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CURRENT ISSUES IN MARITIME AND TRANSPORT LAW

Editors

Stefano Zunarelli - Massimiliano Musi

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Labour Rights of Merchant Seafarers Held Hostage by Pirates*

Abstract

Labour rights of merchant seafarers being held hostage are still blurred in the current legal framework and the maritime industry practice. This paper aims to shed light on the entitlements and rights of seafarers who are hijacked by pirates when they navigate in high-risk waters. Because transit through the waters is under the instruction of shipowners and in their own interests, the shipowner-seafarer employment relationship is constructed and still maintained in the course of the employment on board the shipowners ship according to Maritime Labour Convention 2006. Any wilful misconduct or negligent acts by the third party do not discontinue the relationship. Therefore, seafarers' labour rights should be protected even under captivity, including receiving wages, proper repatriation, obtaining compensation for their physical and mental damages and exercise of maritime lien over the entitlements. Meanwhile, how to address the conflict between the entitlements of seafarers and liability limitation of shipowners is also drawn in response to one of their major concerns. This research is linked to current efforts by the International Transport Workers Federation in the negotiation with international shipowner organizations for development of the international instrument on the rights of seafarers during hostage, and it is also highly relevant to other mobile workers at sea such as fishing seafarers and offshore platform workers.

SUMMARY: 1. Introduction. – 2. The current legal framework and practices. – 2.1. Piracy and maritime labour rights. – 2.2. International community initiatives. – 2.3. State responsibilities and practices. – 3. The current research on labour rights of seafarers during hostage by pirates. – 3.1. Contractual liabilities or tortious liabilities. – 3.2. Items of seafarers' labour rights. – 4. The necessity to construct a legal framework. – 5. The suggested framework of seafarers' labour rights. – 5.1. The legal base of seafarers' labour rights. – 5.2. The items of seafarers' labour rights. – 5.3. The liability limitation of shipowners. – 6. Conclusion. – Bibliography.

* This article has been submitted to double blind peer review.

1. Introduction

Piracy is not a new matter. Since the economic downturn in 2008, piracy around the Somalian waters is becoming more destructive to international security and peace (particularly to the maritime industry). The international community, ranging from the United Nations to those non-governmental organizations, are concerned with its spread and continuous impacts. The three-dimensional legal framework has been established and actions have been taken therefore to deal with piracy worldwide. Piracy, in the first instance, bears the characteristics of a criminal offence which calls for the field of criminal law; then, the commercial transportation of goods or passengers by sea on board ships present the dimension of maritime law; thirdly, seafarers as employees on board ships naturally bring the employment law into one more dimension ⁽¹⁾. But the international community seems to pay more attention to public security or maritime commerce than to the seafarers who are under the threat of piracy, the only human beings who have to bear the direct physical and even mental traumas: 'it is an ironic that when the circumstances of the seafarers are most desolate and desperate, that they are finally failed by the law' ⁽²⁾. Seafarers' rights have long been ignored among the international maritime instruments, and labour rights of seafarers held hostage by pirates are discussed in the paper.

Maritime piracy is at the indirect price of regional economy and at the cost of maritime industry. For instance, one element of direct cost related to labour is in the form of hazard pay, here the so-called hazard pay offers seafarers the right to obtain double pay while transiting high risk areas. In 2012, these costs reached US\$471.6 million, a significant increase as compared to the US\$195.1 million estimated in 2011 ⁽³⁾. On top of this, 61 seafarers were killed and 5,420 seafarers were held hostage on some 279 ships hijacked by pirates through 2005-2012, with piracy around the Somalian waters accounting for nearly half of all the hijackings over this period ⁽⁴⁾. With huge damages to the maritime industry and seafarers, although hazard pay or death compensation may be offered to

⁽¹⁾ A. YÜCEL, *The Impact of Somali Piracy on Seafarers' Rights: A Cross-Disciplinary Assessment* Master thesis, Lund University, 2012, p. 8.

⁽²⁾ H. STANILAND, *Protecting the Wages of Seafarers Held Hostage by Pirates: the Need to Reform the Law*, in *The International Journal of Public Law and Policy*, 2013, p. 345.

⁽³⁾ J. BELLISH, *The Economic Cost of Somali Piracy 2012*, in *Ocean Beyond Piracy Project Working Paper*, 2013.

⁽⁴⁾ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *Maritime Piracy Part I: An Overview of Trends, Costs and Trade-related Implications*, New York and Geneva, 2014, p. 2.

seafarers under piracy threat or their family as comforts in practices, what rights should be given to by those seafarers is still blurred in the current legal framework.

2. *The current legal framework and practices*

2.1. *Piracy and maritime labour rights*

Accompanying the past decade of descending global economy, maritime piracy has dramatically increased around East African waters and piratical acts are more violent and resilient than ever before. Recently piratical acts around the Gulf of Guinea are also reported to have surged. Not only does maritime piracy have impacts on global trade and economies, it also brings humanitarian and security challenges. Basically, maritime piracy has direct threats on ships, ports, terminals, cargoes and seafarers. But among those threats seafarers are the very victims, in piratical attacks they are usually held hostage and may be injured or even killed ⁽⁵⁾.

Definitions of piracy vary under different international instruments, some are narrow while others may import a broader scenario. It is not the purpose of this paper to differentiate the definitions, but the broad meaning from Comité Maritime International's (CMI) work would be employed in the paper. In 2001, CMI adopted a model of national law on acts of piracy or maritime violence, dealing with the offence of piracy and armed robbery including all other types of maritime violence which was further submitted to the IMO for consideration ⁽⁶⁾. The threats to seafarers' security are not so different when seafarers encounter any violence whatever it is at sea.

Seafarers' labor rights are defined by the Maritime Labor Convention 2006 (MLC) as followings ⁽⁷⁾:

- to a safe and secure workplace;
- to fair terms of employment;
- to decent working and living conditions on board ship;
- to health protection, medical care, welfare measures and other forms of social protection.

