

E.C. Tsandis

International Maritime Labour Law

A Case Study of the ILO's Attempts to
Develop Aspects Thereof

Ph.D. Thesis (LSE, University of London)
London 1992



UMI Number: U062786

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI U062786

Published by ProQuest LLC 2014. Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code.



ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

Theses
F
9715



To my parents

Table of Contents

Table of Contents	i-viii
List of Abbreviations	ix-xi
Introduction	1-50
A. The international regulation of maritime employment	1
1) General	1
2) Reasons for the international regulation of maritime employment	2
B. The role of international organisations and other bodies in maritime affairs	7
1) The International Labour Organisation	7
2) The International Maritime Organisation	24
3) The Organisation for Economic Co-operation and Development	25
4) The United Nations Conference on Trade and Development	26
5) The European Communities	27
6) The International Transportworkers' Federation	28
C. The International Seamen's Code and some problems related to its development within the ILO	29
(a) What is the International Seamen's Code and what its objectives?	29
(b) Problems presented by the prevalence of "vague" legal terms in the International Seamen's Code	32
(c) Problems of regionalisation and international labour standards	33
(d) The international regulation of maritime employment: its relation to customary law	39
D. The economic dimension of ILO instruments with particular reference to seafarers' standards	41
E. International labour standards and the 1958 and 1982 Law of the Sea Conventions	44
F. Structure of the present study	46
G. Overview of the Contents	47

Chapter 1

The Regulation of Maritime Employment: Past and Present	51-112
1.1. Early maritime codes concerning seamen	52
1.1.1. The early maritime codes	53
1.1.2. Evaluation of the early maritime codes with regard to maritime labour	54
1.2. Attempts to protect merchant seamen before the Genoa Conference	55
1.3. The competence of the ILO in regard to maritime labour	60
1.3.1. The Advisory Opinion of the PCIJ on the competence of the ILO in regard to agriculture	61
1.3.2. Thoughts concerning the competence of the ILO in regard to maritime employment	63
1.4. The application to seafarers of the "General Principles" of Art. 427 and the Washington Conference decisions	63
1.4.1. The applicability of the 8 hours day and 48 hours a week principle to seamen. The views of the shipowners, seamen and governments	64
1.4.2. The applicability to seamen of decisions taken at the Washington Conference in 1919	66
1.4.3. Analysis of the question concerning the application to seafarers of the "General Principles" of Art. 427 and the Washington Conference decisions and Conclusions	68
<i>1.4.3.1. The application of the Washington decisions to ILO Maritime Conferences</i>	68
<i>1.4.3.2. The applicability of Art. 427 point 4 to seafarers</i>	72
1.5. The ILO and the International Seamen's Code	
1.5.1. The establishment of an International Seamen's Code (ISC)	76
1.5.2. Procedural difficulties at ILO Maritime Conferences	79
1.6. The ILO and the adopted criterion of the ship's registration	80
1.6.1. The history of the question within the ILO	81
1.6.2. Rules of customary law concerning criminal and civil jurisdiction over acts occurring on board ships on the high seas	83
1.6.3. UNCLOS I and UNCLOS III: The failure to establish an effective "genuine link"	85
1.6.4. The UNCTAD Convention on Conditions for Registration of Ships	90
1.6.5. Critical review and conclusions	95
1.7. The Joint Maritime Commission: A Review	
1.7.1. The establishment of the Maritime Branch of the ILO and of the JMC	103
1.7.2. The functions and powers of the JMC	104

1.7.2.1. <i>The scope of the JMC's powers</i>	104
1.7.2.2. <i>The structure and composition of the JMC</i>	105
1.7.2.3. <i>The consultative or binding character of the JMC</i>	106
1.7.3. Conclusions	107
1.8. Summary of Conclusions	110
 Preface to Chapters 2 to 6	 113-116
 Chapter 2	
The entry into maritime employment	117-207
2.1. Conditions for admission to employment	118
2.1.1. Minimum Age	
2.1.1.1. <i>Historical review</i>	118
2.1.1.2. <i>The significance of the Conventions concerning Minimum Age</i>	123
2.1.1.3. <i>Conclusions</i>	132
2.1.2. Medical examination of seafarers	133
2.1.2.1. <i>Historical review of emergent provisions</i>	133
2.1.2.2. <i>Conclusions</i>	137
2.2. Entry into employment	143
2.2.1. The placing of seamen	
2.2.1.1. <i>Convention No. 9: Historical background</i>	143
2.2.1.2. <i>ILO instruments of a general nature concerning employment agencies and the organisation of the employment service</i>	145
2.2.1.3. <i>Recent Developments regarding the engagement of seafarers</i>	148
2.2.1.4. <i>Conclusions</i>	
2.2.1.4.1. <i>Problems concerning the interpretation of Convention No. 9</i>	152
2.2.1.4.2. <i>Convention No. 9: The need for revision</i>	159
2.2.1.4.3. <i>The effect of Recommendation No. 107 (1958)</i>	163
2.2.1.4.4. <i>Convention No. 147: Advantages and Disadvantages</i>	169
2.2.1.5. <i>Summary of Conclusions</i>	172
2.2.2. Seamen's Articles of Agreement	
2.2.2.1. <i>Historical Review</i>	175
2.2.2.2. <i>Articles of Agreement and Discipline:</i>	
<i>These are two questions that have given rise to much controversy</i>	178
2.2.2.3. <i>Analysis of the provisions of Convention No. 22</i>	180
2.2.2.4. <i>Conclusions</i>	187
2.2.3. International Disciplinary Code for Seamen	190

2.3. Seafarers' Identity Documents

2.3.1. Historical Review	198
2.3.2. Analysis of the provisions of the Convention	200
2.3.3. Conclusions	201

Chapter 3

Maritime training and certificates of competency 208-253

3.1. Maritime training

3.1.1. Historical review	209
3.1.2. The Competence of the ILO with regard to the training of seafarers	210
3.1.3. Recommendation No. 137 and the STCW Convention	212
3.1.4. Maritime training and technical developments on board ship: Recommendation No. 139	216

3.2. Certificates of competency

3.2.1. Historical review	219
3.2.2. The competence of the ILO with regard to the certificates of competency	221
3.2.3. Analysis of the provisions of Conventions Nos. 53, 69 and 74	221
3.2.4. Other instruments relevant to the certification of officers and ratings	230
3.2.5. Port State Control and Validity of Certificates of Competency	235

3.3. Conclusions 241

Chapter 4

General conditions of the employment of seamen 254-380

PART I: WAGES, HOURS OF WORK AND MANNING 254-339

4.1. Wages, hours of work and manning 254

4.1.1. 1920 - 1936: Struggles and impasse	255
4.1.2. 1936 - 1946: A repeated story	277
4.1.3. 1946-1958: The years of moderate revision	296
4.1.3.1. 1946-1949: <i>The failure of attempts at major revision</i>	296
4.1.3.2. 1949-1958: <i>The loss of a golden opportunity for complete reexamination and the compromise formula</i>	298
4.1.4. 1958-1988: Revision of the Minimum Basic Wage for Able Seamen: No change in the substantive law of hours of work, manning and wages	305
4.1.5. Conclusions	313
4.1.5.1. <i>The prons and cons of Conventions Nos. 57, 76, 93 and 108 and the prospects of their ratification</i>	313
4.1.5.2. <i>Shipowners' and seamen's views</i>	315

4.1.5.3. <i>The "ideal instrument"</i>	316
4.1.5.3.1. Recommendations concerning the effectiveness of the ILO Office and the Committees' preparatory work relating to wages, hours of work and manning	317
4.1.5.3.2. Recommendations concerning the revision of the ILO instruments concerning wages, hours of work and manning for seamen taking into account trends in state practice during 1920-1987	318
4.1.5.3.3. Conditions of employment and technical developments on board ship	331
4.1.5.3.4. Conditions of employment in Convention No. 147 and Recommendation No. 155: These are a hodgepodge of unconvincing innovations	331
PART II: REPATRIATION AND ANNUAL PAID LEAVE	340-380
4.2. Repatriation	
4.2.1. Convention No. 23 and Recommendation No. 27 (1926)	340
4.2.2. Convention No. 166 and Recommendation No. 174 (1987)	348
4.2.3. Conclusions	358
4.3. Leave	
4.3.1. Seafarers' Leave in the ILO before the 2nd World War	363
4.3.2. 1946 - 1949: Conventions Nos. 72 and 91 on Paid Vacations for Seafarers	367
4.3.3. The question of Paid Vacations for Seafarers revisited: 1967-1976	371
4.3.4. Conclusions	377
4.3.4.1. <i>Comparison between Convention No. 91 and Convention No. 146</i>	377
4.3.4.2. <i>Possible remedies</i>	377
4.3.4.3. <i>Possible improvements to the text of Convention No. 146</i>	378
Chapter 5	
Social Security	381-433
5.1. Unemployment Indemnity for Seafarers in case of shipwreck	
5.1.1. The history of the question of unemployment insurance for seamen	382
5.1.2. Analysis of the provisions of Convention No. 8 and Conclusions	383
5.2. The protection of seamen in case of sickness and injury before the 2nd World War	385
5.2.1. The liability of the shipowner towards sick or injured seamen	386
5.2.2. Public sickness insurance schemes for seamen	388
5.2.3. Conclusions	390

5.3. Social security for seafarers after the 2nd World War	
5.3.1. Social security for Seafarers: Convention No. 70 and Recommendation No. 75	392
5.3.1.1. <i>Convention No. 70 concerning Social Security for Seafarers</i>	392
5.3.1.2. <i>Recommendation No. 75 concerning Agreements relating to the Social Security of Seafarers</i>	398
5.3.2. Convention No. 71 concerning Seafarers' Pensions	398
5.3.3. Conclusions	399
5.4. The Minimum Standards Convention, 1976 (No. 147) and Social Security for Seafarers	401
5.5. Recent attempts to regulate social security for seafarers at the international level: Convention No. 165 (1987)	
5.5.1. Introduction	403
5.5.2. Position of the Shipowners and the Seafarers in 1986	404
5.5.3. State practice concerning social security for seafarers in 1986	406
5.5.4. The Office drafts and the 1986 Preparatory Maritime Conference	412
5.5.5. The 1987 Conference	414
5.5.6. Analysis of the provisions of Convention No. 166	415
5.6. Conclusions	424
 Chapter 6	
Substandard Vessels and Maritime Labour	434-483
6.1. Minimum standards for substandard vessels with special reference to Convention No. 147 and Recommendation No. 155	
6.1.1. The question of substandard vessels within the ILO	435
6.1.2. Analysis of the key features of the MSC and possible remedies	444
6.2. International customary law and other international instruments relating to inspection of labour conditions on board ship and relevant questions	
6.2.1. Brief analysis of the relevant rules of customary and treaty law	459
6.2.2. Conclusions	465
6.2.3. ILO Recommendation No. 28 and the Memorandum of Understanding	468
6.3. Conclusions	473
 Chapter 7	
Conclusions	484-540
7.1. The ILO's impact in promoting social standards for seafarers	485
7.1.1. Uniformity and flexibility: two contradictory features of ILO Conventions	488

7.1.2. Suggestions for the adoption of labour standards concerning certain aspects of maritime employment	489
7.2. ILO techniques for promoting the International Seamen's Code; future developments	491
7.2.1. The regionalisation of ILO standards for seafarers	493
7.2.2. The development of codes of practice or conduct and collective agreements	500
7.2.3. Need for better preparation of final documents	503
7.2.4. The drafting of ILO instruments concerning seafarers	503
7.2.5. The position of fishermen	507
7.2.6. The interrelationship between labour, safety and environmental issues	509
7.3. The ILO's established machinery for the adoption of seafarers' standards	510
7.3.1. Recorded votes at maritime conferences	510
7.3.2. Standard final provisions of ILO maritime Conventions	511
7.3.3. The importance of Resolutions adopted at Maritime Conferences	512
7.3.4. Number of ratifications, percentage of the world tonnage and the criterion of registration	514
7.4. International custom and maritime labour law	515
7.5. The Law of the Sea Conventions and international standards for seafarers	519
7.6. Seafarers' standards and international competition: the role of the ILO	525
7.6.1. The impact of competition on labour standards and their regulation	525
7.6.2. Modernisation of shipping and crew costs	526
7.6.3. The role of the ILO in striking a balance between social objectives and the forces of international competition	528
7.6.4. The need to take account of economic policies in the regulation of maritime labour	529
7.7. Politics and group strategies within the ILO	531
7.8. Shipboard management/labour relations and collective bargaining	531
7.9. Special problems of the seafaring profession	533
7.9.1. Reorganisation of work on board ship and automation	534
7.9.2. Manpower planning; updating of old ILO maritime standards	535
7.10. The relationship between the ILO, the IMO and the UNCTAD	535
7.11. Miscellaneous	536
7.7.1. The ship: A "closed" environment	536
7.7.2. Maritime Labour and the development of offshore registers	537
Final remarks	539

Appendix 1	
State Practice concerning Maritime Training and Analysis of Data	541-554
Appendix 2	
Reasons for the non-ratification of Conventions Nos. 76, 93 and 109	555-556
Appendix 3	
State practice regarding repatriation in 1926 and 1985	557-561
Appendix 4	
A. ILO Maritime Conventions: Ratifications and percentage of total world gross tonnage represented by ratifying countries;	
B. Selected Conventions of general application: Ratifications and percentage of total world gross tonnage represented by ratifying countries	562-564
Appendix 5	
A. MOU - Inspections and detentions	565
B. Delays and detentions per flag State	566-567
Appendix 6	
Crew costs: an international comparison	568-575
Appendix 7	
A. Table concerning the status of Resolutions adopted by ILO Maritime Conferences	576
B. Table of Resolutions adopted by ILO Maritime Conferences	577-586
Selected Bibliography	587-619

LIST OF ABBREVIATIONS

AFL	American Federation of Labor
AJIL	American Journal of International Law
Ann.	Annuaire Français de droit international
BYIL	British Yearbook of International Law
C.A.M.	Commission de l' âge minimum d' emploi des enfants à bord
C.C.	Commission du chômage
C.C.P.M.	Committee on Holidays with Pay for Seamen
C.G.M.M.	Commission on the Protection of Seamen from Sickness or Injury
C.H.T.	Committee on Hours of Work on Board Ship
CILL	Commission on International Labour Legislation
C.M.C. 1936	Committee on Minimum Requirements of Professional Capacity, 1936
C.M.C.P. 1929	Committee on Minimum Requirements of Professional Capacity, 1929
CMI	Comité Maritime International
C.M.P.	Committee on the Protection of Seamen in case of Sickness
C.M.Q.	Committee on Maritime Questions
CR	Committee on the Repatriation of Seamen
C.S.	Commission des sanctions
C.S.A.A.	Commission du contrat d' engagement des marins
EEC	European Economic Community
FAO	Food and Agricultural Organisation
FOC	Flags of convenience
G.B.	Governing Body
GCBS	General Council of British Shipping
GP	General Purpose
GYIL	German Yearbook of International Law
HSC	High Seas Convention (the second of the Geneva Conventions on the Law of the Sea, 1958)
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission

ILI	Industrial and Labour Information
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Labour Review
IMCO	Inter-Governmental Maritime Consultative Organisation
IMO	International Maritime Organisation (successor to the IMCO)
ISC	International Seamen's Code
ISC	International Seafarers' Charter
ISF	International Shipping Federation
ITF	International Transport Workers' Federation
JCST	Joint IMCO/ILO Committee on Training of Seafarers
JCT	Joint IMCO/ILO Committee on Training
JMC	Joint Maritime Commission
JMLC	Journal of Maritime Law and Commerce
JMM	Journal de la Marine Marchande
LLP	Lloyd's of London Press
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
LSC	Liberian Shipowners' Council
Mar. Pol.	Marine Policy
Marit. Pol. Mgmt.	Maritime Policy and Management
MLR	Modern Law Review
MOU	Memorandum of Understanding
MSC	Minimum Standards Convention
MSA	Merchant Shipping Act
MTC	Maritime Transport Committee of the OECD
NIS	Norwegian International Ship Register
NUS	National Union of Seamen
NYIL	Netherlands Yearbook of International Law
O.B.	Official Bulletin of the ILO
OEEC	Organisation for European Economic Cooperation
OECD	Organisation for Economic Co-operation and Development
(Successor	to the OEEC)
PCIJ	Permanent Court of International Justice
PTMC	Preparatory Technical Maritime Conference
RHDI	Revue Hellenique de Droit International
R.C.A.D.I.	Recueil des Cours d'Academie de Droit International
R.C.D.I.P.	Revue critique de droit international privé

R.I.D.C.	Revue internationale de droit comparé
R.P.	Records of Proceedings (of the ILO Conference)
S.A.R.	Summary of Annual Reports
S.Car.L.R.	South Carolina Law Review
SCLR	Santa Clara Law Review
SDLR	San Diego Law Review
SLB	Social and Labour Bulletin
SOLAS	Safety of Life at Sea
STCW	Standards on Training, Certification and Watch-keeping
TCC	Total Crew Cost
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNCLT	United Nations Conference on the Law of Treaties
UNTS	United Nations Treaty Series
VCT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WMU	World Maritime University

Introduction

A. The international regulation of maritime employment

1) General

This study is concerned with the evaluation of the contribution of the ILO towards the establishment of an International Seamen's Code, namely an international regime providing the legal framework for almost every aspect of the seaman's profession and its contribution to the development of public international law, including the Law of the Sea, an aspect hitherto overlooked in studies of the ILO.

The interest of the international community in the regulation of maritime employment started centuries ago, as will be analysed in Chapter 1, but systematic efforts to regulate seafarers' affairs on the international plane were not made until the end of the last and the beginning of the present century. These efforts culminated in the establishment of the ILO by the Versailles Treaty of Peace in 1919, which concluded the First World War. It was also decided at the time of the ILO's establishment that, due to the particular problems that the regulation of seafarers presents, these will be treated by special sessions of the ILO Conference. Since 1919 a considerable number of instruments have been adopted by the ILO which form the so-called International Seaman's Code ¹ and, unlike earlier compilations of laws and customs, which covered questions of maritime employment, for the first time, the aim was the social protection of seafarers, ² as a particular category of workers, at the international level. The first question which arises when one embarks on the examination of a subject, which is not well covered, such as the international regulation of maritime employment, is why such regulation appears necessary and what is its purpose.

At the national level, the regulation of maritime employment has been developed into a substantial body of law in many countries over the years as a branch of private maritime law or employment law. ³ National laws and regulations, custom, collective agreements, national courts have

¹For the meaning of this Code, see *infra* pp. 29 *seq.* and Chapter 1, 1.5.

²For the social goals of the ILO and its contribution to the development of the human rights, see *infra* pp. 10-13.

³Theoretical disputes at the national level as to whether the law of merchant seamen is branch of maritime law or employment law are beyond the scope of this work. It suffices here to say that general principles of employment law, such as the protection of the weaker party to the contract (the employee), the right to social security, etc. are applicable thereto; on the other hand, the special circumstances surrounding maritime employment, such as the risk of the maritime enterprise, the master's authority, the importance of shipping for the national economy, the special nature of the seaman's rights and duties, etc. resulted in the development of special features of the law of maritime employment which are not found in general employment law.

dealt in detail with particular aspects of maritime employment with the result that the law of maritime employment has formed into a separate body of law within national legal systems. This was necessitated by the special nature of the seaman's profession. In the last two centuries, private maritime labour law has undergone substantial changes. In the beginning, many questions were regulated by custom,⁴ but, later, written law rendered custom in most instances obsolete. The next important step was the introduction into the law of maritime employment of many institutions of employment law, such as social security and, in particular, the regulation of many issues of maritime employment by means of collective agreements. It was understood that the two parties concerned, Employers and Workers, were the most appropriate to regulate matters which affected their interests.⁵ Collective agreements are given the force of law in most countries and have contributed substantially to the uniformity of law and to the promotion of the social protection for seafarers at the national level. On the other hand, shipping has always been regarded as an important asset for the development of the national economy and the prosperity of the state and, in recent years, state intervention is all the more apparent and has intruded considerably upon the traditional private character of maritime employment.⁶ Many commentators speak, thus, of a trend towards the publicisation of the law of maritime employment. The public character of this branch of private law has also had its origin in the need for the effective protection of the seafarers' rights by means of state intervention. It transpired that negotiations between Employers and Workers did not always result in the rational regulation of the seafarers' rights and duties due to the stronger negotiating position of the employer, especially in periods of depression; this situation would be corrected by means of drastic state intervention, through the adoption of a considerable body of decrees and regulations, in areas where such intervention appeared from time to time necessary. The aim of state intervention in most cases was the establishment of a minimum level of protection with a view to eliminating or, at least, reducing the possibility of the distorting effect of inter-party negotiations. In other areas, such as social security, repatriation, medical care and social welfare, state intervention was thought necessary, since it was the State itself that undertook the task of protecting and giving effect to the underlying rights of the seaman and was assuming the relevant social, administrative or financial obligations. It can be argued that, in these areas, the State assumed the role of a quasi-contractual party vis-a-vis the seaman, alone or jointly with the employer. State interventionism has become today a regular feature of the law of maritime employment.

2) Reasons for the international regulation of maritime employment

⁴One remembers the old custom making seamen's wages dependent on the successful completion of the voyage. This was the law in the United States and the U.K. until 1872.

⁵However, collective agreements as a means of ratification of ILO Conventions did not receive wide acceptance within the ILO until after the 2nd World War and delayed ratification of a number of Conventions by certain countries, such as the U.K., see *infra* Chapter 4.

⁶This intervention is, for example, evident in the regulation of manning scales on board ship, seamen's discipline, etc. by means of legislative acts, decrees or regulations.

The regulation of maritime employment, to the extent that it was aiming at providing solutions to the multiple problems arising in this field at the national level, had certain important disadvantages: first, it overlooked the international nature of shipping and of the profession of the seaman who, because of the exigencies of his profession, was frequently obliged to perform his services under various jurisdictions whose co-operation in such areas as social security, repatriation, seamen's discipline, etc. was necessary if the regulation was to be effective. Second, the above characteristics of the seaman's profession had the effect of subjecting the seaman to various jurisdictions and laws. The effectiveness of the regulation of his employment at the national level would be greatly enhanced if he could make sure that the same or similar rights would be accorded to him when he had to face the law of other jurisdictions. There would be a gain for the shipowner too, since he would be able to organise his enterprise in the knowledge that his obligations would not vary greatly from jurisdiction to jurisdiction. These aims could be achieved by a uniformity in law which could only be brought about by international legislation. Moreover, due to the international competition in the shipping industry, the effective and successful regulation of the seamen's affairs at the national level and the State's disposition to afford seamen more social rights was largely dependent on the competitiveness of the national fleet vis-a-vis other countries. The problem was particularly acute when competing national fleets left these matters unregulated or displayed a lower sense of responsibility towards such regulation. International legislation, apart from its function of ensuring social protection for seafarers at the international level, would motivate Governments to adopt laws and regulations ensuring, at the same time, a minimum level of uniformity in the regulation of maritime labour at the international level. This would have the secondary effect of reducing the adverse effects of international competition on the development of seamen's law. If the application of such legislation could be reviewed with a view to its effective enforcement, the results would be all the more rewarding.

Taking into account the above considerations, the ILO became the pioneer of international legislation in the area of maritime employment and has adopted during its almost 70 years of existence numerous Conventions and Recommendations which traditionally have been regarded as part of the International Seamen's Code. The appearance and development of this Code inaugurated a third stage in the development of the law of maritime employment and gave substance to what is called nowadays the "internationalisation" of the law of maritime employment. The reasons for the adoption of international maritime labour standards are twofold: a) general reasons for the adoption of international labour standards applying to all workers, and b) specific reasons justifying the development of special standards for seafarers.

As regards the former, the necessity for the adoption of ILO standards is discernible from the general objectives of the ILO as set out in the ILO Constitution and the Declaration of Philadelphia.⁷

⁷See Preamble to the ILO Constitution; Art. 1 of the ILO Constitution and the Declaration of Philadelphia. The Declaration of Philadelphia was adopted by the Conference on 10th May 1944 and was incorporated in the ILO

The social goals contained therein include the improvement of the conditions of labour at the international level, the elimination of social injustice, the establishment of programmes which will achieve, *inter alia*, full employment and the raising of standards of living, etc. To these objectives can be added the need for regulation of questions in which an international element is involved; the pooling together of national experience and specialists in cases where technical questions are involved (this is particularly the case with the adoption of international standards for the shipping industry); the protection of conditions of labour against the detrimental influence of international competition; the harmonisation and consolidation of national laws and the provision of models for the development of national legislation, especially in developing countries.

As regards the specific reasons for the regulation of maritime employment and its systematic examination, it should be noted, in the first place, that the seaman's profession is of a very special nature. This relates to the continued presence of the seaman on board ship while at sea, his exposure to the perils of the sea and to different climatic conditions, his augmented sense of duty in connection with the safety of navigation and of the ship and his continuous movement between various countries. All these factors necessitated the adoption of special protective rules for the regulation of maritime employment⁸ and contributed to the development of a separate body of law based, in many instances, on its own principles.

Secondly, the international nature of shipping and, particularly, of the seafaring profession, and economic competition in the shipping industry are, *inter alia*, factors which can have and have had an influence on the evolution of labour standards for seamen. Thus, the regulation of questions in which an international element is involved as one of the justifying reasons for the international regulation of labour acquires a considerable significance in the field of maritime employment.⁹ Moreover, international competition is a factor of particular relevance in the regulation of seamen's employment, especially as far as such issues as wage policies and social security benefits, are concerned. As will be seen, fear for competition has been one of the factors that has delayed or, even worse, prevented certain ILO standards from coming into force.

Thirdly, merchant seamen as a group are extremely appropriate for a group study from the legal point of view. Shipping is an international activity and seafarers, because of the nature of their job, are required to offer their services in an international environment. The special link between the ship and the country of registration has a number of highly significant consequences as does the fact that, for the most, part seamen perform their work outside the country of the ship's registration.

Constitution in 1946. For the meaning and the significance of the Declaration of Philadelphia see Valticos, *Droit international du travail*, 1983, at pp. 71-73. Its impact on ILO activities has been considerable, see *ibid.*, pp. 71, 77-8.

⁸See G. Ripert, *Droit Maritime*, Vol. I (1950), No. 445-449; see, also, generally, S. Agapitidis, *Contemporary trends in the protection of maritime employment*, (in Greek) Athens (1940).

⁹The international nature of the seafaring profession has no doubt contributed to the clearly identified trend towards the uniform development of a body of law regulating maritime employment at the national and international level. Uniformity, it should be remembered, is one of the purposes of international labour legislation, see *infra* p. 17, n. 55.

Problems concerning the extraterritorial application of law frequently arise. The ship on board which they are employed may be engaged in trade in the territorial waters of the country in which it is registered; or it may be engaged on ocean trade taking it into international areas of the sea beyond the jurisdiction of coastal states; or it may enter the territorial or internal waters of a State other than that in the territory of which the ship concerned is registered. This may give rise to disputes over the law applicable to maritime employment, especially when the vessel enters foreign waters.

Fourthly, the shipping industry is one of the most clearly defined industries in physical, social, economic and legal terms.¹⁰ It is distinguishable from any type of employment ashore and, apart from certain general principles of international, private and labour law applicable thereto, there is a clearly separate body of law relating to maritime employment to which old institutions of maritime law apply, such as the authority of the master, the need for discipline on board ship, repatriation, special dismissal procedures, etc. The special nature of the seaman's employment justifies the development of a particular branch of law dealing with its various aspects, and this is also true at the international level. It will be seen in Chapter 1 that already since 1920, the idea of the development of an International Seamen's Code dealing with the special problems of the seafaring world became prevalent in the minds of the ILO delegates.

Fifthly, the ship, is regarded by sociologists, as a "closed environment", and this fact, with the related issues of seamen's discipline, should be taken into account when laying down legal standards for the regulation of their profession. As will become clear later in this study,¹¹ the regulation of maritime employment is not only a matter for lawyers; social scientists, economists and public administrators have all their part to play in an attempt to define the seamen's needs and ascertaining the methods in which the relevant policies will be accomplished in an industry which, although capital-intensive, has always considered labour as a parameter considerably affecting its efficiency and viability.

Finally, the *international* regulation of maritime employment presents the international lawyer with particular and interesting problems. In fact, it is an area partaking of international law, maritime law and employment law¹² and the fusion of these three branches of law as well as their limits and their interaction is not always ascertainable. Concepts such as labour law and custom, freedom of navigation and territorial and extra-territorial jurisdiction of coastal States, the quasi-territoriality of the ship and coastal or port State jurisdiction are particularly relevant to the law of maritime employment and make difficult the understanding of its underlying laws and principles. However, these principles should always be kept in mind and should guide all systematic attempts at an effective regulation of maritime employment at the international level. Creation of uniform international standards has,

¹⁰J. Kitchen, *The employment of merchant seamen*, Croom Helm, London, 1980, at p. 5.

¹¹See *infra* Chapter 7.9, 7.11.1.

¹²Not to mention administrative and criminal law which are involved in areas such as seamen's discipline; for this question see *infra* Chapter 2.2.2. and 2.2.3.

moreover, become particularly important in the context of developments in the Law of the Sea. The international community, following the 1972 UN Conference on the Human Environment, has become increasingly concerned with problems of marine pollution from vessel-sources. There has been a rapid growth in the number of Conventions relating to this issue, both directly, through the IMO, and indirectly, through Protocols to the UNEP Regional Seas Conventions, and other regional agreements. The UN Convention on the Law of the Sea of 1982 addressed these issues from a global perspective, taking account of the need for uniformity of operating standards on board vessels, *inter alia*. As marine casualties and accidental discharges have continued and even recently increased, more attention is now being paid to the role of the seafarer himself and his training and working conditions, in contributing to such incidents. The need for uniform standards and closer co-operation between the ILO and the IMO has been stressed. The conclusion of an IMO Convention on Standards of Training, Certification and Watchkeeping, with the close co-operation of the ILO provides an example of this, which is discussed in Chapter 3.

Despite the importance of the international regulation of maritime employment and its attractiveness as a subject-matter, it is unfortunate that the monographs, studies or theses concerning maritime labour are, apart from rare examples, involved with national laws and practices and little attention has been paid to the international aspect of maritime labour. Few comparative analyses of seamen's laws exist, especially in this wider international context, and they are neither comprehensive nor up to date. The bibliography available concerning the Minimum Standards Convention, No. 147, 1976 constitutes an exception to this rule. On the other hand, though there are a few comparative analyses of the seaman's environment these are behavioural studies and, though contributive to the establishment of an effective policy on seamen's affairs, cannot be readily assessed from a legal point of view.¹³

This situation is in sharp contrast to the extensive literature available in other fields of marine affairs, such as marine pollution, fisheries, etc. and can be explained mainly on two grounds: first, a vast amount of national laws and regulations has developed on the subject, especially in the present era of State intervention, and their great diversity makes it difficult to have a complete picture of the regulation of the relevant issues; and second, the regulation of labour questions, apart from the development of national legislation, has to a great extent been the subject of regulation between the parties concerned through the conclusion of collective agreements. These agreements, by reason of their rapid changes, are not easily susceptible to analysis and render difficult the identification of

¹³The limited availability of sources on maritime labour, viewed from an international angle, is further aggravated by the fact that no comprehensive studies (apart from a number of papers concerning Convention No. 147, maritime training, flags of convenience, recruitment of seafarers, fishermen and guidelines regarding national maritime policies), have been written by officials in the Maritime Branch of the ILO. On the other hand, there are many works of an international nature written within and outside the ILO relating to other industries, such as agriculture, clothing and textile industries, women's employment, shipbuilding etc. Furthermore, as becomes apparent from the sources used in the Introduction, Chapter 1 and Chapter 7 of this study, there is an abundant bibliography on general legal issues concerning the ILO, its standard-setting activities and its supervisory machinery, especially in the field of human rights.

trends in the regulation of maritime employment at the national level as well as their comparative examination for the purpose of drawing conclusions at the international level.

B. The role of international organisations and other bodies in maritime affairs

In this section the writer gives a brief outline of the contribution of international organisations and other bodies to the regulation of shipping at the international level with special reference to the implications of their work for maritime labour. Since the present study is concerned with examination of the work of the ILO on seafarers' standards, the structure of this will be examined in some detail. A special subsection deals with the supervisory machinery of the ILO and extensive reference is made to the interpretation of treaties with particular reference to the ILO Conventions. It will be seen that the writer has chosen a combination of methods of interpretation of the ILO maritime Conventions which in his view provides an accurate tool for the interpretation of the relevant instruments. The various aspects of shipping which are covered by different institutions world-wide only signifies its complex nature and the great importance which should be attached to its uniform regulation. It is suggested in many instances in this study that the work of international bodies which regulate shipping should be developed on a uniform and cooperative basis. This approach is necessitated by the interrelationship between the economic, safety and labour aspects of shipping, the need for a logical and coherent development of standards relating to shipping, and the desire to economise and invest capital in tasks such as the amelioration of working conditions of seafarers from developing countries and the provision of maritime training and certification facilities.

1) The ILO

The ILO was set up in 1919 by the Treaty of Peace to unite governments for the purpose of establishing social justice and better living conditions in the world.¹⁴ In 1946 the ILO became the first specialised agency associated with the UN. The ILO deals with a huge amount of social problems arising in various industries and the human capital used therein and has adopted numerous standards, which aim at ameliorating the working conditions of different classes of workers. The ILO has a Maritime Branch, which deals with problems associated with employment at sea. The research undertaken by this Branch is considerable and has greatly contributed to the adoption of ILO maritime instruments.¹⁵

¹⁴For details see Chapter 1. The ILO has today 150 member states compared with 42 in 1919 and 58 in 1948.

¹⁵The importance of this Branch is indicated by the fact that Mr. Francis Blanchard, Director-General of the ILO from 1974 to 1989, had held the post of the Director of the Maritime Branch of the ILO before he was appointed Director-General.

(a) The ILO's organs

The ILO is composed of a yearly General Assembly, the ILO Conference.¹⁶ The ILO Conference elects the Governing Body; adopts the ILO's budget; adopts international labour standards. Each national delegation consists of four Members, two Government Members, one Employer Member and one Worker Member, accompanied by technical advisers. Employers and Workers are free to disagree with Governments and with each other. Also, one Government delegate is free to disagree with the other. The Governing Body (of tripartite structure), which is at present composed of 28 government members, 14 employer members and 14 worker members, normally holds three sessions a year at Geneva to decide questions of policy and programme; it controls the work of the ILO Office; it draws up the budget and is responsible for the drawing up of the Agenda of the ILO Conferences.

(b) The activities of the ILO with special reference to maritime employment

The ILO primarily remains a standard-setting body (adopting Conventions and Recommendations) but its other activities should not be overlooked;¹⁷ these include the elaboration and development of technical assistance programmes,¹⁸ the holding of regional Conferences, seminars on different aspects of maritime labour, especially maritime training, collaboration with other international organisations with regard to maritime questions (Joint ILO/IMO Committee on Training), issue of Codes of Conduct and Codes of Practice, sometimes in co-operation with other organisations such as the IMO, the WHO, the FAO and the UNDP (which provides the major part of financing for ILO technical co-operation projects), the research undertaken and the documents published under the

¹⁶In fact, when an ILO Maritime Conference is held in one year, two ILO Conferences take place on that year (one Conference of a general character and one Maritime Conference). Only in 1920 one ILO Maritime Conference (2nd maritime session) was held in Genoa.

¹⁷For the legislative activities of the ILO see, *inter alia*, J. McMahon, "The Legislative Techniques of the International Labour Organisation", *BYIL*, Vol. 41, 1965-66, pp. 1-102.

¹⁸The ILO has assisted developing countries in drawing up maritime labour legislation; see, for instance, International Labour Office, United Nations Development Programme, *ILO Inter-regional Seminar on Maritime Training*, Singapore, 23 April to 6 May 1970, UNDP/TA 01-3-C-8-2; ILO, Swedish International Development Authority, *Seminario sobre Trabajadores Portuarios para America Latina, Organización Internacional del Trabajo y su Actividad en el Sector Marítimo*, Santa Marta, 1977; ILO, Asian Regional Seminar on Workers' Education for Maritime Workers, Singapore, 1977, Report (ILO-EDUC/S.44/D.4); ILO/NORAD Inter-regional Seminar on Maritime Workers' Education, Geneva, 1977 (ILO-EDUC/S.42/D.2); ILO, Report on the ILO/NORAD Regional Asian Seminar on Workers' Education for Maritime Workers, Singapore, 1977 (ILO/TF/AFE/R.28); ILO, Caribbean Regional Seminar on Workers' Education for Maritime Workers, Port of Spain, 1977 (ILO-EDUC/S.47/D.1-4); ILO, Caribbean ILO/Norway Regional Seminar on Maritime Workers' Education, Port of Spain, 1979 (ILO-EDUC/1980/S.51) and Report (ILO/TF/LAT/R.12); ILO, ILO/Norway Regional Seminar on Social Security for Seafarers in Asia, Manila, 1980 (ILO-INRSA/D.1-9) and Report (ILO/TF/AFE/R.36); ILO/SIDA Seminar on Workers' Education for Kenyan and Tanzanian Maritime Workers, Mombassa, 1981 (ILO-EDUC/S. 42/D.1A); Workers' Education and Training for Kenyan and Tanzanian Maritime Workers: The ILO and Means of Trade Union Standard Setting Action, Geneva, 1981 (ILO/SIDA/74/RAF/18); Report on the Subregional Seminar on Workers' Education and Training for Kenyan and Tanzanian Maritime Workers, Mombassa, 1981 (ILO/TF/AFR/R.34); ILO, Panama: Legislación Laboral Marítima; Conclusiones y Recomendaciones del Proyecto, Ginebra, 1981 (ILO-PAN/81/003); ILO, Assistance in Workers' Education for Asian Maritime Workers, Geneva, 1982 (ILO/TF/AFE/R.40); ILO, Technical Memorandum to the Government of the Syrian Arab Republic on Conditions of Employment and Administration of Shipboard Personnel, Geneva, 1982 (ILO-70-3-C-8-1); OIT, Programme de coopération technique, *Mémoire Technique au Gouvernement du Royaume du Maroc*, Genève, 1985; Report on the ILO Seminar on Maritime Labour Standards for Central and West African Countries, Brazzaville, 26-30 November 1985, ILO 1986; Report on the ILO Seminar on Maritime Labour Standards for East African Countries, Dar es Salaam, 27 January-3 February 1987, ILO 1987.

World Employment Programme, its activities within the framework of the Programme of Industrial Activities, which are concerned with problems encountered in the off-shore petroleum industry (Petroleum Committee), the establishment of the Inland Transport Committee, dealing with questions arising from inland transport, etc.

Questions relating to maritime employment ¹⁹ were examined by ILO Conferences, and appropriate instruments were adopted, in 1920 (2nd session), 1921 (3rd session), 1926 (9th session), 1936 (21st and 22nd sessions), 1946 (28th session), 1949 (32nd session), 1958 (41st session), 1970 (55th session), 1976 (62nd session) and 1987 (74th session). ²⁰ Since 1935 the double-discussion procedure, which had become standard within the ILO, has taken the form of a Preparatory Technical Maritime Conference which precedes the final Conference by one year. In these Conferences all important maritime countries participate. Finally, before the Preparatory and the final Conference examine the issues on the Agenda relating to questions which affect seamen's affairs, the same issues are considered by the Joint Maritime Commission (hereinafter cited as JMC), which is a bipartite body of consultative character and consists of representatives of shipowners and seafarers from the most important maritime countries. ²¹ When the JMC thinks that a question requires urgent examination, it recommends to the Governing Body of the ILO that this question should be placed on the Agenda of the next maritime session of the ILO Conference. Consequently, the established pattern which leads to the adoption of an ILO instrument relating to seamen's question is as follows: JMC (examination of the question and recommendation to the G.B.) - G.B. (adoption of the recommendations of the JMC and decision to place the relevant question on the Agenda of a next ILO

¹⁹Some ILO instruments concern questions relating to fishermen (a Committee on Conditions of Work in the Fishing Industry was convened in 1978 to set the future policies in this field) dockworkers etc. These instruments (a) the Marking of Weight (Packages Transported by Vessels) Convention No. 27, 1929; b) the Protection against Accidents (Dockers) Convention (Revised), No. 32, 1932 (it revised the Convention No. 28, 1929); c) Convention No. 137 and Recommendation No. 145 concerning the Social Repercussions of New Methods of Cargo Handling in Docks, 1973; d) Convention No. 152 and Recommendation No. 160 concerning Occupational Safety and Health (Dock Work), 1979; e) Recommendation No. 7 concerning Hours of Work (Fishing), 1920; f) Convention No. 112 concerning Minimum Age (Fishermen), 1959; g) Convention No. 113 concerning Medical Examination (Fishermen), 1959; h) Convention No. 114 concerning Fishermen's Articles of Agreement, 1959; i) Convention No. 125 concerning Fishermen's Competency Certificates, 1966; k) Convention No. 126 concerning Accommodation of Crews (Fishermen), 1966; l) Recommendation No. 126 concerning Vocational Training (Fishermen), 1966; and m) Convention No. 21 concerning the Simplification of the Inspection of Emigrants on Board Ship, 1926) are not covered in the present study, since they are not directly concerned with seamen's problems.

²⁰All the above sessions were special maritime sessions of the ILO Conference except those held in 1921 and 1949, which were general sessions. These two general sessions were held under special circumstances; the first, to adopt international instruments on the question of minimum age requirements for trimmers and stokers and the medical examination of young persons, following the adoption of two relevant resolutions by the 1920 Genoa Conference (in fact, the preparatory work had been accomplished by this last Conference); the second, to revise some of the Conventions which had been adopted by the 1946 Conference and which were not found to be as effective as it had been expected. The reader is referred to Chapters 6 and 7 where it is argued that the holding of general sessions of the ILO Conferences for the examination of maritime questions should be better avoided. In 1929 a maritime session of the Conference was held but this session was devoted to the first discussion of a number of maritime questions and no instruments were adopted (these were adopted in 1936). Two Asian Regional Maritime Conferences were held in 1953 and 1965. However, these Conferences only produced some significant resolutions and no international instruments of a binding character were adopted by them.

²¹For an examination of the JMC functions and powers, see *infra* Chapter 1, Section 1.7.

Conference) - PTMC (preliminary examination of the questions which appear on the Agenda) - ILO Conference (final examination and adoption of instruments).²²

(c) *The role of the ILO in establishing minimum human rights standards of employment*

The Constitution confers important functions on the ILO in the field of human rights and, especially, in the field of social and economic rights.

The concern of the ILO in the protection of human rights has been confirmed, first of all, in the Preamble to its Constitution, which placed great emphasis on the notion of social justice as the foundation of universal and lasting peace. Further, the recognition of the principle of freedom of association for trade union purposes is one of the objects set forth in the Preamble to the ILO Constitution, adopted in 1919. The second of the principles recognised in the old Art. 427 of the Treaty of Versailles was "the right of association for all lawful purposes by the employed as well as by the employers."

The Declaration of Philadelphia²³ in Part I reaffirmed that "labour is not a commodity"²⁴ and declared that "the freedom of expression and association are essential to sustained progress." Furthermore, the Declaration recognised the solemn obligation of the ILO to further among the nations of the world programmes which will achieve "the effective recognition of the right of collective bargaining ...". It confirmed in Part II that "lasting peace can be established only if it is based on social justice" and further stated that "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." Thus, the Declaration has proclaimed equality in both material well-being and spiritual development and has confirmed the importance of values, such as freedom of expression and association. In the field of the so-called economic and social rights, the Declaration in Part III laid down some very important objectives which the ILO is called to achieve in its future programmes, such as full employment and the raising of standards of living, equitable remuneration, satisfactory conditions of employment, the extension of social security measures to provide a basic income and comprehensive medical care, protection for the life and health of the workers, equality of educational and vocational opportunity, etc.

It should be noted that the ILO, first among international organisations, has promoted the recognition of the individual in international law through the tripartite system of representation. The

²²It is common that the PTMC and the ILO Conference appoint committees each of which deals with a specific question on the Agenda. Sometimes, a Co-ordination Committee is appointed which deals with issues relevant to all questions such as the scope of the Conventions and Recommendations to be adopted (extension of this scope to fishing, etc).

²³It is important to stress here the historical importance of the Declaration of Philadelphia because it served as a basis for the adoption of the Human Rights Covenants and ILO Conventions on labour rights, see J.A. Joyce, *World Labour Rights and their Protection*, Croom Helm, London, 1980, at p. 30. For an analysis of the provisions of the Declaration and an assessment of their effectiveness in promoting social justice and the concept of human rights, see W. Jenks, *Social Policy in a Changing World: The ILO Response*, Geneva, 1976, at pp. 55-67.

²⁴This is stronger language than the one used in Art. 427 of the Treaty of Peace, the first principle of which declared that "labour should not be regarded merely as a commodity or article of commerce".

concept of social justice, the cornerstone of the ILO,²⁵ has been ideally served by the introduction in the ILO consultations and deliberations of a revolutionary pattern of international cooperation bringing together labour, management and government officials in the common task of formulating international legal standards of human rights in the field of labour. Each member State is represented at the ILO Conferences by two Government delegates and two delegates respectively of the employers and of the workers of that State.

The ILO's contribution to the development of human rights is threefold: a) the elaboration of labour standards, such as the ones mentioned above; b) the establishment of a supervisory machinery; and c) the establishment of the Governing Body Committee on Freedom of Association and the Fact-Finding Commission.²⁶

The ILO has been concerned with the elaboration of standards relating to the international protection of human rights, namely the international protection of trade union rights, the protection of the freedom of expression, the abolition of forced labour and the non-discrimination in employment. In converting the principles laid down in the Treaty of Versailles and the Declaration of Philadelphia to specific obligations, the ILO has, on the one hand, adopted a number of standards relating mainly to economic and social rights, such as Conventions and Recommendations on conditions of employment, social security, hours of work, protection of young workers, etc., and on the other, a number of standards concerning the protection of political and civil rights, such as the Convention No. 11 on the Right of Association (Agriculture), 1921, Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948,²⁷ Convention No. 98 on the Right to Organize and Collective Bargaining, 1949,²⁸ Convention No. 29 on Forced Labour, 1930, Convention No. 105 on Abolition of Forced Labour, 1957, Convention No. 111 and Recommendation No. 111 on Discrimination in Employment, 1958, Convention No. 100 on Equal Remuneration, 1951, etc.²⁹

²⁵Here, it should be noted that the concept of social justice plays an important role in defining the content and extent of the human rights in the sense that it can be argued that the human rights can only be achieved in the context of social justice; it is then the importance which society attaches to a specific right that defines its nature as a fundamental human right rather than other legal or philosophical considerations, C.W. Jenks, *Social Justice in the Law of Nations (The ILO Impact After Fifty Years)*, Oxford Un. Press, 1970, at p. 77-78.

²⁶For more details see Jenks, "The International Protection of Trade Union Rights" in E. Luard (ed.) *The International Protection of Human Rights*, London, 1967; see also infra pp. 20-22 and accompanying footnote references.

²⁷This Convention constitutes a concise statement of certain fundamental principles concerning the right to freedom of association and provides, *inter alia*, that workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choice without previous authorisation. It also accords certain rights and provides certain guarantees to professional organisations which are indispensable for their proper and unhindered function.

²⁸This Convention provides, *inter alia*, that workers must enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

²⁹For an analysis of the ILO standards relating to human rights, see Valticos, "Les normes de l' Organisation Internationale du Travail en matière de protection des droits de l' homme" in *Revue des droits de l' homme*, Vol. 4, 1971, pp. 691-771, who divides the relevant ILO instruments into three categories: a) those relating to freedom of association, the right to organise and collective bargaining, b) those relating to the principle of equality in employment opportunities and in treatment (non-discrimination), and c) those contributing to the dignity of man and economic security (right to work, right to a fair remuneration, right to just conditions of employment, right to social security, the protection of children and young persons, the protection of employed women); see also for an analysis of the ILO's

Most of these Conventions have been widely ratified and have contributed considerably to the international protection of human rights.

Of special interest from the standpoint of human rights is the system of international control envisaged in the ILO Constitution.³⁰ Apart from the reporting obligations of the member States (Arts 19 and 22 of the Constitution), there is an important stipulation to the effect that governments must send copies of their reports to national organisations of employers and workers; their observations must then be communicated to the ILO. The availability of critical information from extra-governmental sources is an important feature of the ILO's supervisory machinery which contributes to a better and unbiased implementation of the ILO standards on human rights. Another important element is the examination of the governments' reports by an independent organ, the Committee of Experts on the Application of Conventions and Recommendations (with all its constitutional powers to make observations and requests) and the examination of the latter's reports in the Conference by the tripartite Conference Committee on the Application of Conventions and Recommendations.

The ILO has further contributed to the promotion of the concept of social justice and to the protection of human rights by establishing a system of international supervision of labour standards relating to human rights with the participation of both member States and recognised Organisations of Employers and Workers (see procedures concerning the filing of representations and complaints). An important development in this respect was the establishment of the Freedom of Association Committee of the Governing Body. A complaint may be referred to the Committee either by a government or by one of the professional organisations. This Committee, which is composed of Government, Employer and Worker members of the Governing Body, was established in 1951 to make a preliminary examination of allegations of violations of freedom of association submitted to the ILO with a view to their being referred to the Fact-Finding and Conciliation Commission on Freedom of Association. This latter Commission was established in 1950; however, it is not allowed to examine any complaints, unless the consent of the government concerned is obtained.³¹

An important feature of the Freedom of Association Committee, having a particular importance for the protection of human rights, is that in the event that a trade unionist is arrested, detained or sentenced, the burden of proof lies in the Government to show that the measures taken were not related to his trade union activities. The individual complainant is, therefore, entitled to the benefit of the presumption of innocence.³² Moreover, the independence and impartiality of the above and all other independent ILO commissions responsible for enquiring judicially into matters of human rights secures their objectivity in applying principles relating to human rights. This objectivity only rarely

work on human rights, A. Alcock, *History of the International Labour Organisation*, MacMillan, London, 1971, pp. 252-283; G.A. Johnston, *The International Labour Organisation*, London, 1970, pp. 150-162.

³⁰For the ILO's supervisory machinery, see *infra* pp. 20-22 and the accompanying footnote references.

³¹For an analysis of the contribution and the effectiveness of the ILO in protecting human rights, see, *inter alia*, Jenks, *The International Protection of Trade Union Rights*, op. cit., pp. 210-247.

³²*Ibid.*, p. 225.

has been contested and the stature and practical influence of these commissions over the years is another important step of the ILO towards achieving the effective application of the standards laid down in the relevant ILO Conventions.³³

Through the tripartite system of representation, together with the exercise of effective international control over the application of approved legal standards relating to human rights, the ILO has been able to implement and enforce some very important international standards on human rights. Therefore, it is right to say that in the field of human rights the ILO has established a number of methods, some based on reporting obligations of the member States, others on complaints procedures, which, taken together, constitute a highly developed system of international control of standards relating to human rights.³⁴

The above considerations equally apply to ILO standards for seafarers. In the field of political and civil rights, the general instruments concerning basic human rights, such as Conventions Nos. 29, 87, 98, 105 and 111, also apply to them due to their universal scope.³⁵ In particular, the importance of Conventions Nos. 87 and 98 is recognised by their inclusion in Convention No. 147 and Recommendation No. 155. In addition to these instruments, the ILO has attempted to establish a comprehensive body of standards for the purpose of promoting the social protection of this special category of workers. It will be seen that, although much remains to be done in this respect, the ILO has succeeded in this attempt. The ILO standards for seafarers, which form the so-called International Seamen's Code, cover a broad area of social and economic rights, including conditions for admission to employment at sea, fair conditions of employment, social security, social welfare, medical care, the protection of young seafarers, training and educational opportunities, etc. The supervision of these standards through the established supervisory machinery has greatly enhanced the effectiveness of the ILO in promoting and implementing social standards for seafarers at the international level and this in turn contributes to the greater efficiency and effectiveness of the seafarer.

(d) The legal force of ILO Conventions, Recommendations, Resolutions and Codes of Practice or Conduct

The ILO Conventions are international instruments of a binding character which, once adopted, impose certain obligations on ILO Members.³⁶ First, they have to submit to the competent

³³Also, the various Industrial Committees, established by the Governing Body in 1945 to consider problems of the main world industries, have in many instances examined questions of trade union recognition and the practice of collective bargaining in these industries. In addition, the various Commissions of Enquiry, on the spot-investigations, etc. have played an important role in safeguarding human rights and, in particular, trade union rights, at the international level.

³⁴This system is regarded as more effective than that provided in the United Nations Covenants, see A.H. Robertson, J.G. Merrills, *Human Rights in the World*, 1989, pp. 238-241.

³⁵Proposals to the effect that special ILO basic human rights standards for seafarers be adopted have been rejected by ILO Conferences, see *infra* Chapter 7.

³⁶For the special nature and characteristics of ILO Conventions (quasi-parliamentary procedure, tripartite structure, creation of specific legal and constitutional obligations, contractual or not character of ILO Conventions) see N. Valticos, *International Labour Law*, 1979, pp. 44-45; W. Jenks, "Some characteristics of international labour Conventions", *Canadian Bar Review*, Vol. XIII, 1935, pp. 448-462; the same author, "Are International Labour Conventions Agree-

national bodies, usually the Parliament, the instruments adopted within specified periods.³⁷ While this obligation is absolute, there is no obligation on Governments to support the instruments adopted before the competent bodies; they can argue against the ratification of a Convention. Equally, parliamentary bodies are free to accept or reject the government's proposals.³⁸ Furthermore, as will be seen below, where the supervisory machinery of the ILO is outlined, the ILO Constitution demands the submission of reports on the implementation of ratified ILO Conventions, as requested by the Governing Body.³⁹ ILO Conventions, once ratified, impose specific legal obligations on ratifying Members as regards their implementation at the national level.⁴⁰

A particularly important method of application of ILO maritime Conventions is by means of collective agreements. A traditional tool for negotiation of conditions of work (wages, hours of work, repatriation, annual leave, etc.) in most maritime countries is collective bargaining. As will be seen in the following chapters the application of ILO maritime Conventions by means of collective agreements was not envisaged in the early ILO maritime Conventions and this fact has actually prevented traditional maritime countries in which certain maritime labour questions were not covered by legislation, from ratifying these Conventions.⁴¹ From 1946 a clause providing for the application of maritime Conventions by means of collective agreements was included in the text but its inclusion did

ments between Governments", *ibid.*, Vol. XV, 1937, pp. 574-578; G. Scelle, *L'organisation internationale du travail et le BIT*, Paris 1930, pp. 181-185.

³⁷This obligation also applies to Recommendations adopted by ILO Conferences; see Art. 19 of the Constitution where a number of other secondary obligations are also imposed on ILO Members.

³⁸For the nature of the constitutional obligation of ILO Members to submit the ILO instruments adopted to the competent national authorities, the meaning of the "competent authority" under Art. 19, and the difficulties which have arisen in the application of this rule see N. Valticos, "The International Labour Organisation and National Parliaments", *Inter-Parliamentary Bulletin*, 1969, no. I, pp. 16-31.

³⁹Again, as a result of the 1946 amendments to the Constitution, Art. 19 of the Constitution empowers the Governing Body to call for reports on unratified Conventions or Recommendations "showing the extent to which effect has been given, or is proposed to be given" to their provisions. However, in the case of a Convention the report, in addition, must state "the difficulties which prevent or delay ratification".

⁴⁰For information on the legal effects of the ratification of ILO Conventions on the national legislation see the various articles published from time to time in the ILR concerning the influence of ILO standards on national legislation; see also the excellent analysis of this question by N. Valticos in "Conventions internationales du travail et droit interne", *R.C.D.I.P.*, Vol. 44, 1955, pp. 251-288. For problems arisen in respect of the application of ILO maritime Conventions at the national level see *ibid.*, pp. 259, 264, 269-270, 271-274.

