

# THE 2007 WORK IN FISHING CONVENTION AS AN INSTRUMENT TO COMBAT COERCIVE RECRUITMENT PRACTICES: A SOUTH AFRICAN PERSPECTIVE\*

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*The 2007 Work in Fishing Convention(C188) aims to ensure decent work conditions for fishers by establishing minimum work standards on board a fishing vessel. Despite the comprehensive nature of the C188, forced labour remains a pervasive challenge in the fisheries sector, exacerbated by the recruitment of vulnerable workers through deceptive practices. This article determines the extent to which South Africa's current legal and regulatory measures comply with the C188 provisions relating to the recruitment and placement of fishers. The article concludes that there is a lacuna in South Africa's legal framework in its obligation to regulate the recruitment and placement agencies of fishers, leaving them vulnerable to exploitation by unscrupulous recruitment agencies. The article suggests two possible solutions to effectively implement the provisions of the C188 relating to the recruitment and placement of fishers. One option is to amend the existing Seafarer Recruitment and Placement Regulations of 2017 to include fishers. Alternatively, new Merchant Shipping (Fisher Recruitment and Placement) Regulations could be drafted. These new regulations would align with the existing Seafarer Recruitment and Placement Regulations and could be promulgated under the Merchant Shipping Act of 1951 or its successor, thereby giving effect to the convention.*

**[Keywords]** 2007 Work in Fishing Convention, fishers, fishing vessel, recruitment and placement in South Africa

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## I INTRODUCTION

Fishing is one of the oldest and most important human activities, providing food, income, and livelihoods for millions worldwide.<sup>1</sup> According to the Food and Agriculture Organization (FAO) and the International Labour Organization (ILO), approximately 58.5 million people are directly engaged in the primary sector of fisheries and aquaculture.<sup>2</sup> Of these, it is estimated that 21.5 million fishers work on board a fishing vessel full-time while 13.3 million work part-time.<sup>3</sup> The rest fish occasionally or have an unknown status.<sup>4</sup> In contrast, considering subsistence and secondary sector workers and their dependants, around 600 million livelihoods are estimated to depend partially on these industries.<sup>5</sup> Nonetheless, working as a fisher can be extremely challenging and hazardous, especially in the industrial sector where fishing vessels operate in remote and high-risk areas, often for long periods of time.<sup>6</sup> Fishers may face harsh weather conditions, exposure to chemicals and pollutants, heavy physical labour, long working hours, isolation, fatigue, and lack of access to basic services and amenities.<sup>7</sup> These factors can negatively impact their health, safety, and well-being, as well as their human rights.<sup>8</sup> This is compounded by the fact the fisheries sector is not immune to criminal activity, including coercive recruitment practices characterised by manipulation, deceit, and illegality by exploiting the vulnerability of fishers which often leads to forced labour.<sup>9</sup>

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<sup>1</sup> K O'Connor & B Fagan 'Fishing: How the sea fed civilization' (2019) 124(3) *The American Historical Review* at 1035–1036.

<sup>2</sup> Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture 2022* (2022) xix.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Organisation for Economic Co-operation and Development (OECD) - Food and Agriculture Organization of the United Nations *OECD-FAO Agricultural Outlook 2023–2032* (2023) at 213–233.

<sup>6</sup> A Jaleel & H D Smith 'The plight of the fishers and the management of IUU fishing' (2023) 150 *MP* at 3.

<sup>7</sup> Seventh preambular par of the 2007 Work in Fishing Convention (No 188) (WIFC) (adopted: 14 June 2007; EIF: 16 November 2017; available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54755/Part/I-54755-08000028005f62c>, (accessed on 25 April 2024)).

<sup>8</sup> A Couper, H D Smith & B Ciceri *Fishers and Plunders Theft, Slavery and Violence at Sea* (2015) at 30.

<sup>9</sup> The generally accepted definition of forced labour is found in the 1930 ILO Forced Labour Convention No 29 (adopted: 28 June 1930;

Over the years, fishers have been excluded from important legal protections applicable to seafarers, such as the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers<sup>10</sup> and the 2006 Maritime Labour Convention.<sup>11</sup> This was primarily due to the nature of their working conditions.<sup>12</sup> As a response, the ILO adopted the Work in Fishing Convention of 2007 (C188)<sup>13</sup> to address some of the above-mentioned concerns and to ensure decent work conditions for fishers worldwide.<sup>14</sup> The C188 provisions cover issues such as minimum age and medical certification requirements, work agreements and payment of fishers, accommodation and food, compliance, and enforcement, including inspections, these provisions only came into effect when the C188 came into force on 16 November 2017.<sup>15</sup>

Within the above context, this article aims to determine the extent to which South Africa complies with article 22 of the C188, which regulates deceitful recruitment practices, namely: (a) illegitimate or unscrupulous recruitment and placement agencies, (b) deceitful work agreements, and (c) fraudulent medical certificates. These three aspects are important in addressing forced labour in the fishing industry. The rationale

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EIF: 01-05-1932; available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C029](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029), (accessed 13 April 2024)). Hereinafter the FLC.

<sup>10</sup> Article 3(b) of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1361 *UNTS* 190 (adopted: 7 July 1978; EIF: 28 April 1984).

<sup>11</sup> Article 2(4) of the 2006 Maritime Labour Convention, 2952 *UNTS* 3 (adopted: 23 February 2006; EIF: 20 August 2013).

<sup>12</sup> D Guelker 'Fishers and seafarers in international law – really so different?' (2023) 148 *MP* 3.

<sup>13</sup> The 2007 Work in Fishing Convention (No 188) (WIFC) (adopted: 14 June 2007; EIF: 16 November 2017; available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54755/Part/I-54755-080000028005f62c.pdf>, (accessed 13 April 2024)).

<sup>14</sup> South Africa ratified the Convention 2013, see International Labour Organization (ILO) 'Ratifications of C188 – Work in Fishing Convention, 2007 (No. 188)' 9 available at [https://webapps.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312333](https://webapps.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333), (accessed 20 April 2024).