⁽⁵⁾ *Ibidem*.

⁽⁶⁾ COMITÉ MARITIME INTERNATIONAL (CMI), *Maritime Criminal Acts--Draft Guidelines for National Legislation*, 2007.

⁽⁷⁾ Maritime Labour Convention 2006 (MLC), Article IV.

Seafarers' labour rights correspond to shipowners' liabilities which could be divided into two categories, one is the contract liabilities that should be performed until an employment contract is discontinued, usually including remuneration, provisions, and medical treatment during the entire period of service on board ship. The other is the post-contract liabilities which should be performed from discontinuation of an employment contract, normally including repatriation, unemployment compensation, medical cost or compensation (if any injury arises out of the employment), and the post-contract liabilities could be originated either directly from statutory rules or out of the contract itself.

Once a seafarer is held hostage by pirates, the captivity would have direct impacts on the below labour rights:

- seafarers' employment agreement(SEA): it is unclear that SEA would be fairly performed, terminated or discharged, while SEA is the legal base of other rights
- fair remuneration: it is argued whether seafarers should be paid or not
- food compensation: it is argued whether seafarers should be entitled to compensation for provisions that should be provided free of charge during the period of engagement
- medical cost and injury compensation: it is unclear if seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment;
- repatriation: piracy may lead to abandonment of both ship and seafarers on board by a single-ship company, the right to repatriation would be threatened;
- unemployment compensation: it is argued whether seafarers should be entitled to adequate compensation for the unemployment arising from being taken hostage
- maritime lien: although maritime lien is not a right stipulated for seafarers in the MLC, it is widely recognized by the international maritime community. Again, a seafarer under captivity would be restricted in exercising maritime lien that might be regarded as a personal right.

2.2. International community initiatives

A number of international organizations realize the lack of protection of seafarers' labour rights and initiate to provide practicable instruments for them

in response to seafarers' captivity by pirates. Both inter-governmental organizations (IGOs) and non-governmental organizations (NGOs) engage in the issue.

Generally, IGOs work under the international instruments made through the United Nations and International Maritime Organization (IMO). NGOs include the global maritime trade association and workers organization, such as ICS/ISF and ITF, as well as some specific humanitarian organizations, such as SOS (SaveOurSeafarers), Oceans Beyond Piracy (OBP), Maritime Piracy Campaign, Seafarers' Rights International and Seamen's Church Institute ⁽⁸⁾.

IMO Assembly Resolution A.1044(27) adopted on 30 November 2011 on Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia (Agenda item 9) urges Members promptly to encourage owners and operators of ships entitled to fly their flag to consider fully the provision of post-traumatic care both for seafarers attacked or held hostage by pirates and for their families, and in so doing take into account recommendations and good practice guidance produced by the Organization and industry and welfare organizations on one hand; and to establish, as necessary and when requested, plans and procedures to keep substantially interested States informed, as appropriate, about welfare measures for seafarers in captivity on ships entitled to fly their flag, measures being taken for the early release of such seafarers and the status of payment of their wages on the other hand.

Under the United Nations framework, a hostage support programme was approved by the Board of the Trust Fund to Support the Initiatives of States to Counter Piracy off the Coast of Somalia (Trust Fund) to address the humanitarian challenges faced by the hostages held by pirates, to provide seafarers with medical care, accommodation, food, clothes and welfare items during the release phase and to support them in returning home swiftly ⁽⁹⁾.

The Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) was adopted in 2009 at a sub-regional meeting on maritime security, piracy and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States. The instrumental members agreed to rescue ships, persons and property subject to piracy and armed robbery and to facilitate proper care, treatment and repatriation of seafarers, fishermen, and other ship-board personnel and passengers. Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships and Illicit Maritime Activity in West

⁽⁸⁾ A. YÜCEL, *op. cit.*, p. 29.

⁽⁹⁾ UNITED NATIONS, *Report of the Secretary-General on the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, 2013, para. 15.

and Central Africa incorporates some elements of the Djibouti Code of Conduct, for example, the members also agree to facilitate ‘proper care, treatment and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to illegal activities at sea, particularly those who have been subjected to violence’.

On the basis of its Human Cost of Piracy Project in 2010, OBP called for the signature of the Declaration Condemning Acts of Violence against Seafarers in Washington, D.C. in August 2011. Under the declaration, flag States commit to providing reports to the IMB on acts of violence committed by pirates against seafarers. Such information will be used to see how hostages are treated by pirates, including the level and type of violence that pirates use against seafarers, and to determine trends in violence used by pirates ⁽¹⁰⁾.

Actually, the ITF has already inserted protective contractual clauses into its Standard Collective Agreement, which stipulate that the captured seafarers should be entitled to wages, repatriation and other contractual benefits such as food, welfare, and medical assistance ⁽¹¹⁾.

The latest proposal by the ITF was that seafarers should be paid monthly wages during the entire period of captivity at the second meeting of the Special Tripartite Committee (STC) for the Maritime Labour Convention 2006 in Geneva during February 8-10, 2016, but this was refused by the shipowners’ representatives and the traditional European shipping states who control and manage a large percentage of the world fleet because of stakeholders’ economic and even political considerations. The meeting finally decided to establish a working group to examine issues related to the protection of seafarers’ wages when seafarers

⁽¹⁰⁾ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *Maritime Piracy Part II: An Overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy*, New York and Geneva, 2014, p. 55.

⁽¹¹⁾ ITF Standard Collective Agreement 2015, §20(Service in Warlike Operations Areas), reads: “In case a Seafarer may become captive or otherwise prevented from sailing as a result of an act of piracy or hijacking, irrespective whether such act takes place within or outside ITF designated areas referred to in this Article, the Seafarer’s employment status and entitlements under this Agreement shall continue until the Seafarer’s release and thereafter until the Seafarer is safely repatriated to his/her home or place of engagement or until all Company’s contractual liabilities end. These continued entitlements shall, in particular, include the payment of full wages and other contractual benefits. The Company shall also make every effort to provide captured Seafarers, with extra protection, food, welfare, medical and other assistance as necessary”.

are held captive on or off the ship as a result of acts such as piracy or armed robbery, and to prepare a proposal for the Code of the MLC 2006 ⁽¹²⁾.