⁴¹For the application of ILO Conventions by means of collective agreements see F. Wolf, "L'application des conventions par voie de conventions collectives", *Ann.* 1974, pp. 103-114; W. Jenks, "The Application of Conventions by means of Collective Agreements", *Zeitschrift für Ausländisches, Öffentliches Recht und Völkerrecht*, Aug. 1958, pp. 197-224. It has always been the opinion of the Office that as long as the relevant provisions of the Constitution were respected it is up to the ratifying country to choose the nature of the measures necessary to render the provisions of an ILO Convention effective; for a similar opinion of the Office in respect of Convention No. 55 (Shipowner's liability in cases of sickness and accident) see *Int. Lab. Code*, Vol. I, note 352 under Art. 1082. Thus, Wolf argues that "l'application de conventions internationales du travail par voie de conventions collectives n'est en tout cas pas exclue à priori ..."; *op. cit.*, p. 105. On the other hand, it is equally true that certain ILO Conventions either of a "general" or of a "maritime" nature require legislation for the implementation of their provisions as a matter of law. In this sense, Jenks rightly argues that "... the only proper starting point for any adequate discussion of collective agreements as a means of applying Conventions is not the theoretically valid but practically unsatisfactory assumption that legislation is not indispensable in the absence of any provision on the subject in a Convention, but rather the assumption that for all practical purposes legislation is normally indispensable unless the Convention otherwise provides"; *op. cit.*, p. 199. It is interesting to note that the question of the application of ILO Conventions by means of collective agreements was first considered by the JMC in May 1943 and the 1945 Preparatory Conference; for an analysis of the early proposals see Jenks, 1958, *op. cit.*, pp. 204-212.

not instantly eliminate difficulties of ratification, especially in the case of ILO Conventions dealing with wages and hours of work for seamen. Furthermore, as will be seen in Chapter 4, such inclusion created insoluble problems concerning the scope, extent, and continuity of the implementation of maritime labour standards through collective agreements.⁴²

The ILO Recommendations are not binding instruments but, as explained immediately above, impose on ILO Members certain constitutional obligations; furthermore, they possess certain formal and moral force. They are international instruments adopted by ILO Conferences, the supreme organ of the ILO, and recommend some kind of action by ILO Members. In fact, as the replies of Governments to relevant ILO questionnaires show, many ILO Members have taken seriously into account maritime ILO Recommendations.⁴³ However, the importance of an ILO Recommendation does not lie in its legal force but in the role which it plays in the development of the international labour law. As far as Recommendations relating to seafarers are concerned, they serve the following purposes: a) they supplement relevant ILO Conventions, by including more specific and elaborate standards than those included in the relevant Conventions; b) they attempt to initiate action in a new, hitherto unexplored, area whose regulation is not considered ripe for inclusion in a Convention; sometimes, after a period of time these Recommendations are transformed into Conventions; c) they contain regulatory and procedural provisions which could well have been included in Codes of Practice; and d) they lay down higher standards than those included in the relevant Convention.⁴⁴

ILO Resolutions are less formal instruments.⁴⁵ They are adopted either by ILO Conferences or by specialised bodies or technical regional conferences and meetings. As regards maritime labour, three types of Resolutions are of importance: a) Resolutions adopted at the maritime (and sometimes general) sessions of the ILO Conferences; b) Resolutions adopted by the JMC; and c) Resolutions adopted by regional Conferences (notably the two Asian regional maritime conferences held in 1953 and 1965 respectively). The nature of the ILO Resolutions concerning seafarers varies considerably: some Resolutions lay down basic concepts concerning aspects of maritime labour; others lay down specific technical provisions; finally, many of them aim at initiating the procedure for the adoption of an ILO Convention or Recommendation on a specific subject.⁴⁶ The effect of ILO Resolutions in

⁴²For the purposes that collective agreements served in ILO maritime Conventions before and after the 2nd World War and the ensuing legal problems see Jenks, 1958, op. cit., pp. 200-213; see also Wolf, op. cit., pp. 105-6, 110.

⁴³See information supplied by Governments on the implementation of standards contained in maritime ILO Recommendations, which is published in the O.B. and the S.A.R.; for measures which have been taken to apply provisions of Recommendations relating to seamen see, *inter alia*, O.B., Vol. XVII, pp. 166-8, 174-5, 249; Vol. XVIII, p. 36; Vol. XXIII, pp. 44-45; Vol. XXIV, pp. 20-3, 36-7.

⁴⁴For the choice between ILO Conventions and Recommendations and the various functions of ILO Recommendations see N. Valticos, *Droit international du travail*, 1983, pp. 233-235.

⁴⁵For the legal nature and implementation of ILO Resolutions see E. Osieke, *Constitutional Law and Practice in the International Labour Organisation*, Martinus Nijhoff, 1985, pp. 186-194.

⁴⁶On the legal value of ILO Resolutions Valticos states: "None have the authority of Conventions and Recommendations, but a resolution adopted by the Conference carries more weight than the conclusions of a less comprehensive body. The value of such texts lies mainly in the fact that they are adopted by bodies representative of the interests concerned"; N. Valticos, *International Labour Law*, 1979, pp. 59-60.

the field of maritime labour has been variable. As will be seen in other chapters,⁴⁷ sometimes ILO resolutions led to the adoption of maritime labour standards; at other times no action on these resolutions has been taken for various reasons. In particular, the recommendations of the first Asian Regional Maritime Conference have had a beneficial effect on maritime labour in the Asian region but only partially, as has been reported in the Director's Report submitted to the second Asian Maritime Conference.

The ILO has also adopted a number of Codes of Practice or Codes of Conduct. These are not instruments which are recognised by the ILO Constitution, as Conventions and Recommendations are. They usually lay down detailed provisions of a regulatory character, elaborating on adopted ILO standards, and often deal with questions of procedure. They are usually prepared and approved by tripartite meetings of experts, are addressed to government officials and to inspectors and are intended to assist them in the implementation of ILO standards. These codes, although normative in intent, create no binding obligations but require further action by states, e.g. conduct based on their uniform and widespread enactment into national laws.

(e) Interpretation of ILO instruments

The ILO Office has repeated in many instances in which interpretation of an ILO Convention or Recommendation has been requested by a government that while it is at the entire disposal of Governments of Members of the ILO to supply them with any information within its power and any explanations which may be considered necessary with reference to the Conventions and Recommendations adopted by the ILO Conference, the Peace Treaties (Part XIII of which formed the ILO Constitution) do not give it any special authority to pronounce any definite interpretation of the provisions of the Draft Conventions or Recommendations adopted by the International Labour Conference.⁴⁸ Nonetheless, the ILO Office to date has given 20 interpretations of ILO maritime instruments⁴⁹ and it seems that the Office regards its interpretations as having some kind of authority.⁵⁰

⁴⁷See, especially, Chapter 7, Section 7.3.3.

⁴⁸Art. 37 (1) of the ILO Constitution states that "[a]ny question or dispute relating to the interpretation of ... any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice". The binding or otherwise character of these "decisions" of the ICJ under Article 37 (1) is disputed by writers; see E. Osieke, "The Exercise of the Judicial Function with Respect to the International Labour Organisation", *BYIL*, Vol. XLVII, 1974-75, pp. 315-340. Osieke suggests that the binding or non-binding character of the decisions of the ICJ should depend on whether the matter was submitted to the Court in the form of a request for an Advisory Opinion or the dispute between two ILO Members has been referred to Court by one of them; *ibid.*, at pp. 319, 320 n. 2. No question relating to the interpretation of maritime labour Conventions has ever been referred to the ICJ.

⁴⁹See *O.B.*, under the heading "Interpretation of the Decisions of the International Labour Conference"; Recommendation concerning the Limitation of Hours of in the Fishing Industry, Vol. III, pp. 529-532, Draft Convention for establishing facilities for finding employment for seamen, Vol. III, pp. 624-627, Draft Convention concerning seamen's articles of agreement, Vol. XIII, pp. 26-28; Convention fixing the minimum age for admission of children to employment at sea, Vol. XIII, pp. 69-73; Hours of Work and Manning (Sea) Convention, 1936, Vol. XXIII, pp. 30-3; Convention (No. 16) concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea (1921), Vol. XXV, pp. 268-9; Convention (No. 72) concerning Vacation Holidays with Pay for Seafarers (1946), (2 interpretations) Vol. XXIX, pp. 493-8; Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), Sickness Insurance (Sea) Convention, 1936 (No. 56), Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91), Vol. XXXIII, 1950, pp. 305-309; Seamen's Articles of Agreement, 1926 (No. 22) and Medical Examination (Seafarers) Convention, 1946 (No. 73), Vol. XXXVIII, pp. 374-377; Social Security (Seafarers) Convention, 1946 (No. 70), Vol. XL, pp. 477-

The ILO Office employs many methods in interpreting ILO Conventions and Recommendations. Usually, it analyses ILO instruments in the light of discussions held in the preparatory meetings and in ILO Conferences; sometimes, it refers to provisions of the ILO Constitution;⁵¹ in the absence of any other indications, it has made use of dictionaries;⁵² finally, in one instance, as far as ILO maritime instruments are concerned, it has employed subjective criteria, such as the purpose and nature of the Convention in relation to the particular characteristics of the employment of a special category of seafarers, to decide whether or not the Convention concerned applied to this category.⁵³ It

480; Seamen's Articles of Agreement Convention, 1926 (No. 22), Vol. XLI, pp. 596-598; Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109) (Articles 13, 14 and 15), Vol. XLIII, pp. 569-574; Seafarers' Identity Documents Convention, 1958 (No. 108), Vol., XLVI, No. 2, Supplement II, pp. 466-7; Prevention of Accidents (Seafarers) Convention, 1970 (No. 134), Vol., LVII, 1974, Nos. 2, 3 and 4, pp. 208-214; Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), O.B., Vol. LXV, 1982, Series A, No. 3, pp. 129-132; Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), O.B., Vol. LXVI, 1983, Series A, No. 3, pp. 144-145. For a brief account of interpretations of early ILO Conventions given by the ILO Office see W. Jenks, "The Interpretation of International Labour Conventions by the International Labour Office", *BYIL*, Vol. XX, 1939, pp. 132-141.

⁵⁰The Office said in this respect when it interpreted Convention No. 57 on the basis of the interpretation it had given in respect of Convention No. 30: "... it would seem that, when an opinion given by the Office has been submitted to the Governing Body and published in the *Official Bulletin* and has met with no adverse comment, the Conference must, in the event of its subsequently including in another Convention a provision identical with or equivalent to the provision which has been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office has interpreted it."; *O.B.*, Vol. XXIII, Jan.-Dec. 1938, p. 32; see also the Memorandum submitted by the ILO Office to the G.B. in Oct. 1921; 9 *G.B.*, pp. 365-6. However, Osieke's argument that "if an interpretation given by the Office is not rejected by the Members of the I.L.O., they appear to be bound by it as a result of their obligation to apply in a uniform manner the provisions of Conventions to which they are parties" (op. cit., pp. 323-4) is unacceptable on the following grounds: a) it is against Art. 37 (1) of the ILO Constitution which only confers such binding powers, if any, on the ICJ; b) no implicit obligation to apply ILO provisions in a uniform manner can be derived from Art. 19 (5) of the ILO Constitution; in fact, the Office, in its interpretations of ILO instruments, has accorded ratifying States substantial flexibility in applying ILO Conventions, if the purposes of the Conventions concerned, as evidenced by the will of the ILO Conference, are achieved; c) no evidence exists that a rule of customary law to the above effect has been formed, particularly in view of the fact that the ILO Office, in interpreting ILO Conventions, continually stresses the lack of its power in this respect under the ILO Constitution. In any case, an "interpretation" of the ILO Office is not an action of a sovereign States which needs to be rejected, especially if this interpretation is not directly sanctioned by the ILO Constitution; furthermore, some interpretations of the ILO Office (for instance, with regard to the application of Convention No. 134 to fishermen) can hardly be seen as having achieved the desirable uniformity; finally, no evidence is supplied by Osieke that ILO Members have interpreted the relevant ILO instruments and have acted upon them on the same lines as that suggested by interpretations given by the ILO Office. Valticos's thesis is more correct when he argues that "... le fait que de tels avis officiels bien que non authentiques qui sont régulièrement communiqués au Conseil d'administration du B.I.T. et publiés dans le Bulletin officiel du B.I.T., apportent une documentation autorisée sur la question et semblent être tacitement acceptés leur donne un poids considérable"; Valticos 1983, op. cit., p. 134; Dillon observes, in this respect, that "[t]he unofficial interpretations rendered by the Office do not serve in any way as authoritative precedents, but they point the way for proper state action."; C.H. Dillon, *International Labor Conventions: Their Interpretation and Revision*, 1942, p. 128; see also *ibid.*, pp. 135-149. For the sources of international law, in particular, treaty law, international customary law and the significance of state practice in this context see, *inter alia*, I. Brownlie, *Principles of Public International Law*, 4th edition, Clarendon Press, Oxford, 1990, pp. 1-31; H. Lauterpacht, *International Law*, Volume I, General Works, 1970, Cambridge University Press, pp. 58-86; D.W. Greig, *International Law*, London, 1970, pp. 5-43; M. Villiger, *Customary International Law and Treaties*, 1985. For the subjects of interpretation and the validity of their interpretation, see, *inter alia*, G. Haraszti, *Some Fundamental Problems of the Law of Treaties*, Budapest, 1973, pp. 42-78. For the general principles of interpretation of treaty law and the various methods employed see Haraszti, op. cit., M.S. McDougal, H.D. Lasswell, and J.C. Miller, *The Interpretation of Agreements and World Public Order, Principles of Content and Procedure*, Yale University Press, 1967; see also the works mentioned *infra* in n. 56.

⁵¹*O.B.*, Vol. XIII, pp. 26-28.

⁵²*O.B.*, Vol. XXIX, pp. 493-5; *O.B.*, Vol. XL, pp. 477-479.

⁵³*O.B.*, Vol. LVII, Nos. 2, 3 and 4, pp. 208-213; see also Chapter 7, Section 7.2.5., n. 91.

should be noted here that when under the terms of a specific Convention the competent authority has wide discretionary powers to determine its scope, these powers must be exercised "in good faith".⁵⁴

In interpreting ILO instruments account should always be taken of the goals which such an interpretation aims at achieving. Leaving aside the objectives of the international labour legislation as they are frequently formulated by employers' and workers' groups, such as equalisation of competitive conditions in various countries, social progress, etc. it is clear that any interpretation of ILO standards should contribute to the "clarity and certainty of law". Moreover, one of the major goals of international labour legislation, which is often disregarded, is uniformity in the application of international labour standards.⁵⁵ This uniformity can be greatly assisted by some sort of "uniform" interpretation of the same standards in various countries, taking, of course, into account the special economic, social or other conditions prevailing in certain ILO Members. The writer, in his interpretation of ILO maritime standards, has treated uniformity as a major objective of international labour law and, especially, of international seamen's law.

The writer, in his interpretation of ILO Conventions and relevant documents, has relied heavily on the preparatory work of ILO Conferences, especially on the intentions of the delegates who put forward specific proposals at ILO Conferences and preparatory meetings (use of the *travaux préparatoires*).⁵⁶ As a result, the writer has used extensively the interpretative rules contained in Art. 32 of the Vienna Convention on the Law of Treaties (VCT) concerning supplementary means of interpretation. This is so because in many ILO instruments concerning maritime labour many terms,

⁵⁴*O.B.*, Vol. LVII, p. 212, n. 2. Compare Art. 31 (1) of the Vienna Convention on the Law of Treaties.

⁵⁵For the question of "uniformity" in international labour legislation see, *inter alia*, E. Fried, *Rechtsvereinheitlichung im Internationalen Arbeitsrecht*, Frankfurt, 1965, especially, pp. 17-21; Dillon, *op. cit.*, pp. 124-127. Although Dillon's observations concerning the issue of uniformity are justified, the writer cannot endorse his views concerning "adaptation" as an objective of interpretation (*op. cit.*, pp. 127-9). Economic, social, racial and other characteristics must be subjected to the intention of the parties as evidenced in the text of the instrument concerned and in the *travaux préparatoires*. Adaptation of ILO instruments to special conditions of certain countries, unless sanctioned otherwise (for example, by the ILO Constitution or the instrument concerned), should not be a method of corrective interpretation as it would ruin any chances of achieving uniformity in the application of ILO instruments and would reduce the effectiveness of ratification.

⁵⁶By the term *travaux préparatoires* are meant the circumstances of the conclusion of a treaty, the historical background against which the treaty concerned has been negotiated, individual or group attitudes, etc. In this respect, it should be noted that the *travaux* of ILO meetings are easily accessible, reasonably accurate in their contents and do not contain unilateral decisions; moreover, usually, all ILO Members with maritime interests participate in the preparation of ILO Conferences. This is not, however, the case with the PTMC is concerned in which only principal maritime countries participate. The view is (rightly) held that "a result arrived at by the use of primary means of Art. 31 prevails over solutions suggested by the *travaux*"; M. Villiger, *Customary International Law and Treaties*, 1985, p. 346, n. 212; likewise, McNair is of the opinion that when the text is clear no resort to the *travaux* is permissible; Lord McNair, *The Law of Treaties*, 1961, pp. 414-5, 422-3. It happens, however, that in many ILO maritime Conventions the text is obscure and cannot always be relied upon with satisfactory results; Sinclair argues that while the *travaux* cannot be used as an autonomous method of interpretation independently of the general rule no rigid hierarchy is established between this rule and the supplementary means. An interpreter should use all means available at his disposal; however, the *travaux* should be taken into account with caution; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, pp. 116-7; see also the interesting comments of Sir Humphrey Waldock, the Expert Consultant at the UNCLT, *Summary Records and Documents*, 1st session, *op. cit.*, p. 184 and the official commentary to Arts. 27 and 28; *ibid.*, *Official Records*, pp. 38-43 (for a different view see the statement of McDougal in UNCLT, *op. cit.*, 1st session, 31st meeting, pp. 167-8). The writer in interpreting the relevant ILO Conventions, taking into account the *travaux*, does not share the view that these cannot be invoked against States who did not participate in the drafting of the text; on this point see Sinclair, *op. cit.*, pp. 141-147.

taken literally, are of such a general nature that no "ordinary meaning" can be identified which might provide a reasonable degree of accuracy (Art. 31 (1) of the VCT).⁵⁷ On the other hand, the writer has used both the *textual* and *contextual* methods of interpretation. In particular, the position of certain provisions in the relevant Conventions has been assessed. Also, the preamble of a number of ILO instruments has been taken into account in determining the scope and purpose of the relevant instruments; at the same time the intentions of the drafters have also been taken into account.⁵⁸ Of particular importance are understandings upon which certain provisions contained in ILO instruments were adopted. Sometimes these took the form of formal resolutions which interpreted the text of ILO Conventions and, at other times, of informal understandings without which adoption of these provisions would not have been secured; they are taken into account as part of the preparatory work of the relevant ILO instruments but to the extent that they constitute "agreements" or "instruments" within the meaning of Art. 31 (2) of the VCT they are main and not supplementary rules of interpretation under that Convention.⁵⁹ Finally, other basic rules of interpretation encountered both in municipal and in international law have been used, such as the rule "lex specialis derogat legi generale" and the arguments "e contrario", "per analogiam" and "ejusdem generis" (logical interpretation). It was not, it should be emphasised, found necessary to make extensive use of the "teleological" interpretation.⁶⁰ It is submitted that the main method of interpretation of ILO Conventions should be the one

⁵⁷Apart from that fact, the adoption of labour Conventions relating to shipping, which is an ever-changing industry, has always been associated with situations which were prevalent at the time of the adoption of the relevant instruments. The use of the "ordinary meaning" approach could result in changing, at the time of the interpretation, the meaning of implicitly or explicitly "agreed" interpretations of specific terms at the time of adoption. In this connection, Sinclair, referring to the "principle of contemporaneity" developed by Fitzmaurice, states that "the ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty"; Sinclair, *op. cit.*, p. 124.

⁵⁸The writer has not taken account of the supposed primacy of certain rules of interpretation over others for three reasons: a) this matter is controversial and different interpretations of Arts. 31 and 32 have been given; see Villiger, *op. cit.*, pp. 332-4, 341-6; b) the ILO Office has traditionally used extensively the *travaux préparatoires* of ILO Conventions in interpreting them and these interpretations have on the whole been accepted by the inquiring governments; c) it is submitted that primacy of the classical textual approach in interpreting, at least, ILO maritime Conventions can be misleading since, in many instances, important issues such as exceptions to the application of these Conventions, coverage of particular types of vessels or persons by them, etc. are not apparent from a textual exegesis of the relevant provisions and their "ordinary meaning" does not always provide a solution: for example, it is not clear whether fishermen can be included in the term "seafarers"; moreover, as will be in Chapter 7, the "ordinary meaning" of the word "seafarer" can be different in various ILO Conventions although the textual and, perhaps, the contextual approach would render identical results; here, of course, account should be taken of the object and purpose of the Convention. The ILO Office, in interpreting ILO maritime Conventions, used the contextual and teleological methods of interpretation only once when it examined the scope of Convention No. 134. Finally, it should be noted that, usually, delegates in ILO Conferences, namely the drafters of the Conventions, rely heavily on interpretations of treaty provisions given at preparatory meetings to the point that their adoption is dependent on these "preparatory" interpretations. Therefore, it can be argued that the use of the *travaux préparatoires* in interpreting ILO Conventions leads to objectivism rather than subjectivism. The importance of the *travaux* as a means of interpretation of ILO Conventions was pointed out by the representative of the ILO in the UN Conference on the Law of Treaties; see statement of W. Jenks in *UNCLT*, 1st session, *op. cit.*, 7th meeting, p. 37, para. 12.

⁵⁹In particular, the Reports prepared by the Committees appointed by the ILO Conferences to deal with specific issues, although they evidence the conflicting views of the delegates present in the Committees, are usually adopted unanimously by them and are also approved unanimously by the ILO Conference concerned. It is then arguable that these Reports may be treated as part of the "context" of the relevant ILO Conventions rather than *travaux*.

⁶⁰For the methods of interpretation of international treaties see, *inter alia*, Sinclair, *op. cit.*, Chapter 5, pp. 114-158, Villiger, *op. cit.*, pp. 327-8.

suggested by Lord McNair, namely "to search for the common intention of the parties in using the language of the text"⁶¹ and this method is mainly employed in this study. In tracing the common intention of the drafters the writer used the *travaux* which comprise the following documents: records of proceedings of the Preparatory Technical Maritime Conferences; records of proceedings of the Committees appointed by ILO Conferences to study the items of the Agenda; records of proceedings of the ILO Conferences; drafts of the Convention under negotiation.

(f) The ILO's supervisory machinery

Currently, supervision within the ILO is based on the constitutional reporting obligations⁶² of member States.⁶³ It is carried out by the Committee of Experts on the Applications of Conventions and Recommendations and the Committee on the Application of Conventions and Recommendations of the International Labour Conference (Conference Committee). The Committee of Experts is composed of independent experts who meet once a year at the ILO to examine, on the basis of the reports supplied by governments and other information available, the extent to which ILO Conventions are applied by ratifying Members at the national level. The Committee of Experts publishes each year a survey on the application of a number of selected instruments in both ratifying and non-ratifying Members (the latter have a constitutional obligation to submit reports on the implementation of non-ratified standards under Art. 19 of the Constitution). Discussion on the observations made by the Committee of Experts on the reports received is followed up in the Conference Committee (a tripartite body) which discusses the questions arisen with the government representatives concerned.

The supervisory machinery includes the representations and the complaints procedures. A *representation* is made by an organisation of employers or workers on the grounds that a Member has failed to secure the observance of a Convention it has ratified.⁶⁴ The Governing Body may communicate it to the Government concerned for comments. If no comments are received, or if the comments supplied by the government concerned are not deemed satisfactory the Governing Body may decide to publish the representation and the statement, if any, made in reply to it. A *complaint* may be filed in two ways: either by a country against another country if both countries have ratified the Convention concerned,⁶⁵ or by a delegate to the ILO Conference.⁶⁶ The Governing Body is also

⁶¹Lord McNair, *op. cit.*, pp. 373, 423.

⁶²These are based on Arts. 19, 22 and 23 of the Constitution.

⁶³For the ILO's supervisory machinery, see among others E. Landy, "The Implementation procedures of the International Labour Organisation", *SCLR*, Vol. 20, 1980, pp. 633-663; N. Valticos, 1979, *op. cit.*, pp. 239-257; K.T. Samson, "The changing pattern of ILO supervision", *ILR*, Vol. 118, No. 4, 1979, pp. 569-587. For the actual effect of ILO supervision in the field of maritime employment see ILO, *The impact of international labour Conventions and Recommendations*, Geneva, 1976, pp. 50, 51, 54.

⁶⁴Arts. 24 and 25 of the Constitution.

⁶⁵Several complaints have been filed by the Government of France against the Government of Panama concerning non-observance of labour standards relating to seafarers; see, for instance, Complaints by France concerning the observance by Panama of (a) the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), *G.B.* 201/23/17, *G.B.* 201/23/41, *G.B.* 202/7/15; (b) the Officers' Competency Certificates Convention, 1936 (No. 53), the Repatriation of Seamen Convention, 1926 (No. 23), and the Food and Catering (Ships' Crews) Convention, 1946 (No. 68), *G.B.* 207/6/6, *G.B.* 208/21/10, *G.B.* 209/3/11; *G.B.* 211/5/9; *G.B.* 213/6/3; *G.B.* 214/5/5; *G.B.* 219/16/6; *G.B.* 221/19/15; *G.B.* 222/18/7; *G.B.* 223/5/8; *G.B.* 223/5/18; *G.B.* 226/13/5. In the first of the above cases the Government of Panama

empowered to initiate this procedure. In most cases it refers the matter to a Commission of Inquiry to examine the complaint and report on it. If the government concerned fails to carry out the recommendations of the commission of inquiry within a specified time the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.⁶⁷

This brief account of the ILO supervisory procedures would not be complete without a reference to the *Governing Body Committee on Freedom of Association* and the *Fact-Finding and Conciliation Commission on Freedom of Association*. The former Committee, which is a body of tripartite structure, meets three times a year and examines complaints, generally submitted by workers' organisations, that a country has violated ILO principles concerning freedom of association. There are two main characteristics of this Committee: a) it is not necessary for the initiation of the procedure that the country accused of such violation has ratified the relevant ILO standards, and b) the Committee does not need the consent of the country accused to initiate this procedure. The supervision consists of the communication of the complaints filed to the government impugned so that it may comment thereon.⁶⁸ The latter Committee deals with serious cases of alleged infringements of trade union

took the necessary measures to comply with the provisions of the respective Conventions which it had ratified and no further procedures followed. In the second of the above cases, the two governments agreed to resort to direct contacts during which the Panamanian Government showed its willingness to take steps to ensure observance of the relevant provisions of Conventions Nos. 23, 53 and 68. Since these contacts were not fruitful, a Commission of Inquiry was appointed to examine the complaint of France concerning the non-observance by Panama of certain of the provisions of Conventions Nos. 53, 23 and 68.

⁶⁶Art. 26 of the Constitution.

⁶⁷For the reports of the commissions of enquiry and the relevant issues, see Arts. 28-34 of the Constitution.

⁶⁸The right of seafarers' organisations to freedom of association and collective bargaining was recognised by the ILO Conference at its 28th session; see Resolution concerning seafarers' organisations, 28 R.P., p. 330; see also ILO Conference, 28th session, 1946, *Recognition of Seafarers' Organisations*, Report VIII. Many cases concerning alleged violations of the freedom of association of seamen have been referred to this Committee; see for examples, O.B., Vol., XLI, Reports of the Governing Body Committee on Freedom of Association, Case No. 166: Complaint Presented by the Federation of Greek Maritime Unions (Cardiff) against the Government of Greece, pp. 113-116; Case No. 173: Complaint Presented by the Federation of Greek Maritime Unions (Cardiff) against the Governments of the United States and Greece, O.B., Vol. XLIII, pp. 89-93; Case No. 947: Complaint presented by the Pan-Hellenic Union of Merchant Marine Engineers against the Government of Greece, O.B., Vol. LXIII, Series B, No. 2, pp. 56-58; Case No. 998: Complaint presented by the Greek Purser's Union - Piraeus against the Government of Greece and Case No. 1008: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 32-35, O.B., Vol. LXIV, Series B, No. 2, pp. 11-12 and pp. 32-35 respectively; Case No. 1068: Complaints presented by the World Federation of Trade Unions, the Trade Unions International of Transport Workers and the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, O.B., Vol. LXV, Series B, No. 1, pp. 84-87; Case No. 1167: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, O.B., Vol. LXVI, Series B, No. 2, pp. 16-18; Case No. 1213: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, O.B., Vol. LXVII, Series B, No. 1, pp. 187-192; Case No. 1357: Complaint presented by the Panhellenic Union of Merchant Marine Engineers, the Panhellenic Union of Merchant Seamen and the Panhellenic Union of Certified Third-Degree Engineers and Stephenson Pumpmen against the Government of Greece, O.B., Vol. LXIX, 1986, Series B, No. 3, pp. 10-14; Case No. 1432: Complaints against the Government of Peru presented by the Trade Union of Seamen Employed by the Peruvian Steamship Company (CPV) and the Trade Union of Shoreworkers Employed by the CPV, O.B., Vol. LXXI, 1988, Series B, No. 3, pp. 299-304. It should be noted that the Committee requires substantial evidence that there is a violation of trade union rights before it communicates the complaint to the government concerned for comments. For cases where the Committee was of the opinion that certain rules concerning freedom of association of seamen and collective bargaining were disregarded, see Case No. 194: Complaint Presented by the World Federation of Trade Unions and the Malayan National Seamen's Union against the Government of the United Kingdom in Respect of Singapore (as from 1965 against the Government of Singapore), O.B., Vol., XLVI, 1963, No. 1, Supplement, pp. 67-70; No. 3, Supplement II, pp. 39-44; O.B., Vol. XLIX, 1966, No. 3, pp. 43-48; Vol. L, 1967, No. 2, Supplement, pp. 38-40; Vol., LI, 1968, No. 1, Supplement, pp. 33-34; Case No. 877: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, O.B., Vol., LXI, 1978, Series B, No. 1, pp. 16-20; Case No. 1057: Complaint submitted by the Panhellenic

rights. It differs from the G.B. Committee in certain respects: a) it is composed by independent persons, b) it cannot examine cases referred to it if the country concerned is not an ILO Member or has not ratified the freedom of association Conventions and has not given its consent to such examination, and c) it is fact-finding body but is empowered to discuss the matters referred to it with the government concerned with a view to reaching an agreement. It should be noted that all the above mentioned supervisory bodies complement each other.⁶⁹

Finally, a number of other special ILO supervisory procedures exist, such as special surveys in cases of discrimination and special studies and inquiries on an *ad hoc* basis. In general, the ILO's supervisory machinery is assisted by the on-the-spot visits.⁷⁰ These visits involve a) missions by constitutional or established independent bodies, b) direct contacts,⁷¹ and c) special missions or inquiries.

(g) Co-operation of the ILO with other international organisations on maritime matters

In the field of shipping, the ILO has a close working relationship with the UN specialised agencies, other UN bodies and a number of governmental and non-governmental organisations.⁷² The ILO co-operates with the IMO in the field of technical assistance and maritime training; this co-operation culminated in the adoption by the IMO of the Convention on Standards of Training, Certification and Watchkeeping in 1978.⁷³ These two organisations have regularly published revised guides on maritime training. Also, the "IMO/ILO Guidelines for Training in the Packing of Cargo in Freight Containers", published in 1978, indicates the essential requirements for safe packing on board ship, for use as a training aid by those responsible for packing and securing cargo in freight containers.⁷⁴

Union of Merchant Marine Engineers against the Government of Greece, *O.B.*, Vol. LXIV, 1981, Series B, No. 3, pp. 41-43; Case No. 1418: Complaint against the Government of Denmark presented by the Danish Seamen's Union, *O.B.*, Vol. LXXI, 1988, Series B, No. 1, pp. 47-55; Case No. 1470: Complaints against the Government of Denmark presented by the Danish Federation of Trade Unions, the Danish Seamen's Union and several other Danish trade union federations, *O.B.*, Vol. LXXI, 1988, Series B, No. 1, pp. 10-23.

⁶⁹For the relationship between the ILO and other compliance procedures in the field of human rights, see Landy, *op. cit.*, pp. 659-661; Samson, *op. cit.*, pp. 580-583; ILO, *The impact of international labour Conventions and Recommendations*, *op. cit.*, pp. 61-63. For a comparative analysis of the International Covenants on Human Rights and the relevant ILO instruments see *O.B.*, Vol. LII, 1969, No. 2, pp. 181-216; for the link between ILO standards and other international and regional standards see E. Landy, "The Influence of International Labour Standards: Possibilities and Performance", *I.L.R.*, Vol. 101, June 1970, pp. 555-604, at pp. 598-603; "The European Social Charter and international labour standards", *I.L.R.*, Vol. LXXXIV, Nos. 5 and 6, Nov. and Dec. 1961, pp. 354-375, 462-477.

⁷⁰For an analysis of the on-the-spot visits system within the ILO, see G. von Potobsky, "On-the-spot visits: an important cog in the ILO's supervisory machinery", *I.L.R.*, Vol. 120, No. 5, September-October 1981, pp. 581-596.

⁷¹The direct contacts method was used when France filed complaints against Panama since 1976 onwards concerning the application of certain ILO maritime Conventions in Panama that had been ratified by it. As a result, Panama asked the ILO for technical assistance in the preparation of maritime labour legislation; for the complaints filed by France against Panama see G.B./202/7/15 (1977), G.B./211/5/9 (1979).

⁷²For more details concerning the maritime activities of the ILO see the reports submitted by the Director-General of the ILO to the maritime sessions of the ILO Conference. For the latest developments see ILO, *Report of the Director-General*, 74 (Maritime) Session, 1987, Part 3, pp. 65-83.

⁷³For fuller details see Chapter 3.

⁷⁴ILO/IMO *Guidelines for training in the packing of cargo in freight containers*, London: IMCO, 1978.

The ILO has also co-operated with the IMO in the adoption, in 1978, of a Code of Practice concerning accident prevention on board ship at sea and in port. This code was adopted following a meeting of IMO and ILO experts in 1977 as a response to a resolution of the Preparatory Technical Maritime Conference in 1969. There was, however, disagreement as to the definition of "ship". Finally, in the report of the Meeting of Experts it was indicated that the term "ship" should "apply to any registered craft engaged in commercial operations at sea". Hence, a number of the provisions of this Code, appear to be also relevant to the off-shore petroleum industry.⁷⁵

Shipboard safety is not only a matter of training. Thus a joint ILO/WHO Committee on the Health of Seafarers was established, which, at the six sessions since its creation in 1949, has made numerous recommendations on various health problems of ship's personnel; a prominent contribution is the creation of an International Medical Guide for Ships (IMGS). The last (sixth) session of the Joint Committee was held in 1981 and it made recommendations concerning improvement and revision of the existing Guide. The Committee also adopted recommendations on the recording of the medical examination and treatment of seafarers; the training of seafarers in medical care and the provision of statistics on seafarers' health problems. Further collaboration between the ILO, IMO and WHO resulted in the publication in 1975 of the Medical First-Aid Guide for Use in Accidents Involving Dangerous Goods (MFAG) which was revised by the Joint ILO/WHO Committee on the Health of Seafarers.⁷⁶ This Guide is to be used in conjunction with relevant IMO Guides and Codes of Practice. Finally, a Code of Safety concerning Safety and Health Practice for fishermen and fishing vessels was published in 1970 jointly by the FAO, IMO and ILO.⁷⁷

The ILO's work on seafarers' standards will be discussed in Chapters 2 to 6.⁷⁸ There are, however, some new subjects, not examined by the ILO so far, which could be included in future instruments, of whatever nature (Conventions, Recommendations, Codes of Practice): social problems arising from new technology on board ship; environmental aspects on board ship; treatment of foreign

⁷⁵*Accident Prevention on board ship at sea and in port*, 1978 (ILO's Code of practice following an ILO/IMO meeting of experts in 1977).

⁷⁶ILO/IMOWHO: *Medical First-Aid Guide for Use in Accidents involving Dangerous Goods*, 1975.

⁷⁷FAO/ILO/IMO *Code of Safety for Fishermen and Fishing Vessels*, 1970. Recently, the ILO, the IMO and the FAO have prepared jointly a *Document for Guidance on Fishermen's Training and Certification*. For the original text and the subsequent amendments see IMO, *Sub-Committee on Standards of Training and Watchkeeping*, 19th session, 9-13 September 1986, Report to the Maritime Safety Committee, STW 19/5, as amended by STW 19WP. 1; STW 19/13/Add. 1.

⁷⁸For an account of the maritime activities of the ILO, see ILO, *The International Labour Organisation, The First Decade*, 1931, pp. 194-206 (for the period from 1920 to 1929); W. Jenks, "Contribution de l'Organisation Internationale du Travail à l'élaboration d'un droit uniforme du travail", in *Introduction à l'étude du droit comparé (Recueil d'études en l'honneur d'Edouard Lambert)*, vol. II, Paris, 1938, pp. 870-883 (for the period from 1920 to 1936); *I.L.R.*, Vol. 1, no. 1, Jan. 1921 (2nd session), pp. 25-26; Vol. XIV, no. 4, Oct. 1926 (9th session), pp. 508-551; Vol. XXI, no. 1, Jan. 1930 (13th session), pp. 1-44; Vol. XXXV, nos. 1 and 2, Jan. and Feb. 1937 (21st and 22nd sessions), pp. 3-30, 141-176; Vol. LIV, nos. 1-2, Jul.-Aug. 1946 (28th session), pp. 1-28; Vol. LXXVIII, no. 5, Nov. 1958 (41st session), pp. 429-460; Vol. 103, no. 3, March 1971, pp. 211-226; Vol. 115, no. 2, March-April 1977 (62nd session), pp. 145-156; Vol. 127, no. 2, 1988/2 (74th session), pp. 173-189; N. Valticos in *International Labour Law*, 1979, pp. 191-199 and in *Droit International du Travail*, 1983, pp. 480-491; Johnston, *The International Labour Organisation*, London, 1970, ch. 21, pp. 240-251; *Report on the ILO Seminar for senior government officials from Asian countries on maritime labour standards*, Geneva, 1983, pp. 15-25, 35-85; also Int. Lab. Code (1951), pp. 755-7.

seafarers in transit. There are also other areas where the ILO can provide valuable assistance, such as the employment of women on board ship; effects of automation in merchant ships; employment conditions on board atomic-powered vessels; the question of convening in the near future regional maritime conferences to develop regional Conventions; the revision of maritime labour Conventions⁷⁹ and the promotion of social maritime legislation; enquiries into the reasons for non-ratification of certain maritime standards, etc.⁸⁰ Given the close relationship now perceived to exist between standards in training and well-being of seafarers and prevention of accidents, etc. including negligent discharges that pollute the sea, co-operation between IMO and ILO is likely to intensify in future, especially following the 1992 UN Conference on Environment and Development which pointed to the need for greater co-ordination.

2) The IMO

The Convention, which established the IMO (formerly IMCO), was drafted by the United Nations Maritime Conference held in Geneva in 1948.⁸¹ The IMCO Convention required acceptance by 21 states, including seven with at least one million GRT each. This condition was met on 17 March 1958 and the first IMCO Assembly met in London in January 1959.⁸²

The main organs of the IMO are six and include the Assembly, the Council, the Maritime Safety Committee, the Marine Environment Protection Committee, the Legal Committee and the Technical Co-operation Committee. The Assembly decides upon the work programme, approves all recommendations made by the IMO, votes the budget to which all Member States contribute on an agreed scale of assessments, approves financial regulations, elects the IMO Council and Maritime Safety Committee, and approves the appointment of the Secretary General. The Council consists of representatives of 32 Member States elected by the Assembly for a term of two years; it has established Committees on Maritime Safety, Protection of the Marine Environment, Law and Technical Co-operation and Facilitation. From the maritime labour point of view, the work of the Maritime Safety Committee is of significance, since the standardisation of training, watch-keeping and qualifications of officers and crew is one of the subjects considered by this Committee. Also, the Technical Committee deals, *inter alia*, with the question of automation in ships, which has multiple effects on work at sea.

⁷⁹Revision of most existing ILO maritime Conventions is suggested in the following chapters. For the revision of ILO Conventions, the purposes that such revisions serve and the legal implications which they may create, see W. Jenks, "The Revision of International Labour Conventions", *BYIL*, Vol. XIV, 1933, pp. 43-64. No procedural and constitutional problems concerning the revision of maritime labour Conventions have arisen within the ILO. However, the rigidity of the initial requirement for revision of ILO Conventions at ten-year intervals became evident when the question of revision of ILO Conventions concerning hours of work and manning was discussed; see *infra* Chapter 4, Subsection 4.1.3.1. As will be seen later, shipowners and seafarers have frequently not agreed on the need for, and the scope of, revision of ILO maritime Conventions (total or partial).

⁸⁰Some of these questions are discussed in the following chapters.

⁸¹For the text of the Convention see *New Directions in the Law of the Sea* (Churchill, Nordquist eds.), Vol. IV, pp. 519-527.

⁸²For an extensive account of the IMO's work on shipping matters, see S. Mankabady, *The International Maritime Organisation*, Vols. II, 1986, 1987.

The IMO has adopted many Conventions, Recommendations, Resolutions and Codes of practice relating to maritime issues. However, the work of the IMO has been primarily limited to the technical aspects of shipping, namely safety of life at sea, the prevention of collisions and pollution from ships and related issues, the facilitation of maritime traffic, maritime training,⁸³ the establishment of the International Maritime Satellite Organisation (INMARSAT), piracy, etc. However, the contribution of the IMO to the establishment of international standards relating to technical aspects of shipping is unquestionable despite the fact that some writers have questioned the political power of the IMO to effect substantial changes in the international shipping arena,⁸⁴ and the relationship of these to the establishment of standards for seafarers was also evidenced by the adoption by the IMO, in co-operation with the ILO, of the STCW Convention. Moreover, the IMO has interestingly failed to take any substantial action on port state control⁸⁵ but MARPOL does allow inspection in port to check illegal oil discharge: the first step on the way to port state control.

It has to be said that at present IMO Conventions enter into force within an average of five years after adoption. This compares favourably with the record of the ILO: some Conventions adopted by the latter organisation have never come into force while others came into force only after a substantial period of time (see for details, Chapter 7, Section 7.3.4.).

3) The OECD

The OECD (Organization for Economic Co-operation and Development), which is made up of the developed market economy countries,⁸⁶ has from time to time published reports analysing the situation in maritime transport.⁸⁷ It is a governmental body based in Paris. For maritime issues it

⁸³To deal effectively with the lack of specialist maritime personnel in developing countries and with the relative failure of the system adopted by these countries to recruit expatriate experts, the IMO has founded the World Maritime University by means of Resolution A.501, adopted in Nov. 1981; for the establishment of this institution and its aims see P.K. Menon, "The World Maritime University: An attempt to Train Specialist Maritime Personnel", *JMLC*, Vol. 17, No. 4, Oct. 1986, pp. 585-596. Furthermore, in 1989 the IMO established the International Maritime Law Institute in Malta which is intended to promote the implementation of IMO Conventions and codes of practice into national law.

⁸⁴A. Cafruny, *Ruling the Waves*, 1987, p. 267-70; R. Michael M' Gonigle and Mark W. Zacher, *Pollution, Politics, and International Law: Tankers at Sea*, 1979, p. 327. It should be noted, in this connection, that the IMO is an inter-governmental organisation, and employers' and workers' representatives do not participate in the deliberations of the IMO's organs in an official capacity. The views of Captain Tennant, the Workers' adviser of the U.K., about the IMO in 1958 were as follows: "Dealing with the ... I.M.C.O. this is not the kind of organisation that we envisaged. We would have preferred, and still do, to see the establishment of a shipping agency on a tripartite basis in which both shipowners and seafarers would have been able to make the contribution which we believe they are entitled to make in the functioning and the operation of an industry so essentially international in character. ... We think that it is important that a working agreement should be established (he referred to the agreement concerning co-operation between the IMO and the ILO), as it is not the wish of the seafarers that the functioning of the I.L.O. within its specialised field should be in any way curbed or restricted as a result of the establishment of a governmental shipping agency."; 41 *R.P.*, pp. 23-24.

⁸⁵S. Mankabady, *op. cit.*, Vol. I, p. 17. However, the IMO has adopted a number of Resolutions (for example, Resolutions A. 321 and A. 466) which provide for control procedures. The Memorandum of Understanding (see Chapter 6) would, according to the same author, seriously weaken the standing of the IMO; *ibid.* The writer does not agree with this view. The incorporation in the MOU of important IMO Conventions, including two important IMO Resolutions (A. 466 and A. 481), as well as the ILO Minimum Standards Convention, is likely to enhance the status and the effectiveness of IMO instruments.

⁸⁶At present the OECD is composed of 24 member countries.

⁸⁷The main publication of the OECD concerning the shipping industry is the *Maritime Transport* which has been published yearly since 1964. This review deals with issues such as the international shipping development inside and outside the U.N.; the demand for and supply of shipping services, information concerning the freight markets, the

has established a Maritime Transport Committee (MTC). The MTC has frequently dealt with the problems encountered by OECD members in their relations to developing countries and countries with centralised economies and has attempted to define common shipping policies.

4) The UNCTAD

UNCTAD (United Nations Conference on Trade and Development) deals with the economic and commercial aspects of shipping⁸⁸ and in a way its creation complemented the IMO's powers in the field of maritime affairs.⁸⁹ The first meeting of UNCTAD was held in Geneva in 1964. The 3rd Committee of the Conference held discussions which resulted in the establishment of a permanent shipping committee. This Committee on Shipping is subject to the general policy direction of the senior UNCTAD Committee, the Trade and Development Board. Subsequent meetings of the Conference were held every four years since 1968. Meetings of the Shipping Committee are held every two years in Geneva. The UNCTAD has regularly published reports relating to shipping.⁹⁰

UNCTAD's policy has been to manage the carriage of sea-borne cargo to ensure that the emerging fleets of the newly industrialised countries of the third world benefit by gaining a strictly regulated share of their external trade. Hence, the UNCTAD Liner Code reserves cargo in the liner trades on the ratio of 40:40:20 i.e. 40% to each of the nations directly involved in trade and 20% for cross traders.⁹¹ Other areas of shipping in which UNCTAD has been involved include multimodal transport, ports operation and development, protection of shipper interests, development of national merchant marines, especially those of developing countries, maritime fraud⁹² and, most importantly, conditions for registration of ships and has concluded on this subject the UNCTAD Convention on Conditions for Registration of Ships as well as others.⁹³ Technical assistance projects undertaken by UNCTAD and financed by the UNDP include the TRIANMAR and the JOBMAR programmes.⁹⁴

composition of the world merchant fleet by types, etc; some publications have dealt, *inter alia*, with the question of flags of convenience and substandard vessels, see *infra* Chapter 6.1.

⁸⁸For the involvement of UNCTAD in shipping affairs, see B. Farthing, *International Shipping*, Chapter 8, pp. 126-147.

⁸⁹"... the creation of the committee on shipping by UNCTAD can, to a very considerable extent, be attributed to the vacuum that existed in the UN system as a result of the failure of IMCO to deal with matters related to economic regulation in the maritime sector"; B.N. Metaxas, *Flags of Convenience*, 1985, p. 67; for difficulties in the demarcation of the work of IMO and the UNCTAD, see S. Mankabady, *op. cit.*, Vol. I, pp. 27-9.

⁹⁰The yearly UNCTAD publication *Review of Maritime Transport* has been published since 1968 and it contains information on questions such as the development of sea-borne trade and the world fleet, the productivity of the world fleet, shipbuilding, freight markets and other developments.

⁹¹For the advantages and disadvantages of liner conferences, see A. Branch, *Elements of Shipping*, pp. 189-194; for further developments in this respect, see Farthing, *op. cit.*, pp. 136-139.

⁹²See *Maritime Fraud, Measures to improve the exchange of shipping information*, Report prepared by the UNCTAD secretariat, UNCTAD/ST/SHIP/7, 9 Oct. 1986.

⁹³For an analysis of this Convention from the labour point of view see Chapter 1, 1.6.4.

⁹⁴The first aims at assisting the training of all types of managers while the second is concerned with the training of seafarers from developing countries and envisages the possibilities of "on the job" training of these seafarers in developed maritime nations.

5) The European Communities

The EEC countries ⁹⁵ have been eager to promote a common shipping policy in the EEC region since the early 1980s. ⁹⁶ The European Community has achieved a common approach in four areas relating to the regulation of liner conferences, discrimination practices, free trade within the EEC and unfair pricing practices in the shipping sector. Regulations, as distinct from decisions and recommendations, once adopted by the relevant Council of Ministers, become, without further any requirement, part of national law in Community countries. There is a strong tendency towards a common and unified EEC policy and this was recognised by the adoption of the Single European Act which came into force on 1 July 1987. The establishment by the end of 1992 of a free internal market will undoubtedly have considerable effects on EEC shipping policies. However, the EEC has to compete against the aspirations of developing countries to form their own national fleets, the U.S. shipping policies which generally are not favourable to the idiosyncratic shipping regime (partaking of free trade and protectionist policies) that is being established by the EEC, the growth of Eastern-European fleets, and competition within the EEC itself, with the EEC member countries that have substantial cabotage trade trying to prevent foreign companies from invading this traditionally "national" trade. ⁹⁷

In the area of maritime labour, unification of shipping rules would mean free access of EEC nationals to EEC countries and guaranteed employment of these nationals on EEC vessels. Moreover, no discrimination between national and non-nationals would be allowed in such countries as regards facilities for finding employment (employment offices), social security, annual leave, wages, etc. On the other hand, the European Community has long undertaken a campaign against flags of convenience on several grounds: a) to combat sub-standard vessels from the economic, social and technical points of view; b) to improve safety at sea and the protection of the marine environment; c) to ward off the threat to Community shipowners' survival which is posed by competition from FOC operators. The proposed measures for the monitoring of FOC operators and for the promotion of a common maritime social legislation within the EEC would include application of ILO and IMO standards regardless of whether they have been ratified by a sufficient number of States or not; adoption

⁹⁵It should be reminded that the ILO and the EEC have concluded an *Agreement concerning Liaison between the ILO and the EEC* which deals with questions of mutual consultation, exchange of information and technical assistance. This Agreement entered into force on 7 July 1958; see *O.B.*, Vol. XLI, pp. 565-7.

⁹⁶For an analysis of the EEC shipping policy in the late eighties see *Progress towards a common transport policy, Maritime Transport, Bulletin of the European Communities*, Supplement 5/85. As regards maritime employment, one of the objectives of the Community is the improvement of employment opportunities for Community ship officers and seamen; *ibid.*, p. 15. As to the social policy of the EEC in the shipping sector and its effect on the seafaring profession in the Community see *ibid.*, pp. 19-21. It is interesting to note that the Commission proposes as a means for maintaining and improving employment opportunities of EEC nationals on Community ships "a favourable direct tax regime for Community seafarers". Moreover, new rules will be laid down concerning the dismissal of seamen serving on Community ships. For brief information on the EEC's shipping policies and for the EEC Regulations Nos. 4055-58/86 approved by the Council of Ministers in Dec. 1986, see Farthing, *op. cit.*, pp. 153-161, G. Yannopoulos (editor), *Shipping policies for an open world economy*, 1989, pp. 5-7, 40-60.

⁹⁷See G. Yannopoulos, *op. cit.*, pp. 139-144, 145-175; A. Cafruny, *op. cit.*, pp. 202-231, 232-246.

of EEC Regulations with a view to harmonising the living and working conditions (including wages) of seafarers on vessels flying the flag of an EEC Member State; application of the principle of non-discrimination within the EEC (including ILO Convention No. 111); the introduction of a technical inspection system (which came into effect in the form of the Memorandum of Understanding); legislation penalising non-observance of the relevant Community legal instruments; legislation laying down compensatory methods in cases in which social standards have not been observed; and legislation providing for the qualifications of seafarers and the mutual recognition of certificates of competency (Community certificate; Community approval).⁹⁸ However, many of the above goals remain yet to be attained.

6) The ITF

We will close this short account of organisations and bodies which deal with maritime and, especially, seamen's affairs with a brief look at the the International Transport Workers' Federation.⁹⁹ The ITF was established in 1896. The main organs of the ITF are the Congress, the General Council, the Executive Board, the Executive Officers, the Management Committee, the General Secretary and the Secretariat and the Industrial Sections.¹⁰⁰ One of the industrial sections of the ITF was the Special Seafarers' Section, which has led the campaign against FOC shippers since 1948. In 1980 this Section was transformed into the the Special Seafarers' Department. Its involvement in seamen's affairs has been considerable and the ITF, as will be seen in Chapter 6, played an important role in ILO negotiations which aimed to combat FOC vessels. Moreover, the ITF participated in the discussions which led to the adoption of the STCW Convention. Other activities of the ITF include questions concerning the employment of crews of convenience, the co-ordination and financing of international welfare activities, facilities for seafarers, ship abandonment, and piracy. Nonetheless, the main concern of the ITF in the past has been to secure the jobs of its European affiliates and to press for a standardisation of wages at the international level based on European wages level. As will be seen in the following chapters, in neither area has the ITF been successful. On the other hand, the ITF has been a successful advocate of maritime labour issues within the ILO.¹⁰¹

The ITF employs the following means in its attempts to fight FOC shippers: a) it negotiates individual wage agreements with FOC shippers; these agreements can be of an international format or special national agreements;¹⁰² b) it obtains from such shippers special contributions to the

⁹⁸See Economic and Social Committee of the European Communities, *EEC Shipping Policy - Flags of Convenience*, Opinion, Brussels, 1979, pp. 3-11.

⁹⁹For other international bodies and organisations which are concerned with shipping affairs, see Branch, op. cit., Chapter 8, pp. 103-170, Farthing, op. cit., pp. 64-69, 70-94.

¹⁰⁰For the functions and responsibilities of the organs see H. Northrup and R. Rowan, *The International Transport Workers' Federation and Flags of Convenience Shipping*, 1983, pp. 6-13, 24-30.

¹⁰¹It was reported that by 1982 more than 40% of all ILO Conventions had been prompted by the ITF and its affiliate unions; 42 out of 158 Conventions (26,6 %) related to ITF sections: of these 42 Conventions, 31 were concerned with seafarers and 4 with dockers; H. Northrup and R. Rowan, op. cit., pp. 213, 223.

¹⁰²For an example of the ITF agreement and the relevant documentation see *ibid.*, pp. 118-121. In the place of ITF wages rates the ITF has agreed to special national agreements, the "total crew cost" (TCC) agreements which are

Seafarers' International Assistance, Welfare and Protection Fund of the ITF;¹⁰³ and c) it calls for a boycott of those shippers who refuse to sign ITF wage agreements and the appointment of inspectors in various ports to see that these agreements are implemented.

However, in another respect ITF activities have given rise to controversy and malpractices have been exposed. The so-called Asian levy (payment of a sum (for example £30) to the ITF or to its European affiliates for each non-domiciled seaman employed) has not been used by the ITF and these affiliates for the benefit of Asian seamen. It is reported that funds from Asian levies were spent on purposes extraneous to the welfare of Asian seamen.¹⁰⁴

As regards the effectiveness of the ITF, although it is claimed that at least 25% of FOC vessels carry a blue certificate, it has been argued that at least one-half of these ships did not meet ITF standards. This is due to three reasons: a) ITF affiliates, such as the South Korean Seamen's Union and others, to a lesser degree, issued with blue certificates ships which did not maintain ITF standards; b) double bookkeeping and operator-crew connivance were widespread practices; c) backpay requirements were not being observed or encouraged in Third World countries.¹⁰⁵ Moreover, the insistence of the ITF on international wage standards irrespective of different national economic and social conditions and the equation of FOC with substandard vessels are not regarded as appropriate methods of improving the lot of seamen at the international level.¹⁰⁶

C. The International Seamen's Code and some problems related to its development within the ILO

(a) What is the International Seamen's Code and what its objectives?

