LABOUR RIGHTS OF FISHERS IN NAMIBIA

By

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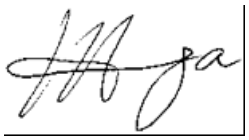
LIST OF KEY ABBREVIATIONS

AC	African Charter on Human Rights and People's Rights
AU	African Union
BCEA	Basic Condition of Employment Act
FAO	Food and Agricultural Organisation of the United Nations
GDP	Gross domestic product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICS	International Code for Seamen
ILO	International Labour Organisation
IMO	International Maritime Organisation
ITF	International Transport Workers Federation
JMC	Joint Maritime Commission
LRA	Labour Relation Act
MLC	Maritime Labour Convention
MSA	Merchant Shipping Act
NEF	Namibian Employers' Federation
PTMC	Preparatory Technical Maritime Conference
SADC	Southern African Development Community
STCW	Standards of Training, Certification and Watchkeeping
SWA	South West Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
WIFC	Work in Fishing Convention

PLAGIARISM DECLARATION

I, **NGHILILEWANGA HASHALI HAMUKUAYA** student number 21107205, hereby declare that the dissertation entitled *"Labour Rights of Fishers in Namibia"*, submitted in fulfilment of the requirements of the degree of Master of Laws, at Nelson Mandela University, in December 2017, is my own work and has not previously been submitted for assessment or completion of any post-graduate qualification submitted to another University or for another qualification.

Signed at Port Elizabeth on the 4th December 2017



Nghililewanga Hashali Hamukuaya

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SUMMARY

Fishers make an important contribution to the global economy and add value to a country's gross domestic product. Their contribution is even more important in countries such as Namibia that rely heavily on the fishing industry as a source of income. The working conditions of fishers have recently come under scrutiny as a result of poor labour standards when compared to employees ashore. A background of the working conditions of fishers is provided illustrating the unique working conditions of the fishing industry. After that the international standards, namely those of the United Nations and the International Labour Organisation (hereinafter referred to as "the ILO"), are discussed and the challenges in the regulations of the condition of employment of fishers are pointed out. The ILO recently adopted the Work in Fishing Convention (hereinafter referred to as "the WIFC") in 2007, which is the primary instrument applicable to fishers' conditions of employment. Namibia has not ratified the Convention and, as a result, it has no legal obligation to comply with the standards it sets.

The international standards were tested against the national legislation of Namibia. This was done to determine the extent of Namibia's compliance with those standards. The dissertation revealed that, if Namibia were to immediately ratify the Convention it would not conform with the standards and, as a result, would be in breach of its international obligation.

The dissertation takes a step further by comparing the approach taken in regulating the conditions of employment in Namibia to the approach taken in South Africa. The purpose of the comparison is to determine the lessons Namibia can learn, if any, to improve the regulation of the condition of employment for its fishers. The dissertation

reveals that there are lessons Namibia can learn from South Africa to improve the conditions of employment of the fishers. These lessons relate to introducing a bargaining council and, where necessary, statutory councils for the fishing industry. The introduction of a bargaining council and statutory councils would give organisations such as trade unions more power to negotiate a general standard across multiple sectors within the fishing industry. The standards that are negotiating could incorporate the standards provided in the WIFC even though Namibia has not ratified the convention.

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CHAPTER 1
GENERAL INTRODUCTION

1 INTRODUCTION

"For fishers, their ship is their home, and for many, the crew is their only family."[1]

A fisher is anybody who works on board a fishing vessel.[2] There are more than 17 million fishers engaged globally, hunting for, and landing around 90 million tonnes of fish every year.[3] The Food and Agriculture Organisation of the United Nation (hereinafter referred to as "the FAO"[4]) estimates that the fishing sector provides for the livelihood of 10 to 12% of the world's population. Also, the FAO estimates that for each person employed in the capture of fish, there are about four more jobs created in the secondary activities, including the post-harvest of fish.[5] The majority of fishers still belong to the informal sector. Small-scale fishers take an estimated 45% of the total world catch. Important to note that the fishing industry is diverse, ranging from highly organised commercial deep-sea fishing operations to the more common small-

1 See ILO "News" available at http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_083074/lang--en/index.htm (accessed 2017-09-28).

2 Art 1(e) of the Work in Fishing Convention, 2007 (No. 188). Hereinafter the Work in Fishing Convention is referred to as the WIFC.

3 Couper, Smith, Ciceri *Fishers and Plunderers Theft, Slavery and Violence at Sea* (2015) 1. These fishers comprise of different nationalities, ethnic and cultural background.

4 FAO "The State of World Fisheries and Aquaculture. Opportunities and Challenges" (2014a) available at www.fao.org/3/a-i3720e.pdf (accessed 2017-09-26).

5 *Ibid.*

scale and artisan fishing. The fishing industry, through diverse businesses,[6] generates financial security for people and adds value to a country's Gross Domestic Product (hereinafter referred to as "the GDP").[7] It is evident that the fishing sector is responsible for the livelihoods hundreds of millions of people.[8] The "Global Marine Trends"[9] forecasted that there is an increase in activity in the fisheries sector as a response to growing international demand for fish and fishery products due to emerging markets. The fishing industry has continued this trend by increasing their fleets and fishing capacity respectively to maximise profits, thus increasing the sectors' contribution to a country's GDP.[10] Namibia is an example of a developing country that regarded this growth in demand as an opportunity and acted upon it.

The population of Namibia has a limited domestic consumption of seafood due to its small population, and its meat-orientated diet. As a result, Namibia exports an estimated 90% of its gross fish catch to other parts of the world.[11] The Namibian fisheries sector has become increasingly important in the national economy of Namibia by contributing significantly not only to the GDP but also to employment creation. As a result, Namibia is in a position of being one of the leading sustainable fisheries

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6 Maritime Stewardship Council "The Seafood Economy" https://www.msc.org/healthy-oceans/the-oceans-today/the-seafood-economy (accessed 2016-05-28).

7 FAO "The Value of African Fisheries" available at http://www.fao.org/3/a-i3917e.pdf (accessed 2016-05-28).

8 FAO "The State Of World Fisheries And Aquaculture" (2008) available at http://www.fao.org/3/a-i0250e.pdf (accessed 2017-10-08) 26. If aquaculture and secondary activities are included it is estimated that over 500 million people are either directly or indirectly dependent on fisheries and aquaculture for their livelihoods.

9 QuinetiQ "Global Marine Trends 2030" http://www.futurenautics.com/wp-content/uploads/2013/10/GlobalMarineTrends2030Report.pdf (accessed 2016-04-20).

10 *Ibid.*

11 FAO "The Republic of Namibia" http://www.fao.org/fi/oldsite/FCP/en/NAM/profile.htm (accessed 2017-01-19).

sectors in the world worth over N$ 10 billion in exports in 2016, compared to the previous year of N$ 7 billion.[12] The fishing industry in Namibia is now the second largest contributor in foreign export to the Namibian GDP.[13] The contribution and importance of more than 13 000 employees in the fisheries sector in Namibia, of which some 5 575 employees work on board fishing vessels, is reflected in their contribution to the Namibian economy.[14] It is clear that the fisheries sector is one of largest global chains from a food security and employment perspective.[15]

The working conditions of employees employed on board fishing vessels have recently come under scrutiny as a result of poor labour standards. To this effect, there has been an increase in the voicing opinions from academics,[16] organisations,[17] and workers concerning the working conditions of employees working on board of fishing vessels.[18] In many instances, these fishers experience an infringement of human rights. Such abuses range from instances of physical violence against crewmembers forced labour and even discrepancy in fishers' wages.[19] For example, fishers on the same vessel who do exactly the same job are paid differently due to their different

12 New Era "Namibia Exported Fish Worth N$ 10 Billion" https://www.newera.com.na/2016/03/01/namibia-exported-fish-worth-n10-billion/ (accessed 2016-06-19). 1 N$ is equivalent to 1 rand.

13 FAO "The Republic of Namibia" http://www.fao.org/fi/oldsite/FCP/en/nam/profile.htm (accessed 2016-04-20).

14 These fishers work full time or as part time fishers.

15 FAO "Increasing The Contribution of Small-Scale Fisheries to Poverty Alleviation and Food Security" available at ftp://ftp.fao.org/docrep/fao/008/a0237e/a0237e00.pdf (accessed 2016-06-20).

16 See fn 3.

17 ITF Seafarers "Fisheries" http://www.itfseafarers.org/ITI-fisheries.cfm (accessed 2016-05-08).

18 Jepsen, Van Leeuwen "Seafarer fatigue: a review of risk factors, consequences for seafarers' health and safety and options for mitigation" 2015 *International Maritime Health* 1 13.

19 ITF Seafarers "Out of Sight Out of Mind" available at www.itfseafarers.org/files/extranet/-1/2259/humanrights.pdf (accessed on 2016-04-11).

origins.[20] In some instances, employees on a fishing vessel are routinely made to work in conditions that would be unacceptable compared to the employees ashore.[21] In some cases, they are afraid to complain or seek assistance from trade unions or other institutions for fear of being discriminated against when seeking further employment.[22] As a result, strikes of employees employed on board fishing vessels have occurred. The main reason for the strikes is that these employees are seeking an improvement in their working conditions. Strikes in the fishing sector have occurred in developed and developing countries such as the United States,[23] Iceland,[24] Greece,[25] France,[26]

20 See fn 3 27.

21 *Ibid*.

22 *Ibid.*

23 Gizmodo "Why are these Massive Cargo Ships Trapped at 29 U.S. Ports" http://gizmodo.com/why-are-these-massive-cargo-ships-trapped-at-29-u-s-po-1686637422 (accessed 2016-04-20).

24 Fish Update "Icelandic Fishermen Threaten Strike" http://www.fishupdate.com/icelandic-fishermen-threaten-strike/ (accessed 2016-10-22).

25 World Maritime News "Greek Seamen on Strike for Two More Days" http://worldmaritimenews.com/archives/175668/greek-seamen-on-strike-for-two-more-days/ (accessed 2016-04-20).

26 The Local "Striking French Seamen Block Calais Port" http://www.thelocal.fr/20150731/striking-french-seamen-block-calais-port (accessed 2016-04-20).

Malaysia,[27] Australia,[28] Thailand,[29] Cameroon,[30] and Namibia.[31] The implication of these strikes has cost the world economy millions, if not billions of dollars in recent years.[32] These cases continue to occur despite the existence of international instruments in the form of Conventions, Treaties, Codes, and Recommendations, which purport to protect human beings in general. The following section provides a background of the working conditions associated with the Namibian fishing industry.

2 BACKGROUND AND RATIONALE OF STUDY

The successful harvesting of fish is dependent upon numerous factors. In Namibia, the practical harvesting is sourced and granted from the allocation of a fish harvesting right, issued by the Ministry of Fisheries and Marine Resources that effectively entitles an entity the allocation of an annual quota.[33] The annual quota is the management tool

27 Global Nation "Fishers Abused by Malaysia Navy Narrate Ordeal Probe" http://globalnation.inquirer.net/139666/fishers-abused-by-malaysia-navy-narrate-ordeal-in-probe (accessed 2016-05-27).

28 JOC "Port Workers Plan to Expand Strike from Fremantle to Sydney" http://www.joc.com/port-news/international-ports/workers-strike-largest-australia-stevedore_20160408.html (accessed 2016-04-20). See also The Guardian "Wharf Strikes Union Fights for Job Security in the Age of Automation" http://www.theguardian.com/australia-news/2016/apr/12/wharf-strikes-union-fights-for-job-security-in-the-age-of-automation (accessed 2016-04-24).

29 Food Navigator Asia "Thai Fishermen Prolong Strike After Government Impounds Vessels" http://www.foodnavigator-asia.com/Policy/Thai-fishermen-prolong-strike-after-government-impounds-vessels (accessed 2016-04-20).

30 All Africa "Cameroon: Seafarer's Strike 18 Months After" http://allafrica.com/stories/201602021230.html (accessed 2016-04-20).

31 New Era "Seaman Strike Implications- Esau" https://www.newera.com.na/2015/11/05/seamen-strike-implications-esau/ (accessed 2016-04-20).

32 Gizmodo "Why are these Massive Cargo Ships Trapped at 29 U.S. Ports" http://gizmodo.com/why-are-these-massive-cargo-ships-trapped-at-29-u-s-po-1686637422 (accessed on 2016-04-20).

33 See s 34 of the Marine Resources Act, 2000 Act 27 of 2000.

and yardstick in determining the quantities and quality of the fish to be harvested.[34] The proceeds from the fish harvesting effectively support the entity's annual operational plan. The entity may only harvest in accordance with the allocated quota that specifies the quantity issued by the Ministry of Fisheries. A fishing vessel is designed with a specific purpose of locating, catching and preserving fish, while at sea.[35] The planned operations of a fishing vessel are usually determined by the overall size of the vessel, the arrangement of the deck, carrying capacity, as well as the machinery and the different types of equipment on the fishing vessel.[36] The specific species the vessel is mandated to catch determines the fishing vessel design and layout and fishing gear that may be used in the harvesting process.

As a procedural measure, each fishing vessel is staffed with a crew to execute all the occupational functions on the fishing vessel. The number of fishers on board a fishing vessel is determined by the occupational functions that are to be carried out on the fishing vessel, supported by the accommodation available on such a fishing vessel.[37] Support instruments and fishing gears are available on each fishing vessel to assist the skipper,[38] and his/her assistant in locating the fishing grounds and the required fish sizes in the water to be harvested.[39] Factors may not necessarily at all times be conducive to administer favourable or desired harvested quality and sizes. Sometimes skippers are sensitised to engage in intensified and focused efforts to gain the most

34 See fn 33 s 38.

35 FAO "Fishing Vessel Types: Technology Fact Sheets" (2011-05-12) available at http://www.fao.org/fishery/vesseltype/search/en (accessed 2017-04-10).

36 See Voices of the Bay "Fishery Basics-Fishing Vessels" http://sanctuaries.noaa.gov/education/voicesofthebay/pdfs/trawlers.pdf (accessed 2017-05-02).

37 See fn 33 s 49.

38 Art 1(l) of the WIFC defines "Skipper" as the person having command of a fishing vessel.

39 FAO "Fishing Vessel Types: Technology Fact Sheets. In: Fisheries and Aquaculture topics" http://www.fao.org/fishery/vesseltype/search/en (accessed 2017-05-02).

advantageous position with a view to enabling the fishing vessel to harvest the required or planned fish species and size. During trawling operations, a trawl net is lowered for a specific period, which in essence may produce limited fish caught in the net. The fishing vessel navigation process is continuous. Sometimes limited fish may be harvested. At times large quantities of fish are trapped in the trawl nets, thus requiring the crew to process the fish in an endeavour to make space for the next trawl net to be lifted from the sea. Moreover, while on board on a fishing vessel, fishers are exposed to unpredictable weather conditions; the slippery working surface on board the vessel; exposure to malfunctioning gear; regular use of knives and other sharp objects; and long working hours which can lead to fatigue.[40] The fact that most commercialised fishing vessels have factory trawlers and freezer systems add to the diversity of employment conditions within the fishing industry and on board fishing vessels.[41]

The level of exposure amongst fishers differentiates considerably, depending not only on the design of the fishing vessel but also the type of catch the vessel is mandated to catch.[42] The kind of catch and the length of the vessel play an influential role in determining the duration the vessel will be out at sea. For example, fishing vessels which are 20 to 40 metres in length are only a few days at sea, usually with a crew of 5 to 20 fishers. The larger commercialised vessels that range 40 metres to well over 100 metres in length operate at times measurable in months away from shore, with a

40 Bureau of Labour Statistics, US Department of Labour. "Occupational Outlook Handbook, 2014-15 Edition Fishers and Related Fishing Workers" available at http://www.bls.gov/ooh/farming-fishing-and-forestry/fishers-and-relatedfishing-workers.htm#tab-3 (accessed 2017-05-11).

41 Politakis "From Tankers to Trawlers: The International Labour Organization's New Work in Fishing Convention" 2008 39(2) *Ocean Development & International Law* 119 128.

42 See fn 3 21 23 above.

larger working crew.[43] However, a new trend has emerged whereby smaller vessels fishing expeditions can be measured in weeks. About the catch, the migration of fish species as well as changes in climatic conditions affects making fishing operations unpredictable on board a fishing vessel. This can result in fishers having no work to do at all: when steaming to and from the fishing grounds, when no fish is available or when the weather makes fishing impossible.[44] For example, line fish such as snoek is not caught at night, meaning that fishers on such vessels get sufficient rest during the evening. On the other hand, for other fish species such as tuna, it can be caught at any moment in time resulting in fishers working for longer durations to maximise the allowable quota. The type of catch also plays a factor with respect to the dangers a fisher is exposed to while at sea. On most demersal fishing vessels,[45] fishers level of exposure, from shooting nets, hauling, unloading, gutting, cleaning, packing and icing fish, throughout both the day and night, in all weathers, are far less compared to fishers on fishing vessels that are mandated to catch tuna.[46] Once fish is caught, it must be processed, packed and be stored in a cold area. Should the next catch also present good results, the crew will have to continue processing the fish, ensuring the fish are stored under favourable temperatures to prevent any of the products from becoming rotten.[47] This results in fishers having to work for longer periods of time and that these

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43 See fn 3 23 above.

44 Politakis “From Tankers to Trawlers: The International Labour Organization's New Work in Fishing Convention” 2008 39(2) *Ocean Development & International Law* 120.

45 A demersal fishing trawler is a fishing vessel. What makes it unique is the gear they use to catch fish. The demersal trawler uses a cone shaped net that is towed on the seabed to target demersal fish species. The mouth of the trawl is held open by a pair of trawl doors (Otter Boards). See Seafish “Demersal Trawl- General” http://www.seafish.org/geardb/gear/demersal-trawl-general/ (accessed 2017-05-02).

46 See fn 3 21 above.

47 All the fish processing normally complies with the Hazard Analysis and Critical Control Points (HACCP) standards under the supervision of the Ministry of Agriculture, Water and Forestry. The HACCP is a food safety quality control system which encompasses the entire food supply chain from raw material production to sourcing and handling, manufacturing and distribution and eventually preparation and consumption of the final product. HACCP aims to eliminate

working hours could at times exceed the maximum working hours envisaged in national legislation. To add to the diversity, some vessels have multiple licences allowing them to target more than one species of fish.

Namibia has a highly diverse and commercially industrialised fishing industry, with an estimate of 20 different types of commercial fish species.[48] For example, Namibia has demersal fisheries. These consist of demersal trawlers ranging from 23m to 70m in length and freezer trawlers ranging from 24m to 73m in length.[49] These vessels normally target hake, which is caught in deeper water.[50] There are also trawler-fishing vessels ranging 19m to 38m in length which fish more inshore for monkfish sole and kingklip.[51] In addition, there are demersal long-liners fishing vessels ranging from 19m to 42m in length which also targets hake, with smaller quantities of highly valuable kingklip and snoek. In the mid-water fishery, fishing trawlers range from 55m in length to 120m and are licensed to fish for horse mackerel. In the purse-seine fishery:[52] the fishing vessels range from 21m to 51m in length and target pilchard for canning. Juvenile horse mackerel and anchovy, which occur sporadically in Namibian waters, are also taken for the fish meal.[53] Deep-water fishery normally consists of deep-water fishing trawlers ranging 19m to 31m in length; these normally target orange roughy

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root causes of food contamination whether they be biological, chemical or physical in nature or due to faulty or absent procedures.

48 FAO "Profile De La Pêche Par Pays: The Republic of Namibia" http://www.fao.org/fi/oldsite/FCP/en/nam/profile.htm (accessed 2017-05-02).

49 *Ibid*.

50 *Ibid*.

51 *Ibid*.

52 It is a method of fishing that employs a dragnet. See FAO "Fishing Techniques" http://www.fao.org/fishery/fishtech/40/en (accessed 2017-08-21).

53 *Ibid*.

and alfonsino.[54] For tuna fishery, the fishing vessels typically range anything from 15m to 81m length utilising long-line and pole-and-line gear to target albacore, bigeye, swordfish, and skipjack, including pelagic sharks. [55] In the rock lobster fishery: the fishery for rock lobster vessels range from 6m to 53m in length normally use lobster traps. In the deep-sea red crab fishery: deep-water traps are used to target red crab, and these vessels range from 49m to 56m in length. In commercial line-fisheries: These type of fishing vessels ranges from 5m-35m in length and operate offshore targeting kob, steenbras, snoek and galjoen. As mentioned earlier, the vicissitudes and unpredictability of nature in the fishing operations play an important part in determining the extent of operations at sea. Catches, as well as changes in climatic patterns, affect in making fishing and activities unpredictable on board a fishing vessel. It is apparent that the working conditions of fishers differ considerably amongst fishers themselves on different type fishing vessels. These factors contribute the difficulty of regulating their basic conditions of employment, especially hours of work and wages for the fishers.

Another characteristic for the fishers' is how they earn their wages. In the commercialised fishing industry, the general practice is to give fishes a basic wage and thereafter earn a commission from the share-catch. The manner in which the fish commission is calculated in the fishing industry is highly controversial. The commission is the amount payable to the employee for fish landed multiplied by the unit tonne, where applicable, and the commission rate for the rank in which the employee is signed on the vessel. The commission rates are as per the rates in existing individual plant level agreements. The controversial aspect is that the employer/fishing company sets the rate of the amount per tonne a fisher earns as commission. In other words, there is no clear standard for the regulation of the fish

54 *Ibid*.

55 *Ibid*.

commission. In some instances, when the employer weighs the catch no one is there to verify the weight. As a result, due to the payment of commission, it is a common occurrence of huge pay discrepancies between fishers working within the same fishing industry but for different companies. Furthermore, in some instances, the employer pays fishers commission instead of overtime, public holidays, night allowance and work on Sundays. By paying workers with a commission based incentive, it incentivises them to work excessive hours, as the more fish they catch of value,[56] the more the fisher earns. The negative effect of this wage model is that it leads to the fatigue of fishers, which can increase injuries while on board the fishing vessel. The next section will provide an overview of the relevant general international standards applicable to fishers.

3 INTERNATIONAL HUMAN AND LABOUR RIGHT INSTRUMENTS FOR FISHERS

By virtue of being a human being; fishers have rights within international human rights instruments and international labour instruments. Most States accept as authoritative the international human rights standards laid out in the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR");[57] the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR");[58] and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred

56 Within the fishing industry, fish species are worth different amounts. For example, generally fishers in the hake industry earn more from share-catch commission compared to those in the pilchard industry.

57 *Universal Declaration of Human Rights U*N Doc. A/810. Hereinafter referred to as the UDHR.

58 1966 *International Covenant on Civil and Political Rights* 999 UNTS 171 and 1057 UNTS 407. Hereinafter referred to as the ICCPR.

to as “the ICESCR”).[59] The UDHR, ICCPR and the ICESCR make up the International Bill of Rights.[60] State Parties to the UDHR, ICCPR and the ICESCR accept the legal as well as the moral obligation to promote and protect human rights and fundamental freedoms.[61] Important to note that the UDHR is a mere declaration. The UDHR is not binding on a State, it merely serves as guiding principle.

The General Assembly of the United Nations (hereinafter referred to as “the UN”) in December 1948 adopted the UDHR. The UDHR sets in place for all UN Member States a general standard that will provide rights to be enjoyed by the workers as human beings. One of the most important core rights of the UDHR is the right to dignity.[62] Human dignity is the basis for shaping to promote the greatest production and widest possible sharing, of values amongst human beings.[63] The right to dignity plays an influential role in the manner laws are adopted and interpreted. As such, human dignity is a fundamental right in all spheres of the life of any person. Other rights provided for in the Declaration include the right to be free from discrimination;[64] the right to life, liberty and security of the person;[65] the right to be free from torture or

59 1966 *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3. Hereinafter referred to as the ICESCR.

60 See Fact Sheet No.2 (Rev.1) “The International Bill of Human Rights” available at http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (accessed 2016-06-20).

61 *Ibid.*

62 See the Preamble, Art 1, Art 22, Art 23 of the UDHR.

63 McDougal "Perspectives for an International Law of Human Dignity" 1959 *Faculty Scholarship Series Paper* available at http://digitalcommons.law.yale.edu/fss_papers/2612 (accessed 2016-06-20) 4.

64 Art 7 of the UDHR.

65 Art 3 of the UDHR.

inhuman and degrading treatment or punishment;[66] the right to a legal remedy;[67] the right to social security;[68] and the right to work;[69] and the right to just a favourable remuneration and the right to work. It is contended that the right just and favourable remuneration is necessary for an employment relationship in realising the right to human dignity. Although the right to a living wage is a universal, the employees in the fishing industry in Namibia are often paid wages they cannot survive on. As such, social protection for these employees is of importance.

The ICESCR protects the economic and social rights of a person.[70] The ICESCR provides, amongst others rights, the right to an adequate standard of living;[71] the right to education;[72] the rights to social security;[73] the right to work under safe and healthy working conditions[74] and within reasonable working hours.[75]

The ICCPR ensures the protection of civil and political rights. Other rights provided in the ICCPR include the right to life, [76] equality before the law,[77] the protection of

66 Art 5 of the UDHR.

67 Art 8 of the UDHR.

68 Art 22 of the UDHR.

69 Art 23 of the UDHR.

70 World Health Organisation "International Covenant on Economic, Social and Cultural Rights" available at http://www.who.int/hhr/Economic_social_cultural.pdf (accessed 2016-06-20).

71 Art 11 of the ICESCR.

72 Art 13 and 14 of the ICESCR.

73 Art 9 of the ICESCR.

74 Art 6 of the ICESCR.

75 Art 7 of the ICESCR.

76 Art 6 of the ICCPR.

77 Art 26 of the ICCPR.

minorities[78] and the right not to be held in slavery or servitude or to be required to perform forced or compulsory labour.[79] The States who are party to these conventions are obligated to provide an 'effective remedy' for their violation. Anyone who believes that they have been wronged and has exhausted all domestic remedies can take his or her complaint to the United Nations Human Rights Committee.[80]

When international bodies such as the UN make authoritative decisions of a world public order core human rights principles are taken into account.[81] Therefore, in terms of international human right standards, employees have the right to decent work and living conditions, even though the rights mentioned in the IBR are too general in scope and application.[82] Decent work is central to human rights and dignity in the workplace. The right to decent work and living conditions is essential for realising other human rights and forms an inseparable and inherent part of human dignity.[83] Employees working on board fishing vessels also have rights as workers depending on the scope of the definitions given in various instruments and notably those of the International Labour Organisation (hereinafter referred to as "the ILO"). The ILO has taken the lead in improving the rights of employees' on board fishing vessels.

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78 Art 27 of the ICCPR.

79 Art 8 of the ICCPR.

80 World Health Organisation "International Covenant on Civil and Political Rights" available at http://www.who.int/hhr/Civil_political_rights.pdf (accessed 2016-06-20).

81 Dougal, Lasswell, Chen "Human Rights and World Public Order: A Framework for Policy-Orientated Inquiry" 265 available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3601&context=fss_papers (accessed 2016-08-17).

82 Gross, Compa "Human Rights in Labour and Employment Relations: International and Domestic Perspectives" 2 available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1051&context=books (accessed 2016-08-17).

83 *Ibid* 15.

The ILO was created in 1919, as part of the Treaty of Versailles.[84] Understandably, the ILO was established as an independent body devoted to promoting social justice and to improve human and labour rights internationally.[85] The ILO has four key objectives: creating jobs; guaranteeing the rights at work; extending social security, and promoting social dialogue.[86] The aims and objectives of the ILO are set out in its Constitution, which declares, "universal and lasting peace can be established only if based on social justice" to ensure labour peace that is essential to prosperity. Its main strategic objective is to seek the improvement of social conditions throughout the world. This objective is carried out by firstly promoting and realising standards and fundamental principles and rights at work. Secondly, create greater opportunities for women and men to decent employment and income. Thirdly, enhance the coverage and effectiveness of social protection for all. Lastly, by strengthening tripartite and social dialogue. The ILO is not a static organisation. It adapts to the social change and requirements of the world this is evident by the ILO introduction of new international labour standards to meet the global market needs.[87]

Recognising the unique nature of the living and hazardous working conditions of employees on ships, the ILO deemed it necessary to establish minimum maritime labour standards. To this effect, the ILO has adopted two recent conventions setting a new precedent for international maritime labour standards for employees on ships.

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84 ILO "Origin and History" http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed on 2016-04-01).

85 ILO "Origin and History" http://www.ilo.org/global/about-the- ilo/history/lang--en/index.htm (accessed on 26-10-2015). ILO "Mission and Objectives" http://www.ilo.org/global/about-the-ilo/mission-and- objectives/lang--en/index.htm (accessed on 2016-08-17).

86 See ILO "Origin and History" http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed 2016-08-07).

87 See ILO "Changing Patterns in the World of Works" http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-c.pdf (access on 2016-06-28).

The conventions introduced are the 2006 Maritime Labour Convention[88] and the 2007 Work in Fishing Convention.[89] The Maritime Labour Convention (hereinafter referred to as "the MLC") deals with the general seafarers' industry, and the Work in Fishing Convention (hereinafter referred to as "the WIFC") deals with specific seafarers' known as fishers. The MLC defines a seafarer as any person who is employed or engaged or works in any capacity on board a ship to which the MLC applies.[90] The MLC and WIFC are relevant international instruments that incorporate a wide-ranging set of global standards and have as its main objectives the protection of fishers, and seafarers against exploitation by industries that control the marine sector. Both the MLC and the WIFC seek grant seafarers further legal protection and to provide seafarers with improved working and living conditions.[91] However, for this study, only the relevant ILO Conventions and more specifically the provisions of the WIFC are discussed in detail.

88 *Maritime Labour Convention* 45 ILM 792. Hereinafter referred to as the MLC.

89 The WIFC.

90 Art 2(1)(f) of the MLC.

91 ILO "Basic facts on the Maritime Labour Convention" http://www.ilo.org/global/standards/maritime-labour-convention/what-it does/WCMS_219665/lang--en/index.htm (accessed on 2016-11-04).

4 THE BACKGROUND OF THE NAMIBIAN LABOUR LEGISLATION

The history of the labour laws of Namibia[92] can be traced back to the early 1885 when the country was under German rule. At the time, the country was known as South West Africa.[93] In 1885, South West Africa became a German colony.[94] Before this South West Africa was colonised by Britain in 1879. Britain annexed the Port of Walvis Bay located at the coast in South West Africa, attaching it to the Cape Colony in South Africa.[95] On 9 June 1915, during the First World War, German troops surrendered to the South African troops under the command of General Louis Botha at Khorib and later in 1919 Germany also suffered a military defeat as a consequence of its involvement in the World War I. In 1919, the Treaty of Versailles dispossessed Germany of all its colonies, including South West Africa. In 1920, the League of Nations gave the mandate for governing Namibia to Great Britain. In terms of Article 22 of the Covenant of the League of Nations, Great Britain asked the Union of South Africa to govern South West Africa, as a mandate territory on its behalf. This mandate

92 Formally known as South West Africa.

93 History World "History of Namibia" http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad32 (accessed 2016-10-26).

94 Fenwick *Labour Law Reform in Namibia: Transplant or Implant* in Lindsay *Labour Reform in Developing and Transitional States* (2007) 319. See also Musukubili "Towards an Efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a Comparison with South African Standards" http://contentpro.seals.ac.za/iii/cpro/DigitalItemViewPageexternal?lang=eng&sp=108942&sp=T&sp=1&suite=def (accessed 2016-09-21).