2.3. *State responsibilities and practices*

Accordingly, the MLC established the responsibilities for the three groups of Member States. A flag state is required to establish an effective system for survey and certification of maritime labour conditions on board the ships that fly its flag. Through this system, a Maritime Labour Certificate would be issued to verify that the certified ship complies with the domestic regulations which should incorporate at least the minimum fourteen areas of maritime labour rights in the Convention. For a port state, the port State Control Officer should be arranged to perform the responsibilities in the Convention to inspect the ships calling at its port to ensure the ship indeed satisfies the requirements listed in the Maritime Labour Certificate carried on board the ship. If there are explicit grounds for believing that the labour conditions do not conform to the requirements, based on the nature of deficiencies, the ship might be detained. Finally, a seafarer supplying state mainly should establish an effective inspection and monitoring system to enforce its labour supplying responsibilities, particularly those regarding the recruitment and placement of seafarers ⁽¹³⁾.

From the perspective of maritime labour issues, the responsibilities are strictly and explicitly allocated to the flag, port and labour supplying states through international labour law. Among the authorities, the flag state should have exclusive authorities over the maritime labour issues in principle, while the port state is arranged to supplement enforcement of those international instruments through exercise of authorities because the flag states have not fully performed their obligations, due to the practices of flag of convenience in the maritime industry. Then labour supplying states would play a role to protect their citizens' labour rights since the labour supplying state is entitled to exercise its authority on the basis of the seafarer's domicile.

For example, Panamanian law requires ship owners to provide unemployment indemnity up to three months of wages for seafarers in cases of loss of a vessel. This seems like a rare privilege provided to seafarers at the national level.

⁽¹²⁾ INTERNATIONAL LABOUR ORGANIZATION(ILO), *Proposal from the Group of Seafarer Representatives Appointed to the Special Tripartite Committee to Amend the Code of the Maritime Labour Convention 2006*, Geneva, 2016.

⁽¹³⁾ INTERNATIONAL LABOUR OFFICE, *Maritime Labour Convention 2006 Frequently Asked Questions (Revised Edition)*, Geneva, 2012, s C5.

However, it is arguable what suffices for “loss of a vessel” and whether this statutory right is applicable within the context of seafarers being held hostage by pirates.

Meanwhile, in the Philippines, the authority Philippine Overseas Employment Administration (POEA) requires any overseas employers who are contracted with Filipino employees (ship owners) to pay double the amount of their seafarers’ basic wage, overtime pay, and leave pay while transiting through the Gulf of Aden and during their captivity. Moreover, in cases of death, injury or illness occurring during this period, seafarers can be awarded double the amount of compensation and benefits ⁽¹⁴⁾.

Nevertheless, some countries, such as Greece and Norway, have a statutory compensation regime for work-related illnesses or accidents, whereas English and Cypriot legal regimes require negligence to be established on a fault based liability under common law. Whether this tortious liability extends to death or injury occurred due to piracy-related incidents remains unclear and untested. What seems clear is that there is a general disharmony existing at the national level ⁽¹⁵⁾.

No Chinese law particularly deals with the situation on labour rights of seafarers under captivity. In its Collective Bargaining Agreement the seafarer shall be paid a bonus according to the international requirements when entering into a piracy region, but it is not mentioned which ‘international requirements’ should be referred to, and the compensation for injury or death due to pirate attacks is referred to the terms and conditions of the war zone ⁽¹⁶⁾.

⁽¹⁴⁾ Philippine Overseas Employment Administration (POEA), Board Resolution No.4/2008, 7 October 2008, para.3, reads: “That the seafarer, while sailing within the declared high-risk zone, shall receive double the amount of his basic wage, overtime pay, and leave pay. On any death, injury or illness while sailing within the high risk zone, the seafarer shall also be entitled to a double amount of compensation and benefits. The higher pay and higher death and disability compensation and benefits provided herein shall be limited to the duration of vessel’s transit through the “high risk zone” and in case of detention of the seafarer, the duration thereof. The Master must immediately notify his Shipowner/Manning Agent and the crew on board the date and time of his vessel’s entry and exit from the coverage of the “high risk” zone as defined herein.

⁽¹⁵⁾ A. YÜCEL, *op. cit.*, p. 60.

⁽¹⁶⁾ The Collective Bargaining Agreement for Chinese Crew (A), Article 8 (Service in War Zones, Epidemic Areas or Piracy Regions), para. 41, reads: “Where a ship enters into a piracy region, the seafarer shall be paid a bonus according to the international requirements. The seafarer who is injured or died due to pirate attacks, should be compensated according to the terms and conditions of the war zone”.

3. *The current research on labour rights of seafarers during hostage by pirates*

The current research on piracy focuses more on public law or policy issues, such as definitions, jurisdiction of piracy, international cooperation of countering piracy or on the commercial side including ship/cargo insurance and ransom, “the leading textbooks do not treat the payment of wages within the context of contemporary piracy”⁽¹⁷⁾.

3.1 *Contractual liabilities or tortious liabilities*

When a seafarer is held hostage by pirates, ship owners’ liabilities to seafarers may arise either from the employment contract or out of the negligent conduct that is governed by law of torts.

When a seafarer agrees to work on board a ship, an employment agreement should be signed between the seafarer and shipowner. Both parties undertake certain contractual duties under this contract. As claiming for labour rights, seafarers may rely on their employment contracts and they need to prove a breach of that contract under the selected law. Law of torts may also be used as a weapon deriving from the doctrine of negligence, and employer’s negligence may serve as a legal basis under the law of torts in this context. Different approaches are available under common and civil law jurisdictions, but both concepts imply fault-based liability to be imposed on ship owners. If the seafarer establishes a satisfactory claim based on employer’s negligence or violation of his employment agreement, he may seek redress from a national court⁽¹⁸⁾.

