

A LANDSCAPE ANALYSIS OF RIGHTS OF FISHING INDUSTRY WORKERS AND CONVENTION 188



REUTERS: DAMIR SAGOLJ



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Linklaters





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INTRODUCTION

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INTRODUCTION

INTERNATIONAL LABOUR ORGANISATION

According to the International Labour Organisation (the “ILO”), more than 30 million people worldwide work as fishers, over half of whom work full-time on board fishing vessels. Fishing is regularly conducted in a challenging environment and is considered to be one of the most hazardous occupations globally. In addition, fishing is an international industry often involving many different countries.

The ILO has recognised these circumstances and the need to establish a global labour standard to ensure decent working conditions in the fishing industry. Since the ILO excluded fishing vessels and fishers from the scope of its consolidated Maritime Labour Convention, 2006 (the “MLC”), it adopted the Work in Fishing Convention, 2007 (No. 188) (the “Convention”), and the accompanying Work in Fishing Recommendation, 2007 (No. 199), in 2007. The objective of the Convention is to ensure decent conditions of work by setting minimum requirements for work on board commercial fishing vessels, conditions of service, accommodation and food, occupational safety and health protection, medical care and social security. However, eight years after its adoption, the Convention has only been ratified by five countries (Argentina, Bosnia and Herzegovina, Congo, Morocco and South Africa).

VISAYAN FORUM FOUNDATION

Visayan Forum Foundation, Inc. (“VFF”) is a Philippines-based non-profit organisation established in 1991. They work towards ending modern-day slavery, especially human trafficking and the exploitation of workers in the Philippines and support victims of human trafficking through a safe house where survivors are protected and provided with a comprehensive package of services. VFF’s key aim is to ensure that robust policies and regulations are in place in the Philippines to ensure that people are protected from inhumane conditions and the risk of being sold and enslaved.

The fishing industry is of particular concern to VFF and they are currently campaigning to improve the working conditions of fishers who work in the pa-aling (a dangerous form of deep-sea net fishing) fishing industry in the Philippines. Fishers have reported that they have been exposed to life-threatening and exploitative working conditions resembling forced labour and modern slavery. VFF have been working with the Philippines Department of Labour and Employment to try to improve working conditions for the fishers. VFF believes that stronger laws and policies will place fishers in a better position to demand fair compensation and benefits from employers, recruitment agencies and fishing companies. VFF holds the Convention as a comprehensive and robust piece of legislation which aims to raise standards and establish minimum requirements for working and living conditions for fishers and aims for Philippines legislation to be consistent with (or at the very least, similar to) the provisions of the Convention.

Due to the fact that the Convention has not been ratified by many countries, VFF requested a comparative analysis of laws and regulations across a number of jurisdictions to provide an overview of what kind of protections and rights are afforded to fishers, with a view to highlighting best practices and lobbying for stronger laws and policies to protect fishers in the Philippines.

THE REPORT

The report we have produced examines the existing rules and standards applicable to fishers and fishing vessels in Germany, Spain, the United Kingdom, as well as at the EU level, the United States, Australia, Japan, China, Thailand, New Zealand, Indonesia, the Philippines, Singapore and South Africa (the “Case Study Countries”). Each Case Study Country has a chapter in this report identifying the competent authority charged with enforcing legislation or regulations impacting fishers; the responsibilities of fishing vessel owners; minimum age requirements; health and safety standards; fishers’ work agreements; the recruitment of fishers; fishers’ wages; social security provisions for fishers and coverage for work-related sickness/injury/death. Each section of the report describes existing laws which protect fishers in the relevant country and identifies material gaps in legislation where the standards of the Convention are not met. The report also addresses enforcement of the existing laws and standards as our research indicated that, in some cases, legislation broadly in line with the Convention may exist, but a lack of enforcement means that its benefits are not enjoyed by fishers.

For each Case Study Country and each topic the report sets out:

1. Convention Provision: a summary of the text of the relevant Convention provision;
2. Corresponding National Laws and Regulations: existing laws in that country that embody the rights set out in that Article of the Convention; and
3. Notes/Recommendations/Analysis: a commentary looking on matters such as remedies available in the event of breach of the relevant laws, identifying gaps in legislation and considering whether amendments to the existing legislation or new legislation are required in order to meet the standard of the Convention.