Since 1920 until today, the ILO standards adopted by ILO Conferences have traditionally been regarded as forming an International Seamen's Code. Code, used in this sense, does not have the same meaning as that usually attributed to codes at the national level, that is, it is not a single instrument adopted by a legislative body and aiming at the regulation of all or most aspects of maritime employment. As will be seen in Chapters 1 and 2, the idea of establishing a comprehensive

considered to be comparable to the ITF agreements but which may contain different conditions of employment and wage rates. If these agreements are observed the ITF issues the shipper concerned with the so-called Blue Certificate which actually eliminates the threat of ITF interference with the ship's operation. For a comparison between total berth costs (all manning costs excluding repatriation and victualing expenses) of crews of various nationalities including crews under TCC agreements see Appendix 6, Table 4.

¹⁰³The Fund was founded to make assistance and welfare payments, such as seamen's homes, on behalf of the seafarers.

¹⁰⁴H. Northrup and R. Rowan, *op. cit.*, pp. 104-5, especially pp. 135-149 where data concerning the financing of the ITF campaign against FOC vessels are given. It is clear from these tables that the ITF has become very wealthy, has devoted its activities to the protection of European affiliates and has done little to promote the welfare of seamen of Third World countries.

¹⁰⁵*Ibid.*, pp. 109-111, 129-133.

¹⁰⁶"By equating FOC shipping with substandard conditions and at the same time refusing to tolerate differential wages for economies that are vastly different, the ITF is in danger of becoming ever more a tool that unions in developed countries can use to ward off job competition from underdeveloped countries rather than being an international body for the purpose of improving and safeguarding seafarers' work and wages world-wide"; *ibid.*, pp. 134-5; see also pp. 149-151.

international instrument dealing with various aspects of maritime labour was abandoned early in the ILO deliberations when it became clear that due to differing national traditions and legal systems, this task would not have any hope of realisation. The Conference was content to adopt a Recommendation and a Resolution with a view to promoting the idea of establishment of comprehensive seamen's codes at the national level.¹⁰⁷

In this study, the term "International Seamen's Code", a term frequently used in this context, refers to the total number of ILO standards adopted for seafarers, whether contained in Conventions or in Recommendations, which, taken all together, form a comprehensive "Code" dealing with most aspects of maritime employment at the international level. The usefulness of such a term resides in the fact that ILO Members are invited to look to such a Code as a whole and try to adopt at the national level as many of the standards contained therein as possible. The psychological advantage of using this term should, therefore, not be underestimated. Finally, through the adoption of new standards and systematic revision of old standards, where necessary, the International Seamen's Code preserves its essentially dynamic nature and gives content to the principle that ILO standards should take into account developments and new trends prevailing in the industry at a particular time.¹⁰⁸

The appearance of ILO and IMO codes of practices or conduct and the special character of maritime social questions, which are traditionally dealt with in national collective agreements, poses certain questions concerning the future of international maritime law. Should it be promulgated in the form of "hard" law or a kind of "soft" law or both? It might be that we are envisaging the evolution of a threefold development of international maritime law: a) through the adoption of formal instruments; b) through the elaboration of codes of practices of a regulatory character; and c) through the growing number of collective agreements at the international level. It is suggested in the Conclusions to this thesis that recent trends in the adoption of international maritime standards, i.e. the adoption of codes of practice, are not sufficient to replace established ILO standard-setting methods in the field of maritime labour.¹⁰⁹ Moreover, the growing number of national collective agreements and their substantial differences could give birth to the idea of establishing a kind of international collective agreement covering seafarers.¹¹⁰ An international collective agreement for seafarers could be created by the ILO, which has the advantages of a "quasi-impartial" tripartite organisation. These international collective agreements relating to seafarers would constitute a method complementary to the present system of standard-setting activities of the ILO.

¹⁰⁷See *infra* Chapter 1.5.

¹⁰⁸For the dynamic nature of international labour legislation, see C.W. Jenks, *Social Justice in the Law of Nations*, op. cit., at p. 73 *seq.*

¹⁰⁹Chapter 7, Section 7.2.2.

¹¹⁰The ITF has created such an agreement which it tries to impose on foreign shipowners but this is not generally accepted by the parties concerned. The ITF agreement is not a collective bargaining agreement as shipowners are not parties to the negotiations. The terms and conditions are set solely by the ITF. For an analysis of the question of collective bargaining within the ILO see, *inter alia*, E. Haas, *Beyond the Nation-State*, Stanford, 1964, pp. 292-335.

The above developments could have the effect of widening the scope of the International Seamen's Code although the latter, according to the ILO, was meant to include only ILO Conventions and Recommendations. It will be seen in Chapter 1 that early in the ILO deliberations the International Seamen's Code was regarded as a collection of laws and regulations relating to maritime employment which would form a common and uniform body of international seamen's law to be adopted by ILO Members. This is still, of course, the aim of the International Seamen's Code; however, there is no reason why the Code should consist only of legally binding instruments. Recommendations, Codes of practice, Resolutions are a regular feature of the ILO legislative activities and can similarly influence State practice. These instruments are also covered in this study and since they cannot be said to contain law *stricto sensu*, their examination in the present study justifies the title given to it, namely the international regulation of maritime employment irrespective of the means whereby this end can be realised.

The International Seamen's Code, during the long period of its development, has encountered various problems, some of which have had a considerable impact on the regulation of maritime employment within the ILO and are worth mentioning below. These are:

a) The international nature of the seafaring profession has frequently provoked reactions from ILO delegates, especially employers' representatives, who objected to the regulation of certain issues, such as wages and hours of work, on the ground that ratifying countries would be placed in a disadvantageous situation vis-a-vis non-ratifying countries. As will become clear from this study, the element of international competition has been apparent in almost every ILO meeting dealing with aspects of employment which could have economic repercussions on the industry and has, in certain instances, adversely affected the development of the relevant standards.

b) The seaman's articles of agreement is an issue which deserves special mention. Because of the nature of their job, the circumstances surrounding their engagement, termination of their contract and dismissal are very different from those of shore workers. Further, seamen's accidents at work have special features which relate to the ship's environment, the liability of the employer and, possibly, its representative at the time of the seaman's engagement, the conditions for and the manner of, compensation, etc. and which substantially differ from these of shore-employment. All these issues, apart from the seaman's engagement, have received scant attention within the ILO.

c) Questions of wages, hours of work and weekly rest, as well as repatriation and social security issues involve special peculiarities related exclusively to the seafaring profession. As regards the former, their special character can be explained by the required continuous presence of the seaman on board ship and by the organisation of work on board ship; these issues are closely connected to the regulation of manning on board ship. As regards repatriation and social security, these relate to the fact that the seaman is obliged to work outside the territory of his country or the country of the ship's registration and he may even be resident of still another country. Wages, hours of work and manning,

nonetheless, continue to remain uncontrolled by any internationally agreed standards. Further, it will be seen that although the ILO has successfully dealt with the repatriation issues, its attempts to regulate social security, which culminated in the adoption of Convention No. 165 in 1987, were only partially successful and leave much to be done in this area.

d) It is beyond doubt that the seaman's profession, its nature and its content, is very much dependent upon technological developments in the construction of ships and equipment. It will be seen that the expansion of technology and automation can have a considerable impact on labour standards, such as manning and, therefore, hours of work, weekly rest and, in particular, training. Although, the introduction of very new technology on board ship has been very slow, unlike early expectations, it has become a reality in certain shipping companies; however, the problems thus created have not yet received proper and detailed attention within the ILO.

e) Finally, as will be seen in later Chapters, questions relating to the criterion for the determination of the country which is under an obligation to legislate and implement ILO seafarers' standards as well as questions of conflict of laws arising out of maritime employment have been dealt with only in cursory manner in ILO Conferences and no systematic attempt to examine these issues with reference to particular aspects of maritime employment has been made.

The above features, though not the only ones, are unique to the seafaring profession and underline its special nature. It is only through understanding of the special features and the principles pervading maritime employment and of the aims and purposes of its regulation that the elaboration of maritime labour standards can hope to achieve some degree of effectiveness.

(b) Problems presented by the prevalence of "vague" legal terms in the International Seamen's Code

As in most branches of law, ILO Conventions and Recommendations contain the so-called "vague" legal terms. These terms, while they have the flexibility necessary to enable them to be adapted and applied to a variety of circumstances, need to be further defined with regard to a particular case for the purpose of achieving clarity of law and ascertaining the basis for the legal consequences of a specific rule. Sometimes, they are defined in the relevant instruments themselves, at other times their meaning can only be ascertained through appropriate interpretation. Even if their definition is provided for in the text, their exact meaning is often far from clear. The legal terms of this kind which are most frequently met in ILO instruments are the terms "ship" and "seaman".¹¹¹ The importance of achieving clarity and uniformity in law in this respect can be easily realised if one takes into consideration that these terms predetermine the scope of international maritime labour standards and, thus, set the limits of their application.

¹¹¹Other terms of such a nature which are contained in ILO instruments are, for instance, the terms "shipwreck", "accident at work", "wages", "benefits", "desertion", "default" of the seaman which in certain cases deprives him of claiming certain rights, etc. Most of them remain undefined in ILO instruments.

The legal definition of the "seaman" and the "ship" has not attracted considerable attention and has not been examined in a systematic manner so far within the ILO. It is known that attempts to define these terms have been successful at the national level where governments and judicial practice have been striving for a uniform definition which would encompass all categories of ships and seamen with a view to the uniform application of the relevant laws and regulations.¹¹² As will become evident from the examination of the definitions of the above terms in ILO instruments in the following Chapters, great divergencies exist in this respect which render rational classification of these definitions void of any content.¹¹³ The definitions of these terms in ILO instruments have been the result of conflicts between Government, Employer and Worker delegates which have had invariably a limiting effect on the scope of the relevant instruments. The exclusion of small tonnage vessels, fishing vessels, pleasure yachts and Government vessels and of various categories of seafarers (masters, officers, training cadets, apprentices) is a regular feature of ILO Conventions. Further, this exclusion has not been realised in a systematic manner with adverse effects on the uniform application of labour standards at the international level.¹¹⁴ The situation is aggravated by the fact that questions of job classification and description, crew structure and hierarchy and manning have never or not sufficiently been examined by ILO Conferences and, thus, the ILO instruments have not addressed in detail the special problems and exigencies of various categories of seafarers according to their position and status on board ship.¹¹⁵ As pointed out in the conclusions to this study, special attention should be paid to the systematic examination of the scope of ILO instruments with particular reference to the terms "seaman" and "ship".

(c) Problems of regionalisation and international labour standards

One of the most important features of contemporary international organisations is that they are composed of States which have different political and economic ideologies and interests which determine their attitude towards proposed decisions or measures. The general tendency has been for States to organise themselves into different groups. This is particularly the case with the ILO. There are four main regional groups in the ILO: Africa, Asia, Latin America and Europe. The Arab countries which belong to the Asian Region hold separate meetings from time to time. The regional groups are

¹¹²The degree of the realisation of this aim has, of course, been variable in various jurisdictions. Moreover, collective agreements in most countries although they usually attempt to regulate conditions of employment in a uniform manner irrespective of the grade of the seaman and the tonnage capacity of the ship, they do provide for different wage and benefit rates based on the ship's registered tonnage or deadweight and on the seaman's qualifications and nature of duties.

¹¹³Apart from the exceptions allowed to a differing degree in various Conventions, even the basic definition of the term "vessel" has encompassed "any ship or boat of any nature ordinarily engaged in maritime navigation (see, for example, Convention No. 7, Art. 1, No. 22, Art. 2, No. 23, Art. 2, No. 58, Art. 1); "every sea-going mechanically propelled vessel" (see, for example, Convention No. 57, Art. 1, No. 72, Art. 1); "sea-going vessels" (see, for example, Convention No. 54, Art. 1); "sea-going vessel engaged in the transport of cargo and passengers for the purpose of trade" (see, for example, Convention No. 73, Art. 1); "all vessels" (Convention No. 53, Art. 1); or a combination of criteria (Convention No. 93, Art. 2).

¹¹⁴In Chapter 6, it will be seen that the attempt of the MSC to provide a general definition of ships has not been particularly successful and may give rise to conflicting interpretations.

¹¹⁵This has been achieved to a greater extent by the STCW Convention, see *infra* Chapter 3 and Appendix 1.

composed of States which belong to a certain geographical region but some states participate in the activities of more than one region. The main purpose of the regional groups is to determine the extent to which the issues before the ILO affect the particular groups concerned or a State belonging to that region. The expansion of the ILO's regional activities (through regional conferences, technical assistance programmes, etc.) was aimed to promote the idea that in formulating universal ILO standards account could be taken of the suggestions made by regional conferences concerning problems which affect the particular region concerned.

Despite the diverse interests of States, even within the same regional group, the holding of regional meetings has been an important feature of the ILO, although the meetings of regional groups are informal in character. A regional conference is held every 3 or 4 years in Africa, Asia, America or Europe. At the moment regional conferences cannot adopt ILO Conventions and Recommendations,¹¹⁶ though this may be possible in the future under Art. 38 of the ILO Constitution if the Conference so decides.¹¹⁷ Their objective is rather to discuss problems falling within the ILO competence which affect the region concerned. This gives rise to the question whether the decentralisation of the ILO could be extended beyond administrative and financial matters to standard-setting activities.

The first issue which arises in this respect is whether the regionalisation of labour standards is envisaged in the ILO Constitution.

An argument for the universalisation of ILO standards can be derived from the ILO Constitution. The Preamble stipulates that "universal and lasting peace can be established only if it is based upon social justice ...", and that "The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, agreed to the ILO Constitution." The Declaration of Philadelphia is characterised by the use of a very general language. It refers to "all human beings without any distinction of race, belief or sex" and recognises "the solemn obligation of the International Labour Organisation to further among nations of the world programmes which will achieve, *inter alia*, "full employment and rising standards of living".

On the other hand, as pointed out above, the regionalisation of labour standards is constitutionally possible under Art. 19, para. 3 and Art. 38 of the ILO Constitution.¹¹⁸ Under the

¹¹⁶The rules formulated by the Governing Body concerning the powers, functions and procedure of regional conferences under Art. 38 of the ILO Constitution do not at present empower such conferences to adopt binding ILO standards; see C. Philip, *Normes Internationales du Travail: Universalisme ou Régionalisme?*, Bruxelles, 1978, p. 147.

¹¹⁷Art. 38, para. 1 envisages the possibility of convening regional conferences with the aim of promoting the aims and purposes of the ILO, while para. 2 provides that the powers, functions, and procedure of regional conferences will be governed by rules drawn up by the Governing Body and submitted to the General Conference for confirmation. It should be noted that Art. 19, para. 3 of the ILO Constitution, which enables the Conference to suggest modifications to instruments to be adopted, taking into account special circumstances prevailing in certain countries, refers to the adoption of universal instruments (Conventions and Recommendations of "general application"). This Article does not empower regional conferences to adopt ILO Conventions and Recommendations; it does not seem, however, to preclude the possibility of adoption of regional standards which would not, of course, be ILO Conventions and Recommendations and, therefore, their adoption or ratification would not require observance of the obligations provided for in Art. 19 of the ILO Constitution; for a discussion, see C. Philip, *op. cit.*, pp. 143-144, 163-168.

¹¹⁸See Philip, *op. cit.*, pp. 171-177.

first Article the special needs of particular regions can be taken into account in framing universal ILO Conventions and Recommendations while under the second these needs would be met through the adoption of binding regional standards, were the rules of the Governing Body modified to this effect.

There are various reasons for the adoption of regional labour standards; these include:

to address the special problems of the region; the harmonisation of labour legislation within a region, supplement universal standards by establishing either more advanced standards (for example, Europe) or by introducing standards appropriate to the needs of the particular region;¹¹⁹ more detailed regulation of questions which could not easily be dealt with in a universal instrument (for example, wages, social security).

With a view to achieving the above ends, many regional instruments have been adopted outside the ILO framework dealing with various aspects of employment law, in particular, with social security questions. The Organisation of Central American States adopted in 1967 a Convention on social security with the assistance of the ILO. In the African Region, a number of regional Conventions have been adopted from time to time mainly concerned with social security questions, while the Arab League elaborated a Convention on labour standards which was approved in 1967 by the Council of the Arab League.

In the European region a number of instruments have been adopted, including two Conventions on social security and on conditions of employment for the Rhine boatmen, the European Convention on Social Security for Workers in the International Transport (1956), the European Social Charter (1961), the European Convention on Human Rights, the European Code of Social Security concluded (1964) and the European Convention of Social Security (1972).¹²⁰

It is important to note that the European Code of Social Security was based on ILO Convention No. 102 concerning social security. Again, the European Social Charter was influenced by the relevant ILO standards and a control mechanism similar to that laid down in the ILO Constitution was envisaged therein (Part IV of the Charter). Three features are visible in the European Social Charter: a) the Charter is divided into two parts, the first containing nineteen separate rights which are laid down as statements of policy without precise legal commitments while the second the legal obligations which the parties undertake so as to ensure the effective exercise of the rights proclaimed in the first part, b) member States were allowed to accept only a minimum of standards

¹¹⁹The Asian regional conferences have so far considered a wide range of social problems, of particular significance to Asian workers, such as the establishment and improvement of systems of social security, the development of employment services and vocational guidance schemes and the betterment of the working conditions of women and young people. Similarly, African conferences have adopted resolutions on questions, such as labour-management relations, freedom of association, vocational training, wage policies, conditions of work, labour administration, etc., see G.A. Johnston, *op. cit.*, pp. 64-66.

¹²⁰For an analysis of these instruments, see, *inter alia*, Valticos, 1983, *op. cit.*, pp. 415-421; E. Landy, "The European Social Charter and international labour standards", *I.L.R.*, Vol. LXXXIV, Nos. 5 and 6, Nov. and Dec. 1961, pp. 354-375, 462-477; C. Villars, "Social security for migrant workers in the framework of the Council of Europe", *I.L.R.*, Vol. 120, pp. 291-302; Hugh G. Mosley, "The social dimension of European integration", *I.L.R.* 129, pp. 147-164; C. Philip, *Normes internationales du travail: universalisme ou régionalisme?*, Bruxelles, 1978, especially, Titre II, Chapitre premier.

depending on their state of development, and c) a supervisory machinery was established based on reporting obligations of member States. The Charter has been ratified by the most important European countries and has achieved practical results, especially by influencing national laws whose provisions were not in conformity with the provisions of the Charter. It is reported that various discrepancies have been eliminated.¹²¹ The EEC in December 1989 adopted by an 11 to 1 vote a European Social Charter. This Charter is aimed to lay down minimum standards in major areas of labour law.¹²²

Regional standards in the field of human rights

In addition to the regional instruments dealing with social security, there are precedents for the regionalisation of standards in the numerous regional instruments that have been adopted in the field of human rights to address special needs of the particular regions.¹²³

The fundamental aim of the Council of Europe as a regional organisation is to achieve a greater unity among the European States. At the foundation of such unity the Preamble to the Statute of the Council places the devotion of its members "to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy."

It was one of the first concern of the nations of Europe, just emerging of the disaster of the 2nd World War, to lay down the standards which must be respected in a democratic society and establish a machinery to ensure the observance of those standards. These efforts culminated in the adoption of the European Convention on Human Rights. This Convention was signed in Rome on 4 November 1950 and entered into force on 3 September 1953¹²⁴ and, undoubtedly, is the most significant development in the area of the regional protection of human rights.

Apart from its concern for protection of a number of basic human rights, such as the right to life (Art. 2), the prohibition of torture (Art. 3), of slavery and servitude (Art. 4, para. 1), the right to liberty and security of person (Art. 5), the right to a fair trial (Art. 6), the right to private and family life (Art. 8), the right to freedom of thought, conscience (Art. 9), the right to marry (Art. 12) etc., the Convention¹²⁵ contains special provisions for the protection of political and civil rights with which the ILO has been concerned, such as the freedom of association (Art. 11) and the prohibition of

¹²¹A.H. Robertson, J.G. Merrills, *op. cit.*, pp. 252 *seq.* In the field of maritime employment it is reported that various countries (Cyprus, Denmark, the F.R.G, Norway, Sweden and the U.K.) which until recently made it illegal for a seaman to leave the ship during the period for which he was engaged, amended their laws in this respect as they were contrary to Art. 1 of the Charter which recognised the principle of freedom of choice of one's occupation, *ibid.*, p. 254.

¹²²The Charter addresses such issues as Sunday work, annual leave, part-time employment, minimum pay, work safety, child labour, social security, union membership and collective bargaining.

¹²³For the advantages of the regional instruments on human rights see, *inter alia*, T. Meron, *Human Rights Law-Making in the United Nations, A Critique of Instruments and Process*, pp. 165 *seq.*

¹²⁴For the text of the Convention, see I. Brownlie (ed.), *Basic Documents in International Law* (3rd edition), Oxford, 1983, pp. 320 *seq.*

¹²⁵For an analysis of the Convention see, *inter alia*, Robertson, *Human Rights in Europe*, 2nd ed., 1977; Fawcett, *The Application of the European Convention on Human Rights*, 1969; Jacobs, *The European Convention on Human Rights*, 1975; A.H. Robertson, J.G. Merrills, *op. cit.*, Chapter 4; I. Brownlie, 1990, *op. cit.*, pp. 574-575, 587 *seq.*

forced labour (Art. 4, paras. 2 and 3). The contracting parties undertake to secure to "everyone within their jurisdiction" the rights and freedoms defined in Section I of the Convention.

The human rights protected by the treaty are to be enforced by three organs, the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe.¹²⁶ The Commission, consisting of a number of members equal to that of the contracting parties, is elected by the Committee of Ministers and any party may refer to it any alleged breach of the provisions of the Convention by another party (Art. 24). The recognition of the right of individual petition to the Commission is not compulsory for the parties (Art. 25). The government concerned must have recognised the competence of the Commission to receive petitions from individuals by express declaration. Subsequent Articles deal with questions, such as the admissibility of petitions, the action taken by the Commission following receipt of a petition and the role of the Committee of Ministers in dealing with reports transmitted to it by the Commission in respect of alleged breaches of the provisions of the Convention.

The Court consists of a number of judges⁵ equal to that of the Members of the Council of Europe. Its jurisdiction extends to questions of interpretation and application of the Convention (Art. 45). Only state parties to the Convention, and the Commission of Human Rights can bring cases before the Court (Arts. 46-48) and its jurisdiction is compulsory only for those states making express declarations of acceptance (Art. 46). Other provisions are concerned with the conditions which have to be met before the Court hears a case, procedural questions and the powers of the Court in the event that a party has not fulfilled its obligations under the Convention.

The method followed by the Council of Europe for raising human rights standards and sometimes for limiting the deviations from standards set in the global instruments is to adopt additional protocols to the Convention. By now eight such Protocols have been adopted, which have entered into force.¹²⁷ The work of the Commission and the Court has facilitated the understanding of human rights problems, has influenced national legislation and decisions of national courts and, finally, has promoted the protection of human rights in the European region.¹²⁸ Moreover, the

¹²⁶Sections III and IV of the Convention respectively.

¹²⁷These Protocols are concerned with the protection of additional human rights and freedoms not included in the Convention, such as the right to property, the right to education, the right to hold free elections and to participate in government, freedom of movement, freedom to choose one's residence, the abolition of the death penalty, due process guarantees for aliens in the event of expulsion from the territory of a contracting State, the right of everyone convicted of a criminal offence by a tribunal to have his conviction or sentence reviewed by a higher tribunal, compensation for the victim of a miscarriage of justice, the principle of *non bis in idem*, equality of rights and responsibilities between spouses with regard to marriage, during marriage, and in the event of dissolution of marriage, etc.); the competence of the European Court of Human Rights to give advisory opinions; amendments to certain Articles of the Convention; acceleration of petition procedures before the European Commission on Human Rights, etc. The first five Protocols are reprinted in I. Brownlie (ed.), *Basic Documents in International Law*, op. cit., pp. 338-348; for the other three see Council of Europe Doc. H (83) 3 (1983), Council of Europe Doc. H (84) 5 (1984), Council of Europe Doc. H (85) 6 (1985).

¹²⁸I. Brownlie, 1990, op. cit., p. 575 and footnote references mentioned there.

European Convention has served as a model in the establishment of regional systems for the protection of human rights in other regions of the world, such as the Americas and Africa (see below).

The Organisation of American States adopted in 1969 the American Convention on Human Rights which came into force in 1979. This Convention contains provisions concerning the freedom of association and forced labour. An important organ envisaged in the Convention with wide powers of supervision is the Inter-American Commission on Human Rights which had been created already in 1959 as a result of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago. The Commission, apart from making recommendations to the Governments of member States on the adoption of measures fostering fundamental freedoms at the domestic level and acting as an advisory body in the area of human rights to the Organisation of American States, has emerged successfully as a supervisory body and assumed the role of investigating individual complaints of violations and making recommendations to particular States. This Commission enjoys considerable status and has contributed significantly to the implementation of legal standards relating to human rights in the American region.¹²⁹ It is important to note that the above Convention was adopted, notwithstanding the adoption of the United Nations Covenants in 1966 as, in the opinion of the majority of American States, the adoption of this Convention would lead to a better protection and supervision of human rights at the regional level.¹³⁰

Both in the African region and, to a lesser extent, in the Arab region important developments in the field of human rights have taken place. In Africa as a result of the deliberations in Lagos in 1961, and following a series of events, the African Commission on Human Rights was created and in 1981 the African Charter on Human and Peoples' Rights was finally adopted.¹³¹ An important feature of the African Charter is that it contains provisions relating to civil and political rights, on the one hand, and to economic and social rights, on the other, although these provisions are generally less developed than their counter-parts in the UN Covenants and the European Convention. Moreover, its provisions are not limited to human rights in the sense of individual rights but extend also to "peoples' rights", that is to collective rights, such as equality of peoples, right to existence and self-determination, right to free disposal of wealth and natural resources, right to development, the right to national and international peace and security and the right to a general satisfactory environment. Finally, the Charter contains provisions concerning not only the individual's rights but also his duties in the community.¹³² The inclusion in the African Charter of provisions concerning duties is explained by

¹²⁹For an analysis of the efforts of the Organisation of American States towards the establishment of an effective regional system of protection of human rights, see, *inter alia*, A.H. Robertson, J.G. Merrills, op. cit., Chapter 5; A. Luini del Russo, *International Protection of Human Rights*, 1971, pp. 239-247.

¹³⁰Luini del Russo, op. cit., p. 243.

¹³¹For an extensive review of the human rights law making process in the African region, see Philip Kunig/Wolfgang Benedek/Costa R. Mahalu, *Regional Protection of Human Rights By International Law: The Emerging African System*, Baden-Baden.

¹³²For an analysis of the peoples' rights and of the individual's duties, see Philip Kunig/Wolfgang Benedek/Costa R. Mahalu, op. cit., pp. 47-50, and, in particular, pp. 59-94. For the developments in Africa in the field of human rights

the notion of solidarity, which has always had a considerable significance in the African region. By including such provisions, the Charter has put forward a distinctive conception of human rights in which civil and political rights are counter-balanced by duties of social solidarity. Although the articles on duties are unlikely to be enforced against individuals, they certainly affect the scope of the rights protected, since the reference to the duties of the individual is likely to have an influence on the interpretation of the other articles of the Charter.¹³³

The implementation of the African Charter is entrusted to the African Commission on Human Rights, which, apart from its promotional functions (studies and research on African problems in the field of human rights, organisation of seminars, formulation of rules aimed at solving legal problems relating to human rights), has also supervisory powers comparable but not identical to those of the European and American Commissions and advisory powers (interpretation of the provisions of the Charter). Finally, in the Arab region the Permanent Arab Commission on Human Rights was established in 1969.¹³⁴

Although sometimes the elaboration of regional instruments on human rights has been difficult to achieve,¹³⁵ the experience obtained therefrom is that they have been successful in laying down innovative provisions and addressing special needs of the regional groups.¹³⁶

It will be suggested in the conclusions to this study that the reasons mentioned above for the adoption of regional labour standards equally apply to seafarers. Moreover, the only partial success of ILO maritime Conventions in terms of attracting ratifications and the introduction of flexible devices therein for regulation, which have had an adverse effect on their effectiveness make plausible the idea of the adoption of regional standards for seafarers. Enforcement procedures could also be strengthened by this approach, as the European Convention illustrates. The examples of regional instruments on human rights mentioned above may provide certain models for the establishment of the necessary machinery.

(d) The international regulation of maritime employment: its relation to customary law

and the differences between the African Charter on Human and People's Rights and other universal and regional instruments, see A.H. Robertson, J.G. Merrills, op. cit., pp. 200-228.

¹³³Ibid., pp. 216-7.

¹³⁴For other developments in the Arab Region in the field of human rights and the establishment of the Permanent Arab Commission on Human Rights, see A.H. Robertson, J.G. Merrills, op. cit., pp. 196-200.

¹³⁵It took 20 years of pressure and negotiations for the OAU Charter on Human and Peoples' Rights to get adopted. This was partly due to the unwillingness of the OAU to proceed in this direction and to condemn violations of human rights in certain African States, see Philip Kunig/Wolfgang Benedek/Costa R. Mahalu, op. cit., pp. 18-24.

¹³⁶It was argued that, although the OAU Charter on Human and Peoples' Rights borrowed elements from the Western tradition, it was drafted in the aim to reflect the African philosophy of law and to meet the special needs of the African region, see Philip Kunig/Wolfgang Benedek/Costa R. Mahalu, op. cit., pp. 24-25. This is, for instance, reflected in the particular emphasis which the OAU Charter on Human and Peoples' Rights attaches to such notions of human rights as self-determination of the peoples, non-discrimination, promotion and achievement of African unity and solidarity, duty to ensure the exercise of the right to development, preservation and strengthening of positive African cultural value, protection of and assistance to refugees, etc. For a brief analysis of the Charter's provisions see *ibid.*, pp. 25-30. This is also the case with the provisions concerning the protection of the right of asylum for political offenders which are peculiar to the American Convention on Human Rights and reflect the efforts of American States to deal with this traditionally "American" issue of human rights at the regional level.

Seamen's affairs were never regulated on the basis of taking into account the mandates of customary international law. Never, in any ILO Conference, was customary law referred to, apart from certain exceptions concerning enforcement and port State Control, and the instruments adopted are the outcome of lengthy deliberations of the three parties concerned in the Joint Maritime Commission, the preparatory meetings and the Conferences. Of course, the ILO Office played a major role in predetermining the final outcome by including in Conventions draft provisions which enjoyed a certain majority among such of its member countries as replied to its questionnaire. However, usually not all countries that reply, reply even to all questions of the questionnaires. Another reason for the disregard of the development of customary international law is that many aspects of the seamen's matters are regulated by national collective agreements which, by reason of their rapid changes, render any attempt to establish the formation of a custom through international comparison of collective agreements over a long period very difficult.

It is true that the ILO Conventions and Recommendations are a prime example of treaty making or, it could be argued, of "international legislation", ¹³⁷ and, in this connection, it is considered by some writers that codification has pushed customary law somewhat into the background. ¹³⁸ It is equally true, however, that no attempt has ever been made to examine whether and what international maritime labour norms have passed into customary international law and to what extent. Further, no attention has been paid to the question whether existing international labour standards in the field of maritime employment are a result of the codification or the progressive development ¹³⁹ of customary law in this area or both. ¹⁴⁰ Finally, the issue of whether certain international maritime labour standards have after the adoption of the relevant instruments become customary international law ¹⁴¹ thus has yet to be examined. If this process has taken place, then one could indeed speak of the construction of a truly general international legal order in the area of maritime employment, based on the provisions of the relevant ILO Conventions.

It is argued in the conclusions to this study that the role of customary law in the field of maritime labour should be studied more closely. There are certain factors, such as the availability of

¹³⁷As to the question of "international legislation", as a new source of international law see, *inter alia*, H.W.A. Thirlway, *International Customary Law and Codification*, A.W. Sijthoff-Leiden, 1972, pp. 31 *seq.*, especially pp. 61 *seq.*

¹³⁸Verdross, *Völkerrecht*, p. 137.

¹³⁹For the concept of codification and progressive development of customary law see, *inter alia*, Villiger, *op. cit.*, pp. 64-72. It would be worth considering whether the ILO standard-setting activities have successfully transformed into *jus scriptum* existing customary law in the field of maritime labour. In particular, whether it has filled the lacunae of customary law, has set out the existing rules in a more precise and systematic manner, has added to the clarity and certainty of law in a particular area, has taken into account the emergence of new States and recent social, economic and legal developments on the international plane, has facilitated the crystallisation and enforcement of the relevant rules, etc.

¹⁴⁰Here, it should be noted that the possibility given to ratifying States to denounce ILO Conventions casts doubts on the status of the provisions laid down by ILO Conventions a pre-existent rules of customary law; see on this point, Baxter in 129 *Recueil des Cours*, 1970-I, at pp. 63-64.

¹⁴¹It is possible for a custom to arise simply from the general ratification of a codifying treaty, North Sea Continental Shelf cases in *I.C.J. Reports* 1969, p. 3, at p. 42, para. 73. See also article 38 of the VCT; for an analysis of this article see, *inter alia*, Villiger, *op. cit.*, Chapter 5.

accurate written material from preparatory ILO meetings, which would greatly facilitate such an effort. The examination of the relationship between ILO Conventions and customary law and the identification of customary rules of maritime labour law would have the effect of enhancing the effectiveness of the International Seamen's Code at the international level.

It was mentioned earlier that the International Seamen's Code has a dynamic content. Its effectiveness can only be realised when it is kept up to date through regular revision and inspection of the relevant standards. It was also pointed out that one of the reasons for the adoption of international standards for seafarers was to achieve uniformity of law in this area and to codify and at the same time promote social standards for seafarers at the international level. Another reason, which has been advanced from time to time, is that the adoption of such standards would have the secondary effect of reducing international competition in the shipping industry; moreover, it was frequently pointed out that these standards could not fail to take account of economic parameters in shipping if they were to be effective. It is to this question that we shall now turn.

D. The economic dimension of ILO instruments with particular reference to seafarers' standards

It is frequently argued that international labour legislation cannot be successful unless it takes into account economic factors by which the regulation of the relevant employment issues is conditioned. To lose sight of economic reality would make any attempt to lay down labour standards futile, especially in the case of developing countries. To what extent, however, can economic considerations have a limiting effect on social values? In other words what is the balance which should be struck between social goals and economic policies and how do they influence each other?

The emergence of flags of convenience ¹⁴² and their alleged impact on the employment conditions of seamen have given rise to considerable discussion about the impact of competition in the shipping industry on labour standards; ¹⁴³ further, the question has arisen as to whether international labour legislation, apart from its social function, could have the effect of reducing unfair competition in the shipping industry. If it could have this effect, then the next question would be by what means this end could be achieved.

The possible effects of economic elements on social values and their interrelationship are considered in the Treaty of Versailles and Declaration of Philadelphia. According to them, labour is not an article of commerce and is not a commodity. ¹⁴⁴ The Declaration placed emphasis on the

¹⁴²For a detailed analysis see *infra* Chapter 6.

¹⁴³For the impact of the flags of convenience on social conditions on board ship, see *infra* Chapter 6.1.1., and the works and studies referred to in notes 3, 4, 5, 10, 19 and 20. See also *infra* Chapter 7.6.2. for the diminishing importance of crew costs as a result of the modernisation of the shipping industry.

¹⁴⁴See Art. 427 of the Treaty of Versailles and Part I of the Declaration of Philadelphia.

collaboration of the employers and workers in the elaboration and application of economic and social policies. At the same time, it defined in general terms the social objectives of the ILO and confirms their primacy in the national or international programmes, especially in the economic field.¹⁴⁵ The ILO, thus, has manifested its interest in financial or economic questions which may affect social problems coming within the domain of the ILO and has recognised the primacy of social goals over economic policies.

One of the oldest arguments in favour of international labour legislation has been the existence of international competition. During the C19th and C20th the international regulation of labour has been used as an answer to the adversaries of national labour legislation who argued that the advanced labour legislation of certain countries placed them in a disadvantageous position on the international market because they produced goods at a higher cost than it was the case in other countries. On the other hand, it was argued that ILO standards could reduce the detrimental effects of international competition on the workers and would constitute among employers and among countries a sort of code of fair competition. However, this argument faded when it was realised that foreign competition had not prevented industrialised countries from adopting legislation for the protection of workers. In the years to come the argument of international or unfair competition was used both by governments and by employers' or workers' organisations for various reasons, namely, to show the disadvantageous position in which ratifying countries would be placed vis-a-vis non-ratifying countries; or to point out the "unfair" economic advantages for countries for which flexibility clauses had been introduced in ILO instruments; or to explain that the adoption of international labour standards would reduce economic competition between countries with high conditions of employment and countries with low conditions of employment.

It is clear that nowadays international competition is not regarded as an essential justification for the international regulation of workers.¹⁴⁶ Moreover, international competition is only found in the third place in the Preamble to the ILO Constitution as supplementary justification of the adoption of ILO standards rather than the "raison d'être" of the international regulation of labour.¹⁴⁷ Since, however, economic development and social progress are two interactive elements, the ILO from its origins has showed an acute interest in their interrelationship and, following the principles laid down in the Preamble to the ILO Constitution and the Declaration of Philadelphia, has confirmed the primacy of social considerations over national and international economic policies. In particular, it has declared that any economic measures or programmes should aim at reinforcing the fundamental social objectives, as set out in the above instruments, in other words, social justice must be the aim of

¹⁴⁵Valticos, 1983, op. cit., p. 73; see also Valticos, "Les normes de l'Organisation Internationale du Travail en matière de protection des droits de l'homme", op. cit., at p. 695.

¹⁴⁶Valticos, 1983, p. 107. For an analysis of the diminishing importance of international competition as a justifying reason for the adoption of international labour standards, see, *ibid.*, pp. 100-107.

¹⁴⁷F.G. Wilson, *Labor in the League System*, 1934, p. 277.

economic policies.¹⁴⁸ The specific conclusions concerning ILO responsibilities deduced by the Declaration are that "it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective" and that "in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate".

The economic dimension in the ILO's activities is made apparent if one considers that in today's sophisticated society economic growth and social progress are two concepts inseparably linked. Social objectives can be fully achieved only by sustained economic growth and, as pointed out above, from the ILO's point of view at least, economic policies are essentially considered to be a means of achieving social objectives and must be judged by their success in achieving these objectives.¹⁴⁹ The Declaration of Philadelphia marked a change in the approach of the ILO towards economic questions. Until then, the question of productivity did not come into operation in determining labour policies. The Declaration, however, proclaimed that "poverty anywhere constitutes a danger to prosperity everywhere", that "the war against want requires to be carried on with unrelenting vigour", and that policies should ensure "a just share of the fruits of progress to all". Such phrases confirm the principle that a proper balance must be held between social progress and economic growth.¹⁵⁰

Further, in an era where economic integration constitutes one of the major goals of the world community, as a response to the dilemma posed by the expanding scale of modern technology and the dispersion and fragmentation of political authority, and has already started at the regional level, it has been argued that ILO standards, by being universal common standards, would contribute considerably to this goal.¹⁵¹

No proper attention has been given to the impact of the above issues on the development of international standards for seafarers. It will be seen that the ILO's efforts to elaborate maritime labour standards have taken little account of economic and financial factors related to the shipping industry. However, the adoption of these standards has not drastically affected either international competition in the shipping industry or the expansion of the FOC regime and of the phenomenon of "off-shore" registers. Finally, the capacity of developing countries in particular to meet the financial consequences of the adoption of maritime labour standards and their impact on the attempts of these countries to establish competitive national fleets has not yet been the subject of detailed analysis.

¹⁴⁸For an analysis of this question, see Valticos, 1983, op. cit., pp. 115-119; see also W. Jenks, 1976, op. cit., at pp. 59-60.

¹⁴⁹Part IV of the Declaration of Philadelphia is a clear statement of the philosophy of economic growth. It calls for a fuller and broader utilisation of the world's productive resources and prescribes four specific series of measures as means to this end: measures to avoid severe economic fluctuations, to promote the economic and social advancement of the less development regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade.

¹⁵⁰See G.A. Johnston, op. cit., pp. 174-175.

¹⁵¹On this point see W. Jenks, 1976, op. cit., at pp. 90-91.

E. International labour standards and the 1958 and 1982 Law of the Sea Conventions

It is conceivable that international labour standards may not be applicable and enforceable directly, that is through the ratification and enforcement of the relevant ILO instruments but in an indirect manner. The latter has been the case, for example, with Convention No. 147 on Minimum Standards: through ratification of this Convention ILO Members are obliged to apply and enforce standards "substantially equivalent" to labour standards contained in other ILO Conventions listed in its Appendix, although they are not parties to the Conventions concerned.¹⁵²

Another opportunity to consider the possibility of the application of international labour standards by means of other international instruments is offered by the two relevant Law of the Sea Conventions, namely the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. The latter frequently refers to "generally accepted international standards" in an attempt to define the prescriptive duties of flag States, coastal States or port States in conformity with standards enjoying some degree of acceptance in the international community. This would lead to the harmonisation of legislative measures taken for the purpose of ensuring compliance with the general goals aimed at by these Conventions and other standard setting methods, such as Codes and Recommendations, such as the safety of navigation and, generally, the safety at sea, the preservation of the marine environment, etc. In addition to the duties of ratifying Members to adopt regulations relating to marine pollution and the safety at sea, the Law of the Sea Conventions have tried to impose on flag States certain duties with regard to the regulation of maritime labour on board ship, regardless of whether or not these States are parties to the standard-setting instruments concerned. It is important, therefore, to try to identify at least the major instruments in this context.

On the high seas the flag State is empowered and obliged to regulate labour matters on board ships flying its flag and to take the necessary enforcement measures. Apart from the general duty of the flag State to exercise its jurisdiction and control in social matters over ships flying its flag,¹⁵³ the HSC and the 1982 UNCLOS, in giving effect to the flag State's duty to regulate these matters, contain (Art. 10 of the HSC and Art. 94 of the 1982 UNCLOS)¹⁵⁴ certain references to "applicable international labour instruments" and to "generally accepted international standards" or "generally accepted international regulations, procedures and practices" with the aim of achieving uniformity of regulation and enforcement of labour standards on board ship at the international level.¹⁵⁵

¹⁵²For an analysis of the MSC, see *infra* Chapter 6.

¹⁵³For this question, see *infra* Chapter 1.6.

¹⁵⁴For the text of these Conventions, see I. Brownlie (ed.), *Basic Documents in International Law*, op. cit., pp. 97 seq. and 143 seq. respectively.

¹⁵⁵On the meaning of "generally accepted international standards", especially in the field of marine pollution, see, *inter alia*, A. Boyle, "Marine Pollution under the Law of the Sea Convention", 79 *AJIL* (1985), 347; Vignes, "La valeur juridique de certaines règles, normes ou pratiques, mentionnées au T.N.C.O. comme généralement acceptées" *A.F.D.I.*, 1979, pp. 712-718; G. Timagenis, *International Control of Marine Pollution*, 1979, pp. 605-607; Van Reenen, "Rules of Reference in the New Convention on the Law of the Sea, in Particular Connection with the Pollution of the Sea by

Art. 10 of the HSC, which is still in force, *inter alia*, provides that every State must take such measures for ships under its flag as are necessary to ensure safety at sea with regard among other things to:

(b) The manning of ships and labour conditions for crews ¹⁵⁶ taking into account the applicable international labour ¹⁵⁷ instruments.

Para. 2 of Art. 10 goes on to provide that in taking such measures each State is required to conform to *generally accepted international standards* ¹⁵⁸ and to take any steps which may be necessary to ensure their observance.

Both Articles evidence a preference for internationally agreed standards on crew conditions to be taken into account or to be complied with by the flag State in the regulation of maritime employment on the high seas. However, these Articles do not specify the precise content and extent of the standards to be applied or taken into account in each case. Each ratifying state is left with wide discretion to determine the exact standards to be taken into account. The issue which arises is whether ILO standards provide the sort of labour standards envisaged by the above Articles and whether these standards can be regarded as "generally accepted" within the meaning of these Articles. In the case of labour conditions on board ship the situation is further aggravated by the obligation of the flag State to take into account the "applicable international labour instruments" (HSC) or "applicable international instruments" (1982 UNCLOS) ¹⁵⁹ and renders necessary the examination of the interrelationship between this term and the "generally accepted international standards".

The application of maritime labour standards through the Law of the Sea Conventions can have considerable consequences: by the time both the 1958 Convention on the High Seas and the 1982 Law of the Sea Convention were adopted, a considerable number of maritime labour standards had been adopted by the ILO; in view of the not very encouraging record of ratification of a number of maritime labour standards it could be argued that only certain maritime labour standards could be applied and enforced, at least to a certain extent, following ratification of the Law of the Sea Conventions or through State practice based on Art. 10 of the HSC and Art. 94 of the LOSC if the latter can be said to codify customary law on the subject.

It will be seen in Chapter 1 that the Law of the Sea Conventions have been less than successful in their attempt to lay down certain principles for the uniform and effective regulation of employment at sea at the international level and the vagueness of the relevant provisions has given rise to a wide

Oil from Tankers", 12 *N.Y.I.L.*, 1981, PP. 3-39; Vukas in Soons (ed.), *Implementation of the Law of the Sea Convention Through International Institutions*, Honolulu, 1990, 405; Bernhardt, 20 *VJIL*, 1980, 265.

¹⁵⁶Art. 94 (3) of the LOSC adds training of crews.

¹⁵⁷In Art. 94 (3) of the LOSC the word "labour" has been deleted.

¹⁵⁸Art. 94 (5) of the LOSC replaces the term "generally accepted international standards" by "generally accepted international regulations, procedures and practices".

¹⁵⁹No similar obligation is imposed as regards the duty of the flag State to regulate or to take measures in respect of other matters, such as the construction, equipment and seaworthiness of ships; the use of signals, the maintenance of communications and the prevention of collisions (Art. 10, para. 1 (a) and (c) of the HSC; Art. 94, para. 3 (a) and (c) of the LOSC).

range of interpretations as to the exact content and extent of the obligations laid down therein. The main disadvantage of the relevant provisions is that they look to the regulation and enforcement of labour matters as a means of ensuring safety at sea, and thereby also contributing to the pollution prevention regime, and not as a goal in itself based on social considerations. At the same time, it is argued in the conclusions to this study that if the above provisions are to be effective in achieving uniformity in the regulation of maritime employment and in promoting, apart from safety at sea, social standards for seafarers worldwide, the widest possible interpretation should be applied for the purpose of giving content to the above vague legal terms.

F. Structure of the present study

For reasons of scope and limitations of space this study presupposes that the reader is well acquainted with the Constitution of the International Labour Organisation and the Standing Orders of, and the procedures followed at the Conference up to the final adoption of an international instrument. Although a brief account of the ILO's supervisory machinery has been given earlier, it is assumed that the reader is familiar with the ILO procedures concerning the supervision of adopted ILO instruments. Reference to these procedures is made only as far as they concern a question of maritime labour.

This does not mean, however, that only ILO maritime instruments will be examined. As is already known, the ILO devotes only a small part of its activities to the improvement of the seamen's standards and this represents an important difference between the ILO and the IMO which is concerned exclusively with the adoption of instruments relating to maritime affairs. This, as will be pointed out in the first Chapter, has had a negative effect on the frequency of convening ILO Conferences devoted to seamen's affairs. Instruments of a general nature will also be considered to the extent that a) they apply to seafarers,¹⁶⁰ and b) may contain a number of provisions which are absent from the respective ILO maritime instruments and would add to the effectiveness of the latter,¹⁶¹ c) by way of comparison with ILO maritime instruments for the purpose of identifying comparable "labour standards" applying to different categories of workers.¹⁶²

Furthermore, instruments adopted by other international organisations, notably the IMO and the UNCTAD, will be studied to the extent that they are relevant to the instruments examined. In particular, it will be seen that the 1978 IMO Convention on Standards of Training, Certification and Watchkeeping has been drafted on a completely different basis and following a different strategy

¹⁶⁰For example, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Medical Sickness Benefits Convention, 1969 (No. 130), and Minimum Age Convention, 1973 (No. 138).

¹⁶¹For example, Minimum Wage Fixing Convention, 1970 (No. 131), Minimum Wage Fixing Recommendation, 1970 (No. 135), Protection of Wages Convention, 1949, (No. 95), Protection of Wages Recommendation, 1949 (No. 85).

¹⁶²For example, all the instruments on Hours of Work.

from those used in the adoption of the relevant ILO Conventions and, though it is not itself flawless, can provide a model for the revision of these instruments in certain respects.

The present writer is aware of the extensive literature on the various aspects of the activities of the ILO. At the international level some authors have concentrated on the analysis of the Minimum Standards Convention No. 147, which is widely regarded the most important instrument adopted by the ILO in the field of maritime labour. However, the present writer preferred to analyse one by one the various aspects of maritime employment rather than to concentrate on a single instrument, such as Convention No. 147, for example. The reasons for this are many:

a) From a systematic point of view, it is preferable that an analysis of the international regulation of maritime employment follows the various points in a seaman's career from the time of his engagement up to the time of his retirement. Such a method also facilitates a more accurate and systematic examination of particular aspects of maritime employment which, in many instances, are more connected with other branches of law rather than with other aspects of maritime employment.¹⁶³ This is also the pattern of investigation adopted in monographs produced at the national level and by the ILO itself.

b) Many aspects of maritime employment, such as continuity of employment, facilities for finding employment for seamen, hours of work, wages, manning and annual leave, are not covered by the MSC.

c) The MSC is an instrument which mainly aims at the *implementation* of labour standards adopted by other means; it is not an essentially standard-setting instrument and, therefore, it would not be an appropriate starting point for the analysis of the ILO's standard-setting activities in the field of maritime employment.

d) As will be seen in Chapter 6, the MSC is flawed as regards the exact content and extent of the labour standards encompassed therein. In fact, the undefined criterion of "substantial equivalence" detracts from the content of the relevant labour standards. It is preferable, from a methodological and analytical point of view, that, in the first place, the exact nature and content of these standards, as they appear in the relevant ILO instruments, is ascertained, before the restrictive impact of the MSC on them is assessed.

G. Overview of the contents

The examination of the work of the ILO on seamen's standards will be attempted from more than one point of view but from the following range of perspectives: a) examination of all preparatory and final ILO documents relating to maritime labour; b) historical analysis of the instruments con-

¹⁶³For example, social security issues concerning seafarers should be studied together with national social security schemes established by countries at the national level and are closely connected with traditional and historical methods of social security coverage systems adopted in each country and with issues of administrative law which are of peculiar nature in each country.

cerned and identification of reasons for non-ratification of ILO maritime Conventions; c) comparison with relevant instruments of a "general" nature whenever this is deemed necessary; d) exposition of the seafarers' and shipowners' views concerning the adoption of international standards relating to seamen; e) analysis of IMO, UNCLOS and UNCTAD instruments having relevance to the law of maritime employment; and f) suggestion of possible remedies, aimed at improving existing ILO maritime standards, taking into account current state practice, when available, and selected studies. As regards the reasons for non-ratification of ILO maritime instruments, it is recognised that the enumeration of these reasons can never be complete, since many countries do not give any reasons for the action taken nationally with regard to an adopted instrument.

It should be noted that this study has as its object the overall work of an international Organisation and aims to be a definitive interpretation, not yet attempted, of existing ILO maritime instruments; it clearly points out to current or prospective ratifying countries, therefore, the nature of their respective obligations. Furthermore, it proposes improvements over existing texts and evaluates, as far as possible, their effectiveness. Any in-depth review of the technical and legal aspects of issues relating to seamen at the national level is outside the scope of the present study. However, in the future the writer intends to embark on comparative studies of this nature, starting with a review of the question of seamen's engagement, which is likely to be on the Agenda of the next ILO Maritime Conference. At the same time, several factors induced the writer to adopt a somewhat analytical approach in assessing the ILO's work on seafarers' standards: a) the relative complexity of maritime legal terms in existing ILO instruments; b) the wide divergencies between national laws relating to maritime employment and the usually opposite views of shipowners and seafarers concerning the adoption of ILO maritime instruments; c) the struggle of the ILO to establish international standards relating to seafarers in a competitive and heterogeneous shipping industry; d) the need for formulating conclusions on the possible legal implications of specific provisions of the International Seamen's Code, as developed by the ILO, at the national level; and e) the international legal implications of the ILO instruments. The first four factors are eminently evident in Chapters 4 and 5, especially the sections dealing with wages, hours of work, manning and social security for seafarers.

The first Chapter is concerned with the evolution of maritime labour law at the national and international level before the Treaty of Peace in 1919 and the first Seamen's Conference held in Genoa in 1920. It identifies differences in the scope and the purposes of early maritime social legislation and customs on the one hand and of the ILO instruments on seamen's standards on the other. Subsequently, it outlines and analyses the major problems which the ILO has encountered since its involvement in seamen's affairs, which include: a) the competence of the ILO with regard to questions of maritime labour; b) the question whether the 8-hour day applicable to industrial undertakings according to Convention No. 1 on Hours of Work, 1919, is applicable as a legal principle to seamen, a negative answer to which would initially free the future regulation of the seamen's hours of work from

any future ILO standards adopted for workers ashore and would suggest a more independent approach toward the regulation of seamen's affairs; c) the meaning of the International Seamen's Code and procedural difficulties encountered at ILO maritime conferences; d) the question concerning which criterion should be employed for the identification of the ships to which the ILO Maritime Conventions apply, the reason why the chosen criterion has been preferred to others, whether it commands the general agreement of both the shipowners and the seafarers and whether the ILO has considered revision of this criterion; which will include a final examination of recent trends concerning the registration of ships to the extent that this might help in drafting of future ILO instruments on seafarers' standards; and e) the structure of the Joint Maritime Commission will be studied briefly and its contribution to the ILO's work will be evaluated; the demands for revision of the composition of this Commission are critically reviewed.

Chapters 2, 3, 4, 5 and 6 deal with the substantial law concerning maritime labour as laid down in the relevant ILO and IMO texts. Chapter 2 deals with the conditions for admission to employment and the entry of seamen into employment. It touches on questions such as the placing of seamen, the seamen's articles of agreement, the seafarers' identity documents, the minimum age and the medical examination of seafarers. Chapter 3 tackles the problems and the inadequacies of the current international system of maritime training. Chapter 4 examines the conditions of employment of seamen and is concerned with such issues as hours of work, manning, wages, the repatriation of seafarers and holidays with pay. Chapter 5 is generally concerned with social security questions, namely unemployment indemnity, unemployment insurance, shipowners' liability in case of sickness or injury, sickness insurance, medical care and seafarers' pensions. Chapter 6 is concerned with the question of minimum standards on vessels. Because of limitations of space certain issues which concern seamen, namely continuity of employment, safety, health and welfare of seamen, will not be examined in this study. The question of the continuity of employment is briefly mentioned in certain chapters in connection with other aspects of seamen's employment such as the facilities for finding employment for seamen. The common characteristic of the issues referred to immediately above is that they did not give rise to substantial controversy at ILO maritime conferences and their provisions, except in one case (that of the application to fishermen of Convention No. 134 concerning the Prevention of Occupational Accidents to Seafarers, 1970) do not present formidable difficulties of interpretation for the international lawyer.