Piratical acts are at first instance out of shipowners control. However, ship owners’ continuous duty of care might be argued at court. When they knowingly directs their vessel to transit the high-risk areas, they have the duty to exercise due diligence and to provide a seaworthy vessel. This might give rise to a contractual or tortious claim for compensation provided that the personal injury occurred due to unseaworthiness of the vessel. The ISM Code and IMO BMP guidelines may serve as *prima facie* evidence to evaluate shipowners’ duty of due diligence⁽¹⁹⁾. The MLC also re-calibrates the concept of seaworthiness and extends the meaning in a number of aspects and integrates the safety and security

⁽¹⁷⁾ H. STANILAND, *op. cit.*, p. 349.

⁽¹⁸⁾ A. YÜCEL, *op. cit.*, p. 65.

⁽¹⁹⁾ A. YÜCEL, *op. cit.*, p. 69.

of seafarers with commercial necessity, so the latest Convention should also be considered for evaluation of shipowners' duty of due diligence ⁽²⁰⁾.

But, those seafarers involved in the *Danica White* capture found difficulty in tortious claiming for compensation due to the shipowners lack of due diligence. Unfortunately, for the crew that suffered 85 days being held captive, the court ultimately decided that there was no negligence on the part of the shipowner, and therefore no compensation for the crew ⁽²¹⁾. The seafarers may not choose the proper cause of action because the seafarers as plaintiff should prove the shipowners negligence when filing a tortious claim, it is commonly difficult for a plaintiff to evidence a shipowner lacking due diligence or providing an unseaworthy vessel.

3.2 *Items of seafarers' labour rights*

Once a seafarer is held hostage by pirates, the captivity would restrict them from exercising the labour rights below.

Seafarers' employment agreement serves as the legal base of other labour rights. Because the MLC does not preclude the termination of employment agreements by the shipowner, if the shipowners terminate the agreements whether for an indefinite period or a definite period when seafarers held hostage, they are entitled to do so. Common law allows for early termination of a seafarer's employment agreement if and when the continued payment of wages is considered by the court to be unjust and oppressive. Piratical acts would unnecessarily lead to an immediate frustration of the employment agreement at least for a reasonable period.

Subject to the MLC Article II (f), "seafarer" is defined to mean "any person who is employed or engaged or works in any capacity *on board a ship* to which the Convention applies". So, since service to the ship is a prerequisite for validity of employment, seafarers could also be regarded as rendering service to the ship while being held hostage, if the ship is still navigated, operate, maintained or moored somewhere by the seafarers even under threat of violence by the pirates or the ship as a 'mother ship' for the purpose of piratical predations. However,

⁽²⁰⁾ P. ZHANG, E. PHILLIPS, *Safety first: reconstructing concept of seaworthiness under Maritime Labour Convention 2006*, in *Marine Policy*, 2016, p. 54.

⁽²¹⁾ J. HJALMARSSON, *Seafarers and Modern Piracy*, in J. Lavelle (edited by), *The Maritime Labour Convention 2006: International Labour Law Redefined*, London, 2013, para. 7.7, 7.27, 7.46.

if seafarers are taken ashore by pirates, service to the ship would not be satisfied for validity of employment ⁽²²⁾.

Remuneration is one of the main concerns for every worker. Captive seafarers may experience wage deductions or even non-payment of wages. For instance, subsequent to the *Charellé's* release after six months, a seafarer reported that they received wages for five months only. Allegedly, *Faina's* owners deducted \$200 from a number of seafarers held in captivity, because seafarers called their families ⁽²³⁾.

The general point is that because wages due are still governed by the individual's contract of employment, seafarers captured for long periods may find their contracts expiring during captivity ⁽²⁴⁾.

Then subject to the MLC Article II (f), it is argued, payment of wages might not be justified where seafarers are held hostage ashore since working on board is a requirement. English Maritime courts might take into consideration three facts; if the seafarers were received back into service; that freight was earned; and that the seafarers performed their service properly ⁽²⁵⁾.

Another item is the shipowners' liability on seafarers' medical cost and injury compensation. During hostage, seafarers suffer from both physical and mental threats, even after release. The traumatising effects of captivity will most likely continue and it may be necessary to provide further psychiatric or psychological care for the long-term post-traumatic distress ⁽²⁶⁾. It is not only seafarers who display symptoms, but the impacts of captivity may also have traumatic effects on their families which too require further psychological care by professionals ⁽²⁷⁾.

Study shows Filipino seafarers, who were taken hostage by Somali pirates, were interviewed for exploration of their experiences and sufferings both during the captivity and after release. It shows that during captivity the victims suffered from various forms of traumatic abuse which scarred them both physically and psychologically. After release, seafarers suffered from symptoms associated with mental health issues such as post-traumatic stress disorder (PTSD) and depression. However, whilst victims endure heavy physical and psychological abuse,

⁽²²⁾ H. STANILAND, *op. cit.*, p. 357.

⁽²³⁾ A. YÜCEL, *op. cit.*, p. 33.

⁽²⁴⁾ J. HJALMARSSON, *op. cit.*, para. 7.9.

⁽²⁵⁾ H. STANILAND, *op. cit.*, p. 359.

⁽²⁶⁾ J.M.C. MARTIN, *The Seafarer'S Rights and P&I Coverage on the Crew in the UK*, Master thesis, Lund University, 2011, p. 57.

⁽²⁷⁾ A. YÜCEL, *op. cit.*, p. 33.

available institutional support is largely limited to the material losses and treatment of physical violence ⁽²⁸⁾.