<sup>15</sup> See also International Collective in Support of Fishworkers (ICSF) *Understanding the Work in Fishing Convention* (2007) 7. The C188 binds every contracting State, the ratification of which has been registered with the Director General of the International Labour Office, see art 48(1) of the C188.

for this assertion is that illegitimate or unscrupulous recruitment and placement agencies often prey on vulnerable fishers, particularly migrant workers, by making false promises about working conditions, wages, and benefits.<sup>16</sup> Similarly, deceitful work agreements can trap fishers in exploitative situations, as they may be unaware of the true nature of their employment or unable to challenge unfair terms of employment.<sup>17</sup> Fraudulent medical certificates can be used to circumvent health and safety regulations, putting fishers at risk of injury or illness without proper protection or care.<sup>18</sup> The article employs a qualitative and doctrinal research methodology focusing on the Merchant Shipping Act of 1951 (MSA).

## II THE 2007 WORK IN FISHING CONVENTION AND ITS APPLICATION IN SOUTH AFRICA.

The C188 was adopted at the 2007 96th International Labour Conference (ILC) session.<sup>19</sup> It was intended that the standards provided for in the C188 were meant to unify and consolidate the existing labour standards that applied to fishers into one international document and establish minimum work and living conditions standards.<sup>20</sup> According to its provisions, the C188 would come into effect '[twelve months] after the date on which the ratifications of ten Members, eight of which are coastal States were registered with the Director-General'.<sup>21</sup>

Although the C188 came into force on 16 November 2017, South Africa ratified it in 2013 and gave it effect in terms of the MSA in 2015. Therefore, its provisions became legally binding and enforceable in 2015.<sup>22</sup> The provisions of the MSA apply to

<sup>16</sup> G Stringer, D H Whittaker & G Simmons 'New Zealand's turbulent waters: The use of forced labour in the fishing industry' (2016) 16 *Global Networks* at 3–24.

<sup>17</sup> V Becker-Weinberg 'Time to get serious about combating forced labour and human trafficking in fisheries' (2020) 36(1) *IJCML* at 88–113.

<sup>18</sup> Stringer et al op cit note 16 at 20.

<sup>19</sup> Preamble of the C188.

<sup>20</sup> See International Transport Workers' Federation *Work in Fishing Convention, 2007 (No. 188)* (2007) at 3.

<sup>21</sup> See art 48(2) of the C188. To date, 22 countries have ratified the Convention, International Labour Organization (ILO) 'Ratifications of C188 – Work in Fishing Convention, 2007 (No. 188)' 9 available at [https://webapps.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312333](https://webapps.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312333), (accessed 20 April 2024).

<sup>22</sup> Refer to the Eighth Schedule of Act 57 of 1951.

fishing vessels registered in South Africa, wherever the vessels may be.<sup>23</sup> The provisions of the C188 apply to all ‘fishers and all fishing vessels engaged in commercial fishing operations in South African waters regardless of the vessels’ registration’.<sup>24</sup> As a coastal State, South Africa exercises the same sovereignty over its internal waters and territorial sea as it does over its land territory.<sup>25</sup> This means South Africa has criminal,<sup>26</sup> civil<sup>27</sup> and administrative<sup>28</sup> jurisdiction over all foreign vessels provided their entrance into South African waters was voluntary.<sup>29</sup> Article 21(1) of the 1982 United Nations Convention on the Law of the Sea (LOSC) provides for the rights of coastal states to adopt laws and regulations for the safety and control of maritime traffic within their territorial sea.<sup>30</sup> However, this authority is subject to certain limitations to ensure that these laws and regulations are consistent with international law and do not unjustly infringe upon the principle of innocent passage of foreign vessels.<sup>31</sup>

The MSA makes provisions for an authority that is responsible for its administration. The authority ‘means the South African Maritime Safety Authority [SAMSA] established by section 2 of the South African Maritime Safety Authority Act, 1998’.<sup>32</sup> The MSA also establishes the office of the

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<sup>23</sup> See s 3(4) of the MSA.

<sup>24</sup> In line with art 2(1) of the C188.

<sup>25</sup> See art 2(1) of 1982 United Nations Law of the Sea Convention, 1833 *UNTS* 3, (1982) 21 *ILM* 1261 (adopted: 10 December 1982; EIF: 16 November 1994). The LOSC is ‘the principal source of law on the law of the sea’ and is often referred to as the ‘constitution for oceans’. See J Dugard & D Tladi ‘Law of the Sea’ in J Dugard, M du Plessis, T Maluwa & D Tladi *Dugard’s International Law: A South African Perspective* 5 ed (2018) 539–577 at 541. The LOSC is also referred to as the ‘blueprint for the partition of the sea’ as it provides for six categories of maritime zones as follows: internal waters, territorial sea, archipelagic waters, contiguous zone, exclusive economic zone (EEZ) and high seas. See M Gavouneli *Functional jurisdiction in the law of the sea* (2007) at 1. See also C Kastrisios & L Tsoulos ‘A Cohesive methodology for the delimitation of maritime zones and boundaries’ (2016) 130 *OCM* 188–195 at 188.

<sup>26</sup> See art 27 of the LOSC.

<sup>27</sup> See art 28 of the LOSC.

<sup>28</sup> See art 21 of the LOSC.

<sup>29</sup> P H G Vrancken *South Africa and the Law of the Sea* (2011) at 129.

<sup>30</sup> See art 21(1)(a)–(h) of the LOSC.

<sup>31</sup> Refer to art 21(2) and (4) of the LOSC.

<sup>32</sup> See s 2 of the MSA definition of ‘Authority’.

proper officer. This is an officer designated by the SAMSA ‘to be the proper officer at the place or in respect of the area and in respect of the matter to which reference is made in the provision of [the MSA] in which the expression occurs’.<sup>33</sup> In conjunction with other state agencies, SAMSA conducts joint operations to inspect vessels, including fishers’ working conditions.<sup>34</sup> The next section discusses forced labour activities and their link to: (a) illegitimate or unscrupulous recruitment and placement agencies, (b) deceitful work agreements, and (c) fraudulent medical certificates.

