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Date 26/09/2015
Discrimination against Seafarers Post 11th September 2001 (United States) and Post 7th July 2005 (United Kingdom)

Roland Cofie Robertson

A Thesis submitted in partial fulfilment of the requirements of Master of Philosophy of the Nottingham Trent University and Southampton Solent University

June 2015
Abstract

The significance of this study derives from the fact that the United States, with the support of the United Kingdom approached the IMO with new domestic legislation for the US maritime industry. This legislation, the MTSA, was to be introduced to regulate the maritime industry for fear that if the aviation industry has been compromised for acts of terror to be committed (11th September), it must be assumed that the maritime sector may be used by terrorists for the same ends. It is an established fact that shipping is the oldest transport industry, in existence long before the invention of aircraft. The modern maritime sector is the most highly regulated industry by the IMO and ILO, and has, to date, not been compromised by terrorists to launch an attack on any sovereign State.

The thesis addresses the violation of seafarer’s human rights in post-11th September 2001 (USA), and post-7th July 2005 (UK). The research identifies the problems that affect seafarers’ rights, welfare and well-being which are embedded in the US Homeland Security Act, Patriot Act, and UK Home Office Anti-terrorism Act respectively. The most influential Resolution which gave the US and the UK the all clear to override international law is the United Nation’s Security Council Resolution (UNSCR) 1373. UNSCR 1373 is a mandatory order with no time limit, and it is not confined to a particular conflict but rather aimed at an undefined, yet expected, threat of global terrorism. The US and the UK declared seafarers potential terrorists in the immediate aftermath of 9/11. However, the importance of maintaining strong respect for human rights while ensuring national security was missing in the content of the UNSCR 1373 after 9/11.

The UNSCR 1373 paved the way for the US to introduce their domestic legislation, MTSA, to the IMO which overrides seafarers’ Treaties, Conventions, State sovereignty and freedom of movement. The thesis investigated the denial of seafarers’ shore leave to seek welfare support as the central focus of the research to determine if a powerful State can override other sovereign States’ domestic law without considering the effect it will have on the rights of people. The US and the UK are sovereign States where terrorists used aviation and terrestrial transport objects to attack their infrastructures and kill civilians. However, both transport sectors have no common grounds with the maritime transport sector and yet seafarers are the group being victimised for the failings of the aviation and terrestrial transport industries. The author identified the security Code which saw seafarers being declared as potential terrorists by the US and the UK. It has to be understood that there must be a proper balance struck between the needs of maritime security, and the protection of seafarers’ rights to maintain the safety and operations of the ship. The research demonstrated how the domestic legislations contained within the MTSA 2002, the HSA 2002 and the UKBA (Home Office) conflict with the ILO’s Convention No.185 post-11th September 2001 and 7th July 2005, hence delaying the ratification of the latter by the US and the UK.
DECLARATIONS

I certify that this work has not been accepted in substance for any degree, and is not currently being submitted for any degree other than that of MPhil being studied at the Nottingham Trent University and Southampton Solent University. I also declare that this work is the result of my own investigations except where otherwise identified by references and that I have not plagiarised another’s work.

Signature: .................................................................

Date: .................................................................
DEDICATIONS

This thesis is dedicated to International Seafarers around the globe.
ACKNOWLEDGEMENTS

I would like to express my deepest appreciation to Almighty GOD who has given me the strength and the ability to progress and complete this thesis. I wish to express my sincere gratitude to the Nottingham Trent University and Southampton Solent University for giving me the opportunity to undertake the research that culminated in this thesis.

Many thanks to my Wife Geeta, my Daughters Rachel & Christelle and my Son Joel for their immense support. Thanks to my father, Master Mariner Captain Elijah COFIE for his advice in life on what is relevant to a man, to acquire knowledge that is transferable for the common good of all humanity. Thanks to my mother Josephine Apprey for her prayers and, my mother-in-law Nelly PORTER for her support. I would take this opportunity to acknowledge my late stepmother Mrs Doris Korkor COFIE for her advice on life’s challenges.

My deepest gratitude and appreciation goes to my Director of Studies Professor Patricia PARK for her supervision during the research and writing up of the thesis. My thanks also extended to my second supervisor Mr Philip JONES, Senior Law Lecturer of Southampton Solent University.

I would like to express my gratitude to Professor Mike BARNETT for his support during my MSc. and MPhil studies. Thanks to Professor David WATKINS and Professor Jenny ANDERSON (Faculty Dean) for their support, even though they were not members of the supervisory team.

Also to the Law Research Librarian, Ms Hannah YOUNG of Mountbatten Library, Southampton Solent University for her huge support in tracking down materials for the research. I would like to acknowledge former MPhil/PhD Research Administrator Ms. Sophie N’JAI and the Southampton Solent University ASQS support staff.
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<th>Description</th>
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<tbody>
<tr>
<td>ABA</td>
<td>American Bar Association</td>
</tr>
<tr>
<td>ACLU</td>
<td>American Civil Liberties Union</td>
</tr>
<tr>
<td>BIMCO</td>
<td>Baltic and International Maritime Council</td>
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<tr>
<td>BTP</td>
<td>British Transport Police</td>
</tr>
<tr>
<td>BW</td>
<td>Bulk Wheat</td>
</tr>
<tr>
<td>CBP</td>
<td>Customs and Border Protection</td>
</tr>
<tr>
<td>CCT</td>
<td>Chemical Carriers</td>
</tr>
<tr>
<td>CEDWA</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
</tr>
<tr>
<td>CO</td>
<td>Crude Oil</td>
</tr>
<tr>
<td>COPT</td>
<td>Captain of the Port</td>
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<tr>
<td>COT</td>
<td>Crude Oil Tankers</td>
</tr>
<tr>
<td>CFIMT</td>
<td>Convention on Facilitation of International Maritime Traffic</td>
</tr>
<tr>
<td>CGJAG</td>
<td>Coast Guard Judge Advocate General</td>
</tr>
<tr>
<td>CPRW</td>
<td>Convention on the Political Rights of Women</td>
</tr>
<tr>
<td>CPPCG</td>
<td>Convention on the Prevention and Punishment of the Crime of Genocide</td>
</tr>
<tr>
<td>CSSTS</td>
<td>Convention to Suppress the Slave Trade and Slavery</td>
</tr>
<tr>
<td>DHS</td>
<td>Department of Homeland Security</td>
</tr>
<tr>
<td>DI</td>
<td>Drug Interdiction</td>
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<tr>
<td>DR</td>
<td>Defence Readiness</td>
</tr>
<tr>
<td>DT</td>
<td>Department of the Treasury</td>
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<tr>
<td>ECHR</td>
<td>European Courts of Human Rights</td>
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<tr>
<td>ECO</td>
<td>Entry Clearance Officer</td>
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<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<tr>
<td>EMSA</td>
<td>European Maritime Safety Agency</td>
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<tr>
<td>ESTA</td>
<td>Electronic System for Travel Authorisation</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>EUHRC</td>
<td>European Union Human Rights Convention</td>
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<td>Acronym</td>
<td>Description</td>
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<td>------------------------------------------------------------</td>
</tr>
<tr>
<td>MCA</td>
<td>Maritime and Coastguard Agency</td>
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<tr>
<td>MEBA</td>
<td>Marine Engineers Beneficial Association</td>
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<tr>
<td>MDP</td>
<td>Ministry of Defence Police</td>
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<tr>
<td>MI</td>
<td>Migrant Interdiction</td>
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<tr>
<td>MSC</td>
<td>Maritime Safety Committee</td>
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<td>MLC</td>
<td>Maritime Labour Convention</td>
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<td>MTS</td>
<td>Maritime Transport Security</td>
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<tr>
<td>MTSA</td>
<td>Maritime Transport Security Act</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organisation</td>
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<tr>
<td>NDAA</td>
<td>National Defence Authorisation Act</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>NHSA</td>
<td>National Homeland Security Agency</td>
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<tr>
<td>NSS</td>
<td>National Security Strategy</td>
</tr>
<tr>
<td>NUT</td>
<td>National Union of Teachers</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-Operation and Development</td>
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<tr>
<td>OFAC</td>
<td>Office of Foreign Assets Control</td>
</tr>
<tr>
<td>OPA</td>
<td>Oil Pollution Act</td>
</tr>
<tr>
<td>PA</td>
<td>Port Authority</td>
</tr>
<tr>
<td>PCMA</td>
<td>Port and Coastal Management Agency</td>
</tr>
<tr>
<td>PEO</td>
<td>President’s Executive Order</td>
</tr>
<tr>
<td>PSC</td>
<td>Port State Control</td>
</tr>
<tr>
<td>PWCS</td>
<td>Ports, Waterways and Coastal Security</td>
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<tr>
<td>SDN</td>
<td>Specially Designated Nationals</td>
</tr>
<tr>
<td>SIDC</td>
<td>Seafarers Identity Card</td>
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<tr>
<td>SOLAS</td>
<td>Safety of Lives at Sea</td>
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<tr>
<td>SRI</td>
<td>Seafarers Rights International</td>
</tr>
<tr>
<td>STNG</td>
<td>Somalia Transitional National Government</td>
</tr>
<tr>
<td>STCW</td>
<td>Standards of Training, Certification and Watch-Keeping</td>
</tr>
<tr>
<td>SUA</td>
<td>Supressing of Unlawful Act of Violence against the Safety of Maritime Navigation</td>
</tr>
<tr>
<td>TCA</td>
<td>Technical and Conforming Amendments</td>
</tr>
<tr>
<td>TDBMIN</td>
<td>Trade Department's Bureau of Marine Inspection and Navigation</td>
</tr>
<tr>
<td>TSA</td>
<td>Transport Security Administration</td>
</tr>
<tr>
<td>Acronym</td>
<td>Description</td>
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<tr>
<td>TT</td>
<td>Twin Towers</td>
</tr>
<tr>
<td>TWIC</td>
<td>Transport Worker Identity Card</td>
</tr>
<tr>
<td>TWOV</td>
<td>Transit without Visa</td>
</tr>
<tr>
<td>UAE</td>
<td>United Arab Emirates</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UKATA</td>
<td>United Kingdom Anti-Terrorism Act</td>
</tr>
<tr>
<td>UKBA</td>
<td>United Kingdom Border Agency</td>
</tr>
<tr>
<td>UNCHR</td>
<td>United Nations Charter of Human Rights</td>
</tr>
<tr>
<td>UNFAO</td>
<td>United Nations Food and Agriculture Organisation</td>
</tr>
<tr>
<td>CICCPR</td>
<td>Charter of the International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>UNCLOS</td>
<td>United Nations Law of the Sea</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
<tr>
<td>USCG</td>
<td>United States Coast Guard</td>
</tr>
<tr>
<td>USDJ</td>
<td>United States Department of Justice</td>
</tr>
<tr>
<td>USGAO</td>
<td>United States Government Accountability Office</td>
</tr>
<tr>
<td>USPA</td>
<td>United States Patriot Act</td>
</tr>
<tr>
<td>VLCC</td>
<td>Very-Large Crude Carriers</td>
</tr>
<tr>
<td>VWP</td>
<td>Visa Waiver Programme</td>
</tr>
<tr>
<td>WTC</td>
<td>World Trade Centre</td>
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CHAPTER ONE

1.0 Introduction to the Thesis.

This research critically examines and investigates the purpose formulating the International Ship and Port Facility Security Code (ISPS Code), reasons behind US and UK’s labelling of seafarers as threat to their National Security or potential terrorist, the denial of shore leave to seek welfare support and the two Nation’s refusal to ratify ILO Convention No. 185, knowing its implications in the Universal Declaration of Human Rights. The ISPS Code has had devastating effects on the lives of seafarers since its introduction following the 11th September 2001 (9/11) terrorist attacks on US soil. On that day, when the US aviation sector was severely compromised, it was the maritime sector that assisted in the evacuation exercise of the injured and those fleeing to safety from the scene.

The significance of this study derives from the fact that the US, supported by the UK, approached the International Maritime Organisation (IMO) with the US domestic maritime legislation, the Maritime Transportation Security Act (MTSA) to request its introduction to regulate the maritime industry for fear that if the aviation sector has been compromised, the odds are the maritime sector may be next or may follow suit. It is an established fact that the maritime industry was the oldest, most regulated transport industry in the world before the invention of aviation; yet, to date, the world has not seen the maritime sector being comprised by terrorists to launch attacks on any sovereign State.

The introduction of the new maritime security code post 11th September 2001 was meant to compel maritime administrators to submit their risk management plans on how to stop would-be future terrorists from using sea-going vessels to carry weapons to attack any port infrastructure. The US laid down guidelines on what actions are required for the IMO’s contracting governments to secure their port facilities. On the day the International Ship and Port Facility Security Code (ISPS Code) was adopted and ratified, however, the United States Coast Guard (USCG) started to exert control on seafarers. This was contrary to what the ISPS Code was designed for.
The USCG stopped allowing seafarers to disembark from their ships based on a Congressional report submitted to Ex-US President George Bush Jnr. The report branded all seafarers as potential National Security risk due to their geographical regions, and as such not welcome into the US.

The London bombings of 7th July 2005 (7/7) reinforced the US actions on seafarers with UK backing, also declaring seafarers as would-be threat to US and UK National Security and to maritime and port facilities. The US and the UK thereafter implemented the ISPS Code to regulate seafarers henceforth. In addition, the International Labour Organisation (ILO) quickly worked on yet another US-instigated Seafarer’s Identity Card (SID) through the Maritime Labour Convention 2006 (MLC 2006) which sets out clear guidelines for international seafarers visiting the US and UK ports. The MLC 2006 sets out requirements to be met by both maritime administrators and seafarers.

The conditions set out in the MLC 2006 enable seafarers to take shore leave when in the US and UK seaports. This would allow them to disembark from their ships to seek welfare support and to visit their faith group or society; however, both the US and the UK have refused to ratify the MLC 2006, causing frustration to seafarers from mainly developing States who are unable to go ashore. The US and UK argument was that a section of the MLC 2006 contradicts with some section of their immigration, border control and homeland security laws. One would think that before the US proposed their domestic legislations to the IMO and/or the ILO, they would have sought in-depth advice from Congress, or in the case of the UK, parliament, but this was probably not the case.

Arguably, it could have been the case that if the US and UK authorities are imposing restrictions on the seafarers from developing States, they would apply to their flagged ships or other flag States for protection in foreign ports, but this has not materialised. The reason is that the flag State only secures the ship itself from danger and not the people who actually manned the ship, the seafarers.

In the light of all the legislative actions taken by the US and the UK to secure their port facilities, seafarers were omitted from any protection under the legislation as if they do not exist simply because from the outset the US has branded all non-US
seafarers from developing States as risk to their National Security and have been denied the right to shore leave although the new maritime security legislations did not impose shore leave restrictions on seafarers.

Twelve years (at the time of writing) after the US and the UK decided to pursue the new maritime security legislation Act under the theme of the ISPS Code, seafarers have difficulties in securing protection from either their flag States or the maritime administration of their country of origin. The ISPS Code by way of legislation has failed to guarantee protection to seafarers.

Against the background, this study seeks to answer the following research question: **What is the purpose of the ISPS Code, and what are the reasons behind US and UK’s labelling of seafarers as threat to their National Security or potential terrorist, as well as the denial of shore leave to seek welfare support and the refusal to ratify ILO Convention No. 185 by the two Nations?** In answering the research question the discussion focuses on the effectiveness of the implementation of the ISPS Code as operationalised in practice.

The study primarily seeks to locate the underlying legal concerns that influence other Conventions such as the ILO’s MLC 2006. In order to answer the research question effectively, the thesis delves into relevant literature, follows qualitative methodology and presents and discusses extensive findings on the actual objectives of the United States and United Kingdom Anti-Terrorism legislations and selected statutes before drawing conclusions.
1.1 Rationale for conducting the study.

The research was born out of the need to find the reasons for targeting seafarers as security threat to the US and UK in the post-11/9 and -7/7 respectively. The 9/11 events generated the implementation of drastic maritime security measures, contained within the ISPS Code. This Code was introduced as a preventative measure to curb future terrorist attacks against maritime port infrastructures and ships. The guidelines in the Code were intended to address Port Authorities, Shipping Companies, Maritime Administrations, Flag States, Port States, Freight Forwarders, Customs and Coast Guards on how to tackle any future terrorist attacks, by requesting that these organisations take preventative measures to stop the possibility of attack on port infrastructures. Instead, the interpretation of the Code by the United States (US) and the United Kingdom (UK) have deemed every foreign seafarer from a developing nation a National Security threat to both States.

In the wake of 11/9 and 7/7, both US and the UK came to the conclusion that, if the aviation and terrestrial transport sectors have been compromised, sooner or later the maritime transport sector will be used as another channel by terrorists, by utilising ships to launch an attack in the US or UK ports. One would expect that the Maritime Security Code would focus on dock workers, freight forwarders, stevedores, or staff of maritime administrators, but since it would be difficult to identify every individual in the supply chain link. The efficient way to narrow the scope of would be potential threat are seafarers’ who already have a direct link to ships and port infrastructures. This has allowed port administrators to deny seafarers their usual traditional shore leave in ports. As mentioned above, the shore leave allows foreign seafarers to seek welfare support ashore among other activities.
The denial of these basic human rights has brought psychological and mental trauma to seafarers who have been at sea for a lengthy period of time. The main problem that confuses seafarers and the maritime community is that the US did not consider the rights of seafarers under the United Nations Convention on the Law of the Sea (UNCLOS). The US was among the United Nation (UN) member States that participated in the Conference on the Law of the Sea from 1973 to 1982.

UNCLOS contains legislations that regulate maritime safety and security of the sea. The US participated in the subsequent negotiations of the 1982 modifications between 1990 and 1994 when UNCLOS came into force. The US recognises UNCLOS as a codification of customary international law, but has not yet ratified it. In as much as the US did not ratify UNCLOS, it did not also respect the rights of seafarers.

Seafarers employed to work on board ships have been trained and hold certificate of competency. Besides that, seafarers are screened, and their family background checked by the company they intend working for. This is to ascertain their mental and physical health by a doctor assigned by their Maritime Administration of a competent standard recognised by the International Maritime Organisation (IMO) or the International Labour Organisation (ILO). Seafarers are also required to follow a strict Code of conduct, hence their profession being referred to as the Merchant Navy. They oversee and carry dangerous cargo, such as Liquefied Petroleum Gas (LPG), Crude Oil (CO), Iron Ore (IO), and Bulk Wheat (BW), as well as 20ft and 40ft Containers.

The research establishes areas of good practice by seafarers through maritime legislations set out by the IMO’s International Safety Management (ISM Code), Standards of Training, Certification and Watch-keeping for Seafarers (STCW) and the ILO’s Maritime Labour Convention 2006 (MLC 2006). One would expect these

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1 UNCLOS defines the rights and responsibilities of nations in their use of the world's oceans; it establishes guidelines for businesses, the environment, and the management of marine natural resources. To date, 162 countries and the European Union have joined the Convention.
legislations to be in the interest of, or to protect the well-being of seafarers; rather it could be argued that it has in fact victimised them.

1.2 Aim of the thesis.

The aim of this thesis is to critically examines and investigates the purpose of formulating the International Ship and Port Facility Security Code (ISPS Code), reasons behind US and UK’s labelling of seafarers as threat to their National Security or potential terrorist, the denial of shore leave to seek welfare support and the two Nation’s refusal to ratify ILO Convention No. 185. In a bid to arriving at the aim of the research, the author has analysed and critically evaluated the UNDHR, the International Convention on Seafarers which is the ILO Convention No.185, the US and UK Border and Immigration Laws, the Anti-Terrorism, Crime and Security Act, and the Patriot Act post-11/9 and -7/7 to find out whether there is any conflict of Laws.

It goes further to examine the natural and human rights as enshrined in UNDHR and also seafarers’ protection under flag States’ responsibilities through ship’s registrations and their compliance with International Law. This is achieved through discussion of the current and previous performances of flag States’ relations between ship owners and seafarers.

1.3 Research Methodology.

This study adopted the desktop research as the primary method. The researcher made use of the materials at the Mountbatten Library, Southampton Solent University, other university/public libraries and academic databases. In essence, the research aimed to analyse a wide breadth of documents and materials: ILO Conventions, Regional and Universal human rights instruments, reports by international organisations, Non-Governmental Organisations (NGOs) and academic sources.
During the third year of this research, the author undertook a six month teaching/researching post at the Warsash Maritime Academy, Southampton, in teaching foreign seafarers from the developing States which proved to be valuable experience in many respects. The author benefited from working within this Academy by having direct contact with foreign seafarers from developing States who have been affected by the new maritime security legislation that holds a central role in the thesis. This afforded the author the opportunity to have first-hand understanding of the impact of the new maritime security legislations on seafarers and the modus operandi of the legislations. Throughout the research, the author has paid particular attention to the development of the Maritime Security Code, and to how it has linked into other security legislations such as the US Patriot Act under USCG and the UK Anti-Terrorism, Crime and Security Act under the (UKBA) Home Office.

With a background in the maritime industry as Marine Cargo and Maritime Claims Adjuster, and also as an Associate Maritime Law Lecturer teaching foreign seafarers, the researcher is well placed to undertake this study. This background has added a veneer of experience to the research which, although not directly reflected in the body of the thesis, has nevertheless broadened the knowledge and the understanding of the author. It has also well shaped the perception of the author on the effectiveness of the new Maritime Security Code which is not only the maritime port facility risk assessment instrument but also has implications for individual seafarers’ rights and well-being.

A base level of the international legal instruments and human rights and sovereignty norms was established through secondary sources involving critical analysis of the ISPS Code, the Patriot Act and Anti-Terrorism, Crime and Security Act. It was ensured that the research design, information collection and analysis match or generate the research aim. The author tried to avoid possible risk occurrence during the study due to sensitivity of Human Rights and Well-Being issues of seafarers. The research was conducted in compliance with Southampton Solent University’s ethics policy.
1.4 Information Collection and Research Objectives.

The first objective of the study is to examine the purpose of formulating the ISPS Code. To achieve the objective 1, the ISPS Code and its supposed functions and related instruments are discussed. The US MTSA on human elements is analysed. An analysis of the ISPS Code and MTSA and their interrelationship with international legal instruments on State sovereignty is also carried out. This is because the ISPS Code was introduced by the US without prior consultation with IMO member States. Information for this objective was gathered from journals, internet websites and documented materials on the subjects. The material served as the starting points for both the review of the literature and answering the research questions. The researcher had the opportunity to acquire information from libraries, conferences, meetings, seminars and presentations.

The second objective is to investigate the role of flag state and the relationship to seafarers and the importance of the genuine link between beneficial ownership, ships and seafarers. In addressing this objective, the Maritime Administrations implementation of the ISPS Code in respect of maritime security activities in ports was critically analysed. Information was gathered from existing sources such as books, maritime journals, publications by shipping companies, seafarers’ welfare association’s centres and website, a visit to ILO offices, and also the use of ILO website. The author explored various sources of literature between 2001 and 2012 as well as ongoing developments in the field. Challenges for flag States to identify with seafarers as their nationals who require protection under their jurisdiction were also identified.

The third objective of the study is to examine the reasons behind the US and UK’s labelling of seafarers as National Security threat, and the reasons for the denial of shore leave to seafarers by the two countries. This objective was approached considering the views of international seafarers and seafarers’ missions. This approach determined if the ISPS Code is really helping to fight the people who are a real threat to US and the UK National Security. This analysis therefore answered the research question on discrimination of seafarer’s post-9/11 and -7/7.
The author visited other humanitarian offices and websites of NGOs and other missions to seafarers such as the Andrew Furuseth School of Seamanship.\textsuperscript{4}

The fourth objective is to suggest in the framework of an academic legal context how freedom of rights due to seafarers for many years can be achieved through international legal instruments. The key issues include identifying the problem of legal knowledge, enforcement, and compliance as well as other concerns. While questions are discussed and answered, they also raise critical and clear understanding, and better inform and suggest the true positions of issues affecting seafarers’ well-being.

These questions also inform the basis and scope of the research. The questions cover a wide range of issues including human rights, terrorism, maritime policies, maritime legislations, duty of care and numerous others, and their respective discussions are contained in the chapters of this thesis.

1.5 Structure of the Research.

The thesis is structured in eight chapters.

The first chapter deals with preliminary issues in the research area and introduces the reason why the research is being undertaken.

The second chapter presents the literature review and analysis of subjects under study, namely terrorism, the ISPS Code, which is the new maritime security legislation for the port security framework, and how it is affecting seafarers’ work efficiency in ports and on-board their ships and whether there are any justifications for labelling seafarers as National Security threat to the US and the UK.

\textsuperscript{4} The following websites were also useful; the IMO, ILO, Seafarers’ Rights International (SRI), International Transport-Workers Federation (ITF), Organisation for Economic Co-operation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), European Maritime Safety Agency (EMSA), and the International Shipping Federation (ISF).
The third chapter informs the reader of issues that address State sovereignty and the rights of its people when powerful Nations force their values on others; it also introduces the central philosophical issues about ethics and morals of “war on terror” affecting seafarers. The thesis tackles whether international law can or should aspire to be democratic when it comes to treatment of seafarers.

The fourth chapter addresses the philosophical problems arising in specific domains of international law in relation to the interpretation of the ISPS code. It goes further to examine natural rights and rights as espoused in the UNDHR and how to attain global peace through the influence of ethics and morals.

The fifth chapter discusses the rights of seafarers under ILO and the purpose of ILO Conventions as a means of control and resources. The chapter investigates the foundation and framework of the ILO and its competence and programmes for promoting the seafarers’ welfare in the context of managing their working conditions so as to regulate them to satisfy all legal requirements to qualify as a seafarer prior to maritime transport employment. The chapter considers the ILOs’ Treaties, the key principles and subsequent amendments to the Conventions, and Articles which provide for the promotion of rights and well-being of seafarers. The chapter details directives and policies provided by the ILO that are intended to be transposed into State law, and the procedural mechanism through which this is achieved.

The key principle of the ILO is for maritime nations to respect the rights of seafarers and to recognise their contribution to international shipping. The research considers how the ILO has worked through member States to enable them to promote economic, social and well-being issues. The key selected area of the ILO Conventions is the Seafarers’ Identity Documents (SID) 2003 (ILO No.185).

The sixth chapter provides the reader with a framework and rationale for flag States in respect of treatment of international seafarers’ rights and why they exist. The purpose of this is to establish the legal context and framework under which seafarers rights have evolved since 1895. It is known that international law establishes duties upon Nations to implement laws at State level.
The chapter introduces Treaties, Articles and Conventions and, more importantly, the duties imposed by the international maritime organisation (IMO) are considered for their impact affecting the behaviour of flag States. The chapter also analyses the performance, duty and responsibility of flag States, and why these fail seafarers instead of protecting them.

The seventh chapter provides the reader with the analysis of US and UK maritime legislation on seafarers in the light of the new US Homeland Security legislations. At this point, the thesis examines the legal maritime powers given to the United States Coast Guards (USCG) which is the branch of the United States Armed Forces. The USCG is a maritime, military, multi-mission service unique among the military branches for having a maritime law enforcement mission with jurisdiction in both domestic and international waters, and a Federal regulatory agency. The USCG operates under the Department of Homeland Security (DHS) during peacetime and under the US Navy by the order of the President during time of war as opposed to the case with the United Kingdom Border Agency (UKBA) and Maritime and Coastguard Agency (MCA).

The eighth chapter draws the conclusion to all the established facts gathered through the research. The established facts were based on the issues of sovereignty, the rights of seafarers and the international and domestic laws that affects the ratification and implementation of the ISPS code.

1.6 Contribution to Knowledge.

As previously discussed, the main problem for seafarers apart from the issue of genuine link, is the initial introduction of the ISPS Code which was strengthened with Anti-Terrorism legislation. It is not that there is no international regulation for a ship’s security and management. There are several IMO regulations which do not discriminate seafarers’ rights, but the Anti-terrorism legislations Act came to overshadow other maritime security legislations, and it seems to lack the impetus needed to regulate those who are a real threat to US and the UK National Security.
This is why the research looks at how the Anti-terrorism legislation was focused on the seafarers as against the real threatening terrorist issues through International Conventions. Conventions such as the MLC 2006 and International Safety Management (ISM) Code are committed to improve the rights and well-being of seafarers through flag States and port States.

The research identifies whether and how the maritime administration supports seafarers’ rights, critically analysing and identifying areas of improvement that could be made and which could contribute further towards seafarers’ rights and well-being. It also makes suggestions on how the national and international laws could be used to bring about effective and peaceful solutions to the problems seafarers face in their place of work as well as clarity between the maritime administrator such as the US, the UK, and the seafarers.

1.7 Consideration of Research Ethics when conducting an Academic Research Study.

The author adhered to University’s ethical and moral issues while searching for the data relevant to this study. This is a good way of creating a good balance between its existing components. The primary aim of addressing ethical and moral issues in this research is to avoid prejudice while dealing with various concerns and components within the research area.

Looking at the current situation - the nature, living and working conditions facing seafarers on board ships - the author argues: always treat a person as ends-in-themselves and never merely as means to your ends.\(^5\) There are two questions that we must ask ourselves whenever we decide to act against another person: (1) is it right to dictate to everyone to act as I choose but would not like to act what I propose? If the answer is no, then one must act upon the action. (2) Regarding the values that I impose on others, do they respect the values of human beings rather than merely using them for my own happiness? If the answer is no, then we must not act in that way.

The above questions were asked to explain to the reader that people need to understand that the food we eat, the clothes we wear, our household and the oil we burn in our cars and homes are supplied through the professional talents and abilities that have been developed through the exercise and the wills of seafarers, the same human beings who transport these things to our homes through maritime transport.

It is not human beings per se but the humanity in human beings that we must treat as an end in itself.⁶ We are to respect human beings simply because they are persons and this requires a certain sort of regard. We are not called on to respect them insofar as they have met some standard of evaluation appropriate to persons.⁷

Andrew Furuseth⁸ had the same view and initiated the freedom of movement campaign for seafarers in the United States in 1895. We need to understand that the idea of doing what is right promotes good values in society if a person found doing something good is encouraged and supported.⁹ Also, previous works on ethics in research used as sources of knowledge and information, as well as the concepts and methodology in all outputs have been acknowledged.

The author believes that doing what is right, forgoing what is bad, taking and giving, and regard for all are basics for the seafarer’s well-being. The reward for ethical operations by the United States and the United Kingdom in the maritime industry is beneficial to both the industry and to those officers who work on often dangerous conditions. Along these lines, there is the need for an integrated development intervention by stakeholders (shipping companies) who are losing well-trained and qualified men and women in the seafaring field of international

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⁷ Ibid.

⁸ Andrew Furuseth was a Norwegian-American, a merchant seaman and an American labour leader. He was active in the formation of two influential maritime unions: the Sailors’ Union of the Pacific and the International Seamen’s Union, and served as the executive of both for decades. He was also responsible for the passage of four reforms that changed the lives of United States seafarers, (The Maguire Act of 1895 and the White Act of 1898) that ended corporal punishment and abolished imprisonment for deserting a vessel. He was credited for drafting and enacting the Seamen’s Act of 1915, known as ”The Magna Carta of the Sea” and the Jones Act of 1920 which governs the workers’ compensation rights of sailors and the use of foreign ships in United States domestic trade.

trade by addressing the abuse of the maritime security legislation thus making the outcome of the research comprehensible.

Should ethics be associated with laws that are irrational and immorally valuable to seafarers’ well-being? The author avoids any attempt to indulge in unethical practices. This is why International Regulations, Treaties, and Codes relating to ethical humanitarian practices and fully adoption of MLC 2006 capable of bringing about seafarers’ rights well-being are considered. The research was designed to produce outcomes that avoid biased information, self-reporting and danger of public relations misuse by following the reference points below.

1.8 Morals and Ethics in research, why is it important.

There have always been many issues and reasons behind research work, hence the importance for a researcher to adhere to ethical norms in research.

1. The initial point of these norms gives rise to the aims of research are inter alia:

   - Knowledge,
   - Truth, and
   - Avoidance of error (prohibitions against fabricating, falsifying, or misrepresenting research data promote the truth and avoid error).

2. Research work often involves major co-operation and co-ordination among different people in various disciplines, many of these ethical standards promote the values that are essential to collaborative work, such as trust, accountability, mutual respect, and fairness. For example, many ethical norms in research, such as guidelines for authorship, copyright and patenting policies, data sharing policies, and confidentiality rules in peer review, are designed to protect intellectual property interests while encouraging collaboration.

3. Many of the ethical norms helped to ensure that researchers can be held accountable to the public.
1.9 Principles and Policies for Research Ethics

Looking at the importance of morals and ethics for conducting research, one should not be surprised that different professional associations, government agencies, and universities have adopted specific policies relating to research ethics. Professor Patricia Park\(^\text{10}\) commented that research ethics policy and guidelines must be applicable to the author’s research work.

1.9.1 Honesty in Research

Data collected by the author were correctly referenced and all methods, procedures, and publications status were acknowledged. Since the research will have an impact on the public, the author did not fabricate, falsify, or misrepresent data that will jeopardise the research work.

1.9.2 Objectivity in Research

The research work was based on International Law and as such the author strived to avoid bias in experimental design, data analysis, data interpretation, peer review, personal decisions, grant writing, expert testimony, and other aspects of research where objectivity was expected or required.

1.9.3 Carefulness and Respect for Intellectual Property

The author was more careful to avoid negligence, carefully and critically examined his work since the research aim was to critically evaluate International Conventions on Seafarers’ Rights.

Socio-economic research also creates intellectual property. The rules governing intellectual property rights were kept in mind when conducting the research. This is because by identifying such protected materials in general permit the reader to determine whether or not questions of intellectual property are concerned. The concept of intellectual property was kept in mind when undergoing the research to identify future legal issues.

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\(^{10}\) Research professor in Maritime, Environment and Energy Law at Southampton Solent University, United Kingdom.
The author understood that in any typical research work, intellectual property is used and created. In order to ensure respect for the intellectual property rights of others, the author at the initial step of his research determined to what extent he can use materials which might not be subjected to intellectual property rights.

Researching Seafarers’ Rights under International Law was a challenging topic that needed to be dealt with caution and with systematic approach. There were several laws and articles that were consulted to bring the research to completion. However the author respected and honoured the patents, copyrights and other forms of intellectual property during the research work.

The author did not use unpublished data without permission. The author duly acknowledged and gave credit to all materials which contributed to the research work.

1.9.4 Non-Discriminatory approach

Research work has no boundaries and as such every researcher capable of conducting research for humanity should be permitted to do so provided that the research is acceptable and does not pose security threat to a Nation or infringes on ones rights. The researcher did not discriminate against any other person either on the grounds of sex, race, ethnicity or other factors which were not relevant to the research competence and integrity.
CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

This literature review presents an overview of the maritime security legislation, its development and how it conflicts with the seafarer’s human rights and well-being, in order to facilitate a general understanding of the field. The chapter goes further to show how the code has influence on the performance and productivity of seafarers. Before further discussion, it is necessary to set out a legal definition of who a seafarer is and how different jurisdictions define them. The chapter also discusses the origin and history of the maritime security legislation, goes further to look at terrorism and how it can be defined and the motive behind terrorist activities. It also discusses whether the Anti-terrorism legislature was justified in its labelling of seafarers as potential threat to National Security.

The chapter also looks at the challenges to shipping, and drivers of the ISPS Code and how it is viewed by seafarers. It demonstrates how the Code is regulating seafarers rather than helping them to fight against maritime terrorism. Since the introduction of the Code seafarers have been victimised and discriminated against and this has had a negative effect on productivity. The research explains what led to the introduction of the new Maritime Security Code. A theoretical framework for the literature review is also considered.

The sections that follow define what terrorism is and who constitute a terrorist and what has led to seafarers being labelled as one. As previously described, the events of 11/9 and 7/7 were caused by an evil group of people who, for the sake of destabilising US and UK governments, targeted and destroyed the World Trade Centre in New York and London underground trains and surface bus system. Terrorism has its own definition and seafarer has its own definition; both however are persons with different intentions. In as much as one can suspect someone to be what they are not, definitions are needed to justify who is who and who is doing what, hence the following.
2.2 Definition of a Seafarer

A seafarer is a person who works on a Merchant Navy ship that trades internationally and visits international ports. The US revisited the definition of ‘vessel’ in relation to a maritime dispute asking what the term ‘seafarer’ means in maritime law. It came to light that the issue of seafarer status is frequently litigated.¹¹ This is because, under maritime law, the types of remedies available and elements of damages recoverable may depend upon whether one is or is not a seafarer.¹²

Maritime law relating to liability for death or injury to seafarer has evolved since maritime Conventions were introduced. Coupled with United States legislation and case law, unique tests of eligibility for seafarer status have developed. A seafarer status is also considered as someone whose duty must contribute to the functioning of the ship or the accomplishment of its mission or a mariner who has a connection to a ship in navigation or to an identifiable group of ships that is substantial in terms of both its duration and nature.¹³

If a worker becomes ill or injured while performing work aboard a ship but cannot satisfy the courts, he or she will not be deemed as a seafarer and, in the alternative, will only be entitled to general maritime law tort or other remedies. A tort remedy under the general maritime law is not as liberal as a seafarer’s remedies. For example, for an injury to a seafarer, a ship owner/employer is liable even without fault (called “strict liability”) for maintenance, cure and unearned wages; but a passenger or guest aboard a ship is not a seafarer, because there is neither an employment relationship nor a substantial connection to the ship they are sailing on.¹⁴

According to Nautilus UK (2008), a seafarer is an employee on a ship who performs duties on a ship. This definition takes no account of the job that a seafarer does or of any maritime qualifications that they have. Therefore, according to Nautilus UK definition, a person is classified as a seafarer so long as he or she works on a ship. However, one cannot be classified as a seafarer if he/she works on a floating structure that is not accepted as a ship, irrespective of the marine qualifications the person has or the duty that he or she performs. A seafarer must execute their duties on a ship that is capable of navigating and is used in navigation.15

2.2.1 ILO Definition of a seafarer

Under Article 2 (d) of ILO Convention (No. 180) concerning Seafarers’ hours of work and the manning of ships, the term “seafarer” means any person defined as such by national laws or regulations or collective agreements who is employed or engaged in any capacity on board a seagoing ship to which the Convention applies. In the event of any doubt over whether any categories of persons are to be regarded as seafarers for the purpose of the Seafarer Identity Documents (SID) Convention, the question shall be determined in accordance with the provisions of the Convention by the competent authority of the State of nationality or permanent residence of such persons after consulting with the ship-owners and seafarers organisations concerned.16

From the above mentioned articles and usages by authorities in the maritime industry, the author was in agreement with the legal definition by ILO’s definition of seafarer under Article 2 (d) of ILO Convention No.180. In this capacity, all persons who have a contract with a flag state or owners of a ship, other than a ship of war, to help in the accomplishment on board in the mission of the ship or other ships of the owners or flag state are seafarers.

16 ILO Convention No. 185, Article 1 (1) (2).
2.3 Definition of terrorism

On 9th November 2005, former Home Secretary Charles Clarke17 told the House of Commons that he had agreed to a request by John Denham18 to conduct a review on the definition of terrorism and to report to the House of Commons.19 This was due to the events that unfolded in the United States on 11th September 2001. Charles Clarke was given the task because of his experience in reviewing legislative links to terrorism and his vast experience in working among organisations such as the Police, Her Majesty’s Revenue and Customs and the Armed Forces.