A large, silvery fish, likely a tuna, is being held by a fisherman in the water. The fisherman's face is visible in the lower right, looking towards the camera. The fish's head is in the foreground, and its body extends towards the top of the frame. The water is dark and rippled. A white rectangular box with the text 'EXECUTIVE SUMMARY' is overlaid on the right side of the image. In the top right corner of this box, there are three small squares: orange, grey, and blue.

EXECUTIVE SUMMARY



EXECUTIVE SUMMARY

This report identifies and summarises relevant legislation, case law and regulations which protect the rights of workers in fishing industries in 14 jurisdictions around the world and analyses their correspondence to the Convention and enforcement. As discussed below and detailed in the report that follows, the Case Study Countries, including the Philippines, have each enacted the provisions of the Convention to some degree regardless of whether they are signatories to it. However, the existence of legislation in and of itself does not protect fishers' rights. Rather, the key issue is whether the Case Study Countries actually enforce the legislation they promulgate and how the diverse agencies often charged with enforcement coordinate their efforts.

Our research indicates that enforcement in the Philippines is hampered by the decentralisation of enforcement of legislation protecting fishers' rights. Because accountability is spread amongst a number of agencies and departments, there is no clear avenue to make complaints or seek redress.

An overall summary for each topic is set out below.

FISHING AUTHORITY

[ILO CONVENTION \(ARTICLE 7\)](#)

Each Member shall designate the competent authority or authorities empowered to issue and enforce relevant regulations and establish coordination mechanisms

amongst relevant authorities for the fishing sector at the national and local levels.

The bodies overseeing the fishing industry or ensuring compliance with relevant laws vary greatly between Case Study Countries. In general, authority over the fishing industry is held at a state level. Very few jurisdictions have a specific body which oversees the industry; where specific oversight bodies exist, they typically oversee only a single aspect of the industry. This could lead to potential issues in enforcement, due to certain issues falling through gaps between the remits of different authorities and fishers not having clarity as to who they should approach with any problems/concerns. For example, the UK, Germany and South Africa all have a specific body which either licenses or has the right to inspect fishing vessels. The Asian Case Study Countries all use government ministries to oversee the fishing industry – this is not always a fishery-specific ministry, but may be a broader entity such as the Ministry of Labour or Agriculture. Similarly, the Philippines has a number of government agencies which oversee different aspects of the fishing industry. The various agencies have recently signed a Memorandum of Understanding, the aim of which is to harmonise the responsibilities of the agencies and to set each agency clear requirements. However, it is unclear at this stage how successful the Memorandum of Understanding will be in its coordination process.

RESPONSIBILITY OF FISHING VESSEL OWNERS

ILO CONVENTION (ARTICLE 8)

The fishing vessel owner has overall responsibility for ensuring that the skipper is provided with the necessary resources and facilities to ensure compliance with all applicable rules.

Fishers shall comply with the lawful orders of the skipper and applicable safety and health measures.

All of the Case Study Countries have legislation in place establishing that fishing vessel owners have a duty of care towards the workers on board that vessel. Under EU law, Member States must put provisions in place which require owners to ensure vessels are not used which endanger the health and safety of workers. Consequently, the European Case Study Countries have fairly robust legislation addressing requirements that must be met by fishing vessel owners and most vessels are subject to inspection by authorities to ensure

compliance. There is similarly robust legislation in the US, Australia, New Zealand and South Africa. All of the Asian Case Study Countries, including the Philippines, also have legislation specifying a duty of care by the owners of fishing vessels, however such legislation is slightly less robust than in the other jurisdictions and is not as detailed. For example, Indonesian law specifies vessels must be in “seaworthy condition” but this is not clearly defined. For most of the Case Study Countries, breach of the duty of care can result in suspension of relevant licences, fines or in some cases criminal proceedings.

MINIMUM AGE

ILO CONVENTION (ARTICLE 9)

The minimum age for work on board a fishing vessel shall be 16 years, although under certain conditions the minimum age may be 15.

The minimum age for activities likely to jeopardise the health, safety or morals of young persons on board fishing vessels shall not be less than 18 years, although under certain conditions the minimum age for such activities may be 16.