### III FORCED LABOUR AND COERCIVE RECRUITMENT PRACTICES

#### a) An overview

As mentioned previously, the C188 aims to provide decent working conditions for fishers. A mechanism employed is regulating the recruitment process and investigating complaints by fishers.<sup>35</sup> This is intended to help prevent forced labour, trafficking, and other abuses.<sup>36</sup> Forced labour in fisheries often involves fishers working for long hours at very low pay in intense, hazardous, and difficult conditions. The generally accepted definition of forced labour is found in the ILO Forced Labour Convention, 1930 (FLC).<sup>37</sup> The FLC defines forced labour as ‘all work or service which is exacted from any person

<sup>33</sup> See s 2(1) of the MSA. If no proper officer has been appointed at a place in South Africa, the principal officer is the proper officer. A principal officer is the officer in charge of the SAMSA office at a port. In instances where there is no principal officer, the Controller of Customs and Excise is the proper officer. The proper officer has the duty to ensure compliance of the MSA and he or she can take any steps necessary to ensure compliance with the Act. These steps include boarding any South African ship wherever it may be or any ship other than a South African ship while it is within South African territorial waters for inspection. See s 8 and s 9(1)(d)(i) of the MSA.

<sup>34</sup> ILO ‘Detention of foreign fishing vessel in South Africa follows ILO training on forced labour’ (2021).

<sup>35</sup> International Labour Organization. (2013). *Caught at Sea: Forced Labour and Trafficking in Fisheries*. Available at <https://humantraffickingsearch.org/resource/caught-at-sea-forced-labour-and-trafficking-in-fisheries/> (accessed 13 April 2024).

<sup>36</sup> *Ibid.*

<sup>37</sup> Article 2(1) of the FLC.

under the menace of any penalty and for which the person has not offered himself voluntarily'.<sup>38</sup> From this definition, it is clear that two elements must be present for a situation to amount to forced labour. These elements are 'involuntariness' and 'the menace of penalty'.<sup>39</sup>

Involuntariness involves how the victim enters employment – negating their freedom of choice. This could be when victims are coerced through various means, including physical confinement at the work site and deception about the nature of work and employment terms.<sup>40</sup> A worker's initial consent becomes irrelevant if obtained through an employer's fraud or deception.<sup>41</sup> Those who are promised certain working conditions but later forced to work under harsher terms are considered victims.<sup>42</sup> Workers who consent to a job but later find that they are not free to leave, even with reasonable notice, are also victims of forced labour.<sup>43</sup> Therefore, formal verbal or written consent does not always mean the worker is acting of their own free will.

The second key element of forced labour is the 'menace of any penalty' used to keep someone in the situation, for example, coercion, non-payment of wages or deprivation of necessities such as food and shelter, and exclusion from future work.<sup>44</sup>

It is important to note that a person is only considered a victim of forced labour if they entered the employment against their will and cannot leave without punishment or threat of punishment. The situation hinges on the relationship between worker and employer, not simply poor conditions, low wages, type of work, or job legality.<sup>45</sup> However, distinguishing these factors from true forced labour can be challenging.<sup>46</sup> For example, document retention by the employer is only

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<sup>38</sup> Article 2(1) of the FLC. See also D K Anton 'Introductory note to Protocol of 2014 to the Forced Labour Convention, 1930' (2014) 53 *International Legal Materials* 1227–1235 at 1227.

<sup>39</sup> Stringer et al op cit note 16 at 5–7.

<sup>40</sup> For example, see C Chantavanich, S Laodumrongchai & C Stringer 'Under the shadow: Forced labour among sea fishers in Thailand' (2016) 68 *MP* 1–7.

<sup>41</sup> Stringer et al op cit note 16 at 5–6.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

forced labour if the worker lacks access to the documents.<sup>47</sup> Locked doors or security guards only constitute forced labour if there is a threat of penalty for leaving.<sup>48</sup> Mandatory overtime is not forced labour if it is within legal limits. Poverty, lack of alternatives, and inability to leave without proper notice do not alone equal forced labour, as long as the worker can accept and leave the job without penalty. Conversely, a well-paid worker may still be a victim if unable to leave at will.

### **b) Illegitimate or unscrupulous recruitment and placement agencies**

The C188 requires public recruitment and placement services for fishers to form part of a public employment service for all employees and employers.<sup>49</sup> These private recruitment and placement services must comply with a standardised system of licensing or certification or other form of regulation.<sup>50</sup> Member States are also required to set the conditions under which any certificates and licences issued to recruitment and placement services may be suspended in the case of a violation of relevant laws or regulations and ‘specify the conditions under which private recruitment and placement services can operate’.<sup>51</sup> Each member State is further required to promulgate laws, regulations and other measures in place to prohibit the exploitative practice of charging fishers for recruitment or placement.<sup>52</sup> While the C188 permits private recruitment agencies to hire workers on behalf of vessel owners, it should be noted that the fishing vessel owner is ultimately responsible for the wellbeing of the fishers.<sup>53</sup>

In South Africa, the MSA provides for the recruitment and placement of seafarers in the Merchant Shipping (Seafarer Recruitment and Placement) Regulations.<sup>54</sup> These Regulations provide for the accreditation of seafarer recruitment and

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> See art 22 (1) of the C188.

<sup>50</sup> See art 22 (2) of the C188.

<sup>51</sup> See art 22 (3)(b) and (c) of the C188.

<sup>52</sup> See art 22 (3)(b) of the C188.

<sup>53</sup> See ILO *Decent Working Conditions, Safety and Social Protection* 13.

See also L C Pinero *International Maritime Labour Law* (2015) 67.