95 For a further explanation on the labour relations in Namibia See Musukubili "Towards an Efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a Comparison with South African Standards" http://contentpro.seals.ac.za/iii/cpro/DigitalItemViewPageexternal?lang=eng&sp=108942&sp=T&sp=1&suite=def (accessed 2016-09-21) 84 88.

remained despite international pressure for South Africa to give up control over the territory.[96]

During the occupation of South Africa of South West Africa, the country had no comprehensive systems labour legislation in place. There existed only a series of fragmented pieces of labour laws fundamentally based on racial discrimination against black workers, who were largely excluded from the application of many of these statutes.[97] As a result, many previously disadvantaged employees were treated unfairly and in a discriminatory manner.[98] With mounting local and international pressure, the *apartheid* regime appointed a Commission of the Inquiry into Labour Matters in South West Africa, now known as Namibia, in 1989.[99] The Commission of Inquiry into Labour Matters in Namibia became known as the Wiehahn Commission.[100] The Wiehahn Commission recommended that at independence Namibia should:

- become a member of the ILO;
- ratify and adopt relevant international labour standards, and

96 RSA (Republic of South Africa) (1979) *Commission of Inquiry into Labour Legislation (The Wiehahn Commission)* (1979).Matz "Civilization and the Mandate System under the League of Nations as Origin of Trusteeship" available at http://www.mpil.de/files/pdf2/mpunyb_matz_9_47_95.pdf (accessed 2017-12-05).

97 LaRRi "Labour Rights in Namibia: Promoting Workers Rights and Labour Standards" available at http://vivaworkers.org/sites/default/files/research-reports/Struggle-for-Workers-Rights-2006.pdf (accessed 2017-10-08).

98 *Ibid.*

99 Known as Namibia.

100 As a result of the name of the Chairperson, Prof W. Wiehahn see Conradie *A Critical Analysis of the Right to Fair Labour Practices* (LLM dissertation) 2013 47. Similar to that of South Africa's position when it was in the process of attaining independence from Britain.

- consolidate all the fragmented labour legislation into one single Labour Code.[101]

Following the independence of Namibia in 1990, Namibia introduced the Namibian Constitution.[102] The Namibian Constitution declares that the national territory of Namibia consists of the whole of the territory "recognised by the international community through the organs of the United Nations".[103] This includes Namibia's territorial seas, contiguous zone, continental shelf and exclusive economic zone.[104] The Namibian Constitution embraced the concept of dignity as a constitutional right, a supreme value and a guide to constitutional interpretation. The Namibian Constitution introduced fundamental changes that resulted in many laws being introduced, amended or repealed.[105] This impacted significantly on the labour relations in Namibia. The Wiehahn Commission's recommendations had been gradually implemented, with the first becoming a member of the ILO and bringing about by the enactment of the post-independence Labour Act of 1992 and later changes implemented through the current Labour Act of 2007.[106] The Labour Act of 2007 deals with the fundamental rights and protection of employees, basic conditions of employment, health, safety and welfare of employees, unfair labour practices, trade unionism and employer's organisations, collective agreements, strikes and lockouts, prevention and resolution of disputes, and labour institutions.[107] Other important national legislative measures

101 Bauer *Labour and Democracy in Namibia*, *1971-1996* (1998) 104.

102 The Constitution of the Republic of Namibia, 1990.

103 Art 1(4) Constitution of the Republic of Namibia.

104 *Ibid*. See also Index Mundi "Namibia Maritime Claims" http://www.indexmundi.com/namibia/maritime_claims.html (accessed 2016-04-20).

105 For examples, the Namibian Labour Act 6 of 1992

106 ILO "Ratifications for Namibia" http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103008 (accessed on 2016-08-10).

107 11 of 2007.

include:

- The Regulations passed in terms of the Labour Act, [108] which include the rules of the conduct of conciliation and arbitration proceedings.
- The Regulations relating to health and safety of employees passed in terms of the repealed Labour Act of 1991.[109]
- The Rules of the Labour Court of 2008, promulgated in terms of the Labour Act.
- The Social Security Act 34 of 1994.
- The Employees' Compensation Act 5 of 1955.
- The Affirmative Action Act 29 of 1998.
- Employment Service Act 8 of 2011.
- The Merchant Shipping Act 57 of 1951.
- The Public Service Act 13 of 1995.
- The Public Service Commission Act 2 of 1990.

It is important to note that the Merchant Shipping Act of 1951 (hereinafter referred to as "the MSA") of Namibia,[110] regulates certain aspects of the labour laws for employees on vessels in the fishing industry. Chapter IV of the MSA deals with engagement discharge, repatriation, payment and discipline and general treatment of seamen, cadets and apprentice-officers.[111] Since its promulgation, the MSA was

108 11 of 2007.

109 These Regulations remain valid although made under an act that has been repealed. See s 2 under Schedule 2 if the Transitional Provisions, which states that any regulation promulgated in terms of the previous Act or the 2004 Act remains in force as it had been promulgated under this act as from the effective.

110 57 of 1951.

111 Chapter IV of the MSA 57 of 1951.

amended to adjust for certain provisions given to the independence of Namibia. Questions arise whether the MSA is line with the Namibia's national Labour Act and whether it is in line with international standards described above. Also, whether the national Labour Act of Namibia conforms with international standards in respect to fishers.

It is submitted that the above legislation seeks to position Namibia effectively in line with international standards. As the Preamble of the Namibian Constitution declares that the people of Namibia desire to promote amongst themselves the dignity of the individual and the unity and integrity of the Namibian nation "amongst and in association with the nations of the world". It is evident Namibia endeavours to be part of the international community by adhering to international standards. This has been supplemented in Article 95[112] and 144[113] of the Namibian Constitution.[114] It is clear that Namibia adopted a positive approach towards international law by introducing Act's that are in line with the international standards of the international community.[115]

112 Art 95(d) Constitution of the Republic of Namibia, 1990. Art 95(d) reads as follows: "The State Shall Actively Promote and Maintain the Welfare of the People by Adopting, *inter alia*, Policies Aimed at the Following: (d) Membership of the International Labour Organisation (ILO) and, Where Possible, Adherence to and Action in Accordance with the International Conventions and Recommendations of the ILO."

113 Art 144 Constitution of the Republic of Namibia, 1990. Reads as follows: "Unless Otherwise Provided by this Constitution or Act of Parliament, the General Rules of Public International Law and International Agreements Binding upon Namibia under this Constitution shall form Part of the Law of Namibia."

114 Constitution of the Republic of Namibia, 1990.

115 Some legal scholars have described the Namibian Constitution as an international law friendly. See, for instance, Devine, Dermont "The Relationship Between International Law and Municipal Law in Light of the Interim South African Constitution 1993" *International Law and Comparative Law Quarterly* 44 1.

5 RESEARCH FOCUS

Previously fishers received protection through other ILO maritime standards aimed at seafarers on merchant ships. However, the consolidated MLC excludes fishing vessels and fishers from its scope.[116] In terms of Article 2(3), the MLC allows a competent authority[117] to exclude particular categories of seafarers from certain provisions.[118] The competent authority referred to may be a cabinet minister, government or other authority having the power to issue and enforce regulations, orders or other instructions having the force of law in respect of the subject matter of the provision concerned.[119] In this regards, fishers were from the scope and application of the MLC during the drafting process of the MCL.[120] As a result, the main focus will be on the provisions of the WIFC. The present dissertation will accordingly be limited to a specific type of seafarer known as fishers. This research will focus on fishers' basic condition of employment conditions in the fishing industry in Namibia.
The grave concern in Namibia is that the fishing industry does not implement/comply with the national Labour Act of Namibia, thereby disadvantaging or excluding the fishers from certain conditions of employment guaranteed by the labour legislation and other international labour standards.[121] Due to the poor working condition of

116 Art 2(4) of the MLC. See also ILO "Work in Fishing Convention and Recommendations, 2007 Action Plan 2016" available at http://transparentsea.co/images/1/12/Wcms_161220.pdf. (accessed 2016-06-23) 2.

117 Art 2(3) of the MLC.

118 See also the Report on the Work in Fishing Convention at www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-iv-2a.pdf (accessed 2016-04-20).

119 Art 2(1)(a) definition of competent authority of the MLC.

120 ILO "Work in Fishing Convention and Recommendation, 2007 Action Plan 2016" available at http://transparentsea.co/images/1/12/Wcms_161220.pdf. (accessed 2016-06-03) 2.

121 *Ibid*. Sun "Salvation coming for seafarers" http://www.namibiansun.com/labour/salvation-coming-for-seafarers.89720 (accessed 2016-04-20). See also Dimitrova and Blampain Seafarers Rights in the Globalized Maritime Industry 2010 54. Human Rights at Sea "Slavery at Sea" https://www.humanrightsatsea.org/slavery-at-sea/ (accessed 2016-06-20). ITF

employment, the fishers of Namibia engaging in intermittently wild cat strikes due to poor employment and living conditions on board fishing vessels. The focus of this study will be on the condition of employment for fishers in Namibia.

The present dissertation intends to compare the legal rights of the conditions of employment of fishers in Namibia to those of South Africa. Specific reference is made to the regulation of working hours, wages and the approach Namibia and South Africa take in regulating fishers conditions of employment. The rationale for using South Africa as a comparison is that before the independence of Namibia, Namibia was seen as South Africa's fifth province., Most laws that were passed in South Africa were subsequently immediately duplicated in Namibia or closely resembled those of South Africa.[122] This is exactly the position of the 1951 MSA of Namibia. It is also important to note that South Africa has ratified both the MLC and the WIFC. Subsequently, South Africa has made amendments to its national legislation to conform to the international standards.

This study intends to answer the following questions:

1. To what extent are labour rights of fishers in Namibia consistent with international standards?
2. To what extent does Namibia's domestic legislation protect fishers in Namibia in regards to fishers conditions of employment?
3. What approach did South Africa take in regulating fishers' basic conditions of employment?

Seafarers "Protection for the Vulnerable" (2013) http://www.itfseafarers.org/Protection-for-the-vulnerable.cfm (accessed 05-04-2016).

122 Van Rooyen *Portfolio of Partnership – An analysis of Labour Relations in a transistional Society Namibia* (1996).

4. Are there any recommendations on how Namibia can improve the labour rights for fishers in Namibia?

6 LIMITATIONS

The notion of State sovereignty is an important concept deeply embedded in the United Convention on the Law of the Sea (hereinafter referred to as "the UNCLOS").[123] When a State assumes legal authority over a ship by granting of its flag, the State also assumes a certain obligation to take measures to ensure that the vessel, viewed both as an instrument of navigation and as a collective of ship-users, acts in a fashion consistent with international law.[124] Some States permit foreign shipowners to register their vessels under its flag State.[125] These vessels are thereby known as the flag of convenience vessels.[126] The flag State must demonstrate its connection with the ship in question by providing a "genuine link" between the ship and the State before exercising effective jurisdiction and control in administrative, technical, and social matters over ships flying its flag.[127] UNCLOS has not defined the term genuine link. To date, there is not a universal understanding of the clear meaning of the term "genuine link" as such this research paper will not investigate the meaning of "genuine link" as it will not serve the purpose of the study. As such, for this study, the complexity of dealing with working conditions of fishers resulting from the notion of the flag of convenience will not be discussed. Furthermore, due to the nature of this study, the jurisdictional aspect of a State to act in respect of UNCLOS will not be discussed.

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123 *United Nations Convention on the Law of the Sea* 1833 UNTS 3. Hereinafter referred to as UNCLOS.

124 Smith *State Responsibility and the Marine Environment, The Rules of Decision* (1988) 154.

125 For example, many ships find Panama's flag convenient. See BBC "Why So Many Shipowners Find Panama's Flag Convenient" (2014-08-05) http://www.bbc.com/news/world-latin-america-28558480 (accessed 2016-08-21).

126 Tanaka The International Law of the Sea (2012) 157.

127 Art 91(1) UNCLOS.

7 AIMS AND OBJECTIVES

The aims and objectives of this research are to explore the basic condition of employment for fishers provided by Namibia's national legislation. The purpose of this proposed research is to usher Namibian legislative reform in taking progressive legislative and enforcement mechanisms in ensuring the dignity of fishers in Namibia are protected and upheld. Furthermore, so clear minimum standards for fishers can be provided. In doing so, the policymakers will have a better comprehension ofwhat legislative reforms needs to take place to grant further protection to fishers to advance the labour rights of fishers in Namibia.

8 RESEARCH METHODOLOGY

The dissertation will be based on and researched from a variety of sources which includes both primary and secondary sources of data. The main sources will comprise of international law, legislation, union agreements of Namibia, proposed legislation and relevant case law dealing with seafarers and the various legal systems which will be researched for a comparative analysis to analyse the respective legal regimes similarities and differences. For this purpose, various pieces of legislation that are relevant to this research project will be accessed and studied. The cases that will be of importance in the researching of this topic include both national and foreign cases.

The secondary sources will include texts, articles, reports, papers, interviews with unions and internet sources. The books utilised in the researching of the proposed research topic will consist of some legal textbooks, theses and dissertations by various academics and legal experts in the field of maritime human rights law. The articles that will be used as resource materials include articles from various national and international legal journals, as well as newspapers. Papers presented at conferences

will also be used where applicable. These sources will be subject to a comparative analysis on a national and international level. The internet will also be used as a research medium, especially searching for overseas newspapers or journals, as well as for any other information that might not be easily found in Namibia South African literature or research databases.

9 CHAPTERS OUTLINE

Chapter 2 discusses the international labour standards for fishers. The chapter starts off with the discussion of the role of the IBR in realising decent work. Thereafter a discussion on the role of the ILO in respect to fishers. The discussion revolves around the regulation of basic conditions of employment specifically hours of work and wages and other conditions of employment, as well as the difficulty of setting a standard for the conditions of employment relating to hours of work and wages for fishers. Before concluding chapter 2, the enforcement mechanisms available in terms of the ILO's Conventions relating to freedom of association and collective bargaining is discussed.

Chapter 3 discusses the conditions of employment for fishers in Namibia. The chapter discusses the Namibian Constitution in respect to Namibia's international obligation in terms of human rights and labour rights. Thereafter the domestic legislation of Namibia is discussed. In this regard, the Labour Act and the MSA are discussed relating to hours of work and wages. In respect to other conditions of employment, various domestic legislation is discussed. Before concluding, the enforcement mechanisms available for fishers are discussed. The discussion of chapter 3 seeks to determine the extent of conformity of Namibia's national legislation in respect to the international standards.

Chapter 4 is a comparison chapter of Namibia and South Africa in the approach of regulating the conditions of employment relating to hours of work and wages. The regulation of other conditions is not discussed in detail the focus is more on the approach South Africa has taken in regulating basic conditions of employment for its fishers. South Africa has two main mechanisms in regulating the minimum conditions of employment for its fishers, namely the bargaining council in the fishing industry and the squid fishing statutory council. The rationale for focusing on the bargaining council and the statutory council is to determine whether there are lessons to be learned for Namibia from South Africa for the realisation of decent work for fishers. Bear in mind the bargaining council caters for roughly six different sectors compared to the squid fishing statutory council that only caters for one.

Chapter 5, the final chapter, will conclude and make recommendations. Chapter 5 seeks to answer the following:

1. To what extent are labour rights of fishers in Namibia consistent with international standards?
2. To what extent does Namibia's domestic legislation protect fishers in Namibia in regards to fishers conditions of employment?
3. What approach did South Africa take in regulating fishers' basic conditions of employment?
4. Are there any recommendations on how Namibia can improve the labour rights for fishers in Namibia?

In addition, recommendations are made on how Namibia can improve the regulation of conditions of employment for fishers.

CHAPTER 2
INTERNATIONAL LABOUR STANDARDS FOR FISHERS

2 1 INTRODUCTION

As mentioned in chapter 1, there is much room for improvement of the employment conditions of those living and working at sea, including for fishers. The fishing industry is a globalised industry; fish is also regarded as one of the most traded[128] commodities.[129] The fisheries sector covers a range of economic activities related to capturing, harvesting, processing, and trading of marine and freshwater living resources, which may take place on board fishing vessels and land.[130] It is recognised that most fishing operations provide acceptable, often decent working conditions for fishers, but not all. In some cases, fishers continue to face abuses of human rights and labour conditions, contravening international human right standards and international labour standards. For example, there are instances; where fishers are

128 The demand for and trade in fish has also increased steadily over a number of decades. The increase in demand has led to the intense competition in the commercial fishing sector to meet the demand, leading to a depletion of fisheries resources around the world. The increase in demand has led to the exploitation of employees on board fishing vessels. See Coning *Caught at Sea Forced Labour and Trafficking in Fisheries* (2013) 47.

129 FAO "International Guidelines for Securing Sustainable Small-scale Fisheries" (2012a) 67. According to the FAO, in 2010, fishers, who are employees on fishing vessels, contributed to the assured livelihoods of about 800 million people. See FAO "The State of the World Fisheries and Aquaculture" (2012a) 43 46.

130 'Marine and fresh water living resources' includes fish, shellfish, marine mammals, marine and fresh water algae and plants, and corals

exposed to many risks, related to health,[131] safety,[132] payment of wages,[133] forced labour,[134] excessive working hours,[135] inadequate social protection,[136] and human trafficking.[137] An additional factor contributing to fishers' plight is the irregularity of pay and lack of transparency relating to a fisher's wage. The reason for this is that traditionally, fishers are considered as "self-employed" because of share-catch, which means that the amount a fisher is paid, was determined by the value of the catch.[138]

Regardless of the nature of fishers' work, fishers have rights within international human rights and international labour rights to decent working conditions by being human beings. Most States accept as authoritative the UN instruments on international

131 See fn 18 117. Oldenburg, Baur, Schlaich "Occupational Risks and Challenges of Seafaring" 2010 52 Journal Occupational Health 249 256. Sea also Griffith "The Seafarer Exposures, Environmental Hazards, and Cancers" available at http://web.deu.edu.tr/maritime/imla2008/Papers/29.pdf (accessed 05-04-2017).

132 Hubilla "An Analytical Review of the Treatment of Seafarers Under the Current Milieu of International Law Relating to Maritime Labour and Human Rights" available at http://commons.wmu.se/all_dissertations/249 (accessed 05-04-2017).

133 International Transport Workers' Federation *Out of Sea Out of Mind* (2006) 6.

134 Coning *Caught at Sea Forced Labour and Trafficking in Fisheries* (2013) 3.

135 Allen, Wadsworth, Smith "The Prevention and Management of Seafarers' Fatigue: A Review" 2007 *International Maritime Health* 58 168.

136 ILO "Sub-Group of the High-Level Tripartite Working Group on Maritime Labour Standards" available at staging.ilo.org/public/libdoc/ilo/2002/102B09_148_engl.pdf (accessed 05-04-2017).

137 UNODC "United Nations Office on Drugs and Crime Transnational Organized Crime in the Fishing Industry Focus On: Trafficking in Persons Smuggling of Migrants Illicit Drugs Trafficking" available at http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf (accessed 17-04-2017). See also, International Labour Office, Governance and Tripartism Department- Special Action Programme to Combat Forced Labour, Sectorial Activities Department Caught at Sea Forced Labour and Trafficking in Fisheries (2013).

138 This isn't the case in all circumstances, in most commercialised fishing industry, the general practice is to give fishes a basic wage and thereafter fishers earn they earn a commission. Regardless of whether there is a minimum wage or not, fishers generally work for longer hours in order to catch as much fish as possible, increasing their commission.

human rights standards laid out in the UDHR;[139] the ICCPR;[140] and the ICESCR.[141] The UDHR, [142] ICCPR, and the ICESCR make up the IBR.[143] State Parties to the IBR accept the legal as well as the moral obligation to promote and protect human rights and fundamental freedoms.[144] The IBR are necessary instruments in the realisation of the concept of decent work for all employees, and it plays an influential role in the international labour standards adopted by the ILO.[145] Fishers enjoy rights as workers depending on the scope of the definitions of the various instruments, notably those of the ILO.

The ILO[146] is a UN specialised agency that is active in promoting and establishing international standards for all employees, including seafarers, and where specifically applicable fishers. These international standards take the form of Conventions. These Conventions result from debates or deliberations that take place during the international labour conferences, which are based on value judgments developed to protect workers' rights. The ultimate goal of these Conventions is to enhance employees job security and improve their terms and conditions of employment on a

139 See fn 57.

140 See fn 58.

141 See fn 59.

142 Important to note that the UDHR is merely a non-binding declaration.

143 See fn 60.

144 *Ibid*.

145 Sengenberger *International Labour Organization Goals, Functions and Political Impact* (2013) 18.

146 The Constitution of the International Labour Organisation (ILO) was originally contained in Part XIII of the 1919 Treaty of Versailles. The ILO became part of the UN system as a specialised agency following the Second World War please provide a reference. In addition, the aims of the ILO were modified in 1944 by the Declaration of Philadelphia to reflect a broader interest in human rights, employment, living conditions, development and social welfare. give a reference to the Declaration and then add the following See de la Cruz, von Potobsky, and Swepston *The International Labour Organization: The International Standards System and Basic Human Rights* (1996) 3 15.

global scale. The standards are created to serve as a worldwide minimum level of protection from inhumane labour practices. On adoption of these standards by the International Labour Conference, Member States are required under the ILO Constitution to submit them to their competent authorities, which in most cases is the Member States' Parliament. This is when the Member States consider the ratification of the instrument. By ratifying Conventions of the ILO, a Member State formally commits itself to putting the Conventions provisions into effect, both in national law and in practice. Upon ratification by a Member State, the Convention comes into force for that Member State one year after the date of ratification.[147] Also, the ILO publishes recommendations[148], which are not international treaties; they merely serve as non-binding guidelines on ILO members. Furthermore, they place certain Constitutional obligations and impose certain formal and moral persuasive force when establishing guiding principles for national policy and practice.[149]

There are other specialised organisations that play an important role in establishing international standards for seafarers such as the IMO,[150] Organisation for Economic

147 Art 19(5)(b) of the ILO Constitution.

148 Recommendations relating to fishers supplement the applicable ILO Conventions by providing principles which elaborate on standards provided for in terms of the Conventions. In some instances, the Recommendations provide a higher standard compared to the standards provided in the Conventions. For example, in the WIFC makes provision for crew members to receive food, in the Recommendations it provides that the cooks should be trained and qualified for such a position. Thus, creating a higher standard when compared to the WIFC.

149 ILO "Conventions and Recommendations" http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (accessed 2016-10-25). For example, the WIFC is supplemented with guiding principles on how to implement the WIFC, however it is not mandatory to follow those guiding principles. Recommendations, generally, merely serve as tool on how the international instruments are to be adopted.

150 International shipping transports more than 80% of the global trade to people and communities all over the world. The International Maritime Organisation (IMO) is a specialised agency of the United Nations that sets a global standard setting authority for the safety,

Cooperation and Development,[151] and the International Transport Workers Federation (hereinafter referred to as "the ITF").[152] In some instances, the ILO collaborates with other specialised organisations to improve standards at work. For example, the ILO co-operates with the IMO in the field of technical assistance and maritime training; this cooperation culminated in the adoption by the IMO of the Convention on Standards of Training, Certification and Watchkeeping (hereinafter referred to as "the STCW").[153] However, this study is primarily limited to the IBR and the instruments adopted by the ILO, relating to fishers and where necessary, seafarers.

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security and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented. See IMO Conventions "Implications Of The United Nations Convention On The Law Of The Sea For The International Maritime Organization" I:\LEG\MISC\8.doc (accessed 2017-10-08). For example, the IMO has adopted the International Convention for the Safety of Life at Sea (SOLAS) 1974, the, International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of the 1997 (MARPOL), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) as amended, including the 1995 and the 2010 Manila Amendments. For a full list of various instruments adopted by the IMO see IMO "List of IMO Conventions" http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx (accessed 05-04-2017).

151 The Organisation for Economic Cooperation and Development (OECD) is an international organisation. The OCED main aim is the promotion of policies to stimulate and harmonise its members' efforts in favouring developing countries. See Congressional Research Service "The Organisation for Economic Cooperation and Development" RS21128. The OECD has also published extensively in regards to the economics in different industries, see OECD "OECD Food, Agriculture and Fisheries Papers" http://www.oecd-ilibrary.org/agriculture-and-food/oecd-food-agriculture-and-fisheries-working-papers_18156797 (accessed 05-04-2017).

152 The International Transport and Worker's Federation (ITF) is an international; federation of transport workers' trade unions. The ITFs' goal is to: promote respect for trade union and human rights worldwide, work for peace based on social justice and economic progress and to provide general assistance to transport workers in difficulty. See ITF "What We Do" http://www.itfglobal.org/en/about-itf/what-we-do/ (accessed 05-02-2017). For example, the ITF has published a guide for unions on the WIFC, see ITF The ILO Work in Fishing Convention 2007 A Guide for Unions (2012).

153 See fn 168 below.

This chapter describes and evaluates the role of the IBR and the role of the ILO to the realisation of decent work for fishers. In this regard, the section will discuss how the rights contained in the IBR are related to the advancement of the realisation of decent work for fishers. Thereafter, the historical and latest development of the ILO's' efforts in regulating the conditions of employment for fishers. Owing to the nature of this study, it is not envisaged to do a historical development on all the conditions of employment; the primary focus will be on hours of work and wages. Thereafter, specific reference to the labour standards provided for in the WIFC for fishers is provided. [154] Finally, the international standards for enforcement will be provided.

2 2 THE INTERNATIONAL BILL OF RIGHTS (IBR)

Shortly after the Second World War, the UDHR was adopted by the General Assembly of the United Nations on the 10th December 1948. The UDHR has been hailed as one of the greatest achievements of the United Nations. Even though the UDHR is not binding on Member States, as it is a Declaration, it does have persuasive force on how States should behave when dealing with human right issues. The UDHR sets out fundamental rights and a common standard for all United Nation Member States [155] and proclaims rights which workers,[156] as human beings, are entitled to enjoy.[157] It

154 WIFC.

155 For a full list of Member States see United Nations “Member States” http://www.un.org/en/member-states/index.html (accessed 07-04-2017).

156 This integrated approach to workers’ rights as human rights was set out in the Declaration of Philadelphia.

157 The reason for such praise relates to the rights the UDHR provides for. These rights include the right to be free from discrimination, the right to life, liberty and security of the person, the right to be free from torture or inhuman and degrading treatment or punishment, the right to a legal remedy, the right to a fair trial or public hearing, the right to free expression, the right to social security, the right to just and favourable remuneration, the right to work, the right to free choice of employment, the right to protection against unemployment, the right to join trade

asserts that all men are born free and equal in dignity and rights, irrespective of race, colour, sex, language, religion, or political opinion.[158] The concept of equality of men is deeply rooted in the UDHR, which does not mean equality in society, but merely equality before the law, and equal opportunity. Thus, it is if everyone has the right to be considered a person before the law [159] and that all persons are equal in court and entitled to the equal protection of the laws.[160] Also, the UDHR includes economic, social, and cultural rights, which are "indispensable for dignity and free development of personality",[161] and to "the right to social security",[162] which entitles everyone to access to welfare State provisions. The UDHR recognises that the right to social security is essential when a person does not own the necessary property or is not able to secure an adequate standard of living through work, due to unemployment, old age, or disability.[163] At the core of social rights is the right to an adequate standard of living.[164] The enjoyment of this right requires that everyone shall benefit from the necessary subsistence rights: adequate food and nutrition, clothing, housing, and necessary conditions of care and health services.[165] To claim the benefits associated with these social rights, one has to enjoy certain economic rights. Amongst these economic rights are several work-related rights, including the right to social

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unions, the right to rest and leisure, the right to a standard of living adequate for the health and well-being of the person and his family.

158 Art 1 and Art 2 UDHR.

159 Art 6 UDHR.

160 Art 7 UDHR.

161 Art 22 UDHR.

162 Art 22 UDHR.

163 Art 22 UDHR.

164 Art 25 UDHR.

165 See Donders, Volodin *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007) 20 22.

protection,[166] the right to rest and leisure including reasonable limitation of working hours and periodic holidays with pay,[167] and the rights to form and join trade unions.[168] Moreover, the UDHR addresses rights that are to be afforded in the sphere of work such as Article 23 and Article 24. Article 23 provides:

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

One of the most important core rights of the UDHR is the right to dignity which is a central component to realising decent work.[169] The UDHR Preamble states, "recognition of the inherent dignity and the equal and unalterable rights of all members of the human family are the foundation of freedom, justice, and peace in the world."[170] Human dignity is the basis for shaping to promote the greatest production and widest

166 See Art 22 and Art 25.

167 Art 24 UDHR.

168 Art 23 UDHR.

169 Preamble Art 1, Art 22, Art 23 UDHR. All human rights are inherent to human dignity. As a result, all human rights have equal status, and accordingly, they "cannot be ranked... in a hierarchical order." The UDHR states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The same words are reiterated in the preambles to the ICESCR and the ICCPR. The equal status of rights was also reaffirmed in the 1993 Vienna Declaration, which urged the international community and national governments alike to treat all human rights "in a fair and equal manner."

170 Preamble of the UDHR.

possible sharing, of values amongst human beings.[171] It is argued that the right to dignity has three elements. Firstly, every human being possesses an intrinsic worth merely by being human. Secondly, the intrinsic worth should be recognised and respected by others, and some forms of treatment by others are inconsistent or required by respect for this intrinsic worth. Lastly, recognising the inherent worth of the individual requires that the State should be seen to exist for the sake of the individual human being.[172] This right governs the manner in which laws are adopted and interpreted. As such, human dignity is a fundamental right in all spheres of human beings' even at the workplace. The UDHR thereby links separate pledges in the UN Charter and grounds the moral obligations to promote full employment and conditions of economic and social progress in a multi-dimensional concept of the right to decent work.

The ICESCR provides the broadest coverage for the right to decent work by protecting human beings economic and social rights.[173] The workers' rights in the ICESCR are similar to those in the UDHR. However, the ICESCR provides greater detail on each of the elements of the right to decent work.[174] For example, the ICESCR establishes

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171 McDougal "Perspectives for an International Law of Human Dignity" 1959 Faculty Scholarship Series Paper 2612 at http://digitalcommons.law.yale.edu/fss_papers/2612 4 (accessed 2016-06-21).

172 *Medical Association of Namibia and Another* v *Minister of Health and Social Services and Others* (A 217/2012) [2013] NAHCMD 362.

173 World Health Organisation "International Covenant on Economic, Social and Cultural Rights" available at http://www.who.int/hhr/Economic_social_cultural.pdf (accessed 2016-06-21).

174 UN Committee on Economic, Social, & Cultural Rights, General Comment 18: The Right to Work, UN Doc E/C.12/GC/18.The committee provided in relation to Art 6 (Right to work) "This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration." Under General Comment 18, decent work also provides income sufficient to support workers and their families. The General Comment draws on several ILO conventions to determine the content of the right to decent work. Thus showing the interlink between labour rights and human rights.

the right to work that is freely chosen and the right to full and productive employment under conditions safeguarding political and economic freedoms of the workers.[175] The ICESCR sets out the right to just and favourable conditions of work, including fair wages and equal remuneration for equal work, a decent living for the worker and family, safe and healthy working conditions, reasonable limitations on work hours, and periodic holidays with pay.[176] The ICESCR provides for union rights, including the right to form and join trade unions, the right of trade unions to function freely, and the right to strike.[177] The ICESCR also provides the right to social security, including social insurance.[178] Lastly, the ICESCR provides for the right to an adequate standard of living.[179] The State who is party to these Conventions is obligated to provide an 'effective remedy' for their violation. Individuals and groups under the jurisdiction of States that have ratified the Optional Protocol to the ICESCR may bring complaints claiming breaches of the rights in the ICESCR.[180]

While it is easier for the Member States to accept these provisions in general or to commit to them as goals of their policies, the question posed is how do we define the nature of States parties' obligations? The Committee on Economic, Cultural, and

175 Art 6 ICESCR.

176 Art 7 ICESCR.

177 See Art 8 and Art 9 of the ICESCR.

178 Art 9 of the ICESCR.

179 Art 11. Note too that many other rights in the ICESCR are also work-related. See, e.g., id. at arts. 10, 12, 13, 15 (establishing the right of working mothers to paid leave before and after childbirth, the right to industrial hygiene, the right to technical and vocational education, and the right of authors to have the protection of interests resulting from scientific, literary, or artistic production). For a full table of work-related rights in the ICESCR see MacNaughton and Frey "Decent Work for All: A Holistic Human Rights Approach" 2011 26(2) *American University International Law Review* 441 462.