The Seamen's Church Institute ⁽²⁹⁾ produced a report on the mental health of seafarers and found that even those not captured, but working in or around the piracy hot spots, experienced greater levels of mental stress. Although the MLC does not specifically addresses mental health care, court decisions over the past fifty years make it very clear that seafarers' right to free medical cost and compensation is included ⁽³⁰⁾.

From a legal perspective, on the basis of the MLC requirement of Regulation 4.2 'in connection with their employment', the shipowners' liability, for physical injury arising out of their employment until repatriation, would in theory cover the period of detention. But it is unlikely to include mental illness and post-traumatic stress associated with piracy unless the contract of employment has specific reference to mental illness, so cracks are left in the Convention ⁽³¹⁾.

The right to repatriation for seafarers is to ensure they return home. For seafarers held hostage by pirates, the prerequisites to exercise the right pertain to their release. Guideline B2.5.1 (1)(b)(iv) of the MLC deals with the situation while the ship is bound for a "war zone" under the national definitions or as per the contract of employment, but no direct provision of Part A in the MLC seems to serve the right for seafarers under captivity, that is to say the MLC itself is silent on the matter for those working in the high-risk areas, as well as the right to refuse transit ⁽³²⁾.

The right to unemployment compensation is likely ignored. Regulation 2.6, the MLC stipulates seafarers' right to two-month-wage indemnity as compensation for the ship's loss or foundering against unemployment. Similarly, under the English Merchant Shipping Act 1995, where a United Kingdom ship is wrecked or lost, a seafarer whose employment on the ship is thereby terminated before the date contemplated and in the agreement under which he is so employed shall be entitled to wages of the two months ⁽³³⁾. Both rules in the MLC and English law have failed to consider the capture of a ship by pirates that

⁽²⁸⁾ S.S. ABILA, L. TANG, *Trauma, post-trauma, and support in the shipping industry: the experience of filipino seafarers after pirate attacks*, 2014, in *Marine Policy*, pp. 132-136.

⁽²⁹⁾ M.S. GARFINKLE, C.L. KATZ, J. SARATCHANDRA, *The Psychological Impact of Piracy on Seafarers*, *The Seamen's Church Institute Working paper*, 2012, pp. 8-10.

⁽³⁰⁾ D.B. STEVENSON, *Seafarers' rights to mental health care*, *The Seamen's Church Institute Bulletins*, 8 September, 2009.

⁽³¹⁾ J. HJALMARSSON, *op. cit.*, para 7.47.

⁽³²⁾ J. HJALMARSSON, *op. cit.*, para 7.18.

⁽³³⁾ H. STANILAND, *op. cit.*, p. 354.

transferred possession and custody of the ship to the pirates, although 'loss' of the ship may be constructed due to piratical capture on rare occasion. For example, where a ransom has been demanded for exchange of ship and seafarers, international economic sanctions may be imposed to prevent the payment of ransoms, therefore ransom is in fact illegal, and the ship could potentially be argued as lost ⁽³⁴⁾.

Maritime lien is dissimilar to the rights to wages or repatriation themselves, but the enforcement of maritime lien could serve seafarers toward better exercise of their rights. Under the effective International Convention on Maritime Liens and Mortgages 1993 (the 1993 Convention) maritime lien should exist based on employment, if seafarers are held hostage on board their ship for some months within valid employment agreements and they are still ready to resume service onboard after release, their claim for wages including costs of repatriation and social insurance contributions payable could be secured and preferred by a maritime lien. But it is argued if seafarers are held hostage for years or ashore, their entitlement to wages (assuming it to exist) would not be secured and preferred by a maritime lien, because their employment agreements would likely be terminated or frustrated and therefore employment would be discontinued, or where a ship is ransomed and released but then sold to a third party maritime lien would not be enforceable. Under English law, the maritime lien arises from the ship-owners' liabilities by reference solely to the maritime law but independent of employment agreements ⁽³⁵⁾.

4. *The necessity to construct a legal framework*

Both the international community and current research has formed some common acknowledgements: it is understood that seafarers held hostage suffer from both physical and psychological traumas. Those seafarers' wages or repatriation has not been settled in a proper way. Both seafarers and their families need further post-traumatic care and treatment as well. Some seafarer supplying countries have some practical or regulatory rules for protection of their seafarers' labour rights, it is not easy to obtain consistence or harmonization because countries' interests vary in the maritime industry. Flag states have not provided enough functional legal tools and port states have no role in the topic. At least three problems are left almost untouched.

⁽³⁴⁾ J. HJALMARSSON, *op. cit.*, para 7.25.

⁽³⁵⁾ H. STANILAND, *op. cit.*, p. 363.

Firstly, the legal base of seafarers' labour rights while being held hostage has not yet been drawn out. It is through the employment relationship that reciprocal rights and obligations are defined and created between the employee and the employer. It has been and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law and social security ⁽³⁶⁾ ⁽³⁷⁾. In the maritime sector it must be the same as other industries. That is, all of seafarers' rights to wages, costs of repatriation and social insurance contributions, etc, are actually based on valid employment relationships. Although some arguments exist on what basis a seafarer employment agreement could be discontinued, fewer studies have a systematic and full discussion on:

- when are seafarer's employment relationships produced or terminated in the situation of piracy?
- what impact would discontinuation of employment relationship have on ship owners' post-contract liabilities?
- what difference is there between causes of contract breach or tort when filing a claim?

Secondly, items of seafarers' labour rights are not properly divided. Piratical acts affect almost every item of seafarers' labour rights, but all the rights seem to be concluded as wage payment, no matter what is shown in the ITF Proposal ⁽³⁸⁾ to ILO Special Tripartite Committee or the draft legislation by legal scholars ⁽³⁹⁾.

Thirdly, shipowners' liability limitation was not counted, but financial strain to small shipping companies would be a major concern when their vessels and seafarers on board are captured ⁽⁴⁰⁾.