<sup>54</sup> GN R986 in GG 41108 of 11 September 2017.



placement services,<sup>55</sup> prohibit recruitment and placement fees, define the duties of seafarer recruitment and placement services, define employment contracts, and define offences and penalties.<sup>56</sup> However, these Seafarer Recruitment and Placement Regulations ‘apply to any seafarer recruitment or placement service that recruits or places seafarers on ships to which the Convention applies’.<sup>57</sup> The term ‘Convention’ refers to the 2006 Maritime Labour Convention (MLC), which does not apply to fishers.<sup>58</sup> Therefore, these Regulations do not apply to fishers’ recruitment and placement agencies. It is concluded that South Africa does not comply with its duties to regulate recruitment and placement agencies for fishers in accordance with the C188. This leaves fishers in South Africa more vulnerable to coercion by unscrupulous recruitment and placement agencies than fishers in other countries which have extended this protection to include fishers.

There are two possible approaches which would result in the recruitment and placement provisions in the C188 having effect in South Africa. The first is to amend Regulation 2 of the Seafarer Recruitment and Placement Regulations to give effect to both the MLC and the C188. This can be achieved by amending the term ‘the Convention’<sup>59</sup> to ‘the Conventions’ and adding the C188 in the definition of the term ‘Convention’. This suggested approach is based on the fact that the definition of the term ‘seafarers’ in the MSA<sup>60</sup> includes fishers. Therefore, the Seafarer

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<sup>55</sup> See reg 5 of Seafarer Recruitment and Placement Regulations.

<sup>56</sup> See reg 11 of Seafarer Recruitment and Placement Regulations.

<sup>57</sup> Regulation 3 of Seafarer Recruitment and Placement Regulations.

<sup>58</sup> See reg 1 of Seafarer Recruitment and Placement Regulations. Moreover, the SAMSA Marine Notice for the Accreditation of Seafarer Recruitment and Placement Agencies 6 of 2016 aims to notify the industry of South Africa’s implementation of the MLC into South African legislation. It can be argued that there are several reasons why fishers were excluded from the MLC and a separate Convention – the C188 was adopted. Fishers face challenges that are different from those of other seafarers and require a separate legal regime tailored to protect them specifically. Additionally, having one legal instrument that puts into effect both the MLC and the C188 may create legislative challenges in the event of any future amendments to either the MLC or the C188, as these two instruments form different legal regimes. The Bargaining Council in the Fishing Industry (BCFI) Main Agreement is also silent on the issue of recruitment and placement agencies for fishers.

<sup>59</sup> See reg 1 of Seafarer Recruitment and Placement Regulations.

<sup>60</sup> See s 2 of the MSA.

Recruitment and Placement Regulations would apply to all the ‘seafarers’ within the meaning of the MSA. While the Seafarer Recruitment and Placement Regulations currently give effect to the MLC, these Regulations are also in line with the recruitment and placement provisions in the C188. Therefore, no further amendments would have to be made to the Regulations to give effect to the C188. The second option suggested is to give effect to the recruitment provisions in the C188 as a separate legal instrument to the MLC. It is recommended that new Merchant Shipping (Fisher Recruitment and Placement) Regulations, which specifically give effect to the C188, be drafted in line with the above Seafarer Recruitment and Placement Regulations and promulgated in terms of the MSA or its successor.<sup>61</sup> This approach would allow legislators to amend the Regulations according to any future changes to the C188.

### c) Deceitful work agreements

It is important for fishers to understand the conditions of employment beforehand to decide whether to accept employment.<sup>62</sup> Reports from the ILO suggest that there are instances where fishers are coerced into working on fishing vessels based on deceitful work agreements at the recruitment stage.<sup>63</sup> Once on the vessel, fishers are often forced to work under different, harsher conditions than those agreed on in the work agreements.<sup>64</sup> While these fishers initially gave formal verbal or written consent to work on the vessels, the change in working conditions renders their initial consent void.<sup>65</sup>

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<sup>61</sup> This approach would not be unique as separate regulations for fishers have been promulgated in terms of the MSA before. For example, while there are Merchant Shipping (Training and Certification) Regulations GN R1547/99 in GG 20772 of 30 December 1999, separate Merchant Shipping (Training and Certification) (Fishing and Marine Motorman Qualifications) Regulations GN R82 in GG 35004 of 6 February 2012, were drafted which only apply to fishers.

<sup>62</sup> See ILO note 51 at 13.

<sup>63</sup> Ibid.

<sup>64</sup> See Center for Human Rights & Humanitarian Law *Slavery, Forced Labour, Debt Bondage, And Human Trafficking: From Conceptual Confusion to Targeted Solutions* (2011) 4. Report available at <https://www.issuelab.org/resource/slavery-forced-labor-debt-bondage-and-human-trafficking-from-conceptual-confusion-to-targeted-solutions.html> (accessed 13 April 2024).

<sup>65</sup> See ILO *Combatting Forced Labour* at 17.

There are instances in which victims of forced labour had no recollection of ever signing a work agreement.<sup>66</sup> In other cases, the signatures on the work agreements were forged.<sup>67</sup> A fisher's work agreement is defined in the C188 as 'a contract of employment, articles of agreement or other similar arrangements, or any other contract governing a fisher's living and working conditions on board a vessel'.<sup>68</sup> The C188 requires all workers on board fishing vessels to have work agreements as follows:

[i]t shall be the responsibility of the fishing vessel owner to ensure that each fisher has a written fisher's work agreement signed by both the fisher and the fishing vessel owner or by an authorized representative of the fishing vessel owner (or, where fishers are not employed or engaged by the fishing vessel owner, the fishing vessel owner shall have evidence of contractual or similar arrangements) providing decent work and living conditions on board the vessel as required by this Convention.<sup>69</sup>

The C188 also requires each member State to adopt laws, regulations or other measures 'requiring that fishers working on vessels flying its flag have the protection of a fisher's work agreement that is comprehensible to them'.<sup>70</sup> In other words, the C188 requires each member State to ensure that the work agreements are in a language the fisher can understand.<sup>71</sup> South Africa complies with these provisions in terms of the MSA, which requires the master of every South African vessel to enter into a work agreement with every fisher on behalf of the fishing vessel owner.<sup>72</sup> This work agreement must be in the prescribed

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<sup>66</sup> C Stringer & T Hareè 'Human trafficking as a fisheries crime? An application of the concept to the New Zealand context' (2019) 105 *MP* 169–174.