Chapter 7 will contain conclusions concerning the improvements which may be effected on existing ILO instruments on seamen's standards. It will also deal with questions, such as group strategies within the ILO; the impact of automation on maritime labour; the need for improving labour/management relations and the role of collective bargaining in the shipping industry; the importance of ILO Resolutions; the effectiveness of ratified or unratified ILO maritime standards; the role of codes of conduct within the ILO standard-setting activities; the position of fishermen; the ways in



which sociological studies on seamen's behaviour might facilitate the establishment of an adequate legal system for the regulation of maritime employment. Some remarks concerning the potential effects of the development of offshore registers on maritime labour will bring this chapter to its conclusion.

Many appendices will be found at the end of this study; they relate mainly to state practice concerning the employment of seamen; tables relating to crew costs on board ships under various flags; and tables concerning the status of ILO maritime Conventions in terms of ratifications and percentage of total world GRT represented by the ratifications registered.

It is hoped that the present thesis will constitute a welcome contribution to the identification and development of international maritime law and, generally, to the law of treaties, since the international regulation of maritime employment, despite its importance, is a completely neglected subject. The International Seamen's Code is a body of international legal rules whose treatment calls for careful analysis, especially in view of the changes in the shipping industry after the Second World War and the development of flags of convenience which have had a direct impact on maritime employment. In fact, these changes have in many instances necessitated the review of relevant ILO standards and have given rise to controversies between shipowners and seafarers concerning the actual effect which changes in the shipping industry and the introduction of new technology on board ship should be allowed to have on existing ILO maritime instruments. The need for a flexible forum, where all questions relating to seamen can be discussed remains constant and efforts should be made towards the establishment of a mechanism whereby ILO maritime instruments are regularly reviewed and kept up to date.

Chapter 1

THE REGULATION OF MARITIME EMPLOYMENT: PAST AND PRESENT

The present Chapter aims to give an account of the historical background of the ILO's attempts to regulate maritime employment at the international level. This background is viewed through recent developments which have taken place within and outside the ILO. First, the pre-ILO era of the regulation of maritime employment is set out. Then, the origins of the regulation of seamen's affairs within the ILO are traced. In particular, the present writer concludes, in agreement with others, that the ILO has unquestionable competence with respect to maritime labour. On the other hand, the question of the applicability of the Washington Conventions and of Art. 427 of the Treaty of Peace to seafarers is analysed and the writer reaches a negative conclusion, at least, as far as the first issue is concerned. The circumstances under which the establishment of the International Seamen's Code was decided are discussed critically and certain procedural difficulties encountered in ILO maritime Conferences are analysed. The establishment of the Maritime Branch of the ILO Office and of the Joint Maritime Commission is described. A special section of this Chapter is devoted to the examination of the origin, composition, powers and purpose of the Joint Maritime Commission, as a permanent consultative body of the ILO in seamen's affairs. The present status of the JMC within the ILO has been criticised many times, in every ILO maritime Conference since the 2nd World War, especially on the grounds that its composition fails to take account of the questions posed by the everchanging shipping industry of today and the need for the ILO to keep pace with these developments. It is concluded that a tripartite structure of the JMC could be an answer to these difficulties provided that certain conditions are fulfilled.

A final gloss should be made on the concept of the concept "genuine link" which is examined in section 1.6. Although the question of flags of convenience is discussed in Chapter 6, this latter Chapter is concerned with port State control from the labour point of view and does not examine the question of the exercise by the flag State of jurisdiction over ships flying its flag on the high seas. This latter question has been addressed within ILO Conferences and preparatory meetings only from the viewpoint of the determination of the scope of application of ILO maritime Conventions. It follows that Section 1.6. does not aspire to provide a detailed analysis of the concept of the "genuine link" but is limited to the evaluation of the usefulness of this concept in determining the scope of ILO

Conventions *de lege ferenda*. It will be seen that, to achieve the above end, the writer favours the criterion of registration, appropriately modified to take account of recent trends which could result in avoiding obligations, assumed by ratifying countries under the ILO Constitution. Since the determination of the scope of the application of ILO Conventions is one of the general problems with which the ILO has been faced, its systematic analysis justifies its inclusion in the present Chapter. On the other hand, the writer briefly analyses customary and treaty law (including the Law of the Sea Conventions and the UNCTAD Convention on Conditions for Registration of Ships) in which the concept of the "genuine link" has been expressed and formulates certain conclusions as to whether it has resulted or may result in the successful treatment of maritime labour issues and, ultimately, the protection of seafarers at the international level.

1.1. Early maritime codes concerning seamen

Maritime codes for the protection of seafarers have improved substantially since their earliest origins, as the following plea illustrates:

"Captayne Marchaunt ... Wee ... desyre that, as you are a man and beare the name of a cap-
tayne over us, so to weighe of us like men, and lett us not be spoyled for wante of foode, for our al-
lowance is so smale we are not able to lyve any longer of it; ... for what is a piece of Beefe of halfe a
pounde among foure men to dynner or half a drye Stockfishe for foure dayes in the weeke, and
nothing elles to help withall - yea, wee have helpe: a little Beveredge worse than the pompe water.
Wee were preste by her Majesties presse to have her allowance, and not to be thus dealt withall, you
make no men of us, but beastes ..."

(Add MSS 12, 505, f. 241, British Museum, quoted
in Peter Kemp: *The British Sailor*, Dent, 1971). ¹

The above expressed the legitimate grievance of the crew of one of the ships in Drake's expedition to Cadiz in 1586, which refused to go on. The life of the sailor has changed considerably since then. Of course, stages of civilization and patterns of human behaviour are developing gradually but law plays an important role in the evolution of the human mind and thus attitudes to standards of behaviour: "The totality of humanity's achievements is called culture; and in this culture, it is the part of the law to promote and vitalize, to create order and system, on the one hand; and on the other, to uphold and further intellectual progress". ² Shipping has always been an international affair. By its very nature, it has given birth to compilations of maritime customs and usages dating back to the 7th century A.D. Collections such as the Rhodian Sea Law, the Rôles d' Oléron, and the Consolato del

¹Frank E. Hugget, *The Past, Present and Future of Life and Work at Sea*, London, 1975, p. 24.

²Joseph Kahler, *Philosophy of Law*, New York, 1921, p. 49.

Mare ³ attempted to codify existing maritime customs, thus securing to a certain extent navigation between different parts of the world and safeguarding sea-trade between the city-states of those times.

1.1.1. The early maritime codes

First, the Rhodian Sea Law ⁴ appeared between 600 A.D. and 800 A.D. and was probably put together by a private person. The material which provided the basis for the construction of these rules came from different sources but the main body of it emanated from local customs. ⁵

The Rhodian Sea Rules exercised a great influence over Roman legislation, became incorporated in Roman laws and formed the main feature of later enactments like the "Rôles d' Oléron". ⁶

The rules of Oleron, ⁷ about whose origin there appears to be some confusion, provided security of tenure and payment for seamen, a scale of punishments and primitive system of welfare. These rules formed the basis of English law in the 12th century and had been accepted in the English Court of Admiralty and other local courts by the end of the 14th century. This collection became the maritime law of the countries of Western Europe, especially of the Atlantic coast and the Baltic Sea. ⁸

The Catalan code, Consolato del Mare, which had the force of law in the Court of Barcelona and probably dates from the 14th century is a compilation of different customs and laws which have originated from different countries and deals with a great variety of subjects, but is very verbose, repetitive and self-contradictory. ⁹ This was not a collection of customs but the greater part of it consists of "suggestions of learned men" who put together a mass of laws of different origins thus sometimes producing texts of a conflicting nature. ¹⁰

Finally, the maritime laws of Wisby (a port on the island of Gotland), a compilation of laws derived from three different sources (Baltic, Flemish or Gascon and Dutch) were first printed in Copenhagen in 1505 and were originally written in the Saxon dialect. These laws were observed by merchants and mariners, who had resorted to that port, and have been translated in many dialects and received wide acceptance. Referring to these three collections of maritime laws and customs, Twiss says: "These (the Wisby Rules) laws may be classed with the judgements of Oleron and with the customs of the Sea (Consolato del Mare) which have been collected and digested in the Book of the Consulate of the Sea of Barcelona, as they form in conjunction with them as it were, a continuous

³For a brief account of the early maritime codes, see R. Pleionis, "The influence of the Rhodian Sea Law to other maritime Codes", *RHDI*, 1979, pp. 171-191. For the text of these codes and a comprehensive analysis, see T. Twiss, *The Black Book of Admiralty*, 4 vol. 1871, 1873, 1874, 1876, London.

⁴For a comprehensive analysis of the Rhodian Sea Law, see Walter Ashburner, *The Rhodian Sea Law*, Oxford, 1909.

⁵*Ibid.*, p. cxiii.

⁶W.S. Lindsay, *History of Merchant Shipping and Ancient Commerce*, 4 Vol. London 1874, Vol. I, p. 184.

⁷*Ibid.*, pp. 379-392.

⁸Dorothy Burwash, *English Merchant Shipping 1460-1540*, 1947, p. 171, Pleionis, *op. cit.*, p. 182, Lindsay, *op. cit.*, p. 379.

⁹Pleionis, *op. cit.*, p. 189.

¹⁰For a comparative analysis of the Rôles d' Oléron and the Consolato del Mare, as far as conditions of seamen are concerned, see Burwash, *op. cit.*, pp. 35-82.

chain of maritime law, extending from the eastern ports of the Baltic Sea through the North Sea and along the coast of the Atlantic to the Straits of Gibraltar, and thence to the furthest eastern shores of the Mediterranean".¹¹

All of these early attempts at "international" maritime regulations have some common characteristics:

1) They were not the outcome of the exercise of legislative power by a sovereign State, except in one case: The Basilica, which was a compilation of rules enacted by Byzantine emperors and was enacted itself by the Byzantine emperor Leo the Wise. Neither were they confirmed by any superior authority. Basically they were collections of customs and usages which because of their intrinsic convenience had been accepted on a wide basis by the parties concerned and approved in their written form.

2) They were put into writing as a response to the threat to maritime adventure posed by pillage, plundering of wrecks, piracy and other malpractices of the Middle-Ages.¹²

3) They established maritime tribunals vested with authority to adjudicate upon maritime disputes.¹³

All these rules contained provisions which dealt with problems of maritime labour (see chapters 3, 5, 6, 7 and 26 of Part 3 of the Rhodian Sea Law; Articles 3, 5, 6, 7, 8, 12, 19, 20 and 21 of the Rules of the Oleron; chapters 29, 47, 79-138, 222-223 of the Consulate of the Sea). We do not propose to analyze the various provisions of these collections here; our aim rather is to draw attention to their significance and point out certain differences between these collections and modern maritime legal systems, so far as maritime labour is concerned.

1.1.2. Evaluation of the early maritime codes with regard to maritime labour

The purpose of these regulations was not the protection of seamen as such. Out of the five chapters of the Rhodian Sea Law which deal with the seamen's status, four are concerned with matters of discipline and one is concerned with the safety of the ship. These rules are characterised by a complete absence of protective measures for seamen. Out of nine Articles of the Rules of the Oleron, which are concerned with the working conditions on board ship, just one (Art. 7 providing for treatment of seamen in case of sickness) has a clear protective nature. All others deal with matters of discipline and safety while sometimes (for example, Arts. 12 and 21) providing the seaman with certain guarantees. Commenting on these, Lindsay said that "it is undeniable that they are framed in a spirit of wisdom and justice towards the shipowner" and that they were established "... to afford protection to those persons and interests (shipowners, mariners, merchants), on which ... the commercial pros-

¹¹Twiss, op. cit., Vol. 4, pp. xxvi-xxvii.

¹²For a lucid account of these practices, see Jacques Bernard, *Navires et gens de mer à Bordeaux (vers 1400-vers 1550)* Trois livres, Paris 1968, deuxième livre, Chapitre V: La violence: Rixes, course et piraterie, pp. 765-787.

¹³Pleionis, op. cit., p. 190.

perity of England in great measure depended".¹⁴ That is the reason why safety and disciplinary matters were relatively thoroughly dealt with.¹⁵ The great bulk of these enactments was focused upon the safeguarding of the maritime adventure as a whole, on which expansion of a State's influence depended. It should be noted the regulation of crew discipline is to be found in all local codes of medieval maritime law.¹⁶

A fair share of the chapters of the Consulate of the Sea was allocated to seamen's affairs (Chapters 29, 47, 79-138, 222-223, 252 out of 334), but as pointed out earlier, the Consulate of the Sea was an amalgam of laws and customs of different origin and according to Ashburner they were merely "suggestions by learned men, which were probably never practised by any mariner or enforced by any court". Chapters 80, 81, 82, 83, 93, 94, 95, 96, 106 and 116 conferred upon the mariners certain rights especially in respect of wages. But again there is a dearth of any provisions concerning social welfare and the mariner's duties while disciplinary matters are dealt with comprehensively.

Finally, the Maritime Law of Wisby deals with the seamen's status in many articles, especially with disciplinary questions and the issue of wages. As to social welfare, only Art. 21 refers to the treatment of seamen in case of sickness (identical with Art. 7 of the Rules of Oleron).

In conclusion, the common features of the early maritime labour law were the comprehensive regulation of discipline, the protection of the maritime enterprise as such and the use of that law, together with other provisions concerning safety, as a tool for the extension of national prestige and power upon the seas. There was a complete lack of organised international effort to adopt protective legal measures and to propagate the idea of social justice, upon which a coherent body of international regulations concerning maritime employment would be based.¹⁷

1.2. Attempts to protect merchant seamen before the Genoa Conference

The second half of the C19th and the early C20th was the period during which vague ideas about the international of labour crystallised into definite laws.

This is not the place to review or assess the significance of these movements.¹⁸ We will content ourselves with giving an account of these progressive efforts, as far as seamen are concerned; they are very few indeed.

¹⁴Lindsay, op. cit., p. 392.

¹⁵As to discipline, see Jack Saddler, *Discipline at Sea* (and industrial relations in the shipping industry), 1983. For the period under consideration, see pp. 16-19.

¹⁶For the early German Codes, see Walther Vogel, *Geschichte der deutschen Seeschifffahrt*, Berlin 1915, I Band, Kapitel 8, *Der Seemann*, pp. 439-464.

¹⁷This was the idea underlying the creation of the Labour Part of the Treaty of Peace; see the Preamble to Part XIII of the Treaty of Versailles, where reference to social justice is made.

¹⁸See James T. Shotwell, *The Origins of the International Labour Organisation*, 2 Vol., 1934, B.E. Lowe, *The International Protection of Labour*, New York, 1921, pp. 3-168, Francis G. Wilson, *Labor in the League System*, 1934, pp. 28-55, G. Scelle, *L'organisation internationale du travail et le BIT*, Paris 1930, pp. 18-30, Ernest Mahaim,

It is true that national laws concerning seamen were passed in a few countries,¹⁹ but the only attempt to deal with the seamen's status on the international plane before 1915 was an agreement between the German Empire and Spain, concluded by an exchange of Diplomatic Notes on November 30, 1912 and February 12, 1913.²⁰

This agreement merely concerned the reciprocal communication of Accidents to Spanish Sailors on German ships and of German Sailors on Spanish ships and constituted a procedural device to facilitate further treatment of the mariners who had suffered an accident rather than a substantial provision. At the same time seamen's problems were also being dealt with at the Conference which assembled in London in 1913 and 1914 and which elaborated an International Convention for the safety of both seamen and passengers at sea, and in the laws drawn up by the International Committee for the Unification of Maritime Regulations.

A little earlier, as a result of the Brussels Congress in September 1897, a congress had been held in Paris in 1900. The establishment of a private office was then decided upon to promote the interests of labour and to bring together "those who in the different industrial countries consider protective legislation of working people as necessary" (Art. 2 (1) of the Statutes of the International Association for the Legal Protection of Labor). Thus, the International Association for Labor Legislation was created;²¹ it was regarded as the harbinger of the International Labour Organisation. This was an unofficial body; but States could participate therein through the appointment of a representative on the Committee of the Association, by which the activities of the Association were to be directed (Art. 5 (6)). The Committee at its Seventh Meeting at Zurich (September 10-12, 1912), adopted a resolution concerning the protection of dockers. This asked for an investigation on a national level into the conditions of labour of dockworkers, especially in regard to the duration of work and maximum load.

On January 18, 1919, at the first session of the Peace Conference, international labour legislation appeared as the third item on the Agenda.²² The countries represented were invited to submit memoranda dealing with labour problems. On Thursday, January 23, 1919 the following resolution was adopted: "That a Commission, composed of two representatives apiece from the five Great Powers, and five representatives to be elected by the other Powers represented at the Peace Conference, be appointed to enquire into the conditions of employment from the international aspect, and to consider the international means necessary to secure common action on matters affecting conditions of employment and to recommend the form of a permanent agency to continue such enquiry in cooperation

Droit international ouvrier, Paris 1913, pp. 196-219; I.F. Ayusawa, *International Labor Legislation*, Columbia University, 1920, pp. 36-131.

¹⁹National legislation concerning seamen is published in the *Official Bulletin* (early issues) and the *Legislative Series*.

²⁰*O.B.*, vol. VIII, p. 247, Lowe, op. cit., p. 227.

²¹Shotwell, op. cit., vol. I, p. 29, Lowe, op. cit., pp. 38-39, John W. Follows, *Antecedents of the International Labour Organisation*, Oxford, 1951, pp. 157-177.

²²Shotwell, vol. II, p. 126.

with and under the direction of the League of Nations".²³ This resolution set up the Commission on International Labor Legislation, which decided to deal with two separate questions: a) the drafting of the constitution of the ILO and b) according to the various proposals submitted, the insertion in the Treaty of Peace of a chapter constituting an international labour chapter. Samuel Gompers, the President of the American Federation of Labor, presided at the Commission. Clauses suggested for insertion in the Treaty of Peace had been submitted by the Italian, American, Belgian and British Delegations.²⁴ Among these, only the American proposal contained a concerning seamen namely, clause 4, which read as follows: "That the seamen of the merchant marine shall be guaranteed the right of leaving their vessels when the same are in safe harbour". The Proposals of the American Federation of Labor to the Inter-Allied Labour and Socialist Conference, September, 1918, concerning the Peace Conference, submitted, *inter alia*, by Samuel Gompers contained a similar clause and it was included in the resolution adopted by that Conference, on 19th September, 1918.²⁵ On the other hand, there were a series of other proposals touching in a cursory manner, on the seamen's problems and urging the establishment of a special international seamen's code and protective legislation for seamen after consultation with seamen's organisations.²⁶

Thus, the Subcommittee of the Commission on International Labour Legislation, entrusted with the task to harmonise the various proposals submitted so far, presented to the Commission a list of labour clauses to be included in the Treaty of Peace. This list consisted of nineteen points. In the Preamble to the Treaty of Peace the High Contracting Parties declared their acceptance of the following principles and agreed to take steps to ensure their realisation. Point 15 read: "The principle that seamen of the mercantile marine should have the right of leaving their ships while they are in port". Point 15 gave rise to one of the longest and most vehement discussions in the Commission.²⁷ Three different drafts were before the Committee: one submitted by the American delegation (see earlier), the text of the Subcommittee and a text suggested by Professor Shotwell to the effect that "no sailor who leaves his ship when the same is in port, should be punished on this ground by imprisonment nor detained nor returned to his ship by force". This proposal was put forward by Samuel Gompers of the AFL. It should be noted that the inclusion of Point 15 was a victory for the Seamen's Union of America and was considered as the yardstick of the progressive trend of the American Labor Move-

²³Shotwell, vol. I, pp. 125-126.

²⁴Shotwell, vol. II, pp. 349-356.

²⁵Ibid., pp. 75-80.

²⁶Resolution of the International Conference of Trade Unions, Berne, October 4, 1917, Res. IX, *ibid.*, p. 48; Memorandum from the German Ministry of Labor to the German Minister for Foreign Affairs on International Labor Legislation at the Peace Conference, December 28, 1918, V 16, *ibid.*, p. 113; Manifesto of the International Trade Union Conference at Berne, February 10, 1919 on International Labor Legislation, par. 13, *ibid.*, p. 340. The Draft Scheme Founded on the Recommendations made by the Interdepartmental French Committee on Labor Treaties, February 4, 1919 called for "the extension to ... maritime workers, of protective legislation which may not yet be applicable to them".

²⁷For the minutes of the International Labour Commission, see *O.B.*, vol. I, pp. 1-259, Shotwell, *op. cit.*, vol. II, pp. 149-322.

ment. Barnes, of the British delegation, rejected the idea of the insertion of this clause in the Treaty. He said that the Commission had to deal with general principles and not specific points such as that proposed. He put forward three arguments against the proposal, viz that: 1) it had been rejected by the recent international seamen's conference, 2) in Great Britain when a contract was signed by a sailor, every precaution was taken to safeguard his position ("The sailor could not be forced from obligations which he had assumed of his own free will") and 3) if the sailor were free to leave the ship when in port, he could not ask the master to bring him back to the country from which he sailed (he forfeited, thus, the benefit of repatriation). Again, Gompers delivered an eloquent speech about seamen's rights and the need to equalise the rights of seamen and land workers, who were only subject to a civil penalty and not imprisonment. The other members of the Commission found themselves incompetent to deal with the question.

To satisfy the American demand a Protocol to Art. 19 was drawn up providing that: "In no case shall any of the High Contracting Parties be asked or required as a result of the adoption of any recommendations or draft conventions by the Conference, to diminish the protection afforded by the existing legislation to the workers concerned". This was adopted by 12 votes, with 2 abstentions²⁸ and, slightly amended, was incorporated in the Treaty of Peace as par. 11 of Art. 405. Thus, the right of the American sailors would be safeguarded. Later, in a passionate speech, Andrew Furuseth, the President of the American Seamen's Union, attacked the Treaty of Peace and asserted that the adopted paragraph did not constitute an adequate safeguard for workers but he was contradicted by Gompers at the Annual Convention of the AFL. Finally, Point 15 was put to a vote and was rejected by 3 votes to 6.²⁹ Instead, a resolution concerning seamen proposed by Arthur Fontaine, the French Government delegate who was appointed President of the Governing Body of the ILO later, was discussed. He proposed that seamen's questions should be referred either to a special session of the International Labour Organisation or to a special organisation of the kind. Since the idea of referring seamen's questions to an organisation other than the ILO was not welcomed, the following resolution was adopted after some modifications by 12 votes against 2: "The Commission considers that the very special questions concerning the minimum advantages (later converted to "conditions") to be accorded to seamen might be dealt with at a special meeting of the International Labour Conference devoted exclusively to the affairs of seamen".

Thus, the only direct reference to seafarers is the above mentioned resolution, which resulted from the deliberations of the Commission. Nowhere in the Labour Part of the Treaty of Peace are seafarers mentioned as a special category of workers warranting special treatment. It is true that the American proposal for insertion of point 15 in the Labour Clauses could not have been accepted.

²⁸*O.B.*, vol. I, p. 217.

²⁹*Ibid.*, p. 218.

Seamen were a special category of workers and the purpose of the Labour Clauses was not to deal in detail with questions relating to specific labour problems.

These clauses were included in Part XIII of the Treaty of Peace under the heading "GENERAL PRINCIPLES". Thus, the Commission had as its task the identification and recognition of certain fundamental principles necessary to social progress which could be further elaborated in subsequent International Conferences. According to the Report of the Commission to the Preliminary Peace Conference: they did not feel called upon to draw up a Charter containing all the reforms which may be hoped for in a more or less distant future, but confined themselves to principles, the realisation of which may be contemplated in the near future". The American proposal, though an "American principle", constituted a provision of substantive law and could only be considered within the standard-setting programme of the ILO. It should be noted that the U.S. Government, replying to the questionnaire drawn up by the ILO Office and submitted to the Governments concerning the possibility of establishing an International Code for seamen, which was the fourth item on the Agenda of the 1st Maritime Session of the International Labour Conference (henceforth cited as the Genoa Conference) reiterated its favourite theme, namely that "while in a safe harbour seamen should be subject to only such civil liabilities as those to which other classes of workmen are subject".³⁰ But it is evident from the answers of the Governments³¹ that this would be one of many principles to be included in such a code and its specificity could not justify its inclusion in the Treaty of Peace.

The subsequent history of the question showed the complexity of the problem which certainly could not have been resolved by the enunciation of a mere principle.

The members of the Commission on the Establishment of an International Seamen's Code at the Genoa Conference were divided upon the question of the equality of the rights of the shipowners and the seamen. Whereas the majority thought that its duty was to recognise the principle of the establishment of an international seamen's code and define the means whereby this end could be achieved, the minority thought that the Conference should deal with the question in detail and submitted to it a resolution by the Norwegian seamen's representatives, based on the American proposal at the Peace Conference that "the seamen be placed upon the same legal level as shipowners, through the repeal of all laws and the abrogation of all treaties under which the seamen may be compelled to labour against their will when the vessel is in safety or suffer incarceration for refusing to fulfil a civil contract to labour".³² The minority report provoked a storm of controversy at the Conference.³³ This, however, was partly due to the harsh language used in the first Part of the Preamble of the Resolution, which stated that "the seamen's status is little better than that of the serf", and it was substi-

³⁰*International Seamen's Code*, Geneva, 1921, p. 21.

³¹See footnote 32 and the Report on 4th item of the Agenda of the 2nd session of the Conference (Seamen's Code), Geneva, 1920.

³²*R.P.*, pp. 559-560.

³³*Ibid.*, p. 443.

tuted by a text combining a resolution submitted by the French shipowners delegate and one submitted by the Italian seamen's delegate;³⁴ in that form it was adopted by the Conference. The resolution made a distinction between clauses of a private and public character, inserted in the articles of agreement, and treated as criminal offences only violations of clauses of a public character. Between 1920 and 1926 the matter was discussed in the Joint Maritime Commission³⁵ and it first found its solution in Art. 3 of the ILO Office Draft Convention concerning the Disciplinary and Criminal Penalties Applicable to Seamen. It was laid down therein that, as a general rule criminal penalties may not be applied in cases, *inter alia*, of desertion and absence without leave where safety on board ship is likely to be endangered.³⁶ Incidentally, it should be noted that under the relevant American law the fact that desertion was not an offence did not preclude the institution of criminal proceedings where the safety of the ship or life on board ship was endangered thereby.³⁷

Just to give an idea of how complex the question was, the Conciliation Committee constituted by the Committee on Articles of Agreement at the second Maritime Conference in 1926 decided, in the light of the impossibility of reconciling the diverging views and the many differences in national laws, to delete Art. 3³⁸ and, therefore, the Committee's draft, leaving aside the classification of the offences (desertion, absence without leave, refusal to obey orders) left the question entirely to national law.³⁹ When the final Record Vote on the Draft Convention concerning the guarantees to be provided for seamen in regard to disciplinary and criminal penalties was taken, the Convention did not attain the two-thirds majority required (in favour 62, against 36) and it thus was not adopted. A similar Recommendation submitted by the Drafting Committee to the Conference as a last resort to achieve a compromise when it had been made clear that the Convention could not be adopted was defeated by 38 votes to 50. Thus, the regulation of cases of desertion and absence without leave, which would have been inserted in the labour clauses of the Treaty of Peace as a general principle, was still not included in any ILO instrument even after seven years of struggle.

1.3. The competence of the ILO in regard to maritime labour

Since the only direct reference to seamen resulting from the work of the Commission on International Labour Legislation is the above mentioned resolution urging for the establishment of an International Seamen's Code, the question arises as to whether, and if so where in the Labour Part of

³⁴See the speech of the Secretary General, *ibid.*, pp. 194-195; for the revised draft submitted by the Drafting Committee for adoption by the Conference, see *ibid.*, pp. 560-561.

³⁵For the history of the question, see *International Codification of the rules relating to Seamen's Articles of Agreement*, Questionnaire I, 1925, pp. 3-23.

³⁶For Art. 3 of the Office draft and comments, see *Report on International Codification of the Rules Relating to Seamen's Articles of Agreement*, 1926, pp. 253, 239-241.

³⁷Questionnaire I, 1925, *op. cit.*, p. 81.

³⁸*R.P.*, pp. 559-560.

³⁹*Ibid.*, p. 569.

the Treaty of Peace seafarers are mentioned indirectly. This question is related to the competence of the ILO with regard to maritime employment. It is not intended here to examine this competence in detail.⁴⁰ However, as far as seamen are concerned, it is interesting to scrutinise the text of the Preamble of the Constitution of the ILO in connection with Arts. 389 and 427 dealing with the "GENERAL PRINCIPLES".

1.3.1. The Advisory Opinion of the PCIJ on the competence of the ILO in regard to agriculture

The Council of the League of Nations decided at its meeting on 12 May, 1922, that a request of the French Government that an advisory opinion should be sought of the Permanent Court of International Justice (henceforth PCIJ) on the question of the competence of the ILO in regard to agricultural labour should be submitted to that Court. This raised some interesting questions in relation to these articles. The question submitted was as follows: "Does the Competence of the International Labour Organisation extend to international regulation of the conditions of labour of persons employed in agriculture?"⁴¹ In giving its opinion the Court⁴² contented itself with providing a grammatical interpretation of the text of certain Articles of the Constitution of the ILO and did not raise any substantive issues.

Reference to seamen was made by M. Talbot (counsel of the ILO) and Albert Thomas (Director-General of the ILO) in their arguments in favour of the ILO's competence in regard to agricultural labour; they asserted that the fact that seamen were not expressly mentioned in Part XIII of the Treaty did not preclude the examination of their problems by the ILO Conferences. Albert Thomas said: "Nothing was expressly provided in the text of Part XIII of the Treaty of Peace in favour of seamen. Notwithstanding, in their case, without any protest having been raised, a great Conference was held at Genoa and draft international regulations were voted for their protection."⁴³

⁴⁰Concerning the competence of the ILO, see E. Mahaim, "L'organisation permanente du Travail", *R.C.A.D.I.*, 1924 III, pp. 104-115, Hiitonen, *La compétence de l'Organisation internationale du Travail*, Paris, 1929, Scelle, op. cit., pp. 72-93, L. Troclet, *Législation sociale internationale*, 1952, pp. 446-482, W. Jenks, "La compétence de l'Organisation internationale du Travail", *Revue de droit international et de législation comparée*, 1937, pp. 156-183 and 586-623, N. Valticos, *Droit international du Travail*, Paris 1983, pp. 184-194, J. Morellet, "Legal Competence of the International Labour Organisation", *The Annals of the American Academy of Political and Social Science*, vol. 166, Mar. 1933, pp. 46-52, M. Guerreau, "L'Organisation permanente du Travail; sa Compétence en matière agricole", *Revue générale du droit international public*, 1922, pp. 223-255, E. Mahaim, "Les avis de la Cour permanente de justice internationale au sujet de l'interprétation de certains articles de la Partie XIII du Traité de Versailles", *Revue de droit international et de législation comparée*, 1922, pp. 503-524, C.A. de Reiterkjold, "La compétence de l'Organisation internationale du Travail en matière agricole", in the same *Revue*, 1930, pp. 261-375.

⁴¹*O.B.*, vol. VI, p. 103.

⁴²For the proceedings before the Court, see *O.B.*, Vol. VI, pp. 121-207; for the opinion of the Court see *ibid.*, pp. 339-373.

⁴³*Ibid.*, p. 168.

As a textual and contextual exegesis of Part XIII of the Treaty of Peace, the PCIJ's opinion applied "equally" to seafarers.⁴⁴ The Court did decide that the competence of the ILO extended to agricultural labour.⁴⁵ The Courts' opinion was supported by the following arguments against the exclusion of agricultural questions from the scope of Part XIII of the Treaty of Peace, viz: that Part XIII established a "permanent labour organisation"; thus agriculture, the most ancient and important industry, could not have been excluded from the scope of that Part of the Treaty of Peace;⁴⁶ the preamble of Part XIII is drawn up in the most comprehensive language, namely, that "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled" and it then enunciate methods by which these conditions could be improved;⁴⁷ the Preamble also declares that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their countries". According to the Court this phrase was applicable "to navigation" as to any industry, and it is also applicable to "fishing ...".⁴⁸

Thus the competence of the ILO according to the Court, is very comprehensive, especially if considered in the light of Art. 387 which says that an organisation is established "for the promotion of the objects set forth in the Preamble".

It is clear that the above cited extracts of the Court's opinion apply equally to seafarers. The Court concluded its argument with an *obiter dictum* which it used to corroborate its previous statements: "Every argument for the exclusion of agriculture might with equal force be used for the exclusion of navigation and fisheries." It laid special stress upon the fact that the second session of the ILO was almost entirely devoted to seamen, and that in that session a recommendation was made on June 30th, 1920 for the limitation of hours of work in the fishing industry. It was never even suggested that either of these great industries was not within the competence of the Labour Organisation.

49

⁴⁴*Collection of Advisory Opinions*, Series B, Nos. 2-3, "Competence of the ILO with respect to agricultural labour", August 12th, 1922, PCIJ, pp. 4-43.

⁴⁵*Ibid.*, p. 43.

⁴⁶*Ibid.*, pp. 23, 25.

⁴⁷*Ibid.* p. 25.

⁴⁸*Ibid.*, p. 25 (emphasis added).

⁴⁹*Ibid.*, p. 41.

1.3.2. Thoughts concerning the competence of the ILO in regard to maritime employment

Even if a textual interpretation of Part XIII might not in itself suffice to prove the competence of the ILO in regard to maritime labour, the analysis of the relevant documents in a historical context leaves no doubts at all on this question.

The adoption of the resolution by the Commission on International Labour Legislation urging that the special problems of seamen should be considered by special session of the ILO Conference (see *supra* p. 58) dispelled any doubts concerning the competence of the ILO in regard to maritime labour. As referred to above, the Commission rejected the proposal to establish a special organisation entrusted with the task of dealing with exclusively with seamen's affairs. By rejecting this idea and by adopting the above mentioned resolution, the Commission established unequivocally the competence of the ILO in regard to maritime labour.⁵⁰ Thus, the relevant Labour Part of the Treaty of Peace broadly interpreted in the historical context applies to seafarers.

1.4. The application to seafarers of the "General Principles" of Art. 427 and the Washington Conference decisions

The competence of the ILO in regard to seamen's affairs has always been beyond controversy and this is confirmed by many writers.⁵¹ It is, however, one thing to confirm the competence of the ILO in a particular field, but a quite different proposition to allege that the "GENERAL PRINCIPLES" enunciated in Art. 427 are applicable thereto. This article provides:

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

⁵⁰For the competence of the ILO in regard to maritime labour, see Scelle, *op. cit.*, pp. 73-74, Troclet, *op. cit.*, pp. 467-9.

⁵¹Scelle, *op. cit.*, pp. 73-74, Troclet, *op. cit.*, pp. 468-9, Valticos, *op. cit.*, p. 185, Hii-tonen, *op. cit.*, p. 148.

A negative or affirmative reply to this question is of great importance in view of a) the seamen's allegations throughout the ILO's history that seamen should not fall behind other categories of workers and b) the consideration and adoption of new ILO instruments relating to the seafarers on the basis of ILO instruments previously adopted which concern other categories of workers.

1.4.1. The applicability of the 8 hours day and 48 hours a week principle to seamen. The views of the shipowners, seamen and governments

This controversial question first arose at the Genoa Conference in 1920 and gave rise to one of the most passionate discussions in the ILO, which lasted for several years. Many delegates contended that Point no. 4 of Art. 427 does not apply to seafarers. The seamen's representatives were of a different opinion: they argued that at the Washington Conference in 1919 a Convention was adopted limiting the hours of work in industrial undertakings to 8 in the day and 48 in the week. "Industrial undertaking" was defined to include in Art. 1 (d) "The transport of passengers or goods by road, rail, sea or inland waterways ...". Art. 1 (d) went on to say that "the provisions relative to transport by sea and on inland waterways shall be determined by a special conference dealing with employment at sea and on inland waterways."

The shipowners argued that:

1) The general wording of Point 4 of Art. 427 provided for all modifications and restrictions and that the 8 hours a day and 48 hours a week principle was only a standards to "be aimed at". Therefore, they were not bound by it and were not forced to apply this principle.⁵² Thus, in the case of ships' stewards, for example, the standard aimed at "can most nearly approached by the limitation of the hours of labour to seventy per week".

2) At the Washington Conference the majority of the delegates were not experts in maritime matters⁵³ and had no power to decide for the shipowners.⁵⁴

3) The Commission on Hours of Labour at the Genoa Conference in its report to the Conference had inserted the following preamble in the Convention limiting the working hours of seamen to 8 hours per day or 48 hours per week: "The principle laid down in the Treaty of Peace, viz. the adoption of an 8 hours day or 48 hours week as the standard to be aimed at where it has not already been attained is reaffirmed". The shipowners now asserted that the High Contracting Parties were not thinking of the merchant marine when they drew up and signed the Treaty of Peace. The different conditions and requirements of the maritime industry were not envisaged by the High Contracting Parties. The principle of 8 hours per day or 48 hours per week was unattainable in regard to maritime labour (for many reasons: effects on accommodation of crew, safety of the vessels; lack of economic

⁵²Declaration of the shipowners' delegates on the Draft Convention concerning hours of labour, 2 *R.P.* , pp. 513-4, 307.

⁵³*Ibid.*, pp. 516, 315.

⁵⁴This argument first appeared when reported by a Government delegate at the Washington Conference, 1 *R.P.* , p. 117.

viability; it had a demoralising effect on seamen, giving them 16 hours of idleness; spacious accommodation would result in a reduction in the capacity of the ship to carry passengers and cargo): the only analogy that could be drawn between work on land and work on board ship was when a ship was in a port, in which cases the principle could be attained. ⁵⁵

4) There was nothing in Art. 427 that compelled the Member States to adopt this principle. The Preamble to Art. 427 said that "all industrial communities should endeavour to adopt, so far as their special circumstances will permit" certain methods and principles. It was argued that the special circumstances of the shipping industry do not permit the application of the principle. ⁵⁶

5) The Washington Conference, in deciding to include transport by sea in the Hours Convention exceeded its power. In any case the Convention was not binding on the Genoa Conference, since it had not come into force by the time the Genoa Conference was held. ⁵⁷

6) The resolution of the Commission on International Labor Legislation proposing that questions concerning seamen might be dealt with at a special maritime meeting of the ILO Conference, empowered that special meeting to decide whether the principle was applicable to seamen or not. ⁵⁸

7) If the hours of work were limited to 8 hours per day, the rest of work necessitated by the special conditions of the shipping industry would be compensated as overtime. The seamen, instead of working less, would attempt to work harder to get compensation for overtime. This would be the very opposite of what Art. 427 declares, namely that labour should not be regarded as a commodity or article of commerce. ⁵⁹

The most comprehensive exposition of the shipowners' thesis was included in a statement by the shipowners' representatives submitted to the 13th session of the ILO Conference in 1929. ⁶⁰

The seamen's arguments, on the contrary, were that:

1) The principle of the 8-hour per day and 48-hour per week, included in point 4 of Art. 427, was applicable to all workers and, therefore, to seamen; in spite of the different view of the shipowners it was a real principle, ⁶¹ though it was subject to such exceptions and modifications as the special conditions of the shipping industry might require. ⁶²

⁵⁵2 R.P. , p. 307.

⁵⁶Ibid., p. 315.

⁵⁷Ibid., p. 315.

⁵⁸Ibid., p. 315.

⁵⁹Ibid., p. 315, 13 R.P., p. 188.

⁶⁰13 R.P. , pp. 341-4, 222. For the reply of the seamen's representatives see *ibid.*, pp. 342-347. In his reply at the plenary meeting of the Conference, the Reporter of the Committee on the Hours of Labour, defending the Report of the Committee, said that "from a legal point of view the decision to hold a special Maritime Conference did not in any way affect the obligation imposed by Art. 427 to promote the realisation of the 8-hour day and the 48-hour a week", *ibid.*, p. 225; see also the speech of the Reporter at the plenary Conference, *ibid.*, p. 186.

⁶¹Cuthbert Laws, the shipowners' delegate of Great Britain said at the Genoa Conference: "it is hypocrisy to put in the front of the Convention a Preamble the promise of which is not fulfilled in the body of the Convention".

⁶²2 R.P. , p. 511.

2) Although the seamen's conditions were excluded from consideration at the Washington Conference, the Hours Convention adopted by that Conference applied to the whole industrial world, and, therefore, there remained only the question of application to seamen of the principle of the 8 working hours per day included in that Convention. ⁶³

In other instances, where reference was made by seamen's delegates to the Treaty of Peace in support of their movements or proposals, no substantial arguments were put forward by them in this respect. ⁶⁴

But the most convincing arguments with regard to the compulsory application of the 8-hour principle to seamen came from the Government delegates, since the seamen's delegates had found themselves unable to oppose the shipowners' allegations on that specific matter. They argued that:

1) Art. 1 (d) of the Hours Convention adopted by the Washington Conference expressly applied to seafarers. ⁶⁵

2) Item I of the Agenda of the Genoa Conference defined the task of the Conference as being the following: "*Application* to seamen of the Convention drafted at Washington, limiting the hours of work in all industrial undertakings, including transport by sea and, under conditions to be determined, transport by inland waterways, to 8 hours in the day and 48 hours in the week". ⁶⁶ Thus, the Genoa Conference was compelled to apply the principle, subject to the specified exceptions.

3) Despite the efforts of the shipowners to prove the opposite, at that time it was possible to apply the principle to the maritime industry. It had been applied already in at least two countries and would not necessitate such great alterations in the ship's structure and in the manning scale as the shipowners had suggested. ⁶⁷

4) The ILO was established by the Treaty of Peace for the promotion of certain objects set forth in the Preamble of the Treaty (see Art. 387). One of these objects, according to the Preamble, is the regulation of hours of work including the establishment of a maximum working day. ⁶⁸ The defect in this argument consists in the fact that the Preamble of the Treaty of Peace, which defines the Competence of the ILO, does not specify the maximum limit of working hours and it is another thing to say that Art. 427 point 4, which enunciates the 8 hours a day or 48 hours a week principle, applies to seafarers.

1.4.2. The applicability to seamen of decisions taken at the Washington Conference in 1919

⁶³Giulietti, *ibid.*, p. 352, see also for a general review of the seamen's attitude at the Conference, *ibid.*, p. 311.

⁶⁴9 *R.P.*, pp. 92, 97, 109, 13 *R.P.*, pp. 328-9.

⁶⁵2 *R.P.*, p. 309.

⁶⁶*Ibid.*, p. 309, emphasis added.

⁶⁷*Ibid.*, pp. 310, 339-40, 258-9.

⁶⁸This argument was put forward by the Government delegate of Netherlands, Mr. Nolens, 9 *R.P.*, p. 102. For other instances, where the same delegate declared himself in favour of the seamen's position, see 2 *R.P.*, pp. 311, 472.

On the other hand, only one Government delegate (that, however, of the most important maritime power at that time), the delegate of Great Britain, argued that the Washington Conference was not binding on the Genoa Conference. Commenting on the Preamble of the draft Convention on the Hours of Labour at the Genoa Conference in 1920, Sir Montague Barlow, the U.K. delegate, said that the questionnaire and the Report sent out to the Member States before the Washington Conference, as well as the Agenda of that Conference, referred only to land transport and omitted any reference to maritime transport. Moreover, the draft Report dated 18th August 1919, expressly stated that "commerce, agriculture and the sea services" and "other non-industrial employments have therefore not been enquired into by the Commission or dealt with by this Report".⁶⁹ He added that that it was unfortunate that Art. 1 (d) was inserted in the Hours Convention and concluded by giving an example of what might happen if at a meeting of the Conference, decisions on any topic, which fell within the competence of another special meeting of the ILO Conference, could be taken with binding effect.

It should be noted that the arguments of Sir Montague Barlow referred only to the question of the binding effect of the Washington decisions on the Genoa Conference and did not touch on the question of the application of Art. 427 to seamen. On the specific point, however, it was the most ingenious argument at the Conference and was contradicted by only one delegate and then only in part.⁷⁰

At the Washington Conference other Government delegates alleged that that Conference was not empowered to take any decision with regard to the maritime industry since the question of hours of work at sea was not dealt with in the report of the Organizing Committee (that Committee prepared the report for the Conference); the question was not included in the agenda of the Conference nor had any Government delegate at the Conference been instructed by his Government to express any opinion on it.⁷¹

The matter was not discussed further at the maritime sessions of the ILO Conferences where the question of the working hours for seamen was dealt with, namely in 1936, 1946 and 1958.

⁶⁹2 R.P. , p. 346.

⁷⁰For the discussion of this argument, see *infra* pp. 68-72. It should be noted that Sir Montague Barlow finally voted in favour of the Preamble since in his opinion the main difficulties with regard to the 8 hours principle came mainly from the operative part of the Convention.

⁷¹1 R.P. , pp. 117, 119, 120.

1.4.3. Analysis of the question concerning the application to seafarers of the "General Principles" of Art. 427 and the Washington Conference decisions and Conclusions

A distinction must be made between the two aspects of the question. First, whether the Genoa or subsequent maritime Conferences are bound by the Washington decision concerning the 8 hours a day and the 48 hours a week principle, and, second, whether Art. 427 point 4 applies to the seamen as a special category of workers. The second question could be subdivided into two further questions: a) Does the Preamble to Art. 427 apply to all workers and if so b) Does point 4 alone apply to all categories of workers and specifically to seamen?

1.4.3.1. The application of the Washington decisions to ILO Maritime Conferences

As to the first point, it is clear that the Genoa and, consequently, all the subsequent maritime conferences are not bound by the Washington decisions.

On 11 April 1919 at the Preliminary Peace Conference, a resolution proposed by Mr. Barnes, establishing an Organizing Committee entrusted with the task of preparing the agenda for the Washington Conference was adopted unanimously.⁷² According to the Annex attached to Chapter IV of Section I of the Treaty of Peace the first item on the Agenda of the Washington Conference was to be the Application of the Principle of the 8-hour day or 48-hour week. So the Committee sent a questionnaire to the Governments, since it wanted to consult them before drawing up the report to be submitted to the Conference. The Questionnaire did not mention the shipping industry. Of course, it was meant to apply to all industries and a comment in the Official Bulletin of the ILO says that "the term "industry" should be interpreted in its most general sense."⁷³ This, however, is merely a suggestion.

Art. 6 (a) and 7 (a) asked the Governments whether it was necessary to except from the 8 hours per day and 48 hours per week limit any industries, branches of industry or particular classes of workers. It was clear that the Report of the Committee to the Conference, which would constitute the mandate of the Washington Conference, would be based on the replies of the Governments. Thus, on the basis of their replies the Committee prepared its Report. Nowhere in the Report, in the conclusions of the Report or in the Draft Convention submitted to the Conference are seamen as a special category of workers mentioned.⁷⁴ On the contrary, the Report submitted to the 1919 Conference on the 8-hour day and 48-hour week principle it is stated: "Commerce, agriculture, and sea service, and other non industrial employments have, therefore, not been included into by the Committee or dealt with in its Report. It will be remembered that special proposals with reference to

⁷²*O.B.*, Vol. I, Apr. 1919-Aug. 1920, p. 301.

⁷³*Ibid.*, p. 355.

⁷⁴*Ibid.*, pp. 366-373.

agriculture and the sea service were made by the labor commission." ⁷⁵ On the other hand, the Report of the Chairman of the Organizing Committee noted that the report prepared by the Committee was the result of the replies of the Governments and it added that the Conference will decide on what matters it wishes to appoint a Commission to make a new report." ⁷⁶

In fact, a commission on the hours of labour was constituted at the Washington Conference and it decided to add, in Art. 1 (d) of the draft Convention, after the words "transport of passengers or goods by road or rail", the words "by sea or inland waterway" adding later another paragraph, namely that "Provisions relative to transport by sea shall be determined by a special conference on maritime employment". ⁷⁷ The Commission on hours of work could, according to the Chairman of the Organising Committee, make a new report to be presented to the Conference. What it could not do, it is submitted, was to include transport by sea in the Convention not so much because of the above mentioned statement (see above n. 75) in the Report of the Organizing Committee - since the assembly of the Conference could make amendments to the Organising Committee's draft provided they were in conformity with the Treaty of Peace and the language of the Agenda ⁷⁸ - but because the Commission on International Labour Legislation had adopted this resolution, namely that the special questions relating to seamen would be dealt with by a special maritime session of the Conference. This resolution was included in the Report of that Commission submitted to the Preliminary Peace Conference and this Report was adopted unanimously at the 35th meeting of the Conference. ⁷⁹ Thus, the consideration of questions relating to seamen were clearly outside the mandate of the Washington Conference.

It should be noted that the Right Hon. Mr. Barnes of the British delegation who played an important role in the drafting of the Treaty of Peace, was a member of the International Labor Commission, presented the report of the Preliminary Peace Conference, and drew the attention of the delegates, at the Washington Conference, to the question of agriculture saying that agriculture was different from other industries and could not be dealt with by the Conference, since no information had been made available upon which a Convention could be framed. This statement equally applies to seamen since the Organizing Committee expressly left out of its consideration the question of the application of the 8 hour day and 48 hour week principle. There were, however, other minor circumstances which made the inclusion in the Convention of a provision relating to seamen undesirable. The majority of the delegates at the Conference had no practical experience in maritime matters and they had not been instructed to deal with seamen's questions by their Governments. Again, it could prove very difficult for countries to ratify the adopted Convention if it included points not covered by

⁷⁵Emphasis added; League of Nations, Washington, 1919, *Report of the Organising Committee on the Eight-Hours Day or Forty-Eight Hours Week*, Item I of the Agenda, p. 4.

⁷⁶O.B., Vol. I, Apr. 1919-Aug. 1920, pp. 400-1.

⁷⁷I R.P., pp. 222-3.

⁷⁸See the ruling of the President of the Washington Conference, *ibid.*, p. 54.

⁷⁹O.B., vol. I, p. 222.

the Agenda, and on which the Governments had not been asked beforehand for their opinion.⁸⁰ This is why Mr. Barnes, said, after the Washington Conference, although this cannot be verified, that: "It is true that the Washington Conference affirmed the principle of an 8 hour day and 48 hour week. But as regards maritime labor this was traveling outside its mandate as laid down in its Agenda and Genoa is not bound thereby".⁸¹

Even if the Washington Convention were not bound by the Resolution adopted by the Commission on International Labour Legislation and nor were the regulation of seamen's problems outside its mandate, there are still other factors which weaken the effect of the inclusion in the Hours Convention of Art. 1 (d), which made this Convention applicable to transport by sea.⁸²

At the plenary sitting of the Washington Conference Arthur Fontaine (Government delegate of France) who was later to become for several years Chairman of the G.B. of the ILO), acting as the Reporter, presented the Report of the Commission on Hours of Work. When some difficulties arising from the inclusion in the text of transportation by sea were pointed out,⁸³ his reply was not satisfactory. Arthur Fontaine who was the Chairman of the Organizing Committee which prepared the Agenda for the Conference, must have realised the implications. He replied that the text merely stated a general principle, the application of which, with "the necessary exceptions", was left to a special conference. He thought that if transportation by sea were omitted, it would compromise the whole convention.⁸⁴ Hence, it was a question of "mere form", especially in the light of statements by the workers' representatives that they could not allow further concessions to the text of the Convention.⁸⁵ Fontaine thought that the principle could be applied to seamen if the necessary exceptions were basically provided in Arts. 4 and 5 of the Convention.

The Convention on Hours of Work relating to seamen was not adopted in 1920 since it did not receive the required two thirds majority of votes.⁸⁶ Since in 1926 the votes of the G.B. were equally divided (12 for and 12 against), the question was not put as an item on the agenda of the 1926

⁸⁰These difficulties were pointed out by many delegates at the Washington Conference, 1 *R.P.*, pp. 117, 119, 120.

⁸¹2 *R.P.*, p. 346.

⁸²In particular, the Commission on the Hours of Work, when it amended the Organizing Committee's draft, did not offer any lucid explanations for the inclusion in the Convention of a provision relating to seamen. The Commission's report to the Conference said that by including "transport by sea" an important limitation was added to the draft text: "Limitation of the hours of work on ships and boats is prescribed herein". The Commission then added another paragraph, namely that "Provisions relative to transport by sea shall be determined by a special conference on maritime employment". The words "shall be determined" might be regarded as being in contrast to the inclusion of transport by sea in the Convention; which makes it a provision of substantive law. This is why the Commission hastened to inform the Conference that its inclusion was only a question of confirming the principle: the application of the principle of the 8 hours a day and 48 hours a week to transportation by sea would still need to be considered at a special maritime meeting of the ILO Conference, 1 *R.P.*, p. 223.

⁸³See supra n. 80.

⁸⁴"Inasmuch as the omission suggested by Mr. Rowell i.e. that transport by sea or inland waterways really has no practical interest, since all details of adjustment are referred to a conference of specialists, I beg Mr. Rowell not to compromise the fate of our convention for the sake of mere form", 1 *R.P.*, p. 119. He added that exceptions have been included in the Convention on a wide and elastic basis, to make it generally applicable to industry, and acceptable to all interested concerned.

⁸⁵Ibid.

⁸⁶2 *R.P.*, p. 478.

Maritime Conference, and a resolution was passed which postponed any hopes of a final solution until 1928.⁸⁷ Since the Maritime Conference of 1929 could not decide the question, and only proposed draft conclusions that were to be examined by the next maritime Conference according to the double-discussion procedure, the first Convention on Hours of Work therefore, was not adopted until 1936 (17 years after the Washington Conference).⁸⁸ The subsequent developments in the field of working hours for seamen show that, at least in terms of ratifications, the 8 hours a day and 48 hours a week principle has had an unfortunate history.⁸⁹

Moreover, the consistently declining importance of the 8-hour day and 48-hour week for seamen⁹⁰ is evidenced by a) a comparison between the wordings of the Agendas of the Conferences on which the regulation of hours of work for seamen had been included as an item (in 1920, 1936, 1946, 1949 and 1958) which reveals that in later Conferences less importance was attached to the "principle" of the Washington Conference,⁹¹ and b) the fact that the Preamble of the 1920 Convention and the 1929 draft Conclusions differed considerably from that of the 1936, 1946 and 1958 Conventions, the later Conventions, unlike the first two, not even mentioning the 8 hours a day principle.⁹² Furthermore, the unqualified 8-hour day and 48-hour week have never been adopted by any ILO Maritime Conference and have been subjected to many restrictions.⁹³

Here it might be observed that the Washington Convention was meant to apply to the whole industrial world and, therefore, it was only a question of application of the principle by subsequent Maritime Conferences.⁹⁴ But, as pointed out above, agreement so to do could be obtained only if exceptions were allowed and application with many exceptions could undermine the principle itself, as has actually happened. Furthermore, the Washington Conference did not confirm the principle with regard to maritime labour; the inclusion of transportation by sea in Art. 1 (d) of the 1919 Convention was the outcome of a compromise.

⁸⁷9 *R.P.*, pp. 470-1, 611.

⁸⁸21 *R.P.*, pp. 151, 174.

⁸⁹See *infra* Chapter 4 where the question of hours of work is discussed.

⁹⁰Fontaine, who, in his inaugural speech as a President of the 1929 Conference, had suggested in 1919, as a reporter of the Commission on Hours of Work to the Washington Conference that application to transportation by sea should be retained in the Convention because otherwise the fate of the 1919 Convention would be compromised, tried to remove any doubts about the task of the 1929 Conference. To a certain extent, his explanations are worth mentioning because they show how time tends to modify original high expectations. He said, 10 years after the Washington Conference, that the text before the Conference had been framed in the very terms of the resolution adopted in 1926. It was no longer necessarily a question of the "application of the Washington Conference to seamen"; the debate was open without restrictions, and it would be the duty of the Conference not so much to adapt existing formulae as to try to find those points which can be recommended to Governments, as likely to give rise to practical solutions, representing a fair compromise between the interests and aspirations of those "concerned", 13 *R.P.*, p. 4. After 10 years it was clear that the 8 hour "principle" had been down-graded to a mere suggestion. The principle had lost its importance and many delegates at the Conference declined to make any reference to the Treaty of Peace and Washington Conference in order to reaffirm the 8 hours a day principle, *ibid.*, pp. 187, 204, 216.