⁽³⁶⁾ INTERNATIONAL LABOUR ORGANIZATION (ILO), *Employment Relationship*.

⁽³⁷⁾ INTERNATIONAL LABOUR ORGANIZATION (ILO), *Report of the Committee of 95th Session International Labour Conference on the Employment Relationship*, Geneva, 2006.

⁽³⁸⁾ INTERNATIONAL LABOUR ORGANIZATION (ILO), *Proposal from the Group of Seafarer Representatives Appointed to the Special Tripartite Committee to Amend the Code of the Maritime Labour Convention 2006*, Geneva, 2016, reads 'Where a seafarer is held captive by pirates, payments as provided including any allotments shall continue to be paid during the entire period of the seafarer's captivity'.

⁽³⁹⁾ H. STANILAND, *op. cit.*, p. 366. The draft legislation could be provided that: '(wages) shall, regardless of any law or agreement to the contrary, continue to be payable to a seafarer during any period he or she may have been captured from his or her ship and held captive or hostage in any circumstances by pirates or any other persons'.

⁽⁴⁰⁾ J. HJALMARSSON, *op. cit.*, para 7.10.

5. *The suggested framework of seafarers' labour rights*

The debate or doubt regarding seafarers' rights at first glance is rooted in the blurred legal base of the rights, so seafarers' employment relationship as the legal base would be constructed through spelling out the spirit and intention of the MLC in this Section. Then, on the basis of existence of the employment relationship seafarers' labour rights are established. Shipowners' liability limitation is also drawn in response to one of their major concerns in the Section.

5.1. *The legal base of seafarers' labour rights*

The creation and continuous existence of the right to wages, repatriation and social insurance contributions, plus maritime lien, all are based on valid employment relationships (whether contractual or factual). At any moment, the existence of an employment relationship is the legal base of seafarers' labour rights. The employment relationship is the legal link between shipowners and seafarers, it exists when a seafarer undertakes work or services under contractual conditions in return for remuneration. The existence of an employment relationship is the condition that determines the application of the labour and social security law provisions addressed to seafarers. It is the key point of reference for determining the nature and extent of shipowners' rights and obligations towards seafarers ⁽⁴¹⁾.

Generally, certain indicators are evaluated to determine the existence of an employment relationship, including the extent of integration in an organization, who controls the conditions of work, the provision of tools, materials or machinery, whether the remuneration is paid periodically ⁽⁴²⁾.

Through the definition ⁽⁴³⁾ of seafarers' employment agreement (SEA) and its itemized particulars being required to be carried on board ship ⁽⁴⁴⁾, SEA is regarded as the *prima facie* of an employment relationship between the seafarer and shipowner. Some may argue there is no direct shipowner-seafarer employment relationship in the 'triangular' relationship among seafarers, service agency and shipowners. Whether the nominal relationship is confused or not among them, the final obligations toward seafarers are imposed onto shipowners in the

⁽⁴¹⁾ ILO, *Employment Relationship*, *cit.*

⁽⁴²⁾ INTERNATIONAL LABOUR ORGANIZATION (ILO), *Proposal from the Group*, *cit.*

⁽⁴³⁾ MLC, *Article II 1. (g)*.

⁽⁴⁴⁾ MLC, *Standard A2.1.4*.

MLC, since they are the ones who bear the final obligations, and the SEA is the very instrument evidencing the existence of the employment relationship between them.

It is under the valid employment relationship that shipowners bear the liabilities that are produced and sustained from seafarers' embarkation of the ship until proper repatriation. Only if seafarers demonstrate wilful misconduct or gross negligence would the liabilities be discharged in the period. It is also common knowledge that while an employee is performing the duty under direction of an employer the employer is liable to bear the results of the employee's behaviour. Neither is an employment relationship discontinued nor the employers' liability toward the employee relieved by any malicious deed or infringement act of the third party. In the entire service period including the time when seafarers are held hostage by pirates, the employment relationship continues to exist and be sustained valid *de facto*, the shipowners liabilities toward seafarers have never shifted due to piratical acts.

When seafarers are taken hostage by piracy, it is argued the MLC does not preclude the earlier termination by ship owners, so they are entitled to do so ⁽⁴⁵⁾. On one hand, the MLC does not exclude the seafarer's labour rights during hostage situations either; on the other hand, without valid notice to the seafarers, ship owners cannot terminate the employment relationship earlier than contracted by *ex parte* implication only.

It is also argued that if seafarers are held hostage on board ship ⁽⁴⁶⁾ but not taken ashore by pirates ⁽⁴⁷⁾, the MLC requirement of service to the ship would be satisfied for the validity of the employment relationship. Similar to shore leave: when the ship is berthed in a port on a regular service, seafarers' temporary disembarkation and being taken under the mandate of pirates, does not change the legal nature of the employment relationship. Because it is seafarers' service to the ship that results in being held hostage and seafarers are still in connection with the ship, the employment contract is not discontinued. Therefore, neither could the situation of seafarers being held hostage ashore nor being taken on board deny the continuous existence of employment relationship.

The definite period agreement might naturally be terminated per contracted terms, as to the indefinite period or voyage agreement the employment relationship would not be terminated by shipowners' *ex parte* implication.

⁽⁴⁵⁾ H. STANILAND, *op. cit.*, p. 351.

⁽⁴⁶⁾ J. HJALMARSSON, *op. cit.*, para. 7.9.

⁽⁴⁷⁾ H. STANILAND, *op. cit.*, p. 358.

Even though some agreements might be naturally terminated or frustrated during captivity, shipowners' continuous post-contract liabilities of care would not be exempted if the liabilities stem from or are in connection with the employment. The post-contract liabilities are in fact mandated by the MLC, including repatriation, medical care, etc. Meanwhile, the seafarers' maritime lien over the shipowners' post-contract liabilities should continue to exist and be enforceable.