All of the Case Study Countries have a minimum age for workers in their legislation. Mostly this is not a minimum age specific to the fishing industry, rather a broader national or statutory minimum age. The majority of the jurisdictions set the minimum age for any employment at 16 or 18, though there are usually a number of caveats if the child is between 16 and 18, such as restricted hours etc. In Indonesia and Singapore the national minimum age is 13, but between 13 and 16 there are certain restrictions on the type of work performed, hours, etc. In a number of the jurisdictions, including the Philippines, children are also explicitly prohibited from ‘hazardous’ or ‘dangerous’ work. However, these terms are not clearly defined and it is unclear whether work in the fishing industry would fall within these caveats.

HEALTH AND SAFETY

ILO CONVENTION (ARTICLES 10-15, 25-28, 31-33)

Protect fishers’ health by monitoring their fitness to perform their duties.

Require that owners of fishing vessels ensure that their

vessels are sufficiently and safely manned for safe navigation and that fishers are given adequate and regular rest.

Ensure that accommodation on board fishing vessels is of sufficient size and quality and appropriately equipped for the length of time that fishers live on board.

Food and water carried and served on board must be of sufficient quality and quantity.

Members must adopt legislation providing for: (i) prevention of occupational accidents; (ii) appropriate training; (iii) reporting and investigating accidents; (iv) the setting up of joint committees on occupational safety and health; and (v) conducting risk evaluation in relation to fishing with the participation of fishers or their representatives.

All of the Case Study Countries have national laws in place that address most, if not all, of the issues outlined in the relevant sections of the Convention. However, with the exception of Germany which has one overarching statute to govern the fishing industry, most of the jurisdictions' health and safety regulations span a number of different pieces of legislation and address various topics. Additionally, a lot of the legislation in the Case Study Countries in respect of health and safety is not specific to the fishing industry. For example, the Philippines only has general Occupational Safety and Health Standards which covers a variety of other specialisations including mining and construction. Consequently, in jurisdictions with a number of varied laws and regulatory bodies, it may be less likely that breaches in relevant legislation are identified and prosecuted.

WORK AGREEMENTS

ILO CONVENTION (ARTICLES 16-20)

Fishers should have the protection of a work agreement that is comprehensible to them and specifying the minimum requirements including decent work and living conditions.

Fishers' work agreements must be provided to the fishers, carried on board the vessel and made available to the fisher upon request.

With the exception of Singapore, all of the Case Study Countries have legislation which states that written contracts of employment must be entered into. Such legislation varies in respect of the terms to be included

in the work agreement; however, it broadly covers wages, terms of employment, rest periods and minimum welfare and safe working standards. There is some lack of transparency with this topic in terms of ensuring fishing industry workers have the opportunity to review or seek advice on their work agreement before entering into it. Additionally, it is not always clear how "worker" or "employee" is defined, and whether contract workers or those deemed self-employed also have access to the same protections under a work agreement.

RECRUITMENT

ILO CONVENTION (ARTICLE 22)

Any public service providing recruitment and placement for fishers must be part of, or coordinated with, a general public employment service.

Any private service providing recruitment and placement for fishers must be licensed or certified by the Member.

Prohibition on recruitment from practices intended to prevent or deter fishers from engaging for work and requires that no fees or charges for requirement or placement be borne by the fishers.

Legislation in the Case Study Countries addressing the recruitment of fishers aligns with aspects of the Convention, but this is mainly due to general recruitment, human rights and migrant laws rather than fisher-specific regulations. Japan and Germany are notable exceptions: each has promulgated legislation setting out the requirements for the placement and employment of seafarers substantially in the form of the Convention. Other Case Study Countries which effectively meet the requirements of the Convention include: Indonesia, where placement fees are payable only by employers and recruitment agencies are obliged to provide welfare, safety and health support for job candidates; South Africa, where employment agencies must be registered and may not charge placement fees; China, where public recruitment services must be free and available to all employers and public service agencies must be licensed and are regulated by labour authorities; and several U.S. states which require licensing of recruitment agencies, regulate how much a job seeker can be charged for placement services and prohibit the misrepresentation of jobs. In the Philippines, employers are barred from demanding payment for a promise of retention and recruitment and placement may only be performed

by licensed entities who are prohibited from charging extortionate fees (as opposed to no fee, as specified in the Convention). The other Case Study Countries do not prohibit means-tested recruitment or service fees for job seekers.