180 Namibia has not party to the ICESCR Optional Protocol. See United Nations Treaty Collection "Human Rights" https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&clang=_en (accessed 06-04-2017).

Social Rights, was set up by the Economic and Social Council of the UN in 1985,[181] so recognised this problem, and tried to address it in several statements.[182] One of the Committees' comments on the matter was "… while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such measures should be deliberate, concrete, and targeted as clearly as possible towards meeting the obligations recognised in the Covenant".[183] However, there must be mechanisms in place, which eventually will have to be improved over time, and which finally create a State where socio-economic rights are being enjoyed by all the citizens of a nation, without discrimination.[184] The "tools" to achieve this objective are legislation, an effective system of judicial rectification, and so-called other measures of an "administrative, financial, educational, or social"[185] nature.[186] The crucial provision of the Covenant itself can be found in Article 2 paragraph 1 of the ICESCR. The words "to take steps … to the maximum of its available resources"[187] in particular need further clarification, which the Committee tried to deliver in a statement given in the year 2007.[188] The Committee concluded that all steps have to be taken by a State,

181 Economic and Social Council 1985 Resolution 1985/17 (28 May1985): Review of the Composition, Organization and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights available at http://bit.ly/Z2RmUt (accessed 10-09-2017).

182 *Ibid*.

183 Committee on Economic, Social, and Cultural Rights 1990 General Comment 3: The Nature of States Parties Obligations http://bit.ly/16tj3VO (accessed 2017-09-10) para 2. Hereinafter referred to as CESCR 1990.

184 Art 2 para 2 of the ICESCR.

185 CESCR para 7.

186 CESCR para 3 ff.

187 Art 2 para 1 of the ICESCR

188 Committee on Economic, Social and Cultural Rights 2007 Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant http://bit.ly/16tjr6v (accessed 10-09-2017). Hereinafter referred to as CESCR 2007.

which is "adequate"[189] or “reasonable” on the one hand, while at the same time not exceeding the level of available resources on the other.[190]

The ICCPR ensures the protection of civil and political rights. These rights provide a working environment for States to provide its members human rights. The ICCPR merely elaborates on the civil and political rights and freedoms listed in the UNDHR. As without civil and political stability, it is hard to provide such social rights. A State can only provide a person with the entitlements to the rights within these international human rights instruments according to the available resources in the State. For example, it would not make sense for a State to provide each person with the entitlement to be living in a new house, when the State does not have the means to provide for such or if resources are directed to combat an armed conflict currently taking place inside the country, threatening people’s health, lives and access to other rights.

In relation to work, the provisions of the IBR are intended to lay down standards of behaviour for each State. When a State ratifies a human rights instrument,[191] it is under a duty to create working conditions that respect, protect, and ensure human rights. The UDHR refers to the “inalienable rights” of all human beings, and bodies charged with the implementation of human rights have taken the view that individuals cannot validly agree to give them up.[192] Thus, international human rights cannot be removed,

189 *Ibid* para 8.

190 *Ibid* para 8 ff.

191 Important to note the UDHR cannot be ratified, it is merely a Declaration that has persuasive force.

192 For example, the European Court of Human Rights, under Art 19 of the *European Convention of Human Rights*, has ruled that the Court will not be relieved of its duty by the sole fact that an individual had stated to his government that he waived rights guaranteed in the Convention.

overridden, by provisions in national legislation or contracts of employment, or otherwise waived. Unlike the global human rights adopted by the UN, the regional human rights systems only bind States with the region that they have ratified the relevant treaty. For example, in Africa, the African Union (hereinafter referred to as “the AU”) has provided standards in terms of the African Charter on Human and Peoples’ Rights 1981 (hereinafter referred to as “the AC”) and Protocols.[193] The inclusion of social security in a number of international and regional human rights instruments such as the African Union and South African Development Community (hereinafter referred to as “the SADC”) as well as national legislation is also an acknowledgement of the fact that social protection and decent work is a human need and enhance one's right to dignity.[194] However, after careful consideration, no discussion on the standards provided for in the AU nor within the SADC will be provided, as it will not serve the purpose of this study. The rationale for this exclusion is that these standards are incorporated within the national legislation of both Namibia

193 The AC, for example covers civil political and economic, social and cultural rights. The AC also recognises collective rights and also highlights people’s rights to struggle against colonial domination. Article 3 is the only provision that makes reference to work:
(a) No one shall be required to perform forced or compulsory labour;
(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;
(iii) Any service exacted in cases of emergency or calamity threatening the life or well -being of the community;
(iv) Any work or service which forms part of normal civil obligations.

194 The SADC Employment and Labour Sector (ELS) has developed social security policy documents aimed at enhancing coordination, convergence and harmonisation of social security systems in the region. These are: The SADC Charter of Fundamental Social Rights; The SADC Code on the Social Security; These documents present the policy framework within which the social security component of the SADC Decent Work Programme will be executed.

and South Africa, the question is whether the national legislation of Namibia incorporates fishers and to what extent when compared to international standards and South Africa. It is evident the IBR is the cornerstone for the realisation of decent work for workers including fishers, and many rights provided for in the IBR are expanded in other instruments.

Decent work is central to human rights and dignity in the workplace. The right to decent work and living conditions is essential for realising other human rights and forms an inseparable and inherent part of human dignity.[195] When international bodies such as the UN make sound decisions of a world, public order core human rights principles are considered.[196] Certain basic human rights are universal to humanity. Therefore, international labour standards are developed to ensure the provision of these rights in the workplace.[197] Thus, in terms of international human right standards, employees have the right to decent work and living conditions. Even though a worker is entitled to these rights, it defeats the purpose if no international standards are present so workers can have access to such rights to benefit their lives. Thus, the ILO has taken the lead in improving the working conditions of the employment conditions for workers, including fishers and seafarers' by setting International Labour Standards. The International Labour Standards are about the development of people as human beings. The international community recognised that labour is not a commodity. Work is part of everyone's life and is crucial to a person's dignity, well-being, and development as a human being. Economic progression should include the creation of jobs and working conditions in which people can work in freedom, safety, and dignity.

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195 *Ibid* 15.

196 Dougal, Lasswell, Chen "Human Rights and World Public Order: A Framework for Policy-Orientated Inquiry" 265 available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3601&context=fss_papers (accessed 2016-08-17).

197 Brown, Deardorff and Stern *International Labour Standards and Trade: A Theoretical Analysis* (1996) 227 272.

Economic progress should be undertaken to improve the lives of human beings; international labour standards and there to ensure that it remains focused on improving human life and dignity. The ILO contributes to this by elaborating and promoting international labour standards aimed at making sure that economic growth and development go along with the creation of decent work.

2 3 THE INTERNATIONAL LABOUR ORGANISATION (ILO)

In 1919, the ILO was created as part of the Treaty of Versailles.[198] The ILO was established as an independent international body, devoted to promoting social justice and to set international standards aimed at improving labour rights in the global market.[199] The ILO recognises that "conditions of labour exist involving, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled". To solve this problem, the ILO has a tripartite structure meaning the ILO works on an equal equilibrium with governments, workers, and employers.[200] The ILO's founders recognised that the global economy needed clear rules to ensure that economic progress would go hand in hand with social just, prosperity and peace for all. This is set out in the aim and objective of the ILO's[201] that

198 Part 13 of the Treaty of Versailles 385 (1919). See also ILO "Origin and History" http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed on 2016-04-01).

199 ILO "Origin and History" http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed on 26-10-2015). ILO "Mission and Objectives" http://www.ilo.org/global/about-the-ilo/mission-and- objectives/lang--en/index.htm (accessed on 2016-08-01).

200 See ILO "How The ILO Work" http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm (accessed 017-02-11).

201 *International Labour Organization Constitution 15* UNTS 40. Hereinafter referred to as the ILO Constitution.

"universal and lasting peace can be established only if based on social justice" to ensure labour peace that is essential to prosperity. [202]

The ILO has four key objectives in realising its aim: creating jobs, guaranteeing rights at work, extending social security, and promoting social dialogue.[203] Its main strategic objective is to seek the improvement of social conditions which include working conditions, throughout the world. This objective is carried out by firstly promoting and realising standards and fundamental principles and rights at work; secondly, by creating greater opportunities for women and men to obtain decent employment and income; thirdly, by enhancing the coverage and effectiveness of social protection for all, and finally, by strengthening tripartite and social dialogue.[204] The objectives of the ILO in its Constitution [205] were further expanded upon in the Declaration of Philadelphia in 1948.[206] These objectives form the basis of the concept of "decent work" and include: full employment and the raising of standards of living; policies regarding wages and earnings, regulation concerning hours and conditions of work, a minimum living wage; right of collective bargaining, the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care; and adequate protection for the life and health of workers in all occupations.[207]

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202 Preamble of the ILO Constitution.

203 See Preamble of the ILO Constitution. See ILO "Origin and History" http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed on 2016-08-06).

204 United Nations *Full and Productive Employment and Decent Work* (2006) 19.

205 Preamble of the ILO Constitution.

206 The Declaration of Philadelphia available at ILO http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf (accessed on 07-11-2016).

207 Declaration of Philadelphia in 1948.

The ILO defines “decent work” as productive work in which rights are protected, which generates an adequate income with adequate social protection.[208] A decent work deficit is said to occur when: there are involuntary unemployment and poverty, there are abuses of rights at work and forced child labour exists; basic income security is missing, and workplace anxiety, depression and exhaustion are commonplace; workers and employers are not organised to either make their voice heard or have obstacles to effective dialogue; and life at work cannot be properly balanced with the claims of the family.[209] In 1999, the ILO supplemented the concept of realising decent work with the adoption of the Decent Work Agenda.[210] This Agenda comprises of four pillars.[211] These four pillars of the ILO Decent Work Agenda are:

- Firstly, employment promotion which corresponds to the right of full employment.
- Secondly, social protection which corresponds to the rights to social security and safe and healthy work conditions.
- Thirdly, a social dialogue, which corresponds to the rights to form and join trade unions and the rights of unions to bargain collectively.
- Lastly, rights at work correspond to the ILO four Core Labour Standards: elimination of forced labour, the prohibition of child labour, elimination of discrimination in employment, and freedom of association.

These four pillars are embodied in the ILO’s Declaration on Social Justice for a Fair Globalisation of 2008.[212] The decent work agenda is the ILO’s commitment to

208 Decent Work Report available at http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm (accessed 2017-10-03) 2. Hereinafter referred to as Decent Work Report.

209 *Ibid*.

210 *Ibid*.

211 *Ibid*.

212 ILO “The ILO Declaration on Social Justice For A Fair Globalization” (2008) 15.

improving the working and social conditions of employees in every industry. By freely joining the ILO, Member States have endorsed the principles and rights set out in the ILO's Constitution and in the Declaration of Philadelphia. It further provides that Member States have undertaken to work towards attaining the overall objectives of the ILO. These principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions and Recommendations made by the ILO. To realise decent work, it is submitted that the regulation of conditions of employment and enforcement mechanisms be of pivotal importance. The ILO Constitution acknowledges that with social and economic progression the working conditions of people must be guaranteed by an appropriate standard if not, their working conditions need to be addressed urgently.[213] The ILO is a commitment to ensuring "decent work"[214] for fishers, and where applicable seafarers, to meet the needs of the global market.[215] As stated above, one of the aims of the ILO is to improve working conditions by setting labour standards. There is no point in setting international standards if there are not any mechanisms to enforce them. The following ILO international labour standards for enforcement that will be considered are: [216]

- Freedom of Association and Protection of the Rights to Organise Convention;[217] and

213 Preamble ILO Constitution. See also ILO *Review Of The Follow-Up To The 1998 ILO Declaration On Fundamental Principles And Rights At Work* (2010) 20.

214 Preamble of the ILO Constitution.

215 See ILO "Changing Patterns in the World of Works" http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-c.pdf (accessed 2017-08-20).

216 Namibia as a member of the ILO is signatory to them.

217 *Freedom of Association and Protection of the Tight to Organise Convention* 1948 No 87.

- The Right to Organise and Collective Bargaining Convention;[218]

The next section will discuss the international Conventions regulating fishers and, where necessary, fishers, and where applicable seafarers', basic conditions of employment related to hours of work, wages and work agreements, then the core international standards mentioned above. The following international instruments and Recommendations of ILO[219] specifically concerned with hours of work, wages and work agreements in the fishing sector:

- Hours of Work (Fishing) Recommendation, 1920 (No. 7)[220]
- Fishermen's Articles of Agreement Convention, 1959 (No. 114)[221]
- The WIFC.[222]

The following ILO instruments have been adopted relating to general seafarers' hours of work, wages, and seafarers work agreements:

- Seamen's Articles of Agreement Convention.[223]
- The Hours of Work and Manning (Sea) Convention.[224]

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218 *Right to Organise and Collective Bargaining Convention* 1949 No 98.

219 For Fishers specifically, the ILO has adopted the following Conventions:

Hours of Work (Fishing) Recommendation, 1920 (No. 7)
Minimum Age (Fishermen) Convention, 1959 (No. 112)
Medical Examination (Fishermen) Convention, 1959 (No. 113)
Fishermen's Articles of Agreement Convention, 1959 (No. 114)
Fishermen's Competency Certificates Convention, 1966 (No. 125)
Accommodation of Crews (Fishermen) Convention, 1966 (No. 126)
Vocational Training (Fishermen) Recommendation, 1966 (No. 126)

220 *Hours of Work (Fishing) Recommendation*, 1920 (No. 7).

221 *Fishermen's Articles of Agreement Convention*, 1959 (No. 114).

222 WIFC.

223 *Seamen's Articles of Agreement Convention* 1926 (No.22).

224 *The Hours of Work and Manning (Sea) Convention* 1936 (No. 57).

- The Hours of Work and Manning (Sea) Recommendation.[225]
- The Wages, Hours of Work and Manning (Sea) Convention.[226]
- The Wages, Hours of Work and Manning (Sea) Convention (Revised).[227]
- The Wages, Hours of Work on Board Ship and Manning Convention (Revised 1958) and Recommendation concerning Wages, Hours of Work on Board Ship and Manning.[228]
- Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180).[229]
- MLC.[230]

The ILO has had a long history in promoting for the regulation of fishers, and where applicable seafarers' conditions of employment and related matters by adopting a number of Conventions and Recommendations at Conferences. The rationale for including general seafarers is to provide an overview why fishers' have been excluded in many of the labour standards provided for by the ILO in relation to conditions of employment regulating hours of work and wages.

225 *The Hours of Work and Manning (Sea) Recommendation* 1936 (No. 49).

226 *The Wages, Hours of Work and Manning (Sea) Convention* 1946 (No. 76).

227 *The Wages, Hours of Work and Manning (Sea) Convention (Revised)* 1949 (No. 93).

228 The Wages, Hours of Work on Board Ship and Manning Convention (Revised 1958) and Recommendation No. 109 concerning Wages, Hours of Work on Board Ship and Manning.

229 *Seafarers' Hours of Work and the Manning of Ships Convention* 1996 (No. 180).

230 The MLC.

2 3 1 HISTORICAL DEVELOPMENT CONCERNING THE REGULATION OF FISHERS WORKING HOURS

As part of the signing of the Peace Treaty of Versailles, one of the objectives was to regulate working hours for all employees in different industries.[231] In 1919, the Commission on International Labour Legislation appointed by the Peace Conference drew up Part XIII of the Peace Treaty of Versailles of which Article 427 provides:

> "The High Contracting Parties, recognising that the well-being, physical, moral, and intellectual, of industrial wage-earners are of supreme international importance, have framed in order to further this great end, the permanent machinery provided for Section I, and associated with that of the League of Nations. They recognise that differences in climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment. But, holding as they do, that labour should not be regarded merely as an article of commerce, they think that there are methods and principles for regulating labour conditions which all industrial communities should endeavour to apply, so far as their special circumstances will permit. Amongst these methods and principles, the following seem to the High Contracting Parties to be of special and urgent importance: The adoption of an eight-hour day or a forty-eight-hours week as the standard to be aimed at where it has not already been attained."[232]

With the introduction of the general principle of Article 427, it was clear that the ILO was committed and aimed to apply the general principle for hours of work within all industries. However, the general principle raised concerns from various groups within the maritime industry, including seamen and shipowners. The general principle also

231 Art 427 of *Versailles Peace Treaty* 225 Parry 188

232 *Versailles Peace Treaty* 225 Parry 188.

raised questions relating to the competency of the ILO in dealing with maritime labour issues.[233] The reason for questioning the competence[234] of the ILO was that the majority of the delegates at the Peace Conference were not experts in maritime matters. As a result, shipowners felt the ILO had no power to decide for them and to regulate conditions of employment aboard a ship. Also, shipowners were of the opinion that the principle of the working hours envisaged by Article 427 of the Versailles Peace Treaty was unattainable in the maritime sector. [235] An International Conference for Seamen was held, at which the proposal was made that a special international organisation for dealing with conditions of work at sea be set up. These proposals were considered by the Commission. The Commission provided that the ILO is competent enough to deal with maritime labour issues, but those issues should be addressed by at Special Sessions of Conferences and not at General Conferences. The Special Sessions of the Conferences would be devoted exclusively to maritime labour issues so that governments are free to nominate specialists as delegates and advisers.

As such, the first attempt to regulate the working hours of seafarers occurred at the First Session of the Washington Conferences on the 29th October 1919 and 27th January 1920.[236] The Commission on the Hours of Work submitted a Draft

233 Tsandis *International Maritime Labour Law: A Case Study of the ILO's Attempts To Develop Aspects Thereof* (published University of London), 1992 63. Also see Scelle, G., L' organisation internationale du travail et le BIT, Paris 1930.

234 Competence of the Int'l Labour Org. in regard to Int'l Regulation of Conditions of Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2 (Aug. 12)

235 Declaration of the shipowners' delegates on the Draft Convention concerning hours of labour, 2 R.P 513 516.

236 Anonymous *The International Labour Organisation The First Decade* (1938) 19.

Convention[237] for approval, which applied the general principle of Article 427 of the Versailles Peace Treaty. The Draft Convention on the Hours of Work was to be applied to the "transport of passengers or goods by… sea or inland waterway".[238] Objections were raised that matters concerning the maritime labour issues at "sea" were to be dealt with at a Special Conference and not at the General Conference, in accordance with the resolution adopted by the Commission on International Labour Legislation appointed by the Peace Conference.[239] The Commission decided that a Special Session of the Conference should be held to deal with questions of employment at sea. The Commission further provided that the General Session was not precluded from dealing with the adoption of general principles covering all forms of employment, including employment at sea.[240] As a result, the Hours of Work Convention[241] was adopted limiting working hours to 8-hours-a-day or 48 hours per week to workers in industrial undertakings, but excluded fishers and seafarers'.[242] Although the maritime labour conditions of seamen were excluded from consideration at the Washington Conference, the Hours Convention adopted at the Conference played an influential role on the ILO envisaged direction in regulating seafarers working hours within the maritime industry. Therefore, there remained only the question of application of the principles of the envisaged hours of work for seafarers.[243] The applicability of the

237 *Ibid* 196.

238 *Ibid* 197.

239 *Ibid* 198.

240 *Ibid*.

241 *Hours of Work (Industry) Convention*, 1919 (No.1).

242 The Convention further limited the hours of work which must, by its nature, be continuous to 56 hours. The methods of applying these principles were to be decided in consultations with the representative organisations of employers and workers, or even by agreement between these organisations. Overtime was allowed, when agreed to by the organisations concerned, as a temporary measure, but the wages paid for such overtime had to be one and one-quarter times the normal rate. See Tsandis International Maritime Labour 64.

243 Tsandis *International Maritime Labour* 64.

principle of the envisaged hours to seafarers was deliberated at the 1920 Genoa Conference.

The discussion on the applicability of the envisaged hours to the principle in the maritime industry occurred at the Second Session of the Genoa Conference in 1920.[244] The Draft Convention on Hours of Work and Manning While at Sea provided various working hours for seamen depending on a load of a vessel.[245] For example, in some instances the Draft Convention on Hours of Work and Manning While at Sea allowed 56 hours of work per week for vessels of more than 2500 tonnes, another variation of 12 hours per day was made for vessels between 700 and 2500 GRT build before the coming into force of the Convention.[246] Such variations limited the applicability of the 8 hours a day principle. Another shortfall of the Draft Convention is that it failed to deal with how compensation for working beyond the envisaged working hours would be calculated.[247] Article 8 of the Draft Convention provided for extra working hours in cases of salvage, fog, stranding, fire, or other circumstances affecting the safety of the vessel.[248] The Draft Convention on the Hours of Work at sea relating to seamen failed to receive the two-thirds majority of votes resulting in the Draft Convention was never being adopted.[249] However, the Genoa Conference succeeded in adopting two recommendations on the limitation of hours of work, one of them concerning the fishing industry. The Recommendation relating to the fishing industry was a declaration from the ILO with the aim to enact legal instruments limiting the hours of work of all workers

244 *Ibid*.

245 *Ibid*.

246 *Ibid*.

247 *Ibid*.

248 *Ibid*.

249 *Ibid*.

employed in the fishing industry in line with the general principle relating to maximum hours of work. The Recommendation acknowledges that special provisions as may be necessary to meet the conditions peculiar to the fishing industry in each country; and that in framing such legislation each Government should consult with the organisations of employers and the organisations of workers concerned. After the failure of the Genoa Conference to adopt the Draft Convention for Hours of Work While at Sea, it was decided that the question of the hours of work should be discussed at the Special Conference to be held in 1928, which was not held until 1929.[250]

After the failure in adopting the Draft Convention on Hours of Work and Manning While at Sea, in 1926, the ILO introduced a double-discussion procedure to deal effectively with maritime labour issues.[251] The double-discussion procedure was employed for the first time in 1927.[252] This double-discussion procedure takes the form of a Preparatory Technical Maritime Conference (hereinafter referred to as “the PTMC”) held before the final Conference where instruments are adopted. Before issues are placed on the Agenda for the final conference, the PMTC and the Joint Maritime Commission (hereinafter referred to as “the JMC”)[253] considers questions that affect seamen's affairs.[254] The JMC is a bipartite body that provides advice to the Governing Body of the ILO on maritime questions including standard setting for the shipping

250 *Ibid*.

251 Final Record, 1926 (8th Session) 191 200, 368 ff.

252 Tsandis *International Maritime Labour* 9. See also Report of the Director, 1928, See. 18. The first to propose the double-discussion procedure was apparently Professor Alfred O'Rahilly, Irish Free State delegate. See Final Record, 1924, pp. 436-37.

253 The JMC is composed of: the Chairman of the Governing Body; two Governing Body members of which one is a worker and the other an employer; twenty regular ship-owner members; twenty regular seafarer members; four deputy ship-owner members; and four deputy seafarer members.

254 Tsandis *International Maritime Labour* 9.

industry.[255] When the JMC considers a question to require urgent examination, it recommends to the Governing Body of the ILO that this question should be placed on the Agenda of the next maritime session of the ILO Conference. Accordingly, an established pattern, which leads to the adoption of an ILO instrument relating to questions of seafarers, is followed. First, the JMC examines questions and makes recommendations to the Governing Body. Then the Governing Body decides whether to adopt the recommendations of the JMC and decision to place the relevant question on the Agenda of a next ILO Conference. Thereafter, the PTMC examines the questions that appear on the Agenda. Finally, at the ILO Conference the final, the examination and adoption of Conventions take place.[256]

The double-discussion procedure was utilised at the Thirteenth Session of the 1929 Maritime Conference. The Conference adopted a questionnaire requesting the Governments of Member States to express their opinion on the limitation of hours of maritime work on the principle of the basic hours.[257] Replies were received from governments during 1930, and they were examined by the PMTC of the full Conference in 1932, that was tasked to draft a Convention based on the general

255 This structure cements that the ILO is a tripartite in nature and ensures all sides are heard in order to set standards.

256 All the above sessions were special maritime sessions of the ILO Conference except those held in 1921 and 1949, which were general sessions. These two general sessions were held under special circumstances; the first, to adopt international instruments on the question of minimum age requirements for trimmers and stokers and the medical examination of young persons, following the adoption of two relevant resolutions by the 1920 Genoa Conference (in fact, the preparatory work had been accomplished by this last Conference); the second, to revise some of the Conventions which had been adopted by the 1946 Conference and which were not found to be as effective as it had been expected. In 1929, a maritime session of the Conference was held but this session was devoted to the first discussion of a number of maritime questions and no instruments were adopted (these were adopted in 1936).

257 For the complete deliberations of the Committee on the Regulation of Hours of Work on Board Ship, appointed by the 13th session of the Conference, see international labour conference, 13th session, 1929, conference committees, Committee on Hours of Work on Board Ship.

principle and responses from various governments. This Convention was based on the 8-hour day principle with numerous variations according to the tonnage of the vessel similar to the 1920 Draft Convention. The Convention was adopted and ratified by four countries but never came into force due to poor ratification. As a result, the first Convention on Hours of Work was not adopted until 1936.

In 1936, the Convention on the Hours of Work and Manning While at Sea was adopted.[258] The Convention was made applicable to vessels employed in the transport of cargo or passengers for trade.[259] This Convention explicitly excluded fishing vessels.[260] This Convention was based primarily on the eight-hour day for officers and ratings in distant trade ships. The Convention laid down the minimum number of such personnel both on deck and in the engine room for certain types of ships. As a recurring trend, certain countries were opposed to the variations relating to working hours being linked to the tonnage of the vessels. The Convention also contained provisions such as the 8-hour day for deck ratings at sea, the 12-hour limit for deck officers, the 48-hour week in port, the 700 tonnes' limit for working hours in the engine room, hours of work in the engine room, hours of work in the catering department, night work for young persons and minimum number of men per watch and number of able seamen per ship. As a result, even though the Member States adopted the Convention, the Convention never came into force due to poor ratification. One of the reasons given for poor ratification was that by professing to regulate hours of work and manning and ignoring wages, the Convention tended not to minimise international competition but actually to aggravate the already existing disparity of costs. In 1945,

258 *The Hours of Work and Manning (Sea) Convention*, 1936 (No. 57).

259 Art 1 *The Hours of Work and Manning (Sea) Convention*, 1936 (No. 57).

260 Art 1(2)(b) *The Hours of Work and Manning (Sea) Convention*, 1936 (No. 57).

the JMC recommended that hours of work, staffing and wages should be dealt within a single new instrument.

At the main Conference in 1946, the Convention on Wages, Hours of Work, and Manning While at Sea was adopted.[261] The Convention was revised in 1949[262] and 1958.[263] This Convention added new provisions are establishing hours of work regulations. For example, the Convention limited the total number of hours in a 2-week period even though this did not reflect a strict limit on hours worked. The Convention removed some provisions relating to the linking the tonnage of the ship and working hours. The subsequent developments in the field of working hours for seamen show that, at least in terms of ratifications, the basic hour's principle from the Peace Treaty of Versailles has not been favoured relating to seamen. Furthermore, the unqualified envisaged hours have never been adopted by any ILO Special Conference and have been subjected to many restrictions. One of the amendments altered a provision, which prohibited the consistent working of overtime, by providing that this practice should be avoided whenever possible. The Convention was adopted, but also did not come into force due to poor ratification.[264]

In 1992, the Governing Body took note of the resolution concerning possible revision of 1958 Convention and Recommendations, as well as another resolution adopted by the Commission concerning the convening of a PTMC and a Maritime Session of the International Labour Conference. Mid-1992, the Governing Body, following

261 *The Wages, Hours of Work and Manning (Sea) Convention*. 1946 (No. 76).

262 *Wages, Hours of Work and Manning (Sea) Convention (Revised)*, 1949 (No. 93).

263 *Wages, Hours of Work and Manning (Sea) Convention (Revised)*, 1958 (No. 109).

264 See ILO “Ratification of C109 Wages Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109)” http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312254 (accessed 2017-04-11).

consultations with the leaders of the shipowners and seafarers' groups of the Commission, decided to hold a Tripartite Meeting. The Governing Body decided to include in the programme of sectorial meetings for the 1994-95 biennium a Tripartite Meeting on Maritime Labour Standards with an agenda including, an item on the revision of the 1958 Wages, Hours of Work and Manning While at Sea Convention, and its Recommendation. The Tripartite Meeting was articulated around two main propositions. First, that normal working hour of a seafarer should be based on an 8-hour day, with one day of rest per week although exceptions being permissible after consultation with the shipowners and seafarer organisations. Secondly, the Convention should lay down clear limits concerning maximum hours of work, or alternatively, minimum hours of rest, for seafarers. In order to limit fatigue amongst the crew and impose international rules, while keeping the limits fairly flexible, the Convention referred to the maximum number of hours of work, which must not exceed 14 hours in any 24-hour period, 72 hours in any seven-day period, or a minimum number of hours of rest which must not be less than 10 hours in any 24-hour period, and 77 hours in any 7-day period.[265] Also, each Member State ratifying the Convention should promulgate legislation and regulations establishing either the maximum number of hours between 14 hours a day and 72 hours per week or the minimum number of hours of rest between 10 hours per day and 84 hours per week. This approach, by the ILO, was a major innovation compared to 1958 Convention and was received favourably by almost all participants. The only point on which agreement could not be reached was whether or not the provision concerning a minimum continuous period of daily rest of 6 hours might allow for exceptions, and thus the draft text adopted at the conclusion of the Tripartite Meeting accordingly omitted any reference to a minimum number of uninterrupted hours of rest.

265 Art 5 *The Wages, Hours of Work and Manning (Sea) Convention* 1996 (C 180).

The basic hour principle was meant to apply to the complete industrial world and, therefore, it was only a question of application of the principle. As illustrated above, the adoption and ratification of Conventions related to seafarers' basic hours could only be obtained, if exceptions were allowed. Many of the exceptions undermined the envisaged hours of work principle from the Treaty of Versailles. It was a common trend to exclude fishers in the regulation of seafarers' hours of work since 1920. As such, under international law, no effective regulation of fishers working hours took place. Thus, fishers, in some instances, experienced human right violations and were exposed to labour exploitations, by working excessive hours. The next section will provide a historical overview of the difficulty of adopting an international standard on wages for fisher, and where applicable seafarers.