In his review, Charles Clarke noticed that an act of terror was an action which results solely in physical violence, but he also said that the intention or the idea of even thinking and saying inflammatory words can be construed as violence-related behaviours and tantamount to terrorism.20 Lord Lloyd of Berwick, however, tended to agree with the FBI model of terrorism definition.21

It was agreed that, it is not possible to define the exact meaning of terrorism, but it maintains a proper balance between the exigencies presented by the types of terrorism evident globally at present.22

17 Charles R. Clarke is a British politician, who was the Member of Parliament (MP) for Norwich South from 1997 until 2010, and served as Home Secretary from December 2004 until May 2006.  
18 John Yorke Denham is a British politician who has been the Member of Parliament (MP) for Southampton Itchen 1992. He has previously served in the Cabinet, as Secretary of State for Innovation, Universities and Skills from 2007 to 2009, and then as the Secretary of State for Communities and Local Government from 2009 to 2010. He was the Shadow Business Secretary in Ed Miliband’s Shadow Cabinet from 2010 to 2011, when he announced that he would be standing down as an MP at the next election, and retired from the front-bench in order to become Miliband’s Parliamentary Private Secretary.  
20 Idem., p.3 para8.  
21 Anthony John Leslie Lloyd, Baron Lloyd of Berwick PC is a retired British judge, and member of the House of Lords. The use of serious violence against persons or property, or threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives.  
The UN has tried to define terrorism that could be accepted by all member States and embedded in international law.\textsuperscript{23} This has not been possible due to the fact that particular religious faith groups in certain geographical regions are of the opinion that the definition will marginalise them, and thus they refused to accept any definition that allowed national liberation movements to be portrayed as terrorist, whereas some UN member States who reside in the Middle and Far East regions would accept no definition that allowed for State agencies such as the Security Forces to be considered guilty of terrorism.\textsuperscript{24} Thus, to date, there has not been a global acceptance of the definition ‘Terrorism’.

2.3.1 Authors definition

In finding out the causes of the on-going terrorist attacks on US and UK, the author came to the realisation that, from the Tamil Tigers in Sri Lanka, through to the suicide attacks in Iraq, down to the attack on the US embassies in Kenya and Tanzania and the world trade centre on 11\textsuperscript{th} September 2001, all the reasons given by the perpetrators has been political. From what has been said so far about terrorism, the author can safely define terrorism as “\textit{any form of threat of violence or use of violence against non-combatant or civilians to draw attention to political issues}”. This definition is based on research undertaken to come out with the finding that the major cause of terrorist activities are political.

2.4. Suicide-terrorism and its causes

Although terrorism has not been able to be defined to be accepted internationally, the general consequence of terrorism is known and an aspect of it which involves the committing of suicide to strike terror in the minds of people has come to take the fore front in fighting by terrorist. Suicide terrorism is an act of terrorism where the attacker or terrorist commit suicide with the main aim of killing and causing havoc.

\textsuperscript{24} Idem.
The purpose of a suicide-terrorist attack is not to die or to take up one’s own life but to kill, to inflict the maximum number of casualties on the target society. Further research has established that suicide terrorism was invented by the Tamil Tigers in Sri Lanka, a group that invented the suicide vest for their suicide assassination of Rajiv Ghandi in May 1991. This Invention was embraced whole heartedly by some Palestinian fanatics. From then on, Al-Qaeda operatives have used it as their main weapon of terror. The author’s research has made it safe for him to conclude that the major reason for terrorist attacks is political in nature and followed by religious motives.

2.4.1 Political motives for terrorist attacks

The main reason or driving force behind suicide attacks is political. The central fact is that overwhelmingly suicide-terrorist attacks are not driven by religion as much as they are by a clear strategic objective is to compel modern democracies to withdraw military forces from the territory that the terrorists view as their homeland.

A report by Karen De Young and Greg Jaffe on Friday, 4th June, 2010 in the Washington post commented that:

Beyond the combat zones of Afghanistan and Iraq, the Obama administration has significantly expanded a largely secret U.S. war against al-Qaeda and other radical groups, according to senior military and administration officials. Special Operations forces have grown both in number and budget, and are deployed in 75 countries. In addition to units that have spent years in the Philippines and Colombia, teams are operating in Yemen and elsewhere in the Middle East, Africa and Central Asia.

27 Ibid.
28 Karen DeYoung is associate editor and senior national security correspondent for the Washington Post.
29 Greg Jaffe is the Pentagon (US Military Headquarters) correspondent at the Washington Post.
These sovereign States see themselves as trapped in their own State and they believed this is attributed to some non-patriots among them who hide behind Western values labelled democracy. Since most of these terrorist do not have the backing and support of all the heads or leaders of the occupied States, it will be difficult to have a uniformed army to fight, thus they have resorted to the use of suicide bombings.

The understanding behind this occupation is to introduce Western form of democracy into the Islamic States because the US believes that not only should their foreign policy institutions be structured and functioned so as to reflect liberal values.

However, its foreign policy should also be directed to the promotion of liberal values in the international community. This promotion of liberal values in the international community has led to some form of difficulties where certain leaders have been forced to relinquish political power and has created unrest which has led to the increase in terrorist activities. According to Robert Pape, Iraq did not witness suicide bombings prior to US invasion. However, what is happening is that the suicide terrorists have been produced by the invasion of Iraq to which necessitated Osama bin laden to declare the following:

And as I looked at those demolished towers in Lebanon, it entered my mind that we should punish the oppressor in kind and that we should destroy towers in America in order that they taste some of what we tasted and so that they be deterred from killing our women and children. And that day, it was confirmed to me that oppression and the intentional killing of innocent women and children is a deliberate American policy. Destruction is freedom and democracy, while resistance is terrorism and intolerance.31

2.4.2 Religious motive for terrorist attacks.

Some faith groups believe that a true religion is an essential part of a person’s identity that influences all aspect of the individual’s life. So a religion is a total way of life that embodies the totality of the person. His reasoning, behaviour and social life are all influenced by their faith. Whether they are in the mosque,

31 John Tyler, America’s Two Holy Wars (Relationship books 2004) p.264
church, synagogue praying or they are in the market square going about their daily business.

The promotion of liberal values in the international community by the US and the UK is something that is vehemently opposed by non-circular faith groups in their community because this will affect all aspect of their life and it also goes against the tenets off their Holy book. Liberal values or democracy gives the individual freedom to do things which are considered unethical with non-circular faith group’s values. This is because politics is separated from religion and individuals are guaranteed equal rights and freedom as enshrined in the 1948 UDHR. However in the Islamic world, the sharia is the final law. This is what makes US and the UK intervention in non-Christian States unwelcome because of misunderstanding with religious difference.

It has been established that an attempt to use military force to introduce democracy in States without liberal values are met with resistance because they already have their internal problems with their democratically elected leaders. They are perceived as secular, and are blamed for promoting adulterate form of worship to God and are also allowing Western democracies such the US and the UK interventions. This is more the fundamental reason that terrorist activities are directed towards the US and the UK interest. It has also been established that people who sacrifice their material comfort and bodies for a cause have been brainwashed that they will win salvation and have all the pleasures of paradise. Those who destabilise Western democracy have also made it known that suicide volunteers who die in the cause of their religion are not dead but rather living with God in paradise. Since politics and religion are inseparable in other religious faith, an intervention are seen from both political and religious view point as an invasion with the intension of introducing liberal values and had to be met with force, and terrorism is what has been seen as the only alternative with the capacity to achieving the desired objective.

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33 The Quran, Sura 2:154
2.5 Philosophy of terrorism

Suicide terrorism has been the modern weapon which is employed by terrorist and some groups to defend themselves in war. The notable group that use this tactic are the Al-Qaida. Iraqi insurgents also use suicide bombings to derail the new political order. In August 1998, Al Qaeda simultaneously attacked U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Al-Qaeda terrorists again attacked the U.S.S. Cole in Aden in 2000, 11th September, the World Trade Centre and Pentagon. What is the ethical and moral justification for going on a mission with the aim of committing suicide to kill and destroy properties of another State?

The author is here to present the philosophy of suicide terrorism. The author would like to draw the readers’ attention to how morals and ethical norms are acquired and come out with how the terrorist’s ethical and moral thoughts are shaped and how they justify their actions.

2.5.1 Morals and Ethical norms

Morals and ethical norms are acquired through parents, family members, the society, religious groups and also through education. All put together, the society is the main author of morals and ethical norms. At an early stage in life, the parents dictate to the child, they tell the child what to do and what not to do. This is a strict rule to be adhered to. While the child is growing to his teens, he interact with people around him/her and forms their own opinion about what is fair and just, based on what they see and hear from the people in their society, also from their religious leaders based on the doctrines of that religion. This is typical in highly religious societies.

For a person born in a war torn State, what he/she sees is war. They talk about war and means of winning wars. Thus if there is any religious or societal justification in the means of fighting a war, it becomes his ideal dream for measuring tactics. Weighing from this angle the author has clarified that morality and ethical standards are standards that are set through society.
From this point it is understood that since we have different societies with different norms and different religious beliefs, standards for distinguishing between acceptable and unacceptable behaviour’s will differ from society to society and from religion to religion. In societies where their ultimate source of morality is seen to be God, all people will respond to Him through their religious faith. There are a lot of religions with each having its own spiritual book which is seen as their source of inspiration which forms their morality.

If we judge based on our moral upbringing and on our faith, people’s perception of fair and just will not be universal or objective looking at it from a universal point of view because God speaks differently to different people at different times. Punishment for stealing and adultery in the Holy Bible’s Old Testament is different from that of the New Testament. The Quran has a different punishment for these two offences in the Sharia Law. It is has a different meaning in the African traditional religion.

Suicide bombing as a modern day tactic for fighting a war is embraced by the terrorist as their option and they see nothing immoral about it. This is because it is the only means by which they can achieve their set objective and the use of another human being is always devastating.

Every individual born into a society has a moral obligation to respond to a duty call by his society and strive for the ongoing of that society. The individual also has a moral and natural obligation to defend his society and the people in it. This makes suicide bombing justified on moral and religious grounds when people are called upon to take up such duties. According to Robert Pape, most of the people who turn themselves in as suicide bombers come voluntarily and are people of sound mind without any particular criminal background.

Ethical guidelines concerning war would be difficult or impossible to be adhered to, so therefore groups which cannot organise a uniformed army with highly sophisticated weapons should use a strategy that will suit them. Terrorism, from experience, has proved to be the strategy of choice because of its devastating effect.
The option that has proved itself is suicide bombings. Suicide bombing is unrivalled in its effectiveness in terms of casualties and destructions. This makes it justified in the eyes of terrorist groups. The objective of wars are to cause major atrocities to the opposing force with the view of winning and terrorism as a means has proved itself justifiable because it has a decent probability of achieving its ends at a cost that makes it worth the course it is taking.

2.6 Definition of the Anti-Terrorism Act.

There is no universally accepted definition of terrorism but it remains the subject of continuing debate in international community. However, Anti-terrorism legalisation has been defined as a law which is designed and passed with the aim of fighting terrorism. It includes specific amendments which permits the State to bypass its own legislation when fighting terrorist-related crimes, under the grounds of necessity. The Act provided the legal framework to strengthen administrative rights to fight terrorism within a State.

The Anti-Terrorism Act is not meant as a substitute for action under ordinary criminal legislation. It defines what a terrorist act is and grants special and executive powers to the investigating authorities described under the Act. To ensure certain powers were not misused and human rights violations would not take place, specific safeguards have been included in the Act. The uncomfortable part of it is, however, that it bypasses the regular legal procedures. Civil liberty groups often allege that anti-terrorism legislation endangers democracy by creating a State of exception that allows an authoritarian style of government.

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34 Lord Carlisle of Berriew Q.C. *The definition of Terrorism* (2007) Cm 7052, Supra Note 3,4,5,6,7,8,9,10.
37 Ibid.
The Anti-terrorism Act in the US is called “The Patriotic Act” and in the UK it is known as the Anti-Terrorism, Crime and Security Act.

2.7 The Events of 11th September 2001 and its aftermath in the United States.

The author followed the events which unfolded on the day the twin towers were attacked by terrorists. American Airlines Flight 11 was hijacked by terrorists and into the North Tower of the World Trade Centre (WTC) in New York.\textsuperscript{40} The event was initially thought to be an accident, a navigational error by the pilot.\textsuperscript{41}

The attack brought people from all walks of life onto the streets, taking photographs of the flames and billowing smoke, and capturing graphic images of people who plunged to their death trying to escape the horror in the building.\textsuperscript{42} Then a second airplane, United Airlines flight 175, was flown into the South tower of WTC. It was at this point that it was confirmed by the US Defence Council that the country was clearly under terrorist attack.\textsuperscript{43}

The hijack of a third plane confirmed the worst; American Airlines flight 77 was flown into the Pentagon, the headquarters of US military operations.\textsuperscript{44} Flight 93, the fourth plane to be seized crashed into a field in Pennsylvania; a further catastrophe was only averted by the brave actions of the passengers on board, who subsequently lost their lives. In less than two hours, three US landmarks had been destroyed. Following these events, the US government shut down the nation’s entire airspace.\textsuperscript{45}

The Government of the United States and citizens will never forget the day thousands of innocent lives were lost from terrorist attacks in their country.\textsuperscript{46} The

\textsuperscript{40} Andrew Langley \textit{September 11th}. Attack on America (Compass Point Books Publishers, 2006).
\textsuperscript{41} Ibid., p.8.
\textsuperscript{42} Ibid., p.9.
\textsuperscript{43} Ibid., p.10.
\textsuperscript{45} Ibid., p.10.
United States became truly united when their world changed on the 11th September 2001.47

It was true that the US population came together to help each other through the harrowing events and the aftermath of that day.48 The researcher also noticed throughout how the entire world reacted to the attacks, and probably the world did change forever at that point.49 Prior to the 11th September 2001 attack, the famous British actor, Sir Michael Caine, had started work on a novel about a terrorist group using an aircraft to attack a skyscraper in London. He had to put a stop to his novel by passing the following comments:50

“I had this plot where terrorists fly a plane into a London skyscraper. However, they did it in real life. I was stunned by that, so I stopped writing.”51

2.7.1 The US domestic MTSA 200252 became International Maritime Security Legislation at the IMO53

The new maritime security legislation was mirrored in the Maritime Transportation Security Act (MTSA) 2002 which is the US domestic maritime security legislation brought forward to the IMO following a Diplomatic Conference held in London between 9th and 13th December 2002. This action was championed by the USCG.

The USCG, as previously stated, is a multi-mission agency with a Maritime Law enforcement mission with jurisdiction in both domestic and international waters, as shown in figure 1 below.

47 Bill Gertz, Breakdown, how America’s Intelligence Failures led to September 11 (Washington D.C.,Regnery Publishing, Inc. 2002).
48 Ibid., p.46.
49 Michael Welch, Scapegoats of September 11th. Hate Crimes and State Crimes in the War of Terror (United States, 2006).
52 The Maritime Transportation Security Act of 2002 (MTSA) is an Act of Congress enacted by the 107th United States Congress to address port and waterway security.
53 The International Ship and Port Facility Security Code (ISPS Code) is a comprehensive set of measures to enhance the security of ships and port facilities, developed in response to the perceived threats to ships and port facilities in the wake of the 9/11 attacks in the United States.
The USCG operates under Presidential or Executive Orders during times of crisis. On this note, in 2001, the USCG delegation to the IMO advocated for the new maritime security measures by presenting their domestic Maritime Transport Security Act (MTSA). The 11th September was a defining moment, not only in the US but also in many individuals' lives, particularly seafarers. A defining moment was the phrase used to describe the 11th September attacks, along with references to other historical events such as Pearl Harbour in 1941. The specific characteristics of the 11th September attack increased its impact on ordinary citizens in different sovereign States, and the sudden introduction of the new maritime security legislations with its rapid ratification was considered as a defining moment in response to this threat. This was seen as one of the unofficial records set in the IMO for a Code to be adopted within such a short space of time.

This new maritime security legislation was named the ISPS Code at the IMO. This is the same as US domestic maritime security legislation also known as MTSA. The initial purpose of the Code is to protect ports, infrastructures and shipping from terrorist, the protection does not cover seafarers.

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The Code also serves to prevent illegal immigration, smuggling, theft and piracy. It is a two-piece legislation describing minimum security requirements for ships. Part ‘A’ provides mandatory requirements whilst Part ‘B’ provides guidance in its implementation. The Code is limited to ships over 500 gross tonnage (GRT).

The main objectives of the Code are:

- To detect security threats against ships and ports and to implement security measures,
- To establish roles and responsibilities concerning maritime security for Governments, local administrations, ship and port industries at national and international level,
- To collate and promulgate security-related information,
- To provide a methodology for security assessments so to have in place plans and procedures to react to changing security levels in ports.

The above objectives are self-explanatory - they are in place to protect maritime property. After sometime, the name given to the Maritime Security Code disappeared into thin air only to be taken over by Anti-Terrorism Acts, although the Maritime Security Code is still lurking behind the scenes.

2.8 Discrimination of the new maritime security legislation against seafarers.

After 11th September 2001, the then US President George Bush Jnr. addressed Congress where he declared “war on terror” that will not end until every terrorist group of global reach has been found, stopped, and defeated. However, the former Defence Secretary Donald Rumsfeld voiced his discomfort at this by stating that:

I was uncomfortable with the word “War on Terror” and argued with President Bush Jnr., that this was something that would not be won by bullets.  

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55 Donald Henry Rumsfeld is an American politician and businessman. Rumsfeld served as the 13th Secretary of Defence from 1975 to 1977 under President Gerald Ford, and as the 21st Secretary of Defence from 2001 to 2006 under President George W. Bush.

This statement by Donald Rumsfeld has been seen by the author as accurate in view of how one can wage war on unseen forces or an ideology. The ideology of terror is not written in the face of a person whereby his thoughts can be read and action taken against him before he commits a crime. Nonetheless, George Bush Jnr. decided to pursue his theory on war on terrorism, and if he was unable to wage physical war against these terrorists then he needed other applicable methods to justify his declaration of “war on terror”. Thus in their bid to wage war on the unseen terrorist, the ISPS code was adopted.

The issue of intervention for human protection purposes has been considered one of the most controversial and difficult of all international relations questions and with the end of the cold war, it became a live issue as never before. US Congress called for intervention in suspected terrorist States. But there was disagreement as to whether, if there was a right of intervention on any sovereign State and its nationals, how and when should it be exercised, and under whose authority must it be exercised.

Since it will not be that easy to intervene in suspected terrorist countries as the US does not have the right of intervention on sovereign States, other measures that can prevent people from suspected terrorist countries should be taken and that is what is be the first line of action. The US primary agenda of the new maritime security measures is to monitor individual seafarers that the US suspected, through either flag State and/or port State control having the belief that they pose a National Security threat.

The legislation demands personal and family data of seafarers before signing on a ship. It is not possible to find a way of preventing the employment of suspected terrorist States members on ships that call on the US and UK ports but they can prevent suspected seafarer from disembarking when their ships call on the US and UK ports.

Instigated by the US, new maritime security legislation was introduced at the IMO.

58 Ibid., p.366.
59 Ibid., p.368.
Though the purpose of the code is to prevent an act of terror, it is however more or less an issue of US Homeland maritime security legislations driven by political influence, which does not look at the interests of the seafarer’s welfare to take shore leave. However, the security measures taken by the US to target seafarers and ships was too draconian, since the impact is barely noticed on the aviation industry whose airplanes were used in the terror attacks of 11th September 2001. The USCG was given Presidential powers to execute their duties in the legislature. In the name of preventing terrorist attacks on port infrastructures, their pretext of fighting terrorism is to stop suspected foreign seafarers from developing States either entering or disembarking in their ports.

2.8.1 Justification for preventive measures adopted by the USCG post 11/9.

The 2002 SOLAS conference that adopted the ISPS code recognized that seafarers have the primary duties and responsibilities for implementing the new security regime for ships. More also seafarers have a duty of care to the cargo they carry and the company they work for, the public they serve and the family they have left behind.

Also, seafarers are expected to embrace the role of security guards on their ships which stretches their working hours so it will therefore be wrong from the surface to label or treat co-partners in a security regime as potential threats. In the first place the discrimination came as an outcome of the laws passed and thus a means through which precautionary security measures can be achieved. It is not an end to itself but a means to an end.

In passing the Act, Congress took into consideration the number of ports in the US, the volume of goods and numbers of tourist that pass through the US ports in a year and how vulnerable the ports are prone to smuggling and drug trafficking. All put together, it was realized that any attack on the port will adversely affect the US economy in particular and other neighboring sovereign States that use their ports.
Taking all this into consideration, any on coming ship and its crew members should be seen as suspects. Going back to 11\textsuperscript{th} September, the intelligent manner in which the “unarmed” terrorists used to tear apart the twin towers and the pentagon, no stone should be left unturned in their effort to fight terrorism. It is typical of terrorist to have explosives hidden in their body but this was not the case. They were with them in the US and attended an aviation institution in the same country where they were to attack.

A “terrorist training field” has been brought into the United States. The whole episode looked like a film. After the first aircraft crushed into the twin tower, it was thought to be an accident. If it were to be seen as a planned terrorist attack, all other plans ready to take off would have been halted or yet still brought down by the superior air force of the United States. Just a year prior to the 11\textsuperscript{th} September attack, a small unsuspecting leisure boat attacked a naval ship USS COLE.

In the 2004 edition of Jane’s Terrorism and Security Monitor, Jane reported that the type of attack widely envisaged, based on analyses of compromised terrorist preparations, and would include an explosion on board a cargo ship laden with fuel oil and ammonium nitrate fertilizer, in effect turning the ship into a waterborne fireball.\textsuperscript{60}


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Should a terrorist somehow manage to get onboard a LNG tanker and cause an explosion, it might be possible to cause a boiling-liquid-expanding-vapour-explosion (BLEVE). A BLEVE might be possible in some instances if the LNG is heated to above its boiling point while still contained within the tank. This rapid heating could cause a percentage of the LNG within the tank to “flash” into a vapour state almost instantaneously. This would cause pressure in the tank to rapidly build up. While LNG tanks do have massive pressure relief valves in place, if these valves were to fail in their ability to release the gas quickly enough or altogether, the pressure in the tank might create a type of explosion that would send dangerous debris flying. Most experts agree that LNG tankers are built to prevent such an event from occurring. One expert polled during the GAO study, Dr. Robin Pitblado from Det Norske Veritas, however, pointed out that a BLEVE might be possible on a Moss spherical tank because these tanks are constructed such that pressure could build up within them. Skepticism exists within the industry regarding Pitblado’s claim. Captain Scott Conway\textsuperscript{60} who has served eight years onboard LNG tankers and who is intimately familiar with the construction of the Moss spherical tanker, views Pitblado’s scenario as unrealistic, questioning his conclusions by asking, “Where is the BLEVE going to occur in this tank? Where are you going to direct the flames backing at this tank to heat up the liquid? How are you going to build
There is a possibility of terrorist targeting the ports because it is noted that a number of known vulnerabilities exist within the LNG industry. These vulnerabilities lie in the human factor and the potential for problems lies within seafarers involved in the industry. Why then should there be laxity in the dealings with individual seafarers. It is also assumed that cargo ships that carry dangerous cargos like Coal, Ore, Crude Oil, Liquefied Petroleum Gas (LPG) and Liquefied Natural Gas (LNG) loaded into ships holds or tanks through a conveyor or pipeline from the supplier port’s warehouse or tanks directly into the ship’s, with minimum human intervention. Therefore, the probability of seafarers or terrorist planting an explosive on board is minimal. There should be no stone left unturned in an effort to fight terrorism because terrorist are unpredictable and that is what makes the war on terrorism difficult.

There has been an instant where cruise ship had been terrorised, as in the case of MS Achille Lauro which was based in Naples and most remembered for her 1985 hijacking by four men representing then Palestine Liberation Front (PLF). If the target of the hijackers were to blow up the ship or ran it into a nearby port, they could have done it easily. There is therefore no reason for the passing of the Anti-terrorist Act 2002 and its effect on the welfare of seafarers. It is the happiness or welfare of a few as against the lives of many.

Part of the legislative requirement of the ISPS code demands personal and family data of seafarers before signing on a ship and this is in breach of their human rights and data protection, as was commented by Lieutenant Commander Jeff Carter of the USCG:

Before 9/11, we required cargo information only on the most hazardous of cargoes; now we require details on all major vessels, all cargo, all passengers, and all crew. This information along with the additional time to cross check and verify it against known terrorist lists gives us the ability to evaluate the security and safety risk of an incoming vessel … long before the vessel enters a US port. We worked with our international partners in the International Maritime Organization to ensure the final ISPS Code requirements mirrored the MTSA requirements. You’re probably wondering if any of these innovations have thus far paid off. I can enthusiastically answer – Yes! The Coast Guard, the lead federal agency for maritime safety and security, takes its responsibilities and its role seriously in laying the foundation for American prosperity, safety and security.

up the pressure so that it overcomes the safety release? When you can explain this all logically as per the ship’s construction, then we’ll talk seriously.

62 Carter, J., Coast Guard Commandant: Collaboration key to improving maritime security (2005)
Despite its breach on human rights and data protection, it is of vital importance to the security services because if there was a possibility of having data on all passengers boarding US bound aircraft prior to 11th September 2001, it would have been possible to know that the architectural engineer from Hamburg, Mohamed Atta, was affiliated to the Al-Qaida group, and his arrest could have foiled the attack on the World Trade Centre.

According to Kant, the most important single motivational factor that influences us to obey a call to duty of our nation or society is a bare respect for lawfulness63. Human beings naturally believe national duties are created by rules or laws of the society or religion that we belong and ought to be obeyed. By doing so, our mind is focused towards maintaining civil or social order.

The individual’s motivation is simple, respect for the Code that makes it our duty in maintaining civil or social order and not the outcome of our duty. In such national issues mere conformity of our will is final. Why would military personnel in the US and the UK accept postings to Middle Eastern regions? This is because military personnel are a duty bound. It is so with all individuals who hold allegiance to their States and respect the laws of their State. The US has placed its armed forces in over 75 countries. In the Middle East alone, there are troops in Saudi Arabia, Bahrain, Kuwait, Oman, Qatar, Turkey, Pakistan, UAE, Yemen, Iraq, stretching out to Afghanistan, Djibouti, Kyrgyzstan, Somalia, Ethiopia, Turkmenistan, Uzbekistan, Tajikistan, and Chad.

Since Presidents are obliged to protect their citizens and foreigners in their country, the Jeremy Bentham approach by the US legislatures which put the benefit of the majority as against the individual can be said to be in the right direction because seafarers as human beings with allegiance to their community and State can pose a threat to the US or the UK and should be taken into consideration because human behaviour cannot be predicted with certainty.


2.9 The importance of shore leave in the life of the seafarer.
The modern day merchant ships recruit fewer workers on board due to automation and these crew members are from different ethnic groups with different languages and characters altogether. Although they are all governed by a code of conduct and ethics on board the vessels the desired social interaction is always missing leading to loneliness.

In this age when people around the world are connected to the rest of the world with just the click of a computer mouse through the internet and the smart mobile phone, the seafarer is in most of the time cut off from the outside world. It becomes difficult if not impossible to connect to family and friends on the high seas. Aside loneliness is the changing weather on the high seas and the country or port where they spend some of their working time. Weather conditions can be intolerable at certain times of the year; all these are endured by the seafarer. Crew members are sometimes required to work continuously for hours when there are emergencies. This aside, they have to take on their usual security duties on board the ship. This long period of work lead to fatigue and reduction in cognitive ability, which is the root cause of accidents on board ships. Every merchant ship has qualified medical personnel on board, but to install all equipment to handle all types of diseases and accidents on board is not practicable. There is the need to call at the nearest port facilities for the necessary assistance. Over working, monotonous work and the inability to contact family members at home leads to acute boredom and fatigue on ships. Living constantly under such circumstances results in boredom, loneliness, stress, depression, and home sickness. All put together, shore leave has the advantage of addressing the issues of loneliness, fatigue and boredom which has a long run effect on the mental health of seafarers and their productivity.

2.9.1 Effects of shore leave denial on seafarers and the maritime industry.
The profit-driven environment of the International Maritime Trade (IMT) has made the maritime organisations ignore the basic requirements of the immediate needs of seafarers. Based on the framework, a set of legal obligations can be identified
that are incumbent upon the US that has ratified some human rights treaties to bear the primary responsibility for realising these obligations towards seafarers. Instead, the new Maritime Security Code is rendering seafarers vulnerable to discriminatory condition in the US and UK ports causing devastating effects on the mental health and productivity of the seafarer and the maritime industry as a whole.

The law recognizes the need for shore leave for maintaining a mariner’s health and for the safe and efficient operation of the vessel. Shore leave is the period which workers on-board a ship are allowed to take some time off the ship while the ship he/she is working on is still berthed at the port. This period can vary from a couple of hours to some few days depending on the time schedule of the ship. Just like in any other profession, seafarer requires a break to relax. Shore leaves have been denied in the US and UK ports with the inception of the ISPS code and it is having a profound effect on the health and productivity of seafarers.

Issues that either escaped the US and UK in their bid to deny certain group of seafarer shore leave is that, the denial of shore leave which is tantamount to discrimination has got an effect on the health of the seafarer, the environment that millions of dollars are spent to protect, the marine transport business as a whole and a negative effect on the implementation of the ISPS code. These are elaborated below.

Advanced technology and automation has made it possible to employ only a few crews on board a ship coupled with the differences in background and lack of contact with the outside world when on the high seas; the seafarer job has made him a lonely person in this wide world. The only period they can socialize is when they are permitted to disembark at port cities. Beside the loneliness, seafarers are required to work long hours during emergencies and when they are behind schedules at ports all due to the introduction of the ISPS code.
Automation has also made it possible for ships to off load at short periods thereby making their stay at port cities very short. Loneliness, leading to depression is found out to have devastating effect on the mental and physical health of the seafarers. Loneliness has been found out to be a risk factor in high blood pressure and sleep difficulties. Psychologically, loneliness has been associated with depression, stress, hostility, lack of confidence and unhappiness. The effects of fatigue and loneliness may lead to marine accidents and oil spillage in the oceans, thereby causing marine pollution. Discrimination by port State authorities against seafarers also breeds anger and vengeance that can lead to seafarers taking up terrorist activities. This is not farfetched because most of the seafarers are from regions where the intervention team of US military are present. Some are also from non-circular States; therefore there is a seed sown already and discrimination trigger unrest.

Also, discrimination and loneliness can lead to job dissatisfaction and can affect labour and business turnover and its related problems of replacement of seafarers. In most cases, it is not the cost of recruitment and training that worries the industry but the disruption of normal operations.

2.10 SOLAS 1974\textsuperscript{64} amended to accommodate the ISPS Code

After the US presentation of MTSA to the IMO, the IMO developed in response to the supposedly perceived threats to ships and port facilities in the form of amendments to the 1974 Safety of Life at Sea (SOLAS) Convention. As stated above, this was aimed at enhancing maritime security on board ships, and at port interface areas. As a well-known maritime Convention, SOLAS is an international maritime treaty concerning the safety of merchant ships. The first version of SOLAS was adopted in 1914, in response to the tragic accident of MV Titanic. It was then amended in 1929, 1948, and in 1960.

The 1960 Convention entered into force on 26\textsuperscript{th} May 1965, the first major step in modernising regulations, and in keeping pace with technical developments in the

shipping industry. The comprehensive amendment of SOLAS was adopted in 1974, and has been updated on numerous occasions. The SOLAS Convention in force today is sometimes referred to as SOLAS, 1974, as amended.

The ISPS Code was mirrored by the MTSA and implemented through SOLAS Chapter XI-2, special measures to enhance maritime security for the Safety of Life at Sea. However, in the US both parts ‘A’ and ‘B’ of the Code must be adhered to, particularly the recommendatory part ‘B’. The remit of the Code is to ensure that security of ships and port facilities takes the form of a risk management activity, and to mitigate and determine what security measures are appropriate. The purpose of the Code is to provide a general and accurate framework for evaluating risk to permit IMO member States governments to offset changes in threat with changes in vulnerability for ships and port facilities through determination of appropriate security levels and corresponding security measures.

2.10.1 SOLAS 1974 Chapter XI-2 - Special Measures to Enhance Maritime Security.

The US domestic law was accepted without any objection from IMO member States who are signatories to SOLAS 1974. An amendment to SOLAS Chapter XI-2 was adopted in December 2002 and came into force on 1 July 2004.

67 Regulations inserted into SOLAS Chapter XI-2. Regulation XI-2/3 enshrines the ISPS Code. Part A of the Code is mandatory and part B contains guidance as to how best to comply with the mandatory requirements. The regulation requires Maritime Administrations to set security levels and ensure the provision of security level information to ships entitled to fly their flag. Prior to entering a port, or whilst in a port, within the territory of a Contracting Government, a ship shall comply with the requirements for the security level set by that Contracting Government, if that security level is higher than the security level set by the Maritime Administration for that ship. Regulation XI-2/5 requires all ships to be provided with a ship security alert system, when activated the ship security alert system shall initiate and transmit a ship-to-shore security alert to a competent authority designated by the Maritime Administration, identifying the ship, its location and indicating that the security of the ship is under threat or it has been compromised. The system will not raise any alarm on-board the ship. The ship security alert system shall be capable of being activated from the navigation bridge and in at least one other location. Regulation XI-2/6 covers requirements for port facilities, providing among other things for Contracting Governments to ensure that port facility security assessments are carried out and that port facility security plans are developed, implemented and reviewed in accordance with the ISPS Code. Regulation XI-2/8 confirms the role of the ship Master in exercising his professional
The Code was drafted within the shortest recorded timeframe. Nevertheless, the majority of seafarers were not convinced that its implementation will prevent a determined terrorist from carrying out an attack. The author noted that the strategy of the 11th September terrorists was complex in its form; hence the draconian measures by US Government to prevent people working in the maritime industry from using ships to carry explosives to attack US ports’ infrastructure. It is indisputable that 11/9 and 7/7 were great human tragedies.

The author is of the understanding based on the AEGIS Intelligence Report that the maritime industry is not under threat because the World Trade Centre, where the Twin Towers used to be before they were destroyed, was surrounded by the ocean, and many ships and ferries crossed each other on a daily basis. From this view, it could be argued that in fact, the waterways would have been the ideal position from which to launch an attack, e.g., a missile from a ship. Yet the terrorists selected the most sophisticated mode of transport with speed and power that could reach its intended and specific target faster to inflict maximum damage.

Most of the US skies are not patrolled by police because the skies remain under the jurisdiction of the Federal Aviation Administration (FAA). Pilots flying up to 18000 feet must file a flight plan stating destination, amount of fuel they are carrying, and number of passengers. The FAA admits it lacks the manpower to review advance flight plans. The New York Police Department patrols said that they patrol the streets; however the FAA patrols the skies. The New York Police admitted that they can control land-based objects, but they cannot stop an armed helicopter from flying overhead.

Judgement over decisions necessary to maintain the security of the ship. It says he shall not be constrained by the Company, the charterer or any other person in this respect.

69 Roger Horner, The New ISPS Code – Increased Protection or Higher Risk for the Private Yacht (undated)
71 James Petras, September 11, beyond the human tragedy. The World Trade Centre/Pentagon (2001)
72 Bruce Hoffman, Inside Terrorism, 2nd Ed. (Columbia University Press, 2006).
73 Paul Thompson, The Failure to Defend the Skies on 9/11 (undated)
The FAA, which sees its role as promoting the aviation industry, argues that flying freely anywhere in the country is a basic American right.\(^75\) The FAA is said to believe that small aircraft should be able to fly low, with no restrictions, over major cities and national monuments.

According to the FAA, under visual flight rules, anyone can fly below 1100 feet without even communicating with them and no security check is involved. Anyone with a licence can rent a plane at many of the approximately 2000 general aviation airfields within a short flight at a place like New York.\(^76\) According to Julia Vitullo-Martin, forged pilot licences are seldom verified at general aviation airports. Aircrafts can legitimately be flown into a place like New York airports to refuel from anywhere in the US, and are not inspected on arrival or before departure. Helicopters are said to constitute a huge portion of local, low-level air traffic, and do not need an airport for departure.\(^77\)

Nevertheless, the US Congressional report continued that merchant ships can be used as kinetic weapons to ram another vessel, warship, port facility, or offshore platform.\(^78\) In the report, commercial ships or merchant ships were seen as potential launch platforms or launch pads for missile attacks; or platforms from which underwater swimmers could infiltrate ports or unmanned underwater explosive delivery vehicles could be launched.\(^79\) The report did not stop there but described how terrorists could also take advantage of a ship’s legitimate cargo, such as chemicals, petroleum, or liquefied natural gas, as the explosive component of an attack. Ships can be used to transport powerful conventional explosives for detonation in a port or alongside an offshore facility.\(^80\)

Table 1 below designed in 2007 by Paul W. Parfomak and John Frittelli represents the possibility that terrorists may use ships to attack the US. The report presented

\(^{75}\) Ibid.

\(^{76}\) Julia Vitullo-Martin, op.cit. 105.

\(^{77}\) Ibid.


\(^{80}\) Ibid.
to the US law makers concluded that every seafarer is a potential threat to the US maritime and ports infrastructure.

2.11 US Congressional Report on Maritime Attack Characteristics

<table>
<thead>
<tr>
<th>Dimensions</th>
<th>Example</th>
<th>Characteristics</th>
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<tbody>
<tr>
<td>Perpetrators</td>
<td>Al Qaeda and affiliates, Foreign nationalists</td>
<td>Disgruntled employees</td>
</tr>
<tr>
<td>Objectives</td>
<td>Mass casualties, Port disruption</td>
<td>Trade disruption, Environmental damage</td>
</tr>
<tr>
<td>Locations</td>
<td>360+ US ports 165 foreign trade partners</td>
<td>Nine key shipping bottlenecks</td>
</tr>
<tr>
<td>Targets</td>
<td>Military, Cargo vessels, Fuel tankers</td>
<td>Port area populations, Ship channels, Port industrial plants, Offshore platforms</td>
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<tr>
<td>Ferries/cruise ships</td>
<td></td>
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<tr>
<td>Tactics</td>
<td>Explosives in suicide boats, Explosives in light aircraft, Ramming with vessels</td>
<td>Underwater swimmers, Unmanned submarine bombs, Exploding fuel tanks</td>
</tr>
<tr>
<td>Ship-launched missiles, Harbour mines</td>
<td>Explosives in cargo ships, Weapons of Mass Destruction in cargo ships</td>
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In his 2003 book, Frittelli said that the US Congress had expressed concern that the MTSA/ISPS Code did not go far enough in its requirements for increasing port security.82 The above report gave Congress the ultimate mandate to transfer Presidential authority to the USCG to implement effectively the denial of foreign seafarer’s shore leave83 in the US ports.

There have been several maritime articles and journals written by shipping companies trying to persuade the US Government that seafarers are not threat to their National Security.84

The fact is that the group which attacked the US and its interests have not attempted to use ships, which can be seen as encouraging. The evidence of this can be seen in the events of 7/7 in the UK, where underground train services and surface bus transport services were targeted, resulting in the deaths of innocent people. Yet again the maritime industry is disbursing huge amounts of resources on a maritime terrorist threat because terrorist are smart and might be well

81 Paul Parfomak et al, op cit.91.
83 Ibid.

43 | P a g e
informed on where there are loopholes. There is no single reliable target for terrorist. They strike at places where they will achieve the most devastating result

2.12 The Unfolding events of the London bombings on 7th July 2005.

The UK saw July 2005 as a positive month. On 2nd July 2005 the Live 8 concert at Hyde Park sent a message to world leaders about poverty in Africa. On 6th July 2005, the 2012 Olympic bid was won for London. On 7th July 2005, G8 leaders were meeting in Gleneagles. On the same day, the weather conditions were not favourable due to heavy rains. According to Eric D. Williams (2006) there were delays in tube train services in the Northern Line. Then there were explosions one after the other within a minute in London’s underground train services. The explosion was confirmed as a bomb which had been detonated by terrorists. The second bomb exploded on a westbound Circle Line train. The third bomb exploded on a southbound Piccadilly line train travelling between King’s Cross St. Pancras and Russell Square. UK national Security declared code amber, and all London underground network services were shut down bringing all trains to a complete halt.

The fourth explosion was confirmed on bus N°30 from Tavistock Square. The explosion ripped off the top deck of the bus. A total of 56 fatalities were recorded that day, including the bombers and more than 700 people were

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86 Ibid.
89 Ibid. p.4.
90 Ibid.
91 Ibid. p.7.
94 Eric D. Williams. op.cit.100
95 Ibid. p.10.
injured. These attacks on London transport services were unacceptable at any level.

The UK affirmed its position with the US to combat terrorism in any form. It did not only gain support from the US, but also the two major maritime States teamed up to scrutinise the implementation of the maritime security legislation thoroughly without any exception. The UK, as a member of the EU, gained support and backing from EU members States, and even landlocked States ensured that the Code was implemented to the full even though they do not share borders with any ocean. The landlocked involvement in implementing of the ISPS Code was due to the fact that ship registrations have become international and every State in the United Nations has the sovereign rights to accord its citizenship to any ship that registers to fly its national flag.