Therefore, seafarers' labour rights could be established on the basis of either the contractual or post-contract liabilities born by ship owners. In addition, based on the existence of employment relationships, seafarers could take action against shipowners on causes of either contract breach or tort. In fact, except for claims of medical compensations there is no difference to choose either cause for other labour rights, but the burden of proof seafarers as the plaintiffs have to bear on negligence is stricter than on contract breach.

5.2 The items of seafarers' labour rights

During the time when seafarers are held hostage by pirates, while the employment relationship continues to be valid for the indefinite period SEA or voyage SEA, shipowners should bear the contract liabilities; while for the definite period SEA the employment relationship might be naturally terminated or frustrated, shipowners should bear the post contract liabilities. Seafarers could claim their labour rights on causes of either contract or negligence.

Wages

During the time when seafarers are held hostage by pirates, since the indefinite period SEA or voyage SEA continues to be valid, ship owners should pay wages. In the situation for the definite period SEA, seafarers should be paid wages as the seafarers have not been captured by pirates until the SEA is legally terminated or frustrated. Wages should be paid as to the standard to transit the so-called high risk zone since the seafarers in fact are held in such a zone. Seafarers' wages should not be deducted or stopped unless there is clear statutory stipulation and the seafarer has been efficiently informed ⁽⁴⁸⁾.

⁽⁴⁸⁾ MLC Guideline B2.2.2.4. (h).

Repatriation

Shipowners' liability to repatriate seafarers is actually a post-contract one because the employment relationship is terminated at the moment when seafarers disembark the ship they have just served. To ensure seafarers return home, seafarers' repatriation evolved into an international customary law, and it is the international instruments that legalize international customary law. Accordingly, whether the SEA is discontinued or not after seafarers are released from the hostage situation, shipowners should take the liability to repatriate seafarers except where the seafarer has been found to be in serious default ⁽⁴⁹⁾.

Medical Costs and Compensation

The MLC make it clear that shipowners' medical liability to seafarers include both the contractual one and post-contractual one. The contractual liability mainly is the medical cost produced between those dates from embarkation to disembarkation of the ship in the period of the existence of the employment relationship, where the post-contract liability is the medical cost and compensation "arising from their employment between those dates" after the employment relationship is discharged ⁽⁵⁰⁾.

Shipowners' medical liability could be excluded only on the basis of a seafarer's wilful misconduct or gross negligence or captivity incurred other than in the service of the ship ⁽⁵¹⁾, and the shipowner should bear the burden of proof.

Current studies show seafarers held hostage suffer from both physical and psychological traumas including post-release traumas, and it is widely agreed that the MLC requires the minimum medical cost and compensation for physical sufferings. The international maritime community has not yet commonly acknowledged shipowners' medical liability for seafarers' psychological traumas, but it should not be excluded since mental traumas are produced in the existence of the employment relationship.

It is difficult to quantify both psychological suffering and compensation; the suggestion is that in the period of captivity the medical compensation rate is equal to a wage. Suppose some employment relationships (not all of them) are discontinued in the period of captivity, there would be no wage available any more, the medical compensation equal to wage could serve as some comfort to

⁽⁴⁹⁾ MLC *Standard* A2.5.3.

⁽⁵⁰⁾ MLC *Standard* A4.2.1(a).

⁽⁵¹⁾ MLC *Standard* A4.2.5.

seafarers still captive and their families. After release, the medical liability for seafarers' psychological traumas could be arranged similar to the rules governing physical suffering, for example coverage of the clinical visit costs or compensation.

Unemployment compensation

Seafarers' mental suffering after release could be so damaging that they may become unable to work for months, a period that needs to be covered with some compensation while a seafarer is unemployed. So the concern regarding "re-employability"⁽⁵²⁾ to work at sea after possible post-traumatic distress should be drawn. But the right to unemployment compensation is almost totally ignored in the MLC or under English law, and international maritime community has not yet commonly recognized shipowners' liability for seafarers' unemployment in these special circumstances.

To be against the unemployment effect, it is worthwhile considering extending the unemployment compensation from ship's loss or foundering to post-piracy, for example for two month's wages.

Food compensation

Similarly, the right to food free of charge by seafarers under captivity is totally ignored, but the captivity does not deprive the entitlement. Once released, seafarers should be compensated for nutritional and energy recovery, actually the provisions should be supplied in the routine service by ship owners⁽⁵³⁾.

Maritime lien

As discussed above, under the effective 1993 Convention maritime lien exists based upon existence of the employment relationship. But it is argued, if seafarers are held hostage for too long their entitlement to wages might not be secured by a maritime lien, because their employment relationship could be discontinued. Under English law, the maritime lien arises from the ship owners' liabilities by reference solely to the maritime law.

In the light of impacts of English law worldwide and flexibility and mobility of maritime lien, it is always enforceable somewhere. For example, if the

⁽⁵²⁾ A. YÜCEL, *op. cit.*, p. 33.

⁽⁵³⁾ MLC Regulation 3.2.2.

shipowners refuse to honour their liabilities, after their release seafarers might apply ship arrest and enforce maritime lien for immediately claiming their entitlements in the first port where the released vessel arrives.

More feasible, seafarers can nominate dependents or family members as beneficiaries, as they who are held hostage by pirates are restricted from exercising maritime lien, the beneficiaries would be legally and justifiably entitled to exercise the seafarer's labour rights that include maritime lien on behalf of the seafarers.

5.3. *The liability limitation of shipowners*

It was obvious, at the meeting of the Special Tripartite Committee for the MLC in Geneva during February 2016 one of biggest concerns for shipowners was how far the liabilities to seafarers would go if seafarers are held hostage for years. For those small size shipping companies, the liability itself could lead to bankruptcy even if some part of risks could be covered by P&I Club.