2 3 2 HISTORICAL DEVELOPMENT ON REGULATING MINIMUM WAGES

The ILO has adopted a number of instruments concerning minimum wage fixing and the protection of wages. In 1946, 1949, 1958,[266] and 1996 of the Wages, Hours of Work and Manning Convention While at Sea. These Conventions lay down a minimum basic pay of different rank of seafarers known as able seamen. Able seamen are qualified, skilled and trained merchant seamen who are certified so by a training authority. Able seamen generally work in the deck department. Apart from performing routine sea duties, able seamen are trained to steer a ship using a compass and another device. However, the relevant provisions do not deal adequately with the case of a country where the category of able seamen have not been introduced. Also, no

266 It should be noted that Convention No. 109 and Recommendation No. 109 are the only examples of ILO instruments where reference to a specific minimum wage is made. All other instruments contain provisions dealing with the methods of wage fixing and the establishment of the necessary machinery. On the other hand, the recent trend in ILO instruments is to provide for specific methods of, or factors to be taken into account in fixing a minimum wage for a specific industry, though no exact minimum wage is laid down.

clear connection was established in these Conventions between the minimum basic wages and the minimum hours of work laid down therein. For example, the 1958 Convention prescribes the minimum basic wages "for a calendar month of service of an able seaman".[267] Another shortfall of the ratification of the ILO instruments on hours of work and wages for seafarers are because they were unable to accept a minimum basic rate linked to foreign currencies.[268] Reference was made in particular of the fact that there was no universally recognised international standard currency.[269] In 1984, the ILO Commission on General Principle of Minimum Wage in relation to the provision of the Recommendation concerning wages, adopted a resolution which noted that the formula used to determine data on changes in the purchasing power of the United States dollar in various countries, as a basis for revising the wage figures of the 1958 Recommendation was unsuitable due to the fluctuations in currency exchange rates and varying levels of consumer price inflation in different countries.[270] In 1987, there was a call from varies stakeholders for the ILO to take action on the subject of the minimum basic wage of able seamen, including improvement of the procedure for updating the wage figure. Subsequently, in 1991 of the 26th Session of the Commission an item concerning: the mechanism and procedure for the periodic revision of the minimum basic wage for able seamen,[271] the minimum pay or wages for able seamen in ships employing extra numbers of ratings, and possible updating

267 Art. 6 of *The Wages, Hours of Work and Manning (Sea) Convention* 1958 (C 180).

268 ILO Revision of *The Wages, Hours, of Work and Manning (Sea) Convention (Revised)*, 1958 (No. 109), *and Recommendation*, 1958 (No. 109) (1996) 2.

269 *Ibid* 3.

270 *Ibid* 4.

271 The term "able seaman" means any seafarer who, by national laws or regulations, or in their absence by collective agreement, is deemed to be competent to perform any duty which may be required of a rating serving in the deck department, other than the duties of a leading or specialist rating.

of wage figures.[272] There has not been much written about wages or setting an international standard for wages for fishers specifically.[273] The next section will discuss the most recent developments in regulating fishers, including seafarers, conditions of employment.

2 3 3 RECENT DEVELOPMENT IN REGULATING CONDITIONS OF EMPLOYMENT

Since the Genoa Conference in 1920, the ILO dealt with the possibility of drawing up an International Code for Seamen (hereinafter referred to as "the ICS").[274] As a result, the Genoa Conference adopted a Recommendation suggesting that national collections of laws and regulations relating to seamen should be undertaken to facilitate the establishment of an ICS.[275] In 1926, at the Ninth Session of the Geneva Conference, one of the items on the agenda was the consideration of the establishment of a Code.[276] The Conference proposed that a Code should be drawn up in the form of a collection of laws and regulations dealing with the conditions and position of seamen with the overall aim of adopting a common and uniform body of

272 For example, since the 25th October 1991 the minimum cash wages for a calendar month of service for the normal hours of work of an able seaman should be not less than US$356 or any updated figure recommended by the JMC. On the 1st January 1995, the figure was updated by the JMC to US$ 385. The latest figure is US$ 614. See ILO "ILO adopts a new monthly wage for seafarers" http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_236644/lang--en/index.htm (accessed 27-04-2017).

273 Most of the literature is that of the ILO.

274 See the Preface of the ILO International Seamen's Code Conventions and Recommendations Affecting Maritime Employment Adopted by the International Labour Conference 1920-1936 (1942).

275 *Ibid.*

276 *Ibid.*

international seamen's law amongst various maritime countries.[277] It was agreed that the Code should be confined to general principles already incorporated in the national legislation of countries and that it should be left to national legislation to develop these principles in detail. The collection of laws and regulations does not mean that a single code regulates all branches of sea-law. However, for it is only by the adoption of a series of separate Conventions, dealing with a specific aspect of maritime labour, that an international code can evolve. The aim was defining the general principles to be followed in the regulation of one or another branch of maritime work, and of influencing national laws to conform to them.[278] States that did not have a national seamen's code but have a maritime industry were requested by the Conference to develop a code embodying provisions based on the principles laid down by the Conference on special agreements. Also, the Conference wanted a uniform standard on Seamen's Articles of Agreement to be included in future Conferences. The objective of the Code is to codify existing laws relating to seamen, which various maritime countries of the world can adopt as a common and uniform body of international seamen's law. Significant progress only took place in 1976. As a result of the adoption of a resolution by the 1976 Conference, the Director-General was tasked to prepare and publish, after consultation with stakeholders a compilation of conventional maritime labour instruments that could be applied in different countries using national legislation, collective agreements or practice. [279] The compilation of the codes and practices would serve as models for legislation but would not create binding obligations compelling Member States into adhering to the codes and practices. In 1983, under the sponsorship of the ILO, a text containing Conventions and Recommendations was

277 *Ibid.*

278 Tsandis *International Maritime Labour* 3.

279 Dúrler *The Maritime Labour Convention 2006 A Major Step Forward in Maritime Law* in Part 3 19 in Norman and Routhledge *Serving the Rule of International Maritime Law: Essays in Honour of Professor David Joseph Attard* (2009) 297 304.

published under the title "Maritime Labour Conventions and Recommendations".[280] This text established the substantial provisions of the ICS. The ICS can be conceived as a broad term, which contains instruments not only dealing with labour issues but also embodying principles concerning safety matters. The term "International Seafarers' Code" includes a comprehensive set of standards for the improvement of conditions of employment on board ship and of the safety of life at sea.[281] The definitions of these terms in ILO instruments related to seamen have been the result of ongoing disagreement/conflicts between government, employer, and worker delegates, which have had invariably a limiting effect on the scope of the relevant instruments. The exclusion of certain vessels and certain categories of seafarers such as masters, officers, training cadets, apprentices are a regular feature of ILO Conventions. Moreover, this exclusion has not been realised systematically with an adverse effect on the uniform application of labour standards at the international level. The situation is aggravated by the fact that questions of job classification and description, crew structure and hierarchy and manning have or not sufficiently been examined by ILO Conferences and, thus, the ILO instruments have not addressed in detail the special problems and needs of various categories of seafarers according to their position and status on board ship. As a common trend, fishers were excluded.

In 2000, the JMC, an advisory body within the ILO launched a project, named “The Geneva Accord”. The project was aimed at bringing together all relevant ILO instruments concerning seafarers, namely the Conventions and Recommendations, into a single document.[282] In 2001, a High-Level Tripartite Working Group was

280 ILO *Maritime labour Conventions and Recommendations* Geneva (1994).

281 *Ibid* 3.

282 ILO “International Shipping Industry Adopts ‘Geneva Accord’” http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_007832/lang--en/index.htm (accessed 2016-08-08).

created.[283] This High-Level Tripartite Working Group had representatives including those from different governments, seafarers, workers, and unions. Extended negotiation subsequently prepared the 2006 Diplomatic Conference, which adopted a legal instrument considered as a landmark for seafarers' rights.[284] This legal instrument is known as the MLC, or the Seafarers Bill of Rights.[285] The MLC consolidates over 68 international maritime labour standards, adopted over the last 80 years. The MLC was welcomed by the international community, and has been described as "historic"[286] and "a way forward". The reason for such a description is that the MLC uses international human rights and labour standards, to establish minimum rights for seafarers. The MLC defines a "seafarer" as any person who is employed, or engaged, or works in any capacity on board a ship to which the MLC applies.[287] The MLC aims to achieve both decent working conditions[288] for seafarers and secure economic interests in fair competition for quality shipowners. Indeed, the ILO calls it the "fourth pillar" of the international regime for quality shipping, focusing on seafarer-working conditions and complementing key Conventions of the IMO.[289]

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283 *Ibid*.

284 *Ibid*.

285 Seafarers Rights "Maritime Labour Convention" http://seafarersrights.org/seafarers-subjects/maritime-labour-convention-mlc/ (accessed on 2016-05-08).

286 See ILO "Basic Facts On The Maritime Labour Convention 2006" http://www.ilo.org/global/standards/maritime-labour-convention/what-it does/WCMS_219665/lang--en/index.htm (accessed on 2016-01-05), UNRIC "ILO's Maritime Labour Convention Comes Into Force" http://www.unric.org/en/latest-un-buzz/28651-ilos-maritime-labour-convention-comes-into-force (accessed on 2016-04-01).

287 Art 2(1)(f) of the MLC.

288 Preamble of the MLC.

289 The Key IMO Conventions which are being complimented are the *International Convention for the Safety of Life at Sea* (SOLAS), 1974; *International Convention for the Prevention of Pollution from Ships,* 1973 as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997 (MARPOL); and *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers* (STCW) as amended, including the 1995 and 2010 Manila Amendments. See IMO "List of IMO Conventions"

This is in line with the ILO objective to decent work and fair competition to achieve fair globalisation.[290] The MLC covers the general seafarers' industry. Article 2(4) of the MLC excludes fishing vessels and fishers. This exclusion reflects the view of the Governing Body of the ILO that, although many of the existing maritime labour Conventions specifically encourage members to apply them to vessels and personnel engaged in commercial fishing, the new maritime labour Convention should not try to also address the very diverse needs and concerns of the fisheries sector. Rather a new Convention and Recommendation consolidating the existing international labour standards on fishing is required. The new Convention would provide protection specifically tailored to meet the needs of the fisheries sector. Members Countries would not be precluded from giving their fishers the benefit of any additional protection.

Following the introduction of the 2006 MLC by the ILO, the ILO introduced the WIFC in 2007 after years of protracted negotiations. [291] Taking into account the need to revise Conventions adopted by the International Labour Conference specifically concerning the fishing sector, namely

- The Minimum Age (Fishermen) Convention,[292]
- The Medical Examination (Fishermen) Convention, 1959 (No. 113),[293]
- The Fishermen's Articles of Agreement Convention, 1959 (No. 114), and

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http://www.imo.org/en/About/Conventions/ListOf Conventions/Pages/Default.aspx (accessed 2016-04-21).

290 ILO "Government Responsibilities Overview" http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/presentation/wcms_230028.pdf (accessed 21-04-2016).

291 See 82 83 of ILO "International Labour Conference 92nd Session 2004 Report V(1) Conditions on Work in the Fishing Sector A Comprehensive Standard (a Convention Supplemented by a Recommendation) on the Fishing Sector" http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/genericdocument/wcms_181288.pdf (accessed on 2016-04-02).

292 *The Minimum Age (Fishermen) Convention*,1959 (No. 112).

293 *The Medical Examination (Fishermen) Convention*, 1959 (No. 113).

- The Accommodation of Crews (Fishermen) Convention, 1966 (No. 126).[294]

The WIFC updates these instruments regularly and aims to reach a greater number of the world's fishers, particularly those working on board smaller vessels. The objective of this Convention is to ensure that fishers have decent conditions of work on board fishing vessels with regard to minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security. It applies to all commercial fishing, except subsistence and recreational fishing; to all vessels regardless of size; and to all fishers, including those who are paid on the basis of a share of the catch. The term "fishers" is defined as "every person employed or engaged in any capacity, or carrying out an occupation on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch, but excluding pilots, naval personnel, other persons in the permanent service of a government, shore-based persons, carrying out work aboard a fishing vessel, and fisheries observers."[295] The WIFC and its accompanying Work in Fishing Recommendation will come into force a year after ten countries (including eight coastal states) have ratified it. The WIFC with its Recommendations incorporates some of the rights provided for in the MLC and is a specific instrument used to regulate fishers' employment conditions.[296] This Convention applies to all types of commercial fishing and seeks to provide minimum acceptable standards that protect fishers in all aspects of their work, which is a highly dangerous and mostly

294 *The Accommodation of Crews (Fishermen) Convention*, 1966 (No. 126).

295 Art 1(e) of the WIFC.

296 See 181 of ILO "International Labour Conference 92nd Session 2004 Report V(1) Conditions on Work in the Fishing Sector A Comprehensive Standard (a Convention supplemented by a Recommendation) on the Fishing Sector" http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/--- sector/documents/genericdocument/wcms_181288.pdf (accessed on 02-04-2016).

unregulated profession.[297] The WIFC is the cornerstone for improvement of the labour standards and enhancing the human rights fishers as fishers believe that their plight was not being recognised.[298] Considering that, fishers and fishing vessels were excluded from nearly all-existing legislation, even from the MLC.

In terms of the preamble, the aim of the WIFC is to promote decent working conditions for fishers. The preamble recognises that fishing is a hazardous occupation and the ILO is aware of the need to protect and promote the rights of fishers. The preamble further acknowledges that the existing Conventions are inadequate to address the rights of fish workers. The WIFC aims at ensuring that fishers have decent conditions of work on board fishing vessels concerning minimum requirements for work on board; conditions of service; accommodation and food; occupational safety and health protection; medical care and social security. The WIFC proposes a comprehensive set of standards concerning the living and working conditions for an estimated 30 million fishers around the world. It applies to all commercial fishing, except subsistence and recreational fishing; to all vessels regardless of size; and to all fishers, including those who are paid by a share of the catch. The WIFC provisions are the most up to date provisions of several old and outdated ILO conventions, as well as introducing new measures, which had not been covered previously.

297 ITF "The ILO Work in Fishing Convention 2007 A Guide for unions" http://www.itfseafarers.org/files/publications/33050/fishing_con_en.pdf (accessed on 02-04-2016).

298 ITF Seafarers "Out of Sight Out of Mind" available at www.itfseafarers.org/files/extranet/-1/2259/humanrights.pdf (accessed on 2015-11-04). See also Seafarers Rights "SRI Annual Review 2013" http://seafarersrights.org/sri-annual-review-2013/ (accessed 2016-04-20). According to Brian Orrell, the SRI Advisory Board Chairman, seafarers are often kept uninformed of their rights intentionally in the mistaken belief that what they don't know won't hurt them, and on board ship working and living environments will be all the better for that. In many situations where seafarers do know their rights they continue to work and live on board environments where they fear asserting them, or are unaware of the procedures to follow.

The main objective of the WIFC is to provide for minimum international standards for the working conditions of fishers, and fishers' social security in the fishing sector.[299] The WIFC's was designed to ensure that fishers worldwide have access to decent working and living conditions which are in line with the objectives of the ILO.[300] The WIFC sets out a basic framework of obligations for employers, and corresponding obligations for governments to input minimum standards into national legislation. This has been viewed as a bigger challenge for some governments than others, given the diverse conditions in which the global fishing industry operates. For the same reason, the WIFC most basic provisions are likely to have a greater impact on fishers working in less developed parts of the industry. The WIFC is flexible so that it can be relevant to all types of commercial fishing and be implemented all around the world. It also enjoys the flexibility of gradual implementation of certain provisions. As mentioned earlier, although adopted, it will not come into force until 10 ILO Member States have ratified the WIFC of which eight must be coastal States. This target has been reached and the WIFC will take effect on the 16 November 2017.[301]

299 *Ibid*.

300 *Ibid*.

301 Art 48 of the WIFC. See ILO "Ratification of C188- Work In Fishing Convention" http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333 (accessed 2016-11-04). Lithuania's ratification is the 10th required for the Convention to enter into force. Lithuania is the third EU country to ratify the Convention, following ratifications by Estonia and France. To date, by Angola, Argentina, Bosnia and Herzegovina, Congo, Morocco, Norway and South Africa has also ratified the WIFC.

2 3 4 LATEST DEVELOPMENTS IN REGULATING HOURS OF WORK OF FISHERS

The MLC is the most up to date international Code for seafarers.[302] In relation to hours of work, the MLC updated and consolidated the Seafarers' Hours of Work and the Manning of Ships Convention.[303] The purpose regulating seafarers' hours of work is to lower seafarers risk to fatigue.[304] The provisions regulating hours of work for seafarers do not require the adoption of laws or regulations but does require that a ratifying country ensure that hours of work or hours of work or rest is regulated.[305]

The MLC defines "hours of work" as the time during which seafarers are required to do work, on account of the ship.[306] The term "hours of rest" mean time outside hours of work; this term does not include short breaks.[307] The MLC prescribes certain limits on hours of work.[308] The maximum hours of work for seafarers should not exceed 14-hours in any 24-hour period, 72 hours in any seven-day period.[309] Alternatively, the minimum hours of rest shall not be less than 10 hours in any 24-hour period; and 77 hours in any 7-day period.[310] Hours of rest may be divided into no more than two periods, one of which shall be at least 6 hours in length, and the interval between

302 Art 2(e) of the MLC.

303 Regulation 2.3 and the Standard and Guideline along with Regulation 2.7 on Manning levels of the MLC.

304 Regulation 2.3 Standard A2.3 4

305 Paragraph 1 of Regulation 2.3.

306 See the MLC Regulation 2.3 Standard A 2.3 1(a).

307 See the MLC Regulation 2.3 Standard A 2.3 1(b).

308 See the MLC Regulation 2.3 Standard A 2.3 5.

309 See the MLC Regulation 2.3 Standard A 2.3 5(a) and 5(b).

310 See the MLC Regulation 2.3 Standard A 2.3 5(b).

consecutive periods of rest shall not exceed 14 hours.[311] However, an exception can be made to all the clauses mentioned above in case the master of the ship deems it necessary to require services of a seafarer instead of maintaining the safety of the ship, especially on an emergency basis.[312] The master can suspend the schedule of work hours and hours of rest in situations of vessels distress and require a seafarer to perform necessary duties until normal conditions are restored.[313] On return to normal circumstances, seafarers involved in work during the period of distress should be granted a rest period to prevent the build-up of fatigue on the ship.[314] As mentioned earlier fishing vessels were excluded inclusive of fishers.[315] The next paragraph will explain the regulation of working hours for fishers in terms of the WIFC.

Unlike for general seafarers, previously there was no international standard for regulating the hours of work for fishers. The WIFC is the first international standard that regulates hours of work. However, the WIFC only provides for “hours of rest” and does not include hours of work for this section.[316] The WIFC provides that fishers should be given regular and sufficient rest to ensure their safety, health and limit fatigue.[317] Minimum hours of rest should, after consultation, be provided for fishers who remain at sea for more than three days, regardless of the fishing vessels size.[318] The minimum hours of rest should not be less than 10 hours in a 24-hour period and

311 See the MLC Regulation 2.3 Standard A 2.3 6.

312 See the MLC Regulation 2.3 Standard A 2.3 14.

313 See the MLC Regulation 2.3 Standard A 2.3 14.

314 See the MLC Regulation 2.3 Standard A 2.3 14.

315 Art 2(4) of the MLC.

316 See Art 14 of the WIFC.

317 See Art 14 1(b) of the WIFC.

318 See Art 14(b) of the WIFC.

77 hours in any 7-day period.[319] The fishers' entitlement to hours of rest on fishing vessels that stay at sea for more than three days may be temporarily exempted by the competent authority for limited and specified reasons.[320] The WIFC allows for temporary exceptions to the limits of daily or weekly rest for specified reasons provided that fishers be granted compensatory periods of rest as soon as practicable.[321] However, there is no express requirement that such compensatory rest should be equivalent in duration.[322] The fishers' period of rest may be altered from those described above. The competent authority should make alternative arrangements after consultation with the representatives of fish workers and employers.[323] Despite these entitlements, the skipper may decide to ask any fisher to perform any hours of work necessary for the immediate safety of the vessel, the persons on board or the catch, or for assisting other boats in distress at sea.[324] Fishers whose hours of rest have been suspended because of an emergency shall receive an adequate period of rest as soon as a normal situation is restored.

On the issue of wages, the Governing Body of the ILO, in 2008, decided to convene a meeting of the Subcommittee on Wages of Seafarers of the JMC to update the ILO minimum basic wage of able seamen, in accordance with the Seafarers' Wages, Hours of Work and Manning of Ships Recommendation, 1996. This Subcommittee was established by the Governing Body in 2001 to meet every two years to update the basic pay or wages of able seafarers. A seafarer does not have a minimum wage. However, a country that has ratified the MLC is encouraged to consult shipowners and

319 Art 14 of the WIFC.

320 Art 14(2) of the WIFC.

321 Art 14 (2) of the WIFC.

322 See Art 14(2) of the WIFC.

323 Art 14(3) of the WIFC.

324 Art 14(4) of the WIFC.

seafarer organisations and to establish procedures for determining minimum wages for seafarers. It is also recommended that the basic pay or wages for a calendar month for an able seafarer should be no less than the amount set from time to time by the JMC or another body authorised by the ILO. However, as mentioned earlier fishers are excluded MLC and from this consideration. The WIFC is silent on wages. The only mentioning in any form concerning wages is Articles 23 and 24 that deal with the issue of payment to fishers. These Articles require that States that have ratified the WIFC be required to adopt laws, regulations or other measures, providing that fishers who are paid wages should receive their payments on a regular basis and have the means to transmit all or part of their payments to their families at no cost.

2 3 5 OTHER CONDITIONS OF EMPLOYMENT IN TERMS OF THE WORK IN FISHING CONVENTION

Part III of the WIFC deals with minimum requirements for work on board fishing vessels. The WIFC revised the Minimum Age (Fishermen) Convention. The minimum age for working on fishing vessels is 16 years old, but this could be reduced to 15 by the competent authority provided that the fisher be no longer subject to compulsory education under the national law and is also engaged in vocational training in fishing.[325] The minimum age for activities, which jeopardise the health, safety and morals of a young person shall not be less than 18 years.[326] These activities are described by national laws or by the competent authority. Fishers under the age of 18 shall not be employed to perform duties at night.[327] An exception to the strict application of this requirement may be made by the competent authority of the

325 Art 9(1) and Art 9(2) of the WIFC.

326 Art 9 (3) of the WIFC.

327 Art 4(4) of the WIFC.

prohibition impaired effective training and provided that such training would not have a detrimental impact on the health or well-being of the fisher.[328]

The Medical Examination (Fishermen) Convention[329] has been revised by WIFC but its provisions remain in force for those State Parties who have not ratified the WIFC. States who ratify the WIFC automatically denounce the Medical Examination (Fishermen) Convention.[330] Article 2 of the Medical Examination (Fishermen) Convention provides that no person shall be engaged in employment in any capacity on a fishing vessel unless he produces a certificate confirming to his fitness for the work for which he is to be employed at sea which has to be signed by a medical practitioner. The certificate is to be signed by a medical practitioner approved by the competent authority who is also responsible for prescribing the nature of the medical examination and the particulars to be included in the medical certificate.[331] The WIFC provides that no fishers shall work on board a fishing vessel without a valid medical certificate, attesting to fitness to perform their duties.[332] The competent authority in relation to the application of the general rule may grant exemptions after consultations with the representative organisations of workers and the employers, taking into account the safety and health of the fishers.[333] In granting the exceptions,

328 Art 9(6) of the WIFC.

329 *Medical Examination (Fishermen) Convention*, 1959 (C113)

330 Art 49 of the WIFC.

331 There are also ILO/WHO Guidelines for conducting pre-sea and periodic medical fitness examinations for seafarers. The IMO's International Convention on Standards of Training, Certification and Watch keeping for Fishing Vessel Personnel, 1995 (STCW-F), includes requirements concerning medical fitness for fishing vessel personnel. Italy is not a party to the 1959 Medical examination convention but has ratified the 1995 IMO Convention.

332 Art 10 of the WIFC.

333 Art 10 (2) of the WIFC.

consideration should be given to the size of the vessel, the availability of medical help, evacuation, duration of the voyage, area of operation, and the type of fishing operation. The WIFC instructs the Member States to adopt laws, regulations or other measures regarding the nature of the medical examination, and the form and content of the medical certificate. [334] The laws, regulations or other measures adopted should specify the frequency of medical examination and the period of validity of the certificate.[335] Fishers are entitled to further examination by a second independent practitioner if they have failed the first test.[336]

Part IV of the WIFC[337] lists the requirements directly related to the conditions of work on board fishing vessels. These requirements include staffing of fishing vessels, fish workers' hours of rest, the list of crews on board, the fishers' work agreements, fishers' repatriation, recruitment, and placement of fishers, and payment of fish workers. ILO Member States that ratify the WIFC are obliged to comply with these requirements and implement them through legislation.

In relation to manning of fishing vessels, the general rule is that there should be legislation that ensures fishing vessels flying their flags are sufficiently manned for safe navigation and operation and that the vessel is under the control of a competent

334 *The Work in Fishing Recommendation*, 2007 provides additional provisions to those already in the Convention in relation to the medical examination. Measures taken by ILO members to prescribe the nature of the medical examination should take into consideration the age of the person to be examined and the nature of the duties to be performed. The certificate must be signed by an officially approved medical practitioner. It is imperative that ILO members should take into account the international guidance on medical examination and certification for working at sea including ILO/WHO Guidelines for Conducting pre-sea and Periodic Medical Fitness Examination for Seafarers.

335 Art 11 of the WIFC.

336 Art 11(e) of the WIFC.

337 Art 13-24 of the WIFC.

skipper.[338] The rule is expanded upon for fishing vessels that are 24 or more metres in length; these vessels should then specify the number and the qualifications of fishers required.

Probably the most frequent complaint concerning conditions relates to the consequence of fatigue. The WIFC provides that fishers on board fishing vessels should be given regular and sufficient rest to ensure their safety and health. Minimum hours of rest should, after consultation, be provided for fishers working on board fishing vessels, which remain at sea for more than three days, regardless of their length. The minimum hours of rest should not be less than ten hours in a 24-hour period and 77 hours in any seven-day period.[339] The fishers' entitlement to hours of rest on fishing vessels that stay at sea for more than three days may be temporarily exempted by the competent authority for limited and specified reasons. If exceptions are invoked, the fishers who have been subjects of such exceptions shall receive compensatory periods of rest as soon as it is practicable. The period of rest of fishers may be altered from those described above. The competent authority should make any alternative arrangements after consultation with the representatives of fish workers and employers. Despite these entitlements, the skipper may decide to ask any fisher to perform any hours of work necessary for the immediate safety of the vessel, the persons on board or the catch, or for assisting other boats in distress at sea. Fish workers whose hours of rest have been suspended because of emergency shall receive an adequate period of rest as soon as a normal situation is restored.

Article 21 of the WIFC deals with the issue of repatriation. States that have ratified the WIFC should ensure that fishers on a fishing vessel flying their flags and entering a foreign port are entitled to repatriation if the fishers' work agreements have expired or

338 Art 13 of the WIFC.

339 Art 14 of the WIFC.

have been terminated by fishers or the owners for justified reasons. This also applies to fish workers who are no longer able to carry out the duties required by the terms of their agreements or who cannot be expected to perform their functions in the specific circumstances, as well as when fishers are, for the same reasons, transferred from the vessels to the ports. The WIFC provides that the fishing vessel owner must bear the cost of repatriation, except when the fisher is found to be in serious default of his/her work agreement. National laws or regulations should provide the precise circumstances under which a fisher is entitled to repatriation, including the maximum duration of service on board a fishing vessel and the destinations to which fishers may be repatriated. In an instance when a fishing vessel owner fails to provide for repatriation, the State Party whose flag the vessel is flying should arrange for the repatriation and will be entitled to recover the cost from the fishing vessel owner.

There are a number of provisions in Articles 25 to 28 of the WIFC that deal with accommodation and food on board fishing vessels. States that have ratified the WIFC are required to adopt laws, regulations and other measures applicable to fishing vessels flying their flag in respect of accommodation, food, and potable water. In terms of these provisions, the accommodation on board fishing vessels should be of sufficient size and quality as well as appropriately equipped according to their operations and a number of time fishers living on board. It is imperative that the laws, regulations or other measures should be adopted addressing certain issues. Specific measures in relation to accommodation include its maintenance in respect of hygiene and overall safe, healthy and comfortable conditions; ventilation, heating, cooling and lighting; mitigation of excessive noise and vibration; and sanitary facilities.[340] National laws should also specify the requirements for the sufficient quantity and quality of food

340 Art 26 of the WIFC. See also the Annex III of the 2007 Convention provides provisions in respect of the measurements to be used for fishing vessel accommodation

and drink to be carried on board the fishing vessels, the cost of which is borne by the fishing vessels' owners.

The provisions concerning fishers' medical care, health protection and social security specify the requirements of the WIFC by setting out the responsibilities of the State and the owners of the fishing vessels.[341] This is the first time the ILO has addressed the issues of medical care, health protection and social security in a single convention in relation to fish workers. States that have ratified the WIFC should adopt legislation requiring that fishing vessels be properly equipped with medical supplies in connection with the service, the voyage, the area of operation, and the number of fishers on board. Every fishing vessel should have at least one fisher qualified in first aid and other forms of medical care. The equipment and medical supplies on board the fishing vessel must have adequate instructions or other information in a language and format, which the fisher or fishers can understand. In the case of serious injury or illness, fishers have the right to be taken ashore for medical treatment promptly.[342]

The WIFC requires that each State that has ratified the WIFC shall ensure that fishers residing in its territory and dependencies are entitled to social security benefits. Since it is clear that few fishing nations have a proper or any system of social security, the WIFC requires that the Member States should take steps to achieve progressively comprehensive social security protection for all the fishers residing in their territories. The social protection shall, by national law, extend to fishers who suffer from work-related injury, sickness, or death. Such protection should include compensation and appropriate medical care.[343]

341 Art 29 to Art 39 of the WIFC.

342 See Art 29 and Art 30 of the WIFC.

343 See Art 34-37 of the WIFC.

The employment agreement is between an employer and employee, which legally bind them to conditions stated in the working relationship. The fishing vessel owner has the responsibility to ensure that every fisher working on board the fishing vessel has a written fisher's work agreement signed by both the fisher and the fishing vessel owner or by an authorised representative of the fishing vessel owner. If fish workers are not employed directly by the owner, the owner should have evidence of contractual or similar arrangements, providing decent work and living conditions on board the vessel as required under the provisions of the Convention.[344] National legislation, regulations, or other measures should ensure that fishers working on board fishing vessels are protected by fishers' work agreements, the terms of which are consistent with the provisions of the WIFC as well as the specific provisions listed in Annex II of the WIFC.[345] Such legislation should also provide procedures to ensure that the fisher can review and seek advice on the terms of his agreement before it is concluded. It should also provide means for settling disputes in connection with the provisions of the agreement. The agreement may be concluded for a definite period or a voyage, and if permitted by national law, it may be valid for an indefinite period. The agreement should state the respective rights and obligations of each of the parties. It should contain certain particulars including: the surname and other names of the fisherman, date of birth, age and birthplace, the place and the date of the agreement, the name of the fishing vessel, the voyage or voyages to be undertaken and the capacity for which he is employed, the time and the place of reporting for service, the amount of the wage and his share and the method of calculation, medical cover during service,

344 Art 20 of the WIFC.

345 Annex II entitled "Fisher's Work Agreement" provides a detailed list of what should be included in the agreement. The list includes fisher's family name and other names, date of birth or age, and birthplace, the place and date of the conclusion of the agreement, the name of the fishing vessel/vessels and the registration number, the capacity for which the fisher is employed, the name of the employer or the fishing vessel owner, the voyage or voyages to be undertaken at the time when the contract is signed, the amount of wages or the amount of share and the method of calculation, and the termination of the agreement.

paid annual leave, social security coverage, repatriation, minimum rest periods, reference to collective bargaining agreement if applicable, the termination of the agreement and any other particulars which may be required by national law.[346] An agreement may be terminated by mutual consent of the parties, the death of the fisherman, loss, or total unseaworthiness of the fishing vessel and any other cause that is provided for by national law.[347]

2 3 6 ENFORCEMENT MECHANISMS

The ILO has taken great strides in dealing with the growing number of needs and challenges that are faced by fishers, and seafarers. However, without ratification, implementation and enforcement mechanism the realisation of decent work for fishers will not be obtained. The principle of freedom of association is at the core of the ILO's values: it is enshrined in the ILO Constitution, the ILO Declaration of Philadelphia,[348] and the ILO Declaration on Fundamental Principles and Rights at Work. It is also a right proclaimed in the IBR.[349] International human rights law lays down obligations,

346 Annex II Fisher's Work Agreement of the WIFC.

347 *Ibid*.