<sup>67</sup> *Ibid.*

<sup>68</sup> See art 1(f) of the C188.

<sup>69</sup> See art 20 of the C188.

<sup>70</sup> See art 16(a) of the C188.

<sup>71</sup> See art 16(a) of the C188.

<sup>72</sup> See s 102(1) of the MSA: If the master of a South African vessel engages single fishers and there is already an agreement with the crew regarding that vessel, those fishers may sign that agreement, and the master need not enter into a separate agreement with them. See s 102(4) of the MSA. The master of the vessel is defined as 'any person (other than a pilot) having charge or command of such ship'. See s 2(1) of the MSA.

form and signed and dated by the master before any fisher signs it.<sup>73</sup> Likewise, South Africa also complies with this obligation as the MSA stipulates that the master, owner or agent of the owner of the vessel must ensure that the agreement is read over and explained to each fisher before they sign it.<sup>74</sup> This provision may go a long way in preventing forced labour at the recruitment stage by ensuring that fishers do not unknowingly agree to terms that may result in them working on fishing vessels against their will.

The C188 and its accompanying recommendation prescribe minimum provisions relating to conditions of employment.<sup>75</sup> South Africa conforms to this obligation through the MSA, which specifies the minimum requirements to be included in the fishers' work agreements. In addition to the requirements in the C188, the MSA includes additional requirements that work agreements must contain.<sup>76</sup> The C188 specifies that no changes can be made to the above details without the fisher's knowledge, as a copy of the fisher's work agreement must be provided to the fisher and carried on board the fishing vessel.<sup>77</sup> In accordance with this requirement, the MSA stipulates that no alteration, deletion or interlineation in any work agreement with the crew of a vessel registered in South Africa is valid without the written attestation of a proper officer with the consent of the crew members affected.<sup>78</sup> Additionally, the C188 requires member States to adopt laws, regulations and other measures relating to the 'maintenance of records concerning the fisher's work under such an agreement'.<sup>79</sup> South Africa conforms with this obligation through the MSA as follows: fishers can sign a

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<sup>73</sup> See s 102(2) of the MSA.

<sup>74</sup> See s 103(b) of the MSA. The MSA defines the owner of the fishing vessel as 'any person to whom a ship or a share in a ship belongs, except as provided otherwise by regulation'. See s 2(1) of the MSA. The BCFI Main Agreement also provides that if an employee is not able to understand the details in the work agreement, the employer must ensure that they are explained to the fisher in a language and in a manner that the fisher understands. See section 28.3 of BCFI Main Agreement.

<sup>75</sup> For a full list of these particulars, refer to Annex II of the C188.

<sup>76</sup> See s 102(3) of the MSA.

<sup>77</sup> See art 18 of the C188.

<sup>78</sup> See s 108 of the MSA.

<sup>79</sup> Article 17(b) of the C188.

separate agreement for each voyage or a running agreement that may extend over two or more voyages.<sup>80</sup> The running agreement cannot be extended for a period longer than a year. It must be amended on every return to a port in South Africa to include any engagements or discharges of fishers made during the voyage.<sup>81</sup> The master of the foreign-going vessel is required to issue a certificate following the execution of an agreement with the crew, which the officer of customs must produce before the vessel proceeds to sea.<sup>82</sup> Forty-eight hours after the ship arrives at her final port of destination or after the discharge of the crew, the master of the vessel must deliver the agreement with the crew to the proper officer and receive a certificate of that delivery.<sup>83</sup> The master of the vessel must also complete a certificate of discharge in the fisher's record book and complete all the spaces in the record book regarding the dismissal of the fisher.<sup>84</sup>

The MSA also provides special provisions applicable to work agreements with the crew of foreign-going South African vessels.<sup>85</sup> These special provisions provide extra protection to this group of fishers. For example, each work agreement must be signed in the presence of a witness, who must attest to each signature.<sup>86</sup> The MSA also provides specific requirements for work agreements with crew working on fishing boats registered

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<sup>80</sup> See s 103(f) of the MSA.

<sup>81</sup> See s 103(g) and (h) of the MSA. While the C188 does not define what a port is, a port in South Africa is defined in the MSA as, 'a harbour of which Transnet Limited has become the owner in terms of section 3 of the Legal Succession to the South African Transport Services Act, 1989 (Act 9 of 1989), or a fishing harbour as defined in section 1 of the Sea Fishery Act, 1988 (Act 12 of 1988), or any place which has under this Act or any other law been designated as a place from or at which any vessel or a vessel of a particular type may be launched, beached, moored or berthed'. A port in a country other than in South Africa means, 'a place, whether proclaimed a public harbour or not, and whether natural or artificial, to which ships may resort for shelter or to ship or unship goods or passengers'. See s 2 (1) of the MSA.

<sup>82</sup> See s 105(1) and (2) of the MSA.

<sup>83</sup> See s 105(3) of the MSA.

<sup>84</sup> See s 5(1) of Merchant Shipping (Seamen's Documents) Regulations GN R432 in GG 21136 of 5 May 2000; ss 6 and 7 of Merchant Shipping (Record Books) Regulations GN R2080 in GG 5764 of 14 October 1977.

<sup>85</sup> A foreign-going ship is, 'a ship plying between a port in one country and a port in another country or a whaling boat other than a shore-based whaling boat'. See s 2(1) of the MSA.