2.13 The United Kingdom’s approach to the New Maritime Security Code

In response to the terrorist attacks, the US highlighted the fact that no country in the world is exempted from being a target for terrorists. The UK post-7/7 also took a draconian approach on terrorism to affirm its standing in fighting terrorism through the Code, because despite the fact that 11/9 and 7/7 did not come through maritime transport. The UK also saw seafarers as potential threat to National Security, and joined the US by denying them the right to shore leave.

The UK government justified their position of denying seafarers shore leave on the basis of their Anti-Terrorism, Crime and Security Act (ATCSA) of 2001, passed in

100 Alsnosy BALBAA, Protecting seafarer’s rights – The need to review the implementation of the ISPS code (undated) Nautical Department, College of Maritime Transport and Technology Arab Academy for Science, Technology and Maritime Transport, Alexandria, Egypt <http://www.solomonchen.name/download/7ms/1-003s2-balbaa.pdf> accessed 5 August 2011.

2.13.1 Maritime Security Legislation threatens Seafarers’ Welfare and Well-being

Seafarers are more apprehensive about their well-being when they are out in the open seas or on the high seas. It is a place where help is difficult to come by should their ship run into difficulties, due to bad weather or acts of piracy. The maritime security legislation, although it might be a good deterrent to would-be maritime terrorists, is highly unlikely to be able to curb the high levels of piracy in certain parts of the world, where seafarers have to navigate whilst exercising duty of care of the cargo they carry on their ships.\textsuperscript{102} With numerous Conventions, Regulations and Guidelines\textsuperscript{103}; for instance, the oil pollution which is the highest enemy of the marine environment brought about the introduction of the Oil Pollution Act 1990\textsuperscript{104}. Much earlier, the high loss of life following the MV Titanic sinking had led to the introduction of Safety of Life at Sea (SOLAS).

Besides these selected Treaties and Conventions, there are numerous others at the IMO that seafarers and ships have to adhere to.\textsuperscript{105} There are also Regulations that are imposed by the ILO\textsuperscript{106}, \textsuperscript{107}. Most of the IMO’s Conventions and other maritime Regulations are meant to standardise and to control the actions of the ships themselves.\textsuperscript{108}

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\textsuperscript{103} John McLaughlin, \textit{Security still firmly at the top of the agenda} (2003) Lloyds List, 3\textsuperscript{rd} March, p.3.
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\textsuperscript{104} Arne Sagen “ISPS Code could still cause slip ups” (2003) Lloyds List, 23\textsuperscript{rd} March, p.1.
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\textsuperscript{106} International Labour Organisation (ILO) is the United Nation’s specialist agency which seeks the promotion of Social Justice and internationally recognised Human and Labour Rights.
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The Conventions cover matters relating to pollution, safety and operational procedures. A new threat affecting the security of ships and port facilities has emerged into the spotlight of the maritime industry.

Piracy as previously mentioned is not new but acts of terrorism seem to be a growing affliction of the twenty first century. The international maritime community responded swiftly to the threat of terrorism by adding the ISPS Code to the cauldron of overflowing rules and regulations of the maritime industry. The Code has been put in place to control elements that are out of the control of ship, ports and seafarers.

The Code is an instrument for the purpose of regulating the conduct of ships against security threat which, unlike pollution or safety, originates from a source that is remote and distant from the ship or port. For example, MARPOL 73/78 and SOLAS 1974 as amended address the source of the accident or pollution which in most cases is the ship. The Maritime Security Code does not address the source of the threat; instead it regulates seafarers, the victims of maritime security. The measures are probably not meant to eradicate the maritime security threat but to ensure that measures are implemented in order to have standard procedures in place in case a security threat emerges.

109 IMO Assembly Resolution A.742 (18) Procedures for the Control of Operational Requirements Related To The Safety of Ships and Pollution Prevention.


111 Ibid., p.225.


113 Ibid.

114 F. Anstey, The fast track to ISPS Code and national security regulation implementation and the implications for marine educators (undated) School of Maritime Studies, Fisheries and Marine Institute of Memorial University, Canada <http://www.solomonchen.name/download/7ms/1-001-s2-anstey.pdf> accessed 25 October 2011.


This has put an extra burden on seafarers and the environment they work in\textsuperscript{117}. The attack on the USS Cole, MV Limburg and MV Achille Lauro were acts of terrorism that injured and killed innocent people.\textsuperscript{118} The effectiveness of the Code to control terrorist groups from attacking ship is yet to be seen,\textsuperscript{119} because it is still uncertain whether the resources and investment involved in its implementation will bring desirable results.\textsuperscript{120} The author believes that terrorist do not know the implications or its effects on them, or they simply do not acknowledge its effectiveness,\textsuperscript{121} because the burden is resting on seafarers.\textsuperscript{122}

Chapter three elaborates on the impact of US values and effects on sovereign States, and reviews the devastating effects of maritime security measures being imposed on citizens of sovereign States, whereby they partially lose their sovereignty. This has affected their right to exercise their human rights and freedom of movement.

2.14 CHAPTER SUMMARY

After analysis in the literature review on the reasons for, and the ways in which, seafarers are continuously denied shore leave and other rights by US and UK ports, the author became aware that none of the selected commentators was addressing the actual causes of the denials of seafarer’s shore leave but were more focused on the ISPS Code on what terrorism can do to ships and port infrastructures.

The USCG in addressing the IMO used a defining moment, not only in the US but also in many individuals' lives, particularly seafarers. This went down well and sped

\begin{footnotesize}
\begin{enumerate}
\item Ted Twietmeyer, \textit{3.5 Years...No 'Terror' Attacks - Get the Picture} (undated) <http://www.rense.com/general63/3five.htm> accessed 14 January 2012.
\item Lieutenant Commander Fiona McNaught, op.cit.1
\end{enumerate}
\end{footnotesize}
up proceeding to adopt the code without knowing exactly the hidden intentions of the US and UK to prevent seafarers from entering their ports. This is seen by sovereign States as an infringement on the rights and welfare of the seafarers who are already burdened with extra security job.

It has been realised by the author that the probability for seafarer to undertake terrorist attack using their own ship is feasible and that efforts to prevent it is in the right direction taking instances from MV Achille Lauro and the potential of cargo ships becoming a fire ball. Part of the reasons for terrorist attack has been cited as the stationing of troops at the Arabian Peninsula and since most seafarers come from these areas and these troops are not leaving those territories in the foreseeable future, there is still the probability of another attack which should be prevented from all fronts.

Measures taken by the US and UK has devastating effect on the welfare and rights of seafarers but in the interim that is the option open to the US and UK. It may seem as if the US and UK are not concerned with the rights and welfare of seafarers.

The researcher came to the realisation that, the US or the UK are not just ignoring the importance of the IMO Convention and how it mandate sovereign State to ensure easy facilitation on shore leave but that, how it conflicts with the US and UK border and immigration laws is what worries them because the international laws will pave way into their domestic laws.
CHAPTER THREE


3.1 Introduction.

The maritime business of the twenty first century is marked by overwhelming inequalities within the world political and financial powers, so for independent developing States, sovereignty is their best and only defence.\(^{123}\) Sovereignty is more than just a functional principle of international relations.\(^{124}\) It is recognition of dignity, protection from governments and the right to exercise freedom of movement without restrictions, that is, if you are a legitimate citizen and a law abiding person.\(^{125}\) Sovereignty affirms the rights of citizen in an independent State to determine how they want to protect their environment from terrorist attack without affecting or interfering with their basic human rights such as their welfare and well-being.\(^{126}\) The United Nations Charter\(^{127}\) recognised that all independent States are equally sovereign under International Law,\(^{128}\) but after the Second World War there have been changes in the conditions under which sovereignty is exercised.\(^{129}\)


\(^{127}\) Article 2(1).

\(^{128}\) Gareth Evans and Mohamed Sahnoun, op.cit. 145.

The world security issues and growing insecurity among some States has made International law evolve\textsuperscript{130} in such a way that it has exerted mounting pressure on developing sovereign States, which in turn has indirectly affected the right procedures in applying human rights laws effectively.\textsuperscript{131}

The emerging concept of security for humanity has created burdens in the form of extra demands to justify a cause by individuals and high expectations from powerful governments in relation to the way other IMO member States treat their citizens\textsuperscript{132} and others based on pressures exerted on them from powerful sovereign States through the UN or the IMO.\textsuperscript{133}

**3.2 What is State Sovereignty?**

Abram Chayes\textsuperscript{134} and Antonia Handler Chayes\textsuperscript{135} described sovereignty as supreme, absolute, and uncontrollable power by which an independent State is governed and from which all specific political powers are derived.\textsuperscript{136} Independence of a nation combined with the right and power to regulate its internal affairs without foreign States' interference.\textsuperscript{137}

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\textsuperscript{134} Was an American scholar of international law closely associated with the administration of John F. Kennedy. He is best known for his “legal process” approach to international law, which attempted to provide a new, less formalistic way of understanding international law and how it might further develop.

\textsuperscript{135} Is a United States lawyer and educator who served as Assistant Secretary of the Air Force (Manpower and Reserve Affairs) from 1977 to 1979 and as United States Under Secretary of the Air Force from 1979 to 1981.

\textsuperscript{136} Abram Chayers \textit{et al}, \textit{The New Sovereignty, Compliance with International Regulatory Agreements} (USA, Harvard University Press, 1998).

\textsuperscript{137} Ibid.
Neil MacCormick also described it as the power of a nation to do everything necessary to govern itself, such as making, executing, and applying laws; imposing and collecting taxes; declaring war and making peace; and forming treaties or engaging in international trade with other sovereign States. 

A sovereign State is a nation with a defined territory in which it exercises internal and external sovereignty, has a permanent government, is independent from other foreign States and powers, and has the capacity to enter into diplomatic relations with other sovereign States. Sovereign State government holds legal title to all mineral and energy wealth in their territorial waters and property therein.

The author define a sovereign State in principles not dependent on any State, but a State can also exist without being recognised by other sovereign States, in which case it has to somehow be dependent on other nations for aid, because of drought or displacement of their citizens due to internal conflict. States’ sovereignty also includes the understanding that all States are equal under the United Nation’s Charter of Human Rights. Despite a State’s land mass, its population size and financial capabilities, all States, irrespective of their size have equal rights to functioning as a State under the UN and to make decisions about what happens within their borders.

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138 Sir Neil MacCormick was a legal philosopher and Scottish politician. He was Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh from 1972 until 2008. He was a sometime Member of the European Parliament, and Member of the Convention on the Future of Europe.


Sovereign States which are not recognised by other States will often find it difficult to exercise full treaty-making powers and to engage in diplomatic relations with other sovereign States.\textsuperscript{145}

The human rights acts, though, does not allow States to impose their domestic legislations onto other States because of their geographical location.\textsuperscript{146} Creating a right to stop future terrorists from other States would only make it easier for the more powerful State to justify its interference in the affairs of the weaker State in the developing world; this is precisely what the US and the UK have done,\textsuperscript{147} contrary to the UDHR.\textsuperscript{148}

Professor Erol Kahveci\textsuperscript{149} commented that there may be conflicts between security and human rights and movements of seafarers.\textsuperscript{150} This means that there must be a proper balance between the need for security, and the protection of the seafarer’s rights to maintain the safety and working efficiency of the ship.\textsuperscript{151} Since all States are equal in the face of the UN Charter,\textsuperscript{152} one State should not have the right to interfere with the internal governance of another State by imposing strict condition on movements of non-political persons such as seafarers.\textsuperscript{153} Practically, sovereignty means that one State cannot demand that another State takes any particular action against its citizens just because they are seafarers, unless they pose a threat to National Security to other States as well.\textsuperscript{154}

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\item \textsuperscript{146} Alex J. Bellamy \textit{et al}, \textit{Humanitarian Intervention in World Politics} (undated)
\item \textsuperscript{147} Ibid.
\item \textsuperscript{148} UDHR Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
\item \textsuperscript{149} Professor Dr Erol Kahveci, \textit{Fast Turnaround Ships and their impact on crew} (undated)
\item \textsuperscript{150} George Quick, \textit{Maritime Security from the viewpoint of Maritime Labour} (undated)
\item \textsuperscript{151} The SIRC Column, op.cit.171.
\item \textsuperscript{152} SEM Contributor, \textit{To what extent are all states really equal under international law?} (2010)
\item \textsuperscript{153} Michelle Maiese, \textit{Human Rights Protection} (2004)
\item \textsuperscript{154} Globalization 101 “The Issue of Sovereignty” (2012) The Levin Institute - The State University of New York
\end{itemize}
3.3 The Interference of Maritime Security Code with IMO Member State’s sovereignty.

Developing States with effective seafarers remain on the right path to ensure that benefits of the internationalisation of trade and the supply of international seafarers are equitably shared.\(^{155}\) However, powerful States with strong allies are seen to have their citizen’s benefit from globalisation and are likely to be most respectful of their human rights.\(^{156}\) Developing States, also in terms of security - are likely to achieve the level of security required for their State through cooperation with powerful States such as the US, the UK and the EU States.\(^{157}\) The defence of State sovereignty by its strongest allies does not include what the other State chooses to do with other people.\(^{158}\)

It has been accepted that sovereignty implies a dual responsibility such as externally to respect the sovereignty of other States and internally to respect the basic human rights of all people.\(^{159}\) Under International Human Rights (IHR) practice and in State practice, sovereignty is understood as embracing total responsibility for, and protection and the well-being of all people’s within a State’s territory.\(^{160}\) Sovereignty as a responsibility has become the model of good international citizenship.

During the Post IMO’s maritime security legislation, the US and the UK exerted pressure on IMO member States to comply with US requirements.\(^{161}\)


\(^{159}\) Christopher J. Bickerton \textit{et al}, \textit{Politics without sovereignty: a critique of contemporary international relations} (University College of London Press, 2007) p.41.


If this was not adhered to, a member State could not trade internationally and would be prevented from entering their ports. This brought a difficult and daunting task to seafarers who have to bear the consequences of US aviation security failures.

The US and the UK requested IMO member States to adhere to their call to control their nations’ seafarers prior to joining ships coming to their ports. Physical invasion of a sovereign State without approval from the UN would be considered as breach of International Law. The US, however, argued that by imposing one’s domestic legislation on another member State is seen as a preventative measure. Breach of a State’s sovereignty cannot be justified in any form in peace time where States are not rising up to stop genocide, or responding to physical invasion and/or interference by a powerful State through the IMO. It is understood that acts of terrorism are not permissible in any civil society, but if one State’s domestic legislation is forced on to the other, it can be construed as a breach of that UN Member State’s sovereignty rights.

3.3.1 State Sovereignty and Human Freedom of Movement.

A powerful State imposing its domestic laws on other sovereign States violates their rights, including seafarers from that State. The US has signed a treaty which is a binding agreement under the UN Charter of Human Rights, which means they cannot force a sovereign State to succumb to its demands without considering the effects on its people, particularly those seafarers who frequent their seaports.

165 The Republic of Nicaragua v The United States of America, ICJ ruled in favour of Nicaragua and against the United States and awarded reparations to Nicaragua. The ICJ held that the U.S. had violated international law.  
168 Ibid.  
169 UN Charter Article 2 (4): “Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”
The perception that powerful States will do as they please without duty of care must be re-examined through the international community. There are numerous international binding treaties in force today guiding most aspects of State behaviour, making it impossible for the US to impose its values directly onto other sovereign States. This by force of the need to trade compels the other States to comply.

After the Second World War, the US took an important role in world politics by promoting human rights as outlined in the UN Charter. Professor Robin S. Mama commented that, for some reason best known only to the US Government, certain Human Rights Conventions are still awaiting US signature. Certain US States promote human rights as if they were synonymous with American values, while others have emphasised the superiority of US values over international standards. In 1998, President Bill Clinton committed to the pursuit of international human rights. To demonstrate this to the world community, he signed an Executive Order on the fiftieth anniversary of the UNDHR.

It shall also be the policy and practice of the US to promote and respect human rights, in our relationships with all countries by working to promote human rights.

Despite the fact that the US has a long tradition in promoting its values in other sovereign States by preaching human rights, the concept of ‘human’ as it applies within the US is rarely discussed. The notion of human rights is almost exclusively focused on other sovereign States. Eric Longley also commented on the delays on the part of the US by not ratifying all human rights treaties.

171 Professor and Dean at School of Social Work, Monmouth University, New Jersey. Since 2001, she has been an appointed representative of the International Federation of Social Workers (IFSW) at the United Nations, New York.
175 Eric Longley is a Guest Editor of Civil War Interactive in Huntingdon, United States
The reason behind Professor Robin Mama’s and Eric Longley’s argument is that the US has not signed the major human rights Convention as one of the primary rights is the right to life due to its capital punishment legislations. Free movement of seafarers are restricted in ports, but under the UN Charter of the International Covenant on Civil and Political Rights (ICCPR), this right is incorporated into treaty law as follows:

- Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- Everyone shall be free to leave any country, including his own.

The above-mentioned rights shall not be subject to any restrictions except those provided by law, and necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. The US isolated itself from most direct effects of these treaties through reservations or by invoking domestic law. This is known as the get-out clause. The author noticed that the US is focusing on section 3 under Article 12 of ICCPR to target seafarers.

The US has an important opportunity to reposition itself as a global campaign leader on human rights for all irrespective of one’s geographical boundary. Their previous involvement in the formation and implementation of international human rights treaties was formidable, and they ratified selected treaties such the CSSTS in 1967 and the CPRW in 1976. Despite these initiatives, however, the US did not ratify any of the major Conventions until 1988 when they approved the

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178 Article 12 International Covenant on Civil and Political Rights.


180 The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.


183 Ibid. p.255.
but they later ratified the ICCPR.\textsuperscript{185} The Senate which has the authority to ratify all treaties were slow to review and approve human rights provisions,\textsuperscript{186} due to the following expressed concerns about the effect of international treaties on US domestic law.\textsuperscript{187}

U.S. ratification of the United Nations (U.N.) Convention on the Rights of the Child (hereafter referred to as CRC or the Convention) may be a key area of focus during the 112th Congress, particularly if the Barack Obama Administration seeks the advice and consent of the Senate. CRC is an international treaty that aims to protect the rights of children worldwide. It defines a child as any human being under the age of 18, and calls on States Parties to take all appropriate measures to ensure that children’s rights are protected—including the right to a name and nationality; freedom of speech and thought; access to healthcare and education; and freedom from exploitation, torture, and abuse. CRC entered into force in September 1990, and has been ratified by 193 countries, making it the most widely ratified human rights treaty in the world. Two countries, the United States and Somalia, have not ratified CRC. The President has not transmitted CRC to the Senate for its advice and consent to ratification.\textsuperscript{188}

The US promotes itself as the world’s foremost proponent of human rights and administrative justice but often objects to scrutiny of its own practices.\textsuperscript{189} The Senate expressed concern that if human rights treaties will conflict with the US Constitution,\textsuperscript{190} then it is not worth ratifying them as stated under Article VI (2) of the United States Constitution as follows

\textit{This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.}\textsuperscript{191}

\begin{thebibliography}{99}
\bibitem{USAC} Ibid.
\bibitem{Putney} Ibid.
\bibitem{Putney91} Albert H. Putney, \textit{United States constitutional history and law} (Buffalo, New York, USA, Fred B. Rothman Publications 2000) p.141.
\end{thebibliography}
According to Professor Frederic Kirgis,\(^{192}\) treaties therefore stand as Federal law, though they are not considered to be law\(^{193}\) if they conflict with the United States Constitution.\(^{194}\) Despite the conflict of ILO Convention \(\text{No}^{.185}\) with the domestic laws of the US, there is a provision in the US Constitution that makes provision for treaty provisions those conflicts with the US Constitution to be referred to congress to legislate on it. Thus, if it is in the interest of the US to consider the welfare of the seafarer, it will refer the treaty to congress.

United States Republican Senators blocked some ratification of human rights treaties\(^{195}\) largely out of concern that the treaties would invalidate racial segregation laws that existed in the US until the 1960s.\(^{196}\) Human rights advocates claimed that these laws violated existing international treaties.\(^{197}\) The US and Palau, countries such as Iran, Nauru, Somalia and Sudan have been taken off the list of the United Nations Treaty Collections as at 12\(^{th}\) March 2012\(^{198}\) because they have failed to comply with the conditions of the treaty. However, the US and Palau, even though they have not ratified the treaty, are still members. Human rights treaties embrace non-discrimination, due process and other core values that most of the world supports.\(^{199}\) The failure of the US to join with other States in taking on international human rights legal obligations has probably resulted in the US being viewed as ineffective State in its stated belief in human values. This brings its credibility into questions in promoting human rights elsewhere whilst seafarers are being suppressed. In the past, the strategy used by colonial masters in order to expand their territory was to invade a State and occupy their land, but

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\(^{192}\) Frederic L. Kirgis is Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia, USA.

\(^{193}\) Reid v Covert, 354 U.S.1, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 [1957].


\(^{196}\) Michael Ignatieff, op.cit.228

\(^{197}\) Ibid


\(^{199}\) Human Rights Watch, op.cit.237
in the twenty first century, this is done through the UN and - for maritime matters-through the IMO.

3.4 Maritime Security and the Seafarer’s Well-being (Human Rights).

The maritime security legislation was imposed upon sovereign States. However the irony of it all is that it was not directed to the industry that first drew attention to the need for such security measures. Paragraph 2, Articles 4 & 7 of the United Nation’s Charter affirms the basic principles of respecting and ensuring equality in other sovereign States.

The Declaration of the World Conference on Human Rights held in Vienna on 25 June 1993 set out that:

_Sovereign States have the right to self-determination and with that right; they are free to decide their own political institutions and pursue their own economic, social and cultural development._

Ex-French President Jacques Chirac acknowledged the above concept by saying that:

_Not one nation, no matter how mighty, dynamic or modern it might be, is allowed to force the whole world to abide by its own laws._\(^{200}\)

The point made by Chirac was a clear indication that by interfering with people in a sovereign State, you tamper with their rights. The US, however, claimed they have to act in this way to defend their country from threat from foreign elements that might have the potential to attack them through maritime transport; and so they are acting in self-defence.\(^{201}\) The US made it known to the international community that the introduction of the maritime security measures must be seen as using ‘reasonable force’\(^{202}\) to enforce its policy on sovereign States. It is important to bear in mind when assessing whether the use of force used was reasonable or not, Lord Morris’s statement in _Palmer v R_ 1971 AC 814:


\(^{201}\) _R v Lindsay_ (2005) AER (D) 349.

\(^{202}\) Section 3 (1) of the English Criminal Law Act 1967 provides that “A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. (_R v Williams (G)_ 78 Cr App R 276), (_R. v Oatbridge_, 94 Cr App R 367).
If there has been an attack so that self-defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken

The fact that an act was considered necessary does not mean that the resulting action was reasonable in $R$ v $Clegg$ 1995 1 AC 482 HL. Where it is alleged that a person acted to defend himself/herself from violence, the extent to which the action taken was necessary will, of course, be integral to the rationality of the force used.

The burden of proof remains with the United States when the issue of self-defence was raised, but they did not adduce sufficient evidence to satisfy the international community beyond reasonable doubt that seafarers are indeed a serious threat to US National Security. The international community has issued declarations on Human Rights that every sovereign State must abide by. Moreover, no State is allowed to impose its own laws on another sovereign State. Powerful States or another sovereign State may use protecting humanity as a pretext to intervene or violate the sovereignty of another State or its citizens in any form.

The US, which stood for the defence of human rights, has started wars to bring justice to sovereign States that did not comply with its values. While defending human rights in other sovereign States, the US is denying the existence and development of seafarers. The reason behind this is that the US goes into others’ States to protect their trade interests, but hides behind the pretext of protecting the rights of people caught in internal conflicts, and is unable to protect the welfare of seafarers entering US ports.

3.5 Maritime Authorities and Seafarers’ Rights.

Maritime Authorities are charged with the responsibility of monitoring, regulating and coordinating activities in the maritime industry. On this note port State control falls under Maritime Authority. The duty of Port State Control (PSC) is to inspect foreign ships for the purpose of verifying that the competency of the Master and officers on board, and the condition of the ship and its equipment comply with the requirements of international Conventions. Port State Control may refuse a seafarer entry into a country, particularly in the U.S., in which case the seafarer is confined to remain on board the arrived ship. Due to stringent entry requirements by the US, UK and EU ports, seafarers holding a passport from a State deemed terrorist-prone region are confined on their ships. They are denied shore leave as seafaring tradition demands after many days at sea. Their nationalities condemn them to be viewed as potential threat to National Security.206 The problem is that the ship is granted permission to enter the port, because the ship does not pose a security risk but individual seafarers are not permitted to disembark from it.207 Granted that it is the sovereign right of each State to permit or prohibit the entry of foreigners into their country. However, the denial of a seafarer’s shore leave after a long period at sea is a violation of their basic human rights and dignity.

All too often, the States who deny seafarers the right to shore leave are the so-called champions of human rights and democracy, but they do not exercise the principles of the UDHR where they are signatories to the Treaty. Even if a seafarer is permitted to leave their ship to visit a hospital for treatment which could not be administered on board, the port authorities - unknown to the seafarer will tag the vehicle with a device to monitor the destination of the vehicle.208 This is unethical and morally degrading according to the US Supreme Court.

David Heindel, ITF Seafarers’ Section Vice Chair, gave evidence to the US Congress in July 2002. He explained that although seafarers were now being treated with suspicion, the flag of convenience system was going ahead unchecked.


3.6 CHAPTER SUMMARY.

State sovereignty guarantees freedom of an individual within an independent State without having to be afraid of another sovereign State threatening your way of life no matter how weak or poor you might be. Sovereignty determines that others will respect your rights and accord you with due respect and consideration when it comes to recognising one’s basic human rights when crossing the border into another sovereign foreign territory without hindrance, so long as internationally recognised documentary procedures have been followed to the letter.

Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination 1966 stipulates the right of everyone, without discrimination of any sort, to have access to any place or service intended for use by the general public. This norm is considered to be self-executing within the national jurisdictions of the parties to the Convention. On the regional level, the right of the individual under Article 25 of the ECHR is another prominent exception to the rule. A closer look into the process of implementation of these rights of the individual reveals that, again, it is the State which is to enforce any decision in favour of the individual. In terms of human rights and humanitarian law, the pre-eminent ethical principle is the unity of all human beings as equally dignified members of one human family, who in turn can, within a framework of unity, develop and take pride in their individuality.

State sovereignty as we have come to understand it is the power of an independent State to rule and make laws. An independent State under the UN can only make laws for themselves, not for others. When international law is decreed, it is up to sovereign States to decide if they want the law to become part of their domestic law after deliberation at the General Assembly, but not imposing it on sovereign States as an obligation. Powerful States must not force weaker States to accept their values through coercion.
In the war on terror waged by the US and UK, State sovereignty provides less protection for human rights. Although the UDHR forms many countries’ Bills of Rights enacted within domestic law, it is the State sovereignty which provides the means for a State to do this. However, recent trends in multi-lateral intervention suggest that the basic rights of individuals no longer fall under the exclusive jurisdiction of the State.

War on terror has eroded State sovereignty at the hands of powerful States such as the US and the UK which are attempting to force their values on the weaker States due to their significant role in international relations defined by their strong economies and military power. In as much as the norms of human rights have become a part of the international institutional structure, and if strict adherence to human rights norms has served to divide Eastern Asia States and Western States rather than unite them, then the powerful States must not impose their values on sovereign States, but instead are obliged to respect them.
CHAPTER FOUR

ETHICS AND THE ROLE OF THE STATE IN PROTECTING HUMAN RIGHTS.

4.1 Introduction.

The underpinning philosophy of this study is that people must be treated as individual human beings, and must not be subjugated to the country they originated from. Human reasoning philosophers have differing opinions on the actions which must be taken against a person who does not fall in line with good practice and accurate reasoning to the benefit of society, by not harming any individual human being. Some philosophers too are of the opinion that tougher action against minorities who are deemed as trouble makers will bring peace, safety, and security to the majority of people who are seen as non-trouble makers, so it is good to isolate those who do not fall in line with good practice in society.

Before isolating such people, though, they need to be branded in order for society to identify them as trouble makers even though there is not yet any justification to that effect. In this case the powerful need to justify what they see as a threat for a cause for action. Some philosophers also hold the opinion that people who are deemed as trouble makers are natural people, and must be treated as human beings irrespective of where they come from or what they do. This is because the right of a person is commonly understood as inalienable fundamental rights to which that person is inherently entitled due to the fact that he or she is a human being.

Since the author was brought up through Christian faith as a child, the philosophical view of human freedom and rights will make some reference to the principles of the Bible, from which some philosophers also derived their principles and theory of reasoning.
The basic principles in the Bible such as ‘love your neighbour as yourself’, and ‘do unto others as you want them to do unto you’, have been embraced indirectly by numerous philosophers whose aims are based on human freedom and the rights of a person as an individual human being. On this note, the author took the approach of Immanuel Kant’s principles and theories to justify why the US and the UK must treat seafarers as human beings and not as fundamentally ‘bad’ people.

4.2 What is Ethics?

Here are two examples that can help to define ethics.

Firstly, ethics refers to a standard against which a person can choose to differentiate what is wrong from right and choose to do right, that prescribes to what human beings ought to do. These are usually to determine a person’s rights, obligations, and benefits to society, fairness, and good virtues. It refers to human instincts that prompt our senses to refrain from harming another human being or the reasonable obligations to refrain from coveting another person’s property, by stealing, by murder, assault, or fraud. Ethical standards can also be construed as virtues of honesty, compassion, and loyalty to a fellow human being, and ethical standards are also a component of the overall standards concerning human rights; for example the right to life by supporting and sustaining a person’s well-being and the right to privacy. These ethical standards are sufficient natural guidelines that are supported by well-founded good reasons.

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Secondly, ethics also mean the study of the understanding of the development of another person’s level of ethical standards. Human feelings and emotions, man-made laws, and social virtues as previously explained can cause a person to divert from exercising his ethical reasoning. So it is important that from time to time one examines and exercises the best ethical standard to ensure that we as human beings are reasonable and well-founded in our actions and behaviours.

4.2.1 Definition of Ethics.

There is a difficulty in defining the word ethics. Due to different interpretations of how ethics must be applied, some people tend to equate ethics with human feelings: but for a person to be ethical in their decision making, it must not corrupt their feelings or emotions. People following their emotions may turn away from commencing what is right because emotions or feelings deviate from what is ethical. Being ethical is also not the same as obeying set-down regulations or legislation. Due to the consequences for not following laws, ethical standards have been incorporated into law when dealing with people who have broken the law. However, legislations, just like emotions can deviate from what is ethical.

For a person to be ethical, this does not translate exactly as doing what people or society accepts. The issue of denial of shore leave has not been accepted by some part of the global community but it represent a fair way of tackling terrorism. In most human societies, people accept ethical standards that represent true facts or

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221 Ibid.
223 J. S. H. Gildenhuys, op. cit.259.
reality, but standards of behaviour in society can change from what must represent true ethics. With non-accurate information and reasoning, an entire community can become ethically corrupt. In the twenty first century where people in a particular faith group glorify terrorism by killing innocent people, this is a good example of a morally corrupt society that humanity has to deal with. If being ethical is doing whatever society accepts, then for a person to understand what is ethical, he would have to look out for what the human community agrees on or accepts about things which do not in fact exist in human society.  

4.2.2 Ethical Decision Making

The reason that a person should exercise integrity is the same reason that he or she needs to adhere to rational principles. Irrational action works against the life of that person. Only non-contradictory loyalty principles that honesty prescribes allows a person to reap the rewards of the other virtues and to achieve great values. Breaches of honesty defeat a person's purpose in his or her pursuit of happiness. The following paragraphs define and explain the purpose for a sovereign State to make ethical decisions which are going to affect another person's freedom and well-being during times of crisis or war.

In times of war, every leader of a State faces great ethical decisions regarding either to respect human rights of a person and forgo war, or to create a State of exception and to go against the right of every natural person.

4.3 Kantianism, the Philosophy of Immanuel Kant.

Kantianism is a philosophy of ethics that believes that people should be treated as an end and never as a mere means to an end. In other words, it is unethical to use people for your own personal gain because people are valuable in

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226 Ibid.
Kantianism is a non-consequentialist theory meaning the act itself is more important than the outcome of that act. Just as a medical doctor owes duty of care to an injured patient, even if he was a murderer, the fact that the injured person is a human being, he would be given the necessary care to save his life for the sake of saving human life and no other reason.

The author chose Immanuel Kant’s principles because Kant believed that it is the individual’s happiness that affects others’ well-being, unlike the nineteenth century sociologists, Jeremy Bentham and John Stuart Mill, who believed in what will benefit the majority without considering individual cases within that majority. The author supports Kant’s approach in the case of seafarers, who must be treated as individuals, not as faceless members of a group or groups that come from one geographical region or a terrorist-prone region.

Immanuel Kant did not only examine the idea of human rights outside politics but also within politics in such a way that it is only a government that reasons on humanity that guarantees an individual natural right to freedom, and from this freedom an individual derives other rights. He made it known in his three basic principles as righteous law in the following:

- The liberty of every member of the society as a man
- The equality of every member of the society with every other, as a subject
- The independence of every member of the commonwealth as a citizen

Kant argued that people can only perform politically in relation to the State if fundamental human rights, laws and entitlements are given to people; that is, enhanced by the State to an individual. Kant’s three basic human rights principles are that they are not set by a State, but are fundamental in the creation

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and acceptance of a nation-State by individuals of the State. These principles are necessary above all, not only for the founding of ‘righteous laws’, but for a nation to exist and function in the first place. This is so because without the acceptance of individuals, a State would not exist—therefore rights are necessary within States to retain the support of individual human beings.

The first principle under which righteous laws are founded is based upon the idea of the liberty of individuals. The liberty of individuals is important because a State is not permitted to dictate the lives of individuals under freedom of movement. If it did, it would take on the role of a paternal government. It is believed that Immanuel Kant would therefore have been happy if the liberty of individuals can only occur within a government because there will be a designated place for individuals to exercise their basic human rights.

The equality of every individual in a civil society is the second rational principle under which rights are created. Each and every one needs to have the same basic rights within a State so that laws can be evaluated and applied in the same and equal manner for everyone. Equality therefore is the basis from which rights for every human being originate.

The final basic principle which Immanuel Kant uses to explain the emergence of rights within a State is that of independence of every member as a citizen. Rights developed from this principle because it is up to the individual to act independently if a right or law should be practiced. If a member of society cannot act in an independent way without the guidance of a State, there would be no need for rights. Presidents and Prime Ministers would be in a position to determine everything for an individual, and a person would not see the need to question or want to practice his rights because the State appears to be right. Independence causes the formation of rights within the political context. This way, governments also have the power to grant rights to individuals which correspond with the nature of the State. The role of freedom within a State is the foundation on which Kant’s principles are based.

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The author has referred to the opinions of selected philosophers such as Aristotle, Plato, Hugo Grotius, Jeremy Bentham, John Austin, Stuart Mills, Martha Nussbaum, Raymond Aron, and Immanuel Kant in this thesis. This is because all these philosophers believed that rights may exist as natural rights or as legal rights, in both national and international law, but their doctrine in the approach to human rights provokes considerable scepticism and debate about the justifications of human rights. Research on seafarers’ rights in the fight against terrorism through war on terror principles may present itself as if it does not favour the approach of some of the above philosophers such as Immanuel Kant. However, in Kantian ethics, there is always moral conflict in the individual and that is what is called conscience. The conscience makes human beings to have a choice to choose form one thing and another. Moral principles are obligations. It limits the individual freedom and that is what compels State leaders to have as their fundamental duties to protect the lives of its citizen in ways that are enshrined in their Constitution.

This research is grounded in the Immanuel Kant’s philosophy, which says every human being must be treated as an individual, because a seafarer is a natural person who reasons and understands the shipping environment he/she works in. Seafarers follow protocols on moral and ethical grounds and exercise duty of care for the cargo they carry to foreign ports. Due to this they understand what is needed to be done to protect the environment when transporting chemical products or crude oil and other hazardous cargos based on the demands of other people.

To be a competent and certify seafarer, however, a person must attend a recognised maritime academy to receive training and certification of competency. This is done through rigorous examinations that give them the right to choose a company they want to work for. They are not forced to select a particular company, unless they were sponsored by a shipping company prior to their training, for which and for that matter they have to work for the sponsored company. From the beginning of their career, they are free people with choices and can decide what they want for themselves; either to pursue their career by undergoing further certified training or to forgo it.
In the case of those who attain a high standard of competency in their field, their career may be restricted simply because a powerful State tends to accept the profession of seafaring while ignoring the person who holds the certificate of competency.

The seafarer’s certificate, as a printed document on its own cannot function without a natural person- a human being, and so a powerful State has chosen to limit the person who holds the certificate movement simply because the certificate attests to the person’s ability and understanding to work the ship, but not to his state of mind. Since the mind of another human being cannot be read by facial expression, the powerful States have decided to control seafarers with legislations. Thus it comes to mind that, although seafarers expressed the freedom of right to attend certified maritime academies of their own free will to achieve a certificate of competency, they must also have the right of freedom to access welfare support in any port.

4.4 The Philosophy of Cosmopolitanism

The author explored Philosophy of cosmopolitanism with specific reference to Martha Nussbaum’s version of cosmopolitanism and evaluates its potential to reduce the growing global discord we currently confront and also influence political decision making. The underpinning principles of cosmopolitanism through the thesis was based on Nussbaum’s cosmopolitanism which the research adopted to evaluate the action of the US post 11/9 and UK 7/7 as they are one of the few States that embraced liberal education. The advocators of cosmopolitanism are of the view that a cosmopolitan citizen will be able to delve into world issues concerning foreign traditions and cultures without prejudice. As in the issue of the actions of the US and the UK decisions to deny shore leave to some particular group they suspected to be threat to their National Security based on their State.
4.4.1 The Global issue of concern

During the present period of rapid economic globalization and widespread international conflicts, there are obvious and compelling reasons to enhance understanding and cooperation among individuals from different cultures and regions of the world. If there is mutual cooperation and understanding, it will erase unnecessary suspicion because of one’s region or religious affiliation. The effort of trying to unite the world started long ago known as globalisation. As the world has come together to become a global village, then there should be individual who think on the lines of global peace. Globalization arises out of centuries-long process that has resulted in the formation of some world bodies like the UN, and institutions such as the International Criminal Court (ICC), the International Monetary Fund (IMF), World Bank (WB), IMO and the ILO.

There have been promises of improved global relations because it is easy for all States to come under one roof to enact laws that will benefit the world at large. Despite these step ahead, there are still wars the globe. There is the need again to create another platform to attain peace. It has become necessary to strive towards universality in morality and ethics. The reason is that, all misunderstandings stems from differences in moral and ethical standard. This idea of universal morality had dawn on early philosophers who addressed it from various points of views which was commonly referred to as cosmopolitanism. That is the creation or production of a world citizen to be referred to as a cosmopolitan.238

The promise of creating a cosmopolitan or global citizen was to reduce conflict. It is believed that all human ethnic groups belong to a single community based on a shared morality. A person who shares the ideal of a universal morality and the idea that we all belong to a single community as was proposed by the philosophers is called a cosmopolitan or cosmopolite.239

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A cosmopolitan community might be based on an inclusive morality, a shared economic relationship, or a political structure that encompasses different nations. In a cosmopolitan community there will not be an Arab or an Indian, African or Chinese. All individuals from different places form a relationship of mutual respect and as seen as one people with one set of universal morality. With universality in morals and ethics, the issue of misunderstanding among nations will be minimised.

The US has its own political values which is different from other States. The Middle East and Africa have their own values as well. The US and the UK are of the view that certain sovereign States have been infringing on the right and freedom of their citizens and needs intervention. This has led to the stationing of troops in over seventy countries. In Nussbaum’s view, if all citizens embrace liberal education, these and other misunderstanding will cease or decrease.