WAGES

ILO CONVENTION (ARTICLES 23-24)

Fishers who are paid a wage must be ensured a monthly or other regular payment.

Each Case Study Country mandates the payment of wages for workers on a periodic basis in accordance with the Convention. Most also mandate a statutory minimum wage at either state or federal level, permit collective bargaining with respect to employment arrangements and enforce legislation mandating overtime payments. Fishers in South Africa are exempted from such protections, as the minimum terms and conditions of employment set out by the Ministry of Labour do not apply to persons employed on vessels at sea. The U.S. similarly exempts the fishing industry from minimum wage and overtime payment requirements thereby allowing fishers to be paid through shares in the gross adjusted catch. Singapore does not have a minimum wage.

Among the Case Study Countries, Spain's prohibition against more than 30% of wages being paid in kind and the Philippines' mandate that wages be paid in legal tender rather than in kind or shares of the net catch of fish (even when employees request otherwise) stand out for their high level of compliance with the Convention. No Case Study Country complies with the requirement in the Convention that fishers on board fishing vessels be given a means of repatriating their income to their families at no cost.

SOCIAL SECURITY

ILO CONVENTION (ARTICLES 38-39)

Fishers injured due to occupational accident or disease must have access to appropriate medical care and compensation, which may be ensured through a system of employers' liability or compulsory insurance or workers' compensation.

If no national provisions for fishers exist, laws must be in place ensuring that fishing vessel owners are

responsible for the provision of health protection and medical care to employees employed, engaged or working on a vessel at sea or in a foreign port, including costs associated with medical treatment in a foreign country.

Each Case Study Country provides some form of medical care and/or compensation for its nationals and/or individuals ordinarily resident in their territory who are injured in the course of their employment. In almost all cases, compensation does not extend to non-nationals. This is a marked inconsistency with the Convention which mandates equality of treatment in relation to the provision of social security benefits to fishers irrespective of their nationalities. Uniquely, the EU and its Member States have promulgated a regime intended to ensure complete social security protection for legal EU national migrant workers by coordinating social security regimes so that a migrant worker does not lose benefits earned in one Member State by temporarily relocating to another Member State for work purposes.

The medical care and compensation for fisher nationals is generally funded by employers, although some of the Case Study Countries (Spain, China and South Africa) require contributions from employees as well. In the Philippines and South Africa, a minimum number of regular monthly payments to the social security administration must be made before employees can receive payouts. If the fishers' employment contracts are structured on a per-voyage and not on an annual basis, they may be ineligible to receive social security since regular monthly payments may not be made on their behalf for the requisite number of months.

Spain has also enacted a package of public measures which are intended to help Spanish fishers. These include early retirement plans for fishers and a lump sum pay-out of up to 10,000 euros in the event that their boats cease operations. While the U.S. only provides a minimum level of health care insurance for low-income individuals below the age of 65 through the federal Medicaid program, states with strong fishing industries provide additional protection specifically for fishers. In China, a series of federal and provincial policies provide support for fishers, including basic medical services and subsidies for fishers who cannot otherwise receive social security payments for any reason.

WORK-RELATED SICKNESS/INJURY/DEATH

ILO CONVENTION (ARTICLES 38-39)

Each Member must take measures to provide fishers with protection for work-related sickness, injury or death.

Critical for compliance with the provisions of the Convention is that either legislation or case law in each of the Case Study Countries defines fishers as “employees”. This means that fishers can benefit from compensation or coverage available to employees who incur occupational sickness or injury in the course of their employment. The UK, Germany and New Zealand hold employers liable for repatriating fishers who become injured or sick in foreign jurisdictions; employers in the U.K. and Germany must also pay fishers’ wages for the duration of their contract regardless of whether they are able to work. South African legislation goes further towards compliance with the Convention: compensation for occupational injuries is paid to fishers on South African ships and fishers on foreign ships in South African waters out of a national fund established for the purpose.