348 In 1944, the International Labour Conference adopted the Declaration of Philadelphia, which now forms part of the ILO Constitution. The Declaration reaffirmed that "freedom of expression and of association are essential to sustained progress" and emphasized that this was one of the "fundamental principles on which the Organisation is based".

349 In terms of the UDHR, Art 20, paragraphs 1 and 2 of the Universal Declaration says that "Everyone has the right to freedom of peaceful assembly and association" and that "No one may be compelled to belong to an association". Art 23, para 4 says, "Everyone has the right to form and to join trade unions for the protection of his interests". In respect to the *International Covenant on Economic, Social and Cultural Rights*, Art 8, paragraph (1) of the Covenant provides, "The States Parties to the present Covenant undertake to ensure the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. The right of trade unions to establish national federations or confederations and the right of the latter to

which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect, and to fulfil human rights. The duty to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The duty to protect requires States to protect individuals and groups against human rights abuses. The duty to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. The "respect, protect, and fulfil" paradigm is used to describe from a human rights perspective the duty of the State. When a State decides to become a member of the ILO, the State accepts the fundamental principles embodied in the Constitution, including the principles of freedom of association. The responsibility for ensuring respect for the principles of freedom of association lies with the State.[350] The principle of freedom of association is essential to the operation of the ILO. Without it, a representative voice of employers and workers simply does not exist where they do not have the right to form organisations of their choosing.

The WIFC, recognises, amongst others, the fundamental rights, those fundamental rights include freedom of association and the effective recognition of the right to collective bargaining.[351] As a result, the focus is on the freedom of association and the

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form or join international trade union organisations. The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. The right to strike, provided that it is exercised in conformity with the laws of the particular country.

350 Freedom of Association Digest 9, see 304th Report, Case No. 1852, para. 492. The idea of an obligation to respect the principle of freedom of association regardless of ratification of any ILO Convention, is seen once again, in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. In 1998, the International Labour Conference adopted a declaration which made clear that "all [ILO] members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions".

351 Preamble of the WIFC.

right to collectively bargain, for an enforcement mechanism, to this effect, the ILO standards are provided. The Freedom of Association and Protection of the Right to Organise Convention describes the right of workers and employers to establish and join organisations of their choosing without previous authorisation. Workers and employers' organisations shall organise freely and not be liable to be dissolved or suspended by an administrative authority, and they have the right to establish and join federations and confederations, which may in turn affiliate with international organisations of workers and employers.[352] The Right to Organise and Collective Bargaining Convention provides that workers shall enjoy adequate protection against acts of anti-union discrimination, including requirements that a worker not joins a union or relinquish trade union membership for employment or dismissal of a worker because of union membership or participation in union activities. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other, in particular the establishment of workers' organisations under the domination of employers or employers' organisations or the support of workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations. The Convention also enshrines the right to collective bargaining and obliges the promotion of collective bargaining by ratifying States.

Freedom of association ensures that workers and employers can associate to negotiate work relations efficiently. Combined with strong freedom of association, sound collective bargaining practices ensure that employers and employees have an equal voice in negotiations and that the outcome will be fair and equitable. Collective bargaining allows both sides to negotiate a fair employment relationship and prevents

352 *Freedom of Association and Protection of the Right to Organise Convention* 1948.

costly labour disputes. Indeed, some research has indicated that countries with an efficient collective bargaining system in place tend to have less inequality in wages, lower and less persistent unemployment, and fewer and shorter strikes than countries where collective bargaining is less established. These guarantees apply to all employers and workers in the private and public sectors, including fishers and seafarers. However, what happens when collective bargaining does not have an effective collective bargaining mechanism? The next chapter will explain the regulation and enforcement mechanisms for their conditions of employment of fishers in Namibia.

2 4 CONCLUSION

It is clear from an international perspective every human being has rights in terms of international human rights. International human rights influence the approach the international community, notably the ILO, has taken to set international labour standards. The ILO in realising the objectives of the decent work agenda has developed most of the related international instruments. The ILO has assumed the regulatory role in setting minimum standards for fishers, and seafarers for the realisation of decent work. Fishers are dependent on not only the ratification but also the effective implementation of international Conventions by States to protect their fundamental rights. Without the ratifications by States of these international standards, fishers would be left unprotected and systemic human right and labour right abuses will thrive, which has been the case in respect to setting international standards for the conditions of employment for fishers, particularly related to hours of work and wages. The process of regulating fishers, and where applicable seafarers', conditions of employment related to hours of work and wages were more complex especially when compared to other occupations. To make matters worse, fishers were excluded from most of the Conventions related to the regulation of hours of work and wages and other conditions of employment for seafarers, since 1920.

With the introduction of the WIFC and the WIFC recommendations, the ILO has consolidated and updated its previous Conventions and Recommendations to establish minimum standards for fishers. The WIFC goes further inserting social welfare provisions. The WIFC has set minimum conditions related to hours of work, which is an important element in the realisation of decent work. The envisaged regulation related to hours of work can lead to positive outcomes. For example, limiting fatigue on the board of fishing vessels. Unfortunately, the WIFC is silent on wages. When one compares the standards applicable to seafarers, in relation to wages, to that of fishers it is clear that seafarers have a higher standard as minimum wages are set and the wages of seafarers are reviewed periodically to set minimum wages. As pointed out before, the success of the WIFC and its Recommendation is dependent on the ratification and implementation by Member States. The next chapter will discuss the Namibian position in regulating condition of employment for fishers.

CHAPTER 3
CONDITIONS OF EMPLOYMENT FOR FISHERS IN NAMIBIA

3 1 INTRODUCTION

The conditions of employment for fishers in Namibia have recently come under scrutiny that resulted in numerous complaints being instituted to the Director of Labour Services of Namibia.[353] In 2014, the Director of Labour Services held numerous consultative meetings with all fishing companies and trade union representatives. The purpose of the meetings was to resolve the disputes relating to fishers' condition of employment. At that time, there was conflict amongst different trade unions and trade union members resulting in no consensus being reached, which eventually led to unprotected ("wildcat") strikes. The centre of the disputes revolved around the regulation of fishers' hours of work, low wages, and other basic conditions of employment.[354]

This chapter sets out Namibia's obligation in terms of its Constitution to adhere to the international standards provided in chapter 2. A brief background of the previous Labour Act's will be provided, inclusive of examples as to why the Labour legislations were not protecting fishers adequately. Thereafter a detailed discussion of the basic

353 New Era "Kaaronda Tears Into Fishing Industry" https://www.newera.com.na/2015/11/11/kaaronda-tears-fishing-sector/ (accessed 2017-08-05).

354 Stop Illegal Fishing "Namibian President Condemns Slave Like Conditions at Sea" https://stopillegalfishing.com/press-links/namibian-president-condemns-slave-like-conditions-at-sea/ (accessed 2017-05-08).

conditions of employment provided in terms of the most recent national Labour Act, and reference to the Merchant Shipping Act (hereinafter referred to as "the MSA")[355] is included. In relation to the basic conditions of employment, the main focus of this chapter is on the regulatory framework for the conditions of employment relating to the hours of work, wages, and other basic conditions of employment in terms of the 2007 Labour Act. The 2007 Labour Act contains provisions regulating hours of work that in turn affect a fishers' wages. These provisions include the declaration of continuous shifts,[356] ordinary hours of work,[357] overtime,[358] night work,[359] daily and weekly spread-over,[360] work on Sundays,[361] and public holidays.[362] The sections of the MSA[363] that are applicable relate to the payment of fishers' wages.[364] Lastly, this chapter explains the enforcement mechanism in light of the principle of freedom of association mentioned in chapter 2. In this regard, the focus will be on the right to freedom of association and the state of collective bargaining in the fishing industry. The primary aim of this chapter is to determine the extent of Namibia's compliance with the international standards provided for in terms of the WIFC and whether or not Namibia should ratify the WIFC. In addition, possible amendments suggested that need to take place in terms of

355 Merchant Shipping Act 57 of 1951. Hereinafter the Merchant Shipping Act.

356 s 15 of the Labour Act.

357 s 16 of the Labour Act.

358 s 17 of the Labour Act.

359 s 19 of the Labour Act.

360 s 20 of the Labour Act.

361 s 21 of the Labour Act.

362 s 22 of the Labour Act.

363 Though the provisions of s 356 (1) of the MSA, regulations have been promulgated by the relevant Ministry. These regulations deal with other specific requirements of the WIFC, such as: the responsibility for the safety of fishers, medical examinations of fishers, accommodation and food on board fishing vessels, the construction of fishing vessels and occupational health and safety of fishers are covered in the relevant Namibian regulations which will not be discussed as it won't serve the purpose of this study.

364 Art 23 of the WIFC: s 123 136 of the MSA

Labour Act and MSA to give effect to the WIFC in respect to the regulation of condition of service of employment for fishers related to hours of work and wages in Namibia will be considered.

3 2 THE CONSTITUTION OF NAMIBIA

Not a great deal has been written about Namibia's transition to democracy and the fundamental rights entrenched in the Constitution of Namibia[365] (hereinafter referred to as "the Constitution"). As provided for it chapter 1, before the independence of Namibia, the mere thought of the previous labour system evokes powerful and painful memories of an abusive contractual labour system that were inspired by policies based on discrimination, especially during the apartheid era. A struggle against groups or people does not define the struggle for independence, but rather a struggle against destructive ideas and ideologies; this includes discriminatory labour practices that violate the dignity of employees.[366] Upon the promulgation of the Constitution of Namibia, the preamble of the Constitution defines the Namibia as the conglomerate of people who "emerged victorious in our struggle against colonialism, racism and apartheid".[367] Throughout the provisions of the Constitution, there is a great emphasis placed on the right to an inherent dignity and the realisation of equal and inalienable rights of all members of the human family.[368] Chapter 3 of the Constitution contains the

365 The Constitution of the Republic of Namibia, 1990. Hereinafter the Namibian Constitution.

366 See African Personnel case.

367 The Preamble of the Namibian Constitution.

368 See In the case of *Minister of Defence v Mwandinghi*, this Court formulated a general approach which should inform Courts in gathering the scope and import of fundamental rights and freedoms protected in Chapter 3 of the Constitution: "The whole tenor of chap 3 and the influence upon it of international human rights instruments, from which many of its provisions were derived, call for a generous, broad and purposive interpretation that avoids `the austerity of tabulated legalism'." In *R v Zundel* "Before we put a person beyond the pale of the Constitution, before we deny a person the protection which the most fundamental law of this

Bill of Rights that outlines fundamental human rights and freedoms such as the right to equality, dignity and property fundamental freedoms and enforcement of fundamental rights and freedoms.[369] The Bill of Rights is based on the UDHR and incorporates the different provisions of the IBR.[370] The rights enumerated in the Bill of Rights are confined to the so-called first-generation or traditional human rights. The Constitution further declares that the people of Namibia desire to promote amongst themselves the dignity of the individual and the unity and integrity of the Namibian nation "amongst and in association with the nations of the world".[371] Naldi opines that "Chapter 3 of the Constitution is not solely concerned with civil and political rights but also seeks to protect certain economic, cultural and social rights, generally referred to as second generation rights in international law, albeit in a somewhat limited and modest fashion."[372] According to Fourie, 'the authors of the Constitution chose to handle economic and social matters outside the rights context and specifically as policy goals.'[373] Social and economic rights concern some form of acknowledgement that a State has a constitutional duty to take care of the social and economic plight of people is necessary and that its ordinary citizens will not relate to a Bill of Rights that recognises only Lockean rights.[374] Thus, the recognition and progressive steps to implement socio-economic rights by a State adds to the welfare of its people and

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land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection."

369 Art. 10 of the Namibian Constitution.

370 However, the form and extent to which socio-economic rights are provided for tend to be a source of considerable interest as discussed below.

371 Preamble of the Namibian Constitution.

372 See GJ Naldi *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (1995) 96

373 See Fourie "The Namibian Constitution and Economic Rights" 1990 6 *South African Journal on Human Rights* 363 365.

374 De Villiers "Human Rights in Developing Countries: Some Crucial Issues" 1999 TSAR 679 681 as quoted in Jansen van Rensburg, "Grondwetlike waardes en sosio-ekonomiese regte met verwysing na die reg op sosiale sekerheid" 1999 *Tydskrif vir Regswetenskap* 43 50.

enhances other rights in the Constitutions such as the right to dignity.[375] This has been supplemented in Article 95[376] and 144[377] of the Namibian Constitution,[378] as Namibia adopts a positive approach towards international law by introducing Acts that are in line with the international standards of the international community.[379] Article 95 obligates Namibia to promote the welfare of the people by adopting, *inter alia*, policies aimed at adhering to and act in accordance with the international Conventions and Recommendations of the ILO. Article 95 provides that the State adopt, policies aimed at:

- Actively encouraging the formation of trade unions to protect workers' rights and interests.
- Ensuring that senior citizens receive pension adequate for the maintenance of a decent standard of living.
- Ensuring that the health and strength of the workers are not abused.
- Ensuring that workers are paid a living wage adequate for the maintenance of a decent standard of living.
- Promoting sound labour relations and fair employment practices.

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375 Basson *South Africa's Interim Constitution* (1995) xxviii.

376 Art 95(d) Constitution of the Republic of Namibia, 1990. Art 95(d) reads as follows: "The State Shall Actively Promote and Maintain the Welfare of the People by Adopting, *inter alia*, Policies Aimed at the Following: (d) Membership of the International Labour Organisation (ILO) and, Where Possible, Adherence to and Action in Accordance with the International Conventions and Recommendations of the ILO."

377 Art 144 Constitution of the Republic of Namibia, 1990. Reads as follows: "Unless Otherwise Provided by this Constitution or Act of Parliament, the General Rules of Public International Law and International Agreements Binding upon Namibia under this Constitution shall form Part of the Law of Namibia."

378 The Namibian Constitution.

379 Some legal scholars have described the Namibian Constitution as an international law friendly. See, for instance, Devine, J Dermont. 1995. "The Relationship Between International Law and Municipal Law in Light of the Interim South African Constitution 1993" 1996 *International Law and Comparative Law Quarterly* 44.

- Providing just and affordable social benefits for the unemployed, incapacitated and disadvantaged.
- Raising and maintaining an acceptable level of nutrition and improving public health.

Although most of the principles listed in Article 95 constitute the so-called second and third generation rights as contained in the IBR. These rights cannot, strictly speaking, be categorised as constitutional rights. Rather, they can be described as policy or general goals that have no force of law. There is no doubt that the courts should and do play a more prominent role in this regard. In the particular context of socio-economic rights, even though the Namibian courts are, by the Constitution,[380] precluded from enforcing the principles stipulated in terms of Article 95, which as was seen earlier, are the equivalent of the socio-economic rights contained international human rights instruments.[381] However, for the realisation of the right to an adequate standard of living provided for in the IBR, a State should take progressive steps to ensuring such rights, including socio-economic rights. As a result, the Constitution contains provisions that seek not only to protect basic human rights but other rights that are significant to the States policy in regulating labour rights.[382] Unfortunately, the Bill of Rights does not refer to workers' rights, except for the freedom of association provisions. It is argued, even though the Constitution does not make specific reference to workers' rights, the human rights provisions should be seen in isolation to labour

380 Art 101 of the Namibian Constitution.

381 As a result, there have not been any reported cases in Namibia involving socio-economic rights, apart from a few cases dealing with expropriation of land One such case is Rehoboth Bastergemeete and Another v Government of the Republic of Namibia and Others 1995 (9) BCLR 1158 (NmH) in which the High Court considered the question whether the transfer of land from the Rehoboth – a community which had settled in Namibia during the 19th century – amounted to expropriation without compensation. The court held that the facts did not constitute expropriation but rather a transfer of state assets from a tier of government which had ceased to exist.

382 Fenwick "Labour Law Reform in Namibia" 327.

rights. Instead, the human rights provisions provided for in the Constitution should play an influential role in shaping and implanting labour rights in Namibia. The implementation, as well as the enforcement[383] of human rights takes place through the legislature by the enactment of the necessary enabling legislation, through the executive and state administration by the adoption of the appropriate policies and the judiciary by interpreting and making the relevant orders of enforcement.[384]

In Namibia, the right to form or join trade unions is guaranteed by the Namibian Constitution.[385] Of particular reference to this study is Article 21 of the Constitution. Article 21 provides for freedom of association that includes freedom to form and join associations or unions, including trade unions. The importance of Article 21 is that it provides employees mechanism to regulate labour conditions for employees by trade unions through collective bargaining. However, due to the diversity and unique conditions of employment in the fishing industry, the effectiveness of the trade unions in protecting the rights of fishers is in question. This point of contention will be

383 Namibia also has an Ombudsman whose functions are provided for in terms of Art 91 of the Constitution. In terms of the Ombudsman Act, no 7 of 1990 the Namibian Ombudsman has extensive powers, and in has the mandate to investigate complaints of human rights violations by both government officials and private persons or entities. The human rights and fundamental freedoms that can be investigated by the Ombudsman are not only those contained in Chapter 3 but include a variety of civil, political, economic, social and cultural rights. The role of the Ombudsman in the protection and enforcement of socio-economic rights in Namibia is evident from the volume and nature of complaints that it deals with. For example, in 2015, the Namibian Ombudsman nearly 3000 complaints. See Art 21(1)(e) of the Constitution. These are all issues of a socio-economic nature, indicating therefore, the important role the Ombudsman plays in protecting and enforcing socio-economic rights in Namibia. This role has to be seen in the context of the fact that the role of the Namibian courts in enforcing socio-economic rights is effectively limited by the Constitution.

384 Art 5 of the Constitution which provides as follows that fundamental rights and freedoms enshrined the Bill of Rights shall be respected and upheld by the executive, legislature and judiciary and shall be enforceable by the courts.

385 Art 21(e) of the Namibian Constitution.

elaborated on later in the study. The next section will provide a short background of the Labour Acts of Namibia's and the incompatibility with the fishing industry.

3 3 BRIEF HISTORIC DEVELOPMENT OF THE LABOUR ACT

After Namibia's' independence in 1990, the Namibian workers expected the government to adopt a Labour Act to replace the oppressive colonial legislation and labour practices.[386] Only in 1992, after protracted delays[387] did the government in terms of Article 95 of the Constitution enacted the 1992 Labour Act. The 1992 Labour Act received accolades for providing basic labour rights to all Namibians regardless of race and employment.[388] Furthermore, the Preamble mirrored some of the Constitution's principles of State policy. These principles include, amongst other things, the formation of trade unions and employers' organisations and, where possible, the adherence to and implementation of ILO Conventions and Recommendations. The 1992 Labour Act, attempted to improve the basic conditions of employment of all workers. For example, the maximum weekly working hours were reduced to 45 hours; overtime was increased from the past 1,33 times the ordinary wage to 1,5 times the ordinary wage. For work on Sundays and public holidays, employers were compelled to pay double or one-half times the ordinary wage and provide the same time off the following week. In respect to night work, which is defined as working between 20:00 and 07:00 and employers had to pay at least an additional 6 percent of ordinary wages to their employees who carry out night work. The 1992 Labour Act also referred the Namibian MSA, whose roots extend as far as British Admiralty instructions of about 1845 and the South Africa's Local Merchant Shipping

386 See fn 98 5.

387 The reason for the delay was occasioned by the government's efforts to balance the interest of workers and employers.

388 Government Republic of Namibia (GRN) Ministry of Labour Annual Report (1997) 57.

Act of the Cape of Good Hope Act 13 of 1855. Wage agreements and employment contracts regulated some matters of employment conditions but could not sufficiently address matters such as employment conditions applicable to the fishing industry, especially while on board fishing vessels. For example, the two labour legislations do not adequately deal with meal times, work on Sundays, and public holidays, over time and spread-overs that affected fishers' wages. For fishers, spread-overs are the length one can be at sea, the hours one is permitted to work per shift and the structure of the number of shifts. It is evident, the Labour Act of 1992 fell short of addressing matters concerning the conditions of employment on board fishing vessel. The main reason was that Walvis Bay, the main port in Namibia, was not at that time reintegrated into Namibia following the independence of Namibia from South Africa. As a result, the Namibian Government did not take cognizance to regulate matters of maritime fishing operations including the conditions of employment of fishers. There is an exception, relating to urgent work. This exception falls short of addressing maritime operations as it concentrated on the loading, provisioning and off-loading instead.[389]

During the mid to late 1990s, the Ministry of Labour in collaboration with the tripartite Labour Advisory Council worked on amending the 1992 Labour Act to bring it up to date with international standards and to cater for the needs of the whole employees. Initially, the amendments focused on improving the dispute resolution system, but as the process unfolded, other aspects of the 1992 Labour Act evidently also needed to be amended. The 1992 Labour Act apparently was drafted in legal language, which made it difficult for the majority of society to understand. Consequently, the Minister of Labour was instructed by cabinet to redraft the complete 1992 Labour Act into "plain language". In the end, all the amendments became so substantial that it was decided to draft an entirely new Labour Act. In the late 1990's members of the fishing industry were invited to attend discussions at the Ministry of Works, Transport and

389 S 30 (2) of the Labour Act 6 of 1992.

Telecommunications. The invitation related to incorporating the fishing industry in the new Labour Act and establishing a new MSA, which would have contained a labour-regulating component catering to the unique needs of maritime employees.

In 2001, the Minister of Labour invited a delegation led by Mr Coppin to come forward with proposals. These proposals were to be done in alignment of the legislated framework of an Employer's Association. Following this invitation, after that the hake association joined and cooperated with the Namibian Employer's Federation (hereinafter referred to as "the NEF").[390] Work followed on the various Draft Bills up to and including the Draft Bill of 2002. During 2002, the Minister of Labour issued a Labour Bill to the fishing industry for comment, which was duly done by consulting amongst the Human Resource managers of the fishing industry. In 2004, these proposals were incorporated into the NEF document, which was submitted to the Minister of Labour. Unfortunately, the Minister appeared to not consider the proposals of the NEF, also not the recommendations from the fishing industry. After being debated in Parliament several times, the Labour Act was finally promulgated at the end of 2004 and was to be implemented in the second half of 2006, but some sections never came into operation.[391] As a result, a 2007 Labour Bill was introduced to fill the gaps of the 2004 Labour Act. The original 2007 Labour Bill was thus passed through the process to the National Council without consideration for fishers. The fishing industry attempted to make a meaningful contribution to the Labour Bill in legislating the accepted norms within the fishing industry in respect to basic employment conditions, to no avail. One key aspect the fishing industry sought was amending section 8(j) of the Labour Bill, which entailed that all maritime fishing operations be declared as urgent work. In the Labour Bill, urgent work was merely described as "work

390 See Namibian Employers Association at http://www.nea-namibia.com/index.html (accessed 2017-09-20).

391 Some section relates to certain issues, for example issues such as dispute resolutions, and it culminated into the new draft labour bill.

connected with the arrival, departure, loading, uploading, provisioning, fuelling, or essential maintenance of a ship]". The envisaged amendment of section 8(j) should classify "the operations of fishing or other sea-going vessel" as urgent work, which provides automatic exemption from the weekly rest periods of 36 hours set out in the envisaged section 20(2). Also, it would have given some protection regarding industrial action at sea as well as reflecting the reality of non-rigid daily spread-overs and meals, while at sea.[392] The fishing industry justifies this by providing that it is common practice to provide fishers with shore leave at the end of each fishing trip. Thus, the envisaged amendment would enable the fishing industry to act within the law and would be in line with the common practice in the fishing industry. However, would amendments have been to the benefit of the fishers? The rationale envisaged is that a fisher works when the fish is available and has been caught because it is a valuable and perishable resource. As a result, there are instances whereby fishers are required to work longer to catch and process as much fish as possible within the quota limits. However as mentioned earlier, one of the factors affecting fishers while at sea is fatigue due to irregular and excessive working hours. As such, it is submitted that amendment of section 8(j) of the Labour Bill would not have been in the best interest of fishers. Also, this amendment to section 8(j) for urgent work would have allowed the fishing industry to exceed overtime provisions at times without compensation.

Since independence, the Namibian Government has enacted several pieces of legislation in favour of good labour relations in Namibia. The current legislation covering labour in Namibia is the Labour Act of 2007[393] (hereinafter referred to as "the LA"). The LA became law in December 2007 and replaced the Labour Act of 1992. As mentioned earlier, the Labour Bill of 2007 was introduced and was prepared by the

392 S 18 of the Labour Bill.

393 11 of 2007.

Namibian Government with the technical assistance of the ILO.[394] In 2007, the LA of 2007 was enacted but only came into operation on 1 November 2008.[395] The LA of 2007 proclaims in its preamble,[396] amongst other things, to:

- Envisage consolidation of and amend the labour laws.
- Establish a comprehensive labour law for all employers and employees.
- Entrench fundamental labour rights and protection.
- Regulate basic terms and conditions of employment.
- Regulate collective labour relations.
- Provide for the systematic prevention and resolution of labour disputes.

The next section will provide for the different provisions of the LA relating to hours of work and wages.

394 The ILO funded the drafting of the Labour Act, 2007, in this case, Professor Halton Cheadle, University of Cape Town, was the expert who drafted the 2004 Labour Act which culminated into the Labour Act of 2007. This Act was transmitted to the ILO Headquarters for technical comments on its compliance with international labour standards.

395 Government Gazette of the Republic of Namibia No 3971 Notice No 236.

396 Preamble of the Labour Act 2007

3 4 HOURS OF WORK

Parties to an employment contract employment are free to determine the hours of work; this is the common-law position.[397] If the contract of employment does not regulate the hours of work, the courts apply the norm of the applicable industry.[398] As a result, the courts may determine whether the working hours demanded of the employee are too harsh and unreasonable. An employer is prohibited from requiring or permitting an employee to work for more than 45 hours in any week.[399] Also, an employer cannot require an employee to work more than 9 hours in any day, if the employee works for five days in a week, or more than eight hours in any day if the employee works for more than five days in a week. Alternatively, not more than the maximum number of hours prescribed by the Minister responsible for Labour for that employee's shift, if that employee works in continuous operation.[400] However, the LA provides an exception[401] to this maximum hour of a work rule.[402] Of which the ordinary working hours of an employee may be extended for up to 15 minutes in a day, but not more than 60 minutes in a week, to continue performing those duties after completion of the ordinary working hours. In addition, the LA provides that an employer must not require or permit an employee who is, *inter alia*, an employee of a class designated by the Ministry responsible for Labour to work more than 60 hours in a week.

397 However, very often, you find situations whereby the prospective employee is automatically at a disadvantage at the negotiation table. This is primarily due to the employee knowing that the prospective employee is desperate for employment and would accept any terms and conditions of employment, even though the terms and conditions are not favourable to the prospective employee.

398 Grogan Riekert's Employment Law 64.

399 In terms of s 16(1) of the LA, and subject to any contrary provisions of Chapter 3 of the Act.

400 S 15(2) of the Labour Act of 2007.

401 S 16(2) of the Labour Act of 2007.

402 S 16(1).

Alternatively, not more than 12 hours in any day, if the employee works for five days or fewer in a week or 10 hours in any day, if the employee works for more than five days in a week. Also, not more than the maximum number of hours prescribed by the Minister of Labour in terms of the employee works in a continuous operation. The LA permits only contractual voluntary overtime.[403] Which means that an employer should not require or permit an employee to do non-contractual overtime work.[404] Even where such agreements exist, overtime worked should not exceed 3 hours in a day or 10 hours in a week; and in any case, not more than 3 hour's overtime a day. However, maximum overtime may be increased, if an employer makes application to the Permanent Secretary responsible for Labour to that effect, and an affected employee agrees.[405]

According to section 17(4), if the Permanent Secretary grants the application, the Permanent Secretary must issue a notice, indicating the class of employees to whom the notice applies, the new limits on overtime work, any conditions concerning the working of the overtime and the duration of the application of the approved overtime. The Permanent Secretary may at any time amend or withdraw the notice.[406] In essence, the maximum overtime one can work 3 hours per day. The LA provides that where an employee works overtime, the following rate of pay will apply to him: the employer must pay to the employee for each hour of overtime worked the rate of at least one and a half times the employee's hourly basic wage.[407] However, if an employee who ordinarily works on a Sunday or public holiday works overtime on a

403 In terms of s17(2) of the LA, and subject to any contrary provisions in Chapter 3 of the Act.

404 *Tiger Bakeries Ltd v Food & Allied Workers Union & others* (1998) 9 ILJ 82 (W).

405 S 17(3) of the Labour Act of 2007..

406 According to section 17(5), section 17(1), (3) and (4) do not apply to an employee who is performing urgent work.

407 S 17(2) of the Labour Act of 2007.

Sunday or public holiday, the employer must pay him at the rate of at least double that employee's hourly basic wage. It must be borne in mind that it is only an employee who has worked overtime which is entitled to overtime payment in terms of the LA.[408]

The LA also limits the maximum spread-over of working hours of employees. According to section 20 of the LA, no employer may require or permit an employee except an employee who is performing urgent work, to work a spread-over of more than 12 hours. Furthermore, an employer must not require or permit an employee, other than an employee who is performing urgent work, to work without a weekly interval of at least 36 consecutive hours of rest. In any event, as per ordinary working hours, a variation order for exemption of section 17 will need to be applied with a view to comply with the WIFC. This variation order should prevent fishers' employers/ representatives from requiring or permitting fishers to work a spread-over of more than 14 hours, meaning the 14 hours should be considered as the max hours per shift, inclusive of breaks, for seven days of the week. This would ensure Namibia complies with the 10-hour rest period envisaged in the WIFC. The WIFC is silent on overtime but taking into account Namibia's LA and the proposed variations the total allowable working hours per 24 hours' cycle should provide a minimum of 10 hours of rest and 77 hours in any 7-day period. It would be up to the different stakeholders to determine how many hours should be regarded as normal hours and what constitutes overtime that will equate to maximum 14 hours total allowable working hours. The fact that fishers are at sea for different durations per cycle also affects the practicality of fishing companies giving fishers weekly rest period in terms of the LA. Fishers would rather catch and process fish and be given paid shore leave to conduct their business at home, which is currently being practised throughout the fishing industry.

408 S 17 of the Labour Act of 2007.

The LA[409] provides that an employee be entitled to additional payment of 6 percent of his basic hourly wage excluding overtime work, for each hour of work the employee performs between 20:00 and 07:00. However, an employer must not require or permit an employee, who the employer knows or reasonably ought to know to be pregnant, to perform any work, including overtime work, between 20:00 and 07:00 at any time during eight weeks prior to her expected date confinement or eight weeks after her confinement. The eight-week period may be extended if a medical practitioner certifies that an extension is necessary for the health of the employee or her child. Fishers who have shifts at night should be entitled to such a benefit.

In the LA,[410] an employer may not require or permit an employee to perform work on a Sunday, unless in certain situations or circumstances.[411] The prohibition does not apply to an employer who employs an employee for the purpose of but not limited to urgent work; engaging in work in which continuous shifts are worked and any other activity approved by the Permanent Secretary responsible for Labour. An employer may apply in writing to the Permanent Secretary to approve work on Sundays if an employee affected by the application agrees. Section 21(4) provides that if the Permanent Secretary grants the application, he must issue a notice in writing, indicating the nature of work to which the notice applies and any conditions attached to the grant. According to section 21(5) of the LA, an employee who works on Sunday is entitled to double his basic hourly wage for each hour worked.[412] However, in terms of section 21(6) of the LA, an employer may pay an employee who works on Sunday one and a half of that employees' hourly basic wage for each hour worked, so long as the employer grants that employee an equal period of time away from work during the next succeeding

409 S 19(1) of the Labour Act of 2007.

410 See s 21 of the Labour Act of 2007.

411 *Ibid*.