4.5 Philosophy of Natural Law and Human Rights.

Hugo Grotius was very particular about the importance of Natural Law. His point can be understood because, to him, natural law is the dictate of right reason. This is what is important to human rational and social nature. It is the order of rights and responsibilities that makes us as human beings to reason and live together in society. It is natural law that is just law. People elected into politics would govern human rational efforts to make a just human society. Those ones would call ‘Nation-States’ must respect and observe the natural rights of people, known as human rights. The rights of a person must be respected irrespective of the individual inclinations of Nation-States.

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241 Ibid
244 Article 1 of Charter of Fundamental Rights of the European Union (2000/C 364/01)
Hugo Grotius understood human reason as a tool which is applicable to human nature, and as an individual with equal opportunity with common human dignity that transcends the ever-changing limits of State borders. This binds people together and beyond all the boundaries of nationality, race and religion.245

4.6 The Role of the State in Upholding Human Rights.

The maritime business of the twenty first century is marked by overwhelming inequalities within world political and financial powers, and each State wants the best for its citizens in the maritime industry. Each State is using its powers to fight for good working conditions and remunerations for its citizens. In the context of this thesis, the State here refers to the flag State. The reason being that, when seafarers board a ship, they assume different citizenship altogether, they become citizens of the State of the ship. When a ship is registered in a particular State, the ship and its owner become subject to the laws of that State. Ship registration renders the ship an extension of national territory while at sea and it also qualifies for its protection. Since the ship operates under the laws of the flag State it is the legal responsibility of the flag State to protect the rights and welfare of seafarers. John Richardson, writing on the Human rights in business program said the first duty of the State is to protect its citizens against human rights abuse by third parties including business enterprise through appropriate policies, regulations and adjudication.

The State of the seafarer is the flag State, the State or nationality of his ship on which he works, and the first duty of the flag State is to protect its citizens against human rights abuse. What ought to have been done by the flag State was to have gone through the treaty to find out the consequences of what they were about to sign.

The US already knew about the consequences of the treaty and it was the duty of the member States to have addressed the part of the treaty that was supposed to pose a problem. Since the first inception, the treaty was vague and this allows for each State to interpret it the way it suitably fit. This is what has given the US Coast Guard the liberty to treat seafarers the way they see fit. In such an issue, it

can be said that the member States did not perform their first duty to protect its citizens against human right abuse. They have shed their first and foremost rights accorded to a State under international law which implies responsibilities. It has left it citizens to be exploited by another State because in the passing of the maritime security legislation, an extra duty which does not attract extra remuneration has been added to the seafarer’s job making the seafaring job a stressful work. Seafarers are now required to take up security duties in addition to their regular duties.

The action on the part of the US shows clearly that they have projected their domestic laws to become international law and in doing that did not consider the sovereignty of other States. The US has projected its image as the world police. This projection has led to an undue influence on sovereign States. It is this influence that made it possible for it to impose its values and domestic maritime laws on other IMO member States. Now that sovereign States have been influenced through the IMO to sign a treaty that has affected the rights and welfare of its citizens, the seafarers, they have another role to play and that is to redress the issue through the ILO for seafarers to be allowed to disembark in US ports with the Seafarer Identity Cards (SID).

4.7 Flag States and their Responsibility

A flag State is a State of registry of a seagoing ship.246 When a ship is registered in a particular State, the ship and its owner become subject to the laws of that State.247 A seagoing ship is subject to the maritime regulations in respect of manning of seafarers, safety standards and consular representation abroad.248

The concept of jurisdiction refers to the power of a State to prescribe and enforce regulatory within its territory.249 Some States also claim jurisdiction over activities

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outside their territory which affect their territory. \textsuperscript{250} States can also claim jurisdiction based upon the nationality principle by extending jurisdiction over their nationals even when they are outside the territory, \textsuperscript{251} and ships are no exception. The fundamental reason for adopting a flag is to benefit from the protection of the flag State. Under international law, the laws of a flag State apply to a ship regardless of the location of the ship. \textsuperscript{252} Therefore, the seafarer is entitled to the protection and laws that are governed by the laws of the flag State, regardless of the nationality of the seafarer. \textsuperscript{253}

The general principle of jurisdiction in this area is that ships are subject to the jurisdiction of the flag State, and cannot be boarded without the State’s express consent. \textsuperscript{254} A ship has the nationality of the flag that it flies and it is therefore evident that ships, like human beings, have a nationality. \textsuperscript{255} The flag State has the authority and responsibility to enforce regulations over ships registered under its flag, \textsuperscript{256} including those relating to inspection, and issuance of safety certificates. \textsuperscript{257} The ship operates under the laws of the flag State and these laws are used if the ship is involved in an admiralty case. \textsuperscript{258} The legal responsibility of the flag State is to protect the rights and welfare of seafarers when a ship is detained in a foreign


\textsuperscript{253} Martin Stopford, op. cit.,295, p.435

\textsuperscript{254} Ibid., p.56-57.

\textsuperscript{255} Deirdre Fitzpatrick \textit{et al}, op. cit., 294, p. 133.

\textsuperscript{256} John N.K. Mansell op. cit., 300 p.60-61

\textsuperscript{257} Ibid., p.435 .

port. According to Deirdre Fitzpatrick, however, flag States in some cases do not act to protect seafarers' well-being.

For there to be a flag to be flown on a ship for protection, there must exist a sovereign State who has all powers to do so. First and foremost, the rights accorded to States under international law imply responsibilities. States are liable for breaches of their obligations, provided that the breach is attributable to the State itself. A State is responsible for direct violations of international law, e.g., the breach of a treaty or the violation of another State's territory.

Also, the flag state is liable for breaches committed by its internal institutions. However, these breaches are defined by its domestic law, by entities and persons exercising governmental authority; and by persons acting under the direction or control of the State. These responsibilities exist even if the organ or entity exceeded its authority. Further, the State is internationally responsible for the private activities of persons to the extent that they are subsequently adopted by the State. A State must make full reparation for any injury caused by an illegal act for which it is internationally responsible. Reparation consists of restitution of the original situation if possible, compensation where this is not possible, or satisfaction through acknowledgment of, and/or apology for, the breach if neither of the above is possible.

Another responsibility of a flag state has to do with taking up the claims of individuals injured because of the acts or omissions of another State. In such circumstances, the injured persons must have exhausted all domestic remedies to hold the State responsible unless these are ineffective. Further, the injured person must be a national of the State adopting the claim. Although States alone possess the right to grant nationality, if the claim is pleaded against another State, the grant of nationality must conform to the requirements of international law and, in particular, demonstrate the existence of a genuine link between the individual and the State concerned.


4.8 Ethics and Morals in Political Theories

The legal or jurisprudential theory underpinning this thesis is a form of legal positivism. Consequently an analytical separation is maintained between law and morals, thus what the law is and what the law ought to be.\textsuperscript{261} One may ask a question about what the law actually is. The law can be defined as the rights, duties, liabilities and powers established under international treaties, domestic legislation and the precedents established by the decisions of judges.\textsuperscript{262}

A strict view that there is no connection between law and morals is overly simplistic because the law is a normative system constructed by society to control human behaviour. This is because it concerns rules or norms that prescribe a course of conduct over what ought to happen as opposed to statements or propositions of fact or physical laws that state casual connections that can be proven to be true or false.\textsuperscript{263} Normative usages include not only laws, but also commands, exhortations, moral, ethical or religious codes or rules of conduct. As a normative system, what the law ought to be undoubtedly influences what the law is because society generally constructs the law to reflect its morals, ethics and values.\textsuperscript{264}

There are different applications of ethical issues by legal regulations that govern behaviours. However, ethical norms happen to expand more informally than laws. Enforcement by legal means is seen as accurate and acceptable by moral standards, and ethical, but one should not mistake ethical and legal rules as having similar concepts, because ethics and law are not the same.\textsuperscript{265} An action may be legal but unethical, or illegal but ethical.\textsuperscript{266} The concept and principles of criticism are always based on moral and ethical issues. Resnik (2011) argued that there have been various ways of acquiring knowledge about morals and ethics, including

\textsuperscript{261} David Dyzenhaus et al, Law and Morality: Readings in Legal Philosophy 3\textsuperscript{rd} ed. (Canada, University of Toronto Press Incorporated, 2007) p.68
\textsuperscript{263} Werner F. Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa 2\textsuperscript{nd} ed. (Cambridge, UK. Cambridge University Press, 2006) p.176.
through parents, faith organisations, academia, employments and other social settings.\textsuperscript{267}

Moral development occurs throughout life; human beings pass through different stages of growth as maturity sets in, and ethical norms seeming to be everywhere at the same time to a point that a person may regard it as simple common-sense.\textsuperscript{268}

4.8.1 United States Principles of Ethics and Morals

The United States believed that not only should their foreign policy institutions be structured and functioned so as to reflect liberal values, but that its foreign policy should also be directed to the promotion of liberal values in the international community.\textsuperscript{269} The US and UK and other IMO member States have their interests defined in terms of power, wealth and security, some of which are sufficiently enduring to be thought of as permanent.\textsuperscript{270}

It is based on this definition of their interest that made them to use their domestic policy as foreign policy to promote their values overseas and this raises doubtful questions about intentions behind those values and policies.\textsuperscript{271} There is a difference between political pressures to make the United States’ political practices conform to their values, and action to make other sovereign States conform to their values.\textsuperscript{272} The question asked by the author is that, can the US genuinely attempt to minimise the difference between their institutions, their values and other sovereign States institutions?\textsuperscript{273} The answer to this is probably not self-evident. Response to the above can be categorised in that it is morally

\textsuperscript{268} Christopher Bennett, \textit{What is this thing called Ethics?} (USA. Routledge Publishers, 2010) p.69.
\textsuperscript{270} Jutta Weldes, \textit{Constructing National Interests: The United States and the Cuban Missile Crisis} (Minneapolis, USA., University of Minnesota Press, 1999) p. 5.
\textsuperscript{273} Ibid.
wrong for the US to attempt to modify institutions of other sovereign States. It is true that States must reflect the values and behaviour of their citizens. To intrude from outside into other sovereign States can be construed as either imperialism or colonialism, each of which also violates ethics and moral values of any person.

It is probably difficult for the US to influence directly the institutional development of other sovereign States without influencing the international body concerned, such as the IMO. Any effort to exert influence directly to shape the domestic institutions of any member State will surely irritate and antagonise other IMO member States. It will also complicate and endanger the developments of other important foreign policy aims. For the US to influence the political development of other IMO member States, it would require military power and economic resources which would probably pose difficulties to their internal governance. Where the response is positive, it can be justified on the following basis that, if other sovereign State institutions pose direct threats to the viability of US institutions and values on their land, then the US effort to respond would be justifiable in terms of self-defence. The efforts by the US to make other sovereign States conform to their values would probably be justified based on their political, military and economic influences forces the rest of the world to support their values.

279 Samuel P. Huntington, op.cit.353, p.243
Belief in the international validity of US values obviously strengthens and projects those hypocritical elements of their long-standing tradition that reflects their role as the sole Saviour State of the world, and leads it to attempt to impose its values and domestic legislation\(^{284}\) on other IMO Member States.

International Relations Theory generally assumes absolute sovereignty of a State.\(^{285}\) However, UNSCR 1373 was a mandatory order with no time limit, and it is not confined to a particular conflict but rather aimed at an undefined threat of global terrorism.\(^{286}\) The importance of maintaining strong respect for human rights while ensuring national security was missing in the signals sent by the UN after 11/9 in UNSCR 1373.\(^{287}\)

The chair of the UN Counter Terrorism Committee explicitly acknowledged that monitoring compliance with international human rights law was not within the Committee’s mandate.\(^{288}\) The UN failed to operate as a force for good governance at a moment when its influence was particularly potent and as to the extent of the damage to domestic laws and human rights protection that resulted from that failure.\(^{289}\) Political responses that defined the counter-terrorism post-9/11 and which arrived at a more consensus-driven approach to the problem of political violence over the longer term should avoid counter-productive rights violation.\(^{290}\)

However, it could be implied that States that do not have the economy of scale to combat terrorism are failing to implement counter-terrorism measures.\(^{291}\) These countries are seen by the US as States who have lost their right to sovereignty in

\(^{284}\) Ibid., p.245

\(^{285}\) Joel Krieger, op.cit.366, p.410


\(^{289}\) OSCE ODIHR, op. cit.378


both the internal and international senses.\textsuperscript{292} States are compelled to protect international peace and security, which terrorism seeks to disrupt.\textsuperscript{293} There must be a balance between duty of a State to their citizens and the duty to visitors\textsuperscript{294} (foreigners).

When we take a closer look at the quality of a global citizen whose allegiance should be to the world community, we see from the example of the US who has pioneered liberal education that it will not be an easy task to produce a person whose allegiance will first be to the world community. It is one thing to be objective in your judgement and another thing to put your nation’s interest second. The 9/11 bombing affected the US directly although some nations may suffer losses so in taking decisions concerning it, the US will have some prejudice against terrorist and people suspected to be terrorist.

In critical stages like the 9/11 issue, patriotism is what reigns because the nation will have to come together to look at the way forward, and US leaders being human and having their primary allegiance to their nation saw it right to blame individuals who saw something wrong with their foreign policies. In an issue in the City University of New York, the chancellor and trustees condemned a faculty member for identifying the foreign policy of the US as the contributing factor for the terrorist. It will be difficult if not impossible to have allegiance to the world without first looking back to your nation as Kwame Anthony Appiah declared herein,

\textit{Cosmopolitanism and patriotism are not incompatible ideas because they are not mutually exclusive or antithetical concepts. Rather, cosmopolitanism, as Nussbaum describes it, celebrates autonomy and democracy, and must therefore respect the right of others.}

The US took measures which will bring the overall good to their citizen. The US and UK advocated the need for a new maritime security legislation at the ILO conference. It was then decided that seafarers should hold a universally accepted

\footnotesize{\textsuperscript{292} Hent Kalmo and Quentin Skinner “Sovereignty in Fragments: The Past, Present and Future of a Contested Concept” (Cambridge, UK: Cambridge University Press, 2010) p.151
\textsuperscript{293} Praven Yogi “Human Rights and Equal Opportunities” (Delhi, India: Isha Books Publishers, 2006) p.85
\textsuperscript{294} Eva Brems “Human Rights: Universality and Diversity” (The Hague, the Netherlands: Kluwer Law International, 2001) p.77}
Seafarer Identity Document (SID). The purpose was to identify each seafarer for the purpose of shore leave on foreign territories. When it came to the practical aspect of allowing seafarer shore leave at US port, they were denied on the basis that it does not replace a travelling document. So being well equipped to discuss global issues is different from being able to doubt and put the happiness of humanity first or having primary allegiance to the human community.

The US Government strategically did not permit other sovereign member States to debate or suggest any further development on how to word the Code so that it would not infringe on the rights of seafarers. If the US had made their intentions clearer, member States would have worked on their own domestic legislation together with seafarers’ representatives, port authorities, manning agents and shipping companies without incurring huge expenses in implementing the new maritime legislation.

Even the right of access to ships by seafarers’ trade unions or welfare representatives are being denied by the USCG officials.295 The security legislation sets out a broad range of requirements intended to improve maritime security, including the implementation of ship, port infrastructures and port security plans.296 However, the USCG interpretation of the Code seems different from how it is meant to be understood by member States. This is because the security legislation is being used to monitor and control the movements of seafarers and the cargo their ship is carrying without exercising reasonable care on the physiological and mental injuries that may arise.297 This brings to mind Lord Atkin’s judgement of taking care of your neighbour that:

Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.298

295 Douglas B. Stevenson, op.cit.276
<www.fswg.org/.../documentdownload.aspx?documentid=15...1> accessed 12 October 2010
297 Donoghue v Stevenson [1932] AC 562
298 Ariel Wagner-Parker “Who is my neighbour” (undated) In the air
<http://www.guywagner.net/pdf/air02-04.pdf> accessed on 4 June 2012
4.9 Application of Bentham’s, Mill’s and Kant’s Ethical and Moral Philosophy on the War on Terror

According to Alice Walla\textsuperscript{299}, human rights violations differ from other violations because of the systematic form of oppression they generate. Since human rights violations are functionally embedded in social structures themselves, they may have an official character, thus they are often legally endorsed, by way such as in the US Congress report on the potential danger posed by seafarers.\textsuperscript{300} Human rights, then, should protect seafarers primarily against a powerful collective when human rights can no longer be conciliated with the rights of individuals.\textsuperscript{301} Immanuel Kant argued that the understanding of one’s freedom is to do as one chooses as long as it does not interfere with the liberty of another natural person, and is the only innate right of a human being.\textsuperscript{302}

People working in US Government departments are natural persons with reasoning ability to differentiate between what is morally right or wrong. The US approaches to seafarers’ problems are typically rooted in Bentham’s utilitarian ethics where it is understood that by stopping every foreign seafarer they consider as a potential threat to national Security will be of the greater overall good to their citizens. Punishing criminals is an effective way of deterring crime\textsuperscript{303}, but the war on terror is not based on fighting with physical enemies, as previously noted. Bentham’s approach to achieve the greater good for the greatest number would not be possible. If war on terror were to be a physical battle, then the achievement of greater good could be probably ascertained when compared to the utilitarian approach taken by former US presidents such as Abraham Lincoln and Harry S. Truman.

\textsuperscript{300} Alice Walla “When —the strictest right is the greatest wrong!; Kant on Fairness” (undated.) < www.uni-graz.at/phth1/www_kant_on_fairness.pdf > accessed 7 November 2011
\textsuperscript{301} Ibid
\textsuperscript{302} Ibid
Ex-US President George W. Bush Jnr’s decisions on fighting terrorism have had to face one of the greatest ethical questions of great importance. Ethical decisions taken by former US presidents have been proved by history’s evaluation of their actions as to whether or not their ethical decisions during crisis or time of war were successful. This was often based on the way in which the president approached moral dilemmas.  

Ex-US President George Bush Jnr and the UK’s Prime Minister Tony Blair’s utilitarian principles were based on John Stuart Mill’s theory by claiming that actions taken in the war on terror were right to the degree that they tend to promote the greatest good for the greatest number of their American and British citizens. When we cast our mind back in history to two former Ex-US presidents, Abraham Lincoln and Harry Truman, both men exercised and applied the theories of Jeremy Bentham and John Stuart Mills; however the President who embraced and applied Immanuel Kant’s theory was Abraham Lincoln. Abraham Lincoln (Kantianism) and Harry S. Truman (Benthamism) applied ethical reasoning in their presidential decisions taken under their democratic governance in making significant judgements and taking particular actions.  

Arguably, though, the US and the UK may have forgotten that utilitarianism failed in its attempt to calculate the amount of pleasure and pain it sends across the world of the seafarers’ community. With ethics, each person must use their intelligence to determine what is morally right, since a person’s foremost characteristic is to reason. The moment a politician or the leader of a State takes the right ethical position or determines by reason, the more ‘individual’ he or she becomes and it is then his or her duty to act ethically on the basis of what he or she has concluded rationally. The other proposition is for a person to tell or to speak the truth. This should have been the primary duty of the US Government - to advise IMO member States of their intentions concerning the new maritime security legislation.  

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305 Ibid

306 Ibid
The US should have judged their actions as if their behaviour were a model for all humanity. This is a direct opposite of the US Congressional Report on seafarers that was prepared for the President.

It is true that democratically-elected Presidents or Prime Ministers have a duty to deliver to their nation what is good for their citizens, hence the applications of either Bentham’s or Mill’s utilitarianism approach or Kant’s theory of pure reasoning. That is, Presidents or Prime Ministers are obliged to develop a mechanism to achieve the greater good of life and happiness for their citizens. By so doing, however, the Presidents and Prime Ministers engage in actions whereby positive outcomes for their State outweigh the negative consequences of a terror threat. However, in a democratic State such as the US or the UK, seafarers need to be seen as ends in themselves and not as tools to be used only when they are needed to serve the flag State or the ship-owner to transport cargo, and in the end they have no right to welfare to the benefit of their well-being.

One would expect Abraham Lincoln’s ethical principles to be based on Bentham’s utilitarianism, as he was elected democratically as President of the US, but the author established that his ethical and moral principles were more of Immanuel Kant’s theory of pure reasoning. Because Lincoln believed in the principles of “Do unto others (individuals) as you would have them do to you”. He continued to say that: ‘As I would not be a slave, so I would not be a master’, and here history tells us that Abraham Lincoln was talking as an individual, based on Kantianism which could be translated into the lives of seafarers as individual human beings, and they must not be used to serve a particular purpose or be controlled by legislation to satisfy the ends of other politicians.

The author noted that Abraham Lincoln’s approach to human reasoning would have seen that the new maritime legislation negative consequences outweighed any positive production by seafarers. Kant’s theory of reasoning was seen in Abraham Lincoln’s view and understanding of human ethics and morals by applying it in his governance. When Lincoln assumed office as US president he struggled with the US

Constitution over the fact that, at his inauguration in 1861, slave trade was a legal and normal business under the US Constitution. Yet he has taken a constitutional oath to uphold and defend the US even in its human trade. So any attempt to stop the human trade would have been a breach of oath he took when he took office. However, to resolve his ethical dilemma over the slave trade, he issued the Emancipation Proclamation in 1863 which saw amendment to the US Constitution which would abolish slave trade in the United States.

Harry S. Truman did not apply Kant’s theory of pure reasoning during the Second World War; his Benthamism utilitarian ethics saw him possibly as one of the greatest presidents that ever lived, when he was faced with the greatest ethical dilemma of his presidency; to end the war with Japan by using extreme force, which achieved the greater good for the United States. Some States praised him for bringing the war to an early end with minimal loss of lives in the US, but on the other hand others condemned him for using extreme force on other human beings without having to reason on the aftermath.

So in the context of the new maritime security legislation, the author can see it from the perspective of Bentham’s theory which is simply the tendency to augment or diminish happiness for seafarers. John Stuart Mills who always leaned to the side of Bentham decided to position himself between his mentor (Bentham) and Immanuel Kant by saying that there must be a balance in how one applies ethics in a difficult situation because not all pleasures were equally worthy. However, Kantianism seem to fully support the seafarers’ plight; that is to say, their human rights must be the centre stage of what Mill would define as ‘the greater good’ in terms of seafarers’ well-being, and must distinguish not just quantitatively but also qualitatively between various forms of happiness or well-being.

308 Eileen E. Morrison “Ethics in Health Administration: A Practical Approach for Decision Makers” (USA: Jones and Bartlett Publishers, 2009) p.25
Seafarers are now been asked to perform duties relating to security, a job which requires a trained professional on security matters. Seafarers can be trained to raise an alarm should they spot a threat but if they are the ones being targeted as the culprit or would-be terrorist, the real results of the war on terror would be difficult to achieve. This is because the US and the UK are not fighting against guns and other visible objects, but are fighting subjects which they cannot see.

Threats, fear, intimidation and criminalisation of seafarers is demoralising and having a negative impact on aspirant future seafarers or maritime enthusiasts to take up the seafaring profession. As a result, this profession may eventually diminish because of the loss of interest in taking up seafaring due to the negative and restrictive attitudes of the US and the UK to this group. However, a statement issued by the former EU Vice President of the Commission for Transport and Energy (CTE), the late Mrs Loyola de PALACIO, by saying that the current geopolitical climate requires an urgent and effective implementation in Europe of what has been agreed at world level to ensure highest possible levels of security for seamen is contrary to the treatment meted on seafarers.

4.10 CHAPTER SUMMARY

An overview of the philosophical views of Nussbaum and Immanuel Kant put side by side, it becomes clear that, their views appear to be towards the same outcome. Nussbaum believed in having a universal morality and our actions and reasoning should be made with humanity and global concern, whereas Kant regarded human philosophy as an essential element when dealing with people from different cultures and traditions. Human beings are different in their views and this poses some difficulties, but held that a diplomatic, convincing approach would bring about positive social change.
The philosophical underpinning of this thesis was based on how the actions of a human being’s reasoning affect the other person. However, to determine how our actions affect the other person, one needs to reason philosophically on how we as human beings could differ from the other in our reasoning. This is because we have freedom of choice to reason on what will make us feel comfortable but what ought to be done would be to consider the rest of the populace who will be affected in our decision. That would have a positive effect and bring about peace. In the view of Nussbaum, all our actions should be aimed at having humanity at the centre and in this wise direction, there will be peace on earth.

In this case, others will not have a choice because our standard and position will determine how we demonstrate our choice of reasoning to those who are not in a position to object to the powerful States’ point of reasoning. The research chose Immanuel Kant’s philosophy of reasoning and Nussbaum’s cosmopolitanism because they saw other people as human beings as well, not less than themselves or higher than them. They believed in giving people the benefit of doubt to be considered innocent at first and then, after going through the legal process in the courts, to be either found guilty or not guilty. Democracy is about giving other human beings the freedom to choose and the freedom to decide, but these needs to be controlled with reasoning in the first place.

Highly emotional involvement in reasoning sometimes corrupts factual cases based on how human beings see or perceive things. Although the author did not comment much on David Hume’s philosophy, he argued that when one observes a resemblance between two objects which is justified by giving them the same name, there are still different impressions and perspectives related to both objects.314

Although we are from different traditions with different cultures and societal background, we can still cooperate without any problem if in our decision we consider the happiness of the rest of the world. Even two people from the same society have different opinions concerning particular issues. Human values, morals

and ethics are inextricably tied together.\textsuperscript{315} We as human beings learn values from childhood and also the general knowledge, images, and things we learn from our parents or guardians, and immediate surroundings.

On the issues of morals, they are the intrinsic beliefs developed from the value systems of how we as human beings should behave in principle whenever we are faced with general issues at all times. When it comes to ethics, our value system really demonstrates how we behave when we are faced with difficult decisions that really test human morals concerning the perceived rights or wrongs of that decision.\textsuperscript{316} This is why Nussbaum proposes the liberal education that will produce global people but this also has its own challenges because the States under the United Nations are not equally resourced.

\textsuperscript{315} Manuel Mendonca and Rabindra Kanungo “Ethical Leadership” (Berkshire, UK: Open University Press, 2007) p.68.
CHAPTER FIVE

THE INTERNATIONAL LAW AS IT RELATES TO SEAFARERS: Seafarers Treaty - International Labour Organisation Convention (No.185) - the Seafarers Identity Documents (SID) - Awaiting US and UK Ratification

5.1 Introduction

Chapter five undertakes an in-depth investigation of a specific treaty related to the case of seafarers that is directly linked to their prohibited entry into the United States and the United Kingdom. It looks at the sources and the nature of seafarers’ rights including how those rights are formulated, adopted and amended. The discussion covers some of the standards set by the ILO’s MLC 2006, human rights instruments and relevant standards of the IMO relating to human elements. ILO Convention No.185 has been a controversial issue in the United States and the United Kingdom. This is because, when ratified by the two countries’ Governments, it will permit seafarers the freedom to disembark for their shore leave. However, the ILO No.185 contradicts with US Immigration and Alien Legislation which requires every foreigner to obtain an entry visa and in the UK, entry clearance. Seafarers are on the US watch list as potential threat to National Security post-9/11 and 7/7.

5.2 Treaty - International Labour Organisation Convention No.185

The Law of Treaties is one of the pillars of international law.\textsuperscript{317} The ILO No.185, as it is known is a treaty based on the consent of ILO Member States, and must be executed in good faith. The concept \textit{pacta sunt servanda} (agreements must be kept) is arguably the oldest principle of international law.\textsuperscript{318} Without such a rule, no international agreement would be binding or enforceable.\textsuperscript{319}

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Pacta sunt servanda is directly referred to in many international agreements governing treaties such as the Vienna Convention on the Law of Treaties of 1969, which concerns treaties between States, and the Vienna Convention on the Law of Treaties between States and/or between International Organisations (1986). There is no prescribed form or procedure for making or concluding treaties. They may be drafted between heads of States or between Government departments. The most crucial element in the conclusion of a treaty is the signalling of the State's consent, which may be done by signature, an exchange of instruments, ratification, or accession. In the ILO No.185, it was by ratification of the heads of the departments. The IMO member States sent their representatives.

5.2.1 Classification of Treaties

Treaties have been classified by International jurists according to various principles. There is a distinction between treaties representing a definite transaction or a cession of territory, and those seeking to establish a general rule of conduct for the renunciation of war. The ILO No.185 has established a general rule of conduct as to how to treat foreign seafarer at the various sea ports. After the 9/11 attack, security measures became stringent and led to the denial of some seafarers’ shore leave and access to port facilities.

325 S. K. Verma, op.cit. 397. P.34.
326 Encyclopaedia Britannica, Volume 22, 1998, p.907. Treaties have been classified in the following structure: Political Treaties: Peace treaties, Alliances, Territorial Cessions, and Disarmament
-Commercial Treaties: Tariff, Consular, Fishery, and Navigation Agreements, Constitutional and Administrative treaties: Such as the conventions establishing and regulating international unions, organisations, and specialised agencies, Treaties relating to Criminal Justice: Such as the treaties defining international crimes and providing for extradition, Treaties relating to Civil Justice: Such as the conventions for the protection of human rights, for trademarks and copyright, and for the execution of the judgments of foreign courts, and Treaties codifying international law, such as the procedures for the Peaceful settlement of international disputes, rules for the conduct of war, and definitions of the rights and duties of States. In practice it is often difficult to assign a particular treaty to any of the above.
Treaties may be terminated or suspended through a provision in the treaty if one exists or of all parties concerned. In the case of a material breach, an impermissible repudiation of the treaty or a violation of a provision essential to the treaty's object or purpose, the innocent party of a bilateral treaty may invoke that breach as grounds for terminating the treaty or suspending its operation. Multilateral treaties may be terminated or suspended by the unanimous agreement of all their parties. A State specifically affected by a breach of a multilateral treaty may choose to suspend the agreement as it applies to relations between itself and the defaulting State. In cases where a breach by one State party significantly affects other States to the treaty, the other parties may suspend the entire agreement or a part of the agreement. In the case ILO No.185 a breach will go a long way to have effect on the maritime transport activities and the global aim of achieving cleaner oceans will not be fully achieved because a breach in the form of shore leave denial will lead to stress on seafarers and the possibility of accidents which will result in oil spillage on the high seas.

5.2.2 Ratification of (Treaties) ILO No.185

Ratification refers to the usual method of declaring consent. Ratification procedures vary, depending on the State's constitutional structure. Treaties may allow signatories to opt out of a particular provision, a tactic that enables States that accept the basic principles of a treaty to become a party to it even though they may have concerns about peripheral issues.

333 Carolyn Rhodes and Sonia Mazey, p.246
The ratification and implementation of the ILO’s Convention No.185 (Revised) 2003 continue to raise concerns in the shipping industry, but the initial support from the US for the Convention has become hesitant because of its provision that waives the rights of seafarers who have ILO No.185 ID Cards to be granted unrestricted access to shore leave. Since the creation of the ILO, the US has never given full backing to its proceedings but was the first to proposed new laws to the organisation for global governance.

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336 At the time of establishment of the ILO, the U.S. government was not a member of ILO, as the US Senate rejected the Covenant of the League of Nations, and the United States could not join any of its agencies. Following the election of Franklin Delano Roosevelt to the U.S. presidency, the new administration made renewed efforts to join the ILO even without League membership. On 19 June 1934, the U.S. Congress passed a joint resolution authorising the President to join ILO without joining the League of Nations as a whole. On 22 June 1934, the ILO adopted a resolution inviting the U.S. government to join the organisation. On 20 August 1934, the U.S. government responded positively and took its seat at the ILO. In July 1970, the United States withdrew 50% of its financial support to the ILO following the appointment of an Assistant-Director General from the Soviet Union. This appointment (by the ILO’s British Director-General,
The Convention if ratified will bind Member States whose ratifications have been registered with the ILO’s Director-General. It will come into force for any individual Member State six months after the date on which that Member’s ratification has been registered.

5.2.3 Difference between IMO Treaties and Maritime Codes

IMO Treaties and Maritime Codes are different, and because the ISPS is a Code, the difference between them is important in determining the legislative requirement for the implementation of the ISPS Code and SOLAS Chapter XI-2. In addition to conventions and other treaty instruments, the IMO adopts Codes and Recommendations by its Assembly, its Maritime Safety Committee (MSC), and the Marine Environment Protection Committee (MEPC).

However, such IMO Codes and Recommendations are non-treaty instruments because they are not concluded between States in international law, but by their Assembly and Committees usually are not mandatory instruments although member States are expected to implement their provisions. Nevertheless, it is now becoming common for such Codes to stipulate which of their provisions are mandatory and which are merely recommendatory. The IMO amended its treaties and incorporated the provisions of such Codes into its treaties by

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C. Wilfred Jenks) drew particular criticism from AFL-CIO president George Meany and from Congressman John E. Rooney. However, the funds were eventually paid On June 12, 1975, the ILO voted to grant the Palestinian Liberation Organization observer status at its meetings. Representatives of the United States and Israel walked out of the meeting. The U.S. House of Representatives subsequently decided to withhold funds. The United States gave notice of full withdrawal on November 6, 1975, stating that the organisation had become politicised. The United States also suggested that representation from communist countries was not truly “tripartite”—including government, workers, and employers—because of the structure of these economies. The withdrawal became effective on November 1, 1977.

The United States returned to the organisation in 1980 after extracting some concessions from the organization. It was partly responsible for the ILO’s shift away from a human rights approach and towards support for the Washington Consensus. The ILO quietly ceased to be an international body attempting to redress structural inequality, and became one promoting employment equity.


reference\textsuperscript{339} and uses the tacit acceptance to encourage Member States to consent to the amendments thereby bringing them into force within a short time\textsuperscript{340} such as the Maritime Security Code. It follows that on its own; the Code is not a treaty;\textsuperscript{341} although by being incorporated into the SOLAS 1974 as amended by reference, it has become a part of a treaty which is binding on parties to SOLAS as from the time stipulated for its coming into force.\textsuperscript{342}

5.2.4 Becoming a Party to a Treaty

The legislative requirement for the implementation of a multinational or multilateral treaty which is SOLAS, or a bilateral treaty or a non-treaty IMO Code in Maritime Administration States is a function of the applicable international law.\textsuperscript{343} As soon as a State becomes a party to a treaty in force, it is bound by its provisions in its legal relations established by the treaty between it and other contracting States or parties to it.\textsuperscript{344} But the provisions of such a treaty will not become implementable or enforceable in the State concerned unless the mode stipulated by its national laws for the implementation of the provisions of the treaty has been fulfilled\textsuperscript{345}, and a State may not use its internal law as a justification for its failure to adhere to a treaty unless its consent to be bound by the treaty violates its domestic law of fundamental importance.\textsuperscript{346} Without their consent, non-parties have neither duties nor rights under treaties.\textsuperscript{347}

\begin{itemize}
\item \textsuperscript{339} Nobuo Hayashi “Multilateral Treaty-making: The Current Status of Challenges to and Reforms: Graduate Institute of International Studies Geneva, Switzerland Staff” (The Hague, Netherlands: Kluwer Law International Publishers, 2002) p.31
\item \textsuperscript{340} IMO “Adopting a Convention, Entry into force, Accession, Amendment, Enforcement, Tacit acceptance procedure” (2011) <http://www.imo.org/about/conventions/Pages/Home.aspx> accessed on 12 November 2011
\item \textsuperscript{341} Mike Igbokwe, op. cit., 415
\item \textsuperscript{342} Ibid
\item \textsuperscript{343} Ibid
\item \textsuperscript{344} Yôrām Dinstein “The Conduct of Hostilities under the Law of International Armed Conflict” (Cambridge, UK: Cambridge University Press, 2004) p.8
\item \textsuperscript{345} Mike Igbokwe, op. cit., 424, para. 2.5
\item \textsuperscript{346} Vladimir Duro Degan “Developments in International Law: Sources of International Law” (The Hague: Kluwer Law International, 1997) p.406
\item \textsuperscript{347} Evelyne Meltzer and Susanna Fuller “The Quest for Sustainable International Fisheries: Regional Efforts to Implement the 1995 United Nations Fish Stock Agreement” (Oxon, UK: CABI Publishers, 2009) p.13
\end{itemize}
In international law, every Nation-State is free to make its own constitutional arrangements for the exercising of its treaty-making power. Under both customary international law and the Vienna Convention on the Law of Treaties of 1969, each State has the capacity to conclude or make treaties.

5.2.5 Transposition of International law (Treaty) into Domestic Law

International Law and Domestic Laws are two separate laws with different sources, institutions, and different enforcement mechanisms, but when it comes to international treaty law it is comprised of a series of obligations that States expressly and voluntarily agree on among themselves. Whatever States agree to, that becomes law as far as their relations are concerned. One example is the maritime security legislation introduced post 11th September. Treaties can cover areas not covered by customary law, or can overlap and thus codify custom or can derogate from it, but a ban on torture, slavery or genocide, which is *jus cogens* (compelling law), are rules of international law which are considered so essential that they can never be derogated.

A State or States cannot enter a valid treaty making torture, slavery, suppression of freedom or genocide legal. The way international law transposes into domestic law always depends on the given domestic legal system because every State exercises that in a different way in either an Monist or Dualist approach (discussed below), although some States use both.

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350 Latin meaning "compelling law." This "higher law" must be followed by all countries. For example, genocide or slave trade may be considered to go against *jus cogens*, due to peremptory norms. The 1986 Vienna Convention on the Law of Treaties affirmed *jus cogens* as an accepted doctrine in international law.
5.2.6 Monist State

A Monist State agrees that domestic and international laws forms unity in legal systems.\(^{352}\) That is to say domestic and international legal rules that a State has accepted by way of a treaty, determine whether actions are legal or illegal.\(^{353}\) There are some States which have both Monist and Dualist systems that distinguish them between international law in the form of treaties, and other international laws such as customary international law.\(^{354}\) However, in a strict Monist State, international law does not need to be translated into their domestic law; it is just incorporated and takes automatic effect.\(^{355}\)

The Monist system, though, dictates that domestic law that contradicts with international law is not valid, even if it predates international law, and even if it is the constitution. In the human rights context a State that has ratified treaties relating to human rights, i.e. the ICCPR but some of its domestic laws limits freedom of the press, but when a State ratifies a treaty, it makes the terms of the treaty legally binding, once the treaty’s requirements for entry into force are met.\(^{356}\)

A person violating this domestic law can invoke the human rights treaty in the courts, and can request the judge to apply this treaty and to decide that the national law is invalid.\(^{357}\) A person does not have to wait for domestic law that translates into international law, but in the world of politics, a government can decide not to translate it: in this case treaties are seen as a political gimmick in order to please a powerful State.\(^{358}\)

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5.2.7 Dualist State

The Dualist State normally clarifies the difference in their domestic law and international law.\textsuperscript{359} They require the translation of the latter into the former. If translation is not effected, international law will not exist as law. International law has to be national law as well, or it is no law at all.\textsuperscript{360} If a state accepts a treaty but does not adapt its domestic law in order to conform to the signed treaty or does not create a domestic to incorporate the treaty, then that would violate international law.\textsuperscript{361} However, one cannot claim that the treaty has become part of national law. It cannot be relied upon, or for that matter judges cannot execute judgement on it.\textsuperscript{362} Domestic laws that contradict it remain in force.\textsuperscript{363} In a Dualist State, judges can only apply international law where it has been translated into domestic law.\textsuperscript{364} International law as such can confer no rights cognisable in the municipal courts.

It is only in so far as the rules of international law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.\textsuperscript{365} In the Dualist system, international laws in most cases do not apply and so they must be translated into domestic law.\textsuperscript{366} However, domestic law that contradicts international law must be amended.\textsuperscript{367} It must be modified in order to conform to international law; but when it comes to human rights issues, and when for political reasons a State does not intend to fully translate it into

domestic law or to take a Monist approach on international law, and then the implementation of the treaty would not be possible. 368

5.2.8 Monist or Dualist System in Common Law States.

The dualist approach is predominant in the United Kingdom. 369 International law is only part of English domestic law once it is accepted in national law. In the United Kingdom, a treaty has no effect in municipal law until an Act of Parliament is passed to give effect to it. 370 In other sovereign States outside the Commonwealth, the legislature, or part of the legislature, participates in the process of ratification, so that ratification becomes a legislative act, and the treaty becomes effective in international law and in municipal law simultaneously. 371

In the US, the Constitution provides that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present are in agreement. Treaties ratified in accordance with the US Constitution automatically become part of the municipal law. 372

The US has a monist-dualist system, but because the US is a federal State, 373 not all the courts applies international law. If the US and UK want to ratify the ILO Convention No.186, they would pass through the constitutional procedure for it to become a municipal law and thereby applied in their country to allow the USCG and the UKBA to allow seafarers with authentic SID to disembark for shore leave. The process through which an international law becomes a domestic law cannot pose a problem.