<sup>86</sup> See s 103(a) and (b) of the MSA.

in South Africa.<sup>87</sup> For example, the fishers' work agreements must not be for a period longer than two years. However, if the agreement expires while the vessel is not in South Africa, it remains valid until it is back in a South African port.<sup>88</sup> When an agreement with a fisher expires, the master or the fishing vessel's owner must deliver the agreement to the proper officer within twenty-one days after its expiration. The proper officer must issue a certificate to that effect.<sup>89</sup> In order to further ensure the legitimacy of the fisher's work agreements, the C188 provides that 'the fisher's work agreement, a copy of which shall be provided to the fisher, shall be carried on board'.<sup>90</sup> In line with this requirement, the MSA requires fishers' work agreements to be signed in duplicate.<sup>91</sup> One copy must be delivered to the proper officer, and the master of the fishing vessel must retain the other.<sup>92</sup> The MSA further stipulates that the master of a South African ship must frame and display a legible, unsigned copy of the agreement with the crew in a conspicuous place accessible to the crew.<sup>93</sup> As with any other employer-employee relationship, fishing vessel owners have more bargaining power than their employees. The C188 balances that power by affording fishers the opportunity to review the terms of their work agreement and seek advice regarding any questions.<sup>94</sup> The C188 also mandates member States to adopt laws, regulations and other measures that ensure fishers can settle disputes regarding their work agreements.<sup>95</sup> In line with this obligation, the MSA provides that any court of competent jurisdiction may rescind the contract if any dispute arises between the master or owner of the vessel and the fisher in relation to the terms of the work agreement.<sup>96</sup>

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<sup>87</sup> These requirements also apply to crew working on coasting ships, sealing or shore-based whaling boats. See s 106 of the MSA.

<sup>88</sup> See s 106(d) of the MSA: Unless the fishers concerned agree, the agreement must not continue for more than three months after its expiration.

<sup>89</sup> See s 107 of the MSA.

<sup>90</sup> See art 18 of the C188.

<sup>91</sup> See s 103(c) of the MSA.

<sup>92</sup> The work agreement must also contain a form for the descriptions and signatures of substitutes or fishers engaged on the vessel subsequent to its first departure.

<sup>93</sup> See s 109 of the MSA.

<sup>94</sup> See art 17(a) of the C188.

<sup>95</sup> See art 17(c) of the C188.

<sup>96</sup> See s 145 of the MSA.

While the C188 can be commended for ensuring fishers have work agreements, several shortcomings must be noted. First, most people who seek employment on fishing vessels are illiterate and cannot afford legal representation.<sup>97</sup> Moreover, the language barrier between fishers and potential employers often results in fishers relying on recruitment agencies to communicate with the vessel owners and facilitate their work agreements on their behalf. It is submitted that in such instances, the protection offered by the fisher's work agreement depends largely on each member State's willingness to enforce the above-mentioned provisions, which regulate recruitment and placement agencies. Secondly, it is commonplace for victims of forced labour to be forced to sign a 'signature page', which is later attached to the main contract without the fishers ever reading it. This practice reduces the fishers' work agreement to a tick-boxing exercise that fishing vessel owners do not take seriously.<sup>98</sup>

Lastly, the protection offered by the fisher's work agreement depends largely on whether the fisher can enforce the contract against the vessel owner if the terms of the agreement are not met. While the enforcement of contracts is beyond the scope of this study,<sup>99</sup> it should be noted that in practice, fishers often do not know the true identities of their employers. Vessel operators who are engaged in transnational organised crimes such as forced labour often use fictitious or shell companies. Additionally, the vessel owners may not reside in the countries where their vessels are registered, which may create jurisdictional issues that may hinder the enforcement of the fishers' work agreements. It is submitted that the additional requirements in terms of the MSA, which are above the minimum standards contained in the C188, provide essential information which may assist South African law enforcement in identifying, rescuing and repatriating victims of forced labour on fishing vessels.

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<sup>97</sup> See Institute for Human Rights and Business (IHRB) *Forced Labour* (2016) 3. Available at [https://www.ihrb.org/uploads/briefings/2016-05%2C\\_IHRB\\_Briefing%2C\\_Forced\\_Labour.pdf](https://www.ihrb.org/uploads/briefings/2016-05%2C_IHRB_Briefing%2C_Forced_Labour.pdf) (accessed 13 April 2024).

<sup>98</sup> Ibid.

<sup>99</sup> This falls within the ambit of private international law.

#### (d) Fraudulent medical certificates

Fishing on long-haul vessels is a physically demanding job as fishers often operate heavy machinery, climb up ladders and lift heaving-weighting objects while exposed to frequently harsh weather conditions.<sup>100</sup> Therefore, fishers must be in good health before working at sea.<sup>101</sup> It is common practice for unscrupulous recruitment agencies, fishing vessel owners and senior crew members to use violence or other coercive means to force unfit or unhealthy fishers to work on fishing vessels as they are more vulnerable. In order to elude law enforcement, fishing vessel operators may use fraudulent documentation, such as fake medical certificates.

The C188 requires fishers to be healthy and fit for the duties expected of them when they are out at sea.<sup>102</sup> In doing so, the C188 specifies that, '[n]o fishers shall work on board a fishing vessel without a valid medical certificate attesting to fitness to perform their duties'.<sup>103</sup> In accordance with this requirement, the MSA provides that, 'the master of a South African ship shall not engage a seafarer to serve in that ship unless there has been delivered to the master a [medical] certificate'.<sup>104</sup> The proper officer appointed in terms of the MSA may request the master of the vessel to produce the above medical certificates, failure of which may result in the proper officer refusing to permit the engagement of the seafarers.<sup>105</sup> Furthermore, the Merchant Shipping (Training, Certification and Safe Manning) Regulations<sup>106</sup> require the fishers to produce a valid medical certificate.<sup>107</sup> Additionally, every person who performs watchkeeping duties on a ship as required by Parts 7 and 8 of

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<sup>100</sup> See International Labour Office *Conditions of Work: A Comprehensive Standard (A Convention Supplemented By a Recommendation) on Work in the Fishing Sector* (2002) at 29.