To alleviate the concern, one way is to cover the risk through insurance. As estimated, the average duration seafarers are held hostage by Somali pirates was 55 days in 2009 and three to four months in 2011⁽⁵⁴⁾, therefore shipowners could arrange insurance accordingly. The other way is to set a liability limitation. Suppose a seafarer is held hostage for years, it would be difficult to say how much should be counted for such a limitation. But the worst situation could be referred to as the benchmark: it is reasonable to consider that the worst situation in piratical acts results in a seafarer's death. Once the accumulated liabilities toward seafarers from the moment of piratical act are amounted to the stipulated or contracted death compensation, ship owners could be relieved of further liabilities.

6. *Conclusion*

The current international legal framework is set to deal with the piracy issue mainly from the dimensions of criminal law and commercial law, but fewer concerns have been given to the legal protection of seafarers' rights in terms of labour law, therefore this paper aims at shedding light on seafarers' labour rights

⁽⁵⁴⁾ UNCTAD, *op. cit.*, p. 16.

while captive. For those seafarers held hostage, both the international community and the current research have realized that their rights to wage, health compensation or repatriation are not achieved properly. ITF and scholars initiated to simplify all the affected labour rights to wage only. The initiative framework looks simple, clear and generalized, providing shipowners and seafarers with legal certainty⁽⁵⁵⁾; it also seems to avoid some argument, even it is maintained that seafarers should not be entitled to wage where they are held ashore. As the matter of fact, their initiatives show the legal base of seafarers' labour rights is highly blurred.

In this paper it is constructed from the MLC, in the entire period from seafarers' embarkation of the ship until proper repatriation, that the employment relationship has always been valid. Thus, shipowners bear the liabilities that are produced and sustained on basis of the relationship, whether the seafarers are held on board or ashore by pirates. The only exception is the definite period agreement that could naturally be terminated per contracted conditions. Shipowners are not entitled to terminate the indefinite period or voyage agreement by their *ex parte* implication. Any malicious deed or infringement acts of pirates (the third party) change neither the nature of employment relationship nor relieve shipowners' liability toward seafarers.

Shipowners' liabilities can be divided into two categories. If seafarers held hostage by pirates conclude an indefinite period SEA or voyage SEA, the employment relationship continues to be valid, and shipowners should bear the contract liabilities continually. Until a definite period SEA is terminated or frustrated, shipowners should not bear the post contract liabilities which arise out of the service in connection with the employment.

On causes of either contract breach or negligence, seafarers could claim their labour rights to remuneration, food compensation, medical cost and injury compensation, repatriation, and unemployment compensation. As to medical rights, seafarers should be entitled to have costs and compensation stemming from both physical and psychological traumas, but the mental health compensation is generally ignored by the industry. It is suggested that in the period of captivity the mental health compensation rate is equal to the contracted wage. Captivity would restrict seafarers from exercising their labour rights, the nominated dependents or beneficiaries would be entitled to exercise the seafarer's labour rights that include maritime lien.

In the case that a seafarer is held hostage for years, a liability limitation might be considered to discharge the shipowners' burden of liabilities, and death

⁽⁵⁵⁾ H. STANILAND, *op. cit.*, p. 366.

compensation could be referred as the worst situation and the limitation therefore. In fact, it might be unnecessary to benchmark the value of liability limitation. For shipowners the cost per incident was US\$28.6 million estimated in 2011⁽⁵⁶⁾⁽⁵⁷⁾, and seafarers were being held hostage by Somalia pirates for an average duration of three to four months at the same time⁽⁵⁸⁾. Suppose a ship was hijacked with 25 seafarers on board, where the average wages for seafarers were US\$7,000 per month. Then it could be calculated, if seafarers were given mental health compensation per wage rate, the amount shipowner would need to spend on mental health compensation would be $7,000 \times 25 \text{ persons} \times 4 \text{ months} / \text{US\$28.6 million} = 2.45\%$. Certainly, there must be some other elements of seafarers' labour rights, but even if the percentage is doubled, it is still less than 5%, so it is understandable that the percentage of costs on seafarers to the total costs per incident should be small for the final settlement.

Those labour rights of seafarers held captive are shipowners' liabilities which are already constructed in the MLC. Enforcement of the rights should not be up to further regulations, but the reality seems that political bargain would have to be taken like a battle among international stakeholders.

This paper takes an overall evaluation of the current labour rights of merchant seafarers once held hostage as the special circumstances, but the points here could be referred to in some other contexts. Firstly, this paper emphasize the employment relationship is still applied to maritime industry from perspective of the MLC, in such a globalized but fragmented market sometimes it would be difficult to evaluate whether an employment relationship is produced or sustained because every state could legislate in a different way, it would be helpful for some other cases if in doubt to evaluate the existence of the employment relationship. Secondly, mental injury compensation is always a difficult issue in sector of maritime labour. Again it is a special circumstance for seafarers to be held hostage, physiological problems arise out of some other phenomenon such as abandonment, accidents, loneliness, separation etc, but this paper still provides some legal framework for mental injury compensation for those highly mobile workers. Thirdly, this research is attempting to look over the current efforts by the International Transport Workers Federation in the negotiation with international shipowner organizations for promotion of the wellbeing of seafarers during captivity. The paper addresses the main concerns for the parties

⁽⁵⁶⁾ A. BOWDEN, S. BASNET, *The Economic Cost of Somali Piracy 2011*, in *Ocean Beyond Piracy Project Working Paper*, 2012.

⁽⁵⁷⁾ UNCTAD, *op. cit.*, p. 13.

⁽⁵⁸⁾ UNCTAD, *op. cit.*, p. 16.

involved, and is likely to have far-reaching references and implications for their decision making. Finally, this paper also draws the general picture of labour rights for those other mobile workers, particularly for those who work at sea, such as fishing seafarers or offshore platform workers, although the particular rules of their labour rights may vary.

Chen Gang
Associate Professor in Maritime Law
School of Navigation
Wuhan University of Technology, China

Desai Shan
Ph.D. Candidate
School of Social Sciences
Cardiff University, UK

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