368 Ximena Fuentes Torrijo “International Law and Domestic Law: Definitely an Odd Couple”
371 Ibid
373 Federalism is the system of government which divides power between one centralized national government and many decentralized state governments. The Constitution explicitly protects the principle of federalism, granting the national government many specific powers and responsibilities but also reserving many other powers to the various state and local governments, or to the people as individuals.
5.2.9 The United Kingdom and Treaty.

There are two key features of prerogative powers in the UK, one is personal and the other is political prerogative powers. Although the British Monarch is the supreme power of the United Kingdom, by Convention, the Monarch will not refuse her assent to a Bill passed by the British Parliament. The King or Queen will act on the advice of his/her ministers in the areas of foreign affairs including relationships with other countries, entering into treaties, national defence to protect the State and its subjects from foreign attack, and national security linked to internal threats to the safety of the nation.\(^{374}\)

Since 1707, no British Monarch has refused to give Royal Assent to a government Bill passed by both Lower and Upper Houses of Parliament. This is because Parliament has removed the monarch’s prerogative powers on a case-by-case basis to meet specific concerns, and has developed over time to regulate and place limits on the exercising of the monarch’s prerogative powers.\(^{375}\) In the twenty first century and modern Britain, it would appear to be untenable that Her Majesty the Queen would refuse to sign a government Bill that had already been passed by Parliament. In such a case, there would be a Constitutional crisis because there are still few royal prerogative powers left in the hands of the monarch which have not yet been removed by Parliament through statute. However, parliament could replace all prerogative powers by statutory powers, should it wish to do so.\(^{376}\)

Nevertheless, the Monarch has the right to grant pardons, though the power to do so lies with the Home Secretary.\(^{377}\) Through proclamations in Council, the Monarch may declare war or treaties, but the declaration of war and the signing of treaties lies with the Prime Minister who acts on behalf of the British Crown, hence Her Majesty’s Government. The Monarch is bound by Statute whilst the Prime Minister governs by Conventions.\(^{378}\) Finally, the Monarch is the formal Head of the

\(^{375}\) Ibid., pp.151-152.
\(^{376}\) Ibid., p.152
Executive, the Legislative and the Judiciary. In *Maclaine Watson v. Department of Trade and Industry*, the House of Lords made the UK’s position clear when it said inter alia the royal prerogative that whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament.

Treaties are not self-executing. Quite simply, a treaty is not part of English law unless it has been incorporated into law by legislation. Where a treaty affects the rights and duties of British nationals, or if its application will modify or add to existing common law or statute, or creates financial obligations for the UK, an Act of Parliament must be passed to enable the provisions of the treaty to operate within the UK. Moreover, it is noteworthy that under the Vienna Convention on the Law of Treaties of 1969, the consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, which in each case means the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty or by any other means if so agreed. In treaty practice, it is the treaty itself that provides for the mode by which a State becomes a party to it either by signature, ratification, acceptance, approval or accession, and if it is by signature subject to ratification, it amounts to signature subject to ratification and is meant to allow a Government a further opportunity to examine the treaty when it is not necessarily bound to submit it to another Constitutional procedure for ratification.
Accession is the traditional method by which a State in certain circumstances becomes a party to a treaty of which it is not a signatory, but usually the right to accede is made independent of the entry into force of the treaty.\textsuperscript{386} Under certain circumstances, a State may - when signing, ratifying, accepting, approving or acceding to a treaty - formulate a reservation. Signatories may ratify or accept a treaty whilst non-signatories may accede to it.\textsuperscript{387}

5.2.10 The United States of America and Treaty

The treaty practice in the United States is based on the difference between self-executing and non-self-executing treaties as explained above. Where a treaty involves political questions, the treaty is left to Congress to legislate on rather than its being applied automatically.\textsuperscript{388} By its Constitution, treaties made under the authority of the United States are part of its supreme law, its judges are bound by them and treaties are regarded by courts as equivalent to an Act of the Legislature whenever they operate of themselves without the aid of any legislative provision, whereas the President may only ratify a treaty if at least two-thirds of the Senate approve of it.\textsuperscript{389}

In the US, a non-self-executing treaty must undergo a legislative transformation before it can be legally enforceable against United States’ subjects and institutions or modified or repealed, but ‘self-executing’ treaty obligations are premised upon the US becoming a party to it, and treated by American courts as a part of US law. It is also treated as having been automatically incorporated into its national legal system and as having the same status as a Federal law with force of law.\textsuperscript{390}

If the national executive or the government of the day decides to incur the obligations of a treaty which involves alteration of law, they have to go through

\begin{thebibliography}{9}
\addcontentsline{toc}{section}{References}
\bibitem{390} Ibid
\end{thebibliography}
the process of obtaining the assent of Congress or Parliament to the necessary statute or statutes.\footnote{Shiva Kant Jha “Treaty Making Power: The Context” (undated)} Once they are created, while they bind the State as against the other contracting parties. Parliament may refuse to perform them and so leave the State in default.\footnote{Geoffrey Philip Wilson “Cases and Materials on Constitutional and Administrative Law” 2nd ed. (Cambridge, UK: Cambridge University Press, 1979) p.230} The rationale behind this is that if treaties were to apply directly within the State without legislative Act, the executive would be able to legislate without the legislature.\footnote{Justia “Treaties and the Necessary and Proper Clause: Treaties as Law of the Land” (undated) <http://law.justia.com/constitution/us/article-2/18-treaties-as-law-of-the-land.html> accessed on 4 August 2010}

5.3 What Prompted the ILO’s MLC 2006?

Prior to MLC 2006, there was a Convention such as SUA, which is still in place, but it does not have any positive effect on the situation of seafarers. Seafarers work on a ship which has different operators running it. Their employment is overseen through a manning agency or sometimes by shipping companies.\footnote{Edna Bonacich and Jake B. Wilson “Getting the Goods: Ports, Labour, and the Logistics Revolution” (New York, USA: Cornell University Press, 2008) pp.164-165} The ship itself is probably built in South Korea, owned by a Greek business man, registered in Cyprus, managed from Glasgow, chartered by a French company, crewed with Asians, Africans and/or Russians, and carrying American or British cargo en route to the US or the UK.

They risk injury or death from falling overboard and from hazards associated with working with dangerous cargo.\footnote{Elaine Chao, op. cit., 554} They live on the margins of society, with much of their lives spent beyond the reach of land. They face dangerous conditions at sea. Whatever the calling, those who live and work at sea invariably confront social isolation,\footnote{Shubham.M.Agrawal “What it means to be a Cadet” (2010) <http://shubhamships.blogspot.co.uk/> accessed on 12 December 2010} stress, abuse of working conditions and overregulation. This has caused increasing numbers of seafarers to leave the profession and the leading cause of seafarers leaving the industry is because of injustice they faced post-9/11 and 7/7.\footnote{Seafarers Rights International “Posts Tagged ‘fear’ Justice for Seafarers” (2012)
problems, it becomes difficult if not impossible for it to be addressed. A ship may encounter bad weather or an ‘Act of God’ during its voyage. In extreme weather condition, it eventually breaks apart spilling her cargo of oil into the high seas, which ends up in sovereign State territorial waters. The seafarer is arrested and the above-mentioned parties disappear into thin air. The seafarer is either abandoned after the arrest of the ship if it is still floating, or may be jailed by port State Control inspectors. It is for this reasons that the ILO’s MLC 2006 has come to alleviate seafarers’ frustrations in foreign ports.

On a daily basis, ships travel between different jurisdictions, and different laws can affect seafarers depending on where the ship is located. However, in order to understand what possibilities there are for seafarers to enforce their rights through public law remedies at the national level, it is necessary to identify which States have, not just in terms of interest, but also jurisdiction, in respect of a particular ship and its crew so that they can be held responsible for acts against seafarers.398

The International Transport-Workers Federation (ITF) and other Non-Governmental Organisations (NGOs) seek for improved standards for seafarers. Because the restrictions on shore leave coupled with reduced time in port by many ships translate into longer periods at sea for seafarers.399 They have complained about extended periods at sea, where living and working is a solitary affair.400 Despite a proliferation of treaties, regulations and international laws, some flag State are not complying with them, thus putting the lives of the seafarers at serious risk. Ships without effective implementation of international law by flag States jeopardise the working conditions and movements of seafarers. The Maritime Security Code at present is regulating the people who are trying to keep our seas safe and clean, and whose skills and commitment are fundamental to the maritime industry’s future. It seems that concentration on maritime pollution and safety has now been shifted to maritime security. Ships’ safety and pollution originated from the ships themselves, but maritime security is a different case, since it originates from outside forces, which are beyond the control of the maritime body. Pressures

<http://www.seafarersrights.org/tag/fear/> accessed on 30 May 2012
399 John Webb “Professional mariners” (2012)
400 Shubham M. Agrawal, op. cit., 557
on seafarers are hard to measure despite the IMO legislations which is supposed to protect their interests. The IMO’s revamped Assembly Resolution A.892 on manpower levels, the Standards for Training Certification and Watch-keeping (STCW 95) Convention and the International Labour Organisation’s Convention No.180 on working hours are all in place, yet remain ineffective.

The IMO Resolution A.892 is probably too vague to be much used, in that there is no requirement to prove that standards have been followed by the US. Are seafarers’ rights being denied for the sake of their demographic region or is it just because of the performance of their ship’s flag State or ship owner? The UKBA (Home Office) argued that a criminal with negative intent can at all times be brought down with rules and regulations if these regulations are being respected and enforced by law.  

The MLC 2006 is being hailed as an international bill of rights for seafarers. It has been drafted to ensure that all seafarers, regardless of their nationality and the flag of their ships, will have protection. Thus, its aim is to address the standards of their health, safety and well-being both on board ships and ashore. It is about respect for seafarers, and their right not to be treated like a commodity. But does it has any effect on or any meaning to States in the cases where the MLC 2006 conflicts with their country’s Constitution. Once the MLC 2006 is in force, all ships which trade internationally must meet its requirements, thus whether their flag States have ratified it or not, ships will be subject to inspection. Port State Control Inspectors will have the same powers as those under the ISPS Code, ISM or MARPOL, including the power to detain ships that do not comply with international maritime legislations. It is said that when persuasion fails, force must be applied, but the force being applied here is not on the intended terrorist but on the seafarers who are absorbing all the related pressures. Every time the US sneezes, seafarers catch its cold.

403 George Foxx, Caught Up in the Boogie Woogie World (USA: Author House Publishers, 2011) p.244.
5.4 The MLC 2006 and its Requirements

The Maritime Labour Convention (MLC) 2006, the Fourth Pillar of the International Maritime Regulatory Regime was adopted by the International Labour Organisation (ILO) in 2006, under Article 19 of its Constitution at a maritime session in February 2006 in Geneva, Switzerland. It sets out the rights of seafarers to decent conditions of work. It both fills a gap in UNCLOS 1982 and complements the IMO’s core Conventions on seafarers’ training, ship safety, ship security, and marine pollution prevention. It establishes an effective enforcement and compliance system with certification of seafarers’ working and living conditions on ships. With its interwoven labour, social rights and economic goals, the MLC, 2006 is an international legal instrument that will have a significant impact on approaches to seafarers’ standards in welfare and other globalised sectors. The MLC 2006 has come to complement the key Conventions of the IMO such as the International Convention for the Safety of Life at Sea 1974, as amended (SOLAS), the International Convention on Standards of Training, Certification and Watch-keeping, 1978, as amended (STCW) and the International Convention for the Prevention of Pollution from Ships, 73/78 (MARPOL).

The MLC is the responsibility of the administration of the flag State. If flag States do not have adequate systems in place for ratification, they will therefore be responsible for implementing the requirements of the convention through national regulations to be identified in the Declaration of Maritime Labour Compliance (DMLC part II), and it’s also the ship owner’s responsibility to follow and adopt procedures to ensure ongoing compliance with the national requirements between inspections and the measures proposed to ensure that there is continuous improvement within their ship.

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405 Ibid.
407 Ibid.
408 Moira L. McConnell et al, op. cit., 482, p.28.
The main purpose and design of the MLC 2006 is to protect merchant navy personnel (commercial seafarers) from abuse. The Convention describes the requirements needed to be implemented, which comprises two parts. Part A is mandatory to all, but Part B consists of guidelines on what ought to be done to achieve good results for Part A. However Part B is not mandatory, but can be helpful because it is essential for a proper understanding of the regulations and the mandatory standards in Part A, just as in the case of the Maritime Security Code where Part A is mandatory and Part B is guidelines. Compliance with the MLC 2006 will be verified on board either by the ship’s flag State or on behalf of flag States by Recognised Organisations (RO), and will be certified by means of a Maritime Labour Certificate issued to each ship.

MLC 2006 certificates are required for all ships with the exception of ships below 500grt. These certificates apply to all other ships that are engaged in international voyages over 500grt, registered and flying the flag of a sovereign State and operating from a port, or between ports, in another State. Ships from non-ratifying states shall not be favoured. They must ensure compliance on such ships. A documentation attesting to safety and well-maintained accommodation on board ships must be presented to maritime administration to certify that the set-down rules and regulations on board meet national law requirements before a MLC 2006 certificate can be issued.

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412 Iliana Christodoulou-Varotsi and Dmitry A. Pentsov, op. cit.575, p.336
413 Germanischer Lloyd SE, op. cit. 580
The MLC 2006 adapted by the ILO in 2006 entered into force in March 2013 and then became mandatory for all ships engaged in commercial activities (except fishing boats, ships of traditional build and warships or naval auxiliaries).417

5.5 ILO’s Seafarers’ Identity Documents (SID) Convention No. 185

There was an ILO’s SID Convention (Revised) 2003 which was an attempt to improve the quality and security of seafarers’ identity documents. The convention’s objective is to recognise actual seafarers in order to ensure that they can be trusted by the US, the UK and other EU seaports. This is to minimise their hardships by giving full access to disembark their ships418. Its purpose is to identify an individual seafarer and to allow admission on a foreign territory for purposes of shore leave. The validity of SID under Article 3 para.6 is of a maximum of 10 years, renewable every five years.

Although treaties may allow signatories to opt out of a particular provision, the US in particular have a moral obligation as a pacesetter in liberal politics and a world police to ratify the treaty because of the human rights aspect that has to do with seafarers. This shows clearly that liberal education and the production of a global citizen is not a practical possibility but an academic delusion because the actions of the US and UK does not have the well-being of the general humanity at heart.

ILO Convention No. 185 deserves to get full attention and support of all member States as it contained a good balance of the interests related to seafarers’ human rights, maritime security and the global economy.

417 Ibid
5.5.1 The Background of the ILO Convention No.185

Post 9/11, seafarers need to be identified by issuing them with Seafarers Identity Cards or Seafarers identification Documents (SID), in addition to their seaman’s discharge book and passport for security reasons. However, these three identification documents were still not sufficient to satisfy the USCG. Therefore, one of the issues considered crucial for improving maritime security is ensuring that seafarers have UN-backed documents enabling their positive verifiable identification. One of the MTSA/ISPS Code requirements is that IMO member States will be requiring such identification before they are prepared to grant special facilities enabling seafarers to carry out their work and also seek welfare support on shore. The review process of the ILO No. 185 by the DHS is illustrated in Figure 3.

Figure 3: US DHS Review of ILO No.185

Source: USGAO

In June 2003, the ILO Governing Body accordingly decided to complement action being taken in the framework of the IMO by placing an urgent item on the agenda

The Convention requires each ratifying Member State to put in place a comprehensive security regime.\footnote{Ships and Ports “Ratifying, implementing SID Convention 185 will benefit Nigeria greatly, says Omatseye” (2010) <http://www.shipsandports.org/detailmorenews.php?id=62> accessed on 20 August 2011} This would cover not only the production by the national authorities of the new identity document embodying security features, but also the maintenance of national databases for the ID Cards. In November 2003 the ILC also adopted, a Resolution concerning the development of the global interoperable biometric.\footnote{ILO “Adoption by the Conference of the Seafarers’ Identity Documents Convention (Revised), 2003 (No.185), and the related resolutions” (2003) <www.ilo.org/public/english/standards/relm/gb/docs/.../gb-3-2.pdf> accessed on 2 September 2011} This Resolution was discussed at the 288th Session of the governing body, which approved a plan of action to be pursued by ILC for the adoption.

In March 2004, at its 289th Session, the ILC endorsed the need to provide assistance to developing Member States to enable them to ratify and implement the Convention, and the biometric standard adopted.\footnote{ILO “Report of the Director-General on Developments in the Maritime Sector” (2006) <www.ilo.org/public/english/standards/relm/ilc/ilc94/rep-ii.pdf> accessed on 2 September 2011} With the adoption of the ILO Convention No.185 and the interoperable biometric standard, Member States of the ILO can now proceed to ratify and implement the ILO Convention No.185, beginning the issuance of identity documents to seafarers. Treaties with a number
of parties are more likely to have international significance.\textsuperscript{425} Example is the treaty of the Convention on the Law of the Sea which was signed in 1982 and came into force 12 years later.\textsuperscript{426}

This comprehensive treaty, which took more than a decade to negotiate, specifies the status of the seas and the international seabed. In addition, the expansion of human rights protection has been overwhelmed through international conventions and regional agreements, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), the 1950 European Convention on Human Rights (ECHR), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), and the 1969 Inter-American Convention on Human Rights (IACHR). States that do not sign and ratify a treaty, however, are not bound by its provisions.\textsuperscript{427}

Under ILO No.185, the new SID carries a fingerprint-based biometric template, aside from the normal physical features for a modern machine-readable identity document. This was adopted with the agreement of ships’ owners and seafarer organisations.\textsuperscript{428} The new SID conforms to an international standard enabling biometrics.\textsuperscript{429} The ILO No.185 SID issued by member states must be correctly read by devices used in other member state’s territory.\textsuperscript{430} In addition, border agencies around the world will be able to verify if ILO No.185 SID produced by a seafarer is

\textsuperscript{426} Mark Nuttall “Encyclopedia of the Arctic: Volumes 1, 2 and 3” (Oxon, UK: Routledge Publishers, 2005) p.2094
\textsuperscript{429} Ibid
genuine or authentic, because the new convention permits legal authorities to check information provided in the SID either by reference to the national electronic database where every individual’s information on SID issued must be stored, or through border entry points of the state of issuance, which must be available 24 hours a day.\textsuperscript{431}

Article 2 of ILO No.185 requires a member state that has ratified the convention to issue a SID to a seafarer.\textsuperscript{432} In addition, a member State issuing SID must be invited to oversee the process for an independent evaluation of the issuance system to be carried out at least once every five years.\textsuperscript{433} Reports regarding the evaluation must be reviewed by the authorities within the framework of the ILO to permit them to gather the appropriate action of maintenance of a list of the states that fully meet the minimum requirements set within the structure of the convention.\textsuperscript{434}

Article 3 sets out specific criteria for SID. This permits State border entry point immigration officers to thoroughly check and identify the holder of the SID is not going to settle permanently in that State but that the holder is temporarily within the territorial jurisdiction of that port State, and the seafarer is identified on the document to be the genuine and legitimate holder of the said document. The ILO has warned member States to remain vigilant against forged documents. On this note, the ILO has requested that member States who have been given the all clear to issue SIDs to seafarers must design the SID Card in a simple manner, but one which is durable enough to withstand conditions at sea.\textsuperscript{435} Article 3, para.9 also provides that all documented data which directly concern individual seafarers, and that have been obtained and clearly recorded on the document in a biometric format must be visible to a scanner, and that every piece of information provided therein is not eye-readable. In the Article, seafarers are to have convenient access to such biometric reader machines to enable the holder to inspect the data

\textsuperscript{432} Charles A. Jesczek, Maritime Security: Federal Agencies Have Taken Actions to Address Risks Posed by Seafarers, but efforts can be Strengthened (United States Accountability Office, 2011) p.61
\textsuperscript{433} DOLE, op.cit.509
\textsuperscript{434} ILO, op.cit.505
\textsuperscript{435} ICAO “Seafarers’ Identity Documents Convention (Revised), 2003 (No.185) – Harmonisation and Collaboration with ICAO” (2011) <www.icao.int/Meetings/TAG-MRTD/.../TagMrtd-20_WP015_en.pdf> accessed on 21 September 2011
recorded onto it to certify their true identity. Article 5 provides quality control procedures that have to be met by member States that have ratified, and are thus permitted to issue SIDs.

Just as in the case of the new maritime security legislation, Part A of Annex III of the Convention is mandatory in implementing the system of issuance of ILO No.185 SID. Part B of Annex III sets out the guidelines for achieving the results of Part A. Article 5, para.4 requires that in every five year period, a member state carries out regular and independent evaluations of the systems for issuance of the SID, and also to provide their findings in a detailed report of any progress or deficiencies that will hamper seafarers’ well-being to the Director-General of the ILO.

These five-year checks and balances on the evaluations and true records of findings are to be made readily available to ratified member states for cross-referencing and authentication, thus providing for a transparent process of what is actually taking place. Article 5, para.6 gives special powers to the ILO’s governing body to also re-access and evaluate the data and reports submitted to them by a member state. If the governing body certifies that the report is authentic and conforms to all legal proceedings in the organisation, Article 5 also empowers them to publish their findings by listing Member States that fully comply with the processes and procedures and quality control for the issuance of ILO No.185 SIDs. Besides issuing authority certifying the genuineness of the holder as a true and legal seafarer with a competent stand in their profession, Article 4 ensures that the authenticity of the document itself can be verified against the holder of the biometric SID.

Maintaining a hard-reference certified copy of SID is clarified in Article 4, para.1, 2 which requires every ratifying member state to maintain an electronic database containing details of a seafarer which are essential. This allows for a speedy verification process of individual seafarers when they are ready to join ship to avoid delays, or when they are transiting or being transferred to another ship. Due to the sensitive nature of information gathered on each seafarer, Article 4, para.5 sets out the required details that are needed to be maintained in the database
that can be made permanently accessible to border control or immigration officials at every entry point.

5.5.2 United States Government Accountability Office (USGAO) on ILO Convention No. 185 and Seafarers

The US regards a visa issued by their consular services as the only permissible entrance clearance certificate. The decision to grant admission to the United States by their consular is made by the United States Department of Justice (USDJ). The applicable US legislation is the Immigration and Nationality Act [8 U.S.C. 1101] which requires seafarers proceeding to the US to hold a valid individual D visa (crew member visa). Section 41.42(d) of the Act specifies that a crew-list visa is valid for six months from issuance and for a single application for admission into the United States. The ILO Convention No.185 however, will grant seafarers full access to shore leave for the period of five years entry to the United States without presenting themselves to any US consular for vetting prior to issuance of entry visa. The US is addressing the important security concerns over terrorism, but the ILO convention also sought to ensure that fundamental rights such as freedom from discrimination and human rights were duly taken into account.

Where a seafarer becomes a suspect, or does not have the right form of ILO No.185 SID, Article 2, para.5 grant seafarers the right to an administrative appeal in the case where their application for SID is rejected. Article 2, para.6 safeguards the rights of refugee seafarers or seafarers who become Stateless. Article 2, para.9 permits seafarers to see all data gathered on them into the chip of the biometric SID by providing them access to machines enabling them to inspect such data. When it comes to accessing the national database, Article 4 of the Convention contains protective provisions that guarantee the rights of seafarers, and these must be consistent with the seafarer’s right to privacy and meet all applicable data protection requirements.

If information gathered on the seafarer is not accurate as deemed fit, Article 4, para.3 gives the seafarer the right to examine and check the validity of all the data that are stored in the database which relate to him or her and to make
corrections if necessary. However, since all seaports are different, it is the responsibility of each individual seafarer to check with their employers and local port authorities to confirm what documents are necessary at the specific work locations.\textsuperscript{436} The US State Department and two components of the Department of Homeland Security (DHS) are responsible for preventing illegal immigrant entering US seaports and identifying individuals who are potential security risks.

The ILO No.185 SID establishes an international framework of seafarer identification documents and reduces their vulnerability to exploitation by fraudulent ship owners and flag States. The USGAO was asked to examine (1) the measures Federal Agencies take to address risks posed by foreign seafarers and the challenges, if any, the DHS faces; (2) the challenges, if any, the DHS faces in tracking illegal entries by foreign seafarers and how it enforces penalties; and (3) the implementation status of the ILO No.185.

The USGAO reviewed relevant requirements and agency documents on maritime security, interviewed federal and industry officials, and visited seven seaports based on volume of seafarers’ arrivals as indicated in figure 4.

\textsuperscript{436} National CMAC, Ratification of the Seafarer’s Identification Documents Convention (Revised), 2003 C185 (2010)

Figure 4: The busiest ports in the US with foreign ships and crews arriving almost on a daily basis

Source: USGAO

Figure 4 shows the top 20 US seaports for foreign seafarer’s arrivals as at 2009. The State Department (SD) issues two types of non-immigrant visas to foreign seafarers, such as C1/D or D. Visas issued to crewmembers are category D visas that allow a seafarer to request a conditional permit to land in the US only if arriving by ship as an active seafarer. Under the C1 category of the combined C1/D visa, seafarers are allowed to seek admission into the US at any port of entry, such as an airport, for the purpose of transiting to ships for employment. If arriving by ship in the capacity of an active seafarer, then category D of the combined C1/D visa may be used to request a conditional permit to land.
5.5.3 U.S. Concerns about Exploitation of ILO No.185 SID by Seafarers

Yet again, the US is very concerned with seafarers exploiting the maritime industry to their advantage.\textsuperscript{437} However the USCG have confirmed that...to date, there have been no terrorist attacks involving seafarers on ships transiting to US ports and they have not yet received any information indicating that extremists have entered the US as seafarer non-immigrant visa holders.\textsuperscript{438} In this regard, the USCG commented further that this should not divert their attention from the overall suspicions they have therefore they must still be concerned about the possibility of a future terrorist attack in a US port by a seafarer.\textsuperscript{439}

5.5 SUMMARY of the MCL 2006- ILO SID Convention No.185.

ILO Convention No.185 and MLC 2006 will have a positive impact on every seafarer if ratified and implemented by influential IMO/ILO Member States, since convention No.185 will ensures speedy access to shore leave, for transit, transfer or repatriation of seafarers. While the MLC 2006 will ensure that, all seafarers regardless of their nationality and the flag of their ships have protection, it addresses issues concerning standards of their health, safety and well-being both on board ships and ashore. The main objective of the MLC 2006 is to protect seafarers from abuse. ILO No.185 and MLC 2006 will ensure internationally uniform treatment for all seafarers regardless of their nationality and the territory their ship berths. This is achievable because Seafarers’ Identity Document created under the ILO Convention No.185 will facilitate entry for seafarers into IMO/ILO member states and crossing of sovereign State borders, while at the same time allowing better control and treatment by immigration and port state authorities. This therefore gives member states the effective security they need to meet these commitments.

Both Conventions has provided a practical solution for sensitive problems such as safety standards, discrimination and abuse by port states control authorities.

\textsuperscript{437} Charles A. Jeszek, op. cit., 513, p.12.
\textsuperscript{439} USGAO “Maritime Security: Federal Agencies Have Taken Actions to Address Risks Posed by Seafarers, but Efforts Can Be Strengthened” (Unite States Government Accountability Office, January 2011) p.12
Technical solutions were needed as well as expertise in a myriad of legal areas. Issues regarding labour law, human rights, immigration law and border control had been looked into whilst political interests had also been acknowledged. The ILO Convention No.185 and MLC 2006 have reconciled the above in their various sittings and have achieved a remarkable step forward in the case of seafarers’ welfare. The content of Convention No.185 constitutes a comprehensive response to maritime security concerns including the necessary safeguards for individual seafarers’ rights. Its combination of seafarers’ welfare and well-being and maritime security, shore leave and facilitation for transit and transfer of seafarers has made it one of the most robust and diverse conventions. The MLC 2006 on the other hand will compel all ships which trade internationally to meet its requirement and it is the ship owners responsibility to follow procedures to ensure compliance in order to qualify for the MLC 2006 certificate, and also all ships in the category stipulated by the convention are subjected to inspection by port State control inspectors who will have the same powers as those under ISPS code, ISM or MARPOL, including the power to detain ships which does not comply.

By adopting Convention No.185 and MLC 2006, the ILO has not only fulfilled its mandate, but has also taken an important step to innovate and modernise maritime labour standards in general.
CHAPTER SIX


6.1 Introduction.

This chapter addressed and discussed the duty and responsibility of a flag State to seafarers. The UNCLOS 1982 declares that a ship flying a particular State’s flag comes under the jurisdiction of that State’s national laws.\textsuperscript{440} This means that seafarers are supposed to be under the full protection of the flag State when their ship sails to a foreign port.\textsuperscript{441} When a ship loses her registration to a State, however, the ship becomes Stateless and that leaves seafarers unprotected in any form, and in this new era of fighting maritime security and war on terror, seafarers will become an easy targets when abandoned in foreign ports. In this era of maritime terrorism, if flag States ignore their legal responsibilities to protect seafarers’ rights and well-being, the world maritime profession will slowly diminish.

The section discussed the duties of flag States to seafarers because the research has identified humiliation suffered by seafarers from Port State Control authorities in foreign ports.\textsuperscript{442} Seafarers often lack support and protection from their flag States.\textsuperscript{443} There have been many instances where seafarers have been stranded in foreign ports, abandoned by the ship owner and the flag State.\textsuperscript{444} This often happens when a deficiency is found on the ship by port State Control inspectors. Flag States for economic reasons tend to heed to the contractual agreements between them and the ship owners, but they must adhere to UNCLOS 1982 Article 94 to protect seafarers.

\textsuperscript{440} Article 90 of UNCLOS 1982
\textsuperscript{443} Ibid
\textsuperscript{444} Ibid
6.2 Historical Background of the Flag State

The institution of the flag State evolved over several hundred years. The significance of flag usage was discovered around 1000 BC by the ancient Egyptians to identify and to distinguish authority, or for identification purposes. The Egyptian concept of the use of flags spread to other civilisations and in the end it came to be used on a ship to identify its homeport and owners. Out of practice flying a flag has become part of customary law.

In the *Asya Case (1948)* A.C. 351, it was ruled that a ship not sailing under the flag of any State had no right to freedom of navigation. In the actual sense, the ship in this case is Stateless. The identification mark of the flag therefore symbolises the legal regime of the ship on the seas and has become a necessity for the maintenance of public order, be it on the high seas or in the territorial waters of sovereign States. A ship’s flag determines the point of responsibility of the flag State. It also shows where the flag State can exercise its legal authority and enforcement over that ship.

On 29th April 1958, the flag was recognised with a code that was ratified under the High Seas Convention held in Geneva. It was the first legally binding international instrument to set out the legal responsibilities in connection with flag State jurisdiction. The Convention came into force on 30th September 1962 and was amended under the 1982 Convention which now provides the broad base understanding for the flag State jurisdiction in international law, notably in relation to the responsibilities of flag States.

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445 Naim Molvan v. Attorney General for Palestine (The “Asya”), 81 Li L Rep 277, United Kingdom: Privy Council (Judicial Committee), 20 April 1948
<http://www.unhchr.org/refworld/docid/3ae6b6544.html> accessed 20 April 2012


6.3 Responsibilities of Flag States in International Law

A flag State is a State of registry of a seagoing ship. When a ship is registered in a particular State, the ship and its owner become subject to the laws of that State. Ship registration renders the ship an extension of national territory while at sea and it also qualifies for its protection. A seagoing ship is subject to the maritime regulations in respect of manning of seafarers, safety standards and consular representation abroad.

The concept of jurisdiction refers to the power of a State to prescribe and enforce regulations within its territory. Some states also claim jurisdiction over activities outside their territory which affect their territory. States can also claim jurisdiction based upon the nationality principle by extending jurisdiction over their nationals even when they are outside the territory.

During the war between Iran and Iraq in the 1980s, ship owners switched flags to fly the United States flag, and some to the United Kingdom flag to gain the protection of the United States and United Kingdom naval forces in the Gulf.

To fly a nation’s flag on a ship, a sovereign State that has all powers must exist to allow its flag to be flown, and the ship can fly a sovereign state’s flag by becoming a national of the flag state through registration.

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452 Ibid., p.431
457 Martin Stopford, op.cit.536, p.432.
6.3.1 Ship registration

The International Court of Justice declared that:

Naturalisation is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far reaching consequences and involve profound changes in the destiny of the individual who obtains it.\textsuperscript{458}

Basically, registration confers nationality on a ship and brings it within the jurisdiction of the law of the flag State.\textsuperscript{459} A registered ship in foreign port is accorded the protection of the government of the flag State as much as citizens from the flag State while travelling abroad. A ship's bona fide nature/identify is established by its registration papers, just as a passport is used to confirm a person's identify. Registration may also determine criminal jurisdiction in the event of any incident or accident in international waters.\textsuperscript{460} Ship registration gives security, and provides the ship owner better protection against claims arising from ship's and seafarers' arrest.

Ships' registration began as a means of controlling ships entitled to carry cargoes within Europe.\textsuperscript{461} In more recent times, it has proved a convenient way of establishing title to the property in a ship. In other words, registration proves the ownership of the ship.\textsuperscript{462} At the same time, registration has served to determine which country's law governs the operation of a ship and the behaviour of its seafarers, a key concept which today plays an important part in the international law of the sea.\textsuperscript{463}

6.3.2 Background of Ships’ Registration

Ship registration was introduced in England in 1302 during the reign of King Edward I through a levy. Over the centuries the piracy rate remained high, but piracy at the time of King Edward mainly involved attacking merchant ships for their wine. The situation forced wine ships to travel in convoy from other States in Europe to

\begin{itemize}
\item \textsuperscript{458} \textit{Nottebohm (Liech. v. Guat.)}, 1955 I.C.J. 4, 24.
\item \textsuperscript{459} UNCLOS 1982, Article 94, Para. 1.
\item \textsuperscript{460} UNCLOS 1982, Article 94, Para. 3-4.
\item \textsuperscript{461} UNCLOS 1982, Article 91, Para. 1.
\item \textsuperscript{462} Ibid.
\item \textsuperscript{463} UNCLOS 1982, Article 92, Para. 2; Article 110, Subpara1 (d).
\end{itemize}
England. Ships that wanted protection decided to fly the English flag, at a cost through tonnage tax. During the reign of King Henry V, the tonnage tax was enacted into law and it became known as statutory tonnage measurement in 1421. The gross tonnage, along with the associated measurement, became inextricably linked with ships’ registration.\textsuperscript{464} In 1650, legislation was passed by England not to allow non-British ships to trade between North America and the West Indies. The British at that time were busy trading in slaves and other commodities, but if a British ship should trade, the crew must be British citizens including the master.\textsuperscript{465}

In 1660, the first Navigation Act was enacted in England which required ships to be legally registered by their legal owners.\textsuperscript{466} Foreign ships at that time were not permitted under any circumstances to register their ships in England unless the ship owner could prove a genuine connection with England. This means that the owner of the ship must be English with a certificate attesting his nationality. Further to that, the ship owner had to declare the actual cost of the ship, how it was paid for, and who sold it to him.\textsuperscript{467} After a thorough check on genuine connection\textsuperscript{468} and the owner’s nationality linking him and the property to England, a safety compliance certificate was issued. All certificates confirming genuine link were maintained by Customs in London. These requirements formed the foundation of ship registration worldwide and the origin of genuine link.\textsuperscript{469}

The requirements underwent a major consolidation in the Mercantile Marine Act 1850, which established for the first time a central government department responsible for all shipping matters including registration.\textsuperscript{470} In 1854 the Merchant Shipping Act was passed in England by bringing all related benefits in merchant shipping under British flagged ships, and seafarers on ships registered in England.

The Merchant Shipping Act 1854 was amended in 1872 with enhancement on maritime administration of tonnage measurement, pilotage, lighthouse dues, and

\textsuperscript{465} Ibid., p.35.
\textsuperscript{467} John N.K. Mansell op. cit. 536, p.27
\textsuperscript{468} UNCLOS 1982, Article 91, Para.2
\textsuperscript{469} Camille Goodman, op.cit. 532
\textsuperscript{470} Norfolk Record Office, “Records of the Registrar General of Seamen and Shipping” (2006) Norfolk Record Office Information Leaflet 53
port charges. The amendment of 1873 Act saw an introduction of permanent marking of the ship’s name on the forecastle of the ship, port of registry, official number and draft marks as a prerequisite for ship’s registration and the attainment of nationality. The main objective of all these developments, from 1302 right to the first legislation introduced in 1660 through to 1873 when ships were supposed to have permanent markings of the ships name, number and port of registry on their forecastle, was to establish the ships identity and port State. It has nothing to do with the treatment of seafarers. That was the case of the owners and the law courts.

6.3.3 Nationality

International law is concerned with individuals who have true connection to a State through the concept of nationality. Nationality is the status of being treated as a citizen of a State for particular purposes by obeying the fundamental laws of that State. Each State exercises its own discretion to determine who can become bona fide citizen or not.

A person can acquire nationality by birth through parents, place of birth, by adoption or naturalisation. As stated above, ships are usually considered as having the nationality of the State in whose territory they are registered. Under international law every sovereign State has the legal right to set the conditions through which it decides to grant nationality to a ship, thereby accepting responsibility for it and acquiring authority over it.

In Muscat Dhows, the Permanent Court of Arbitration made declaration that individual States have the right to set out the conditions for the grant of nationality to merchant ships. When ships acquire nationality through

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471 John N. K. Mansell, op.cit.552, p.27
476 Every ship owner in a sovereign State has the right to decide which State he chooses to fly their flag. In 1905 the Permanent Court of Arbitration made a classic statement of the right of individual States unilaterally
registration, they do it as an “individual” entity. It does not include all those on board the ship because crew members can be from different nations with each having allegiance towards his or her nation. The fact that one has boarded a ship as a crew member does not make him/her an automatic citizen of the ships nation. When one enters a foreign sovereign State with a genuine immigration documents or visa, the travelling document will not make one a citizen of the flag State. The following paragraph elaborates on the genuine link concept and why it is important for seafarers to know where their protection must come from.

6.4 How does the Genuine Link affect the Rights of Seafarers and their welfare?

The genuine link principles in the 1958 Convention and UNCLOS 1982 were considered ‘glittering wording’ by many academics of the time. Richard Obeng Mensah in his book ‘The Vanities of Life’ described such wording as all that glitters are not gold’.477 This statement means that the outwardly attractive appearance of the term ‘genuine link’ is not a reliable indication of its true nature.478 Professor Myres Smith McDougal479 and Professor William T. Burke480 commented that the genuine link concept is the most ambiguous criterion ever devised for identifying a real connection between a ship and flag State instead of with the real owner of the ship.481
Genuine link between flag State and ship has been a long legal debate between the courts, governments and academics. The genuine link principle in international law with regard to relevant court decisions clearly shows that genuine link between a ship and its flag is a precondition to ship’s registration. However, this does not include protection of seafarers. 482

6.4.1 UNCLOS 1982 Article 91, 1958 High Seas Convention Article 5, UNCTAD 1986 - Genuine Link

The genuine link theory conceptualises ship nationality in passionate terms. 483 Nationality, according to the International Court of Justice (ICJ)

...is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. 484

The ICJ’s interpretation of nationality refers to a real person and not to a ship, whereby the latter can be referred to as a property. The legal owner of a property must be a real person termed as a human being and who can demonstrate his/her allegiance to a State, Government or people and have real connection with a State and its legislation.

6.4.2 Ship’s Nationality and Genuine Link

The act of a ship acquiring its nationality through a Sovereign State 485 was established through the 1958 Geneva Convention of the Law of the Sea, which set out the first provisions on nationality of ships. Theoretically, genuine link means there must be a true connection between a ship, the owner and the State.