<sup>101</sup> See par 25.1 of the BCFI Main Agreement.

<sup>102</sup> See ILO *Handbook for Improving Living and Working Conditions on Board Fishing Vessels* (2010) 75.

<sup>103</sup> See art 10(1) of the C188.

<sup>104</sup> See s 101(1) of the MSA.

<sup>105</sup> See s 101(4) of the MSA.

<sup>106</sup> GN R219 in GG 44469 of 23 April 2021.

<sup>107</sup> See s 85(2) of the Training, Certification and Safe Manning Regulations. See also ss 92 (regulates medical examinations of cadets), 101 (regulates medical examination of crew before engagement) or 111 (regulates the employment of young cadets) of the MSA.



the the Training, Certification and Safe Manning Regulations, must also hold a valid Colour and Vision test certificate.<sup>108</sup>

In order to alleviate the issuance and use of fraudulent medical certificates, the C188 Recommendations provide that each medical certificate should be signed by a medical practitioner approved by the competent authority.<sup>109</sup> In line with this recommendation, the MSA stipulates that a medical practitioner approved by SAMSA must sign all medical certificates.<sup>110</sup> Additionally, the medical practitioners must be approved in accordance with the conditions provided by the the Training, Certification and Safe Manning Regulations.<sup>111</sup> The applicant should be a medical doctor with an Occupational Medicine Certificate.<sup>112</sup> This approval must be in writing and is valid for three years.<sup>113</sup> SAMSA is required to publish the list of medical practitioners approved in terms of this Regulation regularly.<sup>114</sup> SAMSA ‘may suspend or cancel an approval in terms of this regulation when there is *prima facie* evidence of non-compliance with the conditions of the approval’.<sup>115</sup> The MSA also clearly prohibits forgery or other fraudulent acts.<sup>116</sup>

The C188 places the responsibility on member States to standardise the nature and frequency of fishers’ medical

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<sup>108</sup> See s 85(3) of the Training, Certification and Safe Manning Regulations.

<sup>109</sup> See s 7 of the WF Recommendation. The WF Recommendation suggests that arrangements should be made to enable fishers who, after examination, are found unfit for work on board fishing vessels to apply for a further examination by an independent medical referee. See s 8 of the WF Recommendation.

<sup>110</sup> See s 101(1) of the MSA read with s 2 of the MSA. The term ‘medical practitioner’ in South Africa refers to any person registered as such under the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974. Outside South Africa, a medical practitioner is ‘a person who is entitled to practise as such under the law in force in that place’. See s 2(1) of the MSA.

<sup>111</sup> See s 87(2)–(3) of the the Training, Certification and Safe Manning Regulations.

<sup>112</sup> See s 87(2)(a)(i) of the the Training, Certification and Safe Manning Regulations.

<sup>113</sup> See s 87(5)–(6) of the the Training, Certification and Safe Manning Regulations.

<sup>114</sup> Section 87(9) of the the Training, Certification and Safe Manning Regulations. For an example of such a list, see the Marine Notice on the List of Approved Medical Practitioners 2 of 2021.

<sup>115</sup> Section 87(7) of the the Training, Certification and Safe Manning Regulations.

<sup>116</sup> See s 314 of the MSA.

examinations and the form and content of the medical certificates to be issued.<sup>117</sup> The C188 also provides three supplementary requirements for the medical certificates of fishers working on board larger vessels, which may be extended to smaller vessels after consultation.<sup>118</sup> First, medical certificates must verify that the fisher's hearing and sight are satisfactory for his or her duties on the vessel.<sup>119</sup> Second, medical certificates must confirm that the fisher has no, 'medical condition likely to be aggravated by service at sea or to render the fisher unfit for such service or to endanger the safety or health of other persons on board'.<sup>120</sup> Lastly, if the period of validity of a medical certificate expires during a voyage, the certificate remains in force until the end of that voyage.<sup>121</sup>

South Africa complies with the above responsibilities by stipulating that the medical examination of fishers must be conducted in accordance with the SAMSA's Quality Standards System, as established in section 6 of the the Training, Certification and Safe Manning Regulations.<sup>122</sup> In conducting these examinations, medical practitioners are required to not only verify the identity of the seafarer and include their identity number on the seafarer's medical and eyesight examination record and certificate, but also to collect and preserve the medical history of the candidate, as well as determine the seafarer's position onboard the ship to understand the job's mental and physical demands.<sup>123</sup>

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<sup>117</sup> See art 11 of the C188. It is recommended that when prescribing the nature of the medical examination, member States must consider the age of the fisher and the nature of the duties they must perform on the fishing vessel. See s 6 of the WF Recommendation.

<sup>118</sup> See art 12 of the C188: These larger vessels are fishing vessels of 24 metres in length and which normally remain at sea for more than three days. See also art 2(3) of the C188 on extending protection to smaller vessels. The term consultation refers to 'consultation by the competent authority with the representative organizations of employers and workers concerned, and in particular the representative organizations of fishing vessel owners and fishers, where they exist'. See art 1(c) of the C188.

<sup>119</sup> See art 12(1)(a) of the C188.

<sup>120</sup> See art 12(1)(b) of the C188.

<sup>121</sup> See art 12(3) of the C188.

<sup>122</sup> See s 88(1) read with s 6 of the Training, Certification and Safe Manning Regulations.

<sup>123</sup> Section 88(2) of the Training, Certification and Safe Manning Regulations.

