

The Maritime Labour Convention 2006: Breathing Life into Art. 94 of UNCLOS*

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I. INTRODUCTION. II. CONTENT OF THE MARITIME LABOUR CONVENTION. III. THE UNCLOS FRAMEWORK. IV. A REVOLUTION IN ILO TREATY-MAKING. V. SUPERVISION OF APPLICATION OF THE MLC. VI. A EUROPEAN SOCIAL DIALOGUE ANGLE ON ENTRY INTO FORCE. VII. A RICH SOURCE FOR FURTHER EXPLORATION

I. INTRODUCTION

This short note calls attention to a relatively new instrument that adds a vital piece to the law of the sea landscape: the Maritime Labour Convention (MLC), adopted by the International Labour Organization (ILO) in 2006. The instrument is poised to enter into force in 2011, one year after it gains the necessary ratifications. The tonnage requirements for entry into force have already been met, and the number of ratifying states is likely to reach the 30 required later in 2010.¹ Once in force, the MLC will stand as the “fourth pillar” of the international maritime regime (see below). For shipowners, the MLC is a tool to help ensure a level playing field. For seafarers, the MLC is a charter for decent work no matter where ships sail or which flag they fly. For Governments, it is a consolidated instrument that promotes international cooperation across a global industry and reduces reporting obligations. These are among many advantages highlighted by the ILO.

II. CONTENT OF THE MARITIME LABOUR CONVENTION

Very briefly, the MLC is an umbrella instrument that consolidates the subject matter of 66 maritime labour instruments that were adopted by the ILO between 1920 and

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¹ Under its Art. VIII, the Convention will come into force 12 months after the date on which ratifications have been registered from at least 30 Member States with a total share of the world gross tonnage of ships of at least 33 per cent. The ratifications registered up to Mar. 31, 2010 were the Bahamas, Bosnia and Herzegovina, Croatia, Liberia, Marshall Islands, Norway, Panama and Spain. Member States of the European Union are committed to ratify (see below), which will bring the total to over 30 ratifications.

1996. As a lengthy document, its scope is vast: engagement of seafarers, fundamental principles and rights at work, certificates of competency, conditions of employment, accommodation and food/catering on ships, hours of work and rest, medical care, health, welfare and social security protection for seafarers, recreational facilities and more. It addresses recruitment and placement services as well as flag State inspection systems. The ILO website (www.ilo.org) sets out the text of the Convention, a summary of its provisions, and various documents through which its drafting history may be traced.²

The instrument is tiered, with 16 Articles in the Convention itself (some purely procedural), a set of Regulations and a Code. The Articles and Regulations set out core rights and principles and the basic obligations of ratifying States. The Code contains the details for the implementation of the Regulations.³ Part A of the Code is mandatory, whereas Part B is not.

The purpose of the Convention is three-fold: to lay down a firm set of rights and principles, to allow (through the Code) a considerable degree of flexibility about how ratifying States implement them, and to ensure that the rights and principles are respected. In practical terms, the crux of the MLC lies in Article V (Implementation and Enforcement Responsibilities). Para. 7 of this Article stipulates that, “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.” The Convention equally provides that, “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 the Convention.” (Art. V, para. 4). These provisions are in addition to the effective exercise of jurisdiction and control over the ships flying under the ratifying State’s flag (Art. V, paras. 1 to 3). The Article also calls for sanctions or corrective measures, and regulation of recruitment and placement services where they are present (Art. V, paras. 5 and 6). Title 5 of the Regulations further specifies responsibilities and parameters for the important new maritime labour certificate (Reg. 5.1.3). In short, the Convention is a force for truly fair competition in the global shipping world.

To assist countries with compliance, in 2008 the ILO convened two committees of experts which produced the *Guidelines for flag State inspections under the Maritime Labour Convention, 2006* and the *Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006*. The International Training Centre of the ILO conducts courses based on the MLC and these guidelines (both published in 2009). These form part of a longer term ILO action plan to achieve rapid and widespread ratification and implementation of the Convention.