Unique amongst the Case Study Countries is the Philippines. While the Philippines’ National Health Insurance Act mandates that all Filipinos receive medical coverage in the event of injury or sickness, regardless of whether they are employed in the formal or informal sector, eligibility is contingent on the payment of premiums for at least three of the six months preceding the first day of the ailment. Consequently, while the legislation appears to cover employees in the event of sickness, injury or death, the timing of the injury or sickness in an employee’s employment determines whether he will receive any benefits.

ENFORCEMENT

Regulations, case law, legislation and policies in the Case Study Countries provide examples of fishers’ rights being protected by government and enforcement agencies; lobbying by citizens and non-governmental organisations (“NGOs”); NGOs leveraging the prospect of reputational damage against companies to force them to respect human rights; and/or union engagement. Each method of protecting fishers’ rights has proven effective in at least one of the Case Study Countries – it is our hope that the information set out in the following report will give the Visayan Forum Foundation a sense of

what combination of methods may be most effective at protecting fishers’ rights in the Philippines.

Examples include:

• Interagency relationships governed by memoranda of understanding

There are several designated competent authorities empowered to enforce regulations protecting fishers in the UK, each of which also has a statutory duty to cooperate with the others, and local authorities, in carrying out its functions. These relationships are governed by memorandum of understanding which impose a best endeavours obligation on each signatory to cooperate effectively and support each other in carrying out their responsibilities and functions. For example, the Gangmasters Licensing Authority (the “GLA”), which monitors employers on U.K. coastal waters, is supported by the Maritime and Coastguard Agency. The arrest of four individuals in an operation directed by the GLA in May 2010 was the result of interagency cooperation of the type contemplated by the memorandum of understanding. The operation culminating in the arrests took place following concerns regarding unlicensed gangmasters tasking individuals with harvesting clams from an unclassified beach. It was carried out by the GLA, Sussex Police, Hampshire Police, Arun District Council Environmental Health, Portsmouth City Council’s Port Health Unit, London Health Officers and Sussex Sea Fisheries District Committee. The GLA also has a statutory duty to notify the Secretary of State if it has reasonable grounds to believe that a person may be a victim of slavery or human trafficking.

Several government agencies in the Philippines, including the Department of Employment and the Coast Guard, recently entered into a similar memorandum of understanding. In doing so, they intend to “jumpstart” the harmonisation of their respective operational, programme and policy interventions to ensure decent working and living conditions on board commercial fishing vessels.

• Litigation brought by private citizens to force companies into compliance

A recent addition to the arsenal of enforcement mechanisms in the U.S. is the California Transparency in Supply Chains Act (the “Transparency Act”). The Transparency Act bars companies from making false claims about illegal conduct in their supply chain, including human rights violations. In August 2015, the

first case brought under the Transparency Act alleged that a U.S. wholesaler was perpetuating human rights abuses of fishers in Thailand by selling prawns which were fed on fish harvested by workers employed in near slave-like conditions. The plaintiff asserted that she had standing to sue based on the fact that she bought the prawns in question from the wholesaler. While the lawsuit in California seeks to enjoin the wholesaler from selling the implicated fish, the greater risk to the wholesaler may be negative publicity generated by the lawsuit.

- *New “soft” law standards*

Leveraging potential reputational damage against companies as a way to ensure that fishers are not subject to human rights abuse is a relatively new phenomenon in enforcement, but one which has potential for future growth. The prevalence of standards like the UN Guiding Principles on Business and Human Rights, which emphasise the responsibility of private sector companies to uphold human rights in their supply chain and jurisdictions of operation, and increasing attempts by NGOs and private citizens to hold companies which they see as violating these standards to account, may indicate a new wave of enforcement methods.

- *Union activism*

Fishers’ unions provide protection to their members by using collective bargaining and strength in numbers to preserve and promote the interests of their membership. For example, the Scottish Fishermen’s Federation lobbies government officials on behalf of its members in Edinburgh, London and Brussels. A sub-committee devoted to safety, training and personnel provides support for members by working to improve training provision for the fishing industry, establishing apprenticeship programmes and developing improved risk assessment, and risk management systems, for fishing vessels.

This Executive Summary was prepared by Linklaters, the global law firm who is coordinating the research for this report. TrustLaw and Visayan Forum Foundation are grateful to Linklaters for leading this research, as well as to the international team of lawyers and in-house counsel who are working pro bono to develop this report. The full report will be available online at www.trust.org in 2016.