⁹¹See *O.B.*, vol. I, pp. 517-8, 21 *R.P.*, pp. vi-vii, 28 *R.P.*, p. viii, 41 *R.P.*, p. vii.

⁹²See 2 *R.P.*, p. 587, 21 *R.P.*, pp. 238, 349, 28 *R.P.*, pp. 318, 382, 41 *R.P.*, p. 272.

⁹³For full details see Chapter 4.

⁹⁴See *supra* n. 63.

Thus, as had been established in the argument outlined so far, the Maritime Conferences were not bound to apply the principle adopted by the Washington Conference.⁹⁵ The conclusion reached, apart from its historical interest, has the practical result of freeing future Maritime Conferences of the restrictions imposed by the Washington Convention on Hours of Work.⁹⁶ This at least has the good effect of leaving to the delegations an area that remains open for further negotiation and discussion, rather than subjecting them to the yoke of a non-ratified principle. On the other hand, it has not been contended that general ILO standards should not exercise an influence over maritime labour standards; the 8 hour principle has admittedly exercised some influence, and has given a direction and served as a guide during the negotiations for the regulations of hours of work at sea.

1.4.3.2. The applicability of Art. 427 point 4 to seafarers

It should be noted from the outset that the question is only of theoretical interest, since shipowners and seamen have followed in practice their own independent path in their efforts to regulate hours of work at sea. It is not intended here to consider the legal effect of Art. 427; it seems clear that the Preamble of the ILO Constitution is binding upon the signatories, and it is this which defines the competence of the ILO.⁹⁷ On the other hand, Art. 427 does not prescribe the level of the competence of the Organisation; it simply enunciates several principles and methods through which the objectives set out in the Preamble of this Constitution could be attained. In its advisory opinion the P.C.I.J. said, dealing with the competence of the ILO with regard to the personal work of the employers, that "This Article (Article 427) in the view of the Court "does not define or limit the powers of the Organisation. It is merely a declaration of principles the enumeration of which is not claimed to be entirely complete or final." ⁹⁸

Interpretation of Art. 427 of the Treaty of Peace

Writers like Scelle distinguished between the Preamble of the Constitution, which in connection with Art. 387 defines the competence of the ILO and is obligatory, and Art. 427 which is merely a

⁹⁵For a different opinion, see Scelle, op. cit., pp. 267-9.

⁹⁶Confirming the conclusions reached above came the Report of the Resolutions Committee to the 55th maritime session of the ILO Conference held in 1970 on a resolution concerning Holidays with Pay for Seafarers. At its 54th session the Conference adopted a Convention on Annual Holidays with Pay (Revised) 1970 which excluded seafarers, 54 R.P., pp. 612, 632; it also adopted a resolution requesting the G.B. to invite the JMC to consider the question of the Holiday with Pay for Seafarers, in the light of the instruments adopted, *ibid.*, pp. 633, 673. The Resolutions Committee, at the 55th session of the Conference, dealt with the question of the applicability of ILO Conventions of general nature to seafarers and submitted its report to the Conference. Para. 25 of that Report said that "Seafarers from among both the Employers' and the Workers' members opposed the view which had been put forward at the Conference in June (54th session), that the standards adopted for workers generally could also be made applicable to seafarers. They referred to the historical mandate, dating back to 1920, which allowed for separate treatment of seafarers in international labour instruments; and they reaffirmed the special conditions of seafarers' life and work which made it inappropriate to apply the same standards to maritime workers, as those which apply to workers on land.", 55 R.P., p. 157.

⁹⁷Morellet, op. cit., p. 47, Jenks, op. cit., p. 175, Scelle, op. cit. pp. 33-4, Advisory opinion of the Court, no. 2, op. cit., pp. 27-29.

⁹⁸Advisory opinion of the P.C.I.J., Series B, no. 13, "Competence of the ILO to regulate, incidentally, the personal work of the employer", at p. 15.

list of principles. Although it is not disputed that Art. 427 cannot limit the competence of the ILO,⁹⁹ the legal effect to be given to that Article is not quite clear.

Art. 387 of the Treaty of Peace (Art. 1 of the Constitution) states that an organization is established for the promotion of the objects set forth in the Preamble. There is no reference to Art. 427 which in this way could have been made obligatory. Here it should be noted that after the amendments to the Constitution in 1946, whereby the Declaration of Philadelphia was included in the Constitution to replace Art. 427, Art. 1 of the Constitution (Art. 387 of the Treaty of Peace) expressly mentioned the Declaration, which thus became part of the Constitution.¹⁰⁰ Although Art. 387 did not mention Art. 427, it has been suggested that Art. 427 has the same force as any other article of the ILO Constitution because of the latter's position in the Constitution.¹⁰¹

The truth is that the legal effect of Art. 427 has never been cleared up in the Commission on International Labour Legislation for a variety of reasons. At its 30th meeting Barnes thought that the insertion of any principle in the labour clauses of the Treaty of Peace, would entail an immediate obligation to apply the principle, as soon as the signatories approved the Treaty. Baron Mayor de Planches had a different view, namely that the principles laid down in Art. 427 would apply only in accordance with the decisions of future Conferences.¹⁰² During the initial discussion the text before the Commission was different from the final version that emerged.¹⁰³ Mahaim argued that there were two parts in the Preamble which could not be disassociated from each other. According to the first part the Contracting Parties accepted the principles proposed; while in the second part, it was made clear that the details of the application of the principle should be laid down in future conferences. The Report of the Committee to the Preliminary Peace Conference stated, *inter alia*, that "... (the members of the Commission) confined themselves to principles, the resolution of which may be contemplated in the near future. It will be seen that the High Contracting Parties are not asked to give immediate effect to them, but only to endorse them generally. It will be the duty of the International

⁹⁹This was the thesis of M. de Lapradelle in presenting his arguments before the PCIJ, when the latter considered the question of the competence of the ILO in matters of agriculture, which was rejected by the Court, Advisory opinion, No. 2, op. cit., p. 33; see also Hiitonen, op. cit., pp. 107-8, Troclet, op. cit., p. 451.

¹⁰⁰For the Declaration of Philadelphia and its effect on the competence of the ILO, see Troclet, op. cit., pp. 445-483, particularly pp. 445-451 and Valticos, op. cit., pp. 77, 190-4.

¹⁰¹Hiitonen, op. cit., p. 106; he said: "Je ne vois pas cependant par quel motif formel et juridiquement acceptable l'on pourrait étayer une telle opinion (that Art. 427 does not have the same legal value as other articles) puisqu'il s'agit ici toujours de diverses parties d'un même traité dans lequel il n'est jamais expressément indiqué qu'il faille nécessairement établir des différences de valeur" and in footnote 3 he added: "Notons à ce propos que la dite déclaration est en réalité comprise dans la partie XIII et cela de telle manière que le premier titre est ainsi conçu: "Section I, Organisation du Travail", ce qui laisse supposer un complément que l'on trouve aussi dans le titre de l'article 427, ainsi conçu: "Section II, Principes généraux", ce qui indique, sans doute, que les principes du dit article sont étroitement liés avec la section première". See also Troclet, op. cit., p. 451 "Ainsi donc l'article 427 (a. 41) faisait partie du texte comme la Déclaration de la Philadelphie".

¹⁰²O.B., vol. I, pp. 196-198 and 200 respectively.

¹⁰³The latter stated that "High Contracting Parties declare their acceptance of the following principles and engage to take all necessary steps to secure their realisation in accordance with the recommendations to be made to the international labour Conference established under the treaty as to their practical application."

Labour Organisation to examine them thoroughly and to put them in the form of recommendations or draft conventions elaborated with the detail necessary for their practical application." ¹⁰⁴

At the Plenary sitting of the Preliminary Peace Conference on 28th April, 1919, Sir Robert Borden of the British delegation proposed as a compromise an amended draft of the nine Principles to be included in Art. 427. He added: "I may say in the first instance of this ... that there are no alterations of substance as I understand." His view was supported by another delegate at the Conference. ¹⁰⁵

Leaving aside the argument, that the term "industrial wage earners" used in the Preamble to Art. 427 does not refer to seamen (which would be in contrast to the PCIJ's wide interpretation of this term in its advisory opinion on the agriculture ¹⁰⁶) it must be recognised that, despite statements to the contrary, the new wording of the Preamble of Art. 427 had a weakening effect. First, there was a reference to the differences prevailing in different countries making "strict uniformity in the conditions difficult of immediate attainment." Secondly, speaking of the principles, the Preamble suggested that "all industrial communities should endeavour to apply them and then only "so far as their special circumstances will permit." Thirdly, these principles, which were not complete or final only "will confer benefits upon the wage-earners of the world *if* adopted." ¹⁰⁷ This means that it was considered that the principles would not be adopted either. That is why Shotwell, while admitting that in the first draft some legal obligations, as some Members of the Commission thought, would be involved, commenting on a first draft of the Borden amendment, phrased in almost identical language to that finally adopted, said: "It will be noted that in this draft the points, to some extent, lose their individual character, while such legal obligation as was involved in the preamble adopted by the Commission is replaced by a kind of confession of faith, so admirably worded, however, that it gives the impression of strengthening the binding effect which in fact it destroys." ¹⁰⁸

Conclusions

Thus, there are doubts about the exact legal effect of the Preamble of Art. 427. ¹⁰⁹ The situation is aggravated by the fact that, as pointed out earlier, the Commission on International Labour Legislation adopted a resolution that the very special questions relating to seamen's affairs would be dealt with at special maritime sessions of the ILO Conferences. ¹¹⁰ The first point, therefore, is that

¹⁰⁴*O.B.*, vol. I, p. 268.

¹⁰⁵*Ibid.*, pp. 306-7.

¹⁰⁶Advisory opinion (PCIJ) No. 2, op. cit., p. 33, Guereau, op. cit., p. 246.

¹⁰⁷Emphasis added.

¹⁰⁸Shotwell, op. cit., pp. 189, 214.

¹⁰⁹Some Members of the Commission were of the opinion the questions relating to seamen were delicate and they were not competent to deal with them; they should be considered by specialists.

¹¹⁰At the 3rd (general) session of the Conference in 1921, in the Maritime Committee which was appointed to deal with the maritime questions on the Agenda, General Baylay, the U.K. employers' delegate, proposed a resolution concerning the future procedure to be followed by the ILO in regard to maritime questions, see ILO, 1921 Conference Committees, Committee on Maritime Questions. Insert "resolution presented by General Baylay" attached to the Report of the Committee to the Conference. This resolution slightly amended, was adopted on 10th November 1921 and it reads: "Seeing that misunderstanding may arise as to the position of those employed in the mercantile marine with re-

though this Preamble was theoretically and grammatically sufficiently comprehensive to deal with all classes of workers, it might be said that in fact the regulation of seamen's problems was outside the contemplation of Members of the Commission.

The second point relates to the question concerning the application of the 8 hour-principle to maritime labour. It is true that the wording of Art. 427 is very comprehensive and at first sight it appears to include seamen. On a literary interpretation of the text, which is that used by the PCIJ in his opinion on the agriculture,¹¹¹ seamen are included. If we interpret the text in the historical context¹¹², however, they might be excluded because their case was expressly excluded from the consideration of the Committee. So the Court's opinion that the above mentioned extracts apply to agriculture might not fit the case of seamen because an application of modified principles ("as far as their special circumstances permit") presupposes non-exclusion from that application. As far as the 8-hour principle is concerned, it is not clear from the Court's opinion whether all the principles must be applied to all particular fields of labour.¹¹³ Again these principles are neither complete nor final.¹¹⁴ Thus, even if seamen were included in the Preamble,¹¹⁵ there could be another principle applicable to them which is not expressly stated.¹¹⁶

Apart from the above mentioned resolution, adopted by the Commission, no other reference to seafarers is to be found in the minutes of the proceedings of the Commission. This could be attributed either to the express exclusion of seamen as a particular category from the consideration of the Commission, thus leaving future Conferences to regulate relevant matters, or the conviction that seamen were included anyway. The latter view, though possible, is not backed up by the Commission's proceedings, especially in the light of the extensive discussions of the question of agriculture.

gard to Conventions and Recommendations to be passed by the International Labour Conference, it is hereby resolved that no such Conventions or Recommendations shall apply to those employed in the mercantile marine unless they have been passed as a special maritime question on the agenda. All questions on maritime affairs put forward for consideration by conferences should be previously considered by the Joint Maritime Commission of the International Labour Office", 3 R.P., pp. 264, 868. For a discussion of this resolution, see *ibid.*, pp. 262-3. It was pointed out by one delegate that the phrase "maritime affairs" would include questions of emigration. The comprehensive wording seems to mean that all questions relating to shipping, whether they relate to employment or not, should be referred in this way.

¹¹¹Advisory opinion, No. 2, op. cit., 31, 33. It should be noted that the Court dealt with the question of the competence of the ILO and not with the question of the applicability of the principle of the 8 hours day to agriculture. It had to deal with it in a roundabout way, since Art. 427 had been put forward as limiting the competence of the ILO, because the 8-hour principle included therein was not specifically applicable to agriculture. The Court also said that any argument used for the exclusion of agriculture from the competence of the ILO could be used "with equal force" for the exclusion of navigation and fisheries, *ibid.*, p. 41. This, of course, was an *obiter dictum*.

¹¹²de Reiterskjold, op. cit., p. 365 "If faut cependant souligner encore, que "le sense exact des termes" ne peut être trouvé que dans l' aspect de l' hypothese fondamentale de la partie XIII du traité".

¹¹³Advisory opinion, No. 2, op. cit., p. 33.

¹¹⁴O.B., vol. I, pp. 306-7.

¹¹⁵It is not disputed that the whole ILO Constitution does not apply to seamen. It should be noted that the case of seamen was discussed in the Commission on International Labour Legislation only in connection with the Labour Clauses of the Treaty of Peace.

¹¹⁶In this context it should be noted that all the proposals, mentioned earlier, which were put forward before the Commission for consideration, dealt with the 8-hour principle and they contained a special provision relating to seamen and made reference to a future international seafarers code to be established, totally unconnected to the 8-hour principle.

If the members of the Commission thought that seamen were included then it would have been expected that nice points relating to the application of the 8-hour principle to seamen would have been raised, as they were in relation to agriculture and commerce.¹¹⁷

The inclusion of the Declaration of Philadelphia which replaced Art. 427 in the Constitution of the ILO had had an expansionary effect on the competence of the ILO *rationae personae et rationae materiae*.¹¹⁸ The wording of this Declaration does not leave any doubts concerning the wider competence of the ILO (it refers to "all human beings"). Seamen are certainly included, but the arguments in favour or against the application to them of the Art. 427 principles cited above still hold.

In conclusion, we have shown in this section that the ILO has undoubted competence with regard to maritime labour, but the 8-hour principle does not have any binding force either by means of the Washington principle nor, presumably, by means of Art. 427.

1.5. The ILO and the International Seamen's Code

1.5.1. The establishment of an International Seamen's Code (ISC)

Historical review

The Genoa Conference in 1920 dealt with the possibility of drawing up an international seamen's code and adopted a Recommendation suggesting that national collections of laws and regulations relating to seamen should be undertaken in order to facilitate the establishment of an international code for seamen; and a Resolution was adopted urging the ILO Office to make the necessary investigations relating to the establishment of an international seamen's code and to report on the progress of its work not later than 1921.¹¹⁹

The Commission on the International Seamen's Code appointed by the 1920 Conference decided that for the purpose of the Report which it was to prepare, the term "seamen's code" would be used to mean "the whole of the laws and regulations dealing with the conditions and position of seamen as such."¹²⁰

The codification of seamen's law which would reflect the maximum of regulations common to "numerous" countries would contribute to the uniformity of law relating to seamen and would facilitate the movement of seamen as an international community all over the world. Since many countries would commit themselves to the implementation of the ILO standards international competition would be expected to diminish. The Commission did not attempt to examine the question whether the International Seamen's Code should be embodied in one instrument, or, whether special codes - on partic-

¹¹⁷As to the problems caused by the inclusion of the word "commerce" in the 8 hours a day principle, see *O.B.*, vol. I, pp. 159-160, 196, 219-220.

¹¹⁸See *supra* n. 100.

¹¹⁹2 *R.P.*, pp. 162-173, 547-566, 594.

¹²⁰*Ibid.*, p. 550.

ular topics - should be elaborated. Subsequent history shows that special instruments have been adopted to deal with particular questions seamen's affairs.¹²¹

The nature of the ISC

A question to be asked is what is the object of the ISC: is it supposed to codify existing laws relating to seamen, or to incorporate provisions constituting in certain respects an improvement on the existing regulation. The answer of the Commission on the establishment of an ISC to that problem was not clear; it said that by using the term "the collection of laws and regulations dealing with the conditions and positions of seamen as such, which it may be possible for the various maritime countries of the world to adopt as a common and uniform body of international seamen's law" was implied.¹²²

The matter was discussed in the first session of the JMC and at the 1926 Conference when the question of seamen's engagement was discussed. Based on the replies of the Governments to an ILO Questionnaire concerning the question of the international codification of the rules relating to seamen's articles of agreement, the ILO Office was, finally, obliged to remark that "in certain respects, no doubt, it may be thought a matter for regret that the idea of a code dealing with the engagement of seamen has had to be relinquished".¹²³

Following the adoption of a resolution by the 1976 Conference which asked the G.B. to instruct the Director-General to prepare and publish, after consultation with the JMC, first a compilation of up-to-date maritime labour instruments which could be applied in different countries by means of national legislation, collective agreements or practice and, secondly, a compilation of codes and practices which would serve as models for legislation and would not create binding obligations, the JMC, at its 23rd session, had as the 3rd item on its Agenda "the consideration of an international seafarers' code and of model legislation concerning seafarers".¹²⁴ The JMC document contained the substance

¹²¹A new era for ILO drafting techniques began in 1976 with the adoption of the Minimum Standards Convention No. 147 and the relevant Recommendation No. 155 concerning the improvement of standards in merchant ships. Until then only single instruments had been adopted by ILO Conferences. For the first time, in the Appendices to Convention No. 147 and Recommendation No. 155 a number of instruments were listed (most of them maritime). Again, at the 74th session of the ILO Conference in 1987 Convention No. 165 (1987) concerning Social Security Protection for Seafarers (Revised) was adopted. This Convention, by incorporating social security standards included in many ILO Conventions of a general nature, further develops the idea of an International Seamen's Code, thought on a smaller scale (in the field of social security for seafarers). For all the above instruments see Chapters 5 and 6.

¹²²*R.P.*, p. 551.

¹²³ILO Conference, 9th session, 1926, *Report I on the international codification of the rules relating to seamen's articles of agreement*, p. 186. Despite the fact that the preparatory work of the Office was aiming at a general codification of rules to be contained in one single instrument, the Office decided to tackle the question in three instruments, a Convention concerning articles of agreement, a Convention concerning repatriation and a Convention concerning disciplinary and criminal penalties. For the history of, and the problems which had arisen in relation to, this question see ILO Conference, *Codification of the rules relating to seamen's articles of agreement*, 1925, Questionnaire I, 25 *G.B.*, pp. 25, 27.

¹²⁴JMC/23/3 (a) and 23/3 (b).

of 26 Conventions and 21 Recommendations which, according to the in-depth review undertaken by the G.B. and completed in 1979, represented current ILO maritime standards.¹²⁵

Recently, in 1983, under the auspices of the ILO, a book containing these Conventions and Recommendations was published under the title "Maritime Labour Conventions and Recommendations";¹²⁶ this gives the substantial provisions of the ISC.

Conclusions

According to some ILO delegates, one of the aims of the ISC was, as pointed out earlier, to reduce international competition. However, as will be seen in Chapter 7, this cannot be the primary aim of the ILO which is rather the establishment of uniform protective social standards for seafarers at the international level. In any case, there is no evidence that competition in the shipping industry has been reduced as a result of the adoption of ILO Conventions and Recommendations. As regards the development of the ISC, it must be said that it is no longer based on a theoretical rationale. The instruments adopted since 1926 have not always been aimed at, or had the effect of, codifying as well as improving seamen's standards nor have economic factors, such as international competition, been taken into account in framing the relevant instruments. In many instances, the adoption of the instruments concerned was rather the outcome of long deliberations of shipowners, seafarers and governments, each group trying to impose its own opinions. As will be seen in later chapters, the development of voting tactics in the Conference resulted in the adoption of provisions which, sometimes, did not codify existing law nor did they mark an improvement in the regulation of seamen's affairs.¹²⁷

Nowadays the ISC can be conceived as a broad term which contains instruments not only dealing with labour questions but also embodying principles concerning safety matters. Convention No. 147, in this context, illustrates the close link between labour and safety matters which is also reflected in the joint deliberations (through the Joint ILO/IMO Committee) and the close co-operation that exists between the ILO and the IMO. As a result of common action by the two organisations towards an improvement of standards safety at sea, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers was signed in London on 7 July 1978. Its objective is to improve safety at sea through a set of minimum standards for training of masters,

¹²⁵Four Conventions of a general nature were included in this compilation: These are Conventions Nos. 87 (Freedom of Association, and Protection of the Right to Organise, 1948); 98 (Right to Organise and Collective Bargaining, 1949); 130 (Medical Care and Sickness Benefits, 1969) and 138 (Minimum Age, 1973). Following the adoption of Convention No. 165 (1987) concerning Social Security Protection for Seafarers (Revised), Convention No. 130 does not have the same significant status in the ISC as it used to have before 1987. The above Conventions apply to all workers and are considered to form part of minimum maritime standards.

¹²⁶ILO, *Maritime Labour Conventions and Recommendations*, Geneva, 1983.

¹²⁷The question of wages, hours of work and manning represents a prime example of lack of concerted action in dealing with seamen's problems. For this question see *infra* Chapter 4.

officers of the deck, engine and radio departments, and of ratings forming part of a navigational or engine-room watch.¹²⁸

Hence, the term "International Seafarers' Code" implies a comprehensive set of standards for the improvement of conditions of employment on board ship and of safety of life at sea. However, safety questions can only constitute a part of the Seafarers' Code in so far as they affect seamen's conditions of employment and seamen's safety at sea.¹²⁹ Related matters, such as passengers' safety and technical matters concerning safety come within the sphere of other international organisations like the IMO.

1.5.2. Procedural difficulties at ILO Maritime Conferences

One or two procedural problems have arisen at maritime sessions of the ILO conference, which have taken up some of the Conference's time.

The first was related to the desire that maritime questions should be dealt with by persons who had wide maritime experience. It was pointed out that the maritime character of the Conference otherwise would be impaired, as the maritime Conferences were attended by a large number of delegates who had no knowledge of maritime matters. Some of them were delegates at ordinary sessions. The problem was solved when special (maritime) sessions of the ILO Conference began to be held at different times of the same year in which ILO Conferences of a general nature were held.

The second question concerned the interpretation of Art. 389 (3) of the Treaty of Peace. It stated that "The Members undertake to nominate non-Government Delegates and advisers chosen in agreement with the industrial organisations if such organisations exist, which are most representative of employers or work people as the case may be, in the respective countries". It was argued before the Credentials Committee at the 1926 Conference that the fact that a resolution was adopted by the Commission on International Labour Legislation to the effect that questions relating to seamen should be considered by special maritime conferences would lead to the following interpretation of the above Article, viz, "... the non-Government Delegates should be appointed, in view of the special nature of maritime affairs, in agreement with the most representative occupational organisations directly concerned in maritime affairs;"¹³⁰

The majority of the Committee did not share this view. Art. 389 (3) did not impose any obligation on governments to consult organisations of special categories of mariners. On this the G.B. on 25 March 1920 adopted a resolution providing that it would be advisable that, at special sessions of the Conference, non-Governments Delegates should be chosen by agreement with employers and

¹²⁸For a detailed analysis of this Convention see *infra* Chapter 3, 3.2.4; 3.2.5.

¹²⁹Compare Convention No. 134 concerning the Prevention of Occupational Accidents to Seafarers, 1970. For the fuller details on the question of safety in the ILO Maritime Conventions and, especially, in Convention No. 147 see *infra* Chapters 4 and 6, Subsections 4.1.5.3.4. and 6.1.2.

¹³⁰9 *R.P.*, Appendix I, 2nd Report of the Credentials Committee, pp. 422-432, at p. 428.

workers associations most representative of all sections of the industry. In addition, Art. 389 (3) provided for technical advisors whom a delegate could consult, if he had no knowledge of maritime affairs. Furthermore, the Committee was of the opinion that the resolution adopted by the Labour Commission was nothing more than a resolution, and in any case it was not clear from the language of the resolution that there should be special representation of seamen's organisations.¹³¹

The authoritative view of the Director General dispelled any doubts concerning the duties. He quoted an extract of the letters sent to Governments which would be represented at the Maritime Conference in 1929.¹³² These letters, which represent the ILO Office's views on this matter, show that the Governments, in consulting the most representative central and not maritime organisations, were in conformity with Art. 389 of the Treaty. It is clear from the wording of these letters that the Governments were not obliged to follow the procedure mentioned therein.

Thus the 1929 Conference confirmed the principle that Governments were obliged under the terms of Art. 389 to consult central organisations and if they thought it desirable they could ask associations of shipowners and seafarers' organisations to express their opinion.¹³³ Nevertheless, in view of the increasing complexity of shipping questions in recent times, it seems desirable that Governments request organisations acquainted with shipping matters to express their opinion before they nominate delegates to the Conference. As a last resort, experts in maritime matters could be appointed as technical advisors to delegates nominated by Governments, who have no first hand knowledge of seamen's affairs.

1.6. The ILO and the adopted criterion of the ship's registration

¹³¹Ibid., pp. 422-427. For a further discussion of this problem see *ibid.*, pp. 142-155, 364-377, 500-502, 13 *R.P.*, pp. 30-75, 312-3, Scelle, *op. cit.*, p. 158, *I.L.R.*, Vol. XIV, no. 4, Oct. 1926, pp. 509-512, Vol. XXI, no. 1, Jan. 1930, pp. 2-6 and Vol. LXXVIII, no. 5, 1958, pp. 433-436.

¹³²They read as follows: "At its fortieth Session the Governing Body had under consideration the question of the representation of the employers and workers at the Thirteenth Session, in view of its exclusively maritime character. While it was recognised that the provisions of the Peace Treaty concerning the method of appointing employers' and workers' delegates and advisers to a Session of the Conference applied to a special maritime Session under the same conditions as to an ordinary general Session, it was urged that it would be desirable that the composition of the Thirteenth Session should correspond with its special character. The Governing Body accordingly desired me to draw special attention to the exclusively maritime nature of the Agenda of the Conference, and from the standpoint of the practical and successful results of the Conference to suggest that in following out the procedure laid down by the Peace Treaty, the Governments should draw the attention of the most representative employers' and workers' organisations to the desirability of nominating their representatives with special regard to their competence on maritime subjects"; 13 *R.P.*, p. 61.

¹³³The question has not given rise to any practical difficulties since then, but for the first time at a maritime conference, in 1929, the double-discussion procedure was introduced. The 1929 Conference could not, therefore, decide any question concerning maritime labour; it proposed draft conclusions to be discussed at a subsequent maritime Conference. The war, which affected shipping, and lack of agreement between the seafarers and shipowners during the deliberations at the JMC, made it impossible to convene the next maritime Conference before 1936. The shipowners were of the opinion that a Conference consisting of maritime experts should be convened to discuss the 1929 proposals. They suggested that a tripartite technical meeting should be held to consider the draft conclusions adopted in 1929, before these were presented to the maritime session of the Conference. On the other hand, the seafarers wanted to have these matters dealt with at either a maritime or a general Conference, as soon as it could be arranged. All these incidents led to the establishment of the Preparatory Technical Maritime Conference in 1935; see *O.B.*, Vol. XV, pp. 143-4. Since then, the PTMC has been an indispensable element for the procedures leading to the adoption of maritime labour standards. It has held six sessions until now (in 1935, 1945, 1956, 1969, 1975 and the last in 1986).

All ILO conventions relating to the seamen's affairs apply to ships registered in the territory of a ratifying country. Thus, the criterion used is that of registration and it is the law of the country in the territory of which the ship concerned is registered that will apply in a legal dispute involving seamen's questions.¹³⁴ While it is not intended in this section to examine the question of flags of convenience or of the nationality of ships,¹³⁵ the possibilities open to drafters of ILO instruments will be examined with a view to adopting a more efficient formula concerning the applicable law in the light of recent developments in the law of ship's registration.

1.6.1. The history of the question within the ILO

The question as to which criterion should be employed to define the ships to which ILO Maritime Conventions apply, has been discussed within the ILO forum on various occasions.

1) At the Committee on Hours of Work and Manning appointed by the 1936 Conference, it was pointed out that the question of supervision was connected with the criterion employed in the Convention for defining the ships to which the Convention was applicable. It was decided that the criterion in the 1936 Convention on Hours of Work and Manning should be registration in a territory for which the Convention is in force. The criteria of nationality and the flag were rejected by the Coordination Committee appointed by the 1936 Conference to study the question. Interestingly, another criterion was approved by this Committee but was not included in any Convention adopted in 1936 or later, namely that the Convention should apply to "all persons employed on any vessel".¹³⁶

2) Similarly, in the Committee on Holidays with Pay for Seafarers appointed by the Conference at its 62nd session in 1976 Algeria stated that the proposed Convention should, *inter alia*, also apply to seafarers who were nationals of countries which had ratified the Convention but who worked on board ships registered in countries which had not ratified the Convention. This proposal was not adopted.¹³⁷

3) At the 62nd session of the ILO Conference in 1976 the Office again rejected the flag criterion proposed by the F.R.G. which thought that it was in conformity with the HSC and the IMO Conventions. The Office said: "The Federal Republic of Germany has made several observations on the text on this Point. As regards the change from the expression "registered in its territory: to the expression "flying its flag", the Office observes that the former expression has been consistently used in

¹³⁴In the instrument of ratification of the 1936 Convention on hours and manning this criterion was construed by the U.S. Government as including "all vessels of the United States as defined under the laws of the United States", *O.B.*, Vol. XXIII, p. 134.

¹³⁵For fuller details see Chapter 6.1. The pioneering works of B. A. Boczek, *Flags of Convenience, An International Legal Study*, (1962) and H. Meyers, *The Nationality of Ships*, the Hague, 1967 remain unsurpassed in their respective areas although the two writers disagree on many important points.

¹³⁶21 R.P., p. 211. The criterion of "all persons employed on any vessel" appears in Art. 1 (1) of Convention No. 8 concerning Unemployment Indemnity in Case of Loss or Foundering of the Ship.

¹³⁷62 R.P., p. 164.

a number of ILO instruments. There would seem to be advantage for the ILO to follow consistent practice in this connection".¹³⁸

4) At the Committee on Repatriation appointed by the 1987 Conference, an amendment was moved by the Government delegate of Poland to the effect that the words "or is flying the flag" should be inserted after the words "Convention applies to a ship registered in the territory". He was concerned that the original text would not cover bareboat charters. He was supported by the Government of Turkey. Many Governments were uncertain about the effect this amendment would have on the Convention on Repatriation. The Government delegate of Liberia pointed out that according to UNCLOS III, the responsibility for social matters concerning the ship lay with the flag State, which necessarily implied its registration there. He did not see how, in the case of dual registration, any State other than the flag State could exercise effective jurisdiction and control under the proposed ILO instrument. On the other hand, the position of non-metropolitan territories which maintained separate registries from those of the metropolitan territory and which flew the flag of that State, but to which the Convention might be extended were the amendment adopted, was troublesome to the Governments of Netherlands and the U.K. The views of the Workers' and the Employers' groups were mixed. It was decided that a working group should be set up to study the question. It recommended that the words "and is flying the flag" should be inserted after the words "ship which is registered in the territory". Finally, the Workers stated that they preferred the *status quo*; since there was no time to assess the possible implications of the insertion of these words in the Convention. The amendment was not adopted.¹³⁹

5) The question of the criterion applicable to the delimitation of the scope of ILO Conventions was discussed to some extent in the Co-ordination Committee appointed by the ILO Conference at its 21st session in 1936 to study the question. The Committee was of the opinion that in the case of international conventions which impose on ratifying countries obligations of a regulatory character and require regular State supervision uniformity was desirable. This uniformity could be achieved only through the criterion of registration.¹⁴⁰

¹³⁸International Labour Conference, 62nd (Maritime) Session 1976, Report V (2), *Substandard Vessels, Particularly Those Registered under Flags of Convenience*, p. 41.

¹³⁹74 R.P., pp. 15/2-15/3.

¹⁴⁰The criterion of nationality was rejected, *inter alia*, because it was too vague and confusing. It was also pointed out that "nationality of the ship ... is not the criterion which determines the jurisdictional rights of States over conditions of employment on board, and that the criterion defining the obligations to be assumed by States must necessarily correspond with that which, under general rules of international law, delimits the extent of their powers of control"; W. Jenks, "Nationality, the Flag and Registration as Criteria for Demarcating the Scope of Maritime Conventions", *Journal of Comparative Legislation and International Law*, Vol. XIX, Third Series, 245-252, at p. 249. The Committee felt the same results could be achieved through the criterion of registration and that of the flag but concluded, relying on a document prepared by the Permanent Committee on Ports and Maritime Navigation of the Advisory and Technical Committee for Communications and Transit of the League of Nations and entitled "Comparative Study of National Laws governing the Granting of the Right to fly a Merchant Flag", that it is the general practice of States that the right to fly a flag depends on prior registration; moreover, the flag criterion would cause difficulties in the case of ships flying the flag of the metropolitan territory but registered in non-metropolitan territories to which application of ILO Conventions is qualified. The criterion of registration despite some disadvantages (no requirement for registration of small vessels; issue of temporary national certificates for ships built of

1.6.2. Rules of customary law concerning criminal and civil jurisdiction over acts occurring on board ships on the high seas

It is beyond question that the flag State has jurisdiction over merchant seamen employed on board ships flying its flag as regards acts concerning their civil status, i.e. births, marriages, wills, civil contracts, etc. Also, the master, as representative of the flag State authorities on board ship is entrusted with the necessary powers to maintain discipline on board.¹⁴¹ As regards crimes committed on board ship on the high seas, the flag State is competent to decide the relevant cases and it also has primary jurisdiction in cases where a crime was committed by a foreign seaman. But this jurisdiction does not exclude a concurrent jurisdiction by the courts of the offender's nationality, especially if the offender has fallen into the hands of the authorities of his own State. Despite the *Lotus* case there is considerable opinion in favour of the view that "jurisdiction in respect of crimes committed on board merchant vessels on the high seas is primarily vested in the Courts of the flag-State of the vessel, but that such jurisdiction is not exclusive and that the State whose national is accused of a crime on board a foreign ship is competent to try him when he is within its jurisdiction, although such jurisdiction is not generally exercised".¹⁴²

As regards jurisdiction over civil actions on the high seas, this is primarily vested in the authorities of the flag State. Although this is not a legal rule as regards foreign nationals employed on board ship, usually jurisdiction is not asserted by other countries in respect of questions of maritime employment involving such nationals.¹⁴³

As far as the rights and duties of the flag State in respect of ships flying its flag on the high seas are concerned, it is agreed that customary law imposes on it the obligation to ensure, within the bounds of reasonableness, that ships under its flag maintain lawful conduct at sea and that the necessary machinery is created for adequately dealing with violations of such conduct.¹⁴⁴ In the context of maritime labour this general opinion poses insoluble questions: does disregard of national or international labour standards constitute unlawful conduct? Have certain international labour standards passed into customary law? If a FOC country or a country which possesses substandard vessels has

purchased abroad; establishment of registers of traditional maritime countries outside their own territory) was preferred; *ibid.*, pp. 250-252.

¹⁴¹J. Colombos, *The International Law of the Sea*, 1962, p. 263, 273; H. Meyers, *op. cit.*, p. 110.

¹⁴²Colombos, *op. cit.*, p. 282; see for discussion, *ibid.* pp. 274-282; see also R. Rienow, *The Test of the Nationality of a Merchant Vessel*, 1937, pp. 189-193, 211-3. For a different opinion see Meyers, *op. cit.*, at p. 48: "Jurisdiction and competence are exclusive, alternative (priority given the state first adjudicating), and in a particular sense possibly cumulative, but never concurrent". MacDougal and Burke, in a more sweeping interpretation of the relevant customary law, state that all matters relating to the public order of the ship (discipline of the crew and control of the passengers, including criminal offences) jurisdiction is vested with the flag State; MacDougal and Burke, *The Public Order of the Oceans*, 1962, pp. 1092-1094.

¹⁴³Colombos, *op. cit.*, pp. 284-5.

¹⁴⁴Meyers, *op. cit.*, pp. 110-3.

passed protective maritime labour laws and has established national machinery for the prevention of their violation (we are concerned here with violations of maritime labour standards occurring on the high seas) but its ship-users never call at national ports and the availability of inspectors abroad is limited for financial or other reasons, has the State concerned acted reasonably?

As regards the first two questions, it seems that certain international maritime labour standards have passed into customary law, such as some provisions concerning minimum age, medical examination of young persons, and concerning seamen's welfare. However, as is indicated in later Chapters, the most important provisions of the ILO instruments, such as those concerning manning, wages, hours of work and social security, have not been followed uniformly in state practice.¹⁴⁵ As regards the last question, it seems that, to the extent that the State concerned has passed maritime labour legislation and has established the necessary machinery, it has discharged its duties under customary law; the fact that its ship-users behave unlawfully is not a decisive factor.¹⁴⁶ In conclusion, it is beyond doubt - and malpractices on board FOC and substandard vessels support this view - that international maritime labour standards cannot be adequately protected by customary law and some kind of special international treaty is necessary to protect seamen at the international level. These treaties, namely ILO Conventions and Recommendations, will be examined in the following chapters but first an examination of the relevance of the UN's Law of the Sea Conventions to maritime employment is attempted below and their effectiveness in this respect is briefly assessed.

¹⁴⁵This thesis does not attempt to answer, for reasons of space, the question whether certain provisions of national laws concerning maritime employment have passed into customary law independently of ILO Conventions.

¹⁴⁶Meyers, *op. cit.*, p. 111. However, it might be that the country concerned has not discharged its obligations under HSC 5. For the concept of the "genuine link" see *infra* Section 1.6.3.

1.6.3. UNCLOS I and UNCLOS III: The failure to establish an effective "genuine link"

In the High Seas Convention adopted by the United Nations Conference on the Law of the Sea in 1958 and in the 1982 Convention adopted by the UNCLOS III there are a number of provisions concerning the so-called question of the "genuine link" between a vessel and the flag it flies: ¹⁴⁷

i) Art 4 of the HSC (UNCLOS III 90) provides that "Every State, whether coastal or not, has the right to sail ships under its flag on the high seas" and

ii) Art. 5 (1) of the HSC lays down that "Each State shall fix the conditions ¹⁴⁸ 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. ¹⁴⁹ There must exist a genuine link ¹⁵⁰ between the State and the ship; ¹⁵¹ in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and *social* matters over ships flying its flag". ¹⁵²

iii) Art. 5 (2) of the HSC (UNCLOS III 91 (2)) stipulates that "Each State shall issue to ships which it has granted the right to fly its flag documents to that effect". ¹⁵³

¹⁴⁷For the elaboration on the concept of the "genuine link" attempted in Recommendation No. 108 see *infra* Chapter 6, Section 6.1.1.

¹⁴⁸However, these conditions are not prescribed by the Convention.

¹⁴⁹The wording of this sentence is said to reject registration as conclusive evidence of nationality; MacDougal and Burke, *op. cit.*, p. 1061, n. 78.

¹⁵⁰Compare the more precise French text "lien substantiel".

¹⁵¹But a proposal in the ILC to the effect that "Nevertheless, for the purposes of recognition of the national character of a ship by other states, there must exist a genuine link between the State and the ship" was rejected by the Conference as offending the principle of national sovereignty; see for the old Art. 29 of the Commission draft and for the relevant discussions International Law Commission, Yearbook, 1956, Vol. I, pp. 69-72, Vol. II, pp. 259-260. It should be noted in this connection that the early proposals before the ILC viewed the concept of the "genuine link" as a recognition of the national character of the ship in connection with nationality of the owners, the nationality of the captain and the crew and the place of domicile or residence of the persons who owned the ship; see Meyers, *op. cit.*, pp. 207-211; see for texts and discussion, ILC, Yearbook, 1955, Vol. II, pp. 22-23, 1956, Vol. I, pp. 36-8. Accordingly, "there can be a ship owned by foreign nationals and yet fulfilling the criterion of the genuine link as laid down in Art. 5 of the Geneva Convention of the High Seas"; N. Singh, "Maritime flag and State responsibility", in J. Makarczyk, *Essays in International Law in Honour of Judge Manfred Lachs*, the Hague, 1984, pp. 657-71, at p. 663. As will be seen later in this Chapter, similar attempts to establish ownership as an element of the "genuine link" were defeated 30 years later in the UNCTAD.

¹⁵²Emphasis added. This Article is almost identical to Art. 91 of the UNCLOS III. Art. 5 (1) (second clause) obliges ratifying countries to exercise social but not economic control. However, there is a divergence of opinion as to whether the words "in particular" ("notamment" in the French text) in the last sentence of Art. 5 mean "*inter alia*" or "that is" (Meyers is in favour of the first interpretation, *op. cit.*, pp. 218-9; Boczek in favour of the second, *op. cit.*, p. 275). The answer to the above question is, however, without any practical significance since the inclusion of some kind of economic control in Art. 5 (1) had never been envisaged and no "economic link" for the allocation of a ship to a particular country is required under customary international law, Meyers, *op. cit.*, pp. 248-9. In any case, a country which has ratified the HSC would be required to rectify labour abuses on the high seas; unfortunately the Article does not mention the labour standards which would serve as a yardstick for the assessment of the exercise of effective jurisdiction over social matters by the flag State; the applicable international labour instruments are only mentioned in Art. 10 of the HSC only in connection with the safety of life at sea and their usefulness in that Article seems dubious (see, below the analysis of HSC 10 and UNCLOS III 94; the UNCLOS III by disengaging the effective jurisdiction and control over social matters from the "genuine link" further weakens the effectiveness of flag State control over labour matters on the high seas). HSC 5 has been criticised by many writers as having been ineffective. It was pointed out that state practice since 1958 has not been in accordance with it; see D.P. O'Connell, *The International Law of the Sea*, 1984, Vol. II, p. 761; Ademuni-Odeke, *Shipping in International Trade Relations*, 1988, p. 72.

¹⁵³Whether the crew list must be counted as included in the documents issued is less than clear. An answer in the affirmative is usually given; see Meyers, *op. cit.*, pp. 158, 159. However, it is questionable whether the crew list serves as a means of identification of the ship, especially, if under national laws a) no requirement for the engagement of

iv) Art. 6 (1) of the HSC (UNCLOS III 92 (1)) lays down that "Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these Articles, shall be subject to its exclusive jurisdiction on the high seas.¹⁵⁴ A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry".¹⁵⁵

v) Art. 6 (2) of the HSC (UNCLOS III 92 (2)) provides that "A ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality".¹⁵⁶

The common characteristic of the HSC and UNCLOS III is that neither clarifies the question of the "genuine link" and the nationality of ships. A kind of "legal" link was established but the inclusion of an "economic" link in these Conventions was never considered. It has also been argued that the HSC clauses on the "genuine link" were not regarded as legally binding because "the proposals permitting non-recognition of flags of convenience and a formal identification of ownership and "genuine link" were rejected."¹⁵⁷ This view does not seem to be correct: the concept of the genuine link, as appears from the wording of Art. 5 (1), was unequivocally binding. "What was rejected was the view that a state has the right not to recognize an immatriculation of a 'ship' by another state, *solely*

national crews exists; b) "company service" contracts are signed or engagement takes place from a roster on a regular basis; c) second or third "supply" crews are employed on board the same ship on a cyclical basis. It should be noted that Art. 7 of Convention No. 22 concerning Seamen's Articles of Agreement does not recognise the carrying of a list of crew on board ship as a requirement. The issue of documents may evidence the nationality of the ship or be a consequence of the attribution of the nationality of the ship under Art. 6 (2) but there is no authority to support the view of MacDougal and Burke that the meaning of this provision, in conjunction with Art. 6 (1) is that "ships must be regarded as having the nationality of the state issuing documents certifying that a ship is entitled to fly the flag shown"; op. cit., p. 1120. Under Art. 5 (3) (c) of the UNCTAD Convention on Conditions for Registration of ships it is clear that these documents have a character indicative, and not conclusive, of the ship's nationality.

¹⁵⁴It has been argued that the word "jurisdiction" in this Article is to be interpreted as having a very broad connotation and it also describes the powers of the flag State with regard to ship-users. In contrast to Art. 6, Art. 5 of the HSC is, according to the same author, to be interpreted as follows: "In this case jurisdiction would seem to refer to the competence of a state to prescribe rules of conduct and to have their application adjudicated in its courts. The competence to use physical coercion would, if that construction is correct, not be included in the term, in contrast to its use in, for instance, Article 6" of the HSC; H. Meyers, op. cit., pp. 36-7, 40. Article 6, however, states that a ship shall be subject to the jurisdiction of the flag State on the high seas. It does not lay down that a State *must* exercise this "jurisdiction". This obligation is imposed by Art. 5 whose application has not been successful.

¹⁵⁵This provision has not eliminated the possibility of dual nationalities or instant changes of flags which it is thought are allowed under this provision, Ademuni-Odeke, op. cit., p. 68; see also MacDougal and Burke, op. cit., p. 1086; contra Meyers who thinks that this Article prohibits multiple allocation, op. cit., pp. 134-137.

¹⁵⁶This provision "prohibits only the contemporaneous use of dual nationality but not the incidence of instant or frequent changes according to convenience", Ademuni-Odeke, op. cit., pp. 68-69.

¹⁵⁷Boczek, op. cit., p. 282; A. Cafruny, *Ruling the Waves*, 1987, p. 100; R. Pinto, "Les pavillons de complaisance", *Journal du Droit International*, Vol. 87, 1960, pp. 344-369, at p. 362; see also R. Carlisle, *Sovereignty for Sale*, 1981, pp. 154-5. It cannot be disregarded, however, that from the wording and the history of Art. 5 of the HSC it can be inferred that the existence of a "genuine link" must result in "effective jurisdiction and control" and, therefore, it implies a duty of the flag State to have means available to ensure sufficient authority over ships flying its flag, Meyers, op. cit., pp. 244-5. Moreover, "there exists a sufficiently "genuine" link when the accessibility of the ship-users or their goods to adequately equipped officials is such that the necessary authority can exist, that the necessary control can be exercised"; Meyers, op. cit., p. 252.

in view of the fact that the latter state in its laws does not impose national immatriculation conditions of any weight upon its ship-users".¹⁵⁸ Accordingly, the right for non-recognition could exist if, on the whole, the flag State did not exercise "effective jurisdiction and control" over ships flying its flag by any means available at its disposal (apart from requirements concerning the nationality of the owner, crew etc.).¹⁵⁹ The HSC has had no effect in deterring use of flags of convenience while UNCLOS III further weakens the concept of the "genuine link" as it "no longer suggests a direct relationship between the genuine link concept and effective jurisdiction and control ...".¹⁶⁰ In general, the concept of the genuine link in the UNCLOS Conventions, despite its obligatory nature, could not possibly provide ILO Members, if it were adopted in ILO Conventions, with specific guidance as to what ILO maritime standards, or for that matter other standards, could be taken into account in defining some kind of link between the flag State and ships flying its flag.

¹⁵⁸Meyers, op. cit., p. 279 (emphasis added); see also *ibid.*, pp. 280-2; for similar views on this point see N. Singh, "International Law Problems of Merchant Shipping", *R.C.A.D.I.*, 1962, III, Vol. 107, pp. 7-167, at p. 62.

¹⁵⁹MacDougal and Burke, commenting on the "genuine link", refer to the "act ... of a state in conferring its national character upon a vessel"; MacDougal and Burke, op. cit., pp. 1055, 1112. Although the concept of genuine link is seen by them, correctly, as an international restriction of competence to attribute national character to vessels, it is less than clear from their book what the content of the international obligations imposed by the genuine link (apart from manning and ownership requirements) is and whether this concept, as enunciated in HSC 5, imposes concrete obligations on ratifying countries in attributing a national character to a vessel. In this respect, the explanation offered by Meyers, which is cited immediately above, is more satisfying. Goldie examines the question of the nationality of ships *de lege ferenda* and suggests the test of control as an alternative basis for the recognition of the ship's nationality (registration of FOC vessels in Bureaux in the US could, in his view, provide "a telling point"); L.F.E. Goldie, "Recognition and Dual Nationality-A Problem of Flags of Convenience", *BYIL*, Vol. XXXIX, 1963, pp. 220-283, pp. 261, 283. Although it is not clear from Goldie's article in what this control consists, it seems that assertion of such control could be based on ownership and (American) control. Goldie's thesis is not convincing in certain respects: a) he seems to limit the application of this control (and, accordingly, the application of the National Labour Relations Act) to FOC vessels under American control (US beneficial ownership); this disregards the fact that today the "open registries" is a much wider phenomenon; moreover, he gives no legal justification of the reason why such jurisdiction should be asserted in the case of FOC vessels under American control and not in the case of other FOC or non-FOC vessels; b) while he gives an intelligent analysis of the theory of conflict of laws, he does not explain why labour disputes should not be regarded as immune from review under the *lex fori*; c) in omitting a clear explanation he disregards some obvious advantages of such immunity, such as certainty of law with regard to the obligations and rights of the crew and the owner and the principle of non-violation of foreign articles of agreement.

¹⁶⁰W. Burke, "Changes made in the rules of navigation and maritime trade by the 1982 Convention on the Law of the Sea", in *The Developing Order of the Oceans*, 1985, pp. 662-677, at p. 663; contrast J.N. Moore cited by M. McConnell in "Darkening Confusion Mounted Upon Darkening Confusion": The Search for the Elusive Genuine Link, *JMLC*, vol. 16, 1985, pp. 365-396, at p. 382, who thinks that the transfer of the sentence referring to effective jurisdiction and control from Art. 91 to Art. 94 was merely a drafting matter.

Art. 10 of the HSC and Art. 94 of UNCLOS III

However, Art. 10 of the HSC and Art. 94 of UNCLOS III, which is an expanded form of Art. 10 of the HSC, do provide that the flag state is to ensure that vessels flying its flag are seaworthy and that labour conditions and standards take into account the work of the ILO and the IMO.¹⁶¹

Art. 94 (3), like Art. 10 of the HSC, lays down that every state must take such measures¹⁶² for ships flying its flag as are necessary to ensure safety at sea with regard *inter alia*¹⁶³ to: (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments. A number of observations¹⁶⁴ must be made in respect of this provision:

1) It establishes a connection between safety and labour conditions on board ship. However, it recognises labour standards only in so far as they have some effect on safety at sea and not as social standards in their own right. This means that no measures have to be taken by the flag state to apply national labour standards which go beyond strict safety requirements. This view is corroborated by paras. 4 (b) and (c) of Art. 94 which lists among the objectives of such measures the need to ensure, *inter alia*, that masters and officers and crew should possess appropriate qualifications¹⁶⁵ and should be appropriate in number for the particular ship. The instances of appropriate qualifications mentioned in this paragraph clearly imply a concern for ensuring safety at sea.

2) If the above interpretation is correct, ILO instruments can only be taken into account in the implementation of Art. 94 in so far as they contain provisions relating to safety at sea.¹⁶⁶ These provisions, as will become evident in the next chapters, especially Chapter 6, are very few.¹⁶⁷ Moreover, the words "manning, labour conditions and the training of crews", unless widely interpreted, seem to

¹⁶¹The penal jurisdiction of the flag State in matters of collision or other incidents of navigation occurring on the high seas is outside the scope of this section. Here it should be noted that, while HSC 11 provides seamen with legal security as regards the suspension or cancellation of certificates by providing that only the State which issued the certificates concerned is competent to take measures in respect thereof, this is not so as regards all other cases: jurisdiction is vested with either the flag State or the State of which the responsible person is a national. Compare the relevant 1952 Brussels Convention; see also *infra* Chapter 6, Section 6.2.1. C).

¹⁶²Though the wording of the Article is not clear, the word "measures", which was substituted for the word "regulations" in UNCLOS I, includes the promotion by the flag State of adequate collective labour agreements; Meyers, *op. cit.*, p. 114.

¹⁶³It has been argued, although no substantial evidence is supplied in this respect, that the words "*inter alia*" in HSC 10 refer to "measures" and not to "safety"; Meyers, *op. cit.*, p. 115 n. 1. Even if this is so, the necessary "measures", according to the Article, are not any measures but "measures ... necessary to ensure safety at sea ...". The same author goes on to say, on the same page, that "in any case the standard to which any national regulation must conform is safety at sea".

¹⁶⁴The observations below, when relevant, also apply to HSC 10.

¹⁶⁵While examples of "appropriate" qualifications are given in para. 4 (b) and (c) (qualifications in seamanship, navigation, communications and marine engineering, etc.), in what these "appropriate" qualifications consist is less than clear. Para. 5 provides that "In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance".

¹⁶⁶Thus Meyers, *op. cit.*, p. 117.

¹⁶⁷Meyers maintains that Art. 10, unlike Art. 5 (2) of the HSC, seems to impose on the flag State the obligation to provide each ship flying its flag with the ship's articles of agreement, a bill of health and a safety certificate, *op. cit.*, pp. 159-160. However, as regards the articles of agreement the writer does not share this view as the presence of the maritime contract on board ship does not aim at ensuring safety at sea but to inform seamen of their rights and obligations under the contract.

exclude areas of maritime employment with which the ILO has long been concerned and which traditionally do not come within the context of "labour conditions", such as social security and continuity of employment of seafarers, identity documents for seafarers, health, medical care and safety of seafarers.¹⁶⁸

3) In ensuring safety of life at sea the flag state must only *take account of the applicable international instruments* (para. 3) while in taking specific measures it is *required to conform to generally accepted international regulations, procedures and practices* (para. 5). First, the wording of para. 3 seems to be expressed in less obligatory terms than para. 5.¹⁶⁹ Secondly, it is difficult to define the "applicable" international instruments and the "generally accepted" international regulations, procedures and practices. As a result of the analysis made under 1 and 2 above, it seems that many ILO maritime instruments are ruled out. Also, it is unclear whether the above expressions, especially the former, imply that the instruments concerned must be ratified (ILO and IMO Conventions);¹⁷⁰ or whether they include such ILO and IMO recommendations as enjoy widespread application; or even ILO or IMO codes of practice or conduct that are widely applied; or, finally, widely applied provisions of international instruments that have never come into force (for example, certain articles of ILO Convention No. 109 concerning wages, hours of work and manning).¹⁷¹

¹⁶⁸It is not clear whether the expression "safety at sea" would cover cases of accidents which occur in the vicinity of the ship and are connected with the ship or fittings (for instance, gangways, anchors, chains and cables, etc.) and thus the application through Art. 94 of Convention No. 134 concerning the Prevention of Occupational Accidents to Seafarers, 1970, and Recommendation No. 142 concerning the Prevention of Occupational Accidents to Seafarers, 1970 seems questionable. As regards the Minimum Standards Convention (MSC), it seems that only its substantive provisions could be taken into account in the application of Art. 94 and not, for example, Art. 4 of the MSC on port state control. Art. 94 has its own port control provisions (paras. 1, 2 and 6) which must be regarded as *lex specialis* with regard to Art. 4 of the MSC; unfortunately para. 6 only provides for action on the part of the flag State. Osieke takes an optimistic view of the potential effect of Art. 94 which, in his opinion, goes some way towards establishing the concept of the "genuine link". As regards the control provisions of para. 6 of this Article he recognises that "they could be strengthened by specifying what the reporting state could do if the flag state willingly or unjustifiably refused to take necessary action to remedy the situation"; E. Osieke, "Flags of Convenience Vessels: Recent Developments", *AJIL*, Vol. 73, 1979, pp. 604-627, at p. 609.