482 Robin R Churchill and Christopher Hedley ‘The Meaning of The “Genuine Link” Requirement in Relation to The Nationality of Ships’ (A Study prepared for the International Transport Workers’ Federation, University of Wales, Cardiff Law School, Cardiff, October 2000)
485 John N.K. Mansell, op.cit.682, p.19
purporting to grant its nationality to that ship, and that link must be real. It is reasonable to assume that a principal object and purpose of the 1986 United Nations Convention on Conditions for Ship’s Registration is to provide a system of regulation and order on the high seas.

This would therefore suggest that a flag State ought to be able to control its ships on the high seas. The flag State is to ensure that ships act in an orderly way and complies with international regulations binding on the flag State. This is particularly necessary as ships on the high seas are in principle subject only to the jurisdiction of their flag States. According to Robert Sloane’s observations in numerous maritime forums, conferences and seminars, no accurate answers have been found regarding the meaning of a “genuine link” between a ship and flag State. Under national law, a direct link is the result of ownership, whilst under international law, the link relates to the effective control over the administrative, technical and social matters that the State enacts over the ship.

6.4.3 The Origin of Genuine Link Concept

Ship registration was introduced in England through a levy in the year 1302 during the reign of King Edward I. In 1660, the first Navigation Act was enacted in England which required ships to be legally registered by their legal owners. Ship owners were to be English. These requirements of being English and being linked genuinely to the property you are about to register to be protected by the British flag formed the foundation of ship registration and the origin of genuine link.

Another case of genuine link developed from the Nottebohm Case in 1955 when Mr Friedrich Nottebohm could not establish a link between his nationality and his
business he had in Guatemala due to changing of his original nationality from German to Liechtenstein during World War II. Although Nottebohm was not a maritime case, it sets the precedent for a real person with nationality to link their real connection to a State where they have registered their assets. According to the International Transport-Workers Federation (ITF), there should be a genuine link between the ship owner and the flag State because, in the case of flag of Convenience (FOC) registries, this genuine link does not exist and seafarer’s protection becomes an illusion. The law attributes of ship’s registration are protection of title for the registered owner, protection of title for persons with securities and protection for third parties, such as the ship owner and charterers, but not seafarers.

6.4.4 Absence of Ship’s Genuine Link with flag State and Owner: Seafarers’ lack of protection

The flag State is responsible for the seafarer’s welfare as far as ship’s jurisdiction is concerned when in foreign ports under Article 6(1) of the 1958 High Seas Convention and Article 92(1) of UNCLOS. Article 5(1) of the High Seas Convention suggests that nationality is not a status to be casually bestowed upon a ship. The link between a ship and the State must be real and a State must be able to exercise effective control and jurisdiction over ships to which it has granted its flag. What constitutes a genuine link is still not entirely clear, as discussed above.

494 Protection for third parties is for the ship owner of a vessel, but the country of registration will know the beneficial owner’s true identity during registration. This is to know who to proceed against with legal action. Ship’s registration provides an excellent means of identification information to third parties when the owner needs to be found. The Courts may receive in evidence a Register Book or a Certificate or some Declarations to connect the beneficial owner with registry. Registration in another sovereign State is to create a safe haven for business and financing. It provides protection for the ship and the owner with the assurance of jurisdiction, nationality and the legal right to use a flag of a chosen State.
Under UNCLOS 1982 Article 91, there must exist a genuine link between State and the ship. After comparing the 1958 HSC and UNCLOS 1982 regarding the genuine link concept, neither Convention defined what should constitute a genuine link between the flag State and the ship.

In 1986 UNCTAD made an attempt to clarify the genuine link concept at the UN Convention for Ship Registration to establish the true identity of the beneficial Owner. The Convention for Registration of Ships requires that a flag State be linked to its ships by having an economic stake in the ownership of its ships. This requirement made certain ship owners register their ships with States with lax registry requirement to avoid being linked directly to their ships. States with lax registry requirement are known as open registry States. National or closed registries typically require that a ship be owned and constructed in national interests, and at least partially manned by its citizens. This concept has been commented on by Charles Abbot, John Henry Abbott and Joseph Story in their book “A Treatise of the Law - Property in British Ships” published in 1829:

No person may be an owners of any ship authorised to be registered, who has taken the oath of allegiance to any foreign State unless he shall be a naturalised subject of the United Kingdom.

Open registries do not have such requirements since online ship registration became available to ship owners who want to use such services. Thus in the event of any problems, the seafarer suffer. Flag States cannot be blamed for neglecting seafarers stranded in foreign ports based on genuine link irregularities. This is because the State of registry confers nationality and protection only to the registered ship since the owner registers a single entity and not the crew members. More also, crew members do change from time to time and swear allegiance to their individual nations. Secondly, giving protection on the high seas

495 “Every state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship”.
496 Robin R Churchill and Christopher Hedley ‘The Meaning of The “GENUINE LINK” Requirement in Relation to The Nationality of Ships’ (A Study prepared for the International Transport Workers’ Federation, University of Wales, Cardiff Law School, Cardiff, October 2000) p. 22
497 Ibid
498 Patricia Park, Flag of Convenience (Conference Paper, Southampton Solent University, May 2011)
and in foreign ports involves money. That is why UNCTAD’S interpretation of genuine link was based on economic and legal link between the flag State and its ships. If the owner of the ship is a national of the flag State and contribute economically to the flag States income or revenue and crew members are also citizens who have allegiance to that State, then the international law that confers responsibility to the State can legally bind the flag State. Without this premise, the flag State has no moral or legal obligation to extend protection to citizens who swear allegiance to another State because a legal link cannot be established in court.

6.4.5 Taking Actions against Ship Owner for Abandoning Seafarers

The only genuine link that could be established is by bringing an action against the beneficial ship owner in personam for neglecting his responsibility to protect seafarers. The United Kingdom Senior Court Act 1981, s21 (1) stated that an action in personam can be brought against anyone who is personally liable.500 The United Kingdom Senior Court Act 1981, s21 (3) also stated that, proceedings cannot be brought against the ship, but an action in rem may be brought against the relevant ship, if it is within the jurisdiction of the Court.501

In ship registration, the beneficial owner is given protection from the time he applies for registration by the flag State.502 The OECD stated that some flag States actively promote anonymity for reluctant ship owners.503 The principal mechanisms are not the registers themselves, but the corporate mechanisms that are available to ship owners to cover their identity. There are legal corporate mechanisms available in many States,504 and these provide a properly incorporated International Business Corporation that allows for the transaction of business almost anywhere in the world, but not in the country of incorporation.

500 UK Supreme Court Act 1981, s21(1).
501 UK Supreme Court Act 1981, s21(3).
504 Ibid., p.3.
From the perspective of the ship registering process, the most important single feature that facilitates anonymity of individuals is the ability of corporations to be registered as owners of ships.\textsuperscript{505} According to Robert Force\textsuperscript{506} and Martin Davies,\textsuperscript{507} procedure in rem is not based upon wrongdoing of the ship personified as an offender, but is a means of bringing the owner of the ship to meet his personal liability by seizing his property.\textsuperscript{508}

This principle has been established in The Jupiter,\textsuperscript{509} Compania Naviera Vascongada v. S.S. Cristina,\textsuperscript{510} The Arantzazu Mendi,\textsuperscript{511} and Republic of India v. India Steamship Co Ltd cases.\textsuperscript{512}

Although a ship’s nationality protects the ship, not the seafarers,\textsuperscript{513} the ship’s crew are bound by regulations of the flag State where the ship is registered.\textsuperscript{514} Theoretically, the seafarer would be protected under the ship’s Protecting and Indemnity (P&I) Insurance Cover,\textsuperscript{515} but it needs the ship owner to establish a membership connection with the P&I Club.\textsuperscript{516} The flag State abandons seafarers if the ship owner cannot be found, because it has no legal connection with the seafarers, only with the ship, hence paying a bond to free the ship from detention when arrested.\textsuperscript{517} Genuine link in this case could not be established between the

\begin{footnotes}
\item[505] Ibid
\item[506] Professor Force is director emeritus of the Maritime Law Centre, of which he was the founding director and holds the only endowed chair in maritime law in the United States. He was Acting Dean from 1977 through 1978. In 2001, Professor Force was honoured by the Seamen’s Church Institute as a maritime law legend and received its Distinguished Maritime Law Award. In 2002, he was honoured by the President of Panama, who designated him a member of the Order de Vasco Nunez de Balboa.
\item[507] Professor Martin Davies is Admiralty Law Institute professor of Maritime Law of Tulane Law School and Director of the Tulane Maritime Law Centre
\item[509] The Jupiter [1924] P. 236 (E.W. C.A.)
\item[511] The Arantzazu Mendi [1939] A.C. 256 (H.L.)
\item[512] Republic of India v. India Steamship Co Ltd., The Indian Grace (No. 2) [1998] A.C. 878 (H.L.)
\item[516] Ibid
\end{footnotes}
ship owner and the flag State because the ship owner in principle is not known by the flag State. Since the flag State adopted the ship to make her a citizen of that State, the State only knows the ship as her citizen or national and not the crew members who are workers in the ship. Seafarers have allegiance to the ship owner who is the beneficial owner, or his agents, and not directly to the flag State. This in fact has resulted in flag States caring little for the rights and welfare of seafarers. The UNCLOS 1982 stipulates that States must ensure that all ships flying their flags meet their obligations to those who need protection.

The formalities of ship’s registration do not impose legislation on the ship owner to include the names and nationalities of seafarers. Seafarers are collective nationals of sovereign States. The ship owner registers the ship only as a single entity which means the flag for protection covers only the ship. Seafarers would hope to be protected by the ship’s flag when they become vulnerable. However, all too often a seafarer becomes an individual striving to survive in a foreign port because the ships flag is no longer protecting.

519 H.E. José Luis Jesus, op.cit.
528 Rainer “Musikerong Bundukeronong Marino” (Enchanted Kingdom Experience on Board the Vessel, M/T Shannon Star, 22 May 2011) <http://musikerongbundukero.multiply.com/journal/item/52/Enchanted_Kingdom_Experience_on_Board_the_Vessel_MT_Shannon_Star> accessed 5 August 2011
Seafarers often lodge complaints through the Port State Control inspectors about their living conditions on board, for example unpaid wages, but never to the flag State directly. If indeed the ship’s nationality protected them, they would have complained through the flag State maritime administration or their wages would have been paid directly by the flag, as is the case with any other nationals working on land.

The ship is a floating part of a sovereign State on the high seas and the State has jurisdiction over that ship but it pays less attention to seafarers working on board. Seafarers usually complain through the International Transport-Workers Federation (ITF) in London which has no affiliation with the flag State’s. On every occasion, the ITF looks for the beneficial owner of the ship without success. They never get through with the flag State because the flag State acknowledges the ship as its citizen and not the ship owner or seafarers’ with different nationalities.

### 6.5 Partial Interpretation of Genuine Link for a Ship

The genuine link between ship and flag State is based on agreed socio-economic factors such a ship’s construction, ship ownership, agent, crew and manning. The report by the United Nations Conference on Trade and Development (UNCTAD), on the economic consequences of the existence or lack of a genuine link between ship and flag of Registry, concluded the relevant elements which must exist when establishing whether a genuine link exists between a ship and port of registry such as i) The merchant fleet contributes to the national economy of the State’s

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531 Juan Somavia “Guidelines on Good Employment Practice” (Undated) Decent work is the most widely shared aspiration of people and their families in all countries. <http://www.marise.org/Employment%20Guidelines.pdf> accessed 17 August 2011


534 Ibid

535 Ibid
revenues and expenditure of shipping, as well as purchases and sales of ships are treated in the national balance-of-payment accounts; ii) The employment of nationals on a ship flying the flag of State of registry, and iii) the beneficial ownership of the vessel must come from the State of registry.

Under UNCLOS 1982, States are permitted to grant their nationality to ships only when there is a genuine link\(^5\) between the ship and State, a term not defined by the Convention, but which is to be interpreted as a strong economic tie between nationals of the flag State and the vessel with regard to ownership, management, and manning of the ship.

The 1958 Geneva Convention and UNLCOS 1982 elevated ship registration from domestic to international law. Given the freedom which States have to formulate their registration requirements, they are obliged to exercise administrative, technical and social controls. The responsibility of the State in this respect is thus defined in this context. A State’s jurisdiction over its ships has been defined as the power of policing on the high seas. This power can also be exercised in respect of ships registered in other countries either on the basis of customary law or under the relevant Conventions or in the context of a unilateral claim by a State to protect its own legitimate interests.

6.6 IMO Interpretation of Genuine Link.

It was expected that the IMO would have had an in-depth definition of the genuine link concept as prescribed by UNCLOS. However, the IMO considers that the ship owner should be considered as subject matter of an economic corporate nature. This, however, falls beyond the purview of the law of the sea and the mandate of the international organisations as defined in UNCLOS. However, the IMO commented further that the importance and the purpose of establishing a ‘genuine link’ is to identify who assumes responsibility for ship’s operations and control when it comes to the UNCLOS 1982 and SOLAS 1974 as amended. The IMO maintains its slogan on safer and cleaner seas but not on the ‘genuine link’ concept.

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\(^5\) UNCLOS Art. 91, Para. 1
6.7 ILO Interpretation of Genuine Link.

The International Labour Organisation, which is the International Labour branch of the United Nations, interprets the concept as duty of care of the flag State and the ship owner to secure the welfare for seafarers in all labour and social matters on board its ships. Without a real connection between the ship owners and the ship’s Registration State, seafarers struggle to express the shortcomings in their working environment. Hence, the new 2006 Maritime Labour Convention was introduced, which moves beyond the previous ILO Maritime Labour Conventions, to establish a system for flag State certification of specified minimum conditions on board ships.\(^{537}\)

There have been various interpretations of genuine link whereby organisations have developed their own definitions and interpretations of what the genuine link concept ought to be. In all of these, however, no responsibility is placed on the flag State or the ship owner to protect its seafarers.

The ICJ has commented that the registration of a ship certifies her nationality and establishes a link between the State and the ship regardless of the nationality of her seafarers. However, the ICJ declined to associate the ship’s nationality to the ship owner. This principle was upheld by the United States Supreme Court decision in *Lauritzen v. Larsen*.\(^{538}\) The association of genuine link with a State has not gone down well because the provisions concerning ship ownership were omitted from the outset by the International Law Commission when drafting it.

The ICJ and ITLOS rulings on cases regarding genuine link have not given a precedent to the legal definition of genuine link between a flag State and ship due to different interpretations by the IMO and ILO. The *Nottebohm*,\(^{539}\) and *MV SAIGA*,\(^{540}\) two ITLOS cases regarding genuine link can be interpreted as an economic approach between a ship and the State where it is registered. The 1958 High Seas Convention (HSC) and UNCLOS 1982 applications have not proven to be entirely successful based on the above cases.

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\(^{537}\) Ibid. p.331

\(^{538}\) *Lauritzen v. Larsen*, 345 U. S. 571 (1953)

\(^{539}\) *Nottebohm (Liechtenstein v. Guatemala)* I.C.J. Reports 1955

\(^{540}\) *MV SAIGA (St. Vincent & Grenadines v Guinea)* 1997
The ‘genuine link’ is an operational concept, namely a concept to be implemented through the way in which ships operate, rather than through who owns them or what the nationality of the crew is. This is why the reference to the need for a genuine link in Article 91 is related to the duties of a flag State in Article 94. What UNCLOS 1982 does is to impose upon every State the obligation and the responsibility to exert effective jurisdiction, so that ships flying its flag comply with the Conventions of the IMO and ILO.

6.8 CHAPTER SUMMARY ON SEAFARERS AND FLAG STATE

It should be understood that the UNCLOS 1982 Article 91 concerning genuine link did not provide a full definition in what constitutes a genuine link. However, based on the above discourse, it can be established that genuine link exists mainly as a requirement for the registered nationality of a ship. The exercising of its jurisdiction by a flag State, however, is not necessarily equated with the genuine link. The tribunal was only concerned with the question of whether the absence of a genuine link entitled other States to recognise the nationality of the ship concerned, but not the nationals (seafarers) who work on board.

This has made the issue of genuine link an illusion since it only equates to the relation between the ship-owner and the flag State. It does not make any provisions for the protection of seafarers. The UNCTADs interpretation of genuine link is based on economic and legal link between the flag State and its ships. Its jurisdiction does not practically cover seafarers’ rights and welfare at foreign ports. Efforts are being made by stake holders to clarify the issue of genuine link and the welfare of seafarers. This is because without seafarers, clearly the ship cannot operate without them, and as such the flag State should make adequate provisions in its insurance coverage over seafarers during ship’s registration.

Ship owners, maritime institutions and flag States see the commercial value of the cargo they trade in over the interests of seafarers because there are systems of ship registration where the beneficial owner is given protection from the time he applies for registration by the flag State.\textsuperscript{541} This protection is to the advantage of

the ship owner but to the disadvantage of the seafarers. It is also noted that some flag States actively promote anonymity for reluctant ship owners.\textsuperscript{542} There are also corporate mechanisms that are available to ship owners to legally cloak their identity. This issue are there and stakeholders are deliberating on it to find lasting solutions. The IMO and ILO have taken a longer time to address the problems of seafarers because the issue of genuine link has posed a hindrance to seafarer’s welfare and safety for a long period because genuine link has not been properly defined by ILO and IMO.

\textsuperscript{542} OECD “Ownership and Control of Ship” Maritime Transport Committee (MTC Secretariat, Paris September 2002) p.3.
CHAPTER SEVEN

EVALUATION OF THE ANTI-TERRORISM LEGISLATIONS BY THE UNITED STATES AND UNITED KINGDOM

7.1 Introduction to the Anti-Terrorism Act

A report was prepared by the United States Government Accountability Office (US GAO) to the president of the United States and Congress on January 2011 on Homeland Security and Maritime Security.\(^\text{543}\) Congress indicated that the US and the UK Anti-Terrorism legislations were developed to control both immigrants and nationals in both States at different levels.\(^\text{544}\) According to John Kaminski, the Anti-Terrorism legislation is considered as “You are Guilty until Proven Innocent”.\(^\text{545}\) Instead of innocent until proven guilty, people deemed guilty will be unable to prove their innocence.\(^\text{546}\)


The United States faces the challenge of balancing the need to secure its borders to prevent the illegal entry of persons while also facilitating legitimate trade and travel. In the fiscal year 2009, maritime crew—known as seafarers—made about five million entries into US ports on commercial cargo and cruise ship vessels. The overwhelming majority of the seafarers entering US ports are aliens. Because the US government has no control over foreign government seafarer credentialing practices, concerns have been raised that extremists may fraudulently obtain seafarer credentials as a way to gain entry into the United States or conduct attacks against maritime vessels or port infrastructure. Although there have been no reported terrorist attacks involving seafarers on vessels transiting to US seaports, the Department of Homeland Security (DHS) considers the illegal entry of an alien through a US seaport by exploitation of maritime industry practices to be a key concern. Screening foreign seafarers to identify those who pose security threats to the United States is a shared responsibility among federal stakeholders. For example, overseas, State Department consular officers screen seafarer applicants for non-immigrant visas—a prerequisite to be eligible for a permit to depart the vessel and enter the United States—and may deny a visa if, for example, they determine that an applicant poses a potential security or immigration risk. Within the DHS, the US Customs and Border Protection (CBP), the unified federal agency responsible for border security, inspects all seafarers arriving from foreign waters to determine their admissibility into the United States and prevent illegal immigration at US seaports. CBP obtains key support from the Coast Guard, the lead federal agency responsible for a wide array of maritime safety and security activities.


Since the intelligence services could not distinguish a foreign terrorist from a home-bred terrorist, the above emergency measures place everyone in the same category but most of all to the detriment of seafarers who suffer rigorously under the new legislations.

The seafaring profession is not seen as an attractive profession in the current twenty-first-century environment, where terrorism has made it very difficult to differentiate them from the unseen perpetrators under the War on Terror doctrine, as previously explained by the author.

This chapter examines the case of the United States and the United Kingdom as two major maritime States who have introduced Anti-Terrorism Legislations which affect primarily seafarers. As stated previously, the acts of terrorism in the US on 11/9 came through aircraft and in the UK on 7/7 via the terrestrial transport sector, and yet the current legislation primarily affects seafarers to their detriment. The chapter elaborates on whether the Anti-Terrorism Legislations are compatible with the UNCHR or for that matter, the EUHRC. The content or the wording of the anti-terrorism legislation does not clarify with whom the government is dealing with because the legislation gives extra powers to either the USCG or UKBA/Police to invade personal or private property of an individual, including car, home, work place and/or on board a ship.

7.2 Anti-Terrorism Legislation: An act of Terrorism and Oppression against Seafarers

In the twenty first century, terrorism has planted the idea of mistrust into the lives of many governments and civil societies, which makes it very difficult to trust another human being. Thus, how to combat terrorism poses an ethical dilemma and generates moral questions because, since the fight is against everyone in general but no one specifically, the reasoning by a person becomes corrupted so


that one needs to blame everyone to justify a cause for action. Ethically, one could raise a question on Immanuel Kant’s moral philosophy conception to counter terrorism. The United States Patriot Act and the United Kingdom Anti-terrorism Act have the moral armour of a double-edged sword which contradicts itself. One side of the sword shows that the US and the UK have moral obligations to protect their citizens and foreign visitors and to ensure the National Security is secured and protected. The other side of the sword shows that the US and the UK have moral and ethical responsibility to protect and respect the rights of every person or group who they suspect as a threat to their National Security, but which has yet to be justified.

Since the Anti-terrorism law bypasses customary legal rules, and procedures to protect humanity to combat terrorism tend to be ignored and disrespected, the rights of humans appear to be downgraded, and these actions also infringe on a person’s civil liberties.\(^{549}\) If Kant’s view is applied to anti-terrorism legislation, then such legislation should be shielding good people from being hurt. The Christian Bible also sets out this fundamental truth:

\[
\text{The Lord is my rock and my fortress and my deliverer, my God, my rock, in whom I take refuge; my shield and the horn of my salvation, my stronghold}^{550} \text{ “You are my hiding place; You preserve me from trouble; You surround me with songs of deliverance.”}^{551}
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When one looks at the fighting of evil with good intentions, this should not affect the righteous and the innocent who are caught up in Anti-terrorism legislations. However, this research argues in agreement of Immanuel Kant’s principles of Just War theory, that they can be justified if the Anti-terrorism legislation is really in the interest of protecting innocent citizens and legitimate visitors, in which case self-defence with reasonable force can be seen as favourable to humanity. The world has seen different forms of terrorism which does not necessarily involve arms or bombings. It is a fact that someone uses verbal threats can affect the other person psychologically and can be interpreted as terrorism, just for the fact that it brings fear into the persons’ life or their way of life. When a government passes a new law to protect its nationals and later on it is noticed to be controlling

\(^{549}\) Idem
\(^{550}\) The Christian Holy Scriptures, King James version “Psalm 18:2”
\(^{551}\) The Christian Holy Scriptures, King James version “Romans 12:14-21”
them, that law can be construed as legislation of fear. Although there are no
bombings involved but the approach the security forces uses may create an
atmosphere of fear and panic among the civilians.

One example is the content of the new Maritime Security Code. The Code was
designed as a proactive measure against terrorist or for shipping companies to find
a way to stop future terror groups from attacking port facilities, but the level of
control it’s exerting on seafarers brings into question the moral issues surrounding
the fight against terrorism. This is because seafarers are in doubt about what the
Code is supposed to be doing. To threaten someone can bring fear into the
person’s life, and intense fear can cause such a catastrophic drop in blood pressure
which could eventually lead to death\(^5\)\(^5\). Terrorism must not only be considered
bombings that kill innocent people. Threats by legislation to the innocent civilian
population is not something new but under current legislation it is not justified as
terrorism because it involves no physical activities, and yet it has a psychological
impact by producing fear, depression or anxiety.

Yvette Cooper\(^5\)\(^4\), commenting on the new guidelines the Home Office is bringing in
for domestic psychological abuse cases, said that recognising the devastating
impact of coercive control and also the effects of domestic abuse on people is
really important.\(^5\)\(^5\) Although coercive control refers to abuse of women in the
domestic environment, its impact and devastation can be mirrored in the case of
seafarers, by the Anti-Terrorism legislative Act. This is because the legislation
represents an act of oppression against everyone including seafarers. It does not
leave visible scars or physical damage on the victim’s body but leave mental scars,
and when someone is mentally derailed, he or she cannot function effectively even
though the person is competent and qualified in his or her profession. The National
Union of Teachers (NUT) also commented on the facts of psychological abuse by
stating that:

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\(^5\)\(^3\) Jeff Wise “Extreme Fear” : The Science of Your Mind in Danger” (New York: Palgrave Macmillan Publishers,
2009) p.72
\(^5\)\(^4\) Yvette Cooper is a British Labour Party politician and currently the Shadow Home Secretary and Shadow
Minister for Women and Equalities.
\(^5\)\(^5\) James Chapman “Stopping your wife having a bank account can be domestic abuse under new guidelines”
The consequences of domestic violence are often devastating and long term, affecting both physical health and mental wellbeing. It is right that recognising coercive and psychological abuse is at the forefront of these changes for the first time.\footnote{Politics Home “NUT comment on Domestic Violence changes”(2012) <http://www.politicshome.com/uk/article/61731/nut_comment_on_domestic_violence_changes.html> accessed 19 September 2012} This means that men or women who abuse their partners psychologically or emotionally could be found guilty of domestic violence offences. The law is being extended to protect those concerned for the first time amid fears many people who suffer in abusive situations have been unable to get the help they need. In the case of the maritime security legislations, and for that matter the Anti-Terrorism Acts, although there is no clear criminal definition for the legislative violence that government impose on seafarers, arguably, this is exactly what the above legislation is doing.

The UK’s current Deputy Prime Minister, Mr Nick Clegg said that legislations on psychological and emotional torture meted from one party to the other human being will be in place by March 2013, to help expose the true face of emotional and psychological violence, which is much more complex and much more widespread than people often realise.\footnote{SKY News “Domestic Abuse: Controlling Partners Targeted” (2012) <http://uk.news.yahoo.com/domestic-abuse-controlling-partners-targeted-025552948.html> accessed 19 September 2012}

Suffering at the hands of people who are meant to care for you is horrific at any age, but it can be especially damaging for young people - the scars can last a lifetime.\footnote{SKY News “Domestic Abuse: Controlling Partners Targeted” (2012) <http://uk.news.yahoo.com/domestic-abuse-controlling-partners-targeted-025552948.html> accessed 19 September 2012}

This thesis is in agreement with Nick Clegg’s argument on suffering at the hands of people who are meant to care for you. In the event of seafarers, the legislations coming from governments (particularly the US and the UK governments) can be potentially damaging due to their effects on the mental state of seafarers. In his inaugural address as 40\textsuperscript{th} president of the United States, the then US President Ronald Reagan said that: the government is not the solution to people’s problems,
rather government is the problem.\textsuperscript{558} This is a true statement when it comes into government-instigated legislation on terrorism that ends up controlling seafarers.

7.3 Linking Maritime Terrorism to Foreign Seafarers by the United States

The influence of the United States on the OECD\textsuperscript{559} is represented illustrated by figure 12 to confirm the possibilities and channels that potential terrorists could explore to smuggle explosives through a corrupt seafarer.

The US is however missing the point that inserting explosives in the aircraft cargo hold or cabin has been proven by several evidential examples; by Richard Reid (also known as ‘the shoe bomber’\textsuperscript{560}) and Umar Farouk Abdulmutallab (also known as the ‘diaper bomber’\textsuperscript{561}).\textsuperscript{562} With this evidence, the aviation industry is being exempted from the world’s constant security routine on personnel who work with aircrafts and airports.

The maritime industry has always been tight in terms of security because seafarers have duty of care for the cargo their ship carries to arrive safely at its final destination port. Seafarers, just like any other person working either on land or in the air, have no prior knowledge about where the cargo they carry is loaded or where it is coming from.

The author evaluated the diagram below and extrapolated that the concerns of the US over seafarers being used as, or becoming, terrorists can be seen as an over-exaggerating worry due to the following factors.

\textsuperscript{558} Awake Magazine “Will Our World Ever Change” (25 Columbia Heights, Brooklyn, NY 11201-2483, USA, July 2012) p.4


\textsuperscript{560} Richard Reid alias the Shoe Bomber is a British citizen. He tried to detonate a bomb implanted in his shoes on-board American Airlines Flight 63, a commercial flight from Paris to Miami. The U.S. federal court sentenced him in 2002 to life in prison after admitting his guilt.

\textsuperscript{561} Umar Farouk Abdulmutallab alias underwear bomber is a Nigerian citizen confessed to attempting to detonate plastic explosives hidden in his underwear while on board Northwest Airlines Flight 253, en route from Amsterdam to Detroit, Michigan, on Christmas Day 25 December 2009. He was convicted in a U.S. federal court of eight criminal counts, including attempted use of a weapon of mass destruction and attempted murder of 289 people. On 16 February 2012 he was sentenced to life in prison.

\textsuperscript{562} United States v Umar Farouk Abdulmutallab (Case 2:10-cr-20005-NGE-DAS)
In the instance of inserting explosives into cargo, the author noted that the probability of someone planting an explosive device in cargo to be transported for an attack on another State is high. However, in the maritime/shipping realm all cargos are handled by third parties who have no direct business connections with seafarers. There are some cargos that ships carry that, arguably, pose just as much danger - if not more - to the seafarers, who put themselves at risk if constant watch is not exercised over these cargos. Some of the dangerous cargos are Coal, Ore, Crude oil, LPG, LNG, bulk Wheat and Maize. Such cargos are loaded through conveyors or pipeline from the shipper or supplier’s port warehouse directly into the ship’s hold. Some of these cargos are very dense, corrosive, or abrasive, and seafarers are particularly exposed to the dangers of cargo shifting which can cause a ship to capsize during sea voyage. Unitised cargo also comes from different warehouses which are handled by the ship’s agents.

Another comment in the OECD report stated that people, which the US referred to as seafarers, are bound, at some point in time, to be tempted by large illegal

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payments. People sometimes agree to accept certain contracts and bribes due to their financial circumstances. Although it is known that seafarers’ are not much higher earners than the international minimum wage based on their ship’s flag. It is yet to be established with evidential proof that a seafarer has been bribed or paid to be a suicide bomber, although it is possible for a corrupt seafarer to accept financial incentive to detonate a bomb. However it has been established to have occurred in the aviation sector by a passenger in the Hindawi Affair.\textsuperscript{564}

In support of Michael Clarke’s\textsuperscript{565} argument, aircraft are a symbol of modernity and look vulnerable; the ideal target in launching an attack on a State. It is also yet to be established that a seafarer’s identity has been falsified to insert terrorists on board a ship, or that a seafarer has turned against other crew members to hold them to ransom as bait to execute any terror attack on a country. The only such activities have been the recent spate of pirate attacks on ships off the waters of Somalia, in which pirates held defenceless seafarers to ransom, demanding huge sums of money. The likelihood of terrorists using a ship as a weapon has not yet been established, but using a boat of less than 500grt that is exempted from the maritime security legislation is considered possible. The policy exempts ships below 500grt, and it was such type of boat that carried out a few attacks on ships of the US on 12\textsuperscript{th} October 2000 and Western States’ (France) interests on 6\textsuperscript{th} October 2002 outside the ship’s flag State jurisdiction. In actual fact, these ships were not targeted or attacked in US or EU ports.

Terrorists sinking a ship of their political opponent State will not have maximum impact, whereas attacking the State itself will affect people and infrastructure. For over 32 years beginning on 23\textsuperscript{rd} July 1983, the Liberation Tigers of Tamil Eelam (LTTE) also known as the Tamil Tigers\textsuperscript{566} which was a political freedom-fighting organisation in Sri Lanka have been operating fleets of ships that traded internationally. It would have been easier for these so-called freedom fighters to insert terrorist seafarers in any of their ships to attack the US, UK or EU ports. Even though they operate ships and believe in a faith that glorifies martyrdom,

\textsuperscript{564} Niek Yoan “Hindawi Affair” (VDM Verlag Dr. Mueller e.K., 2010).

\textsuperscript{565} Michael Clarke “Here’s why jihadist just love to fly: Aircraft are a symbol of modernity and look vulnerable – the ideal target in a holy war” The Times, 11 August 2006.

\textsuperscript{566} Liberation Tigers of Tamil Eelam
their terror activities were centralised mainly for internal political struggle in their homeland rather than in foreign waters.

Francis X. Taylor\(^{567}\) said that the US State Department’s reasons for banning the LTTE as a proscribed terrorist group was based on allegations that they do not have respect for human rights, and that they do not adhere to the standards of conduct expected of a resistance movement or what might be called ‘freedom fighters’. It can be understood that, if the LTTE were to have respected human rights in their home country, the US may have been more willing to turn a blind eye to their fight against their government. The FBI, however, referred to the activities of the LTTE as ‘deadly’; but the Bureau has the resources and, with assistance from the USCG, could track down the shipping operations of this organisation if they suspected that they were hiring terrorists as seafarers into the seafaring jobs. In the aviation industry in Europe, on the other hand, a major security blunder occurred when an unemployed man who called himself Andrea Sirlo and wearing a pilot’s uniform, boarded and joined the genuine flight crew in the cockpit of a commercial flight from Munich, Germany, to Turin in April 2012. He was finally arrested in Italy by Italian police. He used false ID, a pilot’s cap and uniform to convince flight crew that he was a qualified pilot.

7.4 Another Breach in Aviation Security post-11/9 and 7/7

By establishing the facts that Andrea Sirlo went through airport security without being detected or stopped, the aviation security has once again been breached through the same EU partners who in agreement with the US believed that seafarers posed the more serious threat to their National Security, while ignoring the very same industry that facilitated the 11/9 events. This airport security breach took place while security in the twenty first century was consistently high; yet here we find an EU national of no distinctive appearance of someone from the Middle or Far East or South America, or for that matter, of African origin, where the majority of seafarers come from. Persons from the above mentioned regions

\(^{567}\) Francis X. Taylor, Coordinator for Counterterrorism on-the-Record Briefing on release of “Patterns of Global Terrorism 2001” Annual Report Washington, DC
would have been picked up in no time the moment they claimed to be what they were not.

Once again, in the year 2012, amidst consistently high terrorist alerts in Europe and worldwide, a person could openly and boldly pretend to be a pilot of a foreign commercial airline, fake his name, and succeed in flying as a third pilot in the cockpit of a commercial aircraft without being recognised by the real pilots assigned to fly the Air Dolomiti aircraft, an aircraft which is part of the German airline, Lufthansa, one of the most secure airlines in Europe.

Thus, questions have inevitably been raised on how effective the SUA Convention on Aviation is, and by default, how relevant the new Maritime Security Code is. It can be argued that airlines have security measures in place to counter the possibility of such events occurring; for instance, employees and crew check in with a unique code that confirms their identity on their ID card. However, none of these checks and balances prevented Sirlo from being stopped by security before he was able to board the aircraft.

This proved to be another major flaw in the aviation industry because one would think security would be tougher with airline personnel since they spend more time behind the scenes such as contact with luggage, airport facilities and the aircraft itself. This incident described above cannot be construed as an aberration caused by people just being asleep on the job; instead, it is pure systemic failure of the whole airport and aviation security system. Otherwise, on 25th July 2012, how else could Liam Corcoran, an 11 year old boy, be allowed to board a Jet2 flight to Rome without being asked for his passport or boarding pass?

The author is not arguing that there have not been maritime security breaches by stowaways. There have been many such instances; but not through seafarers, as the US claim. Stowaways find their way on board ships through the laxity of shipping companies, freight forwarders and stevedores working the ships. Stowaways using cargo container has been possible probably due to the lax systems

in some ports, although, again, these have not been linked to any seafarer.\footnote{Daily Mail “Mystery of ship possibly carrying Pakistani stowaways - including some that may be dead - arriving in New Jersey port” (2012) < http://www.dailymail.co.uk/news/article-2165480/Ville-DAquarius-stowaway-mystery-Cargo-ship-believed-carrying-Pakistanis.html > accessed 30 June 2012} Ex-President George Bush Jnr. said that religious fanatics can bribe their way through by sponsoring a seafarer’s family with monetary influence.

If the international community felt threatened by terrorists group infiltrate and funding seafarers through the manning company who employ them, it would have dealt with LTTE’s shipping operations directly, rather than speculating about their existence and fearing that they may supply fake seafarers to the maritime industry. However, money, although described as the root cause of all evil\footnote{King James Bible “1 Timothy 6:10”} has never influenced a seafarer to become a terrorist. In his own words George W. Bush Jnr. agreed and said that poverty does not breed terrorists but evil mind set of particular people who want to replace the good work of other for bad.\footnote{Krueger A. and Malecková, J. (2003). "Education, Poverty and Terrorism: Is There a Causal Connection?" Journal of Economic Perspectives V.17 (4) pp.119-144.}

Commenting on the pressures that seafarers face (as described in Figure 5), the OECD also suggested that that ship can be used to launder illicit funds for terrorist organisations. The researcher argues that seafarers cannot be part of this transaction since the control or operating of the ship lies solely in the hands of the ship’s operators appointed by the ship’s owner. No matter how the seafarer may try to become part of any illegal deal with a third party outside the ship, the authorities will find out about this, because before the ship sets sail, all passports, discharge books and other related documents are given to the Master. This has always been the practice in the maritime industry.\footnote{International Safety Management (ISM) Code” means the International Management Code for the Safe Operation of Ships and for Pollution Prevention} No matter how money is used to influence a seafarer, he/she will not have the power to launch an attack on a State, but in the aviation industry one person can execute his/her mission without being detected until it is too late. To launch an attack from a merchant ship on a sovereign State would require the collective action for the whole ship’s crew (seafarers), by being influenced or bribed in advance through the ship’s owner, the ship’s operator or the charterer. This is because any potential terrorist operations
on a ship cannot be done by contracting just one or two seafarers, but just one is all it takes in the aviation industry.

7.5 Demonstration of Agents in the Maritime Cargo Supply Chain.

As mentioned above, the author explained the functions of each shipping agent involves in bringing the cargo on board a ship base on international trade law. It has to be understood that the seafarer has no prior knowledge of these players and their responsibilities and the cargo they bring on the ship.

![Diagram of maritime supply chain](image)

Figure 6: Links in international trade before cargo is moved onto ship for maritime transport. Source: Air link Lebanon

7.6 Relation between seafarers and Cargo Agents

The main shipping agents and authorities in the cargo supply chain are (1) Marine Cargo Insurance, (2) Customs and Excise, (3) Freight Forwarders, (4) Port

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Authorities,\(^{578}\) (5) Marine Cargo Inspectors / Surveyors,\(^{579}\) (6) Flag States,\(^{580}\) and (7) Port States.\(^{581}\)

An individual seafarer or group of seafarers has no relation whatsoever with the above cargo agents and organisations. The seafarer’s major task as employee of the ship-owner is to carry the cargo loaded to its final destination as mentioned in various contracts. It is not the responsibility for a seafarer to open an already sealed item on board the ship to verify if it contains contraband or instruments of a terrorist nature, unless the seafarer has been called upon as a believer to accept an assignment of martyrdom. Thus, the overarching conclusion by the US

\(^{575}\) It is an insurance covering loss or damage goods during sea voyage. Marine insurance typically compensates the owner of merchandise for losses sustained from fire, shipwreck, etc, but excludes losses that can be recovered from the carrier.

\(^{576}\) One of the little rituals all international travellers go through is customs. To most people, this is just another stop in an airport or a minor inconvenience at a country’s borders. But when one goes through customs, you are actually taking part in a key component of the global economy. A nation’s customs service has many responsibilities. At its most basic level, its purpose is to regulate what comes into and goes out of a country. The foremost element of this regulation is controlling international trade.

\(^{577}\) A freight forwarder is an individual or a company that book or otherwise arranges space for shipments between countries via common carriers, providing all the necessary documentation and arranging Customs clearance. Freight forwarders do not ship cargo themselves but instead arrange for its carriage by others. They also prepare and process the documentation and perform related activities pertaining to their shipments. Some of the typical information reviewed by a freight forwarder is the commercial invoice, shipper’s export declaration, and other documents required by the carrier or country of export, import, or transshipment. In these cases the forwarding company takes on prime responsibility for the entire transport operation, specified in each contract, for a charge or fee which covers the total transport operation and, in turn, pays the actual carriers for the transport services rendered to it.