III. THE UNCLOS FRAMEWORK

Art. 94 of the United Nations Convention on the Law of Sea (UNCLOS) sets out the duties of the flag state. These include the exercise of jurisdiction and control “in

² See also C. Doumbia-Henry, D. Devlin and M. L. McConnell, “The Maritime Labour Convention, 2006 Consolidates Seafarers’ Labour Instruments,” 10 *ASIL Insight* 23 (Sept. 13, 2006).

³ See Explanatory Note to the Regulations and Code of the Maritime Labour Convention, reproduced with the Convention.

administrative, technical and social matters over ships flying its flag.” (Art. 94, para. 1). Measures to ensure safety include those regarding “the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments.” (Art. 94, para. 3). They encompass measures relating to the ship itself as well as provisions for a qualified crew and officers (Art. 94, para. 4).

The Maritime Labour Convention, 2006 fleshes out the social pillar of UNCLOS as contemplated by Art. 94. This is similar to how the International Convention for the Safety of Life at Sea, 1974 (SOLAS), as amended, the Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW), as amended, and the International Convention for the Prevention of Pollution from Ships, 73/78 (MARPOL 73/78), all developed in the International Maritime Organization, relate to other aspects of Art. 94, para. 4(c).

In taking the measures foreseen by paras.3 and 4 of Art.94, “each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.” (Art.94, para.5). The final provisions of Art. 94 lay the basis for port state control and inquiry into marine casualties and navigation incidents on the high seas (Art. 94, paras. 5 and 6). Both are taken up in the MLC.

IV. A REVOLUTION IN ILO TREATY-MAKING

The consolidation of so many earlier international labour Conventions and Recommendations into a single instrument was unprecedented. This radical departure was spurred by the realization of the representatives of the Shipowners and Seafarers that the body of standards they had spearheaded over decades risked becoming irrelevant. Since a maritime session of the International Labour Conference was being scheduled only once every ten to twelve years, there was no way that “business as usual” could keep pace with technological and labour market developments in the shipping industry. Placing maritime items on the agenda of a regular session of the annual International Labour Conference also seemed impractical, since the expertise required for the maritime and regular sessions differs not only for governments, but as well for the social partners (employers and workers). Thus emerged the idea to embark on an ambitious programme of updating the ensemble of maritime labour standards in one exercise.

To some extent, the seeds of the Maritime Labour Convention were sown in another innovative instrument, the Merchant Shipping (Minimum Labour Standards) Convention, 1976 (No. 147). This Convention had pioneered the idea of “substantial equivalence” and of port state control “lite” in the labour context. Under Art. 2, para. (a)(iii) of this standard, a State undertook to satisfy itself that its laws and regulations were “substantially equivalent” to provisions identified in an Annex to the Convention (if the State had not yet ratified the instruments in question). The annexed instruments addressed minimum age for employment at sea, social protection, repatriation, conditions of engagement and on board ship, and freedom of association and collective bargaining. In relation to port state control, Convention No. 147 provided for any ratifying State which received a complaint or obtained “evidence that the ship does not conform to the standards of the Convention” to report to the ILO and to “take any measures necessary to rectify any conditions on board which are clearly hazardous to safety or health.” (Convention No.147, Art.5, para.1). The MLC builds on and reinforces this approach.

The new MLC borrows from devices used in instruments of the International Maritime Organization, especially in relation to future revision of the Code annexed to the MLC. Under the ILO Constitution, the normal process for revision of a Convention is a relatively lengthy one, and it is not unusual for 2 to 3 years to elapse between a decision by the ILO Governing Body to place the item on the agenda of the International Labour Conference and a vote by that body on a revised text (the ILO Constitution, Art. 19, and stipulations reproduced in the Standing Orders of the International Labour Conference, Arts.43- 44 of which provide the details.). This avenue remains the one available for revision of the Articles and the Regulations, but the MLC for the first time introduced to the ILO the “tacit consent” accelerated amendment process used in the IMO (this is however limited to the more technical matters covered by the Code appended to the Convention). This takes place within an institutional context that is a basic feature of the ILO: tripartism. In addition to the role of representatives of employers and workers that is built into the regular revision procedure for ILO standards, the MLC provides for the Convention to be kept under continuous review through a tripartite committee with special competence in the area of maritime labour standards (Art. XIII). Its composition is two representatives of Governments of States which have ratified the Convention, and two representatives each from Shipowners and Seafarers appointed by the Governing Body after consultation with the Joint Maritime Commission.⁴ A weighted voting provision is included, with two government votes for each social partner’s vote (Art.XIII, para. 4). Under the accelerated amendment process for the Code, a government member of the tripartite committee (with the support of five other ratifying states), or the Shipowner or Seafarer group, may propose an amendment (Art.XV, para. 2). Under various procedural safeguards, the amendment process then begins. “In essence, the procedure gives individual States parties to the Convention an opportunity to opt out of amendments to the Code approved by the tripartite General Conference of the ILO, which would otherwise apply to them, by tacit consent, if they do not opt out within a stated time.”⁵