¹⁶⁹According to MacDougal and Burke the former provision "relieves the state of any obligation to adopt any of the mentioned conventions and seems to have no obligatory effect"; *op. cit.*, p. 839. This is too sweeping an interpretation since while a ratifying State is not obliged to adopt any of the relevant ILO instruments it does have an obligation to take them into account, an obligation equivalent to the criterion of "substantial equivalence" used in Convention No. 147. Furthermore, the "applicable international labour instruments" could include widely applied ILO Recommendations.

¹⁷⁰As regards international labour standards, there is no clear-cut choice between ratified ILO Conventions. It is doubtful whether "generally accepted" international regulations etc. apply to a) ILO instruments ratified by most ILO member States or by most maritime countries which are parties to the ILO (as will be seen in the following chapters, only few ILO maritime Conventions have been ratified by most, no matter all, important maritime countries; not many Asian and African countries have ratified ILO maritime instruments (does this fact lower the level of the applicable international labour instruments within the meaning of HSC 10 and UNCLOS III 94?); or b) ILO instruments ratified by countries whose total registered tonnage represents a specified percentage of the world total (by 1989 only 7 ILO maritime Conventions have been ratified by countries whose tonnage amounts to more than 50% of the world total); or c) to ILO instruments ratified by countries which have a significant number of nationals employed on board ships of whatever nationality. Finally, it is not clear whether the applicable international labour standards imply only ILO maritime instruments or also ILO instruments of a "general" nature which are applicable to seafarers even if they have not been ratified by a substantial number of maritime countries.

¹⁷¹As regards the relationship between the above phrases and IMO instruments, the Secretary-General of the IMO stated at the 19th Annual Conference of the Law of the Sea Institute that "most of the major international regulations and standards developed in IMO in relation to maritime safety and the prevention of marine pollution by ships and by dumping are covered by these terms" ("applicable" or "generally accepted" standards), C.P. Srivastava, "IMO and the

Finally, Art. 94 (7) obliges flag States to hold an enquiry in the event of a marine casualty or navigational accident on the high seas.¹⁷² However, this provision does not refer to employment or occupational accidents occurring on the high seas.

In conclusion, the impact of ILO standards on the observance by the flag State of legal rules concerning seamen and on the establishment of a "genuine link" for this purpose through the HSC and UNCLOS III is minimal.

1.6.4. The UNCTAD Convention on Conditions for Registration of Ships

The question of gradual phasing out of open registries and the laying down of conditions for registration of ships has been examined in the UNCTAD since early 1978.¹⁷³ The efforts of the UNCTAD, which in the meantime had established a preparatory group whose purpose was to draft a convention laying down specific rules relating to the registration of ships, in this respect led to the convening of an International Conference, under the aegis of the UN. This Conference held three sessions between 1984 and 1986. There was general agreement on the following points: a) establishment of an effective maritime administration, b) proper ship registration machinery and effective control, c) appropriate maritime legislation in the flag State and d) an effective means for identification and accountability on the part of those responsible for the operation of the vessels. However, there was disagreement on four hotly disputed issues: a) manning (national or otherwise), b) management (where should it be located and what should be its nature?), c) equity participation (must the venture be owned by flag state nationals),¹⁷⁴ d) the nature of the proposed instrument (binding or recommendatory).¹⁷⁵

Law of the Sea", in *The UN Convention on the Law of the Sea: Impact and Implementation*, pp. 419-25, at p. 421. For the views of Group B concerning the meaning of the "generally accepted international rules and standards" which were expressed in the UNCTAD Conference on Conditions for Registration of Ships see TD/RS/CONF/10, Appendix VIII, p. 49. In short, this Group thinks that the above phrase refers to IMO and ILO Conventions. IMO Conventions in force can be considered "generally accepted" while the entry of ILO Conventions into force is only an indication of general acceptance. Whether Recommendations should be regarded as "generally accepted" standards would depend on the degree of their implementation.

¹⁷²The application of this provision is limited to accidents occurring on the high seas and to accidents incurred by persons nationals of a State other than the flag State. Compare the more successful wording of Art. 2 (g) of ILO Convention No. 147; for a discussion see Osieke, op. cit., p. 621.

¹⁷³See B. Farthing, *International Shipping*, 1987, pp. 140-145.

¹⁷⁴For the differing views of the various groups (77, B, D, etc.) on the question of manning, management and equity participation and the plethora of amendments moved see United Nations Conference on Conditions for Registration of Ships, Report on the first part of its session held in Geneva from 16 July to 3 August 1984, Part Three, Report of the First Committee, TD/RS/CONF/10, pp. 32-61; For an interesting account of the positions of the various groups and countries in 1985 see United Nations Conference on Conditions for Registration of Ships, Report on the third part of its session held in Geneva from 8-19 July 1985, TD/RS/CONF/19/Add.1, 7 Aug. 1985, Annex I, Composite Text as at the Close of the Third Part of the Conference on 19 July 1985, pp. 1-22.

¹⁷⁵For the respective views of the spokesmen for the Group of 77, Group B and Group D see TD/RS/CONF/10, 12 Oct. 1984, pp. 9-16; the views of the Group of 77 were expressly supported, apart from Group D, by the representatives of China, the United Republic of Tanzania (speaking on behalf of the African Group), Kuwait (speaking on behalf of the Asian Group), Argentina and some international bodies (ICFTU); *ibid.*, pp. 16-17, 23, 28; they were opposed by the representatives of Liberia, (implicitly) the US, the ISF, the Bahamas, Vanuatu, Israel, Panama and other international bodies (ICC, ICS, INTERTANKO, INTERCARGO); *ibid.*, pp. 18-19, 20-22, 23, 25-27; see also Farthing, op. cit., p.

Analysis of the provisions of the UNCTAD Convention

Below a brief analysis of certain provisions of the UNCTAD Convention is given to the extent they are relevant to maritime labour questions.¹⁷⁶

1) Art. 5 (1) provides that the flag state must have a competent and adequate national maritime administration, which must be subject to its jurisdiction and control.¹⁷⁷ This provision, it is submitted, adds nothing new to the existing regime and it is an aspect of the "genuine link" in the UNCLOS Conventions as analysed above.

2) Art. 5 (2) lays down that the flag state must implement applicable international rules and standards concerning, in particular, the safety of ships and persons on board ...". Again, as in the UNCLOS Conventions the identification of the "applicable" rules and standards¹⁷⁸ might cause problems of interpretation. However, it is submitted that the UNCTAD text is more successful than Art. 10 of the HSC and Art. 94 of UNCLOS III in two respects: a) it expressly states that "the safety of persons on board" is one of the aims to be achieved through the implementation of the applicable rules and standards;¹⁷⁹ and b) the implementation of the international applicable standards is not connected with safety at sea. As a result, the applicable international labour instruments (and other international instruments) to be implemented are not limited to those aiming to ensure safety at sea.

144. For a review of the UNCTAD attempts to establish a "genuine link" and an analysis of the UNCTAD Convention, see, *inter alia*, S.G. Sturmeijer, "The United Nations Convention on Conditions for Registration of Ships", *LMCLQ*, Feb. 1987, pp. 97-117; H.W. Wefers Bettink, "Open Registry, The Genuine Link and the 1986 Convention on Registration Conditions for Ships", *NYIL*, Vol. 18, 1987, pp. 69-119, at pp. 102-119; M. McConnell, 1985, op. cit., pp. 386-394.

¹⁷⁶It should be noted here that the Convention has not eliminated the ambiguous provisions of the UNCLOS Conventions. In particular, in Art. 4, paras. 2 and 5 reiterate the provisions of Art. 5 (1) (second sentence) and Art. 6 (1) (second sentence) of the HSC. For the text of the Convention see TD/RS/CONF/23; ILM, Vol. 26, p. 1229 et seq.

¹⁷⁷For a possible meaning of the words "which shall be subject to its jurisdiction and control" see M.L. McConnell, "Business as usual": An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships", *JMLC*, Vol. 18, No. 3, July 1987, pp. 435-449, at p. 443. It seems that the national maritime administration may be located either within or without the territory of the flag State. According to one author, the location of the national maritime administration within the territory of the flag State would raise the responsibility of that State and improve the efficiency of the maritime Administration itself; see G.S. Egiyan, "The principle of genuine link and the 1986 UN Convention on the Registration of Ships", *Mar. Pol.*, Vol. 12, Jul. 1988, pp. 314-321, at p. 319. This view was also supported by the ITF during the preparatory meetings of the Conference; see *infra* n. 196.

¹⁷⁸The UNCLOS Conventions refer to "instruments" and "standards". No great significance should be attached to the difference in the wording. However, it is not clear whether these "rules" and "standards" in the UNCTAD Convention include collective agreements. The more consistent interpretation is that they do not. These international "rules" and "standards" must be implemented by the flag State. First, collective agreements are national instruments and they are observed by the parties interested; their implementation by the State is not conceivable. Second, the UNCTAD Convention, unlike the UNCLOS Conventions, does not refer to "measures". As pointed out earlier, these "measures" were meant to comprise the implementation of labour standards through the promotion of the conclusion of collective agreements. Under the UNCTAD Convention this possibility does not seem to be open (the ITF collective agreement is an international instrument but it is doubtful whether it can be regarded as a "standard" or a "rule" within the meaning of Art. 5 (2)). It should be noted that a proposal to add the word "relevant" before the word "applicable" was not adopted as it was not acceptable to the Group of 77; see United Nations Conference on Conditions for Registration of Ships, Report on the third part of its session held in Geneva from 8-19 July 1985, TD/RS/CONF/19, 18 Oct. 1985, p. 15.

¹⁷⁹However, again this phrase seems to exclude implementation of safety standards relating to the accidents occurring while the seaman or another person are embarking on board ship.

Thus, the scope of the UNCTAD Convention is broader than that of the UNCLOS Conventions. However, a problem of interpretation arises here. The UNCLOS Conventions, by connecting the measures to be taken with safety at sea, gave the relevant provisions a reasonably circumscribed scope. Art. 5 (2) of the UNCTAD Convention, however, places the words "in particular" after the words "applicable international rules and standards", which could mean that the safety of ships and persons on board and the prevention of pollution of the marine environment are only instances of the range of international standards to be implemented. If this interpretation is correct it should be noted that the "applicable international rules and standards" relating to shipping which have been adopted by intergovernmental and private bodies amount to some hundreds. The question concerning the means by which the scope of Art. 5 (2) could be reasonably limited should be clarified. If, on the other hand, this provision is to be interpreted as limiting the obligations on contracting parties to compliance with rules concerning safety of ships and persons on board, and the prevention of pollution, then it is obviously incomplete. No requirements concerning the certification of seamen, employment conditions, social security and manning are included in Art. 5 although some of these questions are dealt with in Art. 9 (6).

3) Under the UNCTAD Convention ownership and manning requirements are optional and either can be used in establishing the "genuine link" but a country "may comply with both" requirements (Art. 7). Under Art. 8 (2) the flag State "shall include appropriate provisions for participation by that State or its nationals as owners of ships flying its flag or in the ownership of such ships and for the level of such participation" and the relevant laws and regulations "should be sufficient to permit the flag State to exercise effectively its jurisdiction and control over ships flying its flag". It is beyond doubt that the vagueness of this provision gives ratifying countries almost complete freedom to decide ownership requirements. Furthermore, the manner in which effective jurisdiction will be enhanced by ownership or manning requirements is not clear under the Convention. In particular, one wonders why a provision concerning effective jurisdiction was not similarly included in Art. 9 relating to manning and whether no such exercise of jurisdiction is required if a ratifying country decides to apply Art. 9 instead of Art. 8.¹⁸⁰

¹⁸⁰Thus Sturmeijer, op. cit., p. 101; see also Wefers Bettink, op. cit., pp. 114-115. Wefers Bettink, in opposing Sturmeijer on this point, argues that the absence of a clause concerning effective jurisdiction and control does not affect the compulsory provisions of Art. 5 which require ratifying Members to have a competent and adequate maritime administration. This interpretation is neither in accordance with the intention of the UNCTAD Conference nor supportable by the text of the Convention as it now stands. The spokesman for the Group of 77 said at the Conference that "[h]is group agreed that there should be a competent maritime administration *but this in itself was not enough for a flag State to exercise effective jurisdiction and control unless a significant percentage of key officers and crew were nationals*" (emphasis added) TD/RS/CONF/10, p. 35, para. 203. Moreover, a general requirement to have a competent and adequate maritime administration does not automatically imply its use for the exercise of that jurisdiction and control if the latter are not otherwise legally required. The present view is supported by the fact that Article 5 is entitled "National Maritime Administration" and deals with the general principles which should pervade the function of maritime administrations. Furthermore, the list of requirements in Art. 5, paras. 2 and 3 does not include manning, except as an implicit prerequisite for safety on board ship, and then it refers only to "applicable international rules" and not to national requirements such as are imposed by Art. 9.

4) After having imposed the insignificant obligation that the State of registration must observe the principle that "a satisfactory part of the complement consisting of officers and crew of ships flying its flag be nationals or persons domiciled or lawfully in permanent residence in that State" (Art. 9 (1)),¹⁸¹ the Convention, in Art. 9 (2), further reduces the impact of its "manning" provisions by allowing the State of registration, in determining manning scales, to take into account factors such as "the availability of qualified seafarers within the State of registration" (cl. (a)) and "the sound and economically viable operation of its ships" (cl. (c)).¹⁸²

Art. 9 (2) (b) speaks of bilateral or multilateral arrangements, binding on signatories, which they have to take into account in fixing manning scales.¹⁸³ Also, Art. 9 (6) stipulates that the State of Registration must ensure (a) that the manning of ships flying its flag is of such a level and competence as to ensure compliance with applicable international rules and standards, in particular those regarding safety at sea; and (b) that the terms and conditions of employment on board ships flying its flag are in conformity with applicable international rules and standards. The following observations can be made here:

i) It is not clear to what extent the state of registration must give effect to international standards relating to "social" manning as defined in Chapters 4 (section 4.1.5.3.4.) and 6.

ii) The Convention fails to lay down specific manning scales for various categories of seafarers. As will be explained in Chapters 3 and 4, with few exceptions, for example manning of survival craft, there are no international standards and rules applicable to manning.

iii) ILO instruments relating to seafarers are expected to play a major role through Art. 9 (6) (b). This provision is not restricted by any reference to safety at sea as clause (a).

iv) It is interesting to notice that this Article, in contrast to Art. 5 of the Convention imposes obligations on the state of registration and not on the flag state but at the same time presupposes that the state of registration and the flag state are the same state.

¹⁸¹The Group of 77, Group D and China would have preferred "a significant percentage" of key officers and crew to be nationals of the flag State; TD/RS/CONF/10, p. 34, 35, paras. 195, 203. It is wondered whether this principle, for EEC countries, is not against Art. 48 (1) of the Treaty of Rome which recognises the freedom of workers within the Community. In fact, the European Court of Justice held that French regulations reserving the manning of French ships to French nationals only were illegal: cited by I. von Münch, "Freedom of Navigations and the Trade Unions", *GYIL*, 1976, pp. 128-142, at p. 140. If the Treaty of Rome were taken into account under Art. 9, para. 2 (b) of the Convention, this would defeat the purpose of Art. 9, para. 1.

¹⁸²While the availability of national seafarers has been at times critical in developed countries (see, for example, Greece: Shipowners authorised to recruit more foreign seamen, *SLB*, 2/1981, p. 198), the first of these clauses in the Convention may discourage the engagement of certificated personnel on board ship while the second introduces a criterion which is in complete opposition to safety and social requirements underlying the concept of manning. Sturmei, commenting on Art. 9, says that the Convention was correct in allowing such flexibility in view of the lack of qualified seafarers which would become apparent on board high-tech ships. He argues that if national manning requirements were strict developing countries would have to hire land-based technicians and this would initiate a wage spiral, *ibid.*, p. 102. This view overlooks certain factors: a) seafarers from developing countries are in many respects highly qualified as a result of IMO/ILO technical assistance programmes; b) many seafarers from developing countries receive maritime training abroad; c) this flexibility could run counter to developing countries' interests in the long run as, in effect, it sanctions the *status quo*, which has not allowed developing countries to establish a significant merchant marine and, therefore, it does not give them the incentive to establish maritime training schools and certify ship personnel.

¹⁸³This provision is not likely to improve the status of labour on board ship; Sturmei, *op. cit.*, pp. 103-104.

v) Despite the welcome inclusion of these provisions in the text of the Convention, which are an improved version of Art. 94 of UNCLOS III from a social point of view, the Convention lacks the necessary means for enforcing them.

5) Art. 10 (3) ¹⁸⁴ provides that the State -of registration "should ensure" that the persons responsible for the management and operation of a ship are in a position to meet the financial obligations arising therefrom in respect of, *inter alia*, "wages and related monies owed to seafarers employed on ships flying its flag in the event of default of payment by their employers". Interestingly, seafarers' wages will be covered by such means as a maritime lien, mutual fund, wage insurance, social security scheme or any other governmental guarantee. ¹⁸⁵ What is meant by the words "related monies" is less than clear (social security and repatriation benefits, wages during inability to work, compensation in cases of shipwreck, etc.) and a clarification of this point is desirable. ¹⁸⁶ Moreover, the use of the word "should" instead of the word "shall" in this provision diminishes its importance to the point of a mere exhortation. ¹⁸⁷

6) As a principle, the Convention, unlike the UNCLOS Conventions, prohibits dual registrations (Art. 4 (4)) but this is subject to the provisions of the Convention concerning bareboat chartering (Art. 11 (4) and (5) and Art. 12). Para. 4 of Art. 11 endorses the principle that in registering a ship a party to the Convention should ensure that previous registration is deleted while para. 5 provides for the suspension of the right to fly the flag of the former flag State and of previous registration when a ship has been bareboat chartered and entered in on a new register. These provisions are of an hortatory character (the words "should assure itself" are used). Art. 12 attempts to assimilate bareboat

¹⁸⁴From the outset it should be pointed out that Art. 10 does not seem to change the *status quo* in shipping business transactions since the identifiability of individual shareholders of bearer shares is not required by it. Moreover, a provision which would facilitate the identification of individual owners was put forward in the version of Art. 2 (vi) of the draft on Registration of Ships submitted by the First Committee. This provision provided that the register must record, *inter alia*, "the name ... nationality of the owner or owners and the proportion of the ship owned by each"; TD/RS/CONF/10, Appendix XVII, p. 60 (emphasis added). The latter part of the provision was finally transformed to a mere recommendation (Art. 11 (3) (a) of the Convention).

¹⁸⁵Apart from social security schemes, all other means for the coverage of wages of seafarers are unavailable under ILO Conventions. It is important to note, in this respect, that the Convention adopts a very progressive view on the question of the protection of wages through the combination of private and governmental procedures. In this connection, Art. 11 (2) (i) provides that the particulars of any mortgage or other similar charges upon the ship must be recorded in the register. Unfortunately, this provision is qualified by the phrase "as stipulated by national laws". Moreover, as Art. 11 (2) stands, it does not place an obligation on ratifying countries to assure that the entries made are accurate. In the case, for example, where wages are owed to a seaman and they are covered by a lien on the ship ("charges upon the ship") it is difficult to see how a ratifying State can be made, under the Article, subject to legal damages on the grounds that it has not assured itself through appropriate national procedures that the particulars recorded are accurate. Finally, although the remedies available to the seaman under Art. 10 (3) are more precise than those laid down by ILO Conventions, they do not constitute anything more than a mere codification of existing practice in the business of open registries and of private law requirements.

¹⁸⁶It is regrettable that Art. 10 (3) does not refer to the enforcement of other social obligations of the shipowner, apart from payment of wages and related monies; compare the statement of the representative of Israel and the amendment he withdrew at the 4th part of the deliberations of the Conference; see footnote j/ in TD/RS/CONF/19/Add.1 and United Nations Conference on Conditions for Registration of Ships, Report on the fourth part of its session held in Geneva from 20 January to 7 February 1986, TD/RS/CONF/24, 4 Nov. 1986, p. 15.

¹⁸⁷Many important provisions of the Convention, apart from Art. 10 (3), prefer "should" to "shall": Art. 6, paras. 3 and 4, Art. 8 (2) (second sentence), Art. 11, paras. 3, 4 and 5, Art. 12, paras. 2 and 4; for the ensuing uncertainty see Sturmeij, *op. cit.*, p. 106.

charterers to shipowners for the purposes of the Convention but, again, the main provisions do not have a compulsory character. In any case, circumvention of the provisions of Art. 12 is possible even if the relevant provisions of the Convention are respected.¹⁸⁸

7) As regards the protection of the interests of labour-supplying countries, it suffices to note here that the effect of Art. 14 in conjunction with Resolution 1 of the Convention leaves the matter to bilateral agreements between labour-supplying countries and flag-States, to the regulation of national employment agencies of labour-supplying countries and to the harmonisation of goals at the regional and international level with the participation of the relevant international organisations.¹⁸⁹ It remains to be seen how these recommendations will be carried out.

The Convention on Conditions for Registration of Ships was adopted on 7 February 1986 and has not yet come into force. As regards the entry into force of the Convention,¹⁹⁰ it has been argued that "current indications are that this will take some years. But ...the importance of this convention lies not so much in when it comes into force, but the changing atmosphere during the long and difficult negotiations and the fact that, subject to conditions, the principle of open registries has been firmly established. This has opened the flood gates to flag flexibility in pursuit of cost saving, an economic necessity in most, if not all, the traditional maritime nations".¹⁹¹

1.6.5. Critical review and conclusions

The law of the flag is not absolute or exclusive; especially when vessels enter ports. Several provisions of U.S. shipping law impose obligations on carriers entering American ports as regards unfair trade practice, available space accommodation etc.¹⁹² On the other hand, it has been stated in the *Nottebohm* case that the grant of nationality to an individual need not be respected by other States if there is no real connection between the State and the individual.¹⁹³ There is considerable legal authority, however, to support of the view that this opinion cannot be extended to define the "genuine link" between the flag State and a ship flying its flag.¹⁹⁴ Furthermore, it seems that under interna-

¹⁸⁸See Sturme, op. cit., p. 108.

¹⁸⁹Interestingly, para. 1 of the Resolution suggests, inter alia, that the engagement of seafarers from labour-supplying countries might be made conditional on compliance with the provisions of Art. 10 concerning the securities to be given to seafarers in respect of wages, etc. No such provision exists in ILO Convention No. 9. The suggestion contained in para. 1, in the unlikely case in which it will be carried out, is a welcome development in the law of the engagement of seamen since it would mean that in the future engagement of seafarers would be made dependent on compliance with laws of the flag State concerning securities for seafarers' wages including, perhaps, social security benefits. Again, however, there is no provision for the enforcement of the recommendations of para. 1 of the Resolution while, theoretically at least, such enforcement should be secured by the laws of the flag State.

¹⁹⁰It will enter into force 12 months after at least 40 states with total 25% of world tonnage become contracting parties (Art. 19, para. 1). For an interesting discussion of the question of the entry of the Convention into force see Sturme, op. cit., pp. 116-117.

¹⁹¹Farthing, op. cit., p. 145.

¹⁹²Don F. Dagenais, "Foreign ships in American ports: The question of NLRB jurisdiction", *Cornell International Law Journal*, Vol. 9:50, 1975, pp. 50-81, at p. 80.

¹⁹³*Nottebohm* case (*Liechtenstein v. Guatemala*), [1955] I.C.J. 4.

¹⁹⁴Meyers, op. cit., pp. 96-7; 270-75; Boczek, op. cit., pp. 121-122; MacDougall and Burke, op. cit., pp. 1026-1033; D.H.N. Johnson, "The Nationality of Ships", *The Indian Year Book of International Affairs*, Vol. 8, 1959, pp. 3-15, at

tional customary law seamen of whatever nationality on board ship are protected under the law of the flag State and not under that of other States such as the State of the beneficial ownership.¹⁹⁵ The HSC and the UNCLOS III basically confirm this principle but, as pointed out earlier, their attempt to require the flag State to enforce labour standards on board ships flying its flag has not been successful and is not supported by adequate legal provisions.

The question then arises concerning what is the applicable law in the area of maritime employment and whether recent developments in defining the concept of the "genuine link" provide some legal or other reasons why the traditional use in ILO instruments of the law of the State in the territory of which the ship is registered should be discontinued. In particular, it must be asked whether the applicable law in international instruments and the registration requirements in national laws and regulations should be defined with a view to eliminating gradually FOC vessels. The UNCTAD Convention has proved a disappointment in this respect. In fact, it seems rather to accept flags of convenience as an established lawful regime. Most commentators regard this instrument as creating numerous loopholes which will permit the lawful, unhindered operation of FOC vessels in the future; in essence, the adoption of the UNCTAD was a ratification of the *status quo*: "Contrary to the early hopes of the secretariat, the convention ultimately proved to be a victory for flags of convenience. This was foreshadowed by an agreement in mid-1985 in which language on three key issues - ownership, manning, and management - was changed. On manning, a "satisfactory part" of the vessel's crew are supposed to be citizens of the flag state. However, owners are able to take account of "sound and economically viable operation" of vessels, allowing shipowners to continue current practices."¹⁹⁶ If the UNCTAD Convention had been adopted in its original form it would have

pp. 12-5; Pinto, op. cit., pp. 350-2; see also Ademuni-Odeke, op. cit., p. 73; contra H. Schulte, *Die billigen Flaggen im Völkerrecht*, 1962 at p. 93; Goldie, op. cit., pp. 267-9, 274-6; for other views in favour of the application of the *Nottebohm* case to ships, see MacDougal and Burke, op. cit., pp. 1013-1016, 1026-1028.

¹⁹⁵Meyers, op. cit., pp. 98-107; contra A.D. Watts, "The Protection of Merchant Ships", *BYIL*, Vol. XXXIII, 1957, pp. 52-84, at pp. 73-84. The basic flaw in Watts's article is that he bases his conclusion on the assumption that the *Nottebohm* case applies to shipping; see particularly pp. 66-67; also, there is no connection between the American cases he cites (pp. 73-76) and the establishment of a rule of customary law; mostly, these cases deal with questions of compensation of the real owners of the vessel and do not examine the question whether national ownership is the essence of the concept of the genuine link. Moreover, while he recognises that "the registration can correctly be regarded as *prima facie* evidence of a right to protect" he does not elaborate on the reason why such *prima facie* evidence is not adequate, as a matter of policy, for the purposes of the law of the sea; see also Watts's comment on the article of McDougal, Burke and Vlasic in *AJIL* in *Revue Egyptienne de Droit International*, 1961, pp. 135-141.

¹⁹⁶A. Cafruny, *Ruling the Waves*, 1987, p. 255; see also D. Caron, "Ships, Nationality and Status", *Encyclopaedia of Public International Law*, Vol. 11, *Law of the Sea; Air and Space*, 1989, pp. 289-297; he makes the general statement that the genuine link is a classic example of "soft law"; *ibid.*, p. 292; Wefers Bettink, op. cit., pp. 112, 118-9. The most pessimistic reviewer of the UNCTAD Convention has been the ITF which commented critically on the 1985 Composite Text: it described the terms of the Convention as follows: "... the composite text represents a failure to achieve the aforesaid goals (promote the orderly expansion of world shipping, give effect to the principle of the genuine link) and ... does nothing to further the hopes and aspirations of hundreds and thousands of seafarers ... but rather contributes to the maintenance of the status quo with inferior conditions for seafarers at large. ... the proposed regime ... will effectively whitewash and legitimise flag-of-convenience operations"; ITF, *Conditions for Registration of Ships - The ITF Perspective*, opening statement. The main changes which should be effected in the text, according to the ITF, comprised, *inter alia*, elimination of the 500 GRT limit; inclusion of mobile offshore units in the scope of the Convention; location of the maritime Administration within the territory of the flag State; inclusion of mandatory pro-

established an "economic link", through ownership and manning requirements, as a prerequisite of the allocation of a ship to a particular State and thus would have constituted a novelty in international maritime law; ¹⁹⁷ however, it failed manifestly to do so this.

Apart from the question of what a United Nations Convention should aim to achieve (clarity of law, international cooperation, codification and progressive development of customary and treaty law), it is clear that the UNCTAD Convention is a business Convention. It facilitates business and it allows States to participate therein (Art. 9 (1) (b) and (c)). The Convention failed to lay down concrete obligations at the national level but its attempt to lay down such obligations at the international level should not be underestimated. In particular, Art. 5 (2) and Art. 9 (6) of the Convention lay down international obligations, especially from the labour point of view, which are superior to those codified in existing UN treaty law. ¹⁹⁸ Unfortunately, lack of enforcement of the above provisions of the Convention would mean that their importance will be substantially diminished. On the other hand, the Convention is partly successful ¹⁹⁹ in identifying possible areas which would be incorporated in the concept of the "genuine link"; these are: a) competent and adequate maritime administration; b) identification and accountability of owners and operators; c) national ownership; d) national manning; and e) establishment of the company and/or principal place of business in the State of registration. However, what the Convention does is merely to identify these criteria. Their real significance in the context of creating the "genuine link" is down-graded by the vagueness and permissible character of most relevant provisions.

Certain improvements could be effected on the Convention; these improvements concern the strengthening of the existing Convention requirements, and not the strengthening of the "genuine

visions concerning participation by nationals in both manning and ownership; replacement of the word "satisfactory" part of the complement by the word "substantial" in Art. 9; elimination of those provisions in Art. 9 which undermine the principle of "national" manning; and inclusion of provisions concerning port state control; *ibid.* pp. 1-7.

¹⁹⁷ As pointed out earlier, economic control was not envisaged in the HSC and was not required by customary law; see *supra* n. 152. Moreover, it has been shown that before the HSC requirements with respect to the nationality of owners, officers and crew as conditions for the lawful assignment of international rights and obligations on a ship by a particular State have not become valid in customary law; R. Rienow, *op. cit.*, pp. 50-78, 79-116, 215-7; This view still stands under HSC 5; Meyers, *op. cit.*, pp. 257-266; MacDougal and Burke, *op. cit.*, pp. 1133-1137.

¹⁹⁸ It should be noted that compliance with the provisions of Art. 9 (6) is not optional according to Art. 7 which permits optional use of Art. 9 in respect of its first three paragraphs.

¹⁹⁹ The Convention, by giving an optional character to Arts. 8 and 9 (Art. 7), generates doubts concerning whether ownership and manning requirements are a *condicio sine qua non* for the allocation of a ship to a State. This situation is aggravated by the vagueness of the relevant provisions of these Articles concerning national ownership and manning requirements.

link" elements of the Convention ²⁰⁰ which is neither desirable in certain respects nor in conformity with customary law: ²⁰¹

a) The inclusion of provisions concerning enforcement. This would be achieved either through the establishment of an international enforcement authority or by following the example of the MSC and the MOU. There is no reason why the provisions of the Convention could not be enforced in addition to flag States, by port States, parties to the Convention. In fact, the genuine link, if there is any, will have more chances of becoming established if the requirements underlying it, however vague, are enforced by port States. ²⁰²

b) Although it cannot be foreseen how the Convention will work after its entry into force, it is submitted that the provisions of the Convention, referred to earlier, in which the word "should" appears should be reviewed if they are not in the event regarded as mandatory by ratifying States. Moreover, some kind of sanction should be imposed on ratifying States if they fail to ensure by adequate procedures the accuracy of the particulars required to be recorded by the Convention, such as economic sanctions in port, detention of the ship (depending on the importance of the particulars concerned), imposition of fines on, or suspension of the certificate of, the person responsible for ensuring the accuracy of the particulars concerned, etc.

c) The possibility of extension of the application of the requirements of the Convention to ships belonging to non-parties thereto should be considered. This extension would concern the safety requirements of the Convention while, as will be seen in Chapter 6, port State control of labour conditions on board ship should be directed to ships belonging to parties only, at least at a first stage. ²⁰³

The genuine link in ILO Conventions

²⁰⁰ A new kind of genuine link is suggested in the area of private maritime law, namely the inclusion of clauses in charterparties concerning compliance with the provisions of international conventions relating to safety, labour and environmental issues, including the STCW and the MSC Conventions; see Sturme, op. cit., p. 111. The passing of elimination-of-subsidy Acts was proposed as another measure to eliminate American FOC operators; see Walton J. MacLeod, "Flags of Convenience Problem", *S.Car.L.R.*, Vol. 16, 1964, p. 409, at pp. 417-418.

²⁰¹ In view of Art. 20 of the Convention, amendments thereto will come into effect only at least 10 years after the Convention has entered into force.

²⁰² Here, it should be noted that the representative of the IMO had proposed a kind of enforcement based on reporting obligations in the following terms: ... (c) with regard to the conditions of the periodic reports of implementation to be submitted by countries parties to the international agreement once entered into force, IMO suggested that member States be requested to report to each of the three organisations concerned, e.g. IMO, UNCTAD and ILO, with regard to the field of their respective competence"; TD/RS/CONF/10, p. 20, para. 90. This suggestion was not adopted.

²⁰³ At first sight, the above proposition contradicts the principle that treaties do not create either obligations or rights for third States without their consent, see Art. 34 of the VCT; I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, 1984, pp. 98-106; E. Osieke, *Constitutional Law and Practice in the International Labour Organisation*, 1985, pp. 166-167. However, the extension of the application of some provisions of maritime Conventions to ships registered in countries, not parties to the Conventions concerned, which enter the port of a ratifying country is permissible under the rule of international customary law that these ships are subject to the laws and regulations of the port State, at least as far as certain matters, such as the safety and the public order of the port, are concerned; compare Art. 38 of the VCT; see also Sinclair, op. cit., p. 99, 100; Philippe Cahier, "Le problème des effets des traités à l'égard des États tiers", *R.C.A.D.I.*, Vol. 143, III, at pp. 599-600; R.F. Roxburgh, *International Conventions and Third States*, London, 1917, at pp. 101-103. However, as regards labour questions this rule is far from clear. For an analysis of the question and conclusions see infra sections 6.2.1; 6.2.2. and n. 184 to Chapter 6.

In view of what has been said above, the adoption in ILO Conventions of the UNCTAD's concept of the "genuine link" is not recommended. In any case, it would not change the *status quo* as regards international obligations arising from ILO Conventions.

This leads to the following question concerning whether the criterion of registration seems to be sufficient for ILO purposes. First, the proposal of Algeria (cited above under 1.6.1. 2)), namely that the law of the flag State should, *inter alia*, also apply to seafarers who are nationals of countries which have ratified the Convention but who work on board ships registered in countries which have not ratified the Convention, ignores the fact that, in principle, the flag State is entitled to protect all seamen, whether national or alien, employed on board ships flying its flag under customary law.²⁰⁴ Accordingly, a treaty that contained that part of the Algerian proposal with respect to the protection of alien seamen by the State of their nationality would not be binding on States which did not become parties thereto. It is another matter that these States might choose to waive their right to protection of alien crews on board ships flying their flag. If they did not do so, in the absence of any bilateral agreements, the right of the State of the nationality of seamen to protect nationals on board foreign vessels could, in the case of a dispute, be open to question from a legal point of view.

The distinction drawn between registration and the right to fly a flag, despite occasional discussions within the ILO, cited under 1.6.1., has not played an important role in ILO instruments in practical terms. It is unquestionable that the right to fly the flag does not always depend on registration. But in ILO instruments this distinction has not attracted particular attention. Let us take Convention No. 55 as an example. This Convention certainly applies to pleasure yachts although this is not expressly stated.²⁰⁵ This is so irrespective of tonnage unless a ratifying State takes advantage of Art. 1 (2) (a) (iii). It is common knowledge that many countries do not subject pleasure yachts, especially of a small tonnage, to the requirement of registration. Despite this, the Convention applies "to all persons employed on board any vessel ... *registered* in a territory for which this Convention is in force ...".²⁰⁶ It is clear that registration in ILO documents does not imply a formal requirement in the sense of the recording of certain data concerning specific ships in an official document but the re-

²⁰⁴Thus Meyers, op. cit., pp. 104-107; O'Connell, op. cit., Vol. II, p. 761; F. Gamillscheg, *Internationales Arbeitsrecht*, Tübingen, 1959, pp. 21, 136, 177-179. The law of the flag, as the main criterion for determining the law applicable to employment relations on board ship, is also recognised by national laws, case law and European social security instruments including the Nordic Agreement on Social Security. Exceptions to this rule are made in cases where: a) a foreign vessel is engaged solely within the national waters of a coastal State; then, the law of the latter State applies; b) a seafarer has a continuing contract with a shipping firm in one country but he is subsequently assigned to a ship flying the flag of another State; then, the law of the original State applies; and c) in case of FOC vessels an attempt is made to "pierce" the veil of the flag by applying other rules of conflict of laws; see F. Morgenstern, *International conflicts of labour law*, ILO, Geneva, 1984, pp. 30-32; Gamillscheg, op. cit., pp. 136-137. For an analysis of the European Convention on Social Security and the Supplementary Agreement see C. Villars, "Social security for migrant workers in the framework of the Council of Europe", *ILR*, Vol. 120, No. 3, May-June 1981, pp. 291-302. In some cases national courts have applied other laws, such as the law of the seaman's nationality when the law of the flag contains stipulations contrary to the *public order* of the country of the *lex fori*; see Gamillscheg, op. cit., p. 73.

²⁰⁵See infra 5.2.1., at p. 386.

²⁰⁶Art. 1 (emphasis added). It should be noted that this is a typical phrase in ILO instruments and many of them include implicitly pleasure yachts.

levant ILO provisions could be read as follows: "to all persons employed on board any vessel ... which belongs to a State for which this Convention is in force ...".²⁰⁷

Whereas, to crystallise the concept of the genuine link, Rienow prefers the criterion of registration, Watts and others prefer that of the nationality of the shipowners, Meyers refers to a bundle of duties and rights assigned to a ship, MacDougal and Burke mention "the act" by which nationality is attributed to a specific ship and UNCTAD attempts the establishment of a socio-economic link, the present writer thinks that none of these approaches is practical for determination of the application of ILO maritime Conventions. There are several reasons for the latter view:

a) The requirements imposed by the maintenance of public order on the high seas (responsibility of the flag State, navigation interests, etc.) are different from the social goals which the ILO aims to achieve in the field of maritime employment (improvement of working conditions).

b) ILO Recommendation No. 108 attempts to define the genuine link but if the categories of requirements listed therein (ranging from the engagement of seafarers, through repatriation requirements to manning and social security measures) were adopted as defining the concept of the genuine link, the adoption of other ILO maritime instruments would be pointless.

c) In fact, the ILO aims to improve the working conditions of seamen through manning and other requirements, not by incorporating these in criteria aiming to determine the applicable law, but by urging ILO Members to ratify the instruments concerned. Accordingly, ILO instruments, since they themselves establish a kind of genuine link from the labour point of view, do not need criterion other than one which can provide reasonable proof of the fact that a vessel belongs to a particular State. In this respect, no one can dispute that such proof is in most cases provided by registration requirements.²⁰⁸ When an ILO Conference intends to extend the application of a specific instrument not only to persons employed on board ships registered in the territory of a ratifying Member but also to other persons having a connection with a ratifying Member, it has done so to date by expressly adopting an alternative criterion such as the law of the residence of the seaman or, in fact, any other law.²⁰⁹ It should be noted that Convention No. 165 is the first ILO maritime Convention in which

²⁰⁷This means that absence of registration does not determine the question of whether a ship has the right to fly the flag of certain State, or whether, in fact, it possesses the nationality of that State. A more explicit provision could be substituted for all similar provisions in ILO instruments: "This Convention applies to all ships registered in the territory of a contracting party and to non-registered ships having the nationality of this party"; compare Art. II of the IMO 1962 Convention concerning revision of the 1954 Convention for the prevention of water pollution from hydrocarbons.

²⁰⁸Thus MacDougal and Burke, *op. cit.*, pp. 1112-1113 where they reject flag and documentation as alternative methods of proof of the nationality of the ships: the first because it can be run up and down quickly and the second because documents can be easily falsified; see also *ibid.*, pp. 1113-1121. According to Singh, the duty to register is a rule of customary law and registration should be the only basis for grant of nationality and for the exercise of the right of protection; Singh, 1962; *op. cit.*, pp. 39-40, 63-64. However, he qualifies the criterion of registration a) by resort to minimum requirements imposed by the concept of "genuine link" which should follow registration and b) by proclaiming that flag should not be divorced from registration which is "a vital factor for fixation of responsibility and maintenance of law and order on the high seas"; *ibid.*

²⁰⁹See Art. 17 of Convention No. 165 analysed in Chapter 5, Section 5.5.6., pp. 419-421. Likewise, social security instruments in the European Community depart in certain cases from the principle of the law of the flag State: as regards persons employed in the ports or territorial waters of a Member State these are subject to the legislation of that Member State while seamen employed on board a vessel flying the flag of a Member State by an undertaking whose

the criterion of registration has been abandoned but this has not been done on the basis of doctrinal principles but because of practical necessities. In the future, it seems that the ILO will adopt any criterion that facilitates the implementation of the standards adopted. This criterion will depend on the nature of the labour standards adopted, the administrative difficulties which may be encountered in their implementation at the national level and the desire to avoid positive and negative conflicts of law. If the same approach is followed in respect of other international maritime instruments concerning safety and economic considerations and they become widely ratified, the elusive genuine link will be provided by the adopted instruments and the invention of another genuine link through the HSC, UNCTAD or another method would be of less value.²¹⁰

From the above analysis it has been made clear that the usefulness of the concept of the genuine link in the context of ILO maritime Conventions is minimal and the identification of a reliable means of the proof of the nationality of the ships is more important for ILO purposes. Apart from special provisions concerning the applicable law which have a direct effect on this question, such as the relevant provisions of Convention No. 165, a standard criterion should be found which would be appropriate for inclusion in ILO Conventions.²¹¹ The criterion of registration provides reasonable certainty but cannot avoid malpractices.²¹² The situation could be rectified if a provision is made in

registered office or place of business is in the territory of another Member State, are subject to the legislation of the latter in matters of social security (see Art. 14 (2) (b) and (c) of EEC Reg. 1408/71).

²¹⁰In the writer's opinion the principle of the genuine link as recognised in the Preamble to the UNCTAD Convention has never been established. While in the beginning this principle was aimed at denoting certain substantial obligations of the flag State, in modern times it is used to camouflage the same obligations in the name of international law. The concept of the genuine link should be eliminated and only its essence should be expressed in international instruments adopted by international organisations and bodies. In fact, the UNCTAD Convention in its Preamble, as it stands, eschewed any attempt to define this concept; compare the draft submitted by the Working Group on the Preamble which attempted such definition, TD/RS/CONF/10, Appendix II, p. 69. To the extent that these international agreements provide for port state control the concept of the "genuine link" would have to be modified to include both flag State and port State control.

²¹¹If any conclusion can be drawn from the ILO practice in respect of the "genuine link", it is that in the majority of cases the criterion of registration has been used to establish a connection between a ratifying country and the ship to which the relevant ILO instruments apply. The criterion of registration is also supported by MacDougal and Burke as the preferable means for establishing the national character of the vessel and by Rienow as establishing the nationality of the ship itself. However, these views are of limited assistance for the purposes of the present enquiry for the following reasons: a) the objective to be achieved here is the effectiveness and widespread application of ILO Conventions and not the legal or other connection between a State and a ship; b) these views were formulated when the practice of dual registrations and bareboat charters was not so widespread as today (the UNCLOS Conventions do not prohibit dual registration); and c) they attempt to define customary law rather than formulate a basis for future policies.

²¹²About 6 FOC countries today permit dual registration. One of the most popular combinations is that of Panama/Philippines. As can be seen from table Appendix 6, Table 4, ships falling under this category have the lowest crew costs in the shipping market. Dual registration allows foreign owned tonnage to be chartered under a bareboat charter and registered on to a second register. If the ILO criterion of registration applies to the first State of registration, a shipowner who has ships registered under, for instance, the Liberian flag and intends to avoid ILO standards could register its ship under a bareboat charter with a State such as the Philippines. As regards the usefulness of the flag criterion in this respect, if the ship concerned were flying the flag of the State of the second registration, the use of the flag criterion would result in the application of ILO Conventions to ships flying the flag of a ratifying country, in our example, Philippines but not Liberia. If, on the other hand, the ship concerned flew the flag of the State of the first registration, the relevant ILO Conventions would apply to Liberia but not to the Philippines. The above examples show that in the future the question concerning whether the first State of registration retains its obligations under ILO Conventions or they are transferred to the second State or both States assume obligations for the purposes of the application of the ILO Conventions concerned should be examined.

ILO Conventions to the effect that these would apply to countries in the territory of which the ship is i) registered and ii) registered under a bare-boat charter but such a provision would leave out offshore registers to which ILO Conventions would not apply.²¹³ The scope of ILO maritime Conventions in the future could be delineated as follows: "The provisions of the present Convention apply to ships registered a) in the territory of a Member for which this Convention is in force, b) in the territory of a Member for which this Convention is in force and to which a particular ship has been transferred from the registry of another Member to which the Convention applies by means of clause a), as a result of a bareboat charter, c) in a place other than a territory of a Member for which the Convention is in force under clauses a) and b) which are entitled to fly the flag of one of the Members to which this Convention applies by means of such clauses".²¹⁴

Finally, it should be noted that in this section, the writer has not argued for or against use of flags of convenience. It is beyond doubt that malpractices have occurred on board FOC vessels.²¹⁵ It is the view of this writer (see also *infra* Section 7.6.2. where the question of crew costs is discussed) that from the moment when internationally accepted safety and labour standards are applied on board FOC vessels, the value of the legal and moral arguments against the use of FOC vessels will be substantially reduced.²¹⁶ The aspiration of developing countries to establish their own national merchant fleets is regarded as a political and not legal factor. Moreover, it is highly questionable whether the elimination of flags of convenience will have any beneficial effects on the development of merchant fleets of developing countries.²¹⁷ Here, it should be noted that UNCTAD and OECD dif-

²¹³It is obvious that if the country to which the ship has been bareboat chartered has not ratified the ILO Convention concerned, this country could not assume any obligation in respect of this Convention under the ILO Constitution. However, ratification of international Conventions by a State takes into account different considerations from those on which private decisions of particular shipowners are based.

²¹⁴Clause c) would not apply to non-metropolitan territories within the meaning of the ILO Constitution and to territories which are independent and are entitled to be Members of the ILO and, therefore, can assume obligations under ILO Conventions by means of the criterion of registration. Its sole objective would be to deal effectively with offshore registers (see for a brief account of these registers Chapter 7, Section 7.11.2.) whose development might corrode the meaning of national sovereignty, down-grade the importance of the flag and registration at the international level and facilitate evasion of international obligations by transferring permanently or temporarily nationally owned tonnage, operating under the flag of the mainland, to convenient places of registration.

²¹⁵In 1958 Greek shipowners informed the U.S. authorities that a ship under the Liberian register was to be taken out of service. In fact, they paid off the crew at Chester, Pennsylvania and caused it to be repatriated in order to secure a new crew at lower wages a few days later, misleading the U.S. authorities so as to cause them to order a repatriation of the employees which would not have been required if the intention of reactivating the ship had been revealed. The case was brought before the Governing Body Committee on Freedom of Association which concluded that this was not a case of violation of trade union rights by the Greek Government, since the latter had denied responsibility concerning ships under a foreign register; Case No. 173: Complaint Presented by the Federation of Greek Maritime Unions (Cardiff) against the Governments of the United States and Greece, *O.B.*, Vol. XLIII, pp. 89-93.

²¹⁶Apart from safety and labour questions, attempts by shipowners to evade their responsibilities in respect of insurance against their liability as operators of nuclear ships, which is compulsory for parties to the Brussels Convention on Nuclear Shipping of 1962, constitute another reproachable aspect of the operation of FOC vessels; see Goldie, *op. cit.*, pp. 222-3.

²¹⁷See for conflicting views on this point, A. Cafruny, *op. cit.*, pp. 250-255, 261-2; McConnell 1985, *op. cit.*, pp. 390-2. However, it cannot be denied that the FOC concept nowadays is based on market oriented considerations and disregards the aspirations of developing countries to build up national merchant fleets with all ensuing advantages for their national economy (balance of payments, employment opportunities, etc.). The latter countries view the development of FOC as a residue of colonialism which frustrates their attempts to establish a New International Economic Order. For an evaluation of the UNCTAD's work from this point of view see M. Rowlinson, "Flags of convenience: The

fer on their approach toward "genuine link" requirements for national vessels. While the former was of the opinion that the lack of any involvement in the the ownership, management or manning of a ship in open registers resulted in a situation where the shipowners can escape obligations imposed by the ILO and the IMO, a representative of the OECD stated, *inter alia*, that "We see no reason to believe that nationality requirements for ownership, crew and management would lead to any improvement in the safety, control or effectiveness and economy of international shipping".²¹⁸

Epilogue: An ILO flag?

Further developments could be envisaged, such as ships flying an IMO, ILO or EEC flag.²¹⁹ However, the outcome of such developments is unclear as it depends on the relationship (protectionist or not) of these flags to other national flags. The question of the attribution of a flag to international organisations is outside the scope of this book but it must be said here that this issue encounters serious legal problems which have not been yet solved in a satisfactory manner at the international level.²²⁰ In particular, assuming that the ILO Constitution permitted it to immatriculate ships,²²¹ the allocation of ships to the ILO could be envisaged as follows: an ILO ship would be a ship to which all or the most important ILO maritime instruments would apply. This ship would fly the UN or a special ILO flag and could, in addition, fly the flag of an ILO Member. The purpose of this experimental ship would be to testify its competitiveness in the shipping industry. On the other hand, any of the ILO Members could add to its flag the ILO flag, which would constitute *prima facie* evidence that the ship concerned conforms to the ILO standards on which the attribution of the ILO flag was made dependent.²²²

1.7. The Joint Maritime Commission: A Review

1.7.1. The establishment of the Maritime Branch of the ILO and of the JMC

In a Memorandum submitted by Albert Thomas, the first Director-General of the ILO, to the Governing Body, the establishment of a Maritime Section of the International Labour Office was en-

UNCTAD case", *Marit. Pol. Mgmt.*, 1985, Vol. 12, No. 3, pp. 241-4; L. Juda, "World shipping, UNCTAD, and the New International Economic Order", *International Organisation*, Vol. 35, No. 3, Summer 1981, pp. 493-516. By a curious irony the phasing out of open registries is also said to defeat the "legitimate" aspirations of developing countries for a national flag fleet; see the statements of the representatives of the Bahamas and Vanuatu in the UNCTAD Conference; TD/RS/CONF/10, pp. 21-22.

²¹⁸UNCTAD and OECD differ on open registers", Vonnie Bishop, Report from Hong Kong, EXPOSHIP, Far East 84, 17 Nov. 1984. On the other hand, the Commission of the European Communities rejected the idea of the "genuine link" as conceived by the developing countries while at the same time supported measures which would ensure greater transparency of ownership and improvement of ship safety and social standards; see "Progress towards a common transport policy", Maritime transport, *Bulletin of the European Communities*, Supplement 5/85, pp. 26-28.

²¹⁹*Lloyd's List*, no. 53420, Tuesday 28 October 1986, "EEC countries urged to create new Euroflag".

²²⁰Meyers, op. cit., pp. 323-351, especially at pp. 341-351; D. Caron, op. cit., pp. 294-6; Singh 1962, op. cit., pp. 134-161.

²²¹Currently the ILO Constitution does not empower the ILO to register and own tonnage.

²²²In this connection Art. 7 of the HSC and Art. 93 of UNCLOS III permit ships employed on the official service of UN specialised agencies to fly the flag of these agencies.

visaged. This was necessary to prepare for the first Maritime Conference in 1920. It was also a demand made by the International Congress of Seamen, which met in February, 1919.²²³ In the Memorandum a "permanent joint Representative Commission" was mentioned "which the seamen have likewise demanded in default of special regular conferences."²²⁴

According to a resolution adopted by the Commission on International Labour Legislation, the Governing Body at the third sitting of its second session decided that the second session of the ILO Conference should be devoted to seamen's affairs and it therefore so arranged the Agenda for the Seamen's Conference.²²⁵ Then at its third session, after some discussion on the advisability of the establishment of a Commission composed of representatives of shipowners and seamen which would discuss and give advice on seamen's problems, the G.B. decided that a Joint Commission of twelve members should be appointed consisting of five shipowners and five seamen chosen by the Genoa Conference and two members chosen by the Governing Body. This Commission would assist the technical maritime section of the Labour Office, and would be consulted on any questions of maritime labour. It would meet when convened by the President of the G.B., who would preside at its deliberations. The members of the Committee were to be nominated by the Conference and it was thought by the Members of the G.B. that it would have a purely consultative character.²²⁶

1.7.2. The functions and powers of the JMC

The examination of the JMC's contribution to the ILO's work on seafarers' standards aims at providing some answers to the following issues:²²⁷

- the structure of the JMC (bipartite or tripartite).
- the need for tripartite subcommittees of the JMC.
- the composition of the JMC (adequate representation of shipping interests).
- the scope of the JMC's work on seafarer' standards (for example, standardisation of wages at the international level, consideration of safety questions affecting seamen etc.).
- the consultative or binding character of the JMC.

1.7.2.1. The scope of the JMC's powers

²²³The seamen's organisations had asked for the establishment of a permanent general conference for the international regulation of maritime labour and of an international supervisory office for maritime labour. Finally, they were content to have special meetings of the ILO devoted to seamen's affairs and establishment of a maritime section of the ILO Office. Also a Joint Maritime Commission would be established to assist the maritime section of the Office.

²²⁴*O.B.*, vol. I, pp. 510-1.

²²⁵*G.B.*, pp. 11-13.

²²⁶*G.B.*, p. 12. It should be noted that the establishment of a Joint Maritime Commission composed of seamen's and shipowners' representatives was a demand from seamen's organisations as set out in one of the resolutions adopted by the Seamen's Trade Union Conference held at Antwerp in January 1920, 2 *G.B.*, p. 39.

²²⁷For an account of the work of the JMC see "The Joint Maritime Commission and the Maritime Work of the ILO", *ILR*, Vol. LXII, no. 5, Nov. 1950, pp. 337-363 (hereinafter cited as *ILR*, 1950).

As regards the scope of the JMC's powers, in practice, they have been exercised only in relation to questions concerning maritime employment, although the wording of the 1921 Resolution which, *inter alia*, stated that all questions on maritime affairs to be examined by future Conferences should be considered by the JMC would have given the JMC wider powers.²²⁸ The JMC has occasionally studied questions of a "quasi-maritime" character.²²⁹

The JMC has occasionally set up sub-committees which have examined various maritime questions. These sub-committees had either bipartite²³⁰ or tripartite structure.

1.7.2.2. *The structure and composition of the JMC*

The structure and composition of the JMC was first discussed in 1941 when the Report of the Director General to the International Labour Conference, convened in New York, suggested that the seriousness of the problems affecting seamen, especially after the war, might justify a change in the composition of the JMC to provide for governmental representation.²³¹ No action was taken on this suggestion until 1946 when a Resolution adopted at the 28th (maritime) session of the ILO Conference urged for the reconstitution of the JMC on a tripartite basis.²³² However, the Governing Body decided to postpone consideration of this question until a later session.²³³ Finally, it was agreed that the appointment of tripartite subcommittees of the ILO to deal with a) the review of the progress of ratification of Conventions and the possible desirability of revising a Convention and b) with technical questions in the practical application of which Governments have a substantial part to play (for instance, questions relating to social security, crew accommodation, etc) should be considered.²³⁴

One commentator has defended the bipartite structure of the JMC: "The continued successful working of the bipartite Joint Maritime Commission may be viewed as an important concomitant of the purpose of ILO's tripartite structure. The retention of this structure assures an effective mechanism for the consideration of the many and complicated matters formulated by the conference (referring to the 55th (maritime) session of the ILO Conference).²³⁵

²²⁸See supra n. 110.