A fisher may only be declared medically fit ‘when they meet all the requirements for medical fitness, visual acuity, hearing, colour vision or lookout duties unaided by medication or medical technology’.<sup>124</sup> A medically fit fisher must be issued with a ‘medical certificate, with appropriate annotations, in the form and manner set out in the Quality Standards System’.<sup>125</sup> Additionally, an eyesight test certificate must be issued to a fisher who passes the eyesight test.<sup>126</sup>

A fisher ‘found to be medically unfit must be issued with a medical certificate declaring the candidate as unfit’ as provided for in the Quality Standards System.<sup>127</sup> Additionally, a fisher who fails the eyesight test must be given a certificate declaring the candidate as unfit.<sup>128</sup> According to the the Training, Certification and Safe Manning Regulations, a medical examiner may choose to either endorse a medical certificate or declare unfit any fisher who uses medication that restricts their ability to perform some or all of their duties.<sup>129</sup> A fisher who requires the assistance of medication or medical technology must be issued with a medical certificate that states the appropriate limitations or restrictions.<sup>130</sup>

The C188 also places the responsibility on member States to set the period of validity of the medical certificates.<sup>131</sup> The competent authority may grant exemptions to this requirement, considering factors such as the safety and health of the fishers, the size of the vessel, and the duration of the voyage.<sup>132</sup> South Africa complies with this duty as follows:

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<sup>124</sup> Section 91(1) of the Training, Certification and Safe Manning Regulations.

<sup>125</sup> Section 88(3) of the Training, Certification and Safe Manning Regulations.

<sup>126</sup> See s 88(4) of the Training, Certification and Safe Manning Regulations.

<sup>127</sup> Section 88(5) of the Training, Certification and Safe Manning Regulations.

<sup>128</sup> See s 88(6) of the Training, Certification and Safe Manning Regulations.

<sup>129</sup> See s 91(3) of the Training, Certification and Safe Manning Regulations.

<sup>130</sup> See s 91(2) of the Training, Certification and Safe Manning Regulations.

<sup>131</sup> See art 11 of the C188. It is recommended that when prescribing the nature of the medical examination, member States must consider the age of the fisher and the nature of the duties they must perform on the fishing vessel. See s 6 of the WF Recommendation.

<sup>132</sup> See art 10(2) of the C188. This exemption may be done after consultation. The term consultation refers to ‘consultation by the competent authority with the representative organizations of employers and workers concerned, and in particular the representative organizations of fishing

- (1) A medical certificate shall be valid, from the date which the candidate was examined, for a period not exceeding two years, except—
- (a) if the medical practitioner [has] found the candidate to have conditions that requires to be reviewed at an interval shorter than two years, in which case the certificate shall be valid for the period determined by the medical practitioner;
  - (b) if the seafarer is under the age of 18, in which case the medical fitness certificate shall be valid for a period of one year.<sup>133</sup>

A visual acuity test is valid for at most two years from the date the fisher is examined.<sup>134</sup> Additionally, a colour vision test is valid for a period not exceeding six years from the date the candidate is examined.<sup>135</sup>

The C188 Recommendations further provides that the competent authority should consider global guidelines on the medical examination and certification of persons working at sea such as the (ILO/ WHO) Guidelines for Conducting Pre-Sea and Periodic Medical Fitness Examinations for Seafarers.<sup>136</sup> South Africa complies with this provision as follows: ‘SAMSA shall establish the Medical Fitness and Eyesight Standards. Such standards must conform as closely as possible to guidance published by the IMO and other United Nations entities as well as local medical standards’.<sup>137</sup>

The C188 also requires each Member State to ‘adopt laws, regulations or other measures providing for the right to a further examination by a second independent medical practitioner in the event that a person has been refused a certificate or has had limitations imposed on the work he or she may perform’.<sup>138</sup>

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vessel owners and fishers, where they exist.’ See art 1(c) of the C188. However, such exemptions do not apply to fishers working on fishing vessels of 24 metres in length and over or which normally remain at sea for longer than three days. See art 10(3) of the C188.

<sup>133</sup> See s 86(1) of the Training, Certification and Safe Manning Regulations.

<sup>134</sup> See s 86(2)(a) of the Training, Certification and Safe Manning Regulations.

<sup>135</sup> See s 86(2)(b) of the Training, Certification and Safe Manning Regulations.

<sup>136</sup> See s 9 of the C188 Recommendation.

<sup>137</sup> See s 90(1) of the Training, Certification and Safe Manning Regulations.

<sup>138</sup> See art 11(e) of the C188.

South Africa affords fishers an opportunity to appeal a medical practitioner's decision through the the Training, Certification and Safe Manning Regulations.<sup>139</sup> This appeals process allows a fisher who has been declared unfit to apply to SAMSA to have the decision reviewed.<sup>140</sup>

#### IV CONCLUSION

This article aimed to determine the extent to which South Africa's legislative framework complies with the C188 provisions in regulating the recruitment practices of those who work on board fishing vessels. The article analysed the MSA, a key piece of legislation that governs the legal aspects of prevalent coercive recruitment practices leading to forced labour on fishing vessels. The focus was on practices such as illegitimate or unscrupulous recruitment and placement agencies, deceptive work agreements, and issuing fraudulent medical certificates. The article concludes that a *lacuna* exists in South Africa's legislative framework. The article suggests that the C188's provisions relating to the recruitment and placement of fishers could be effectively implemented in South Africa either by amending the existing Seafarer Recruitment and Placement Regulations to include fishers or by drafting new Merchant Shipping (Fisher Recruitment and Placement) Regulations. These new regulations would align with the existing Seafarer Recruitment and Placement Regulations and could be promulgated under the MSA or its successor, thereby giving effect to the C188.

The findings highlight the importance of strengthening legislative compliance, enhancing enforcement capabilities, and fostering international cooperation to combat coercive recruitment practices and forced labour effectively in the fishing industry from a South African perspective. This research contributes to the ongoing discourse on labour standards in the fishing sector, offering valuable insights into the effectiveness of the C188 as an instrument to protect fishers' rights, promote decent work conditions, and address the complex challenges of forced labour in the fisheries sector.

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<sup>139</sup> See s 89 of the Training, Certification and Safe Manning Regulations.

<sup>140</sup> See s 89(1) of the Training, Certification and Safe Manning Regulations read with s 2 of the MSA.