

While the previous maritime labour instruments denote a continuous evolution in the enforcement norms and principles applied in the field of maritime law, they remained, in practice, loosely applied at best. It is from the perspective of substantive social justice, then, that the MLC can be considered to have introduced revolutionary approaches to the enforcement of labour rights for seafarers.

Perhaps the most revolutionary step made by the MLC is to have developed a maritime labour system which will be practically universal in nature once it comes into effect, without the need for all the affected States to ratify the Convention. It is this feature, combined with the innovative application and amendment procedures, which send the MLC into new territory in the international law making arena. The functional universality of the MLC has been achieved by the introduction of the jurisdictional safety net in Article V, which has worked within the existing jurisdictional principles of the maritime legal regime to develop an enforcement system which is not dependant on a single State for the success of the Convention. A major step in this process has been the clearly noticeable shift towards the enforcement of relevant international standards through Port State Control. This demonstrates an even greater shift away from exclusive Flag State

jurisdiction primacy towards greater Port and other non-Flag State jurisdiction.

This safety net system may also transfer the ability to forum shop to the seafarer, providing more access to justice options and promoting the social and judicial dialogue necessary to continue to mainstream considerations of seafarer rights in the discussions and development of international and national maritime law. Any tensions between universality and state sovereignty are resolved by the fact that the MLC works within the established jurisdictional principles of maritime law, not questioning, but utilising them as a route into the maritime legal regime for international labour standards.

Furthermore, the MLC has introduced a legally grounded CSR system backed by an enforcement procedure not centred so much on law, but rather on economic and competition motivations. CSR has traditionally been a legal concept which has been voluntary in nature, but the MLC has now, without expressly stating it, given a legal footing to a process which requires shipping companies to comply with international labour standards if they are to remain commercially competitive. Indeed, this also acts to the realisation of social justice within the maritime society from the perspective of many shipping companies as they will no longer be undercut by unscrupulous competitors willing to endanger the health and welfare of their workers. This illustrates the potential progress that could be made towards developing more substantive and legally grounded CSR provisions in the general human rights field by including employers in the drafting process and seeking to balance the outcomes, or benefits, which they seek to achieve between the various social actors in the relationship, including employers.

The revolutionary enforcement provisions of the MLC do not eliminate the flag of convenience system, but certainly seem set to remove the perceived benefit of undermining the labour rights of seafarers to keep costs down.

However, there is a clear shortcoming in the complete realisation of formal social justice for seafarers with the failures to adequately address issues concerning the scope and content of both the right to strike and access to shore leave. This leaves traces of objectification and unfair balances of power in the employment relationship and in the relationship between States and foreign workers. It should not, however, detract from the considerable overall advancements in applicability, flexibility and enforceability made by the MLC towards a fairer and more socially just maritime society.

The MLC has thus employed several innovative features or adapted and evolved existing techniques from both the international labour and maritime legal fields to produce a living document which provides detailed and adequate protections to the safety, security and dignity of workers at sea. Yet it goes beyond this to, for the first time, create a comprehensive and potentially universal accountability system for violations of maritime labour law by Flag, Port and even Labour Supplying States, in the process

furthering access to justice for the individual seafarer through the capacity to human rights forum shop. Interestingly, the MLC has also embedded principles of CSR into a binding international instrument where the enforcement procedures also extend, through the medium of competition norms, to the employers themselves, strengthening social justice for seafarers and developing an enforcement mechanism which may be able to be used to speak to businesses in other industries beyond the maritime arena.

6.3 Final Remarks

From the outset, the premise of this thesis was perhaps slightly unfair. We have seen in the Introductory Chapter that the MLC was never intended to revolutionise the maritime labour system *per se*, but rather to find better ways of implementing the existing protections - deemed adequate by seafarers themselves - in practice.

It aspires to be “globally applicable, easily understandable, readily updatable and uniformly enforced.”⁴¹² To do so the MLC is required to act beyond the already established system of maritime labour protections to integrate itself more fully with international maritime law in general and to develop methods which countered the social justice challenges posed by the industry. The preceding analysis has revealed several points of innovation towards turning these goals into reality, many of which can be seen as having concurrently made progress towards the fuller realisation of social justice for seafarers.

This thesis has sought to highlight the problems associated with the maritime industry concerning the realisation of social justice and to analyse whether the MLC has introduced innovations which are set to combat these or whether it has merely served to codify the existing problems in the guise of revolution. It is clear that the MLC has indeed introduced potentially revolutionary reforms which are set to positively impact the realisation of social justice for seafarers. From working towards equality and flexibility in the law, to introducing universality and competitive motivations in enforcement, the drafters of the MLC can be seen to have drawn on the best parts of existing labour and maritime standards while also introducing jurisdictional and CSR centred methods of enforcement. It is these enforcement principles which, while working within the existing bounds of the law, may prove to be particularly revolutionary in practice and in the discussions that could open up concerning the wider application of their use in international human rights and labour law.

The above analysis shows that the MLC has not sought to realise social justice by revolutionising the international maritime or labour law regimes.

⁴¹² <http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm> (accessed 22/5/13)

Instead, it has sought to work within the pre-existing legal space developed by these fields to attempt to integrate labour considerations into the very fabric of the maritime industry and to develop formal and substantive social justice principles that work universally within international law and the practices of the industry.

The findings suggest that labour rights are perhaps best served in practice by using the social constructs of industries as the blueprint for developing enforcement procedures rather than trying to fit often internally looking legal regimes into an overarching, general labour rights system. Labour law must become more expansive and more flexible, seeking to incorporate itself into the nature of the industries it seeks to regulate. Through doing so, it is easier to understand the causes of problems and work with existing norms to find mutually beneficial solutions for all social actors. This will not only raise labour standards, but create a sustained increase in standards backed by the industries themselves. Similarly, this investigation has illustrated that tensions and divergent mandates between international legal regimes and organisations can perhaps be bridged not by vying for superiority, but by developing a labour system which works within the confines of the laws and norms of these different regimes.

Simply because the MLC has not yet come into force, much of the analysis in this thesis has been hypothetical in nature. It remains to be seen exactly how the innovations introduced by the MLC will work in practice when it comes into effect. But to best safeguard its effectiveness there is a need in all countries for responsible officers to have the backing of clear legislation empowering them to take action in respect of labour standards on foreign-registered ships, and for them to be fully aware of their powers and duties in this respect. Only after the MLC comes into effect will the various methods for doing this be able to be evaluated against the aims and obligations set forth by the Convention. The scope for future research into this area is thus quite large, with particular attention likely to focus on the methods of inspection used by Flag States when determining whether ships meet the certification requirements of the Convention. Similarly, future negotiations and focuses within international maritime law and particularly those conducted within the IMO to see to what extent the MLC has succeeded in becoming the “Fourth Pillar” of the international maritime regulatory system and, if not, determining the factors which have prevented this being the case.

The innovations of the Maritime Labour Convention perhaps do not amount to a complete revolution in maritime labour law. But they certainly should not be perceived as having frozen international maritime labour standards in time or place, instead striving towards greater realisation of social justice for seafarers in the present through universal application and stronger enforcement measures while casting an eye to the future adaptability and development potential.

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