Developed through a highly consultative process conducted over five years, the Convention was adopted with no votes cast against. This widespread support and the fact that it is as a universal instrument should make its status under Art. 94 of UNCLOS assured. Within the ILO, the instrument represents an innovative aspect of a wider effort that the Organization has undertaken since the mid-1990s to streamline and update its body of international labour standards.

V. SUPERVISION OF APPLICATION OF THE MLC

In addition to the special oversight mechanism already described, the MLC will be subject to the regular ILO supervisory system. This consists essentially of three elements: (a) reporting at regular intervals by ratifying States on the effect given to a Convention under Art.22 of the ILO Constitution (which may include comments provided by employer/shipowner and worker/seafarer groups), (b) possible representations or complaints under Arts. 24 or 26 of the Constitution, and (c) reporting, when requested by the ILO Governing Body, on the law and practice in relation to the Convention even in the

⁴ The Joint Maritime Commission, while chaired by the Chairperson of the ILO Governing Body (normally but not always a government representative), is bipartite, i.e. composed of representatives of Seafarers and Shipowners.

⁵ Doumbia et al., op. cit., p. 2.

absence of its ratification, pursuant to Art. 19(5)(d) of the ILO Constitution.⁶ In relation to the latter, changes may be afoot concerning how this is carried out, related to adjustments being made in light of follow-up to the adoption in 2008 of the ILO Declaration on Social Justice for a Fair Globalization.

VI. A EUROPEAN SOCIAL DIALOGUE ANGLE ON ENTRY INTO FORCE

The instrument is also of interest to practitioners and academics focusing on European law. Under Art.139(1) of the Treaty establishing the European Community, the social partners at Community level can enter into a dialogue which may lead to contractual relations, including agreements. The European Community Shipowners' Associations and the European Transport Workers' Federation did just that, and requested the Council to turn its Agreement into a Directive under Article 139(2). On Jan. 14, 2009, the European Parliament approved a resolution on the proposal for a Council Directive implementing the Agreement. Council Directive 2009/13/EC implementing the Agreement was adopted on Feb. 16, 2009 (*Official Journal of the European Union*, L 124/30 of May 20, 2009). Thus all EU Member States have been called upon to ratify the Convention without delay.⁷ To date, most are making progress toward that goal. Under its Art.7, the Directive itself will enter into force at the same time as the Convention.

VII. A RICH SOURCE FOR FURTHER EXPLORATION

The Maritime Labour Convention and the mechanisms and tools developed in its wake will be worth watching as practice is gained under the new arrangements. Not only those interested in law of the sea, but also those who follow the law of international organizations, the role of non-State actors, and treaty-making should find it a rich source for exploration in the years to come. The MLC holds much promise for delivering on the universal goal of "decent work for all" in the context of the 2008 Declaration on Social Justice for a Fair Globalization and Art. 94 of UNCLOS.

⁶ See ILO, *Rules of the Game: A Brief Introduction to International Labour Standards* (Rev. ed.) (ILO, Geneva, 2009); L. Swepston, "The International Labour Organization and Human Rights: Access to the ILO," in G. Alfredsson, J. Grimheden, B. Ramcharan and A. de Zayas, eds., *International Human Rights Monitoring Mechanisms* (Martinus Nijhoff, 2009), pp. 291-300, and Laurence R. Helfer, "Monitoring Compliance with Unratified Treaties: The ILO Experience," in 71 *Law and Contemporary Problems* 193 (2008).

⁷ European Parliament Resolution of 14 January 2009 on the proposal for a Council directive implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006 and amending Directive 1999/63/EC, P6_TA(2009)0020.