²²⁹These include questions concerning dock workers and fishermen. For the quasi-maritime character of these questions, see Wilfred Jenks, "Contribution de l' Organisation Internationale du Travail à l' élaboration d' un droit uniforme du travail", in *Introduction à l' étude du droit comparé* (Recueil d' études en l' honneur d' Edouard Lambert), vol. II, Paris, 1938, pp. 870-883, at p. 871; the JMC has also dealt with questions of safety at sea affecting the safety of the crew, see the 8th Session of the JMC in *O.B.*, Vol. XIII, pp. 63-8, Vol. XIV, pp. 46-57, Vol. XXV, pp. 168-170.

²³⁰Sub-Committee on Deck Cargoes, see *O.B.*, Vol. V, p. 188, Vol. VII, pp. 211-2, Vol. X, pp. 7-8.

²³¹*O.B.*, Vol. XXV, pp. 118, 188.

²³²For the text of the Resolution see *O.B.*, Vol. XXIX, pp. 198-9. The Resolution, *inter alia*, requested the GB to "consider the desirability (a) of reconstituting the Commission on a tripartite basis while continuing to provide for bipartite discussions wherever suitable or desirable".

²³³*O.B.*, Vol. XXIX, pp. 419, 454.

²³⁴These considerations were included in Art. 13, para. 2 of the Standing Orders of the JMC concerning tripartite subcommittees. Later attempts, especially from the Workers' delegates of France, to reintroduce the question of the tripartite structure of the JMC have not been successful; for a discussion of this question see 41 *R.P.*, pp. 155-158, 168-169; 55 *R.P.*, pp. 34, 64, 104, 112, 122, 123, 124, 158-9, 200-2, 204-5; 62 *R.P.*, pp. 41, 204; 74 *R.P.*, pp. 6/10, 7/4.

²³⁵Joseph P. Goldberg, "Seamen and modernisation of merchant shipping", *Monthly Labor Review*, Feb. 1971, pp. 49-54, at pp. 53-54. Likewise, the review of the JMC's work in the ILR concludes that although the JMC is a body of an

1.7.2.3. *The consultative or binding character of the JMC*

At present, the JMC is a body of a consultative character, viz. it cannot take decisions which are binding on third parties. Also, it does not have any constitutional powers as regards the drawing up of ILO questionnaires and drafts which deal with maritime questions.²³⁶ However, it must be recognised that over the years the JMC has participated actively in the evolution of the International Seamen's Code. The importance of the JMC lies in the fact that the Governing Body decides on the items to be placed on the agenda of a maritime session of the Conference after the JMC has considered possible issues which require urgent action on the part of the ILO and has recommended their inclusion on the agenda. Thus the JMC predetermines, to a certain extent, the future of the ILO's work on seafarers' standards.

The question of the powers assigned to the JMC, especially whether it should be a body of a consultative or binding character, depends, to a certain extent, on the structure given (bipartite or tripartite) to the JMC. If the JMC remains a consultative body there is no need, to a certain extent, for turning it into a tripartite body. The PTMC complements the powers of the JMC and it has a tripartite structure which ensures that the views of all parties concerned are heard.²³⁷

On the other hand, this question is also linked to the question of the frequency of maritime conferences: from 1920 to 1987 only nine maritime sessions of the ILO Conference (in two instances, in 1921 and 1949, general conferences considered maritime questions) have been held and in recent years the fact that long periods intervene between maritime Conferences, viz. from 6 to 12 years, has led to criticism of the system based on convening special sessions of the Conference to deal with maritime matters.²³⁸ In particular, it has been suggested that if maritime sessions of the Conference

advisory character, "it has wielded a considerable influence on the maritime work of the Organisation"; *ILR*, 1950, p. 362.

²³⁶The Deputy-Director, in response to a letter which had been addressed to the ILO Office by the Shipowners' Group of the JMC, in 1925, stated: "With regard to your regret that the International Labour Office was not able to comply with your request to place the draft Questionnaire before the JMC for consideration in its collective capacity, I must point out that it was not in the power of the International Labour Office to accede to this request. The actual practice, as decided by the Governing Body, is that the responsibility for the preparation of the Questionnaire should be left to the Director, and so long as this procedure is in force it would hardly be possible to impose this responsibility on the JMC as regards Questionnaires dealing with maritime questions. It is of course not impossible to conceive that another procedure might be decided on, but it must be remembered that it would be an innovation of a very considerable character. If the Governing Body were to decide to discuss and draw up the Questionnaires itself, and to refer those dealing with maritime questions to the JMC, it would necessarily have to deal in the same way with what are known as the blue Reports containing the replies of the Governments to the Questionnaire and the draft texts which are put forward for discussion by the Conference. If this method were to be followed it would be necessary to provide for one or two annual Sessions lasting at least a month over and above the Sessions which are held at present."; *O.B.*, Vol. IX, p. 138.

²³⁷Here, it should be noted that the Seafarers' Group in the JMC, had opposed the establishment of the PTMC in 1933, as it would result in delaying agreements and would involve unjustifiable expense; see *O.B.*, Vol. XIX, p. 10.

²³⁸The 2nd Asian Maritime Conference urged the G.B. to "expedite the holding of maritime meetings of the International Labour Organisation and ... to ensure that maritime sessions of the Conference, meetings of the Asian Maritime Conference and meetings of the Joint Maritime Commission are held at considerably shorter intervals than has recently been the case"; see Resolution (No. 6) concerning Future Maritime Meetings of the International Labour Organisation

are still to be held the JMC should be given more power. In this way maritime Conferences would be free to discuss fresh topics and would not be required to revise existing instruments. However, if the JMC were to be given binding revision powers, it should become a tripartite body. Also, its composition would have to be enhanced, with the result that the JMC would be transformed into a mini-Conference the convening of which at frequent intervals would have obvious financial implications.

1.7.3. Conclusions

The JMC has been to some extent successful in advocating the seamen's cause on the international plane. It headed off international seamen's strikes; provided the basis for the conclusion of national collective agreements; and standardised international practices with regard to crew welfare. It has also been argued that deliberations in the JMC have influenced the drafting of collective agreements at the national level.²³⁹ The reasons behind proposals of seafarers' delegates during the last ILO Conferences for a transformation of the JMC into a tripartite body are easy to identify. By giving the JMC a tripartite structure it is hoped that the power and authority of the JMC will be enhanced thus influencing more directly ILO decisions relating to seafarers.

It is the opinion of the writer that the JMC should be transformed into a tripartite body for three reasons:

a) The enlargement of the JMC with government delegates will save it from extinction or from becoming a merely formal body. It is submitted that the JMC does not now function as it should. First, the convocation of the JMC every 4 years on average²⁴⁰ signifies that the JMC does not quite serve its purpose as a body entrusted with the consideration of up-to-date maritime labour standards. Secondly, the overloaded agenda of the JMC is hardly reconcilable with the fact that the limited time available to the Commission is not sufficient for adequate consideration of the numerous issues involved. The duration of JMC meetings has ranged from 1 (last (1987) session of the JMC) to 11 (20th and 21st sessions (1967, 1972) of the JMC) days (3 to 4 days being the most common). If one considers the workload of the Commission, one comes to the conclusion that consideration of the

in *O.B.*, Vol. XLVIII, pp. 290-291. This resolution was adopted in 1965 but, in view of the lack of any developments in this direction, it also applies to the present situation.

²³⁹"Agreements worked out in the JMC are important ... because the chief actors in Geneva are the same persons who later negotiate collective agreements at the national level. Hence, even in the absence of ratified Conventions, principles arrived at in the JMC can find their way back into collective agreements simply because the same parties negotiate both."; E. Haas, *Beyond the Nation-State, Functionalism and International Organization*, Stanford California, 1964, at p. 306.

²⁴⁰Excluding the first 9 sessions of the JMC from 1920 to 1929 which, in fact, followed the establishment of the ILO and the Maritime Branch of the ILO and had to deal with emerging questions concerning the establishment of the International Seamen's Code.

questions on the Agenda within the time available, other than that of a guiding and introductory character, is almost impossible.²⁴¹

b) The JMC has worked in a satisfactory manner, especially during its last sessions, but it should be noted that, apart from the question of minimum standards on board ship and of social security for seafarers, the JMC has not considered recently salient questions concerning seamen's affairs. On the contrary, the implacable opposition of shipowners and seafarers has, in the past, rendered difficult the examination of issues such as wages, manning, disciplinary code for seamen, etc.²⁴² These questions thus were sent to the ILO Conference for examination. Even in cases in which some progress can be observed on crucial issues concerning seamen, such as introduction of port state control of labour conditions on board ship in 1976, the JMC played an ambivalent role: it was the 1976 ILO Conference that provided the final solution.²⁴³

c) The ILO Conferences are, to some extent, indirectly bound by JMC decisions. The JMC considers the various issues to be inserted on the Agenda of future maritime conferences and recommends accordingly to the Governing Body. Although the G.B. may disagree with the JMC decisions, its policy until now has been to follow the JMC recommendations in drawing up the Agenda of future conferences. Although ILO Conferences are empowered to overturn decisions taken at preparatory meetings, they do not have the power to discuss questions falling outside their Agendas;²⁴⁴ thus, the indirect power of the JMC: governments are, to a great extent, not consulted on the possible contents of the Agenda of maritime conferences. The view that the negotiation of maritime labour issues at the national and international level should be left to collective bargaining between the two parties concerned seems to be dated: a) government intervention in the shipping industry has undoubtedly increased during the eighties; and b) as will be seen in the following chapters, all ILO maritime instruments, including those adopted at the last maritime session of the Conference, call Governments to undertake important functions as regards the implementation of the standards included therein.

It is hoped that the tripartite structure of the JMC will instil greater responsibility into the preparatory stages leading to the adoption of maritime labour standards. Governments will also have greater influence on the drawing up of the Agenda of ILO maritime Conferences. Alternatively, the establishment of tripartite subcommittees of the JMC to deal with specific matters concerning

²⁴¹See, for example, the meeting of the 12th session of the JMC, which, despite the 5 days available for the consideration of the items of the Agenda, confined itself to the examination of the question of safety and welfare; *O.B.*, Vol. XXV, p. 189.

²⁴²An example of disagreement in recent times can be cited: the question of social and industrial implications of technological development and modernisation aboard ship was not considered by the 62nd (Maritime) Session of the ILO Conference as seafarers and shipowners could not agree on its inclusion on the Agenda of that Conference; *O.B.*, Vol. LVI, Nos. 2, 3 and 4, pp. 139-141.

²⁴³As will be seen in Chapter 6, Section 6.1.1. C), at p. 443, Art. 4 on port state control was included in Convention No. 147, only after a seafarers' amendment had been adopted at the plenary sitting of the 1976 Conference.

²⁴⁴In fact, any delegate can, as a point of order, dispute that a specific issue falls within the Agenda of the Conference.

maritime labour could be envisaged. This has been done in many instances in the past.²⁴⁵ These tripartite subcommittees could, *inter alia*, deal with such questions as examination of ratified Conventions with a view to revision and the drawing up of the Agenda of future ILO maritime Conferences, taking into account recent developments in the field of maritime employment, with a view to adoption of new instruments. However, the establishment of tripartite subcommittees does not give an answer to the question concerning what procedure might be found to transform the JMC into a body of a quasi-binding nature if ILO maritime Conferences cannot be convened at more frequent intervals. Moreover, these subcommittees, because of the limited participation of delegates in their deliberations, may not be representative of all parties concerned. As a result, important decisions, relating to the law of maritime employment, might not reflect the interests of a significant part of the maritime community.

The effectiveness of the JMC will be enhanced if:

- i) it is convened at more regular intervals and not only before maritime conferences;
- ii) it becomes more independent of these conferences. The JMC could undertake the review of ILO maritime standards and propose recommendations which do not have the formal character of ILO instruments under the ILO Constitution. These recommendations, however, could either be adopted by ILO Conferences, which could be conferences of a "general" nature;²⁴⁶ or they could be incorporated in codes of practices which will be JMC codes of practice, or both.²⁴⁷
- iii) it established permanent tripartite subcommittees to deal with "permanent" issues such as the evaluation of the effectiveness of existing ILO maritime instruments with a view to revision,²⁴⁸

²⁴⁵At its 14th session in 1947 the JMC, following the resolution adopted by the 1946 Conference concerning the desirability of restructuring the JMC on a tripartite basis, adopted Resolution II which stated that "the decision whether any particular subject coming before it should be referred to bipartite or tripartite discussion should be taken on the merits of the case. But considers that as a general rule the following matters are suitable for tripartite discussion: 1. The review of the progress of ratification of Conventions, including the consideration of obstacles to ratification and the possible desirability or revising a Convention. 2. Technical questions in the practical application of which Governments have a substantial part to play, *inter alia*, social insurance measures, crew accommodation, etc."; *O.B.*, Vol. XXX, pp. 308-9.

²⁴⁶The writer has generally opposed the adoption of maritime standards by such conferences. The adoption of maritime standards by conferences of a "general" nature would be possible subject to two conditions: a) a tripartite JMC or a permanent tripartite subcommittee thereof could be enlarged so as to encompass all countries having an interest in maritime employment policies; and b) a practice could be developed or a mechanism be devised whereby these JMC decisions would not normally be disputed at these conferences or, if they were so disputed, no final decision would be taken on the relevant issues: they would be submitted back to the JMC for reconsideration. Although this would run counter to the supremacy of ILO Conference within the ILO, a practice could be established according to which undecided matters would be submitted back to the JMC by means of Conference resolutions. It should be remembered that, as pointed out earlier in this Chapter, the entire involvement of the ILO in maritime affairs is based on a resolution adopted by the Peace Conference.

²⁴⁷As will be seen later in Chapters 3 and 7, the ILO and the IMO have adopted many codes of practices dealing with maritime matters. The codes dealing with maritime labour questions, however, are not so numerous. An example of a code which became an instrument of a binding character is provided by Convention No. 164 concerning Health Protection and Medical Care (Seafarers), 1987 which has included almost verbatim provisions concerning training in medical care which were contained in the joint IMO/ILO international maritime training guide, adopted by the ILO/IMO Committee on Training in 1985.

²⁴⁸This was done, for example, in 1948 when a tripartite subcommittee of the JMC was established to consider the revision of the Seattle Conventions; see *O.B.*, Vol. XXXI, pp. 199-200. The Committee on Conditions of Work in the Fishing Industry which met in Geneva, in its 4th session in 1988, adopted a Resolution, *inter alia*, urging the GB to

and the consideration of proposals concerning adoption of new instruments in a specific area. These instruments could be either ILO Conventions and Recommendations or informal JMC recommendations and codes of practices.

1.8. Summary of Conclusions

Generally, it can be said that the early maritime codes which were in use in various regions of the world did not aim to protect the maritime labour force but were based on the principle of sovereignty and the desire for its expansion beyond national territory for commercial purposes and for reasons of prestige. Strict regulations concerning discipline and safety did not give way to considerations of social justice until the establishment of the International Association for the Legal Protection of Labor and, more importantly, the establishment of the ILO by the Treaty of Peace in 1919.

No doubts have ever been raised concerning the competence of the ILO in regard to maritime labour but it is useful to bear in mind that such a competence is beyond controversy. Its existence was alluded to by the first Director-General of the ILO, Albert Thomas, before the PCIJ in 1922 when it considered the competence of the ILO in regard to agricultural labour and has not been questioned by any writer of that time. Furthermore, the above Advisory Opinion of the PCIJ can be regarded as applying equally to seafarers. On the other hand, the writer after an examination of the preparatory work of the Washington Conference and of the International Labour Commission concludes that the Washington decisions and, possibly, Art. 427 point 4 of the Treaty of Peace did not apply to seafarers. However, the implications of this long controversy within the ILO are substantially mitigated a) by the fact that the 8-hour day and the 48-hour week have never been unequivocally adopted in any ILO Convention and have never become binding on ILO Members; b) by doubts concerning the intention of the drafters of Art. 427 of the Treaty to impose on signatories the specific obligations contained in Art. 427 and b) by the "all-encompassing" wording of the Declaration of Philadelphia which replaced the above Article and undoubtedly applies to seafarers. Nonetheless, the lesson to be learned from this long dispute is that unscrutinised application of labour standards of a "general nature" to seafarers is not recommended in view of the specific requirements of their profession. This, of course, does not prevent ILO instruments from exercising a beneficial effect on maritime labour standards, especially in view of the fact that the latter are updated at very irregular intervals.

request the Director General to create a standing committee for the fishing industry which may consist of tripartite delegations and to convene regular meetings of this committee at least every four years; see Committee on Conditions of Work in the Fishing Industry (Geneva, 4-13 May 1988), *O.B.*, Vol. LXXI, 1988, Series A, No. 1, pp. 33-41, Resolution on future action of the ILO for the fishing industry, at p. 39.

Although the International Seamen's Code had been originally envisaged as a comprehensive instrument dealing with most maritime labour issues, in practice this has not proved feasible. The ILO has over the years adopted numerous instruments dealing with specific questions relating to maritime employment. However, in recent years the need for effective protection of seamen at the international level and the long periods which intervene before outdated and not widely ratified instruments can be revised resulted in the adoption of comprehensive instruments such as Conventions Nos. 147 and 165. It seems that in the future the ILO's on seafarers' standards will concentrate on the adoption and subsequent revision of comprehensive instruments covering wide areas of the law of maritime employment such as welfare, social security, minimum standards etc. However, the successful treatment of maritime labour questions presupposes adequate inspection of labour conditions on board ship by the authorities of the flag and the port State and, as will be seen in Chapter 6, it is in this respect that Convention No. 147 is dangerously flawed. It should always be remembered that an efficient International Seamen's Code should incorporate, as its part, provisions concerning effective control of *all* requirements laid down by it.

The controversial concept of the "genuine link" as developed in customary and treaty law is of no use as a criterion for the identification of the ships to which ILO maritime Conventions apply. It is not clear what specific obligations customary law imposes on flag States from the labour point of view while the potential application of ILO instruments by means of the relevant provisions of the Law of the Sea Conventions is arguably minimal. In any case, these provisions are so vaguely drafted and with so little regard for labour terminology and social aims that only further complications can arise from their application. The UNCTAD Convention constitutes a welcome development in this connection since it lays down more specific and comprehensive obligations of flag states in regard to maritime employment. Unfortunately, the effectiveness of this Convention is compromised a) by the vague obligations imposed on flag States at the national level; b) the optional and non-binding character of certain of its provisions; and c) the apparent lack of enforcement which has always been a major problem of the "genuine link".

It is suggested in this Chapter that the most appropriate method of determining the application of ILO maritime Conventions is the criterion of registration because of its inherent ability to provide reasonable proof of the ship's national character. However, it has to be modified to encompass a) ships registered under a bareboat charter and b) ships registered under offshore registers. An appropriate formula is suggested above to achieve this end. It is hoped that the concept of the "genuine link" will be eventually replaced by obligations assumed by ratifying countries under international maritime conventions. These can be of an economic, safety or labour nature, and their widespread application through bilateral or multilateral enforcement mechanisms will have as a result the obsolescence of the concept of the "genuine link" of which they will be a substitute. In any case this concept has proved notoriously incapable of producing any results.

Although the JMC has greatly boosted the development of the International Seamen's Code, it is thought that a JMC restructured on a tripartite basis will be able to deal more efficiently with controversial issues concerning maritime labour and will be able to undertake important functions which will ultimately benefit the evolution of the law of maritime employment. These include active and regular participation of the three parties in the drawing up of the Agenda of ILO Conferences, suggestions for revision of outmoded maritime Conventions, identification of new issues relevant to seamen's affairs whose regulation requires substantial research and the adoption of Codes of Practice which would aim to facilitate and improve compliance with obligations assumed under ILO Conventions.

Preface to Chapters 2-6

In the following Chapters an analysis of the maritime instruments adopted by the ILO is presented. These instruments, whether Conventions, Recommendations or Resolutions, deal with the following aspects of maritime employment:

A) Entry into, and conditions for admission to employment (Chapter 2).¹ This Chapter deals with questions of the minimum age for admission to employment, medical examination, facilities for finding employment for seamen, seamen's articles of agreement and seafarers' identity documents.

B) Maritime training and certificates of competency (Chapter 3).²

C) General conditions of employment (Chapter 4).³ This Chapter deals with questions of wages, hours of work, manning, repatriation and paid annual leave.

D) Social security (Chapter 5).⁴ This Chapter deals with questions of unemployment indemnity in cases of shipwreck, unemployment insurance, shipowner's liability in cases of sickness and injury, sickness insurance, seafarers' pensions, and, generally, most aspects of social security for seafarers.

E) Substandard ships and maritime labour (Chapter 6).⁵ This Chapter deals with questions of minimum standards on board ship and inspection of conditions on board ship from the labour point of view.

In particular, Chapter 6 is concerned with the question of minimum standards on board ship and labour inspection. This Chapter focuses on the interpretation of Convention No. 147 and it points out its deficiencies. Revision of many points of the Convention is recommended. Since Convention No. 147 touches on the question of substandard vessels the writer explores certain aspects of the FOC issue and its relevance to the law of maritime employment (the question of the "genuine link" is, however, discussed in Chapter 1). Finally, as Convention No. 147 is typically concerned with the port inspection of labour conditions on board ship, the writer also gives a brief account of current international law concerning port State control of labour conditions on board ship and proposes some measures whereby this control can be rendered more effective.

On the other hand, Recommendation No. 9 concerning the Establishment of National Seamen's Codes is discussed in Chapters 1 and 2 where the International Seamen's Code and the sea-

¹Conventions Nos. 7, 15, 16, 58, 73, 138, 9, 22 and 108; Recommendation No. 107.

²Conventions Nos. 53, 69, 74; Recommendations Nos. 77, 137.

³Conventions Nos. 57, 76, 93, 108, 23, 166, 54, 72, 91, 146; Recommendations Nos. 49, 27, 174.

⁴Conventions Nos. 8, 55, 56, 70, 71, 166; Recommendations Nos. 10, 75, 76.

⁵Conventions Nos. 147; Recommendations Nos. 28, 108, 155.

men's articles of agreement are examined. Recommendation No. 139 concerning Employment Problems Arising from Technical Developments on Board Ship and Recommendation No. 153 concerning the Protection of Young Seafarers are not allocated separate sections, but, since these two Recommendations deal with certain aspects of seamen's employment from rather specific points of view, namely the effect of technical developments on seamen's employment and the need for the protection of young seafarers, they are examined together with other relevant ILO maritime instruments and their effect is assessed in that context.

Issues relating to the safety, health, welfare (prevention of occupational accidents, seamen's welfare in port and at sea, food and catering, accommodation, medical care), and to the continuity of employment of seamen are not dealt with in the present study for two reasons: a) limitations of space preclude their detailed examination; and b) they did not give rise to much controversy at ILO Conferences and no subtle issues of interpretation have arisen in respect thereof.

As can be seen from the organisation of chapters 2 to 6, they intend to describe and analyse the ILO's contribution to the development of seafarers' standards; they deal with seamen's affairs in the order in which they appear in the seaman's life, starting with his admission to the seafaring profession and ending with his retirement and pension. Thus the different aspects of maritime employment are not dealt with in order of importance. Such an order would first require the examination of the question of wages, hours of work and manning followed by the question of minimum standards on board ship. The order preferred in this study follows the traditional classification of aspects of maritime employment in ILO collections of seafarers' standards and in national monographs dealing the law of maritime labour and serves research purposes adequately.

The writer starts with an exposition of the attitudes of the shipowners, seafarers and governments before the adoption of an international instrument on a specific subject. He follows the preparatory stages leading to the adoption of each instrument and provides an accurate interpretation of the relevant provisions. A number of interpretations of ILO maritime instruments given by the ILO Office are also referred to in this study. When available, state practice is examined and compared to existing instruments with a view to a) examining how efficiently state practice was evaluated in drawing up the relevant draft instruments, and b) considering what improvements can be effected on existing instruments. State practice is based on information supplied to the ILO, following questionnaires sent to governments asking for information concerning specific aspects of maritime employment. Selected monographs have also been taken into account for the purpose of a) assessing state practice and b) suggesting areas which remain unexplored by existing instruments.

When necessary, ILO maritime instruments are compared to similar instruments of a general nature. The assistance offered by the latter instruments is twofold: a) they show whether seamen's standards compare favourably with standards for shore-workers, and b) they contain elements which could be incorporated into ILO maritime instruments to advantage. Similarly, the resolutions adopted at the two ILO maritime regional Conferences in 1953 and 1965 are taken into account while the im-

pact that the adoption of a number of IMO instruments, especially in the field of maritime training, safety on board ship and inspection, has had on the law of seamen's employment is assessed.

At the same time the attitudes of shipowners, seafarers and governments, studied together with the subsequent number of ratifications and attitudes of governments, permit the writer to draw some conclusions concerning the effectiveness of certain instruments over the years, the reasons for non-ratification of ILO maritime instruments and possible remedies. But above all, this study aims to be a definitive hand-book of interpretation of ILO maritime instruments. Therefore, while comments of the Committee of Experts on the Application of Conventions and Recommendations are occasionally taken into account, no extensive study of the effectiveness of ILO supervision in respect of maritime labour is undertaken. This topic requires separate research.

The ILO's work on seafarers' standards covers the span of 69 years. It should be noticed that in recent years the ILO's standard-setting activities in the field of maritime employment have been limited to revision of older instruments. It is worth noting that all four Conventions adopted at the 74th (maritime) session of the ILO Conference were intended to revise older ILO instruments, whether Conventions or Recommendations. Moreover, the revised instruments had been adopted, sometimes, over fifty years ago and it cannot be contended that during this period the International Seamen's Code, which consists of ILO maritime instruments, has been up-to-date. In many instances, the revisionary process was a result of the adoption of ILO instruments of a general nature in the same field. These considerations pose the following questions: a) the need for convening ILO maritime conferences and ILO regional maritime conferences at more frequent intervals, which may prove difficult for financial reasons; b) the reconsideration of the powers of the JMC and the Preparatory Conferences (for which see Chapter 1); c) ILO maritime instruments should be adopted independently of the adoption of revising instruments of a general nature for two reasons: i) they are influenced by these instruments in the sense that provisions of instruments of a general nature are included in recent ILO maritime instruments which may not be appropriate for maritime labour and preclude the possibility of inclusion of provisions based on the practice and law of maritime States (see the remarks made in respect of the 1987 Convention on social security for seafarers in Chapter 5, Section 5.6., at pp. 432-433), and ii) the international nature of shipping may require more urgent adaptation to changing conditions (minimum standards, diminishing importance of crew costs in comparison to the total operating costs of the ship, etc).

Before the analysis of the ILO maritime instruments is set out in the following chapters, some general remarks can be made here. First, although the ILO has adopted a considerable number of maritime instruments which cover most aspects of maritime employment, there are, as will be pointed out in Chapter 7, still areas (automation on board ship, regional maritime standards, human relations on board ship etc.) where the ILO can play an important role. Secondly, from the examination of the existing standards on maritime labour, it will become clear that many of these standards, even some recently adopted, need to be revised. Thirdly, there are some subjects which have not been dealt with

successfully within the ILO: the possibility of the drawing up of an international disciplinary code for seamen, including the master's responsibilities was considered in 1926 but was not approved and has never been reconsidered since then; comprehensive standards on manning were adopted only in 1936 but the relevant 1936 Convention has never come into force; manning standards in subsequent Conventions have not lived up to expectations; the questions of wages and hours of work have been regulated in a more complete manner in many ILO instruments, but none of them has come into force yet. The reasons for these failures are set out in the respective chapters.

Finally, the shipowners and seafarers played an important role in the development and adoption of ILO standards for seafarers. Their attitudes varied according to the importance of the matters discussed but it is interesting to notice that they were opposed on most salient issues. As regards the participation of Governments, while in the past proceedings have been dominated by traditional maritime countries, such as the U.K. and the United States, nowadays more and more governments participate actively in the discussions, especially those of developing and Eastern European countries. However, the differences of opinion of Governments have significance only if the representatives of shipowners and seafarers disagree on a specific point. As has happened sometimes, especially in recent times, the coalition of the shipowners and the seafarers has outvoted opposition on the part of Governments, especially on the burning issue of the latter's financial responsibility in respect of certain maritime questions, and it would be better to adopt a "wait and see" attitude before pronouncing upon the possible adverse effects of the tripartite structure of the discussions on ratification and the effectiveness of recent ILO maritime instruments.

Chapter 2

THE ENTRY INTO MARITIME EMPLOYMENT

In this Chapter an analysis of a number of maritime instruments adopted by the ILO is presented. These instruments, whether Conventions or Recommendations, deal with three distinct questions, though sometimes therefore related to each other: the conditions for admission to employment, the entry into maritime employment and, finally, the seafarers' identity documents. As will be seen later, reference to other instruments not specifically concerning the above-mentioned questions is also made, when this is deemed necessary. Resort to these latter instruments was necessitated by the fact that the "maritime" instruments adopted by the ILO on minimum age, facilities for employment and articles of agreement date back to the period between the two World Wars. Since then many developments have taken place and the ILO has adopted instruments of a "general" or a "maritime" nature which are directly relevant to the question of the entry into maritime employment.

Unfortunately, as will be seen in the present Chapter, none of these instruments are wholly satisfactory from the viewpoint of the protection of seafarers. Convention No. 138 on minimum age, unlike Convention Nos. 7, 15 and 58, contains provisions which enable ratifying countries to avoid the application of its provisions to their territory, at least, temporarily. Convention No. 9 and the relevant provisions of Convention No. 147 on facilities for finding employment are open to subjective interpretation and the former instrument is outdated. The instruments concerning medical examination are more successful but they also have some flaws. Convention No. 22 on articles of agreement is an instrument difficult to interpret and also out of date in certain respects. Convention No. 108 on seafarers' identity documents seems to be one of the most complete ILO maritime instruments. However, it also poses some questions of interpretation and it does not go so far as to establish an international model seafarers' identity document; moreover, it fails to deal, at least explicitly, with the position of refugee seafarers. On the other hand, some of the instruments concerning the entry of seafarers into employment, especially those relating to minimum age and medical examination, are the most successful ILO maritime instruments in terms of ratifications received and certainly have resulted, within their limits, in the protection of seafarers world-wide.

2.1. Conditions for admission to employment

The Conventions and the Recommendations concerning the conditions for admission to employment at sea deal with two questions: The minimum age required for such admission and the medical examination of young seafarers preceding the issue of a medical certificate testifying to their eligibility for the seafaring career. The relevant instruments are Conventions Nos 7, 15, 58 and 138 (concerning Minimum Age) and Conventions Nos 16 and 73 (concerning Medical Examination). The first three Conventions concerning minimum age relate exclusively to maritime employment while Convention No. 138 is universal in scope.

2.1.1. Minimum Age

2.1.1.1. Historical review

A. Convention No. 7 (1920)

At its 2nd session in January 1920 the Governing Body included in the agenda of the 2nd International Labour Conference (the Genoa Conference) the question of the "Application to seamen of the Convention adopted at Washington prohibiting the employment of children under 14 years of age." ¹ Accordingly, the ILO Office prepared a report on the problem of employment of children at sea which gave a brief account of the position in different countries until 1920 and recommended the adoption of a Convention on the subject by the Genoa Conference. ²

The Washington Convention and the Office draft

The Washington Conference in 1919 had adopted a Convention fixing the age of the admission of children to industrial employment at 14 years. Art. 1 defined the scope of the Convention as follows: "For the purpose of this Convention, the term 'industrial undertaking' includes particularly: ... (d) Transport of passengers or goods by road or rail or inland waterway, including the handling of goods at docks, quays, wharves and warehouses, but excluding transport by hand." This text applies the 14 years requirement to inland navigation but appears to exclude maritime navigation, although the special provision in Art. 1 of the Hours of Work Convention that "the provisions relative to transport by sea and on inland waterways shall be determined by a special conference dealing with employment at sea and inland waterways" was not included in the Minimum Age Convention. On the other hand, the language in the French text of the Convention seemed to be more general: 1(d) "Le transport de personnes ou de marchandises par routes, voie ferrée ou voie d'eau...". The words 'voie d'eau' might include maritime navigation. The Office, on the basis of the replies of the Governments to the questionnaire and because it thought that the 14 years principle was fixed by both the Treaty of Peace

¹2 G.B., p. 13.

²See ILO Conference, Seamen's Conference, Genoa, June 1920, Report III, *Employment of Children at Sea*, Item III of the Agenda.

and the Washington Conference, leaving only the question of the application of this principle to subsequent Maritime Conferences, decided to submit to the Conference a draft Convention fixing the minimum age of employment on board ship at 14 years (Art. 2 of the Office draft).³ The principle was not to apply in cases where only members of the same family were employed on board ship or to work done by children in school-ships or training ships (Arts. 2 and 3). The master was required to keep a register of all persons under the age of 16 years employed on board ship to facilitate the enforcement of the Convention (Art. 4).

Genoa Conference - Commission on Minimum Age

During the deliberations of the Commission on the Minimum Age for the employment of children at sea appointed by the Genoa Conference, a proposal was made by the Greek shipowners' delegate to fix the lower age limit for employment at sea at 12 years, since in Greece special conditions prevailed. The proposal was rejected by 7 votes to 1 with one abstention.⁴ It was also suggested that the words "... to make special mention in the articles of agreement..." be substituted for the words "... to keep a register...", since the requirement that the master should keep a register might result in unnecessary complications. Furthermore, if mention were made in the articles of agreement of persons under the age of 16 years employed on board ship, the interests of those seamen would be completely safeguarded. This proposal was adopted unanimously.⁵ The Commission finally decided to add two new articles to the Office draft, the first prohibiting the employment of seamen under the age of 18 years as trimmers and stokers and the second forbidding the employment of young persons under 17 years of age on night watches between 8 p.m. and 6 a.m.⁶ The Commission had been preoccupied by the special requirements of these two classes of work (heavy work, and the burden of responsibility, which would fall upon the shoulders of young persons, if they alone had to keep a night watch), which were incompatible with the physical strength of young persons under the age limit suggested. Thus, the Commission draft differed from the Office draft, in that the former contained provisions relating to the minimum age of trimmers and stokers and to employment of seafarers under 17 years old on night watches.

Genoa Conference - Plenary Meeting

At the plenary Conference the proposal of the Greek shipowners' delegate to qualify the 14 years principle for Greek vessels was rejected after some discussion.⁷ Later the Conference, on the instructions of the Secretary General, decided to exclude the questions of the minimum age of trimmers and stokers and employment on night watches from the Convention, since they were not covered

³Ibid., p. 19.

⁴Conférence Internationale du Travail (2ème session, Gênes, 1920), *Commission de l'âge minimum d'emploi des enfants à bord*, Procès-verbaux, 2nd meeting, pp. 2-4 (hereafter cited as C.A.M.). For the Report of the Commission to the Conference, see 2 R.P., pp. 539-543; see also 2 R.P., pp. 115-116.

⁵C.A.M., op.cit., 2nd meeting, p. 5.

⁶Ibid., 3rd meeting, pp. 2-4.

⁷2 R.P., pp. 120-124.

either by the agenda or the questionnaire sent to the governments.⁸ Although the first was included in the agenda of the next Conference in 1921 having obtained the necessary two-thirds majority, the Conference failed to do this in respect of the second⁹ with the result that it could not be considered by the following Conference in 1921. In the Commission on Minimum Age the question had been raised as to whether a special exception should be included in the Convention with regard to Indian seamen, namely that they may be employed on deck and in general service from the age of 12 years. The reasons for the exception requested were that the physical growth of children in tropical climates was more rapid than in Europe; secondly, children of 12 years of age were not paid for the job they were doing but were treated as members of the same family. From 12 to 14 years they gained valuable experience of life at sea, while at the same time avoiding being sent to heavier industries.¹⁰ Finally, it should be noted that Art. 6 of the Washington Convention on Minimum Age contained an exception regarding India, which fixed the minimum age of Indian workers at 12 years. Although this view was supported by some members, who availed themselves of the Indian demand to advance exceptions for their own countries, the Indian proposal was rejected both in the Commission and after some discussion at the Conference.¹¹ Thus, the Minimum Age (Sea) Convention applies the 14 years principle to maritime employment with no exception whatsoever except those contained in the Office draft (for members of the same family and employment on school-ships or training vessels).

B. Convention No. 15 (1921)

The Office draft

As mentioned above, the Genoa Conference decided that the question of the minimum age of trimmers and stokers should be placed on the agenda of the next Conference (hereinafter, cited as the Geneva Conference) in 1921.¹² Since the matter had been discussed at length at the Genoa Conference, the Joint Maritime Commission decided at its first session not to reopen the discussion but expressed doubt as to the capacity of the delegates to deal with maritime questions.¹³ Accordingly, the Office sent to the Governments a questionnaire and prepared a draft on the basis of their replies. The Office draft fixed the minimum age of trimmers and stokers employed on board at 18 years. This was considered to be a general principle. The only exception allowed concerned the employment of young persons on school or training ships.¹⁴

Committee on Maritime Questions

⁸Ibid., p. 128.

⁹Ibid., pp. 140-142.

¹⁰C.A.M., op.cit., 5th meeting, pp. 2-4.

¹¹Ibid., p. 4, 2 R.P., pp. 145-152.

¹²For the Resolution adopted by the Genoa Conference, see 2 R.P., p. 593.

¹³1 J.M.C., pp. 6-7.

¹⁴ILO Conference, 3rd session, 1921, Report VIII A, *Age of Employment as Trimmers and Stokers*, pp. 37-38; see also O.B., Vol. IV, pp. 326-327.

A long discussion took place in the Committee on Maritime Questions created by the Geneva Conference. Two exceptions were added to the Office draft to the effect a) that the provisions of the Convention would apply mainly to steamers and b) that "young persons of not less than 16 years of age, if found physically fit after medical examination, may be employed as trimmers or stokers on vessels whose orbit of trading is limited to the coast of India or to the coast of Japan, subject to the regulations made in consultation with the most representative organisations of employers and workmen in those countries".¹⁵ The latter was a concession to India and Japan, despite the fact that many members of the Commission were opposed to it. Finally, the Commission draft provided for cases, where only persons under the age of 18 were available in a port; younger persons could then be employed provided that they were at least 16 years old and that two such young persons were counted as the equivalent of one man.

Geneva Conference - Plenary Meeting

At the Plenary Conference a new article was proposed by Great Britain providing that the articles of agreement should contain a summary of the provisions of the Convention; this was unanimously accepted.¹⁶

Thus the Minimum Age (Trimmers and Stokers) Convention declares as a general principle the 18 years lower age limit for trimmers and stokers. Exceptions are made in respect of school and training ships and young people employed on vessels 'mainly propelled' by means other than steam. In the case of India and Japan a 16 years age limit is set, but subject to certain conditions to be fulfilled. Special provision is made for the cases, where no trimmers and stokers over 18 years old are available in the port.

C. Convention No. 58 (1936)

The 19th session of the Conference - Plenary Meeting

At this session in 1935 unemployment among young persons was on the agenda and a resolution concerning the revision of certain ILO instruments was proposed. Also, a proposal to include the question of partial revision of the Minimum Age (Sea) Convention adopted in 1920 in that resolution was put forward. Despite to some opposition to such an inclusion, the resolution was adopted by the Conference on the understanding that the Joint Maritime Commission would be consulted.¹⁷ The resolution recommended three measures aimed at the reduction of unemployment among young persons. The first fixed the minimum age for admission at 15 years, which meant that the Minimum

¹⁵4 C.M.Q. , pp. 3 and 5. For the Report of the Commission presented to the Conference, see also 3 R.P. , pp. 252-253.

¹⁶3 R.P. , vol. I, p. 260.

¹⁷19 R.P. , pp. 817-818.

Age (Sea) Convention (1920) which set the limit to 14 years had to be revised. It was adopted by the Conference at its 27th meeting.¹⁸

The Office draft

The Governing Body, before placing the question of partial revision of the 1920 Minimum Age Convention on the agenda of the 1936 Maritime Conference sought, according to the usual procedure, the opinion of the Joint Maritime Commission which agreed that the Minimum Age (Sea) Convention adopted in 1920 could be revised provided that no effect would be given to the provisions of the revising Convention, before a similar revision was applied to shore workers.¹⁹ The Governing Body at its 76th session decided to put the question of revision on the agenda of the 22nd (maritime) session of the ILO Conference.²⁰ Although some governments, such as Great Britain and Cuba, when asked for their opinion on the raising of the minimum age limit for employment at sea from 14 to 15 years, proposed that exceptions to the 15 years limit be allowed for children between 14 and 15 years, the Office draft submitted to the Conference included only the exceptions in the Minimum Age (1920) Convention (employment of members of the same family on board ship and employment on school and training ships).²¹

The 22nd session of the Conference - Committee on Partial Revision

The Committee on the Partial Revision of the Minimum Age (1920) Convention appointed at the 22nd session of the Conference, however, adopted the following amendment moved by the British government delegate providing "that national laws or regulations may provide for the issue in respect of children of not less than fourteen years of age of certificates permitting them to be employed in cases in which an educational or other appropriate authority designated by such laws or regulations is satisfied, after having due regard to the health and physical condition of the child and to the prospective as well as the immediate benefit to the child of the employment proposed, that such employment will be beneficial to the child."²² It explained that the exception would be limited to the special cases and be subject to the conditions described therein; there was no question of establishing a general exception to the age limit of fifteen. The competent authority might be the local education authority or whatever authority was most competent to deal with the question of certificates of exception. In taking its decision, the authority would consider not only the immediate but also the long term interests of the young seaman, taking into account his future career, wages, conditions of employment and, as expressly stated, his health and physical capacity.²³ The amendment was adopted at the

¹⁸*Ibid.*, pp. 633 and 949.

¹⁹12 *J.M.C.*, p. 8; see also ILO Conference, 22nd session, Geneva 1936, *Report on the Partial Revision of the Minimum Age (Sea) Convention (1920)*, pp. 5-6.

²⁰76 *G.B.*, p. 46.

²¹*Report on the Partial Revision of the Minimum Age Convention (1920)*, *op.cit.*, p. 18.

²²*C.R.A.M. (Commission de la revision de l'âge minimum) (1936) P.V. I/3.*

²³21-22 *R.P.*, p. 391.

plenary Conference as para. 2 of Art. 2 of the Convention and the whole Convention was adopted unanimously.²⁴

D. Convention No. 138 (1973)

Finally, at its 58th session, in 1973, the Conference adopted (by 328 votes to nil, with 24 abstentions) the Convention concerning Minimum Age for Admission to Employment (no. 138). Unlike the previous Conventions on the subject its scope is universal and, therefore, is of direct importance to the maritime industry.

After citing the previous Conventions dealing with the question of Minimum Age for admission to employment, the Preamble of the Convention No. 138 aims at establishing a general instrument on the subject "which would gradually replace the existing ones applicable to limited economic sectors..." Para. 3 of Art. 2 adopts as a general minimum the 15 years limit. Para. 4 allows developing countries to specify a minimum age of 14 years, subject to an obligation to report to the Office that difficulties in the application of the 15 years standard persist (para. 5). Art. 4 entitles the competent authority, after consultation with the organisations concerned, to exclude from the application of the Convention "limited categories of employment or work in respect of which special and substantial problems of application arise." This article, however, does not apply to hazardous work. Again, developing countries can initially limit the scope of the Convention in respect of certain branches of economic activity (including transport) (Art. 5). Countries which avail themselves of either of these provisions must indicate in their reports on the application of the Convention the general position as far as the employment of young persons in any branch of activity excluded from the scope of the application is concerned. In certain cases work may be permitted at an age lower than the minimum standard laid down in the Convention e.g. work in undertakings forming part of an educational, training or orientation programme (minimum age: 14 years), work in schools for vocational education or training (no limit) (Art. 6). For hazardous work, the general standard is 18 years but can be decreased to 16 under certain conditions (Art. 3).

2.1.1.2. The significance of the Conventions concerning Minimum Age

A. Convention No. 7

The Minimum Age (Sea) Convention No. 7 is a comprehensive instrument. Its scope includes every ship engaged in maritime navigation, except ships of war. Apart from the easily justified exceptions referred to above (for family members and of employment on board school- or training ships) the minimum standard laid down in the Convention is 14 years. No other exception is allowed despite some states' attempts to secure exemptions. A 12 years minimum age limit proposed by

²⁴*Ibid.*, pp. 392, 394; see also I.L.I., Vol. LX, (1936), p. 182.

Greece and India was rejected by the Committee on the Minimum Age at the 2nd session of the Conference.²⁵ Greece raised the question because the school-leaving age therein was 12 years. From 12 to 14 years a young man would thus either remain idle or be sent to heavier industries; the only alternative was to send young boys between 12 and 14 years old to training ships but problems could arise if countries did not possess training ships; though the prospective seamen might be sent into training institutions on shore. The Convention fails to provide a solution in cases where the school-leaving age is lower than 14 years, since it does not deal at all with the relationship between the school-leaving age and the age for admission to employment. The Convention could have provided for production of a school leaving certificate when the articles of agreement are signed or the enlistment of the particulars contained in such a certificate in the articles of agreement. Nowadays, this is considered important. In the light of the technological developments on board ship, general and vocational education is a prerequisite for admission to employment at sea. On the other hand, the intelligence of a child of 12 years is not sufficiently developed; education at an early age (before 14) might help the seaman appreciate better his position and his responsibilities on board ship, so that he would be in a better position to protect himself and his interests.

According to Art. 2 of the Convention the 14 years principle does not apply to work done on board vessels, "upon which only members of the same family are employed". This is ambiguous since the word 'family' has many meanings. It could indicate those descended from a common ancestor; or a group of persons, whether or not living under one roof, connected by blood or affinity; moreover, it could also mean a group of people bound together by religious or other convictions.²⁶ By giving a wide interpretation to the word family, the restrictions of the Convention could be circumvented; for example, in cases where a dozen of young boys under 14 years old from the same village join the same ship but in the minds of the delegates at the Conference 'family' had its usual meaning, viz. parents and children belonging to one family (in the strict sense); only in such cases, the ship would be a family ship. This interpretation was also given by the Reporter of the Committee at the Conference.²⁷

²⁵C.A.M., op.cit., 2nd meeting, p. 4, 5th meeting, p. 4.

²⁶See The Oxford English Dictionary, 2nd edition, 1989, Vol. V under "family", meanings 2, 3, 4 and 5, at p. 707; Webster's Third New International Dictionary, 14th edition, 1961, under "family", meanings 1, 2 and 3, at p. 821.

²⁷2 R.P., p. 123.

B. Convention No. 15

The proposed 18 years age limit for trimmers and stokers, together with the other limit suggested (17 years for employment of children on night watches), was introduced by the Reporter of the Minimum Age Committee during the proceedings of that Committee. The Genoa Conference at first was uncertain about the exact limit to be adopted but finally agreed to the 18 years limit. As pointed out earlier, though the Genoa Convention on Minimum Age did not make any exception in favour of any country, the (Trimmers, Stokers) Minimum Age Convention (1921) excepted persons employed as trimmers or stokers on board Indian or Japanese vessels (here it should be reminded that Arts 5 and 6 of the Washington Convention on Minimum Age (1919) had modified the 14 years principle with regard to Japanese and Indian workers: a 12 years limit had been adopted). One might wonder why the 1921 Convention contained such exceptions while the Genoa Convention (1920) did not allow any exception whatsoever for any country. The reason is first that in the Genoa Convention a 14 years limit was established as a general principle. If further exceptions were allowed for specific countries (12 years), they would undermine that principle. The Trimmers and Stokers Convention, on the other hand, adopted a 18 years limit. It was easier for the members of the Committee on Maritime Questions in 1921 to agree to a 16 years limit (here, the argument, mentioned before, concerning the earlier maturity of Indian or Japanese seamen appears to be stronger) in respect of these two countries²⁸, since this concession would not compromise the 14 years principle. The most important reason, however, for the concession was that unlike the exceptions suggested in 1920, the exception contained in the Trimmers and Stokers Convention is saddled with so many restrictions that the possibility of abuse was negligible, viz.: a) the young person must be at least 16 years old; b) he can be employed as a trimmer or stoker only after he has been found physically fit after medical examination; c) the necessary regulations would be drafted only after consultation with the most representative organisations of employers and workers and d) the exception applied only to vessels engaged in the coastal trade of Japan and India.²⁹

Art. 3 (b), which makes the Convention applicable to vessels mainly propelled by steam covers the case where a person is employed on vessels with auxiliary driving machines, which are used only intermittently, thus allowing the seaman a sufficient amount of rest.³⁰ Consequently, sailing vessels, even though equipped with coal machines, were excluded from the scope of the Convention, if these machines do not provide the main means of propulsion.

²⁸It should be noted that the Indian Workers' delegate, though he voted for the draft Convention, did not accept the exceptions made with regard to Indian seamen, see 3 *R.P.*, pp. 253-254.

²⁹However, a provision providing for the "gradual stiffening" of this special treatment article is desirable; compare Art. 9 (5) of the Minimum Age (Non-Industrial Employment) Convention, (No. 33) 1932; see also W. Jenks, "The Revision of International Labour Conventions", *BYIL*, Vol. XIV, 1933, pp. 43-64, at p. 60.

³⁰1 *C.M.Q.*, p. 3, 4 *C.M.Q.*, p. 3.

Unfortunately, the question of application of the Convention to vessels burning oil fuel was left open at the Conference. In the Committee on Maritime Questions, which was to present a Report to the Conference in 1921, it was suggested that these vessels should be excluded.³¹ However, the question was held over by unanimous agreement of the Committee, since heating by oil burners was not widely used at that time.³² As a result of considerable technical progress in ship-engine construction the situation has changed now, but oil burners are still excluded and the Convention has not yet been revised. Fixing the minimum age of persons employed as trimmers and stokers on board oil burning ships is a matter left to national law (see also, *infra* discussion of the 1973 Minimum Age Convention). On the other hand, the Convention does not make a distinction on the basis of climatic temperature nor does it take account of other factors like the structure of the ship, the number of men, amount of rest, etc.

Both the 1920 and 1921 Conventions require the master to keep a register or a list in the articles of agreement of all persons under a certain age (16 and 18 respectively). In countries where the log-book of the ship is badly kept, sufficient protection would be given by the possibility of making special mention of these persons in the articles of agreement, which are drawn up by maritime authorities on land. Thus, fraud is rendered impossible. This provision is welcome but gives rise to another question: What happens in the cases, where it is impossible to ascertain the age of the seaman? No provision is made in the Minimum Age Conventions for such cases. In the second draft Convention dealing with the question of the establishment of an International Seamen's Code submitted by the ILO Office to the Joint Maritime Commission at its 4th session an article was included (Art. 7(a)) supplementing Art. 7 of the original draft. According to Art. 7 (a) the medical certificate issued after medical examination before any seaman can be employed on board should include a statement to the effect that the seaman can be engaged, if his physical development corresponds to the minimum age standards laid down in the relevant conventions.³³ This provision became Art. 8 of the Office draft sent to the governments for consideration.³⁴ However, after the replies of the governments had been received the Office decided, as pointed out in Chapter 1, first to divide the gigantic draft of 73 articles into three separate Conventions and secondly to leave outside the Convention the question of the physical and professional qualifications of seamen. Since the elucidation of the question of ascertaining the age of seamen was closely linked to the issue of a medical certificate attesting their physical fitness, Art. 8 was omitted in the Office draft submitted to the Conference and it has not appeared in any ILO maritime instrument since. The matter is left to national law. The criterion to be used is the physical development of the seaman (as to his mental development, see *infra* p. 140). The

³¹*3 C.M.Q.*, p. 5.

³²*3 R.P.*, p. 763.

³³*4 J.M.C.*, p. 75.

³⁴9th session Geneva, 1925, *International Codification of the Rules relating to Seamen's Articles of Agreement*, Questionnaire I, pp. 2* - 3*.

national regulations must also provide for the competent authorities, who must issue the certificate; these, to avoid complications, can be the authorities described in Art. 2 of the Compulsory Medical Examination (1921) Convention.

C. Convention No. 58. Related instruments concerning training

The 1936 (Minimum Age) Convention raised the minimum age limit for admission to employment at sea to 15 years, subject to the qualification mentioned earlier. When the Joint Maritime Commission was consulted as to the desirability of revising the 1920 Convention some members of the Commission called attention to the close relationship between the age of entry into employment and the school-leaving age.³⁵ However, no decision on this point was taken at the 1936 Conference. As it has been said earlier, the question of age for admission to employment is largely bound up with the school leaving age.³⁶ Moreover, in the light of technological advances affecting working conditions on board ship, training has now acquired a preponderant status in the regulation of seamen's affairs. Consequently, these three elements (age for admission, school leaving age and pre-sea training) should be studied together and their respective regulations should be co-ordinated. Art. 2, para. 3, of the Certification of Able Seamen Convention (No. 74) of 1946 lays down that the minimum age for granting a certificate of qualification is 18 years. Para. 4 requires the seaman to have spent at least 36 months at sea, before he applies for a certificate. If minimum age for admission to employment is 15 years (as is, in fact, laid down in the Minimum Age (1936) Convention) then it is clear that the above provisions take account of one another. Art. 4 (a) and (b), however, introduce an exception to the 36 months sea-service requirement, allowing for a shorter sea-service if the seaman has received training in training institutions or training ships. As the 15 years limit does not apply to young persons employed on board training ships, it is possible that a seaman applying for the certificate of an able seaman might have obtained the necessary qualifications before the age of 18 years. Nevertheless, he must not be employed on board as an able seaman before that age.

Though the question of training will be dealt with in Chapter 3, the instruments concerning training of seamen contain some provisions where a connection between minimum age, school leaving age and training is manifested. Subpara. 2 of para. 4 of the Vocational Training (Seafarers) Recommendation (No. 77), 1946, states that "the age of entry and other conditions of admission and the curriculum in institutions for pre-sea training should be related to the age of leaving and the curriculum of the schools of the country". Recommendation No. 137 (1970) concerning Vocational Training of Seafarers, which supersedes Recommendation No. 77, lays down that training programmes should be drawn up in cooperation with educational institutions (para. 5 (2)), that there should be

³⁵12 J.M.C., p. 6; see also the speech of the Director of the Office *ibid.*, p. 4.

³⁶It will suffice to note that France could not ratify the 1920 Convention, which fixed a 14 years limit, because proposals had been put forward in the French Parliament raising the school leaving age to fifteen *ibid.*, pp. 6-7.

collaboration between training institutions and bodies responsible for recruitment and employment (para. 6 (g)) and that the level of general education required for admission to vocational training courses leading to certificates of competency should be taken into account in the drawing up of the training schemes (para. 11(b)). Thus, assuming that a country ratifies the 1936 Minimum Age (1936) Convention, such training programmes should be drawn up on the basis of a 15 years minimum age limit though Art. 3 of the Convention, which excludes from its scope employment on board training vessels, complicates matters. In both Recommendations, expressly or indirectly, training is connected with the question of school leaving age, but the fixing of the minimum school leaving age is left to national law. No clear connection between school leaving age and the minimum age for admission is established.

D. Convention No. 138

a) Relationship between Convention No. 138 and Conventions Nos 7, 15 and 58

In 1973 the Minimum Age Convention (No. 138) was adopted. This Convention revises the 1920, 1921 and 1936 Conventions concerning minimum age for admission of seamen to employment (Art. 10 para. 1). This Convention came into force on 19th June 1976 but it does not close the Minimum Age (Sea) Convention (Revised) 1936 to further ratification (para. 2). The 1920 and 1921 Conventions will be closed to ratification only if all parties thereto have agreed to such closure (para. 3). Acceptance of the obligations of Convention No. 138 entails automatic denunciation of the 1920 (Minimum Age) (Sea) and the 1921 (Trimmers and Stokers) Conventions (para. 5 (c)). On the other hand, if the obligations of Convention No. 138 are accepted by a Member which is a party to 1936 Minimum Age (Sea) (Revised) Convention and a minimum age limit of either at least 15 or 18 years is specified by virtue of Articles 2 and 3 respectively of the former Convention, this "shall *ipso jure* involve the immediate denunciation" of the latter (para. 5 (d)).³⁷ To denounce the old Conventions in favour of the new one is not a simple matter. The pros and the cons of the 1973 Convention should be weighed. They are as follows:

b) New Convention: Advantages and provisions aiming at the improvement of the lot of seamen

aa) The obvious advantage of the new Convention is that it replaces under the conditions mentioned above all the existing Conventions on the subject. Thus, countries instead of having to ratify two instruments (either the 1920 and the 1921 Conventions or the 1936 (Revised) and the 1921 Conventions) can accept the obligations of a single instrument. This might lead to a higher degree of uniformity in international and national legislation in the field.