412 *Ibid*.

working week, and the employee agrees to such arrangement. In such cases an employee who ordinarily works on Sunday, an employer must pay the employee his daily remuneration plus the basic hourly wage for each hour worked. For the purpose of section 21, if the majority of hours worked by an employee on a shift, which extends onto or begins on a Sunday, falls on a Sunday, all the hours on that shift are deemed to have been worked on Sunday, or if they fall on a Saturday or Monday, all the hours on that shift are deemed to be work on Saturday or Monday. In terms of section 22(1) of the LA, an employer must not require or permit an employee to perform any work on a public holiday, save as provided in section 22; but certain employers are exempted from this restriction. According to section 22(2), this prohibition does not apply to an employer who employs an employee for the purpose of but not limited to urgent work; work in which continuous shifts are worked; or an activity approved by the Permanent Secretary responsible for Labour. Working on a fishing vessel while at sea is deemed to be continuous in nature. If an exemption order in terms of section 139 is applied to vary section 15 to declare the operation of the entire fishing industry as continuous, then fishers will not be entitled to double pay, just an additional hourly basic wage for each hour worked at sea.

The Permanent Secretary may approve an employer's application to allow work on a public holiday only if an employee affected by the application agrees. If the Permanent Secretary grants the application, he must issue a notice in writing, indicating the nature of work to which the notice applies and any conditions attached to the grant.[413] A public holiday is a paid holiday in terms of the LA. Consequently, if a public holiday falls on a day on which an employee would ordinarily work, an employer must either pay the employee who does not work on the public holiday an amount that is not less than the employee's daily remuneration, subject to section 22(6), or pay an employee who

413 s 22(4) of the Labour Act 2007.

works on a public holiday an amount equal to that employees' normal daily remuneration plus his hourly basic wage for each hour worked.[414] However, an employee who works on a public holiday may rather opt, if his employer agrees, to be paid his normal daily remuneration plus a half of that employee's hourly basic wage for each hour worked. In that case, in addition to the payment, an employee is also entitled to be granted an equal period of time from work during the next succeeding working week. According to section 22(7) of the LA, if an employee works on a public holiday that falls on a day other than the employee's ordinary working day, an employer must pay double that employees hourly basic wage for each hour worked. Section 22(6) of the LA provides that if an employee who does not work on a public holiday fails without a valid reason to work on either day immediately before or immediately following the public holiday, then his employer is not required to pay that employee his daily remuneration in terms of section 22(5)(a)(i). Finally, section 22(7) of the LA provides that if the majority of hours worked on a shift, which extends into or begins on a public holiday, then all the hours of that shift are deemed to have been worked on a public holiday, but if they fall on another day, all the hours on that shift are considered to have been worked on that day.

A variation order in terms of section 139 of the LA should be applied for to amend the definition section to include fishers as per the WIFCs'. The variation order should amend section 16 of the LA by compelling an employer not to require a fisher to work more than 54 hours in a week and in any case, not more than 9 hours a day if a fisher works 6 or fewer days a week. This would be a significant step for Namibia in accommodating the unique working conditions of fishers in the fishing industry as fishing vessels operate in cycles. In simple terms, the effect of the variation order will mean that the maximum ordinary hours for a fisher would be 11 hours in a 24 hours' cycle, with 3 hours' maximum overtime, for work for 6 or fewer days a week. This will

414 s 22 (5)(a) of the Labour Act 2007.

ensure that the 10-hour rest period is adhered to. In relation to continuous operations on fishing vessels, the max hours of ordinary hours can be 11 hours and 3 hours' overtime.

Recently there was a Government Gazette giving notice of variation of the provisions of Chapter 3 of the LA varying the working hours of fishers.[415] The variation order includes fishers in the definition section the same as in the WIFC.[416] The variation order prohibits employers of fishers from requiring or permitting a fisher to work more than 54 hours in a week, and in any case, not more than 9 hours a day if a fisher works 6 or fewer days a week. An employer must not require or permit a fisher to work overtime except by an agreement, but such agreement should not permit more than 35 hours of overtime in a week and not more than 5 hours overtime in a day. An employer must give the fisher a meal interval of at least 30 minutes for every 5 hours of continuous work. Also, no employer may require or permit a fisher to work a spread-over of more than 14 hours. Upon the return of a fisher from sea, the employer must grant the fisher paid shore leave, calculated as follows: (i) one full day for every seven days worked at sea; and (ii) a fraction of a day calculated on a pro-rata basis for less than seven days worked at sea. It is evident that Namibia as a State is taking progressive steps in aligning their national legislation in line with the international standards provided for in terms of the WIFC.

415 Government Gazette of the Republic of Namibia No. 6149 available at http://www.the-eis.com/data/literature/Gazette%20Env%20Man%20Act%206149.pdf (accessed 10-07-2017).

416 "fisher" means a person employed or engaged in any capacity or carrying out an occupation on board a fishing vessel, including persons working on board paid on the basis of as share of the catch but excluding pilots, naval personnel, shore-based persons carrying out work aboard a fishing vessel and fisheries observers.

3 5 WAGES

Concerning wages, fishers in Namibia complained that they work excessive hours and receive low wages. Namibia does not have a national minimum wage for the fishing industry. As a result, wages are set between the parties to the contract. The WIFC provides that the Member States should adopt laws to ensure fishers are provided with regular payments. It is silent on when fishers should be paid. The MSA does not provide that fishers should be paid regularly nor for shore leave, shore leave has been covered by the recent Government Gazette giving notice to the variation of Chapter 3 of the LA.[417]

As mentioned earlier the commission of fishers is determined at a company level, resulting some fishers are paid more favourably through commission when compared to other fishers'. In relation to the payment of fishers,[418] covered by section 123 to section 136 of the MSA on time of wages, settlement of wages and the right of fishers to transmit all or part of his/her wages to the seafarers' bank account or to that of a close relative. Section 140 of the MSA states: In this section, the expression seaman includes every person employed or engaged in any capacity on board any ship, but in the case of a ship which is a fishing boat, does not include anyone who is entitled to be remunerated only by share in the profits or the gross earnings of the working boat. This should be amended to include fishing vessels. Practically, it is argued that

417 Government Gazette of the Republic of Namibia No. 6149 available at http://www.the-eis.com/data/literature/Gazette%20Env%20Man%20Act%206149.pdf (accessed 10-07-2017).

418 Art 23 and 24 of the WIFC reads as follows: Article 23 Each Member, after consultation, shall adopt laws, regulations or other measures providing that fishers who are paid a wage are ensured a monthly or other regular payment. Art 24 Each Member shall require that all fishers working on board fishing vessels shall be given a means to transmit all or part of their payments received, including advances, to their families at no cost.

adhering and implementing variations on hours of work for fishers, would be difficult. As fishers would rather work longer hours to catch as much quality fish as possible with a view to earning a higher commission, at times disregarding the hours of work prescribed by the national legislation. Without establishing minimum standards on wages and commission, it is submitted that fishers will still be left in a vulnerable state.

3 6 OTHER CONDITIONS OF EMPLOYMENT

In respect to minimum age, the WIFC provides that the minimum age for work on board a fishing vessel should be 16 years. However, a competent authority may authorise a minimum age of 15 years for a person who is no longer subject to compulsory schooling, and who are engaged in vocational training.[419] The MSA and the LA are the relevant legislation dealing with the minimum age of employees on board fishing vessel. Section 110 of the MSA provides that: “The owner or master of a ship which is registered in Namibia, or of a ship which is not registered in Namibia and is wholly engaged in plying between ports in Namibia, shall not knowingly take into employment or keep in employment or permit the employment of any person under the age of fifteen years in any capacity on board the ship.” The MSA needs to be amended to read 16 years instead of 15 years to be in line with the WIFC. Section 111 of the MSA also needs to be amended by inserting section 111(9) young- being persons under the age of 18 years persons, as contemplated by sub-section (8), shall not be permitted to work at night. The issues to be contemplated by the Namibian tripartite alliance are the protection of fishers under the age of 18 years as per the WIFC

419 See para 1 to 5 of Art 9 of the WIFC.

Recommendations.[420] There is a *lacuna* in terms of Art 9(3) to 9(5) of the WIFC,[421] as the activities that may affect safety or moral have not been provided in Namibia's national legislation. Art 9(6) of the WIFC, the MSA should be amended to include the

420 Part 1 of the WIFC Recommendations: Protection of young persons

1. Members should establish the requirements for the pre-sea training of persons between the ages of 16 and 18 working on board fishing vessels, taking into account international instruments concerning training for work on board fishing vessels, including occupational safety and health issues such as night work, hazardous tasks, work with dangerous machinery, manual handling and transport of heavy loads, work in high latitudes, work for excessive periods of time and other relevant issues identified after an assessment of the risks concerned.

2. The training of persons between the ages of 16 and 18 might be provided through participation in an apprenticeship or approved training programme, which should operate under established rules and be monitored by the competent authority, and should not interfere with the person's general education.

3. Members should take measures to ensure that the safety, lifesaving and survival equipment carried on board fishing vessels carrying persons under the age of 18 is appropriate for the size of such persons.

4. The working hours of fishers under the age of 18 should not exceed eight hours per day and 40 hours per week, and they should not work overtime except where unavoidable for safety reasons.

5. Fishers under the age of 18 should be assured sufficient time for all meals and a break of at least one hour for the main meal of the day.

421 Art 9(3) of the WIFC reads as follows: The minimum age for assignment to activities on board fishing vessels, which by their nature or the circumstances in which they are carried out are likely to jeopardise the health, safety or morals of young persons, shall not be less than 18 years.

Art 9(4) of the WIFC reads as follows: The types of activities to which paragraph 3 of this Article applies shall be determined by national laws or regulations, or by the competent authority, after consultation, taking into account the risks concerned and the applicable international standards.

Art 9(5) of the WIFC reads as follows: The performance of the activities referred to in paragraph 3 of this Article as from the age of 16 may be authorized by national laws or regulations, or by decision of the competent authority, after consultation, on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons concerned have received adequate specific instruction or vocational training and have completed basic pre-sea safety training.

prohibition of night work for fishers under the age of 18 years old for a period of 9 hours.[422]

Section 92[423] and Section 101[424] of the MSA regulate medical examinations and certificates. A gap exists as vessels less than 100 Gross Tonnes are excluded from this requirement. An amendment needs to occur in section 101(8)(b) to include all fishing vessels or to include for progressive implementation for crews on vessels under 100 gross tonnes.[425]

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422 Art 9(6) of the WIFC reads as follows: The engagement of fishers under the age of 18 for work at night shall be prohibited. For the purpose of this Article, "night" shall be defined in accordance with national law and practice. It shall cover a period of at least nine hours starting no later than midnight and ending no earlier than 5 a.m. An exception to strict compliance with the night work restriction may be made by the competent authority when: (a) the effective training of the fishers concerned, in accordance with established programmes and schedules, would be impaired; or (b) the specific nature of the duty or a recognised training programme requires that fishers covered by the exception perform duties at night and the authority determines, after consultation, that the work will not have a detrimental impact on their health or well-being.

Important to note that the LA of Namibia regulates night work for under 18 year olds.

423 s 92 of the MSA reads as follows: No person shall be employed as a cadet on board any Namibian ship or indentured as an apprentice-officer to the owner of a Namibian ship until he has passed the colour and form vision tests prescribed and has been certified by a medical practitioner approved by the proper officer as physically fit for the sea service.

424 Subject to the provisions of this section, the master of a Namibian ship shall not engage a seaman to serve in that ship unless there has been delivered to the master a certificate, valid in terms of sub-section (3), from which it appears that the seaman has been examined, that he is physically fit to serve in the capacity in which it is proposed to employ him, and that he is not suffering from any disease likely to be aggravated by, or to render him unfit for, service at sea or likely to endanger the health of other persons on board. (2) The certificate mentioned in sub-section (1) shall be signed by a medical practitioner or, if the certificate relates only to the seaman's sight, by a person approved by the proper officer. (3) The certificate shall remain in force for a period of six months from the date on which it was granted: Provided that a certificate relating only to colour vision shall remain in force for six years from the date on which it was granted.

425 Estimated to be fishing vessels of approximately 18 metres in length.

In respect to manning and hours of rest, Article 13 of the WIFC requires members to adopt laws to safeguard the fishing vessels are safely and efficiently manned by fishers afforded adequate rest. The Manning of Ships Regulations[426] covers the WIFC requirement in that fishers are not to work more hours than is safe to be determined by the master. In addition, the Manning of Ships Regulations covers the requirement that ships are efficiently manned. Hours of rest has already been dealt with above in terms of the LA.

Regarding the crew list, section 188 of the MSA adequately covers the requirement for every Namibian-fishing vessel to deliver to the Principal Officer of Directorate for Maritime Affairs a list of the crew and to report any subsequent change in the crew.

In relation to the work agreement of fishers,[427] section 102 of the MSA covers the work agreements for crews on fishing vessels exceeding 100 gross tonnes. A gap exists for

426 Ch 2 of the Manning of Ships Regulations 240 of 2003.

427 Covered under Art 16-20 of the WIFC reads as follows: Art 16 Each Member shall adopt laws, regulations or other measures: (a) requiring that fishers working on vessels flying its flag have the protection of a fisher's work agreement that is comprehensible to them and is consistent with the provisions of this Convention; and (b) specifying the minimum particulars to be included in fishers' work agreements in accordance with the provisions contained in Annex II. Art 17 Each Member shall adopt laws, regulations or other measures regarding: (a) procedures for ensuring that a fisher has an opportunity to review and seek advice on the terms of the fisher's work agreement before it is concluded; (b) where applicable, the maintenance of records concerning the fisher's work under such an agreement; and (c) the means of settling disputes in connection with a fisher's work agreement. Art 18 The fisher's work agreement, a copy of which shall be provided to the fisher, shall be carried on board and be available to the fisher and, in accordance with national law and practice, to other concerned parties on request. Art 19 Articles 16 to 18 and Annex II do not apply to a fishing vessel owner who is also single-handedly operating the vessel. Art 20 It shall be the responsibility of the fishing vessel owner to ensure that each fisher has a written fisher's work agreement signed by both the fisher and the fishing vessel owner or by an authorized representative of the fishing vessel owner (or, where fishers are not employed or engaged by the fishing vessel owner, the fishing vessel owner shall have evidence of contractual or similar arrangements) providing decent work and living conditions on board the vessel as required by this Convention.

crews of fishing vessels under 100 gross tonnes. It is submitted that section 102 of the MSA needs to be amended to include crew agreements to all fishing vessels. In regards to the particulars of the work agreement, there is conformity with the WIFC. With respect to Art 19 of the WIFC: Article 16 to 18 is not applicable to a single-handed operated owner/skipper. Existing national legislation does not cover this exceptional case. A gap exists that section 109 of the MSA does not exclude the owner/skipper in this regard. With regard to Article 20 of the WIFC, *a lacuna* exists that section 109 of the MSA does not provide for a signed copy to be in possession of the crew. An amendment of section 109 of the MSA is necessary to include in the text that each fisher shall be in possession of a signed copy of his/her work agreement.

In relation to repartriation, the WIFC requires the owner to cover the cost of the fisher to be repatriated. Repartriation is covered in terms of section 114 of the MSA which provides the same standard provided for in terms of the WIFC.[428]

The MSA is silent on the issue of placement and recruitment of fishers. Owing to Namibia's colonial history, the recruitment and placement of fishers by private employment agencies, Namibia has moved to contain and largely prohibit this practice.[429]

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428 S 114 of the MSA provides: "(1) When the service of a seaman or apprentice-officer belonging to a Namibian ship terminates without the consent of the said seaman or apprentice-officer at a place other than a proper return port, and before the expiration of the period for which the seaman was engaged or the apprentice-officer was indentured, the master or owner of the ship shall, in addition to any other relative obligation imposed on either of them by this Act, make adequate provision for the maintenance of the seaman or apprentice-officer according to his rank or rating, and for the return of that seaman or apprentice-officer to a proper return port. (2) If the master or owner fails without reasonable cause to comply with the provisions of sub-section (1), the expenses of maintenance and of the journey to the proper return port shall, if defrayed by the seaman or apprentice-officer, be recoverable as wages due to him, and if defrayed by the proper office, be regarded as expenses falling within the provisions of sub-sections (4) and (5) of section one hundred and fifty-four. Inability to provide the said expenses shall not, for the purposes of this sub-section, be regarded as reasonable cause."

429 See *Africa Personnel Services (Pty) Ltd v Government of Republic of Namibia and Others* (SA 51/2008) [2009] NASC 17.

In relation to accommodation and food, no gap exists. The MSA covers aspects of the requirements. In terms of section 161, the owner of a Namibian ship shall provide the crew with accommodation to the satisfaction of the proper officer, and in accordance with the regulations. Section 156 provides for the dietary requirements for fishers and section 158 of the MSA provides a standard on how the food should be preserved.

Medical care is covered under section 167 of the MSA, which makes provisions for the medicines and appropriate medical equipment to be on board vessels by the prescribed scales contained in the Medical, and Eyesight Regulations. Section 168 of the MSA regulates the periodic inspection of the medical supplies and equipment. These inspections currently form part of the Safety Surveys by the Directorate of Maritime Affairs. The only shortfall is that it needs to be aligned with Article 30 of the WIFC,[430] concerning maintenance and inspection of medical supplies. Provisions need to be made to require vessels to carry a medical guide adopted or approved by the competent authority. The Manning of Ships Regulations cover the requirement for radio officers on board all vessels and the access to medical advice via radio in case of an emergency at sea, which conforms with the WIFC.

430 For fishing vessels of 24 metres in length and over, taking into account the number of fishers on board, the area of operation and the duration of the voyage, each Member shall adopt laws, regulations or other measures requiring that: (a) the competent authority prescribe the medical equipment and medical supplies to be carried on board; (b) the medical equipment and medical supplies carried on board be properly maintained and inspected at regular intervals established by the competent authority by responsible persons designated or approved by the competent authority; (c) the vessels carry a medical guide adopted or approved by the competent authority, or the latest edition of the International Medical Guide for Ships; (d) the vessels have access to a prearranged system of medical advice to vessels at sea by radio or satellite communication, including specialist advice, which shall be available at all times; (e) the vessels carry on board a list of radio or satellite stations through which medical advice can be obtained; and (f) to the extent consistent with the Member's national law and practice, medical care while the fisher is on board or landed in a foreign port be provided free of charge to the fisher.

In respect to occupational safety and health and accident prevention,[431] the Education, Training and Certification of Namibian Seafarers Regulations, 2004, Regulation 2 covers competencies required on board fishing vessels. Regulation 3 covers the requirements of a documented safety for ships covered by the STCW. A gap exists that needs to be attended to, with the current regulations that a documented safety system is not required for fishing vessels.

Other important legislation dealing with labour is the Social Security Act of 1994. The Social Security Act provides for the payment of maternity-and sick leave benefits while also covering death benefits. It also provides for medical benefits, old age pension and has a fund to support training schemes for disadvantaged and unemployed people. It

431 Art 31 Each Member shall adopt laws, regulations or other measures concerning: (a) the prevention of occupational accidents, occupational diseases and work-related risks on board fishing vessels, including risk evaluation and management, training and on board instruction of fishers; (b) training for fishers in the handling of types of fishing gear they will use and in the knowledge of the fishing operations in which they will be engaged; (c) the obligations of fishing vessel owners, fishers and others concerned, due account being taken of the safety and health of fishers under the age of 18; (d) the reporting and investigation of accidents on board fishing vessels flying its flag; and (e) the setting up of joint committees on occupational safety and health or, after consultation, of other appropriate bodies. Art 32 1. The requirements of this Article shall apply to fishing vessels of 24 metres in length and over normally remaining at sea for more than three days and, after consultation, to other vessels, taking into account the number of fishers on board, the area of operation, and the duration of the voyage. 2. The competent authority shall: (a) after consultation, require that the fishing vessel owner, in accordance with national laws, regulations, collective bargaining agreements and practice, establish on board procedures for the prevention of occupational accidents, injuries and diseases, taking into account the specific hazards and risks on the fishing vessel concerned; and (b) require that fishing vessel owners, skippers, fishers and other relevant persons be provided with sufficient and suitable guidance, training material, or other appropriate information on how to evaluate and manage risks to safety and health on board fishing vessels. 3. Fishing vessel owners shall: (a) ensure that every fisher on board is provided with appropriate personal protective clothing and equipment; (b) ensure that every fisher on board has received basic safety training approved by the competent authority; the competent authority may grant written exemptions from this requirement for fishers who have demonstrated equivalent knowledge and experience; and (c) ensure that fishers are sufficiently and reasonably familiarised with equipment and its methods of operation, including relevant safety measures, prior to using the equipment or participating in the operations concerned. Article 33 Risk evaluation in relation to fishing shall be conducted, as appropriate, with the participation of fishers or their representatives.

is not clear whether the general Social Security Act applies to all fishers' ordinary resident in the territory, or whether steps are being taken to achieve progressive, comprehensive social security protection for all fishers, or whether there are any specific provisions in place, in accordance with Article 38 of the WIFC, for the system of liability that takes into account the characteristics of the fishing sector. The Social Security Act applies to all persons employed in Namibia if such a person is a Namibian citizen or lawfully admitted to Namibia for permanent residence therein. The Act does not cover those fishers that earn above a certain wage level *per annum*.

Concerning protection in the case of work-related sickness, injury or death,[432] the Employees Compensation Act[433] provides a way of a joint employer's liability for fishers except those earning more than N$ 81 300.00 per annum. Additionally, fishers compensated by a share of the catch are excluded from this protection. A gap exists in that top end earners, earning over N$ 81 300.00 per annum, are not covered. Fishers who are compensated solely by a percentage of the catch value are not covered. The Employees Compensation Act needs to be amended so the Act can cover fishers that earn more than N$ 81 300.00 per annum. Alternatively, another means of cover can be established for fishers as contemplated in Article 38 of the WIFC.

3 7 ENFORCEMENT MECHANISMS

The 2007 LA confirms the fundamental right of freedom of association entrenched in the Namibian Constitution. The LA protects employees against prejudice from an employer and makes it clear that nobody can be discriminated against by employers.

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432 Art 38 and 39 of the WIFC: Members to establish laws and regulations to provide fishers with protection for work-related illness, injury or death via a vessel owners' liability, compulsory insurance, workers compensation or other schemes.

433 Employees Compensation Act 30 of 1941 as amended.

Workers also have the right to exercise any rights provided for in the LA, disclose information required in terms of the LA or any other law and refuse to do something that is not lawful. Workers have the right to be a member of a trade union and to participate in lawful trade union activities. The right to join or form a trade union is a human right linked to freedom of association, which is recognised in international human rights law.[434] Everyone has the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.[435] A trade union or employers' organisation has to register with the office of the labour commissioner and must provide a constitution that does not conflict with Chapter 3 of the Namibian Constitution, which deals with the fundamental human rights and freedoms. Upon registration, trade unions and employers' organisations are required to comply with issues such as accountability of organisational structures, the appointment of officials and office– bearers, the election of shop stewards and procedures for changing the constitution amongst others. Once registered, trade unions have the right to represent their members in any proceedings brought under the LA, have access to an employer's premises, have the right to have union membership fees deducted, rights to form federations with other organisations, and to affiliate and participate in any international workers' organisations activities. Employers' organisations also have the right to represent their members in any proceedings brought forward under the LA, to form federations with other employers' organisations, and affiliate and participate in the activities of any international

434 A trade union may be described as an organisation of employees whose objective is the regulation of relations between its members, on the one hand, and their employers or employers' associations of which the employers are members, on the other hand. According to the LA, a trade union means an association of employees whose principal purpose is to regulate relations between employees and their employers. Chapter 6 of the LA has established the legal framework for the formation and registration of trade unions and other matters connected with, or incidental to, trade union rights and activities.

435 Art 22(1) of the ICCPR or Art 21(e) of the Constitution, provides that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

employers' organisation. According to the LA, a registered trade union that represents the majority of the employees in an appropriate bargaining unit is entitled to recognition as the exclusive bargaining agent of the employees in that bargaining unit to negotiate a collective agreement on any matter of mutual interest. This, of course, only applies to a trade union registered according to the Labour Act and if the union indeed represents the majority of the employees. A trade union can seek recognition as the exclusive bargaining agent of an appropriate bargaining unit by delivering a request in the prescribed form and submit it to the employer as well as the labour commissioner. Within 30 days, the employer then has to notify the union, in the prescribed form, whether the request was successful or not. As long as the majority of workers are members of a union, it has the legal support to become the 'exclusive bargaining agent'. Bargaining takes place either at the industrial and company level.

Ensuring freedom of association and collective bargaining can go a long way towards promoting, implementing and enforcing labour rights standards. Under the implementation part of the WIFC,[436] the WIFC recognises that members of the WIFC will have to ensure their legal framework is in line with the provisions of the WIFC. One method that can be used to implement and enforce the provisions of the WIFC is using collective bargaining, which forms part of their employment agreement.

3 8 CONCLUSION

Decent work plays an important role in helping to achieve sustainable growth, full employment and poverty reduction. Achieving the goal of decent work for fishers is essential. The wildcat strikes of fishers that occurred in Namibia primarily concerned conditions of employment relating to hours of work and wages. The dissertation

436 Art 6 of the WIFC.

investigated whether Namibia was compliant with international standards related to fishers' hours of work and wages. The most relevant international labour standard related to hours of work and wages is the WIFC. Other international standards related to fishers do not provide a standard for hours of work and wages. Owing to Namibia not being a signatory to the WIFC, Namibian legislation is in conformity with international labour standards.

The question posed is whether the current Namibian legislation will conform with the WIFC if Namibia ratifies the WIFC. After careful analysis in relation to hours of work, Namibia would conform with the WIFC. As mentioned earlier, the WIFC does not provide specific requirements in relation to wages. To this effect, the Namibian legislation, with the recent promulgation of the Gazette to amend hours of work for fishers, conforms with the minimum requirements related to hours of work and wages in terms of the WIFC. This dissertation took a step further by providing whether the Namibian legislation will conform with the other minimum conditions of employment provided for in the WIFC. These conditions relate to the age requirements to work on board a fishing vessel; medical examination; crew list; work agreements; repatriation; placement and recruitment; accommodation and food; medical care; occupational, safety and health; social security and benefits; work-related sickness, injury and death. It is clear from the above that the Namibian legislation will not conform with the other minimum standards for the condition of employment provided for in terms of the WIFC. The recent strikes that occurred have shed light on the poor labour standards afforded to fishers in Namibia. The next chapter will provide the South African approach in regulating the conditions of employment for its fishers.

CHAPTER 4
CONDITIONS OF EMPLOYMENT FOR FISHERS IN SOUTH AFRICA

4 1 INTRODUCTION

Historically South Africa had a labour system that evokes powerful and painful memories of an abusive contractual labour system that were inspired by policies based on discrimination, especially during the apartheid.[437] In South Africa, like in Namibia, labour relations are closely tied to the political and social history of the country. [438] During 1973 to 1977 there was growth of a dualistic labour relations system. During this period, black workers, because of their lack of power base, were restricted to mainly employer-initiated committees without any bargaining power. As a result, black workers were left in a vulnerable situation where employers and prospective employers could insert dubious terms of conditions of employment. This situation existed despite the amendments of the Industrial Conciliation Act in 1977. Although the amended Industrial Conciliation Act recognised agreements negotiated by committees, enforcing the resultant agreement in the event of a dispute with the

437 Wolpe "Capitalism and Cheap Labour-Power in South Africa: from Segregation to Apartheid" 2006 1(4) *Economy and Society* 425 456.

438 For example, in the Brink case one can see the concept and historical background of equality. Policy of apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as white, which constituted 90% of the landmass of S.A. Senior jobs and access to established schools and universities were denied to them. Separate civic amenities, prevention of ownership of property or residing in certain areas. Scars of this programme in history are still visible today and it affects our interpretation of the right to equality. See also Bezuidenhout *Post-colonial Workplace Regimes in the Engineering Industry in South Africa*, in *Beyond the Apartheid Workplace: Studies in Transition* by Webster and Von Holdt (2005) 73 96.

employer was still impossible.[439] By the late 1970s, the dualistic system of labour relations proved unsuccessful. It led to the appointment of a Commission of Inquiry, headed by Professor Nicholas Wiehahn, to investigate the status of black workers within the labour relations legislation system known as the Wiehahn Commission.[440] The Commission reported its findings in the early 1979 and made significant proposals including, *inter alia* that:

- full freedom of association be granted to all employees regardless of race, sex and creed;
- trade unions, irrespective of composition in terms of colour, race or sex, be allowed to register;
- stricter criteria be adopted for trade unions' registration;
- liaison committees be renamed as workers councils;
- where no industrial councils had jurisdiction, workers' councils and workers; and committees be granted full collective bargaining rights.

The amendments also signalled the launch of the Industrial Court, which commenced functioning in 1980. The Court was empowered to arbitrate matters referred to it by the Conciliation Boards under the guideline of unfair labour practice.[441] Unfair labour practices were first defined as[442] "any labour practice which in the opinion of the Industrial Court is an unfair labour practice". In terms of its "unfair labour practice" jurisdiction, the Industrial Court began eroding the past discriminatory practices that were regarded as part of the national order in South Africa. In the same manner, it lay down and developed the principle of fair collective bargaining and protected collective

439 Finnemore *Introduction to Labour Relations in South Africa* 34.

440 *Ibid*.

441 Grogan *Collective Labour Law* 5.

442 Industrial Conciliation Amendment Act 94 of 1979.

rights.[443] From this stemmed a coherent system of labour law leading to freedom.[444] To cement the transition away from the previous system, South Africa committed to adhering to international standards including those of the IBR and the ILO.[445] Considering this, South Africa has promulgated a Constitution,[446] the Labour Relations Act (hereinafter referred to as "the LRA"),[447] The Basic Conditions of Employment Act (hereinafter referred to as "the BCEA"),[448] The Employment Equity Act,[449] and The Skill Development Act,[450] The Unemployment Insurance Act,[451] The Occupational Health and Safety Act,[452] The Compensation for Occupational Injuries and Disease Act (hereinafter referred to as "the COID"),[453] just to name a few, that gives effect to the international standards that affect labour, the employment relationship.[454] The

443 Gorgan *Collective Labour Law* 5.

444 Du Toit *et al Labour Relations Law* 11.

445 S 233 of the Constitution which reads: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

446 The Constitution of the Republic of South Africa, 1996.

447 Labour Relation Act 66 of 1995. Hereinafter referred to as the LRA.

448 The Basic Condition of Employment Act 75 of 1997. Hereinafter referred to as the BCEA.

449 The Employment Equity Act 55 of 1998.

450 The Skill Development Act 97 of 1998.

451 Act 30 of 1966.

452 Act 85 of 1993.

453 Act 130 of 1993.

454 As mentioned earlier, the fundamental goal of the ILO is the achievement of "decent and productive work for both women and men in conditions of freedom, equity, security and human dignity", including social protection. The concept of decent work is based on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in the community, and economic growth that expands opportunities for productive jobs and employment. In the furtherance of this goal the ILO's Decent Work Agenda aims to implement decent work at country level by means of policy and institutional intervention, and Decent Work Country Programmes have been developed. For a more detailed description on the legislation used to foster an abusive contractual labour system See also Musukubili "Towards an Efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a Comparison with South African Standards"

legislation has been the cornerstone in improving the labour relations for workers in South Africa.