\(^{578}\) A government body which in international shipping maintains various airports and/or ocean cargo pier facilities, transit sheds, loading equipment warehouses for sea and air cargo, has the power to levy dockage and wharfage charges, landing fees and other services. In recent times there have been several shipping companies that operate and manage maritime ports; however, the government remains the landlord for tax purposes.

\(^{579}\) They basically inspect cargoes of seagoing ships to certify compliance with national and international health and safety regulations in cargo handling and stowage. Marine cargo inspectors read ship documents that set forth cargo loading and securing procedures, capacities, and stability factors to ascertain cargo capabilities according to design and cargo regulations. Surveyors advise seafarers in techniques of stowing dangerous and heavy cargo. Inspects loaded, secured cargo in holds and lashed to decks to ascertain that pertinent cargo handling regulations have been observed. Issues certificate of compliance when violations are not detected and recommends remedial procedures to correct deficiencies.

\(^{580}\) Flag State refers to the authority under which a country exercises regulatory control over the commercial ship which is registered under its flag. This involves the inspection, certification, and issuance of safety and pollution prevention documents. The detail roles and responsibilities of the Flag States will be discussed in chapter three.

\(^{581}\) Port State refers to that authority under which a country exercises regulatory control over the commercial ship which is registered under another country’s flag. This authority only exists while those vessels are operating within that country’s territorial waters. In the U.S the United States Coast Guard (USCG) carries out this responsibility under the Port State Control (PSC) initiative. The USCG verifies that all foreign flagged ships operating in U.S. waters are in substantial compliance with international conventions, as well as all applicable U.S. laws/regulations and treaties and in the U.K. it is the Maritime and Coastguard Agency (MCA).
Government on seafarers as potential threat to National Security heading for their country to commit atrocities is not yet entirely accurate. This conception has caused seafarers to face unjust restrictions when they are on official duties in the US and other European ports. There are international laws regulating the rights of seafarers. However, the US has categorically refused to acknowledge their existence and has therefore given powers to the USCG through the Patriot Act 2001 and in the UK to the UKBA through Police Powers under Anti-terrorism, Crime and Security Act 2001 to stop seafarers from disembarking from their ships. Thus, it comes to mind whether international instruments actually have any bearing on the civil liberty of seafarers.

7.7 The Background of the United States of America Patriot Act 2001

Terrorism- a word no one wants to hear, even as a joke amongst friends and family members; a word which is of great concern more than any infectious or terminal ailment. Even a whisper or a joke at the airport that refers to ‘terrorism’ could land you in jail. The threat of terrorism is a common concern to every reasonable human being.

Following the events of 11/9, Ex-President George W. Bush Jnr. declared a national emergency and issued Executive Order 13224, blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism. This Executive Order necessitated the US Congress to pass the Patriot

584 Executive Order 13224 was signed by President George W. Bush on September 24, 2001, to cut off resources to terrorists and terrorist organisations through asset blocking. The Executive Order prohibits transactions with those entities deemed by the Executive Branch to be associated with terrorism and freezes all assets controlled by or in the possession of these entities and those who support them. The E.O. prohibits the provision of any financial or material support to any entity specifically listed in an Annex or determined by the Secretaries of State or Treasury as well as any associated entities. Several U.S. government agencies have created lists of known or suspected terrorists, as has the United Nations and the European Union. The most comprehensive of the U.S. lists, is the Treasury Department’s Specially Designated Nationals (SDN) list. Both the Treasury Department and Executive Order lists are physically included in the Executive Order. The open-endedness of the prohibitions contained in the E.O. is worrisome for Grant Makers. No distinction is made in the E.O. between domestic and international terrorism.
Act 2001 which was signed into law by the President. The Executive Order freezes all property and interests in property of certain persons - both individuals and organisations - identified as terrorists or otherwise associated with terrorism. Persons listed on security watch lists are under constant watch by the US, the UK, the EU, the UN, and other governments and/or governmental bodies. The consolidated list of individuals being watched is maintained by the US Office of Foreign Assets Control (OFAC)\(^\text{585}\) at the Department of the Treasury (DT). The list is referred to as the OFAC, where the acronym SDN refers to Specially Designated Nationals.

The USCG interpretation of the President’s Executive Order (PEO) has linked every foreign seafarer to the listed organisations or individuals as potential family members, since the USCG cannot differentiate between those on the list from seafarers. The reason behind not permitting seafarers ashore is the possibility that thousands of people on the list might somehow or in some other way have an affiliation with a seafarer, or vice versa. In the US, the Patriot Act is seen by politicians as an act uniting and strengthening the country,\(^\text{586}\) by providing appropriate tools which are required to intercept and obstruct terrorist threats. The Act was signed into law by Ex-President Bush Jnr. on 26 October 2001.\(^\text{587}\) On 31 December 2011, before the midnight deadline for the Patriot Act 2001 to expire, the current US President Barack Obama renewed it by signing it into law for another four years.\(^\text{588}\) The President commented that:

\[\text{It's an important tool for us to continue dealing with an ongoing terrorist threat.}\(^\text{589}\)

The legislation represents the US Government’s primary legislative response to the 11/9 attacks. The Patriot Act which is the new US Public Law No. 107-56 focuses


\(^{586}\) The United States PUBLIC LAW 107—56—OCT. 26, 2001


\(^{589}\) Ibid
mainly on reinforcing the Central Intelligence Agency\(^\text{590}\) (CIA), the Federal Bureau of Investigation\(^\text{591}\) (FBI), and Federal Prosecutors (FP) for identifying and disabling terrorist networks operating both within and outside the US. Unlike most of the Acts, the Patriot Act, which is permanent law, must be renewed periodically because of concerns that the legislation could be used to violate individual privacy and human rights.\(^\text{592}\)

### 7.7.1 Confusion over Provisions in the United States Anti-Terrorism Act (The Patriot Act)

On 29 March 2012 Mr Grant McCool\(^\text{593}\) published on Reuter’s website the worries of the public about the new Anti-Terrorism legislation. Lawyers for the US President’s administration were put to the test by a judge to explain why civilians should not fear being detained under the new anti-terrorism law. This is because activists and journalists are suing the US Government to try to stop implementation of the law’s provisions of indefinite detention for those deemed to have substantially supported terrorists. The Government lawyers argued in the New York Federal Court that the plaintiffs did not have the standing to challenge the National Defence Authorisation Act\(^\text{594}\) (NDAA) - “The Patriot Act” - provisions signed into law by President Barack Obama.

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\(^{590}\) It was President Truman who signed the National Security Act of 1947 establishing the CIA. The National Security Act charged the CIA with coordinating the United States’ intelligence activities and correlating, evaluating and disseminating intelligence affecting national security.

\(^{591}\) The FBI was established in 1908. It is an intelligence-driven and a threat-focused U.S. National Security and Law Enforcement Organization, the mission of the FBI is to protect and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the criminal laws of the United States, and to provide leadership and criminal justice services to federal, state, municipal, and international agencies and partners.


\(^{593}\) Grant McCool reports white-collar crime cases and investigations, financial industry civil litigation in New York, mostly in the federal district that includes Wall Street. Grant has worked as a reporter and editor in Africa, Asia and the United States, mostly for Reuters.

\(^{594}\) The National Defence Authorisation Act (NDAA) for Fiscal Year 2012 was signed into United States law on 31 December 2011, by President Barack Obama. The Act authorises US$662 billion in funding for the defence of the United States and its foreign interests. Before signing into law, the U.S. President Obama described the Act as addressing U.S. Security programmes, Department of Defence (DOD) health care costs, counter-terrorism within the U.S. and abroad, and military modernisation. The Act also imposes new economic sanctions against Iran (section 1045), commissions reviews of the military capabilities of countries such as Iran, China, and Russia, countries with most seafarers on foreign ships. The most controversial provisions to receive wide
Southern New York District Judge Katherine Forrest who was appointed by President Obama on 17th October 2011 was listening to oral arguments by lawyers of Mr Chris Hedges (former New York Times war correspondent) and others who argued that the Patriot Act will hamper their work as professional journalists. Judge Forrest was sceptical that the plaintiffs would win a constitutional challenge to the Patriot Act, but will welcome clarification on how the ordinary citizen understands the Patriot Act. She continued to argue by saying that “I can’t take the statute and strike it down for what it says, but can Mr Chris Hedges and others be detained for contacting terrorist organisations as reporters?” Mr Chris Hedges told the court that “I don’t think we know what ‘associated forces’ are. That’s why I’m here”.

The lawsuit, filed in January 2012, cited the President’s statement of his “Serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists”. This is when he signed the Patriot Act. On this note, Judge Forrest asked Assistant Attorney Professor Benjamin Torrance if “associated forces” could be interpreted in different ways. Professor Benjamin Torrance commented that the plaintiffs were “taking phrases out of context” and that the law specifically applied to those found to have ties to terrorist organisations. Judge Forrest argued about “What does substantially supported mean? How much is enough? When are someone’s activities substantial or insubstantial?” Professor Benjamin Torrance commented that he did not have a specific example, and said “It is not proper for plaintiffs to come in and say they are chilled and what-not” He emphasised that the activity would “have to take place in the context of armed conflict”. Judge Forrest did not rule on the motion. However, Ex-Defence Secretary Donald Rumsfeld pointed this out to Ex-President Bush Jnr. on the wording of “war on terror”.

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595 Mr Chris Hedges is an American journalist, author, and war correspondent specialising in American and Middle Eastern politics and societies.
596 Benjamin H. Torrance is an Adjunct Professor of Law at Fordham University School of Law in New York.
597 Grant McCool “U.S. lawyers tested in court over anti-terrorism act” (2012)
This was further commented on by Professor Benjamin Torrance on 29 March 2012, who said that the war on terror would have to take place in the context of armed conflict; that is, it needs the physical presence of another human being, which is a real person with arsenals to engage in a war, not an ideology.

### 7.8 Background to the United States of America Homeland Security

The initial recommendation by the US Commission to introduce a Bill on National Security for creating a National Homeland Security Agency (NHSA) was discussed by the House of Representatives (HR) in February 2001 but was promulgated after 11/9 by Executive Proclamation of Ex-President Bush Jnr. on 8 October 2001 by Executive Order and with the cooperation of Congress. The US needed a command centre which would coordinate and consolidate various departments responsible for national security because Homeland Security activities spanned 40 different US Government agencies; hence the intention of bringing all these departments under one umbrella.

#### 7.8.1 Department of Homeland Security (DHS) Responsibility

The Department of Homeland Security (DHS) is responsible for securing the borders of the US by protecting its nationals from terrorism, illegal immigration policy and organising disaster preparedness and recovery. These have been the core operations of the USCG post-11/9, including counter-terrorism activities from threats such as explosions in ports and port facilities. Besides the above-mentioned security operations, the DHS also provides immigration-related services and benefits, such as naturalisation and work permits to legal foreign nationals who reside in the US. The other functions of the DHS are enforcement of customs laws and air security laws. In times of ‘Act of God’ natural disasters, or man-made atrocities such as ‘terrorist’ attacks, or any other emergency on a large scale, the responsibility lies with DHS to ensure that emergency personnel are ready to be deployed on the coastal waters to secure the nation’s maritime borders. The Department is also responsible for recovery efforts, and coordinates with State and

local law enforcement agencies at such times. The main purpose of the Homeland Security Agency is protection of US citizens and soil, and prevention of terrorist attacks within the U.S even though, should there be any attacks from within, the impact will reduce the country’s vulnerability to a minimum to which the recovery rate from damage would be quicker.

7.8.2 The United States Coast Guard’s Role under the Homeland Security Act 2002

The United States Coast Guard (USCG), which is a part of the Department of Homeland Security (DHS), is the lead federal agency for maritime homeland security. Section 888(a) (2) of the Homeland Security Act of 2002 under US Public Law 107-296, which established the DHS, specifies five Homeland Security missions for the United States Coast Guard: i) Ports, Waterways and Coastal Security (PWCS), ii) Drug Interdiction (DI), iii) Migrant Interdiction (MI), iv) Defence Readiness (DR), and v) other Law Enforcement (LE). Under the Ports and Waterways Safety Act of 1972 and the Maritime Transportation Security Act (MTSA) 2002, the Coast Guard has responsibility to protect ships and harbours

598 Preserving Coast Guard mission performance (a) DEFINITIONS.—In this section:
(1) NON-HOMELAND SECURITY MISSIONS.—the term “non-homeland security missions” mean the following missions of the Coast Guard: (A) Marine safety. (B) Search and rescue. (C) Aids to navigation. (D) Living marine resources (fisheries law enforcement). (E) Marine environmental protection. (F) Ice operations.
(2) HOMELAND SECURITY MISSIONS.—the term “homeland security missions” mean the following missions of the Coast Guard: (A) Ports, waterways and coastal security. (B) Drug interdiction. (C) Migrant interdiction. (D) Defence readiness. (E) Other law enforcement.

599 The Homeland Security Act of 2002 was signed into law on November 25, 2002 (Public Law 107-296) in response to the September 11, 2001 terrorist attacks. The Act brought together approximately 22 separate federal agencies to establish the Department of Homeland Security and sets forth the primary missions of the Department. The Act has been amended over 30 times since its original passage.

600 Legislative Purpose: To promote navigation, vessel safety, and protection of the marine environment. The PWSA authorizes the U.S. Coast Guard to establish vessel traffic service/separation schemes (VTSS) for ports, harbours, and other waters subject to congested vessel traffic. PWSA applies in any port or place under the jurisdiction of the United States, or in any area covered by an international agreement. 33 CFR 2.05-30 defines waters subject to the jurisdiction of the U.S. as navigable waters, other waters on lands owned by the U.S., and waters within U.S. territories and possessions of the U.S.

601 The Maritime Transportation Security Act of 2002 (MTSA) is designed to protect the nation’s ports and waterways from a terrorist attack. This law is the U.S. equivalent of the International Ship and Port Facility Security Code (ISPS), and was fully implemented on July 1, 2004. It requires vessels and port facilities to conduct vulnerability assessments and develop security plans that may include passenger, vehicle and baggage screening procedures; security patrols; establishing restricted areas; personnel identification procedures; access control measures; and/or installation of surveillance equipment. By creating a consistent security programme for all United States’ ports
from subversive acts.\textsuperscript{602} With regard to port security, the USCG is also responsible for evaluating, boarding, and inspecting commercial ships approaching their territorial waters\textsuperscript{603}, countering terrorist threats in the US ports, and helping to protect US Naval ships. A USCG officer in each of port area is the Captain of the Port (COTP), who is the lead federal official for security and safety of vessels and waterways in that area.\textsuperscript{604} They use broad law enforcement powers to suppress violations of immigration laws, as well as to secure the US from terrorist threats.\textsuperscript{605}

The USCG defence capabilities are essential to military operations in peacetime, crisis, and war time.\textsuperscript{606} They also have Presidential powers to protect and guard against terrorism.\textsuperscript{607} In summary, the USCG is the only Federal Agency that offers the combination of law enforcement and military capabilities together with legal authorities to carry out their duties.\textsuperscript{608} The USCG said that since 1790, “we have been the Law of the Sea”\textsuperscript{609}; now, one can understand why the US had always been developing or promulgating maritime legislations through the IMO. This is because they see themselves as the enforcers of the Law of the Sea. Although the USCG has Presidential powers to execute their duties, in the name of preventing terrorist attacks on port infrastructures, their pretext of fighting terrorism is to stop foreign seafarers from either entering or disembarking in their ports.

The author justified the above by analysing the (i) PWCS, (ii) DI, (iii) MI, (iv) DR and (v) LE. These do not need to come under the HSA 2002 because the MTSA, which is the US domestic legislation on maritime and waterways, automatically covers PWCS, DI, MI, DR and LE. So the main purpose of HSA 2002 legalisation is to prevent terrorist attacks within the US to reduce vulnerability to terrorism, to

\begin{itemize}
\item \textsuperscript{602} Jonathon P. Vesky “Port and Maritime Security” (New York: Nova Science Publishers 2008) p. 45-46
\item \textsuperscript{603} Janine A. Levy “Terrorism Issues and Developments” (New York: Nova Science Publishers 2007) p.200
\item \textsuperscript{604} Ibid
\item \textsuperscript{606} USCG “U.S. Coast Guard: America’s Maritime Guardian” Coast Guard Publication 1 (2009) <http://www.uscg.mil/doctrine/CGPub/Pub_1.pdf> accessed 22 January 2011
\item \textsuperscript{608} USCG “Operations:” Coast Guard Publications 3-0 (2012) pp.3-8 <http://www.uscg.mil/doctrine/CGPub/CG_Pub_3_0.pdf> accessed 2 March 2012
\item \textsuperscript{609} United States Coast Guard “Maritime Security” (undated) <http://www.gocoastguard.com/discovering-our-roles/maritime-security> accessed 12 January 2012
\end{itemize}
minimise the damage and to recover from any attacks should they occur. Based on the analysis of the HSA 2002, one can argue that there are not that many terrorism activities within the US to warrant the above legislation. Domestic terrorism such as gun crimes, murders, abductions, and armed robberies occur on a daily basis and constitutes a higher rate of local terrorism than that of the fear of seafarers coming to terrorise US seaports and border posts.

The financial and manpower resources to maintain the actions surrounding HSA 2002 are rather not supporting its course, because severe natural and human disasters in the US are much more prevalent than terrorist attacks. The HSA 2002 can be construed as risk-mitigating legislation, and to protect borders, but its adoption is serving a different purpose under the USCG which in turn is controlling seafarers. It is also a legislation that tends to deal with general risk should there be an attack, so its impact in the case of much more specific risk will be minimal.

We hear how terrorists are intelligent and adaptive people in a way in which other (non-human instigated) risks are not. However this fits a philosophy that sees the US Government having the primary responsibility for ensuring the nation’s borders are protected from unseen threats by using seafarers as scapegoats to justify the act to promote domestic tranquillity and to provide some common defence.

It is known that through history there have been several natural disasters in the US ranging from hurricanes, wildfires, tornadoes, earthquakes, winter storms and severe floods which their citizens find more deadly than what the government is worried about in a form of terrorism. These acts of God bring misery, homelessness and deprivation into the lives of many citizens in most parts of the country, and makes them question, if the tangible devastations of these natural disasters can be seen around them, why is it that the US Congress cannot legislate to help minimise their effects on the lives of the people, but can continue drafting legislations to control the ideals of people they cannot see? One can understand why the USCG under the Homeland Security Act can say ‘we have been the law of the sea since 1790’. This is because the true meaning of the security act that the USCG operates under has never really been fully understood.
The USCG is a maritime military wing of the US defence force, not the navy. The Agency operates a policy of ‘shoot first ask questions later’. Questions may never be asked because you will be either dead or detained without a cause; this is the true, hidden philosophy of the HSA 2002. The hidden philosophy was commented on by William Crowe\(^\text{610}\), Ex-Chairman of the Joint Chiefs of Staff in the following:

*The real danger lies not with what the terrorists can do to us, but what we can do to ourselves when we are spooked.*\(^\text{611}\)

Based on the above, the HSA 2002 may be of a greater threat to seafarers because it justifies US Government efforts to curtail civil liberties and so seafarers’ rights and well-being are not immune to that control. Under the HSA 2002, foreign seafarers can be detained if suspected as terrorists.\(^\text{612}\) The Act has allowed a secret watch to be kept on seafarers, and racial profiling is also increasingly more acceptable due to the geographical regions of seafarers. This is because the homeland security alert levels are used only when they have political values, and terrorism is the mainstream in today’s politics of the US, the UK and other EU Governments.

### 7.8.3 The Role of the United States Coast Guard under the Ports and Waterways Safety Act 1972

The USCG has a statutory responsibility under the PWSA to ensure the safety and environmental protection of ports and waterways.\(^\text{613}\) The PWSA was signed into law in 1972 by Ex-President Richard Nixon. The PWSA authorises USCG to establish, operate and maintain ship traffic services in ports and waterways subject to congestion.\(^\text{614}\)

\(^{610}\) Admiral William James Crowe, Jr. was a United States Navy Admiral who served as Chairman of the Joint Chiefs of Staff under Presidents Ronald Reagan and George H. W. Bush Snr., and as the ambassador to the United Kingdom under President Bill Clinton.


\(^{613}\) Title 33 U.S.C. §§ 1221-1236 (2002)

The reasons for and purpose of the PWSA Act was to establish good order and to take a proactive approach against unauthorised use of the waterways.\footnote{USCG “Ports and Waterways Safety System (PAWSS)” (undated) <\url{http://www.navcen.uscg.gov/?pageName=vtsPAWSS} > accessed 12 May 2012}

The author noted that seafarers are also seen as a threat to the environment in the eyes of powerful nations such as the US. There have been many instances where, due to the negligence of some flag States to delegate competent class surveyors to undertake ships' safety inspections, many seafarers have been let down and have ended up in foreign jails for something that was no fault of their own. Seafarers have been always associated with crude oil spills in either coastal or territorial waters around the globe, or accidents in ports by collision, and as such the wrong impression has contributed to the facts of them not being trustworthy. In the US, under the PWSA, a ship master or for that matter any foreign seafarer is instantly charged with negligence when there is marine pollution or an accident even before a hearing takes place on what actually happened.

7.8.4 Sources of United States Coast Guard Legal Authority

The mandate of the USCG is to enforce and defend the US Federal laws on immigration, the environment, on the high seas, coastal waters and inland waterways of the US. On 4 August 1790 Congress authorised the construction of ships for the Coast Guard to combat smuggling in coastal and territorial waters.\footnote{Irving H. King “The Coast Guard Expands 1865-1915: New Roles, New Frontiers” (USA, Congress Cataloging-in-Publication data, 1996) p.1}

They were previously known as Revenue Cutters but as time progressed their responsibilities grew in different and more demanding directions. In 1915, Congress voted to merge the Revenue Cutter with the Life-Saving Service thereby providing the US with a single maritime service dedicated to saving life at sea, and enforcing maritime laws.\footnote{Ibid., p.2} In 1939, through Congress, Ex-President Franklin Roosevelt gave extra powers to the USCG to operate lighthouses and other aids to navigation.\footnote{USCG “Historical Overview” (2012) <\url{http://www.uscg.mil/history/articles/h_uscghistory.asp} > accessed 25 May 2012}

The active and dedicated duties of the USCG accredited them with being given full
and permanent powers in 1946619 where Congress permanently transferred the Trade Department’s Bureau of Marine Inspection and Navigation (TDBMIN) to them. Ever since, ships’ registrations and ships’ safety certification in the US must be certified by the USCG. By looking into the Federal Government organisations, the USCG has been graded as one of the oldest organisations before the establishment in the Port and Coastal Management Agency (PCMA).620

In 1967, the USCG was transferred to the Department of Transportation. Post9/11, Ex-President Bush Jnr. proposed the creation of the Department of Homeland Security which was seen as the new Cabinet-level agency to deal with terrorism in US ports. The USCG was foremost among the agencies expected to become a constituent of the new department. On 25 November 2002, Ex-President Bush Jnr. signed House of Representatives (HR) 5005 creating the Department of Homeland Security under the Homeland Security Act 2002. On 25 February 2003, the USCG dependency on the US Department of Transport came to an end after 36 years. They became an independent body with the sole task to manage US Homeland Security to move to the forefront of the service’s primary missions.621

Legislation passed in 2002 transferred the USCG to the Department of Homeland Security, a department created post-9/11 solely to deal with terrorism-related issues,623 and to effectively tackle unseen terror attacks either within or on

international waters. However, in times of war and conflict, and by the authority vested in them by the President, the USCG serves under the Navy. They have about 7,000 officers and 29,000 enlisted on active duty. They have state-of-the-art operational equipment at their disposal to deal with any emergencies, such as ships, boats, aircraft and shore stations that conduct a variety of missions. Like any other military services, the USCG is supported by Reserves and volunteer Coast Guard Auxiliary in times of need. The Powers and Legal Authority of the US Coast Guard differ from those of the other from the other US Armed Force Services.

The majority of democratic elected governments in the world appoint a civilian to head their Defence Departments. The same principle applies in the US where the Secretary of Defence is appointed by the President. The Secretary of Defence comes under the Department of Defence which consists of three Military Departments: (1) the Department of the Army (DA), (2) the Department of the Air Force (DAF), and (3) the Department of the Navy (DN). The above mentioned Military Departments are also headed by civilians. Political appointments are made by the President for politicians to head the Army, the Air Force, and the Navy, as heads of department or Secretaries.

Within the Military Departments, however, there are five military branches - the Army, the Air Force, the Navy, the Marine Corps, and the USCG. In times of war and conflict, individual appointed secretaries report directly to the Secretary of Defence and the Commander in Chief, the President, for executive decisions.

Although the USCG performs Military, Police, Customs and Immigrations duties with military training and capabilities just like any of the armed forces, they do not fall under the Department of Defence.

Since its creation, the USCG has seen and participated in almost every conflict the US has ever been involved in. Although it is under the management of civilians (politicians), their tactical operations are commanded by a Naval Admiral. The USCG lawyers also serve as representatives on behalf of the US at meetings at the IMO, including the Maritime Safety Committee (MSC), Subcommittee on Flag State Implementation, Subcommittee on Safety of Navigation, Legal Committee, the Marine Environmental Protection Committee, the Radio-communications and Search and Rescue Subcommittee. A report issued by Coast Guard Judge Advocate General (CGJAG) to the American Bar Association (ABA) commented that the legal role of CGJAG at the IMO's Legal Committee is to represent the US delegation to shape important international initiatives regarding piracy, fair treatment of seafarers, pollution enforcement, and liability and compensation for damage from trans-boundary oil pollution damage from offshore exploration.

The author disagrees on the statement of ‘piracy and fair treatment of seafarers’ made by the CGJAG with the argument that, when the USCG presented the new Maritime Security Code to the IMO, it did not make any reasonable provisions for the welfare of seafarers, nor did it afford them any rights whatsoever. This has been a great disappointment to the maritime community, in academia and among NGOs concerning the neglect and non-considerate legislation imposed on seafarers. Ever since the blunders of the aviation industry, the situation has been nerve racking for seafarers and their families; and so for the CGJAG report issued in August 2011 to say the US delegation shaped important international initiatives regarding piracy and fair treatment of seafarers is inaccurate.

The US initiated the SUA Convention to combat piracy against seafarers, but day-in-day-out; seafarers have been at the receiving end of bullets and detention from pirates. The CGJAG report needs revisiting to amend or delete the written statement made therein. It can be seen that the written statement is a politically

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motivated article to present and portray the USCG as the guardian angel of seafarers but beneath it, the use of legislation to deny them their basic human rights has become their worst nightmare. It is unfortunate that page 8 of the report prepared in Toronto, Canada where this comment appeared was not objected to by any member of the IMO. One may ask why it was permitted in the first place whilst they know perfectly well the current condition seafarers are facing at the hands of USCG. This is because the US has UN veto power, and due to 11/9 and 7/7, a perfect excuse for IMO member States to sympathise with the US and could not consider their position to object to such a written statement. One would expect that if the US has made such a written statement, they will honour their word by treating seafarers fairly.

The reason is that the USCG derives its legal authority from their President under the Homeland Security Act. Their decision to act is dictated by political pressure to justify a cause from Congress, the law makers. The written statement yet again contradicts with the US Government Accountability Office report dated January 2011 which also states that ‘Federal Agencies Have Taken Actions to Address Risks Posed by Seafarers. Could the August 2011 CGJAG report override the January 2011 legal report? Even if it did, both reports serve different interests and different purposes. One was written for the IMO which portrayed the US as the seafarers’ lives saver, and the other report presented to the President from Congress portrayed seafarers as potential terrorists.

7.9 Travel and Effective Screening of Seafarers by United States of America Embassies or Consulates

The author identified and discussed relevant issues regarding ILO No.185 SID which is the main obstacle Convention for the US to ratify. Since the Convention is not in accordance with US immigration laws, they are reluctant to accept the wording under Article 6, because the US assumes that all seafarers are potential terrorists, and as such, they must undergo face-to-face interviews with their visa consulates to confirm their identity as it states on the ILO No.185 SID with their national passports. The US is not in favour of ILO No.185 SID because of the inserted clauses. Should seafarers be allowed to use just the ILO No.185 SID, the probability
that terrorists will infiltrate the seafaring career would be greater. So the only secure way for seafarers to be accepted into their ports is for them to go to through their Embassies vetting procedures individually and in person to certify themselves as the true and legitimate seafarer.631

Under Subtitle B s7201-(B) the Department of State said that Consular Officers will be trained on how to inspect and review travel or identity documents as part of their official duties.632 Section 222(d)633 of the United States Immigration and Nationality Act 8 U.S.C. 1202(d) requires that all non-immigrant visa applications be reviewed and adjudicated by a Consular Officer. This will enable the Consular Officer to detect any fraudulent person (seafarer) or document under the enhanced Border Security and Visa Entry Reform Act of 2002 s305(a) in accordance with s7201(d) of the 9/11 Commission Implementation Act of 2004.

Congress elaborated that these checks were necessary and important due to the fact that international terrorists travel across international borders to raise funds, recruit members and plan and carry out attacks. Congress confirmed instances where international terrorists have planned and carried out attacks on the World Trade Centre on 26 February 1993, the Kenya and Tanzania bombings of United States Embassies on 7 August 1998, the attack on the USS Cole on 12 October 2000 and 9/11 of the New York Twin Towers. So they believe that the identities of the perpetrators of these attacks were not thoroughly checked; or it is believed that they had more than one passport; and so they argued that targeting travel is the most effective way to control potential terrorists.

632 (B) DEPARTMENT OF STATE.— (i) IN GENERAL.—The Secretary of State shall provide all consular officers who inspect or review travel or identity documents as part of their official duties with the training described in paragraph (1)(C). (ii) REPORT TO CONGRESS.—Not later than 12 months after the date of enactment of this Act, and annually thereafter for a period of 3 years, the Secretary of State shall submit a report to Congress that— (I) describes the number of consular officers who inspect or review travel or identity documents as part of their official duties, and the proportion of whom have received the revised training program described in paragraph (1)(C)(i); (II) explains the reasons, if any, for not completing the requisite training described in paragraph (1)(C)(i); (III) provides a timetable for completion of the training described in paragraph (1)(C)(i) for those who have not received such training; and (IV) describes the status of periodic retraining of appropriate personnel described in paragraph (1)(C)(ii).
633 Sec. 222 [8 U.S.C. 1202] (d) Every alien applying for a non-immigrant visa and alien registration shall furnish to the consular officer, with his application, a certified copy of such documents pertaining to him as may be by regulations required. 1b/ All non-immigrant visa applications shall be reviewed and adjudicated by a consular officer.
Congress commented on data collection from foreign nationals through the Homeland Security, the US Attorney General and all directors of relevant intelligence agencies to ensure that data collected by all agencies are consistent and valuable, and this will permit officials to be better focused on identifying terrorists attempting to enter the country.

The US boasted of consistent and valuable documentation on intelligence gathering, forgetting the very same ILO No.185 SID they initiated through the ILO for every seafarer to have contain all relevant biometric information ever produced to identify every seafarer at the touch of a button. The programme was so comprehensive that when the US initiated it, the maritime community saw it as relieving the situation of the seafarers; that is, if they have suggested such a move, then it is in accordance with international agreement. Why the US would have initiated such a wonderful scheme and then retreat from its own initiatives is questionable. With the seafaring profession, SID was an ideal form of identification to facilitate easy movement of seafarers when changing ships. This is why the US initiated it in the first place because the visa system was not to the benefit of seafarers. As noted previously, they travel around the world most of the time and so it is difficult and often impossible to secure a visa while they are still on board when orders are received to proceed to the US that requires them to have a visa. It is like the US breaking their promise on what they themselves have initiated to the IMO and ILO respectively.

7.9.1 No Waiver of Travel Documents by Individual Seafarer into the United States of America Seaport or Airports

On 1 January 2008, the Department of Homeland Security developed a plan which required all foreigners travelling to the US to have valid passports and other relevant identification documents deemed by the Secretary of Homeland Security to be sufficient to denote identity and citizenship, for all travel into the United States by individuals for whom documentation requirements have been previously waived under section 212(d)(4)(B) of the Immigration and Nationality Act. After

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634 USA PATRIOT ACT 2001 (US Public Law 107- 56)
635 8 U.S.C. 1182(d)(4)(B)
complete implementation and under the Technical and Conforming Amendments (TCA), travellers are to hold a valid travel document which requires Entry Clearance Visa (ECV). Neither the Secretary of State nor the Secretary of Homeland Security may exercise discretion under section 212 of such Act to waive documentary requirements for travel into the US, and the President may not exercise discretion under section 215 (b) of such Act to waive documentary requirements for US citizens departing from or entering or attempting to depart from or to enter the country.

On 2 October 2012, the Department of Homeland Security (DHS) announced the designation of Taiwan into the Visa Waiver Programme (VWP). Eligible Taiwan passport holders can travel on the VWP beginning 1 November 2012. However, potential Taiwanese travellers may apply for travel authorisation approval through the Electronic System for Travel Authorisation (ESTA). The Visa Waiver Programme (VWP) enables nationals of participating countries to travel to the United States for tourism or business and they can stay up to 90 days or less without obtaining a visa. The programme was established to eliminate unnecessary barriers to travel, stimulate the tourism industry, and permit the Department of State to focus consular resources in other areas.

The VWP-eligible travellers may apply for a visa, if they choose to do so. Nationals of VWP countries must meet eligibility requirements to travel without a visa on VWP, and therefore, some travellers from VWP countries are not eligible to use the programme. The VWP travellers are required to have a valid authorisation through the ESTA prior to travel, are screened at the port of entry into the US, and are enrolled in the Department of Homeland Security’s US-VISIT programme.

Table 2: Visa Waiver Programme

<table>
<thead>
<tr>
<th>Andorra</th>
<th>Hungary</th>
<th>New Zealand</th>
<th>Greece</th>
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<tbody>
<tr>
<td>Australia</td>
<td>Iceland</td>
<td>Norway</td>
<td>The Netherlands</td>
</tr>
<tr>
<td>Austria</td>
<td>Ireland</td>
<td>Portugal</td>
<td>Taiwan</td>
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<tr>
<td>Belgium</td>
<td>Italy</td>
<td>San Marino</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Brunei</td>
<td>Japan</td>
<td>Singapore</td>
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<tr>
<td>Czech</td>
<td>Latvia</td>
<td>Slovakia</td>
<td></td>
</tr>
</tbody>
</table>

636 Ibid.
638 8 U.S.C. 1185(B).

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The US has multilateral agreement with the countries listed in table, which removes quantitative restriction and measures of movement between the US. Only passport holders of those countries are included in the scheme. Residents in those countries, who are not nationals of that country, are not covered and that goes extends to all foreign seafarers who are not citizens in these countries.  

<table>
<thead>
<tr>
<th>Republic</th>
<th>Denmark</th>
<th>Liechtenstein</th>
<th>Slovenia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estonia</td>
<td>Lithuania</td>
<td>South Korea</td>
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<tr>
<td>Finland</td>
<td>Luxembourg</td>
<td>Spain</td>
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<td>France</td>
<td>Malta</td>
<td>Sweden</td>
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<tr>
<td>Germany</td>
<td>Monaco</td>
<td>Switzerland</td>
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</table>

Source: U.S. Department of State (October 2012)

7.9.2 Abolishment of Transit without Visa Programme by the United States

On 2 August 2003, the U.S.A. Department of Homeland Security suspended two programmes that allow certain international passengers to travel through the US for transit purposes without first obtaining a visa. These programmes were the Transit without Visa programme (TWOV) and the International-to-International transit programme (ITI). However, the action was meant to control foreign nationals and not affect US citizens or citizens from visa waiver countries.

If they plan to transit the U.S.A. after that date and time, however, they must either obtain a visa or change their return itinerary to exclude a stop in the United States.

639 Ibid
640 The Transit Without Visa program has been in use in the United States since 1952. It applies to passengers who normally would be required to obtain a visa to travel to the United States. Under the TWOV program, passengers arriving in the United States from a foreign country are permitted to travel through the United States to another foreign destination without first obtaining a visa to stop and change planes in the United States. Passengers under the TWOV program go through the full border inspection process upon arrival in the U.S. Under the TWOV program, a passenger may stop at one or two U.S. airports en route to another foreign destination. If on a domestic flight to a second U.S. airport, the airline is responsible for ensuring that the passenger does not illegally enter the United States. Airlines provide contract security escorts and are required to maintain control of the passenger’s passport and other travel documents.

Homeland Security issued instructions to all ports to no longer allow passengers to utilise these transit programmes. The Homeland Security agencies took additional steps to increase security surveillance at both airports and sea ports that usually transport and process passengers under the above programme.

Our number one mission is to protect Americans and American interests from the threat of terrorism and we realize that terrorists aim to exploit our vulnerabilities and freedoms. The steps announced today, are an appropriate response to the threat. We know they will have an impact on international travellers, but we believe they are necessary in order to protect lives and property.642 Tom Ridge643

Section 212(d)(4)(C) of the US Immigration Act states that the Secretary of State shall not use any authorities granted under the above section until the Secretary, in conjunction with the Secretary of Homeland Security, completely implements a security plan to fully ensure secure transit passage areas to prevent “aliens” (foreigners) proceeding in immediate and continuous transit through the US from illegally entering the country, hence the US and the UK reluctantly do not want to ratify ILO No.185 SID. The ILO No.185 would require foreign seafarers not to have or hold an entry clearance visa to travel to the US and the UK. This is seen by the two major maritime States as a form of illegal entry of seafarers or better illegal immigrants which strictly goes against both countries’ immigration laws.644

7.10 Cruel and Unusual Punishment - 18 USC Chapter 107 - SEAMEN AND STOWAWAYS - 18 USC § 2191 - Cruelty to seamen (Seafarers)

Whoever, whether the master or officer of a vessel of the US, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the US flogs, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any corporal or other cruel and unusual punishment, shall be fined under this title or imprisoned for not more than five years, or both.645 Other Cruel and

642 Idem.
644 8 U.S.C. 1202(a)(b)(c)(d)(h)
645 US Code TITLE 18, PART I, CHAPTER 107, § 2191.
Unusual Punishment can be defined as using legislations to stop another person from exercising his or her human rights. Since there is no universal definition that exists, any punishment that is clearly inhumane or that violates basic human dignity may be deemed cruel and unusual. Cruel and unusual punishment is prohibited by the US Constitution as well as some State constitutions.

The general principles that the US Supreme Court relied on to decide whether or not a particular punishment was cruel and unusual were determined by Justice William Brennan. He said that there are four principles by which one may determine whether a particular punishment is cruel and unusual:

- The essential predicate is that a punishment must not by its severity be degrading to human dignity, especially torture,
- A severe punishment that is obviously inflicted in wholly arbitrary fashion,
- A severe punishment that is clearly and totally rejected throughout society,
- A severe punishment that is patently unnecessary.

Point one of the four above said ‘punishment must not by its severity be degrading to human dignity’. The author agreed on this point because by denying the right of a seafarer to disembark from his ship on the pretext that he is a terrorist, by virtue

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647 The U.S. Eighth Amendment was adopted, as part of the Bill of Rights, in 1791. It is almost identical to a provision in the English Bill of Rights of 1689, in which Parliament declared, “as their ancestors in like cases have usually done...that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The provision was largely inspired by the case in England of Titus Oates who, after the ascension of King James II in 1685, was tried for multiple acts of perjury which had caused many executions of people whom Oates had wrongly accused. Oates was sentenced to imprisonment including an annual ordeal of being taken out for two days pillory plus one day of whipping while tied to a moving cart. The Oates case eventually became a topic of the U.S. Supreme Court’s Eighth Amendment jurisprudence. The punishment of Oates involved ordinary penalties collectively imposed in an excessive and unprecedented manner. The reason Oates did not receive the death penalty (unlike those whom he had falsely accused) may be because such a punishment would have deterred even honest witnesses from testifying in later cases. England’s declaration against “cruel and unusual punishments” was approved by Parliament in February 1689, and was read to King William III and his wife Queen Mary II on the following day. Members of Parliament then explained in August 1689 that “the Commons had a particular regard...when that Declaration was first made” to punishments like the one that had been inflicted by the King’s Bench against Titus Oates. Parliament then enacted the English Bill of Rights into law in December 1689. In England, the “cruel and unusual punishments” clause was a limitation on the discretion of judges, and required judges to adhere to precedent. According to the great treatise of the 1760s by William Blackstone entitled Commentaries on the Laws of England:

648 In Furman v. Georgia, 408 U.S. 238 (1972)
of thinking something derogatory of another human being without any justification or establishing facts or proof, this can be construed as defamation of character.649

The UDHR under Article 2 declared that everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The new maritime legislation, however, subjects seafarers to severe punishment when another human being is not permitted to seek medical attention ashore650 for fear of him being a potential terrorist. The maritime industry and seafarers did not have much choice to the introduction of the new maritime security legislation due to its severity and how it is punishing seafarers and their families. The author is in support of the fourth point made by Justice William Brennan because the maritime security came about through the negligence of the aviation industry, and the introduction of the regulatory system that targets solely seafarers is unnecessary when one looks at the severe punishment meted on seafarers.