As mentioned in Chapter 1, South Africa has ratified the WIFC, the MLC and made the necessary amendments to its national legislation to conform to the international standards provided for in the WIFC. The ratification shows that South Africa is committed to address, in a true spirit of tripartism and social dialogue, modern challenges to the world of work and enhance the level of protection afforded to some of the most vulnerable fishers, and seafarers, who frequently fall victims to exploitation and abusive practices. To this effect, this chapter will provide an overview of the Constitutional rights for fishers and the approach on how South Africa regulates the basic conditions of employment in realising decent work for their fishers. The focus of this chapter is on the structures in place in South Africa to regulate the conditions of employment for fishers. The primary focus is on the bargaining council and statutory council registered for fishers. Thereafter, a discussion on how the hours of work and wages for fishers are regulated. The next section will provide a brief overview of the South African Constitution relating to human rights and labour rights.

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http://contentpro.seals.ac.za/iii/cpro/DigitalItemViewPageexternal?lang=eng&sp=108942&sp=T&sp=1&suite=def (accessed 2016-09-21).

4 2 THE CONSTITUTION OF SOUTH AFRICA

The Constitution of South Africa is based on the protection and development of human rights, in line with the IBR as its pinnacle objective in advancing human rights and labour rights.[455] Chapter 2 of the South African Constitution, the Bill of Rights, enshrines a broad range of fundamental human rights and freedoms.[456] Even though South Africa does not have a hierarchy regarding the rights provided for in the Bill of Rights, the State clearly places human dignity as a pivotal point of departure.[457] This is evident by the approach and role the judiciary has played in numerous landmark decisions.[458] For example, in *Dawood v Minister of Home Affairs,* the Constitutional Court held that the recognition and protection of human dignity is a foundational constitutional value.[459] The Court explained that human dignity is a legitimate and enforceable right that must be respected and protected. It forms the constitutional adjudication and interpretation at a range of levels.[460] The Court also provided that the right to dignity be a value that informs the interpretation of many, possibly all, other rights.[461] The courts are of a clear opinion that the value of dignity is a personal right

455 Govindjee *et al Introduction to Human Rights law* (2009) 36.

456 These include political and civil rights, socio-economic and cultural rights and environmental rights.

457 *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) par 213.

458 European Journal of International Law "Human Dignity and Judicial Interpretation of Human Rights" (no date) http://ejil.oxfordjournals.org/content/19/4/655.full (2012-10-5)

459 *Dawood and Another v Minister of Home Affairs and others*; *Shalabi and Another v Minister of Home Affairs and Others* ; *Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) par 34.

460 In *S v Williams and Others* (CCT20/94) 1995 (3) SA 632, the Court stated that respect for human dignity is a value which, if acknowledged, it includes an acceptance by society that even the 'vilest criminal' remains a human being possessed of common human dignity.

461 *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC). The Court also provided that the right to human dignity plays a central significance in the limitations enquiry. The Constitutional Court in *S v Makwanyane*, stated that the right to life and dignity are the essential content of

and is “inseparably linked” to one’s personal identity “as one's identity defines one's sense of self-worth”.[462] The Court warned against the danger of “allowing stereotyping and prejudice to creep in under the guise of commercial interests”, the purpose of recognising the values of human dignity, equality and freedom is not just to protect individuals against State power, but also to ensure that State power is used to secure the goals of dignity and equality.[463]

As mentioned in Chapter 2, for the realisation of decent work, access and implementation of socio-economic rights are important. The courts place a duty on the

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all rights under the Constitution, take them away, and all other rights cease.461 The Court confirms that the right to dignity is intricately linked to other human rights in that “human beings are entitled to be treated as worthy of respect and concern”. Human dignity is not only a justiciable and enforceable right that must be respected and protected it is also a value that informs the interpretation of possibly all other fundamental rights. For example in Beja Case (WC High Court): Open toilets in the WC. Dignity played a key part in the court’s decision that this was unacceptable. Other rights, such as privacy also violated. Any agreement on part of community to permit this was unlawful/ unenforceable because of the dignity violation. See also the European Journal of International Law “Human Dignity and Judicial Interpretation of Human Rights” (no date) http://ejil.oxfordjournals.org/content/19/4/655.full (accessed on 2017-08-01).

462 For example, in *Hoffman v South African Airways* (CCT17/00) [2000] ZACC 17, the applicant did not get the job from South African Airways as he had AIDS.462 South African Airways did not even look at his abilities for the job. The Court emphasised that there’s a violation of the right to dignity when a person is denied employment because of their HIV-positive status concerning their ability to perform duties of position from which they have been excluded. Further discrimination against HIV-positive persons constitutes a “fresh instance of stigmatisation” since HIV-positive persons already subjected to a ‘prevailing prejudice’ and, as a result, an assault on their dignity.

463 See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15. The Constitutional Court provided that transformation be a process. This case provided that substantive equality is associated with “transformative constitutionalism”. Substantive equality should give effect to the right to make sure that the outcome is equal therefore affirmative action is part of the right to equality. In the case of Van Heerden it was stated that “substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privileged, which persist. The Constitution encourages us to dismantle them and to prevent the creation of new patterns of disadvantage.

State to “respect, protect, promote and fulfil” the rights in the Bill of Rights.[464] The South African Constitution is comprehensive in the approach to granting enforceable human rights and socio-economic rights, regardless of whether they are first, second or third generation rights. This comprehensiveness is also widely recognised in the academic literature. The right to access social security is recognised as a human right.[465] Social insurance includes social security schemes like occupational pensions and unemployed insurance. They are funded by the contributions of employees and often employers. The term social security can be defined according to the nine classical social risks embodied in the ILO Social Security Standards Convention as sickness, maternity, employment, injury, unemployment, invalidity, old age, death, medical care and family. Social security is the protection which society gives to its members, through a series of public measures, against economic and social distress that the stoppage or reduction of earnings will cover.[466] This includes secure access to income, employment, health and education services. Basic means for all people living in the country, including vulnerable employees such as fishers, to effectively participate and advance in social and economic life and in return to contribute to social and economic development.

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465 S 27(1) of the Constitution.

466 In relation to the duty to respect, protect, promote and fulfil rights relating to social security, the positive obligation on the State in terms of s 27 does mean that the State must distribute money or resources to individuals, but must set up a framework where individuals can realise these rights without State influences. The State must protect these individuals and against third party violations. For example, pensions and unemployment insurance legislation should protect these individuals against discrimination when getting these funds. Courts will not hesitate to order the State to ensure that social security and related rights are properly realised within the constraints of the availability of resources.

As mentioned earlier, the South African Constitution refers to specific labour rights. Section 23(1) of the Constitution provides: “Everyone has the right to fair labour practices”. In respect to the labour rights, ‘fairness’, which is at the core of section 23, is by its nature a flexible and expansive concept, which is premised on the circumstances of a case as well as the conflicting and evolving rights and interests of the employers and employees collectively.[467] In the context of an employment relationship, the protection of party’s interests in such a relationship is regulated to maintain fairness. To maintain a labour economy that provides prospering stability of labour relations and the enforcement of fair labour practices, measures to regulate it must be in place. The main objective of labour law is to function as a countervailing force to counteract the inequality in bargaining power which is inherent and must be inherent in the employment relationship.[468] As mentioned the purpose of this chapter is establishing the approach South Africa has taken in regulating the basic condition of employment of their fishers. With this in mind, the next section will provide a brief background on the regulation of the basic condition of employment for fishers.

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467 S 23 continues by providing: (1) Everyone has the right to fair labour practices. (2) Every worker has the right— (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right— (a) to form and join an employers’ organisation; and (b) to participate in the activities and programmes of an employers’ organisation. (4) Every trade union and every employers’ organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with s 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements.

468 The aim and purpose of labour law is the regulation of the rendering of services by means of common law, case law and statutory measures, which are applicable to, on the one side, the employees and, on the other hand, management, in such a manner that labour harmony and efficiency is created, so that the country and all its people may enjoy a prosperous and democratic co-existence.

4 3 BRIEF BACKGROUND ON THE REGULATION OF THE CONDITIONS OF EMPLOYMENT OF FISHERS

The BCEA sets minimum terms and conditions for employment that are generally applicable to all employees. The main purpose of the BCEA is to advance economic development and social justice by regulating the right to fair labour practices conferred by the Constitution. Employers and employees have limited freedom of contract when they conclude an employment contract with the employment conditions contained in the BCEA conditions of employment will automatically form part of the employment contract, subject to its application and scope.[469] The terms and conditions more beneficial to the employee, or terms not covered by BCEA may be negotiated between employer and employee or with a trade union to conclude a collective agreement. The terms less beneficial may only be agreed upon in accordance with the BCEA. It is a method by the State to address the unequal bargaining position between employer and employee. The general rule is that the minimum condition of employment in the BCEA automatically constitutes a term of every employment contract.[470] These rules are only applicable to the extent that any other law provides a term that is more favourable to the employee, or if the basic condition has been replaced, varied or excluded in accordance with the provisions of the BCEA or if a term of the employment contract is more favourable to the employee. Noting that the BCEA takes precedence over any agreement is important, whether entered before or after the commencement of the BCEA.

469 See s 49-50 of the BCEA.

470 There are exceptions to the general rule: there is no minimum annual leave given in the BCEA also no minimum work hours or wages prescribed, always a maximum prescribed.

The provisions of the BCEA bind employers and employees: but there is some flexibility in that some conditions may be varied by agreement by:

- the employer and employee;
- a collective agreement; or by
- a collective agreement concluded in a bargaining council.

Fishers are excluded from the BCEA, except for section 41.[471] Indeed the Act does not apply to persons employed on vessels at sea in respect of which the Merchant Shipping Act[472] applies, except to the extent provided for in a sectoral determination.

The exclusion of fishers, and seafarers, was decided before the commencement of the BCEA. In 1996, companies within the Maritime Industry were invited by South

471 S 41 of the BCEA reads as follows: (1) For the purposes of this section, ‘‘operational requirements’’ means requirements based on the economic, technological, structural or similar needs of an employer. (2) An employer must pay an employee who is dismissed for reasons based on the employer’s operational requirements severance pay equal to at least one week’s remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35. (3) The Minister may vary the amount of severance pay in terms of subsection (2) by notice in the Gazette. This variation may only be done after consulting NEDLAC and the Public Service Co-ordinating Bargaining Council established under Schedule 1 of the Labour Relations Act, 1995. (4) An employee who unreasonably refuses to accept the employer’s offer of alternative employment with that employer or any other employer, is not entitled to severance pay in terms of subsection (2). (5) The payment of severance pay in compliance with this section does not affect an employee’s right to any other amount payable according to law. (6) If there is a dispute only about the entitlement to severance pay in terms of this section, the employee may refer the dispute in writing to— (a) a council, if the parties to the dispute fall within the registered scope of that council; or (b) the CCMA, if no council has jurisdiction. (7) The employee who refers the dispute to the council or the CCMA must satisfy it that a copy of the referral has been served on all the other parties to the dispute. (8) The council or the CCMA must attempt to resolve the dispute through conciliation. (9) If the dispute remains unresolved, the employee may refer it to arbitration. (10) If the Labour Court is adjudicating a dispute about a dismissal based on the employer’s operational requirements, the Court may inquire into and determine the amount of any severance pay to which the dismissed employee may be entitled and the Court may make an order directing the employer to pay that amount.

472 MSA 57 of 1951.

African Maritime and Safety Association (hereinafter referred to as “SAMSA”), the Department of Labour and the the ILO to attend a conference with the view to amending Chapter 4 of the South African MSA. Chapter 4 of the South African MSA deals with conditions of engagement of officers and crew. The different parties and organisations agreed that the South African MSA was incompatible with the BCEA. The various parties were adamant that fishers should be excluded from the BCEA and Chapter 4 of the South African MSA in line with the recommendations of the ILO.[473] The rationale for this was that the unique working conditions of fishers, as outlined in chapter 1, did not make the BCEA compatible with the fishing industry. The initial meeting was aimed mainly at the merchant marines and not at fishers. The ILO agreed that it would convene a conference to deal with the specific needs of fishers. The conference dealing with fishers was held in 1997 in Cape Town and was attended by most companies in the various sectors of the fishing industry. Trade unions such as the Food and Allied Workers Union (hereinafter referred to as “FAWU”), the Trawler and Line Fishermen Union (hereinafter referred to as “TALFU”) and Weskus Werkers Unie (hereinafter referred to as “WWU”) as well as the Department of Labour, and organisations such as SAMSA and the ILO participated.[474] Several work groups such as the Deep-sea and Bottom Trawl, Tuna and Line Fishing, Squid and Pelagic were formed to investigate and report back on working conditions in their specific sectors. After this exercise had been completed, only the majority of companies in the Deep-sea and Bottom Trawl fishing agreed to form an alternative mechanism in regulating the conditions of employment for fishers. FAWU and the National Certified Fishing and Allied Workers Union opposed the forming of a bargaining council exclusively for fishers because they wanted the shore processing operations included. The argument against this was that shore-based workers had the protection of the BCEA. Fishers

473 S 3(3) of the BCEA.

474 Bargaining Council For The Fishing Industry “Origin of the Bargaining Council” http://bc4fi.co.za/about/ (accessed on 21-11-2017).

did not have such protection. The alternative mechanism in the regulation of fishers' condition of employment is discussed in the next section.

4 4 ALTERNATIVE MECHANISM

As mentioned earlier, South Africa seeks to conform to the international labour standards of the ILO by promoting collective bargaining.[475] South Africa has ratified Protection of the Right to Organise Convention,[476] The Right to Organise and Collective Bargaining Convention,[477] and Collective Bargaining Convention.[478] All these Conventions embrace the right of an employee to engage in collective bargaining with a view to improving working conditions. Section 18 of the Constitution guarantees everyone the right to freedom of association.[479] This gives effect to obligations incurred by South Africa as a member State of the ILO and provides a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine hours of work, wages, and other

475 The *Constitutional Court in re Certification of the Constitution of Republic of SA* 1996 1996 BCLR 1253 & (1996)17 ILJ 1253 (CC) also quoted in Cheadle Collective Bargaining and the LRA 147 elaborated on what collective bargaining in the country entails by stating "collective bargaining implies a right on the part of those who engage in collective bargaining to exercise economic power against their adversaries...once a right to collective bargaining is recognised, implicit within it will be the right to exercise economic power against partners in collective bargaining. See also NUMSA v Bader Bop(Pty) Ltd(CC); (2003) 24 ILJ 305 where the Constitutional Court held that the Act sought to provide a framework whereby both employers and employees and their organizations could partake in collective bargaining and the formulation of industrial policy and that it sought to promote orderly collective bargaining with emphasis on bargaining at sectoral level, employee participation in decisions in the workplace and the effective resolution of disputes.

476 *Protection of Right to Organise Convention* 1948.

477 *The Right to Organise and Collective Bargaining Convention* 1949.

478 *Collective Bargaining Convention* 1981.

479 Right to freedom of association is regulated in a detailed fashion in Ch II of the LRA. But the Act does not apply to "soldiers and spies" Also, the Constitution extends the right to associate freely every worker, employer, trade union and employers' organisation.

terms and conditions of employment.[480] The approach that South Africa has taken in enforcing fair labour practices is through the constitutional provision of collective bargaining.[481] This right is important, because collective bargaining makes it possible for people to strive together for the more effective realisation of their constitutional rights, including human rights, labour rights and social protection.[482]

The purpose of the BCEA, LRA and other labour relations legislation, is to advance economic development, social justice, labour peace and to advance social rights for employees in the workforce.[483] The LRA regulates the organisational rights for trade unions and regulates collective bargaining.[484] The governance of bargaining councils,

480 S 39 (1)(b) of the Constitution of the Republic of South Africa, 1996. Hereinafter the Constitution of the Republic of South Africa is referred to as "the Constitution". International law is not binding in South Africa unless the international instrument forms part of the legislation of South Africa, for example through enactment by Parliament. There is no obligation on South Africa to apply international legal instruments that South Africa has not ratified, it must merely be considered.

481 S 18 of the Constitution. Employers' rights to freedom of association are dealt with in some detail in section 6 of the LRA. The Act provides every employer with a right to participate in forming an employers' organisation or a federation of employers' organisations; and to join an employers' organisation, subject to its constitution. In addition to that it also provides for any member of employers' organisations to participate in the elections of office bearers. Like the employees right to association, the employers' right to association must be practised subject to the constitution of the employers' organisation or federation of employers' organisation concerned. The LRA prohibits both juristic an natural persons from, inter alia discriminating against the employer for exercising their right, preventing an employer from exercising rights conferred by the Act, prejudicing an employer right to association or because an employers disclosed information they were compelled to do, and advantaging an employer in exercising for employer not exercising any right composed by the Act

482 In line with Art 22 of the International Covenant on Civil and Political Rights. In addition, Art 10 of the African Charter on Human and Peoples' Rights protects the right to associate freely with anyone, but as long as he abides by the law.

483 See s 1 of the LRA.

484 Bhorat & Leibbrandt *Modelling Vulnerability and Low Earnings in the South African Labour Market* (2001).

statutory councils, and collective agreements are regulated in terms of the LRA.[485] Section 29 of the LRA regulates the process and requirements for the registration of a bargaining council. Parties wishing to establish a bargaining council will have to apply to the registrar of labour relations for registration of the bargaining council.[486] After the registrar receives the application, the registrar is required to publish a notice in the Government Gazette to allow the public the opportunity to object to the application.[487] The Registrar is also required to send a copy of the notice to the National Economic and Development Council (hereinafter referred to as "NEDLAC").[488] NEDLAC has the responsibility of evaluating whether the application for the establishment of a bargaining council is warranted for the sector an area. The NEDLAC must provide the registrar with a written report. When considering the application, the registrar has to determine, amongst other things, whether the constitution of the proposed bargaining council complies with the requirements laid out

485 In terms of the LRA, one or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector and area. The LRA also provides for the State to be a party to any bargaining council if it is an employer in the sector and area in which the bargaining council is established.

486 S 29 of the LRA.

487 The LRA sets out the steps to be followed by the person who objects as well as the applicant.

488 The mission of the National Economic Development and Labour Council is to ensure effective public participation in the labour market and socio-economic policy and legislation, and the facilitate consensus and cooperation between government, labour, business and the community in dealing with the South Africa's socio-economic challenges. The National Economic and Labour Council: strives to promote the goals of economic growth, participation in economic decision making and social equity; seek to reach consensus and conclude agreements on matters pertaining to social and economic policy; consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament; encourage and promote the formulation of coordinated policy on social and economic matters; consider all the significant changes to social and economic policy before it is implemented or introduced in Parliament; and consider socio-economic disputes in terms of s 77 of the LRA. See National Economic Development and Labour Council at https://nationalgovernment.co.za/units/view/128/National-Economic-Development-and-Labour-Council-NEDLAC (accessed on 2017-11-22).

in section 30 of the LRA.[489] The registrar must be satisfied that the applicants have made adequate provision for the representation of small and medium enterprises on the council; and if the parties to the council are sufficiently representative of the sector and area as determined by NEDLAC or the Minister of Labour. If the registrar is satisfied that the applicant has met all the requirements, the bargaining council is registered in the register of councils. Section 31 of the LRA explains the binding nature of collective agreements concluded in a bargaining council, with regard to the parties of the agreement. Section 32 of the LRA regulates the extension of collective agreements concluded in a bargaining council. In terms of the section 32 of the LRA, a bargaining council can request the Minister of Labour in writing to extend a collective agreement to non-parties which fall within its jurisdiction. A number of provisions must be satisfied in order for the Minister to agree to extend a collective agreement.[490] This includes that the trade unions whose members constitute the majority of the members of the party trade unions and the party employee organisations that employ the

489 S 30 of the LRA reads as follows: (1) The constitution of every bargaining council must at least provide for - (a) the appointment of representatives of the parties to the bargaining council, of whom half must be appointed by the trade unions that are party to the bargaining council and the other half by the employers' organisations that are party to the bargaining council, and the appointment of alternates to the representatives; (b) the representation of small and medium enterprises; (c) the circumstances and manner in which representatives must vacate their seats and the procedure for replacing them; (d) rules for the convening and conducting of meetings of representatives, including the quorum required for, and the minutes to be kept of, those meetings; (e) the manner in which decisions are to be made; (f) the appointment or election of office-bearers and officials, their functions, and the circumstances and manner in which they may be removed from office; (g) the establishment and functioning of committees; (h) the determination through arbitration of any dispute arising between the parties to the bargaining council about the interpretation or application of the bargaining council's constitution; (i) the procedure to be followed if a dispute arises between the parties to the bargaining council; (j) the procedure to be followed if a dispute arises between a registered trade union that is a party to the bargaining council, or its members, or both, on the one hand, and employers who belong to a registered employers' organisation that is a party to the bargaining council, on the other hand; (k) the procedure for exemption from collective agreements; (l) the banking and investment of its funds; (m) the purposes for which its funds may be used; (n) the delegation of its powers and functions; (o) the admission of additional registered trade unions and registered employers' organisations as parties to the bargaining council, subject to the provisions of section 56; 7 (p) a procedure for changing its constitution; and (q) a procedure by which it may resolve to wind up.

490 See s 32 of the LRA.

majority of workers must vote in favour of the extension. If the Minister is satisfied that all requirements have been met, the collective agreement is extended by publishing it in the Government Gazette. As mentioned earlier, before the application to Department of Labour could be made for the establishment of a Bargaining Council, employers firstly had to establish an employers' organisation. As a result, in order for a bargaining council to be formed an employers' organisation has to be established. This cements the positive collective nature of collective bargaining in South Africa as all employers within the bargaining council are represented in order to create a standard for the employment of workers. The LRA gives effect to the freedom to bargain collectively by providing the institutional infrastructure for voluntary collective bargaining at sectoral level and for the binding nature of collective agreements.

For the fishing industry, the employers' organisation known as South African Fishing Industry Employers' Organisation (hereinafter referred to as "the SAFIEO") was recognised in June 2000. After the negotiations between SAFIEO and TALFU, the constitution of and the application for the establishment of a bargaining council was submitted to the Department of Labour. On the 14 December 2001, the bargaining Council for the fishing industry (hereinafter referred to as "the BCFI") was registered with the Department of Labour. On an annual basis, the BCFI has provided a forum for employers and trade unions to meet to negotiate, bargain collectively and consult on matters of mutual interest, including salaries and basic conditions of employment for sea-going employees. On 2 May 2003, the first main agreement was concluded. The main agreement sets out the basic conditions of employment for the employees. The basic conditions include a set daily wages for each category of fisher, set hours of work and regulated rest and leave periods. After many years of having only two chambers Deep-sea Bottom Trawl Chamber and Inshore Chamber, the BCFI had its constitution approved on 30 March 2011 to include a third chamber, namely the

Midwater Trawl Chamber.[491] Recently the BCFI added three more chambers to its constitution. At present, the bargaining council in the fishing industry remains the main mechanism for collective bargaining for fishers in South Africa as it presently caters for six sectors. The fisheries sectors are:

- Hake deep-sea bottom Trawl.
- Hake inshore bottom Trawl.
- Horse mackerel mid-water Trawl.
- Small pelagic fishing.
- West Coast rock lobster.
- South coast rock lobster.[492]

The BCFI serves as an organisation made up of employers' organisations and trade unions, established for a certain area and sector with the purpose of reaching enforceable agreements on conditions of employment and other matters of mutual interest.[493] The main purpose of bargaining councils is to reach consensus on the terms and conditions related to specific industries. The BCFI has the following objectives:

- to maintain and promote economic development, social justice, labour harmony and democratisation of the workplace;
- to maintain and promote the viability of the fishing industry;

491 The Bargaining Council for the Fishing Industry "About" http://bc4fi.co.za/about/ (accessed 2017-11-25).

492 See Employment in the South African deep-sea trawling industry available at http://www.sadstia.co.za/assets/uploads/Factsheet-Employment-1.pdf (accessed 30-10-2017). For the last three additions, the BCFI recently made an application to add those sectors within its registered scope. The gazette application is available at https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-627-no-41131-dated-2017-09-22.pdf (accessed 2017-10-30).

493 See s 27 of the LRA.

- to provide for the representation of small and medium enterprises and should the need arise the Bargaining Council shall establish a separate Chamber to cater for this particular interest group;
- to embark on programs to promote and strengthen the Bargaining Council including but not limited to encouraging the admission of parties;
- to negotiate, to bargain collectively and to consult on matters of mutual interest and issues which affect or may affect the relationship between parties to the Bargaining Council or their members and to provide for and to regulate collective agreements;
- to establish procedures to exempt parties or non-parties from collective agreements;
- where affordable, to provide mechanisms for the dispute resolution functions referred to in the LRA to prevent and resolve labour disputes within the Bargaining Council's registered scope;
- to work with the applicable Sector Education and Training Authorities to establish, promote and co-ordinate training, education and development schemes;
- to consider and deal with any other matter that may be of interest to the parties including but not limited to consider matters of mutual interest between the parties or their members in accordance with the provisions of the Act and this constitution; and
- to comply with its duties and functions in terms of the LRA and its constitution.[494]

494 See Constitution of the Bargaining Council for the Fishing Industry available at http://bc4fi.co.za/wp-content/uploads/2014/05/BC-CONSTITION-AS-APPROVED-30.03.11.pdf (accessed 26-09-2017).

The bargaining council may request the Minister to extend a collective agreement concluded in the bargaining council to any non-parties within its registered scope.[495] This means the Minister may only extend such collective agreement when requested to do so by the bargaining council and does not have the power to do so on his or her own initiative. The BCFI has in the past requested in writing that the Minister extend the agreement to non-parties. The BCFI is a national council but does not have the power to make sectorial determination only the Minister of Labour has such powers. If a sectoral determination is made by the Minister of Labour, the determination can set minimum conditions of employment and wages for particular sectors of the economy. Any employer can apply to the Bargaining Council Executive Committee for exemption from the terms of the collective agreement in terms of clause 37 of the Councils Main Agreement.[496] The BCFI agreements set down minimum conditions of employment and minimum wages for member parties to the BCFI, and are binding on all employers in that sector if the Minister of Labour extends the agreement to non-parties.

The BCFI provides for mechanism to enforce fishers' rights in line with the provisions of section 33 of the LRA. The Secretary of the BCFI can at any time require a designated agent to monitor compliance with the provisions of the main agreement. If there is a dispute relating to the interpretation, application or enforcement of the agreement, any person covered by the scope of the agreement can file or refer the matter to the Secretary, for a resolution in terms of the agreement. The Secretary may require a designated agent to investigate the dispute. The designated agent will investigate the facts surrounding the dispute. If the designated agent finds a reason to believe that the terms of the collective agreement have been breached; the agent can endeavour to secure compliance with the agreement through consent of the employer.

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495 S 32(1) of the LRA.

496 See Clause 3.1.2 of Part B of the Main Agreement.

The designated agent has to submit within seven days after consensus has been reached, a written report to the Secretary on the investigation, the steps taken to secure compliance and the agreed outcome of the investigation.[497] Once the Secretary receives the report from the designated agent the Secretary may:

1. Require the designated agent to make further investigations.
2. If conciliation is indicated by designated agent, appoint a conciliator from the Council's panel of conciliators.
3. Refer the dispute for conciliation and appoint a conciliator from the Council's panel of conciliators.
4. Issue a compliance order.
5. Refer the dispute to arbitration in terms of the agreement.[498]

If the Secretary were to appoint a conciliator or refer the dispute, the Secretary will decide the date, time and venue of the conciliation meeting and will serve notice of these particulars on the parties to the dispute. If the Secretary issues a compliance order, the order will be served on the party allegedly in breach of the agreement. The Secretary may apply for the compliance order to be made an award by referring it to arbitration, provided the employer has not complied with the compliance order and has not filed:

1. An objection in writing within 21 calendar days of receipt of the compliance order. If the employer can show good reason why the objection was not filed within 21 calendar days, the Executive of the Council can permit an employer to make an objection.

497 See Schedule 10 of the LRA for all the powers conferred to a designated agent.

498 See the main agreement available at http://bc4fi.co.za/wp-content/uploads/2014/05/main-agreement.pdf (accessed on 2017-11-25).

2. An appeal against the compliance order. If the employer can show good reason why the objection was not filed within 21 calendar days, the Executive of the Council can permit an employer to make an objection.
3. A review of the compliance order.

Once the Secretary is satisfied by the designated agent that an employer has not complied with the main agreement a compliance order can be issued.[499] A copy of the compliance order is served by the designated agent on the employer named in it, and each employee affected by it unless this is impractical and on a trade union representative of the employees. Failure to serve a copy of a compliance order on any employee or representative trade union of the employee(s) does not invalidate the order. The employer must display a copy of the compliance order within the workplace and must be accessible to the affected party.[500] An employer may object to a compliance order by making representations in writing to the Secretary within 21 calendar days of receipt of the compliance order. If the employer can show good reason why the objection was not filed within 21 calendar days, the Secretary of the Council can permit an employer to make an objection. The executive has to appoint one of its members to consider information that includes:

1. Any evidence concerning the employers' compliance record.
2. The likelihood that the employer was aware of the relevant term of the agreement.
3. The steps taken by the employer to ensure compliance with the relevant term of the agreement.

499 See s 40.2 of the main agreement on what information the compliance order must set out.

500 See s 40.7 relating to when the Secretary may not issue a compliance order.

After considering any representations by the employer and any other relevant information, the appointed executive member may confirm, modify or cancel an order or any part of the order; and must specify the period within which the employer must comply with any part of an order that is confirmed or modified. The executive member on the BCFI will instruct the Secretary for a copy of the order to be served on the employer named in it, and each employee affected by it unless it is impractical and on a trade union representative of the employees. If the appointed executive member of the BCFI confirms or modifies the compliance order or any part of the compliance order, the employer must comply with that order within the time period specified in that compliance order. An employer can appeal to the Secretary in writing against a compliance order issued by the executive member within 21 calendar days of receipt of the compliance order who shall refer the matter to arbitration. However, an employer can make an appeal after 21 calendar days if they can show good reasons why they did not submit it within 21 calendar days. If the dispute is still not resolved, the BCFI can refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration. The BCFI will apply the same rules as that of the Commission for Conciliation Mediation and Arbitration in any dispute under its jurisdiction. The employer can apply to the Labour Court for the review of the arbitration award in terms of section 145 of the LRA within 21 days of receipt of the arbitration award. If the employer did not submit it within 21 days and can show good reasons, the Labour Court may permit an employer to apply for a review after the 21 days has expired. Any compliance order is suspended pending:

1. The confirmation or modification of the objection by the appointed executive member.[501]
2. The determination of the appeal by the arbitrator.[502]

501 In terms of subclause 40.9 of the main agreement.

502 In terms of subclause 40.14 of the main agreement.

3. The final review of the arbitration award by the Labour Court.[503]

In accordance with the provisions of the LRA,[504] the arbitrator conducting the arbitration conducting an arbitration in terms section 33A of the LRA, may impose fines subject to the maximum fines set out in the main agreement.[505] Any obligation to pay a fine is suspended: pending the outcome of the application where upon whom a fine has been imposed;[506] if affected party files either an objection or an appeal or a review application in terms of section 40(8) or section 40(13) of the main agreement.