The Eighth Amendment651 to the US Constitution prohibits the federal government from imposing cruel and unusual punishment on another human being. Also the

650 Article 3 of UDHR
651 The Eighth Amendment to the U.S. Constitution, ratified in 1791, has three provisions. The cruel and unusual punishments clause restricts the severity of punishments that state and federal governments may impose upon persons who have been convicted of a criminal offense. The Excessive Fines Clause limits the amount that state and federal governments may fine a person for a particular crime. The Excessive Bail Clause restricts judicial discretion in setting bail for the release of persons accused of a criminal activity during the period following their arrest but preceding their trial. The Eighth Amendment requires that every punishment imposed by the government be commensurate with the offense committed by the defendant. Punishments that are disproportionately harsh will be overturned on appeal. Examples of punishments that have been overturned for being unreasonable are two Georgia statutes that prescribed the death penalty for rape and Kidnapping (Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 [1977]; Eberheart v. Georgia, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 [1977]).

The U.S. Supreme Court has also ruled that criminal sentences that are inhuman, outrageous, or shocking to the social conscience are cruel and unusual. Although the Court has never provided meaningful definitions for these characteristics, the pertinent cases speak for themselves. For example, the Georgia Supreme Court explained that the Eighth Amendment was intended to prohibit barbarous punishments such as castration, burning at the stake, and quartering (Whitten v. Georgia, 47 Ga. 297 [1872]). Similarly, the U.S. Supreme Court wrote that the Cruel and Unusual Punishments Clause prohibits crucifixion, breaking on the wheel, and other punishments that involve a lingering death (In re Kemmeler, 136 U.S. 436, 10 S. Ct. 930, 34 L. Ed. 519 [1890]). The Court also invalidated an Oklahoma law (57 O.S. 1941 §§ 173, 174, 176–181, 195) that compelled the state
Fourteenth Amendment⁶⁵² to the US Constitution bars the States from inflicting cruel and unusual punishment.

7.11 Anti-Terrorism, Crime and Security Acts - UNITED KINGDOM

The UK terrorism threat level is unchanged from “substantial”, which means a terrorist attack is a “strong possibility”. There are two higher levels – “severe”, meaning an attack is “highly likely”, and “critical”, meaning an attack is “expected imminently”.⁶⁵³ Following the attacks of 11 September 2001, it is right that we should take stock and review our laws to see where they might need strengthening. This Bill contains proportionate and targeted measures which will ensure and safeguard our way of life against those who would take our freedom away.⁶⁵⁴ David Blunkett⁶⁵⁵

The author discussed terrorism legislations in the US where Presidential powers were given to the USCG to arrest, detain or refuse entry for foreign travellers they suspected to be a threat to their national security. This is because the USCG has 11 mission tasks under their operation including controlling immigration and port facilities. However, in the UK, there are two separate agencies that deal with seafarers entering the country; the United Kingdom Border Agency (UKBA) under the Home Office Department which deals with Anti-Terrorism and Immigration issues, and the Maritime and Coastguard Agency (MCA) under the Department of Transport which deals with marine safety, cleaner seas and promotes the safe construction, operation and navigation of ships.

government to sterilize “feeble-minded” or “habitual” criminals in an effort to prevent them from reproducing and passing on their deficient characteristics (Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 [1942]). Significantly, however, the Court had let stand, fifteen years earlier, a Virginia law (1924 Va. Acts C. 394) that authorised the sterilisation of mentally retarded individuals who were institutionalized at state facilities for the “feeble-minded” (buck v. bell, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 [1927]).

⁶⁵² The Equal Protection Clause of the 14th amendment of the U.S. Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. See U.S. Const. amend. XIV. In other words, the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances. A violation would occur, for example, if a state prohibited an individual from entering into an employment contract because he or she was a member of a particular race. The equal protection clause is not intended to provide “equality” among individuals or classes but only “equal application” of the laws. The result, therefore, of a law is not relevant so long as there is no discrimination in its application. By denying states the ability to discriminate, the equal protection clause of the Constitution is crucial to the protection of civil rights. Generally, the question of whether the equal protection clause has been violated arises when a State grants a particular class of individuals the right to engage in an activity yet denies other individuals the same right.

⁶⁵⁵ David Blunkett was a British Labour Party politician and the Member of Parliament (MP) for Sheffield Brightside and Hillsborough and Home Secretary 2001 - 2004.
The two separate agencies derive their authority from Acts of Parliament, whereby the UKBA gives extra powers relating to Anti-terrorism and Security to the Police, but extra powers concerning ships’ safety, aids to navigation and search and rescue missions to the MCA. As the chapter progresses, the two agencies’ roles and responsibilities will be elaborated further. These are important paragraphs in that they are directly linked to the denial of seafarers’ rights in these ports after the promulgation of the Maritime Security Code and the Anti-Terrorism legislation. The United Kingdom Terrorism Act 2000 s41 gives powers to the police to arrest a suspected terrorist without a warrant whereas s44 permits a search on a suspected terrorist to detain and question persons at ports of entry.656

This chapter also looks at the terrorism legislation, which includes the Terrorism Act 2000 and Anti-terrorism, Crime and Security Act 2001, and focuses on the powers given to the police for stop and search, arrest and detention. This section of the thesis is relevant because seafarers are mainly stopped from entering ports and are detained on board their ships instead of being allowed to disembark for welfare support.

7.11.1 Historical background of United Kingdom Terrorism Legislation

The introduction of the UK terrorism legislation was presented to Parliament in 1974657 as a result of previous Irish Republican Army (IRA) terrorism activities against the United Kingdom between 1970 and 2009.658 In 1996 Lord Lloyd reviewed the terrorist approaches and the definition of terrorism in respect of Northern Ireland and other terrorist threats from the IRA. Following Lord Lloyd’s review, the government of the United Kingdom supported his findings by including some of his proposals into the legislation against terrorism in 1998. This was based on the Good Friday Agreement in Northern Ireland659 and the immanent enactment of the Human Rights Act 1998. This was seen as the right moment to revisit what was desired from such legislation.

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656 Terrorism Act 2000, s41, s44
657 Prevention of Terrorism Act 1974
659 British Irish Agreement reached in the multi-party negotiations (Cm.3883, London, 1998)
The Terrorism Bill was presented to the House of Commons in 1999 with a fresh perspective on terrorism. This was based on the experience the United Kingdom had with the IRA’s random terrorist bombings in Northern Ireland, London and other major UK cities. The Terrorism Bill was presented to the House of Commons on 2 December 1999 and was passed with few amendments; it was enacted into law by 2000. The 2000 terrorism legislation gave exceptional powers to the police under the context of terrorism.

7.11.2 Anti-terrorism, Crime and Security Act 2001

The year, 2001 saw the promulgation of the Anti-terrorism, Crime and Security Act due to the 9/11 terrorist attacks in the US. The introduction of the above Act was initiated by David Blunkett, the then Home Secretary. The Bill was outlined to Parliament on 12 November 2001 with the following comments:

*Following the attacks of 11 September 2001, it is right that we should take stock and review our laws to see where they might need strengthening. This Bill contains proportionate and targeted measures which ensure and safeguard our way of life against those who should take our freedom away.*

Before passing the above Bill, there were already existing legislations in place that give powers to the police. There were also powers under the Immigration Act 1971 which permitted the removal and deportation of persons, but these powers were restricted with the ruling of *R v Governor of Durham Prison, Ex parte Singh*661 where the courts held that detention can only be exercised during the period necessary and that if removal was not possible within a reasonable amount of time it would be unlawful.

The powers given to the police from the Home Office under s44, sub-sections 1 and 2 are to search any individual suspected to be a threat to UK national security or social life. Under sub-section 1, the legislation gives special powers to any police officer in uniform to stop a vehicle in a selected area or a specified place which has been addressed in the Act by the Home Office; that is to search a vehicle, the driver of the vehicle, a passenger, if there was any in the vehicle, anything in or

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on the vehicle or carried by the driver or passenger at the time of the search. Subsection 2 is the most interesting, and what it can be to the seafarers’ detriment in a port area. In the port area the legislation stretches it remit to a pedestrian or anything carried by him or her in a specified area or place. This could also be an area around port facilities. Since ships’ turnaround in ports has changed so much in the twenty first century, it is believed that the ports need a superior force such as the one the USCG has. Section 45(1) authorises a random search if the police officer at a particular area or place has any suspicions or doubts of an activity that could be construed as or linked to terrorism. However, before proceeding, safeguard procedures under section 44 to 46 needs to be looked at because they restrict to some extent the use of given powers under section 44.

The power under section 44(3) given to a Police Officer needs authorisation if he or she considers it expedient for the prevention of an act of terrorism. Section 45 is one of the safeguards which limits the type of searches by requesting that the person who is stopped and a search needed to be conducted is only required to remove any of his or her outer clothing in a public place including headgear (even if it is for religious purposes) and footwear. Under section 46, this is considered important because it requires consent of the Home Secretary, who must confirm these intentions in writing within 48 hours. There might be an instance that the Home Secretary would not be able to confirm consent within the stipulated time of 48 hours; yet sub-section 4 would nonetheless render the arrest lawful. All the same, section 41 gives powers of arrest without a warrant as stated in section 41(1) that:

\[ \text{A Police Officer may arrest without a warrant a person whom he or she reasonably suspects to be a terrorist.} \]

This section of the Act really gives the Police Officers powers to arrest without any specific offence being committed because section 41 does not give a specific reason for who are terrorists and what they look like, hence the police officers not

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663 Anti-terrorism Act 2001, s.41(1)
being required to state on arrest the offences of the suspect. Here is a case which prompted the Home Secretary to revisit section 41:

The Home Secretary's decision to scrap their use against individuals follows a ruling by the European court of human rights in January that the powers were unlawful because they were too broadly drawn and lacked sufficient safeguards to protect civil liberties.664 Student Mr Gillan was detained as he was cycling to join the demonstration, while Ms Quinton, a journalist, was in the area to film the protests. Both the High Court and the Court of Appeal rejected their claim that such tactics were illegal, ruling that stop-and-search was legitimate given the threat of terrorism in London.665 However, the European Court of Human Rights (ECHR) disagreed, and declared it an unlawful violation of an individual’s right to privacy and family life.666

On 8th July 2010, the Home Secretary Mrs. Theresa May acknowledged the rulings of the European Courts of Human Rights (ECHR) on s44 that it infringes on the private life of a person under European Human Rights law. Mrs May commented that the UK Government cannot appeal the judgement of the ECHR, and as such, s44 will be used solely to stop and search vehicles (planes and ships). However, to maintain the balance in the Anti-terrorism Act which gives the Police powers to defend the nation, s43 was introduced as a new suspicion threshold. Henceforth a Police Officer needs to use s43, the powers which require the Police to reasonably suspect a person to be a terrorist before stopping, arresting or detaining him or her.667

The first duty of government is to protect the public but that duty must never be used as a reason to ride roughshod over our civil liberties.668

Table 2 shows the Home Office summary report on s44 of the United Kingdom Anti-terrorism, Crime and Security Act 2001.

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665 Gillan and Quinton v UK ECHR 12 Jan 2010
668 Ibid
Table 3: Police powers results on stop and searches under Anti-Terrorism Act

<table>
<thead>
<tr>
<th>Police force area</th>
<th>Number</th>
<th>Date of search</th>
<th>Total Year Ending</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cumbria</td>
<td>58</td>
<td>7</td>
<td>-</td>
</tr>
<tr>
<td>Essex</td>
<td>301</td>
<td>33</td>
<td>-</td>
</tr>
<tr>
<td>Greater Manchester</td>
<td>49</td>
<td>32</td>
<td>25</td>
</tr>
<tr>
<td>Hampshire</td>
<td>49</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>London, City Of</td>
<td>319</td>
<td>426</td>
<td>313</td>
</tr>
<tr>
<td>Metropolitan Police</td>
<td>27,246</td>
<td>22,831</td>
<td>18,267</td>
</tr>
<tr>
<td>North Yorkshire</td>
<td>36</td>
<td>45</td>
<td>40</td>
</tr>
<tr>
<td>South Wales</td>
<td>187</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Sussex</td>
<td>423</td>
<td>309</td>
<td>303</td>
</tr>
<tr>
<td>Cheshire</td>
<td>9</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Merseyside</td>
<td>4</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Thames Valley</td>
<td>48</td>
<td>60</td>
<td>23</td>
</tr>
<tr>
<td>England and Wales</td>
<td>28,729</td>
<td>23,746</td>
<td>19,083</td>
</tr>
<tr>
<td>British Transport Police</td>
<td>2,362</td>
<td>6,311</td>
<td>3,002</td>
</tr>
<tr>
<td>Scotland</td>
<td>24</td>
<td>26</td>
<td>7</td>
</tr>
<tr>
<td>Great Britain</td>
<td>35,079</td>
<td>30,083</td>
<td>22,092</td>
</tr>
</tbody>
</table>

Source: Home Office; British Transport Police and Scottish police forces

1. Does not include vehicle only searches.
2. Only police forces in England and Wales that conducted any searches between 1 April 2009 and 30 June 2011 are separately identified in the table.
3. Difference between the totals for the 12 months ending 30 June 2010 and 30 June 2011.
4. The four searches conducted in Oct-Dec 2009 were carried out under the authorisation issued to the British Transport Police.
5. Sussex Police cannot separate vehicle only searches from vehicle and occupant searches; as a consequence data here cover searches of pedestrians only.

7.11.3 Seafarers and United Kingdom Anti-terrorism, Crime and Security Act 2001

The s23 element of the legislation, which extended power to arrest and detain a foreign national where it is intended to remove or deport the person from the United Kingdom, was untouched. However, when it comes to the full treatment of seafarers, they are regulated by Anti-terrorism Act, Crime and security Act 2001 and Immigration Act 1971 where the Immigration Act states that:

*Seafarers are covered by Section 8(1) of the Immigration Act 1971 rather than the Immigration Rules because they are in transit (under contract) to join a ship or are in transit as part of a crew.*

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670 Section 8(1) UK Immigration Act 1971
7.11.4 United Kingdom Border Agency (UKBA) Crew Member Entry Clearance

The Home Office view on checks and balances on identification of a person who is on board a yacht in United Kingdom territorial waters differs from the views of the United States Coast Guard.

There is no compulsion for UK residents sailing for pleasure within UK waters to carry identification with them. There is no penalty for those who fail to supply identification when requested by UK Border Agency officers. As there is no compulsion for UK residents sailing within UK waters to carry identification, the UK Border Agency does not collate figures on how many times we have asked for identification. Our prime responsibility is to protect the border from illegal immigration, smuggling and prevent border tax fraud on all vessels. This applies to any vessel, whether it has sailed from a port within the EU or from a country outside the EU. As part of our law enforcement responsibility, we play a key role in protecting society and the boating community from the threat of criminality. When boarding a vessel to investigate possible illegal immigration or smuggling, we may ask for proof of identity and ask a number of questions. This can help us establish the rightful owner of the vessel to prevent pleasure craft theft, as well as to determine who people are.671

On 19 June 2003, ILO Member States adopted ILO No.185 SID, and the first Western Country to pave the way for more signatories was France. This means that ILO Member States who have ratified the Convention are allowed to issue Seafarers Identity Documents (SID) to their nationals only or foreigners who have Indefinite Leave to Remain or Permanent Residence in a country who have ratified the Convention.

C185 allows seafarers who have been issued an SID to enjoy shore leave as well as joining, transferring to from or leaving their vessels without the need of a visa, but subject to certain conditions.672

ILO Member States that have previously ratified ILO No.108 SID of 13 April 1958 still recognise ILO No.185 as amended but may have different opinions when it comes to its ratification. To date, the US is still battling with Article 6 of the Convention whereas her major maritime State counterpart, the UK is trying to find a way out to balance the issue between the UKBA Immigrations Act and the ILO No.185 SID.


The UK is home to the UN Maritime Branch, the IMO. This makes it somewhat difficult for the UK to delay in ratifying the Convention. Despite UK Anti-terrorist legislation, the UK recognises that security is making it difficult for honest and professional people to go about their work. The irony of the ratification process is that the originator of the SID proposal to the ILO, the UK, and Canada, are among the nations who have failed to ratify ILO No.185 SID.

The UK is still holding onto her part of the ratification process, probably awaiting the US and Canadian governments to ratify first. However, the UK is still working with the 1958 ILO No.108 Convention by allowing seafarers from ILO Member States who have ratified the 1958 Convention to enter UK ports with their passport (visa) and Seafarers Identity Document (SID) under UKBA Immigration Law which allow seafarers in transit (under contract) to join a ship or who are in transit as part of a crew, but not to be allowed to go further outside the permitted area designated by the UKBA or proceed further to restricted areas without a visitor’s visa or entry clearance visa.

7.12 The UKBA Immigration Directorates’ Instructions (IDI) for Seafarers

Section 33(1) of the Immigration Act 1971 defines ‘crew’ as all persons actually employed in the working or service of a ship or an aircraft. In practical terms, this may include, for example waiters, croupiers, hairdressers, painters and repairmen arriving with the ship from abroad and departing with it or being repatriated. However, recorded stowaways and passengers do not come under the definition as a crew member. Under Section 8(1) of the Immigration Act 1971, and subject to the exceptions set out in paragraph 4.1., a person arriving as a crew member of a ship may enter without leave if he or she is under engagement to depart on that ship. Such persons may remain on board until the departure of the vessel.

A contract seafarer admitted into the port area, who fails to sail with his ship or is suspected of intending to fail to do so, may be removed under paragraph 12(2) of Schedule 2, or an Immigration Officer requires him to submit to examination.

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673 UKBA Immigration Act 1971 under Section 8(1)
674 UKBA Immigration Act 1971, s8(1)
675 UKBA Immigration Act 1971, para. 12(2), Schedule 2
under Paragraph 13(1) (a) of Schedule 2. According to the UKBA, the arriving ship must provide the UKBA with a full crew list; failure to do so by the Master is an offence under Section 27 of the Immigration Act 1971, and should be investigated and referred to a Chief Immigration Officer (CIO).

**CRM1.2 Identity documents and Seafarers**

The UKBA Home Office internal guidance legislation used by entry clearance staff on the handling of applications made outside the UK from seafarers is cited as Crew members (CRM). The above Code CRM1.2 refers to the UKBA reference on Seafarers Identity Documents (SID) which states that every seafarer must hold either a valid passport, or a Seafarers Identity Document (SID) containing photograph, signature (or fingerprints) and a description of the holder, including nationality. This restriction only applies to international seafarers; EU nationals are not subject to the restrictions, provided that they produce either a National Identity Card (NID) or a passport and are not subject to restrictions.

**CRM1.4 Seafarers joining ships in the UK where the 1958 Convention is applicable**

The above guideline makes it clearer for foreign seafarers who are under contract to joining ship in the United Kingdom that they need to have a visa, which is entry clearance unless they hold a document issued by a country which has ratified the 1958 International Labour Organisation (ILO) Seafarers Identity Documents Convention No. 108. It has to be understood that the United Kingdom is still operating under the ILO Convention 108 of 1958 and so the document of the seafarer must state that it is issued under the Convention, but the bearer of such document does not need to be a national of that country and can also be a stateless person in order to be considered visa-exempt. As previously stated, the United Kingdom is yet to ratify ILO C185, but the total freedom for seafarers under

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676 UKBA Immigration Act 1971, para. 13(1)(a)
677 UKBA “CRM1.2 Identity documents and Seafarers” (undated.)
678 Idem CRM1.4 Seafarers joining ships in the UK where the 1958 Convention applies
Article 6(6) is hampering the ratification of the Convention. According to the UKBA, the Home Office intends to ratify if an effective method of implementation can be identified.

To date, the United Kingdom has not ratified ILO No.185. ILO Member States who have ratified ILO No.185 have had to denounce ILO No.108. According to the UKBA, holders of documents issued by Member States who have ratified the Convention will be treated as visa-exempt for the purpose of gaining entry to the UK ports to execute their professional duties if they have a contract with the arriving ship, or the Entry Clearance Officer (ECO) may issue entry clearance if they are satisfied that the ship to be joined is already at the particular port or will be when the seafarer arrives there. However, the UKBA commented that these persons will be regularly reviewed and risk-assessed on an intelligence basis by policy and intelligence colleagues but if a seafarer poses a threat to UK national security and public safety, under the UKBA CRM1.11 Refusing Seafarers guidelines, entry should be refused under sections 12(2) and 13(2) of the Immigration Act 1971.

Under the Transit without Visa (TWOV) programme, the United States government has abolished the scheme and requires every foreigner to have a valid visa to enter or transit any of the US sea ports or airports. However, in the United Kingdom, the approach on people passing through is flexible to some extent, so long as the foreign traveller can justify their identity with effective and supportive documents, in which case the Transit Without Visa (TWOV) is considered as a foreign national who is going to the UK simply to travel on to another country by meeting the following conditions:

- The person arrives and departs by air or ship within the port area without going through immigration to cross the border
- The person’s onward flight or ship is confirmed and departs within 24 hours
- The person is properly documented for his or her destination and has a visa if he or she needs one.

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679 Idem CRM1.4
A seafarer travelling on duty who is a visa national does not need a visa if he holds a seaman’s book issued by one of the ILO No.108 signatories. The seaman does not need to be a national of the country that issued the document.\textsuperscript{680} However, on 1 February 2013, the UKBA announced that all seafarers’ visa applicants will be eligible to use their priority (express) visa service in the Philippines where the greatest number of seafarers comes from. This is in order to join ship in the UK ports. However, if a seafarer is applying to join a ship in the UK, they must hold the ILO’s Seafarers Identity Documents (SID) in addition to their passport and seaman book. The UKBA added that if countries such as the US, Canada, Australia, New Zealand or any State in the Schengen area have previously refused a seafarer entry clearance visa, they will not qualify for the visa priority service and they strongly recommend that if a seafarer has been refused entry to the above countries, they must NOT use the services. It further stated that using the priority services does not imply or guarantee that a seafarer will be successful in their visa application.

7.13 CHAPTER SUMMARY ON PATRIOT ACT POST-9/11 AND ANTI-TERRORISM, CRIME AND SECURITY ACT POST-7/7

The events of 9/11 necessitated the Executive Orders by both the US and the UK, the two major maritime States and members of the IMO and ILO to secure their borders. This made the United States approach the ILO to review the ILO’s Convention No.108 as a matter of urgency to reintroduce the seafarer’s Identity Card. This is because the introduction of the ISPS Code and MTSA requires every IMO Member State to secure their borders against terrorists from attacking port facilities and ships that carry goods to the world’s biggest port, the United States, and the European Economic Area. At the instigation of the United States, ILO C108 was reviewed following which it became an independent Convention such as STCW or MARPOL. The Convention became ILO C185 and all seafarers must have a Biometric Identity Card before they can work on any ship that trades in the US or EU ports.

The ILO Convention No.185 came into force on 9 February 2005. To date, only 24 ILO Member States have ratified the Convention in order to conform to the new maritime security legislation. The Convention is yet to be ratified by the United States where the foreign seafarers’ nightmare begins when approaching without transit or working visa. In effect, the United States Coast Guard derives their authority from the President because they have the power and authority to carry weapons; this makes their border enforcement more robust. On the other hand, the United Kingdom powers to control seafarers is divided into agencies, the UKBA and the Police under the Home Office, whereas the MCA deals more with ship’s safety, crew management and pollution prevention.

The United States Title V Code on Border Protection, Immigration, and Visa Matters section 7111 which states that promoting Democracy and Human Rights at International Organisations does not really support the above Convention when it is seen as denial of seafarers’ rights. Section 7111 (a) Support and Expansion of Democracy Caucus and in general, the President, acting through the Secretary of State and the relevant United States chief mission, should continue to strongly support and seek to expand the work of the democracy caucus at the United Nations General Assembly and the United Nations Human Rights Commission. 681

This is purely to achieve political purpose and not in the interest of the rights of seafarers’. The plight of seafarers’ does not stop in the U.S. or the U.K. but en route to the Americas and other parts to deliver their service, yet they face other challenges which are pirates. Once again, there is International Maritime Organisation’s Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) to protect seafarers on the high seas, and yet these Conventions do not protect the rights and the well-being of seafarers when they encounter pirates.

Pirates on the high seas in the twenty first century are what we call armed robbers and terrorists on the high seas. They capture ships; they kidnap seafarers for ransom, and where ransom is not paid, seafarers are detained or even killed.

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681 USC sec.7111
CHAPTER EIGHT

CONCLUSION

This chapter concludes the study. Within 2 hours on 11 September 2001, when the World Trade Centre came down in flames, with almost 3000 fatalities, it brought sorrow and sadness to greater number of people. The shock of the incident sent fear and panic throughout the US. The nature of the attack made President Bush comment as follows:

Today’s enemies do not mass armies on borders, or navies on high seas. They blend in with the civilian population. They emerge to strike, and then they retreat back into the shadows. And that’s why there are thousands of our fellow citizens running down every single piece of intelligence we can find; doing everything we can to disrupt folks that might be here in America trying to hurt you.\(^{682}\)

The new kind of war called for an urgency to tighten security of the nation through the ports and all the borders to curb another occurrence. Shortly after the attack, the US and UK passed the Patriot Act 2002 and Anti-terrorism, Crime and Security Act 2001 respectively. The MTSA underwent a speedy amendment and through the influence of the USCG, it was adopted by the IMO. This was seen as one of the unofficial records set in the IMO for a Code to be adopted within such a shortest space of time. The legislation was named the ISPS Code at the IMO. The initial purpose was to protect ports, infrastructures and shipping from terrorist. The conclusions made from the study are presented in sub-headings as follows.

8.1 Problems posed by the introduction of ISPS code

The job of seafarers has the potential of affecting them physically and mentally due to the condition they find themselves in. Chapter 2 has established and demonstrated that, fatigue, denial of shore leave, discrimination by port State authority has an effect on the physical and mental health of seafarers. Loneliness and discrimination leads to depression which can trigger hostility whiles fatigue

causes accidents on the high seas. Part of the aims of the introduction of the ISPS code was to provide security for ships and port facilities, thus, if the Code ends up victimising, breeding anger and hostilities in seafarers, then the reasons or objectives for its implementation has not been achieved.

It was the intention of the US and UK to deny seafarers from entering their port because of threat to their National Security and they also suspected that some seafarers might be coming from terrorist prone regions. It has been established in chapter 2 (section 4.1) that the cause of the attack is political in nature and the underlying factor is the stationing of US and allied troops in areas the terrorist see as their homeland.

The research has established in chapter 2(section 8.1) that human beings have a higher moral responsibility to perform State or National duties when called upon. According to Kant, in responding to this call to duty, the most important single motivational factor is a bare respect for lawfulness and not the consequences of the actions. The individual’s obedience to the law helps to maintain civil or social order. It has also been established in chapter 2 (section 5.1) that majority of seafarers are from areas deemed as terrorist prone by the US and the UK. Based on this premise, any security measures will first be targeted at them. They are the first suspect because they have a moral obligation to respect the laws of their Nation or State and a higher moral obligation to obey any call to duty without having to ponder over the outcome. Chapter 2(section 4.2) has established that the cause of terrorist attacks is the foreign policies of the US and its allies. The US and the UK are seen as interfering with their religious faith by introducing so called Western values and democracy into their way of life, hence resisting it through a jihad. Therefore, when the call to duty is to attack an enemy in whichever way is prescribed, the seafarer who is rooted in this religious faith will not hesitate to obey. This is what prompted the US and the UK to focus on foreign seafarers.
The nature of the security of ships and port facilities undertaken by the US and the UK is global and that its solution should be considered globally and not individually. Considering the volume of international trade that passes through the US and the UK ports, any terrorist attack will have an impact on the world economy. From the philosophy of cosmopolitanism, it has been established that, in all our actions, we should consider humanity. Nussbaum went on to say the benefit of our actions should be universal in nature. Looking at the factors that were put into consideration before the ISPS Code was passed; it seems to be global in nature. The only aspect of it that has attracted attention is the denial of seafarers’ shore leave, the Patriot Act in the US and Anti-Terrorism legislation in the UK. There should be another way of preventing terrorist activities and that is a counter action through ideology by not interfering on the line of religious faith. This has been established by the German economist Karl Marx who said that “Religion the Opiate of the Masses” or “Religion is the Opium of the People”.

However, in matters of such grave concern, naturally, all nations will take actions similar to that of the US and the UK. This is because the influence of the society is what shapes the morals of humans and this makes their prime allegiance to be with their society and its development. It is for this reason that the US influenced the member States to adopt their domestic maritime laws for the sake of the US society. The ISPS Code did not consider the rights of seafarers and that should not be the case. Their services are vital to the running of the maritime industry so the Member States should have been able to draw the attention at the IMO Conference as to the effect that it will have on seafarers but the IMO members were not given any time limit. The author established that this was because of the exigency of the matter at hand.
8.2 Existing problems not solved prior to the denial of Shore Leave

Facts that has been established in chapter 6 proves that, genuine link, in the 1986 UN Convention on Conditions for Ship’s Registration is just there to regulate ships on the high seas and not to establish any legal link between the flag State and the seafarer or compel the flag State to come to the aid of seafarers when they face problems in foreign ports.

With respect to the genuine link, the history of it has been established in chapter 5 that, its introduction did not take into consideration the employment of foreign seafarers. In the earlier years when ship’s registration commenced in England, the concept of genuine link was meant that all ship’s crew, owner, must be English citizens and business registered in England with proven documentation. Crew members in most of the ships were from Britain. So having majority of the crew members from the ships flag State makes extending responsibility to the crew more flexible under the legal context of the State when the crew encounters difficulties. The reason being that, majority of the crew on board hold allegiance to the flag State in principles and thereby must be accorded automatic protection under international law. Later in the years when the running cost of ships became expensive, ship owners resorted to the employment of crew members from other States where labour force is cost effective instead of employing directly from within the flag State. However, the IMO and ILO did not take the responsibility to find out the implications it has on a foreigner on a ship. The genuine link regulation was disguised with the assurance that seafarers are bound by the laws of the flag State and that they are covered. Theoretically, the seafarer would be protected under the ship’s Protecting and Indemnity (P&I) Insurance Cover but in practice it was not so effective.

Therefore, it is appropriate the author deduce from this that, the understanding of genuine link has been a problem since ship ownership has become global and not necessary to have all crew and place of purchase to be in one particular State. Therefore, the genuine link must be tied to economic and commercial interest. This will surely enable the seafarer to be informed from the onset where his protection lies before joining a ship.
The State can however be compelled to come to the aid of seafarers when it is benefiting them economically as established in chapter 6. The mere fact that a seafarer is under ship’s jurisdiction on a floating vessel does not make him/her citizen of the flag State because their allegiance to flag State is purely economic.

8.3 Reasons for Seafarers being labelled as threat to National Security

Seafarers have been labelled as potential threat to National Security of the US and the UK based on the facts that were made available to the legislators from both States. Contrary to public opinion that terrorism has its roots in religion and for that matter faith in certain religious denominations, investigations conducted by the author which can be found in chapter 2 has established that, 95% of the main cause of suicide bombings are not being undertaken by religious fundamentalism but rather political in nature to draw the attention of the US and its allies to withdraw from their territories. Based on these investigations, it will be reasonable to deduce that, anybody from particular region occupied by the US and its allies can turn themselves up to undertake a suicide mission. Religion plays a minor role in enticing the potential suicide bombers with rewards in paradise. What makes this allegation to be true is that, the research established that there are caliber of people that turn themselves up voluntarily for suicide missions and it came to the realisation that majority of them are not violent or criminals.

Coming back to the research question, the reason why the legislation has turned out to rather restrict the movement of the co-partners in the provision of security for the ports is that, there is no trust for seafarers from certain States which the US and the UK see as terrorist prone region and considering damage that terrorist activities has caused and can cause to the global economy based on the percentage of trade that is carried out by the maritime industry, security measures would not be taken lightly because any on coming ship is suspected of carrying unseen or hidden destructive mechanism or for that matter, terrorists.

In the transcript of Osama bin Laden's Speech on Aljazeera.net in Doha, Qatar, on the 30th October, 2004, the event that compelled the Al-Qaida to think of bombing the twin towers was in 1982 when the US permitted the Israelis to invade Lebanon. He went on to say that the reason for the attack on the World Trade Centre is still
there for a repeat. More also, there is no foreseeable future for the withdrawal of all US and allied troops from the Middle East and its regions. This also made the Al Qaeda operatives in Pakistan planned further to derail trains in the United States by placing obstructions on tracks over bridges and valleys in US cities. This information was discovered after the leader of Al Qaeda command was terminated in Pakistan.

8.4 The Urgency of Fighting Terrorism and Sovereignty

In the adopting of the Code, sovereign States lost their sovereignty. The US and the UK compelled IMO member States to comply with US requirements or else that Member State could not trade internationally and would be prevented from entering their ports. Meanwhile every sovereign State should be seen as supreme and has absolute and uncontrollable power to enter into contract and treaties and regulate its internal affairs without any foreign intervention, but here is a case where IMO member States were compelled to comply. The 9/11 attack made these Member States to either through sympathy or fear of losing their right to trade internationally to put aside their sovereignty for a while. The role of sovereign States is to seeing that the rights and welfare of its citizens in the maritime industry are not trampled upon by third parties. It was their duty to go through the Code and to see its effect.

A sovereign State in theory controls its entire internal affairs without any foreign interference. It can go into treaties and opt out when it is in the confines of international laws, but in practice, this is not what happens. Power and financial stand is what counts. It is established in chapter 3 that a nation is sovereign because it knows it boundaries and has its own President but behind this, there is always a powerful State that dictates to them because this powerful State comes to their aid in times of crisis. Therefore, when there is a treaty that will be in favour of that powerful State, the supposed needy sovereign State is compelled to favour the stance of the powerful State and its allies.
Apart from this, the international bodies that make international legislations always favour the stance of the powerful States. The US instigated the amendment of the maritime security legislature but it did not end there. The US influenced the IMO to adopt its domestic maritime security legislature to become ISPS code. They also instigated the introduction of the SID and ended up not signing the treaty.

Fighting terrorism can only achieve its objectives if it is fought on all fronts with other sovereign States giving a helping hand. If other States leave it in the hands of the US and the UK alone, it will not yield the needed result so the US and the UK will make all efforts to get other States on board. There is no law that neither binds the US and the UK to ratify all parts of an international treaty nor implements international treaties that contradict with its domestic laws.

The US and UK refused to ratify ILO Convention No.185 because the Convention is considered as soft law where a State can pick and choose. Both the US and the UK however, have so far chosen to abstain from it, not to ratify it. More also, the clauses in Article 6 sets conditions that both States (the US and the UK) who have enacted anti-terrorism legislations into their domestic laws cannot be compelled by law to accept ILO No.185 into their domestic laws due to their internal laws, and the declaration of war on terror. Despite their refusal to ratify the Convention, they were able to trespass on the sovereignty of other Member States because they are able to influence the UN and IMO since they sustain the functions of the General Assembly with huge financial contributions as established in chapter 2.

The action of the US to influence the IMO to adopt its domestic maritime legislature into ISPS code can be seen as a move to save the maritime industry against threat of terrorist attack and the urgency of it does not make for time for deliberation. The patriot Act was passed under pressure because there was fear in all quarters of the US, and something had to be done in the shortest possible time.

The 9/11 and 7/7 attack and its resultant Patriot Act 2001 and Anti-terrorism, Crime and Security Act 2001 has made the citizens of the US and the UK and the seafarer lost some of their rights as human beings for the sake of security. The ISPS Code has come to erode the individual seafarer’s right to freedom of movement. Seafarers are now denied shore leave because they have been branded as threat to National Security. The action of the US and UK has drawn criticism from the international community. The fight against terrorism is a different war altogether. The enemy is within the State and outside the State without having a permanent location and this call for different tactics. Therefore, things must be done differently from how they were done before. The new war has made it prudent for the individual to sacrifice part of his or her individual rights for the sake of the national security and international trade.

As an individual, the most important of all our rights is the right to life, freedom from slavery and torture. The individual's right to personal liberty can be limited in times of emergency that threatens the security of the society or nation. The nature of the emergency will determine the limit of the right. The ISPS Code has denied the seafarer of his or her freedom of disembarking from his ship when they berth at US and UK ports. With respect to the US and the UK citizens and foreigners, a limit to their privacy and government surveillance is what has been compromised for protection. The action of the US and the UK were for the security of their States and all maritime trading partners and those who use their ports. At all times in history, some people sacrifice willingly with their life for the society and others are compelled to sacrifice for the society.

The security of the State and well-being of the majority is what is of utmost concern of the two governments. The Patriot Act 2002 and Anti-terrorism, Crime and Security Act 2001 were passed under pressure so there will be certain flaws, but majority of the people hailed it because they were in the heat of the attack and the fear that there will be a repetition was still lingering.
Every individual is entitled to his/her right but there are times when the right has to be limited for security reasons and for the well-being of all. So in situations such as the US has found itself, everybody who will be affected by any terrorist attack will have to sacrifice part of his liberties for security and peace. The individual is the unit to form a society but the security of the units that come together to form a nation is also important. It goes to say that, the security of the nation is more important than the civil liberty of the individuals. What is the essence of an individual civil rights if an interview of a terrorist leader can create panic and restrict movements.

The security of the individual is now being exchanged for part of his or her civil rights. The question to be asked is, is the individuals civil right more important than his right to life which can be taken by just two members of a terrorist group? If the law does not take part of the civil rights in exchange for protection, an interview and rumour of terrorist attack will take it including the right to freedom of movement. How many people or tourist will be able to go visiting when it is rumoured that there is an impending attack on an unspecified State in the US or the UK?

Although seafarers have been denied shore leave, MLC 2006 is coming to their aid. No law or action can benefit everybody and that is what Bentham believes in. The philosopher believes in what will benefit the majority. The actions of the US and UK is to benefit all stake holders in the maritime trade worldwide because any problem at the various US ports will have a devastating effect on international trade. In the views of Immanuel Kant, humanity should be treated as an end and not a means. This cannot always hold because the means by which the Nation can achieve the goals of its security is by sacrificing the rights of some people to achieve the greater good for the greatest number of people as proposed by Bentham.

The urgency with which the US and the UK had to tackle their security through the IMO brought about a lot of infringement on individual right and right of Sovereignty of IMO member States. In a speech by the then President George Bush Jnr., he said
if you are not with us, you are with the terrorist. This shows how serious the issue was. They needed the support of every individual State who does not support terrorism.

It is in times of national emergencies that, certain freedoms which are not vital to life itself will be compromised. It is a give and take affair. Give part of your freedom and sovereignty for protection and trade. All laws that were hither to unacceptable in a civil society would have to be approved off for security reasons. Encroachment of privacy and arrest without warrant in some cases had become legal. Although it is for the protection of the State, it also poses a problem for the individual because their privacy has been encroached upon through surveillance and stop and search. It is therefore prudent for the legislature to be careful in drafting and amending laws in times of emergency not to give too much power to the security forces or else it can lead to abuse of power and discrimination against some minority group in society. The seafarer problems will be resolved and sovereignty of IMO member States will be accorded because now the US and the UK have had ample time of peace and can work out a means of restoring the rights of seafarer and other individuals affected by the introduction of Patriot Act 2002 and the Anti-terrorism, Crime and Security Act 2001.
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