South Africa also in place a statutory council for the fishing industry, which is for the squid sector.[507] A statutory council is a body established in terms of the LRA. The statutory council caters for an area or sector of an industry where no bargaining councils exist. The functions of the statutory councils are to: perform dispute resolutions, promote and establish training and education schemes; establish and administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds and any similar schemes or funds for the benefit of one or more parties to the council; conclude collective agreements to give effect to any of the functions mentioned above.[508] The council may agree to perform other functions of a bargaining council in terms of its constitution. The statutory council's right to perform its functions is subject to an annual review of how representative it is of the entire are which falls

503 In terms of subclause 41.6 of the main agreement.

504 s 33A(13) of the LRA.

505 For the maximum allowed fines see s 42 of the main agreement.

506 Fine imposed in terms of s 42 of the main agreement.

507 See Statutory Council for Squid and Related Fisheries in South Africa "The Squid Council" https://www.squidcouncil.co.za/ (accessed 2017-11-06).

508 See Brregmans "Statutory Councils" https://www.bregmans.co.za/statutory-councils/ (accessed on 2017-11-25).

within its registered scope, even if its member trade unions or employers' organisations have no members in part of that area. An existing statutory council can apply to have its status changed to that of a bargaining council if it meets the necessary conditions and criteria. A collective agreement which concluded in a statutory council is binding on its member. The council may ask the Minister to extend the agreement to all parties which fall within the registered scope of the council, whether they are members or not.

The LRA makes provision for unions and employers' organisations that represent 30 percent of the employees or employers in a sector or geographical area to apply to establish a statutory council. The same requirements the Registrar looks at for a bargaining council applies to statutory councils. If the Registrar is satisfied that the applicant is representative and that there is no other statutory council in that area, a notice is published in the Government Gazette establishing the statutory council. The notice invites all registered unions and employers' organisations or any interested parties in the sector or area to attend a meeting presided over the labour commissioner. This objective of the meeting is to reach an agreement on the parties to the statutory council and the constitution of the statutory council. If no agreement is reached, the commissioner convenes separate meetings for the registered trade unions and employers' organisations. If there is still no agreement, the Minister of Labour decides who to admit.

The Statutory Council for the Squid and Related Fisheries of South Africa was established in August 2007. It was established by the Minister of Labour in terms of the LRA. The council is an independent body and juristic person. Therefore does not belong to and is not controlled by any political party, trade union or business. Currently there are three parties to the council: FAWU; the United Democratic Food and Combined Worker's Union and the Small Employers Association for the Squid Industry. Two members of each of the three parties constitute the Executive

Committee of the Statutory Council.[509] The purpose of the Statutory Council for the Squid and Related Fisheries is to:

1. Resolve labour disputes as promptly as possible in a professional manner.
2. To ensure that collective agreements are adhered to by all parties concerned.
3. To give effect to decisions taken by the Executive Members of Council.[510]

Just like the BCFI, the statutory council for the squid industry is accredited to conduct conciliations and arbitrations.[511] Any dispute within the registered scope of the council must be resolved in terms of the dispute resolution procedures agreement of the statutory council for the squid industry. The council must appoint a commissioner for the purpose of conciliating and arbitrating disputes.[512] Any disputes in terms of section 51(3) of the LRA, where any party to the dispute is not a party or a member of a party to the council must be resolved as follows:

1. Any of the parties to the dispute may refer the dispute in writing to the council using the prescribed CCMA dispute referral documentation, setting out the nature of the dispute and the outcome sought.
2. The applicant of the dispute must satisfy the council that a copy of the referral form has been served on all other parties to the dispute.
3. The Secretary of the council must appoint a member of the panel of commissions who must attempt to resolve the dispute and arbitration at the earliest opportunity as agreed between the parties.

509 See the Statutory Council for Squid and Related Fisheries of South Africa at https://www.squidcouncil.co.za/ (accessed 2017-11-22).

510 *Ibid*.

511 Notice 703 published in the GG 38989 in terms of the LRA.

512 For the full details on how a commissioner is appointed please refer to clause 15.2 of the statutory main agreement available at http://www.squidcouncil.co.za/wp-content/uploads/2014/06/Draft_Employment_Agreement.pdf (accessed 2017-11-24).

4. The Secretary of the council must serve notice of the date, the time and the venue of the conciliation or arbitration of the dispute on the parties of the dispute.
5. During the conciliation proceeds, the commissioner may: mediate the dispute; conduct a fact-finding exercise; and or make a recommendation to the parties to the dispute which may be in the form of a binding or non-binding arbitration award.
6. Representation of the parities to the conciliation or arbitration must be in accordance with the rules of the council.
7. A certificate must be issued indicating whether or not the dispute has been resolved.
8. Nothing in this agreement prevents an officer of the council from investigating the dispute and or attempting to resolve the dispute before appointment of a conciliator or arbitrator.
9. Subject to the provisions of the Act, an arbitration award made by a commissioner to resolve the dispute is final and binding on the parties to the dispute. The commissioner shall have power to vary, rescind or amend an award made by him/her on good cause shown, or of his/her own accord. Without limiting the generality thereof, the commissioner shall have the power if: the award was erroneously sought or erroneously made in the absence of any affected by the award; or the award is ambiguous or contains an obvious error or omission; or the award was granted as a result of a mistake common to the parties to the proceedings.
10. The council must serve the award together with written reasons given by the commissioner on all the parties to the dispute.

11. Upon receipt of a written request from a party to the dispute, the Secretary of the council must apply to the Director of the CCMA to certify the arbitration award is an award contemplated in section 143(1) of the LRA.[513]

The council also provides for a dispute resolution mechanism for involving parties to the statutory council. A party to the council includes any registered trade union or any registered employer's organisation that is a party to the council. If the dispute between the parties is one which arises from negotiations entered into for the purpose of concluding a collective agreement in the council, the Secretary must appoint a member of the panel of commissioners who must attempt to resolve the dispute through conciliation within thirty (30) days from the date when the dispute was referred to the council, or within any extended period as agreed to in writing between the parties to the dispute. If the dispute remains unresolved, the parties may exercise their rights in terms of the Act and / or any collective agreement concluded at the council. Any other dispute between the parties to the council which the Act requires to be arbitrated, or which disputes would otherwise be adjudicated by the Labour Court, but which the parties to the dispute have agreed to arbitrate, including a dispute about the interpretation or application of the provisions of the disputes would otherwise be adjudicated by the Labour Court, but which the parties to the dispute have agreed to arbitrate, including a dispute about the interpretation or application of the provisions of the council and / or any collective agreement between the parties to the dispute, must be resolved by the council in accordance with the procedures set out herein. Upon receipt of a written request for arbitration of a dispute about the interpretation or application of the provisions of any collective agreement between the parties to a dispute, the Secretary must appoint a member of the panel of commissioners to arbitrate the dispute. The Secretary or Compliance Officer of the council shall be

513 The statutory main agreement available at http://www.squidcouncil.co.za/wp-content/uploads/2014/06/Draft_Employment_Agreement.pdf (accessed 2017-11-24).

responsible for the monitoring and enforce compliance with any collective agreement concluded at the council. The council shall take all reasonable and necessary steps to ensure compliance with this agreement and with any collective agreements concluded at the council. If, whether through its own investigations or through any other source, it appears that the provisions of this or any other collective agreement may have been breached, the council shall invoke the following procedures to enforce compliance. The Secretary shall investigate the alleged breach. The Secretary will conduct an investigation and if Secretary has reason to believe that a collective agreement has been breached, the Secretary may endeavour to secure compliance with the collective agreement in terms of guidelines of, or decisions by the council, where these exists, by: publicising the contents of the collective agreement, conducting inspections, investigating complaints, conciliation and issuing of a compliance order requesting any person bound by the collective agreement to comply with the collective agreement within a specified period, thereby indicating that a dispute exists. In the event of an unresolved dispute, the Secretary of the council may refer the dispute to arbitration. The Secretary of the council must: Appoint a commissioner from the panel of commissioners to arbitrate the dispute. Serve notice of the time, date and venue of the arbitration on the parties of the dispute giving at least fourteen (14) days' notice of such process. If any party to such arbitration is not party to the council and objects to the appointment of a member of the council's panel of commissioners, the Secretary must approach the CCMA to appoint an arbitrator, in which case the objecting party must pay the arbitrator's fee to the council and the council shall pay the fee set by the CCMA. The provisions regarding the handling of arbitration matters contained herein shall apply throughout, provided that the arbitrator may make any appropriate award including: ordering a person to pay an amount owing in terms of a collective agreement; imposing a fine for failure to comply with a collective agreement in accordance with item 29 of schedule 7 and section 33A(13) of the Act; charging a party to the arbitration an arbitration fee; ordering a party to the arbitration to pay the costs of the arbitration; confirming, varying or setting aside a compliance order issued; any

award contemplated in terms of section 138(9) of the Act which gives effect to the objectives of the Act, the council's constitution or this or any collective agreement reached at the council; any award in relation to interest or penalties payable on any amount that a person is obliged to pay in terms of a collective agreement. Subject to the provisions of the Act, an award in an arbitration concluded in terms of this procedure is final and binding on the parties to the dispute. The Secretary of the council may apply to the Director of the CCMA to certify that an arbitration award issued in terms of this procedure is an award contemplated in terms of section 143(1) of the Act. The provisions of this procedure stand in addition to any other legal remedy through which the council may enforce a collective agreement. The exemption panel must ensure that the correct and fair exemptions procedures will be followed.[514] The next section provides how the hours of work of fishers are regulated.

4 4 1 HOURS OF WORK

Since the BCEA excludes fishers in its application except for section 41. Resulting in no discussion taking place in respect to hours of work for fishers in terms of the BCEA. Additionally, the LRA does not set a standard relating to hours of work. The South African MSA provides that if there is an agreement in place on board a fishing vessel concerning the conditions of employment for the fisher, then the terms of that agreement apply to the employment of that fisher.[515] Currently fishers' basic condition relating to hours of work is negotiated. These negotiations can either be through private agreements between employer and employee, or through collective bargaining, the BCFI or the Statutory Council for the Squid and Related Fisheries of

514 See The statutory main agreement available at http://www.squidcouncil.co.za/wp-content/uploads/2014/06/Draft_Employment_Agreement.pdf (accessed 2017-11-24).

515 S 7(d)(b) of the South African MSA.

South Africa, just to name a few.[516] Owing to a limitation of available resources the only readily available agreement is the main agreement of the BCFI. The main agreement of the BCFI provides that the employer should not allow a fisher to work in excess of 14 hours per day.[517] Also, the employer may not allow a fisher to work more than 5 hours continuously without a rest interval of at least 30 minutes. The hours of rest should be in line with the Occupational Health and Safety legislation and SAMSA regulations.[518] The employer will grant at the end of every voyage, a fisher 4 hour paid shore leave for every 24 hours that the fisher was at sea. Shore leave can commence upon actual arrival after the employee is granted permission to leave the ship. Shore leave may be taken at the conclusion of a trip at the discretion of the employer provided in the event of shore leave being granted away from the employees' homeport then the employer is responsible for the transport to the fishers' homeport. The fisher and the employer can enter into any alternative written agreement dealing with shore leave.[519] This is in line with the international standards provided in terms of the WIFC.

The main agreement of the squid statutory council provides for the regulation of hours of work. Due to the unpredictable nature of the squid fishing industry the hours of work are not defined. However, an employer may not require or permit an employee to be

516 The Statutory Council for the Squid and Related Fisheries of South Africa was established in August 2007 by the Honourable Minister of Labour, in terms of the LRA. The Council is completely independent body and therefore does not belong to and is not controlled by any political party, trade union or business. For further information see Statutory Council for Squid and Related Fisheries of South Africa at https://www.squidcouncil.co.za (accessed 23-09-2017)..

517 Part F of the main agreement available at Bargaining Council for the Fishing Industry "Main Agreement" http://bc4fi.co.za/wp-content/uploads/2014/05/main-agreement.pdf (accessed 30-10-2017).

518 *Ibid*.

519 *Ibid*.

involved in the act of fishing for more than 12 continuous hours per 24-hour cycle.[520] This conforms to the standard of hours of rest in terms of the WIFC.

If a fisher does not fall within the jurisdiction of the BCFI and the statutory council for the squid industry, then a fishers' employment condition relating to hours of work is determined by contract between the employer and the employee. This can either be through verbal agreements with the mere promise of good wages, food, guaranties of repatriation at the end of a stipulated period.[521] Verbal agreements are not all bad. In the small-scale fishing fleets operating in home waters, most crew agreements are verbal. There is a general understanding of what to expect in the divisions of labour, shares in catch proceeds and wages. These customary arrangements remain well understood and the community pressures to ensure compliance.[522] In other instances where fishers who fall outside the jurisdiction of the BCFI and the statutory council for the fishing industry, have written employment agreements. But these written agreements do not conform to international standards, and since the BCEA excludes fishers, fishers are left in an unequal bargaining position whereby employers can place dubious terms of agreement which leaves fishers vulnerable to exploitation.[523] This results in the exploitation of fishers in South Africa. South Africa has ratified the WIFC, which comes into force internationally on 16 November 2017. The WIFC will improve

520 The Statutory Council for the Squid and Related Fisheries of South Africa Employment Agreement 31 October 2010- 31 December 2015 available at http://www.squidcouncil.co.za/wp-content/uploads/2014/06/Draft_Employment_Agreement.pdf (accessed on 2017-11-24). Stringer and Le Heron *Agri-Food Commodity Chains and Globalising Networks* (2016) 48.

521 See fn 3 above.

522 See fn 3 above.

523 DAFF response to oral submissions received from MSP bill public hearings available at https://pmg.org.za:443/files/171024_Response_DAFF.ppt (accessed 2017-11-24).

the living and working conditions for all fishers working on board all South African fishing vessels, incorporating the standards for hours of work provided in the WIFC. The MSA of South Africa was amended to give that all fishers working on registered vessels have workers agreement, which are subject to inspection by the South Africa Maritime Safety Authority.[524] The next section will provide for on how wages are regulated.

4 4 2 WAGES

The discussion in the previous section on the hours of work applies to wages as well. The South African MSA excludes fishing vessels in most respects related to wages. The only applicable provision is section 7(d)(b) of the MSA that provides that if there is an agreement in place on board a fishing vessel with the employer covering wages agreed to under a registered bargaining council or statutory council in terms of the LRA, then the terms of that agreement apply to the fisher. In terms of the BCFI main agreement, fishers are provided a minimum standard on the amount of wages for fishers, which are periodically reviewed.[525] Each fishery sector forms a separate chamber of the BCFI and annual negotiations around salaries and conditions of employment are specific to each fishery. This is done through collective bargaining involving the employers and trade union representatives. The format of determining and periodically reviewing of wages through negotiations is similar to that of the ILO

524 See South African Maritime Safety Authority "Marine Notice No. 0 of 2017" https://www.samsa.org.za/sites/samsa.org.za/files/MN%2010%20of%202017.pdf (accessed 2017-11-24).

525 S 2 Core Rights of the main agreement. See also the GG in relation to wages available at Bargaining Council for the Fishing Industry "Government Gazette" http://bc4fi.co.za/government-gazettes/ (accessed on 2017-11-22).

structure, the JMC, approach in setting an international basic wage for seafarers, through the JMC.[526] It is clear that South Africa has incorporated the international practice of the ILO within the main agreement of the BCFI and in practise.

At present, the negotiation of wages is not prescribed by the statutory council for the squid industry's' constitution, wages cannot be discussed or negotiated at the statutory council. This however does not mean that the constitution of the statutory council cannot be changed or amended to include things like wage discussions or negotiations.[527] Wage conditions can be negotiated between employers and trade unions.

For fishers who do not fall within the jurisdiction of the BCFI and the statutory council for the squid industry and are not represented by trade unions, are left in a vulnerable position. As employers have all the bargaining power since fishers are excluded from the BCEA, they are left with little to no power in the negotiation proceedings.[528]

526 See ILO "ILO Body Adopts New Minimum Monthly Wage for Seafarers" http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_236644/lang--en/index.htm (accessed 2017-11-22).

527 See the constitution of the Statutory Council for the Squid Industry available at http://www.squidcouncil.co.za/wp-content/uploads/2014/06/Statutory_Council_Constitution.pdf (accessed 2017-11-24).

528 See fn 538 above.

4 5 CONCLUSION

Following the acceptance of the Wiehahn Commission recommendations, South Africa has taken great strides in respect to industrial relations. With the principles of human rights such as human dignity, equality, unfair labour practices and collective bargaining at the centre of industrial relations, the trade unions and employer associations within the fishing industry have taken a more active approach in regulating the basic conditions of employment for fishers. Before the commencement of the BCEA the trade unions and employers already realised that due to the unique nature of the work fishers do, the BCEA was not compatible with the fishing industry. As a result, South Africa expanded on the notion of collective bargaining by establishing a higher standard for negotiating the basic conditions of employment for fishers. South Africa established a bargaining council which now caters for 6 sectors and a statutory council for the squid industry. These structures can only be formed if employers and trade unions cooperate for their establishment, shifting bargaining power from the employer to a more equal footing amongst employers and representatives of fishers. The establishment of the BCFI is a key milestone in the history of the South African fishing industry. As the BCFI takes into account on the vulnerability of fishers by ensuring minimum standards are set which improves the dignity of the South African fishers. The BCFI negotiates the basic conditions of employment for its fishers. For example, the BCFI set hours of work and regulated rest and leave periods; set daily wages for each category of fisher; benefits such as protective clothing, death and disability; the regulation for annual leave, sick leave, sick leave, maternity leave, family responsibility leave; how appointments are to be made; age of employees; medical examination; prohibition of forced labour; record keeping; and the termination of employment of fishers. The BCFI also negotiates the social welfare aspects on behalf of fishers to establish a minimum standard. The social

welfare aspects relate to conditions of service, medical care, health protection and social security as well as compliance and enforcement. The BCFI main agreement ensures international compliance, incorporate and adapts the provisions of the BCEA to the fishing industry by providing minimum conditions. The main agreement of the BCFI is important as it guides trade unions and employers when negotiations at plant level occur. As a result, the work agreements for fishers are in line with the main agreement and international standards.

Owing to the uniqueness of the squid industry, a statutory council for the squid industry was formed. The squid council is similar to that of the bargaining council but just has less power. For example, currently the squid-stator council in the squid industry cannot negotiate wages for fishers within its jurisdiction. This is done at plant level negotiations. The squid industry can negotiate other conditions of employment just like the bargaining council. These conditions include but not limited to: set hours of work and regulated rest and leave periods; benefits such as protective clothing, death and disability; the regulation for annual leave, sick leave, sick leave, maternity leave, family responsibility leave; how appointments are to be made; age of employees; medical examination; prohibition of forced labour; record keeping; and the termination of employment of fishers. Once the council parties represent the majority of fishers in the sector the statutory council will be replaced by a bargaining council and wages can then be negotiated for the sector on a centralized basis.

Unfortunately, not all the sectors are covered within the ambit of the BCFI and the statutory council for the fishing industry. Those fishers are in an unequal bargaining position with prospective employers, which makes them vulnerable employees. As employers can put in dubious terms of conditions of employment that can severely

impact the condition of employment for the fisher, especially related to wages, social schemes and benefits.

Even though South Africa has taken great strides in regulating the conditions of employment for fishers, more can be done to include more sectors to the BCFI, or by setting up more statutory councils for different sectors. This would provide fishers with greater protection concerning hours of work and minimum wages.

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

As mentioned in chapter 1, the fishing industry is a major contributor to economic development and is essential to millions of people who are dependent on this industry. While fishers are out at sea they are exposed to significant hazards, including rough weather at sea, crushing waves, powerful and dangerous machinery and health issues related to being at sea.[529] The fact that fishers have poor labour conditions and sub-standard social protection does not help their plight. These employees face extreme employment conditions due to the nature in their respective trade. The general public has little to no idea of the human cost involved of being a fisher. Ensuring decent working conditions for fishers is essential to ensure they are not left open to exploitation and in a vulnerable state. There is accordingly significant room for conditions of employment for fishers. As the workplace for fishers is the fishing vessel and accommodation away from home. This chapter concludes to answer the following questions:

1. To which extent are labour rights of fishers in Namibia consistent with international standards?
2. To what extent does Namibia's domestic legislation protect fishers in Namibia in regards to fishers conditions of employment?
3. What approach did South Africa take in regulating fishers' basic conditions of employment?

529 *Ibid* 30.

4. Are there any recommendations on how Namibia can improve the labour rights for fishers in Namibia?

Chapter 2 provided for the international standards related to the basic conditions of employment for fishers. When international organisations such as the United Nations and the ILO make decisions, they take into account human right principles. Certain basic human principles are universal to humanity, such as those provided for in the IBR. The provisions provided for in the IBR are intended to lay down standards of behaviour for each State.[530] When a State ratifies a human rights instrument, it is under a duty to create working conditions that respect, protect and ensure human rights.

The ILO has taken the lead in providing for international labour standards. It has recognised that labour is not a commodity. Work is part of everyone's life and is crucial to a person's dignity, well-being and development as a human being. Economic progression should include the creation of jobs and working conditions in which people can work in freedom, safety and dignity. This should be undertaken to improve the lives of human beings; international labour standards are there to ensure that it remains focused on improving human life and dignity. The ILO contributes to this by elaborating and promoting international labour standards aimed at making sure that economic growth and development go along with the creation of decent work. Decent work is central to human rights and dignity in the workplace. The right to decent work and living conditions is essential for realising other human rights which encompasses social welfare and protection. Therefore international labour standards are developed to ensure the provisions of these rights are implemented in the workplace.[531] The ILO has taken the lead in improving the working conditions of the employment conditions

530 See ch 2 subsection 2 2 THE INTERNATIONAL BILL OF RIGHTS (IBR) 40.

531 See fn 217 above.

for workers, including fishers and seafarers', by setting international labour standards.[532]

Fishers and fishing vessels were excluded from nearly all existing ILO international labour standards relating to hours of work and wages, since the inception of the ILO in the early 1920's till 2007. This was primarily due to the general provisions of hours of work and wages being incompatible with the unique working conditions of fishers. In 2007 the ILO introduced the WIFC. The WIFC seeks to improve the living and working conditions of fishers while on board of a fishing vessel. The WIFC sets out basic minimum standards of obligations for employers, and corresponding obligations for governments to input minimum standards into national legislation. The WIFC goes a step further by introducing social welfare provisions for fishers, such as medical care, social security schemes and benefits, protection against sickness injury and death. The Freedom of Association and Protection of the Right to Organise Conventions of the ILO provide a mechanism for the enforcement and the enjoyment of these rights.[533] Since these are Conventions, it is binding on States that have ratified them. The adoption of the WIFC is fundamental for those countries that have no comprehensive laws relating to the fishing industry. The WIFC should serve as a mechanism to improve conditions of employment in the fishing industry. It should be used as a tool to fix existing problems related to the working and living environment in the fishing industry, to develop measures to protect fishers from the hazardous forms of labour and to provide social security protection to all fishers. There should be a consultation at the national level of fishers, employers, and authorities at different levels towards ratifying the WIFC and in developing a plan of action for implementing it through national legislation. Such a process ensures that the international labour standards

532 See ch 2 subsection 2 3 THE INTERNATIONAL LABOUR ORGANISATION (ILO) 49.

533 Art 2 of the Convention provides: "Workers and employers, without distinction, whatsoever, shall have the right to establish and, subject to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."

established in the WIFC are implemented through national legislation and practices. The international standards provided for in Chapter 2 are the standard used to determine the extent of Namibia's compliance relating to the basic conditions of employment for fishers to the international standards.

Chapter 3 provided for the regulation of the basic condition of fishers in Namibia and the extent of compliance in terms of the standards provided for in Chapter 2. The Constitution of Namibia encompasses the provisions of the IBR by including human rights such as the right to equality and dignity. Even though the Constitution of Namibia makes reference to human rights such as those provided in terms of the IBR it does not refer to specific workers' rights, except for the freedom of association provision in Article 21. Namibia is a member of the ILO but has not ratified the WIFC. As a result, Namibia is not under any obligation to conform to the provisions of the WIFC. Namibia is thus compliant with the current international standards. This dissertation took a step further to determine whether Namibia current national legislation relating to the basic conditions of employment for fishers would comply with the WIFC if Namibia were to ratify the WIFC presently.

If Namibia were to ratify the WIFC, Namibia would comply with the standards provided for in the WIFC relating to fishers' hours of work for fishers. This is due to the recent government gazette that provides a minimum 10-hour rest period for a 24 hours' work shift.[534] The non-compliance is with the other pieces of national legislation which

534 Government Gazette of Namibia Notice 6149 at www.the-eis.com/data/literature/Gazette%20Env%20Man%20Act%206149.pdf (accessed 03-02-2017). An employer must not require or permit a fisher to work more than: (a) 54 hours in a week, and in any case not more than -(i) nine hours a day if a fisher works six or fewer days a

primarily relate to the social security provisions of fishers. For example, as mentioned in Chapter 3, the Social Security Act as well as the Employees Compensation Act does not cater for the specific needs of fishers.

Chapter 4 of South Africa was to determine the approach South Africa took in regulating fishers' basic conditions of employment. South Africa's Constitution encompasses not only the provisions of the IBR but makes provides for specific labour rights such as the right to fair labour practices, unlike the Namibian Constitution. Important to note that the fishing industry in Namibia and South have similar structures available to them in terms of the national labour legislation in negotiating the conditions of employment of fishers. Just like in Namibia, the LRA of South Africa embraces collective bargaining in the workplace. Through collective bargaining between employers and trade unions. It is important in a labour relationship and plays a major role of building a harmonious employment relationship. Premised on a joint purpose of employment relationship through cooperation, commonality of interest, trust and compromise. With the intent to result in an agreement applicable across a group of employees, provide a mechanism of reconciling conflicting interests and help build constructive labour relations by identification of mutual goals and realisation of common interests.

week.". In addition, an employer must not require or permit a fisher to work overtime except in accordance with an agreement, but such an agreement may not require a fisher to work more than 35 hours of overtime in a week and in any case not more than five hours overtime in a day.". Also No employer may require or permit a fisher to work a spread-over of more than 14 hours.

Like in South Africa, Namibia's LA makes provisions for establishing various forums such as bargaining councils and statutory councils. However, the fishing industry in South Africa has taken the lead in establishing such forums for their fishers after realising that the BCEA was incompatible with its fishers, for the realisation for decent work. Subsequently, South Africa excluded fishers from the BCEA. Instead of leaving them in a vulnerable state, South Africa established a statutory council and a bargaining council for the fishing industry where trade unions use national labour legislation as a guiding principle when negotiating conditions of employment at a sectoral level. There are certain advantages and disadvantages of bargaining at a sectoral level:

- Sector-level bargaining is less costly for employers and trade unions. This is because negotiations are conducted by representatives of organisations in respect of a particular industry or part of an industry.
- Sector-level bargaining shifts collective bargaining on the major issues out of the workplace, with that workplace relations are less strained. This has the effect of levelling out issues that may hinder efficiency in the workplace.
- Bargaining outcomes are general in nature. They tend to be given in a general nature that will allow for variation to take place at the workplace.
- Sector-level bargaining stifles competition. The reason for this is that sectoral level bargaining sets reasonable standards applicable to all employers in the local market. Thus, competition between those employers is based on productivity rather than socially undesirable wages or extension of hours.
- Strikes and lockouts are less damaging to employers at sector level. This is due to negotiations happening frequently. Even if strikes and lockouts were to occur, the competitors would also be subject to similar strikes and lockouts.
- Collective bargaining is voluntary. The voluntary nature of industry level bargaining makes it desirable in a free country like Namibia and South Africa.

- Through the bargaining council and statutory council, the enforcement mechanisms of international standards can more readily be applied and implemented in the main agreements while a State is in the process of conforming its domestic labour law to international standards.
- The bargaining council can also extend its main agreement to non-parties within its jurisdiction.
- The disadvantage of sectoral bargaining is that it is less flexible, as the constitution of the council determines what can be negotiated.
- Another disadvantage is that smaller organisations may be marginalised and the interest of selected groups tend to be underrepresented.

As mentioned above, if Namibia were to ratify the WIFC presently, the non-compliance would be with the other conditions of employment specifically relating to social security provisions.[535] South Africa has taken a more proactive approach in this regard through negotiating the social security provisions in the main agreements of the bargaining council and the statutory council, thus establishing a minimum standard for social security. This means that the employment contracts of fishers who fall within the jurisdiction of the councils must conform to the standards provided for in the main agreement of the councils.

Recently South Africa has taken a step further in the realisation for decent work for all employees in South Africa by introducing a national minimum wage in 2018. The proposed minimum wage per month is R 3 200 or R 20 per hour. In 2016 an

535 See 3 6 OTHER CONDITIONS OF EMPLOYMENT 108.

investigation on the feasibility of the national minimum wage for South Africa was conducted.[536] The investigation provided that the minimum wage negotiated by the BCFI was R 3 030.72 which is below the proposed national minimum wage. But one should bear in mind that fishers receive commission based on the share catch value. The calculation of the rate of commission happens at plant level. As provided for earlier currently the statutory council in the squid industry cannot negotiate minimum wages for their fishers. This takes place at company level as well as their commission. As a result, no minimum standard relating to wages is established for the squid sector. Unfortunately, no statistics is available on the minimum wage for fishers not covered in terms of the BCFI. It is submitted that the proposed national minimum wage is a positive approach in realising decent work for fishers. This would ensure even the most vulnerable fishers, especially those not represented by trade unions and who don't fall within the scope of the BCFI and the statutory council, will be entitled to the proposed minimum wage in terms of the proposed National Minimum Wage Bill.[537] Which in effect provides fishers and fishers' representatives more bargaining power relating to a fisher's wage. Namibia should also consider establishing a minimum wage for their fishers, which could go a long way in improving the standard of living for even the most vulnerable fisher.

For decent work to be achieved there needs to be realisation that this is not a goal to be achieved at once but rather that various policies need to be put into place to facilitate the progressive realisation of decent work. Since the fishing industry is highly

536 The feasibility report is available at http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Working_Papers/DPRU%20WP201601.pdf (accessed on 2017-11-24).

537 See National Minimum Wage Bill available at https://www.parliament.gov.za/storage/app/media/Docs/bill/8038e752-7014-4b25-806a-8854b859c8e5.pdf (accessed 2017-12-06).

diverse, for a more efficient regulation of conditions of employment, it is argued that a bargaining council and statutory council where necessary, need to be established in Namibia to set minimum condition of employment. By establishing a bargaining council, and statutory council where necessary, through collective bargaining minimum conditions and standards of employment can be established in line with international standards. It is submitted that Namibia will not conform with the international labour standards of the WIFC if the WIFC were to be ratified presently, legislative reform will need to take place.

It is recommended that Namibia should ratify the WIFC as it will show a strong commitment in taking a progressive means in regulating the condition of employment for fishers. This would also give fishers and the representatives of fishers more negotiation powers to bargain for better conditions of employment. Namibia should do a gap analysis to determine the full extent of Namibia's compliance with the WIFC. Where gaps have been identified, legislative reform should take place. This will ensure that all fishers are not left in a vulnerable state. Namibia should strongly consider following South Africa's approach by establishing a bargaining council, and where necessary statutory councils, for the fishing industry to regulate the minimum conditions of employment for their fishers. Even though the South African system might have its own unique issues, at least their system is a more progressive step that can improve the lives of fishers in Namibia. Factoring in the uniqueness of the working conditions of fishers it is further recommended that a separate piece of legislation be drafted catering specifically for fishers' basic condition of employment. Inclusive in the legislation should be a set of minimum wages for different categories of fishers that is reviewed on regular intervals taking into account the economic situation in the fishing industry. This will ensure that even those fishers not covered through trade union representatives or any councils that form are entitled to the basic condition of

employment, leaving them in a less vulnerable state when compared to the current situation.

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