³⁷For the the relationship between the three old Conventions, see ILO, *Int. Lab. Code 1951*, p. 846 (Art. 1051).

bb) There is an explicit provision about the relationship between age for admission to employment and school leaving age. According to Art. 2, para.3 the minimum age to be specified by the ratifying country "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years". If, for example, in a particular country the school leaving age is fixed at 16 years, this will also be the minimum age for admission to employment. According to Art. 7, para. 2, however, employment is permissible from the age of 15, even if the persons concerned have not yet completed their compulsory education, but only on work which is not likely to be harmful to their health or development and is not such as to interfere with attendance at school, their participation in training programmes or their capacity to benefit from the institutions attended. While in the 1936 Convention the 15 years limit is the standard, in the new Convention this standard can be raised upwards following improvements in national legislation concerning school leaving age. Only under the conditions mentioned above can young persons be employed from the age of 15 years. Whether these conditions are fulfilled in each case is a question to be decided by the competent authority.

The requirement that employment from the age of fifteen should not prejudice attendance at school raises the question as to whether young persons who are 15 years of age, can be engaged in work on board ship, if in the country where the ship is registered the school leaving age is higher than 15 years. This would seem to present difficulties, since employment on board ship would always interfere with attendance at school (long absence from port, emergencies etc.), unless these persons are employed on board school or training ships. In this case no age limit is applicable under Art. 3 of the Minimum Age (1920 and 1936) Conventions. The 1973 Convention contains a more elaborate provision. If work is done in schools for general, vocational or technical education or in other training institutions, no age limit is applicable. If, on the other hand, work is done in undertakings, which form part of educational, training or orientation programmes, then a 14 years limit is applicable (Art. 6). The question then arises whether a school or training ship is a school for educational purposes, a training institution or an undertaking, which undertakes the realisation of such programmes as approved by the competent authority. The answer depends on the relevant provisions of the national regulations. If these treat the ship as an undertaking within the meaning of Art. 6, for the first time a 14 years limit applies to persons employed on board school or training ships. Educational considerations thus can have a beneficial effect on the establishment of a minimum age limit.³⁸

cc) The 1920, 1921 and 1936 (Revised) Conventions do not apply, as has been stated earlier, to persons of the same family employed on board the same vessel. There is no such clear exception

³⁸There is an absence in the Convention of a provision clearly laying down that the minimum age for admission to employment at sea and the school leaving age should be the same (for example, it might be that under the national law of a country having ratified the 1973 Minimum Age Convention the compulsory school leaving age is 12 or 13 years). It was thought improper to insert a provision concerning educational issues in a Convention dealing with minimum age. Ratification might also be impeded. On the other hand, the gap could be filled by training requirements (see earlier in the text). A Recommendation to the effect that ratifying countries should endeavour to establish an identical minimum school leaving age limit may prove to be useful.

in the 1973 Convention. Consequently, if a party to it does not intend to apply the Convention to employment on board family ships, it has to come within the exceptions provided for therein (Art. 4 concerning categories of employment or work in respect of which special and substantial problems of application arise). Art. 5, para. 3 excludes family and small-scale holdings producing for local consumption from the application of the Convention, but this appears in the Convention only as a result of a sub-amendment submitted by the Employers in the Committee on Minimum Age at the 58th session of the Conference in 1973 and applies only to agricultural undertakings.³⁹ Countries insufficiently developed may, after consultation with the organisations concerned, initially limit the scope of application of the Convention (Art. 5, para. 1). This provision could apply to employment on board family ships. However, as was pointed out earlier, in order for a country to avail itself of these provisions, certain conditions have to be fulfilled (consultation with the organisations concerned, inclusion in the reports to the ILO Office on the application of the Convention of information on the categories or sectors not covered). In the previous Conventions employment on family vessels was excluded without any limitation whatsoever.

dd) Art. 3 (1) of the 1973 Convention prescribes an 18 years minimum age limit for admission to "any type of employment or work, which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons..." The types of employment to which the paragraph applies, are to be decided by the competent authorities after consultation with the organisations concerned. Art. 3 is concerned with so-called "hazardous work". The wide language of the Article makes it applicable to firemen in oil burners (excluded from the Trimmers and Stokers Convention) but other categories of seamen could be included too, such as messmen of the deck and the engine department, persons employed on board nuclear powered vessels or on vessels where the degree of automation is such that a higher age for entry into employment is required. Art. 3 could also be used to prohibit the employment of young persons on night watches before a certain minimum age is attained.⁴⁰ Ultimately, the competent authority could decide that the whole category of seamen in view of the special requirements of their profession should come under the provisions of the article, thus meeting the premature aspirations of the Greek Workers' delegate at the 1921 Conference.⁴¹

ee) Finally, the Minimum Age (1973) Convention, unlike the previous Conventions on the subject, contains more complete and elaborate provisions for the enforcement of the regulations laid down by the competent authorities in accordance with the Convention. The 1920 and 1921 Conven-

³⁹58 R.P., p. 486.

⁴⁰It should be remembered that at the 2nd session of the ILO Conference in 1920 a resolution concerning the submission of the question of the prohibition of employment of young persons under 17 on night watches to the next Conference in 1921 was rejected, see *supra* p. 120, note 9.

⁴¹3 R.P., p. 259; he suggested a 18 years minimum age limit for all seamen. Here it should be noted that the International Seafarers' Charter proposed a 16 years minimum age limit for all seamen, 18 years for trimmers and messmen of the deck and engine department and 20 years for firemen (see paras. 52, 60 and 63).

tions require the ratifying State to take such action as may be necessary to make their provisions effective (Art. 9 and 10 respectively). The Minimum Age (Sea) (Revised) Convention (1936) does not contain any provisions relating to enforcement. The Government of the United States had, before the adoption of the latter instrument, proposed in the Governing Body a new formula, which enunciated the principle of child protection and suggested an intensified system of supervision and penalties along the lines of Convention No. 33 concerning the Minimum Age for admission to non-industrial employment. Mention of the particulars of the school record of young persons in the register kept by the employer was even envisaged. The American proposal was rejected as it constituted a radical departure from what the Governing Body then thought it had to do, namely to place on the agenda of the Conference the question of partial revision of the Minimum Age (Sea) Convention (1920).⁴² The 1973 Convention requires the competent authority to take all necessary measures to ensure the effective enforcement of the provisions of the Convention. These measures include the provision of 'appropriate' penalties. Furthermore, national laws or regulations or the competent authority must define the persons responsible for compliance with the provisions giving effect to the Convention (Art. 9 paras 1 and 2). Hence, the interests of the young seafarers are effectively safeguarded.

c) The disadvantages of the new Convention

On the other hand, despite certain conditions that have to be fulfilled, the exceptions allowed under the 1973 Convention are of considerable proportions. Art. 2 para. 4 allows developing countries to specify initially a 14 years minimum age limit instead of 15; Art. 4, para. 1 makes it possible for a country to exclude from the application of the Convention "limited categories of employment or work in respect of which special and substantial problems of application arise" (nevertheless, this is not the case when maritime employment is regarded as hazardous work within the meaning of Art. 3 (Art. 4, para. 3)); Art. 5, para. 1 permits developing countries to limit initially the scope of application of the Convention (employment at sea might be excluded from its scope); finally, Art. 7, para. 1 permits the employment of persons aged 13 to 15 years on light work which is not likely to be harmful to their health or development or to interfere with school attendance, participation in educational and training schemes, etc. Though the availability of such exceptions is, as mentioned earlier in the chapter, conditional upon strict compliance with certain conditions, the wording of the sole exception appearing in the 1936 Convention (Art. 2, para. 2) is much more restrictive.⁴³ That is the reason why Art. 10, para. 2 says that ratification of the 1973 Convention shall not close the Minimum Age (Sea) 1936 Convention to further ratification. At the same time, Art. 10, para. 4 (d) provides that if a member specifies a minimum age limit of at least 15 years under Art. 2 of the 1973 Convention, this

⁴²76 G.B. , pp. 41-46. As to child welfare, in 1976 a Recommendation (No 153) was adopted concerning the protection of young seafarers and the protection of their general welfare.

⁴³See *supra* p. 122.

shall *ipso jure* involve the immediate denunciation of the 1936 Convention (the country is not allowed to avail itself of para. 4 of Art. 2 and specify a 14 years limit).

The indisputable advantages of Art. 3 of the new Convention concerning hazardous work have been emphasised earlier. However, Art. 3, para. 3 permits the employment of young persons from the age of 16 instead of 18 years provided that "the health, safety and morals of these persons are fully protected and that they have received adequate specific instruction or vocational training". This paragraph is so carefully worded that it is difficult to imagine how it would be applicable to trimmers and stokers,⁴⁴ night watchmen, etc. Consequently, Art. 10, para. 5 (c) (as opposed to Art. 10, para. 4 (d)), provides that ratification of the 1973 Convention shall involve the denunciation of the Trimmers and Stokers Convention without any further qualification.

2.1.1.3. Conclusions

The present position, on the basis of the Conventions and Recommendations analysed in this section on minimum age, is as follows: If a country desires to apply high standards as regards minimum age limit to maritime employment, it needs to lay down in national regulations either that Art. 3 of the 1973 Convention applies to employment at sea (minimum age: 18 years) or that the same article applies to special categories of seamen (trimmers, stokers, etc.). In the latter case, if a country so desires, it can establish a minimum age higher than 15 years for other categories of seamen (see Art. 2 para. 2). Action on the lines suggested above will involve denunciation of the 1921 and 1936 Conventions if the country concerned is a party thereto. Secondly, a country might specify a 15 years limit for all seamen (Art. 2 para. 3). Special categories of seamen engaged in hazardous or dangerous work would fall under the provisions of Art. 3. A third possibility for a country intending to frame minimum age regulations is to lay down a minimum age lower than 15 years. Many options are open in this case: It could ratify only the 1920 Convention (14 years age limit); or the 1973 Convention specifying initially a 14 years (Art. 2 para. 4) or an even lower limit in specific cases (Art. 7). Nonetheless, Art. 3 of the latter Convention would apply to trimmers and stokers (18 years limit); or a State concerned could exclude maritime employment altogether from the scope of the 1973 Convention (this would not apply to trimmers and stokers); or it could initially limit the scope of the Convention in respect of seafarers (Art. 5) (this would apply to trimmers, stokers, etc.). However, if the country concerned is a party to the 1936 Convention ratification of the 1973 Convention under the conditions described above would not disengage it from obligations assumed under the former Convention (Art. 10 para. 4 (d)), unless it had previously denounced it.⁴⁵

⁴⁴Compare the narrow scope of Arts. 3 (c) and 4 of the Trimmers and Stokers Convention.

⁴⁵The analysis in this section of the chapter was based on examination of the progressive work of the ILO towards the abolition of child labour on board ship. In the future, it might be desirable that instruments concerning maximum age

2.1.2. Medical examination of seafarers

2.1.2.1. Historical review of emergent provisions

A. Convention No. 16 (1921)

The Genoa Conference and the Office draft

As mentioned above, at the 1920 Genoa Conference a Committee on Minimum Age was established. During its deliberations it decided to recommend that the Conference should insert on the agenda of the International Labour Conference in 1921 the question of compulsory medical examination of young seafarers.⁴⁶ The resolution was adopted by the Genoa Conference⁴⁷ and the Governing Body at its 6th session in January 1921 decided to place the question on the agenda of the next ILO Conference in 1921 (the Geneva Conference). A questionnaire was sent to the Governments and the ILO Office submitted a draft Convention to the Geneva Conference. The draft required the production, before any persons under 18 years of age could be employed on any vessel, of a medical certificate attesting fitness for employment at sea other than a family ship. Continued employment of such persons at sea was made subject to the repetition of medical examination at intervals of not more than one year and the production of the relevant certificate.⁴⁸

Geneva Conference - Committee on Maritime Questions

In the Committee on Maritime Questions appointed at the Geneva Conference considerable discussion took place on certain points. The British Government opposed the draft because it considered that it would not be able to bear the expenses of a compulsory medical examination scheme for persons under 18 years old. They were also against the periodical repetition of the medical examination. An attempt was made to render the text less rigid by leaving the question of fixing the period for such medical examination to national law but the proposal was defeated. Other countries, like Norway, considered that ratification of the draft Convention might lead to confusion in the implementation of the standards adopted, since in Norway regulations on the matter had already been in force for some time. They requested exclusion of coasting vessels from the scope of the Convention but again this amendment was rejected. The Commission inserted an addition to the text of the Office draft to the effect that if the validity of the medical certificate expired during the voyage (according to the Office draft its maximum duration was fixed at one year), it might be prolonged until

for admission to employment at sea should be adopted. These would relate either to the whole category of seafarers or to special categories (firemen, watch-keepers) where employment after a certain age would be detrimental to their health or to the safety of the vessel.

⁴⁶C.M.A./P.V./ 5th sitting, p. 4.

⁴⁷2 R.P. , p. 144.

⁴⁸International Labour Conference, 3rd session, Geneva 1921, Report VIII B, *Compulsory Medical Examination of all children employed on board ship* , p. 39.

the end of the voyage.⁴⁹ Finally, the Commission introduced a new article (Art. 4 of the Commission draft) to provide for urgent cases, where it was impossible at the moment of the vessel's departure to secure a seaman issued with a medical certificate. In such cases the seaman should undergo medical examination at the first port at which the vessel called. It was explained in the Committee that the competent authority for selecting the doctor, who was to examine the seaman, was the consul of the seaman's nationality. Furthermore, if the seaman was found unfit after the examination, he would be entitled to be repatriated and to the consequent pecuniary benefits.⁵⁰

The Convention, thus amended, was adopted by the Geneva Conference after the British Government delegate made clear his intention to abstain from voting.⁵¹

B. International Seafarers' Charter

On 28 and 29 July 1944 a Conference of seamen's representatives of twelve maritime countries was held. This Conference had been convened by the Seamen's Section of the International Transport Workers' Federation (ITF) and the International Mercantile Marine Officers' Association and adopted the International Seafarers' Charter, an instrument consisting of 180 paragraphs, which contained the seamen's views on every aspect of maritime labour. Para. 60 considered medical examination to be a prerequisite for entry into the seafaring profession irrespective of age. The seamen were particularly concerned with the case of trimmers and firemen, whose arduous work was likely to be detrimental to their health. They declared themselves in favour of periodical repetition of the medical examination and thought that seafarers should have a right to appeal against the doctor's decision; this case would then be considered by a medical referee.

C. Convention No. 73 (1946)

The Copenhagen Conference

At its January 1945 session the Governing Body decided to appoint tripartite (government delegates were included) subcommittees to consider and form conclusions on the items that would be placed on the agenda of the maritime session of the Conference in 1946 (the so-called Seattle Conference). The subcommittee on Continuous Employment and Entry, Training and Promotion dealt, *inter alia*, with the question of the medical examination of seafarers. The documents prepared by the ILO Office for consideration by the subcommittee recommended that seafarers be medically examined when they first entered into the seafaring profession regardless of age. This would prevent persons not physically fit from following the seamen's career and from being employed as seamen on board ship. Special consideration should be given to the high physical standards required for the employ-

⁴⁹7 C.M.Q. , p. 7.

⁵⁰8 C.M.Q. , p. 6.

⁵¹3 R.P. , pp. 261 and 310.

ment of persons as firemen. Furthermore, tests of hearing and eyesight might be included in a future instrument dealing with medical examination.⁵²

The subcommittee did not come to any conclusion on the question. Consequently, the ILO Office submitted a Report to the Preparatory Technical Maritime Conference, which would be convened in Copenhagen in November 1945 indicating three methods of dealing with the problem:

- i) By framing an instrument which, for the first time, would deal with health as a condition of entry into employment at sea independently of minimum age;
- ii) By drafting an instrument concerning the medical examination of seafarers, where the question of health would be dealt with in detail (condition of entry into service, periodical renewal of the medical examination throughout the seafarer's carrier); or
- iii) By including provisions concerning the issue in a comprehensive instrument dealing generally with conditions for admission to employment at sea.

In the Report three different texts providing for medical examination of seamen were inserted.⁵³ The Preparatory Technical Maritime Conference⁵⁴ drafted an instrument concerning General Conditions of Entry to Sea Service. The Copenhagen draft provided for a hearing and a colour vision test when a person entered for the first time the sea service or re-entered it after an absence of two years or more. The medical certificate could be issued by any medical practitioner provided that the nature of the examination had been clearly laid down by the competent authority. The Preparatory Conference agreed on the necessity for periodical repetition of the medical examination at two years intervals, though in urgent cases no certificate was to be required from a person embarking on a single voyage. Each case is to be decided by the competent authority. Finally, a right of appeal against the decision of the medical doctor is guaranteed to the seaman.⁵⁵

The ILO Office before submitting the text to the Seattle Conference decided to delete any references in the Copenhagen draft to age requirements and submitted to the Conference a draft instrument relating solely to medical examination of seafarers. A resolution was also submitted containing other conditions of entry into employment at sea to be dealt with by a future Conference when they became ripe for international regulation.

⁵²*P.T.M.C.*, Copenhagen, Nov. 1945, Report VIII, Part III A, pp. 38-39.

⁵³*Ibid.*, Part IV, pp. 58-59, 63-66, 69-70, 95-97.

⁵⁴No record of proceedings of the Copenhagen Preparatory Conference has been published. However, comprehensive information on the discussions held at the Conference is contained in the Reports submitted by the Office to the 1946 (Seattle) Conference (Reports II to IX, blue reports) and a brief account is given in *I.L.R.*, Vol. LIII, Nos. 1-2, Jan-Feb 1946, pp. 59-63.

⁵⁵ILO Conference, 28th session, Report V, II Proceedings of the Copenhagen Conference, pp. 12-18.

The Seattle Conference

At the Seattle Conference a Committee on entry, training and promotion was appointed. During the deliberations of the Committee certain amendments were adopted. In the case of the eye-sight test, the certificate could be issued either by a medical practitioner or by a person appointed by the competent authority. For a period of two years from the date of entry into force of the Convention, a seaman can be employed on board ship without the production of a medical certificate, if he has been so employed for a substantial period during the two previous years. The nature of the medical examination, which is laid down by the competent authority, has been made dependent on the age and nature of the duties of the seaman. The period of validity of the certificate has remained at two years but in the case of the colour vision test it remains in force for a period not exceeding 6 years. An amendment was moved in the Committee by the Shipowners' group to the effect that the determination of the nature of the medical examination should be entrusted, first, to organisations of shipowners and seamen and, secondly, to the competent authority, if the organisations concerned cannot reach an agreement. The Workers' group agreed but the Netherlands Government delegate pointed out that the question of medical examination involved considerations of public safety and, accordingly, the amendment was rejected both in the Committee and at the Plenary Conference, where the discussion on the question was reopened. Instead, the duties of the competent authority can be discharged by delegating its work, or part of it, to an authority or organisation exercising similar functions in respect of seafarers.⁵⁶ As amended, the Convention was adopted by the Seattle Conference.⁵⁷ There is a difference between the 1921 and the 1946 Conventions. The first is concerned with the medical examination of "children and young persons" employed at sea, the second with the medical examination of seafarers generally. This is the reason why, in the former Convention, an age limit of 18 years is fixed beyond which medical examination is not compulsory (Art. 2). Repetition of the medical examination is obligatory until the age of 18 is reached.

D. Reasons for the adoption of ILO instruments concerning the medical examination of seafarers

The arguments in favour of a medical test before admission to employment are, first, that it would reveal any inherent⁵⁸ physical disabilities which would later prevent the young person from following a career at sea, and, secondly, that it constituted a preventive measure, whereby maladies or defects could be anticipated and warded off, thus "effecting immediate practical economy in the seaman's special calling, and adding to general national efficiency".⁵⁹

⁵⁶28 R.P., pp. 272, 114-115.

⁵⁷Ibid., pp. 115, 179.

⁵⁸See 7 C.M.Q., p. 5, 8 C.M.Q., p. 3.

⁵⁹ILO, International Labour Conference, 3rd session, 1921, Questionnaire V, p. 9.

2.1.2.2. Conclusions

1) One important defect is apparent in Convention No. 16: The medical examination is compulsory under the age of eighteen years, but since the age limit for admission to employment of trimmers and stokers is fixed at 18 years, the relevant provision cannot be made applicable to them. The medical examination of trimmers and stokers is considered necessary because they are the principal persons interested considering their peculiar working environment and the hazardous nature of their work.⁶⁰ Hence, the Convention is incomplete in the sense that it provides for medical examination-as a condition of entry into the seafaring profession-of all categories of seamen, except the most concerned.

The doctor, who is to give the certificate, according to the Convention, must be approved by the competent authority.⁶¹ Thus, the person in question cannot be *any* medical practitioner having experience in medical matters approved by the shipowner or by shipowners' or seamen's organisations; of course, they can recommend a person for the position of the doctor, but their proposal is subject to approval by the competent authority.

2) On the other hand, the 1946 Convention provides for the medical examination of seafarers without any age limit whatsoever. It is a more comprehensive instrument, which deals with medical examination both as a condition for admission to employment at sea (Art. 3) and as a requisite of the efficiency of the seafaring personnel and the safety of the ship (Art. 5). More particularly, Art. 5 provides for periodical repetition of the medical examination irrespective of age and regardless of whether the seaman enters into a contract of maritime employment for the first time.

The 1946 Convention, like the 1921 Convention, applies - subject to Art. 2, where certain categories of persons are excluded from its scope - to all seafarers employed on a vessel registered in the territory of a ratifying country and not only to nationals.⁶² In contrast to the latter Convention, it lays down that the medical certificate shall be signed by "a medical practitioner", who could be any such person. There is no need for the medical practitioner to be approved by any authority. In the Committee on Entry, Training and Promotion of seafarers at the Seattle Conference many formulas were suggested relating to the selection of the doctor: That he should be "nominated", or rather "approved" by the shipowners (nomination) and the competent authorities (approval); by the

⁶⁰See for a brief comment, 6 *C.M.Q.*, p.4. If young persons less than 18 years -but at least 16 years- old are employed on a vessel as trimmers or stokers, then they must be found physically fit for such work after medical examination (Art. 3 (c) of the Trimmers and Stokers Convention). Nevertheless, this provision, while turning on the very special circumstances of the case as it has been explained before, does not obscure the idea underlying the whole Convention, that beyond the age of 18 years no medical examination is necessary.

⁶¹Note that during the deliberations of the Commission on Maritime Questions the word "competent" was substituted for the word "maritime", giving a freedom of choice to ratifying countries to leave the matter either to maritime or to any other authorities already established and competent to deal with it, see 7 *C.M.Q.*, p. 5.

⁶²ILO Conference, 28th session, Report V, op.cit., p. 13.

shipowners or the competent authorities; and finally by the shipowners jointly with seafarers' organisations. When put to the vote all were defeated with the result that the Office text was maintained.⁶³ Consequently, the medical practitioner can be appointed by the shipping company without any obligation on it to inform the competent authority of the appointment. However, the nature of the medical examination must be clearly laid down by the competent authority after consultation with the shipowners' and seafarers' organisations concerned (Art. 4 para. 1). Factors to be taken into account are the age and the nature of the duties of the person to be examined (para. 2). Hence, different standards might be prescribed for the deck, engine or catering department. Firemen for example, would be subject to a special examination revealing their ability to work under tough conditions. The language of para. 2 of Art. 4 seems to be restrictive. It may be thought that other factors like the structure of the ship, its usual trading route (perhaps necessitating prolonged residence in tropical latitudes), the degree of modernisation on board ship, would have merited mention.

3) Even if the nature of the medical examination is prescribed by the competent authority, abuse is possible, when the doctor is, for example, appointed by the shipowner. There is no guarantee that the doctor will follow the pattern laid down by the competent authority and, unfortunately, there is no provision for supervision or a system of penalties in the case of breach of the relevant regulations. The broadness of the provision could instigate discrimination against candidates for the seafaring career, should extraneous factors were to be taken into account, whenever the doctor is called to issue a medical certificate. The only resort for the seaman would then be Art. 8 of the 1946 Convention, which gives a right of appeal to the seaman, the appeal to be held before a medical referee, who is independent of any shipowners' or seafarers' organisations; in other words, he must be appointed by the competent authorities. Since, in that case, heavier expenses would be incurred, which would fall, at least in the first instance, upon the seafarers' organisations or even solely upon the seafarer himself in countries, where seafarers are not sufficiently organised, it would have been better, if the medical practitioner had to be approved from the beginning by the competent authority and no right of appeal was given, provided a system of supervision and penalties were established in the ratifying country. It might be the case, however, that the cost of a possible second examination is met by the government, in which case the financial onus upon it will be heavier, unless the expenses of the first (or both) examination have been undertaken by the shipowner or other agencies.

4) It is beyond doubt, that the medical examination of seafarers will avoid waste of time (in the case of inherently unfit persons) and will contribute towards the improvement of safety at sea. Nevertheless, there are some financial problems. In the 1921 Convention the question concerning who should bear the expenses of the examination was left to be determined by national law. The same

⁶³28 R.P. , p. 272.

solution applies under the 1946 Convention.⁶⁴ A scheme for medical examination, in the absence of any provision in the Convention, can, however, be financed by the shipowners (this might be unacceptable to some shipowners) or by the governments (in this case, ratification might be impeded). A third possibility is the establishment of a joint fund, towards which both the shipowners' and the seafarers' organisations - and possibly the governments - would contribute.

5) In the 1921 Convention the medical certificate attests the "fitness for such work" (employment on board ship) but the Committee on Entry, Promotion and Training at the Seattle Conference added the words "at sea" after the words "a certificate attesting his fitness for the work for which he is to be employed". The seafarers' group abstained from voting on the addition. Perhaps, the effect of the addition is that the medical examination is confined to the particular job done by the seaman on board ship without consideration of any other work indirectly connected with it.

6) It should be noted that the medical certificate must refer, *inter alia*,⁶⁵ to the colour vision state of the person examined. After a long discussion at the Preparatory Technical Maritime Conference it was decided that the colour vision test should apply to all persons employed in the deck department -not only to watch-keepers, who need to be able to distinguish the lights.⁶⁶ Exception is made solely in the case of specialist personnel, whose work is not likely to be affected by defective colour vision, for example, carpenters. This provision will undoubtedly lead to the improvement of safety at sea.

7) As has been said earlier, Art. 8 of the 1946 Convention provides a seaman with a right to appeal against a first negative decision of the medical practitioner but does not give the same right to the shipowners. Let us suppose that under the national law of a country the doctor is appointed by seafarers' organisations, who are keen to promote their employment policies without paying much attention to safety requirements; it is only fair that in such a case the shipowner should be given the opportunity to protect his interests.

8) In the 1921 Convention provision is made for urgent cases. A young person (below the age of eighteen) can embark without having satisfied the requirements of the Convention, provided that he will undergo medical examination at the first port of call. While the 1946 Convention provides for urgent cases -in the case of a person employed for a single voyage- it does not contain a similar provision to the above with the result that, according to the text of the Convention, a seaman must pass the medical test before he embarks on a voyage - for example, at the port of departure -; he does not

⁶⁴*C.M.Q.*, p. 4 and *P.T.M.C.*, Report VIII, op.cit., p. 65 respectively. This issue, left with considerable uncertainty with regard to its proper settlement, is particularly acute in respect of the 1946 Convention, since according to the Convention periodical re-examination will continue not only until the age of 18, as is the case in the 1921 Convention, but even until the age of retirement, thus adding to the financial burden to be undertaken.

⁶⁵The medical examination can include a number of medical tests under national law. The legislation of some countries requires, for example, the production of a certificate of vaccination, before any person is admitted to employment at sea. Nevertheless, a hearing, sight and "disease" test is compulsory under the 1946 Convention (Art. 4, para. 3).

⁶⁶ILO Conference, 28th session, Report V, op.cit., p. 14.

have the opportunity to be examined at the first port of call in urgent cases, if he is not employed for a single voyage.⁶⁷

9) Both the 1921 and 1946 Conventions are drafted on the principle of the periodical repetition of medical examination at regular intervals. In any future revision of the instrument it might be thought convenient to extend the period of the renewal of the examination from two to four or five years (the medical certificate is valid for 6 years in relation to the colour vision test); or it could be laid down that the medical test must be passed whenever a ship embarks on a voyage or on every occasion when articles of agreement are signed, if signed for more than a single voyage. Factors to be taken into account are the simplification of the medical inspection system and the facilitation of ratification of the Convention (by reducing the financial responsibilities of the ratifying countries).

10) Though the 1921 and 1946 Conventions provide for examination of the physical fitness of seamen, mental examination is excluded from the scope of this provision. In view of the additional expenses and complications which such kind of examination would involve, the question is best left to national law. The ILO Office had submitted to the Seattle Conference a resolution concerning other conditions of entry the international regulation of which would be desirable. Among them the production of evidence of having attained a minimum standard of education was included. During education courses, surely the mental unfitness of a person would be revealed. However, the resolution was defeated in the preliminary discussions and was not submitted to the Conference. In any case, as pointed out earlier, the questions of minimum age, training and education are interrelated. Since the instruments concerning training, especially the 1973 Convention, presuppose school education, the ascertainment of the mental state of the seaman would not present serious difficulties.⁶⁸

11) Another contemporary problem relates to the medical examination of those on board nuclear powered vessels. Here the effects of radiation should be taken into account. Periodical re-examination schemes should encompass radiation surveillance. Apart from radiation monitoring systems, which have to be installed - this is a matter of naval construction - personal monitoring should be introduced and survey instruments and personal devices for the measurement of exposure should be made available on board ship.⁶⁹ This is an interesting problem, needing to be examined by the ILO in co-operation with other concerned international organisations, especially the WHO (it could perhaps be placed on the agenda of a future meeting of the joint ILO/WHO Committee). Many provisions of the 1946 Convention will have to be revised (e.g. the period for periodical repetition of the

⁶⁷Compare the "emergency provision" in the Copenhagen drafts, *P.T.M.C.*, Report VIII, op.cit., pp. 65, 66.

⁶⁸However, with the advance of technology on board ship and the multiple tasks which are required to be performed by the modern seaman an increase has been noticed in the attention given by certain countries to mental fitness for the seafaring profession. This mental fitness relates to the growing burden of responsibility of the individual seafarer and to his mental stress as a result of manning reductions and automation on board ship. Examinations which will ascertain the mental/psychological fitness of the seafarer have been introduced in Belgium and their introduction is considered in a number of countries; see ILO, *Report of the Director-General*, 74 (Maritime) Session, 1987, p. 51.

⁶⁹Safeguards for Crew Members of the Nuclear Ship "Savannah", *I.L.R.*, Vol. LXXX, No. 3, Sept. 1959, pp. 236-250, at p. 247.

examination, the nature of the examination, the categories of persons to whom the Convention applies under Art. 2).

12) The significance of the medical examination is made clear by the negative repercussions which non-compliance with the provisions of the relevant Conventions could have on other areas. In 1936 two Conventions were adopted at the 21st session of the International Labour Conference dealing with the protection of seamen in case of sickness namely Convention No. 55 concerning the liability of the shipowner in case of sickness, injury or death of seamen and Convention (No. 56) concerning sickness insurance for seamen. Both these questions had been discussed in the Commission on the Protection of Seamen from Sickness or Injury. An amendment to Art. 3 of the Shipowner's Liability Convention, moved by the shipowners' group, proposed the addition of a new third paragraph to the effect that the shipowners' liability in case of sickness would not come into operation if the seaman refused to be medically examined. If the shipowner was to cover the liability of the seaman for sickness by insurance, it would be only fair to protect the former's interests, if a disease possibly entailing heavy liability of the shipowner was not apparent. Moreover, insurance companies were not likely to insure without a medical examination. The proposal was fair but nonetheless was opposed by the seafarers' group. On being put to the vote the amendment was adopted by the 22 votes to 21.

⁷⁰ It might be argued here that the shipowner was free not to engage such a seaman but it is not fair to expect him to look for another seaman in the event of every refusal by a seaman to be medically examined, particularly when the shipowner must comply with manning scale requirements. ⁷¹ Thus, even if a seaman is employed on board a vessel registered in the territory of a country which has not ratified any Medical Examination Convention, he should accept medical examination on request if he does not want to lose his protection under the Sickness Liability of the Shipowners Convention, if that country has ratified the latter Convention. In that case, the expenses of the medical examination would be defrayed by the shipowner. The shipowners attempted to insert a provision to the same effect in the Convention concerning Sickness Insurance for Seamen (as a new article 12). This proposal was rejected by the Committee because it was not thought desirable - by some members of the Commission not even possible - to impose a medical examination under the national insurance scheme envisaged by this Convention as opposed to an individual liability for sickness insurance scheme. Under such a national insurance scheme financed by all the parties concerned (employers

⁷⁰C.G.M.M. (Commission on the Protection of Seamen from Sickness or Injury) /P.V. 3, III, pp. 3-4, 21 R.P., pp. 250-251.

⁷¹It should be noted that para. 3 of Art. 3 of the Convention was referred to a sub-committee. The text, which it proposed, was adopted at the Plenary Conference and has the effect of reducing substantially the effectiveness of this paragraph by laying down that national laws may provide that the liability of the shipowner shall not apply in this case; hence, the cessation of the liability of the shipowner is not automatic on the refusal of the seaman to be medically examined.

and employees), both good and bad risks should be covered. Considerations of public health and safety should not apply in this case.⁷²

13) Finally, attention should be drawn to the different length of time laid down for the periodical repetition of the medical examination prescribed by the 1921 and 1946 Conventions (one year until the age of 18 under the former, two years without age limit under the latter). Consequently, if a country ratifies both Conventions⁷³, it has to carry out an annual medical examination to seamen employed on vessels registered in its territory until the age of eighteen years and a biennial one thereafter.

The ILO Conventions concerning minimum age and medical examination for seafarers are among the most widely ratified ILO maritime instruments (see Appendix 4, Table A.) and certain of their provisions, such as the 15-year minimum age limit, the 18-year minimum age for trimmers and stokers, and the medical examination of seafarers before admission to employment at sea (but perhaps not the periods of the validity of the medical certificates laid down in Convention No. 73) have arguably become part of international customary law.

⁷²C.G.M.M./P.V. 11, XI, pp. 1-4, 21 R.P. , pp. 266-267.

⁷³Many countries have ratified both Conventions (among them Djibouti and Tunisia on the same date).

2.2. Entry into employment

The issues relating generally to entry into the seafaring profession in addition to those concerning conditions for admission to employment at sea, examined in the previous section, can be divided into three categories:

1) The question of ensuring to seamen fair employment opportunities (Convention for Establishing Facilities for Finding Employment for Seamen, No. 9, 1920).

2) The desirability of having a contract that is acceptable to both the shipowner and the seaman, which would protect the interests of both parties and be subject to supervision by the competent authority (Convention No. 22 concerning Seamen's Articles of Agreement, 1926).

3) The question of the reciprocal or international recognition of seafarers' national identity cards, which would facilitate the movement of seafarers and increase their employment opportunities (Convention No. 108 concerning Seafarers' National Identity Documents, 1958).

Finally, training can be regarded both as a means for improving a seaman's understanding of maritime issues, thus rendering him more capable of following the seafaring career and enhancing the efficiency of the seafaring personnel, and as a condition for admission to employment in certain cases (Vocational Training (Seafarers) Recommendation, 1946 (No. 77) and Vocational Training (Seafarers) Recommendation, 1970 (No. 137)). This question will be examined in Chapter 3.

2.2.1. The placing of seamen

2.2.1.1. Convention No. 9: Historical background

In 1919, at the Washington Conference, a Convention and Recommendation were adopted dealing with unemployment and unemployment insurance respectively. Since these two instruments were not intended to take account of the peculiar needs of seamen, the Governing Body, at its 1st session, decided to place on the agenda of the Genoa Conference the question of application to seafarers of the Washington instruments.¹ Accordingly, the Office sent a Questionnaire to the governments asking for their views on the desirability of adopting instruments concerning facilities for finding employment for seamen and the establishment of an unemployment insurance system.² On the basis of the replies of the governments the Office decided to submit to the Genoa Conference a Convention concerning facilities for finding employment for seamen.

¹ *G.B.*, p. 13.

² The latter question will be discussed later together with other social security issues in Chapter 5.

Reasons for the adoption of Convention No. 9

The reasons why an instrument of this kind needed to be adopted were that seamen, because of the nature of their profession, were obliged to join ships whose crews consisted of sailors of different nationalities. Also, they had to follow the ship from port to port in different countries. When the ship finished its voyage the seamen often, especially in periods of depression and a consequent unemployment crisis, remained idle and being in a country unknown to them were in urgent need of people who could help them in the search for jobs. Often they fell victims to the deplorable system of "crimping". The "crimps", under the pretext of finding employment for seamen in a foreign port, exploit seamen in need until they are financially exhausted and worn out. These malpractices³ could be ended by the establishment of national employment offices providing seamen with some guarantees of employment without charging any fees for their services. An internationally co-ordinated system of unemployment offices would procure ship's crews whenever needed. It would also make it easier for the shipowner to secure a competent crew, since he would know from information received from the offices in which port seamen are most likely to be available. Seamen, themselves, would be supplied with valuable information as to where employment opportunities exist. Finally, it would greatly assist development of an international system of unemployment insurance statistics of unemployment to be supplied by such offices.⁴

The Office draft

The Office draft prohibited the establishment of employment agencies which charge fees and of similar commercial enterprises. These offices should be eliminated as soon as possible and an efficient system of free employment offices should be established in the ports of a ratifying country. This system could be set up either by employers' or by workers' associations or, failing that, by the State, but a joint committee composed of shipowners and seafarers was envisaged in the draft, which should be consulted on all unemployment issues. Moreover, all guarantees for the protection of seamen should be mentioned in the articles of agreement. Under Art. 5 of the draft its provisions were made applicable to non-nationals. The ILO Office would co-ordinate all national activities in this context.⁵

The Committee draft

At the Genoa Conference a Committee on Unemployment was appointed to consider the Office draft and propose amendments, if necessary. The Committee draft included a provision to the effect that offences against the prohibition of fee charging employment agencies would be punishable

³The first principle of the old Art. 427 of the Treaty of Peace declared that labour should not be treated as a commodity or an article of commerce.

⁴For the reasons necessitating the adoption of an international instrument, see International Labour Conference, 9th session, June 1920, Genoa, Report II, *Unemployment*, pp. 26-33; see also L. Grosjean, *La protection internationale des Marins*, Paris, 1933, p. 21.

⁵ILO Conference, 1920, Report II, op. cit., pp. 33-38.

by fine or imprisonment (Art. 1 (i) (a)). These agencies would be temporarily allowed to operate but only under certain conditions (Government licence and supervision, Government inspection) (Art. 1 (ii) (a-b)). An important amendment -finally adopted- provided that the system of free employment offices should be established either by shipowners' and seafarers' organisations -jointly under the control of a central authority- or, failing that, by the State itself. So, unlike the Office draft, according to which this system could be established either by seafarers or by shipowners, the Committee draft required a "controlled" joint action (Art. 2). The Norwegian Government delegate drew the attention of the members of the Committee to the public character that such offices should have. The word "public" was inserted before the words "employment offices".⁶ The Committee draft also provided for a co-ordination on a national basis of all different types of free employment offices existing in a country. There was a more elaborate provision concerning the joint consultative Committee established to give advice on these matters; national law would, if necessary, make a provision for the selection of an independent chairman of the Committee, for the degree of State supervision and for the participation of other interests in the Committee (Art. 3 (a, b, c)).⁷ Art. 4 of the Committee draft ensured to seafarers and shipowners freedom of choice, while Art. 5 complemented that article by giving the opportunity to all parties concerned to examine the contract before and after signature. Art. 6 constituted a substantial amendment of the Office draft; while the latter extended the application of the Convention to non-nationals without any qualification, Art. 6 provided that the same facilities for finding employment should be available for seafarers of countries, where "the conditions of employment are generally the same". Finally, a new article (Art. 7) was inserted in the Convention leaving to the ratifying country to decide whether it would apply the provisions of the Convention to deck and engineer officers.

2.2.1.2. ILO instruments of a general nature concerning employment agencies and the organisation of the employment service

Instruments concerning the organisation of the employment service

Since 1920 comprehensive instruments concerning employment policies and the organisation of an employment service have been adopted (Convention No. 122 concerning employment policy,

⁶This character, according to the same delegate, would make these bureaux accessible even to seafarers who are not members of workers' associations or trade unions; *Commission du chômage* (hereinafter cited as C.C.), IIème session, Gênes, 1920, Procès verbaux, 5ème séance, p. 6.

⁷It was the wish of the Japanese Government that other interested persons like professors, priests, etc. could participate in this Committee. Though it wanted a provision concerning the participation of these interests to be inserted in Art. 2 (which creates binding obligations), it was finally decided, despite the disapproval of the Japanese delegate, to include such provision in Art. 3, thus, leaving the national authorities to decide whether such participation would be desirable, *ibid.* 2 C.C., p. 7, 6 C.C., p. 10, 7 C.C., p. 6; see also Art. 5 of the final Convention. The constitution of advisory committees consisting of an equal number of representatives of seamen and shipowners is obligatory under Art. 5; but there is no stipulation that each employment office should have an advisory committee; see interpretation of Convention No. 9 given by the Office in *O.B.*, Vol. III, pp. 624-7.

the relevant Recommendation No. 122 suggesting the adoption of concrete measures to realise successful employment policies, both adopted in 1964; Convention No. 88 and the supplementing Recommendation No. 83 concerning the Organisation of the Employment Service, both adopted in 1948).

It is not intended to analyse these instruments. However, attention should be drawn to Art. 5 of Convention No. 88 and para. 12 of Recommendation No. 83. Art. 5 lays down that "the general policy of employment service in regard to referral of workers to available employment shall be developed after consultation of representatives of employers and workers" through the advisory committees provided for in Art. 4 of the Convention. Though the Office draft was more specific, it was decided to include the rest of the provisions of Art. 4 of the Office draft in a supplementing Recommendation, since a Convention could not deal with the question of referral of workers in detail.⁸ Consequently, para. 12 of Recommendation No. 83 provided that the employment service should ...(b) "not refer workers to employment in respect of which the wages or conditions of work fall below the standard defined by law or prevailing practice" and (c) "not, in referring workers to employment, itself discriminate against applicants on grounds of race, colour, sex or belief."⁹

Instruments dealing with the question of fee charging agencies

It will be remembered that the Seamen's Placing Convention No. 9 was adopted in 1920. Since then, two trends can be identified in the regulation of the question of fee charging employment agencies:

i) The distinction, first made in Convention No. 34 concerning Fee-Charging Employment Agencies (1933)¹⁰ between profit making and non-profit making fee-charging employment agencies. The Convention provides for the abolition of agencies conducted with a view to profit (Art. 2), allowing exceptions under exceptional circumstances (Art. 3) and for the supervision of agencies not conducted with a view to profit (Art. 4). The latter agencies are defined in Art. 1 (b) as agencies which, though not conducted with a view to deriving any pecuniary or other material advantages, levy from either employer or worker an entrance fee, a periodical contribution or any other charge for the above services.¹¹ It has already been established earlier that under Convention No. 9 trade unions of seafarers are not allowed to continue in existence if they charge fees for the placing services. If Art. 1 (b) and 4 were made applicable to the placing of seamen, then trade unions of seafarers would be covered by Art. 4, with the result that their placing activities would be subject to authorisation and su-

⁸31 *R.P.*, p. 405.

⁹It should be noted that the Employers' Members were consistently opposed to the adoption of such a paragraph. Some Government delegates were also against it. It was argued that the paragraph, instead of an employment service, established a kind of wage inspection service, which was outside the scope of the Convention. Also some difficulties in identifying the "prevailing practice" were pointed out. A considerable discussion took place and many amendments were moved; see 31 *R.P.*, pp. 410, 208-215. The determination of many delegates to fight against discrimination of any kind resulted in the adoption of the paragraph in its present form on the understanding, however, that the proposed instrument was a Recommendation.

¹⁰This Convention does not apply to seamen (Art. 1, para. 2).

¹¹Whether placing activities are the principal or the main object of these agencies is not material, 17 *R.P.*, p. 551.

pervision of the competent authority and the fees charged could not be in excess of the scale fixed by the authority with strict regard to the expenses incurred (Art. 4 (b)).¹² This provision provides the certainty which the Seamen's Placing Convention lacks, since governments, sometimes under pressure from trade unions, might interpret Art. 2 of the latter Convention as not covering trade unions charging fees for placing services. This would result in fee-charging trade unions having absolute control over the finding employment for seamen without any supervision whatsoever.

ii) In 1949 Convention No. 33 was revised. An important innovation was introduced to give more flexibility to the revised Convention as it had not received a satisfactory number of ratifications. The option was given to ratifying States either to proceed to the progressive abolition of fee-charging employment agencies conducted with a view to profit and the regulation of other agencies not so conducted or simply to regulate fee-charging employment agencies. Thus, Member States are free, if they do not wish to abolish these agencies, to subject them to certain conditions of operation (Art. 10 of the Convention No. 96 concerning Fee-Charging Employment Agencies (Revised) 1949). It was the view of the Belgium Government delegate, who was supported by his French colleague, that the distinction proposed in the 1949 Convention was inadmissible. According to that delegate the adoption of a revised Convention would enable States to choose between the progressive abolition of fee-charging agencies and their regulation and this was a retrograde step.¹³ Since the majority of the Workers favoured the text as drafted by the Committee, the Convention was finally adopted with the above option given to the States retained.

¹²Emphasis added. An amendment to substitute the words "shall not make any charge in excess of a moderate sum corresponding to the cost of their placing service" for the words finally adopted was rejected because of lack of a quorum, 17 *R.P.*, p. 346.

¹³Some extracts of his speeches are worth mentioning and might be relevant, if it is thought necessary to adapt these provisions to the placing of seamen: "... The 1933 Convention - already in 1919 a Recommendation adopted at the Washington Conference disapproved the use of fee-charging agencies - in condemning fee-charging agencies conducted with a view to profit, had laid down standards of social policy which should not be abandoned ... Moreover, it would be a grave danger to the ILO to adopt a Convention which contained two rather extreme alternatives and asked the Governments to accept one or the other of them. To sanction such a procedure would constitute a very dangerous precedent and would mean that in practice ratifications would become almost meaningless and that the various countries, in ratifying the same Convention, would be adopting different principles and standards" 32 *R.P.*, p. 553. Furthermore, as pointed out by the same delegate, ratification of the 1933 Convention might have been hampered because of the provision in Art. 3, which laid down a rigid limit of 3 years for the abolition of these agencies (the Government of Belgium was unable to ratify the Convention for this very reason, although it was not opposed to the principle of abolition of the agencies over a longer period), see 32 *R.P.*, p. 247. In this respect the 1920 Convention is less rigid, as it provides for abolition of the said agencies "as soon as possible".

2.2.1.3. Recent Developments regarding the engagement of seafarers

a) Asian Maritime Conference

The methods of recruitment and engagement of seafarers were discussed at the two Asian Maritime Conferences in 1953 and in 1965. The Report prepared by the ILO Office for the 1953 Conference recalled the maritime traditions exercising an influence over the recruitment and the engagement procedures of Asian seafarers ¹⁴ and concluded that there are two problems with which Asian seafarers seeking employment are faced: a) unemployment resulting from overpopulation and from the impossibility of Asian seafarers being absorbed by their national fleets in their current state of development and b) corrupt practices in the placing of these seafarers by intermediaries. ¹⁵ The Conference adopted two resolutions (Nos. IV and V) concerning the recruitment of Asian seafarers and the machinery for this recruitment respectively. Para. 2 (c) of the first resolution recommended that the machinery for the recruitment of such seafarers "should ensure that no charge (other than an official fee) be levied directly or indirectly on seafarers in respect of their obtaining employment." Under the second resolution five systems of employment agencies were recognised:

- i) A joint body consisting of representatives of shipowners' and seafarers' organisations.
- ii) A tripartite body consisting of representatives of the government and of organisations of seafarers and shipowners. ¹⁶
- iii) Employment agencies set up by the government to regulate the question of the placing of seamen in consultation with representatives of shipowners and seafarers (para. 4 in conjunction with para. 2).
- iv) In the absence of any such action, the State itself (para. 4 in conjunction with para. 3).
- v) Directly by the shipowners, if this method is agreed to by the bodies mentioned under the previous headings. Finally, "reasonable" freedom of choice should be ensured to the shipowner and the seaman in the choice of the crew and of the ship respectively (para. 6). ¹⁷

In 1965 the second Asian Maritime Conference was held. During the 12 years that had elapsed since the first Conference, the situation regarding the engagement of Asian seafarers had improved in certain areas though that progress was "by no means universal." ¹⁸ The resolution (No. 4) concerning the Recruitment of Asian Seafarers adopted by the 1965 Conference, while taking notice

¹⁴Asian Maritime Conference, Second Item on the Agenda, Report II, *Methods of recruitment and engagement of Asian Seafarers*, Geneva 1953, pp. 3-5.

¹⁵*Ibid.*, p. 39.

¹⁶The organisations of shipowners and seafarers under a) and b) should be "bona fide" organisations.

¹⁷For the text of the Resolutions, see *O.B.*, Vol. XXXVI, 1953, pp. 103-104. The first resolution was adopted unanimously; the second was adopted by 28 votes to 9 with 7 abstentions, see J.M.C./18/1/1, Oct. 1955, Report of the Director General, pp. 38-39.

¹⁸Report of the Director General, Second Asian Maritime Conference, Tokyo, April 1965, Report I, first item on the agenda, p. 103.

of the progress achieved since the adoption of the 1953 resolutions, emphasised certain areas where further improvement was desirable (such as, for example, the development of strong organisations of workers) and recommended, as a result of an amendment moved by the Seafarers' group, that countries in whose territory seafarers are engaged to serve on board foreign vessels should "give full consideration to the provisions of the Seafarers' Engagement (Foreign Vessels) Recommendation, 1958 (No. 107).¹⁹

b) 17th and 18th sessions of the J.M.C

At the 17th session of the Joint Maritime Commission in 1952 the Seafarers' members expressed some doubts as to the effectiveness of the No. 9 Convention. Particularly, they argued that it was possible for foreign shipowners to engage seamen through irregular procedures contrary to the provisions of the Convention. Therefore, they strongly urged that the engagement of seafarers should be conducted, without any distinction of nationality and irrespective of the flag of the ship on board which the seaman was to be employed, through official or otherwise approved channels.²⁰

The sixth item on the agenda of the 18th session of the Joint Maritime Commission was the possible revision of the Convention (No. 9) concerning facilities for finding employment for seamen. After examining the ten-yearly Report of the Governing Body on the application of the Convention, which had been submitted to the 1950 Conference, the Report of the Office to the Commission concluded that the provisions of the Convention had been widely adopted as the international standard, the Convention was not out of date and the question of providing facilities for finding employment for seamen through official employment offices regardless of nationality was outside the scope of the Convention. However, it added that this "does not necessarily mean that these groups (shipowners and seafarers) would or would not now consider that there is a need for ensuring in an international instrument, whether by amending Convention No. 9 or otherwise that *all* seafarers should be engaged through official or approved employment agencies."²¹

c) Preparatory Technical Maritime Conference 1956. Adoption of Recommendation No. 107

The question of the engagement of seafarers on board ships registered in a foreign country was considered at the Preparatory Technical Maritime Conference held in London in 1956. The Seafarers' group thought that the adoption of an international instrument regulating the engagement of seafarers for employment on vessels registered in a foreign country would contribute towards the elimination of the abuses which had taken place in connection with the recruitment of seafarers for

¹⁹*O.B.*, Vol. XXXVIII, 1955, pp. 286, 289. The 1953 and 1965 Resolutions concerning the recruitment of Asian seafarers have had a considerable effect on the organisation of recruitment systems for seamen in India, Singapore, Pakistan and Hong Kong; see E. Argiroffo, "Recruitment of Seamen in Asia", *I.L.R.*, Vol. 95, No. 3, pp. 145-165.

²⁰The minutes of the proceedings of the 17th session of the J.M.C. have not been published. For a summary of the proceedings, see 119 *G.B.*, pp. 79-82.

²¹Emphasis added, J.M.C./18/6/1, pp. 27-29.

employment on ships flying "flags of convenience".²² The proposed instrument was in the form of a Recommendation²³ and, with minor amendments, it was adopted by 138 votes to 0 with 11 abstentions at the 41st session of the International Labour Conference.²⁴ Para. 1 of the operative part of Recommendation No. 107 concerning the Engagement of Seafarers for Service in Vessels Registered in a Foreign Country provides that "Each Member should do everything in its power to discourage seafarers within its territory from joining or agreeing to join vessels registered in a foreign country unless the conditions under which such seafarers are to be engaged are generally equivalent to those applicable under collective agreements and social standards accepted by bona fide organisations of shipowners and seafarers of maritime countries where such agreements and standards are traditionally observed."

d) The Engagement of Seafarers and its relationship to national manpower policies

The question of the recruitment of seafarers in connection with the establishment of manpower plans within a national employment policy is dealt with in Recommendation No. 139 (1970) concerning Employment Problems Arising from Technical Developments on Board Ship. However, it should be noted that the purpose of the Recommendation is not to lay down specific standards, which would be unacceptable if they were adopted in the form of a Convention, but, as the effect of technical developments on board ship on employment questions was a new unexplored topic, to formulate "guidelines for national action".²⁵ In para. 5 it is suggested that systems for the regulation of the recruitment of seafarers should take into account existing manpower plans while para. 6 recommends that mobility within the maritime labour force should be facilitated by the operation of an effective employment service.

e) The Engagement of Seafarers and Continuous Employment

The Continuity of Employment (Seafarers) Convention, 1976 (No. 145) reflects recent developments in the field of employment security.²⁶ The Convention lays down that the conclusion of contracts providing for continuous or regular employment with a shipping company or an association of shipowners might be one of the possible methods²⁷ employed to promote continuous or regular employment of "qualified" seafarers (Art. 3 (a)). The supplementing Recommendation (No. 154)

²²International Labour Conference, 41st session, 1958, Report III, *Engagement of Seafarers through Regularly Established Offices*, Proceedings of the Preparatory Technical Maritime Conference, p. 5. For the question of flags of convenience and substandard vessels, see *infra* Chapter 6.

²³*Ibid.*, p. 7.

²⁴41 R.P., pp. 162-163.

²⁵International Labour Conference, 55th session, 1970, Report IV (1), Fourth item on the Agenda, *Employment problems arising from technical developments and modernisation on board ship*, pp. 3-6, 20-21.

²⁶Already in 1953 it was pointed out that certain countries had developed a system of continuous employment for seafarers, i.e., a "company service contract", dispensing with the services of employment offices; see Asian Maritime Conference, 1953, Report II, *op. cit.*, pp. 6-7.

²⁷The measures specified in Art. 3 are not exhaustive; countries are free to adopt either or both of these measures or to find a more appropriate method of addressing the question of continuity of employment for qualified seafarers; see the wording of Art. 3 which uses the phrase "might include"; see also 62 R.P., p. 148.

states that systems of allocation of employment should preserve, so far as practicable, the freedom of the shipowner and the seaman in the choice of the crew and the ship respectively (Para. 3 (2)).

f) The Engagement of Seafarers and Substandard Vessels

The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), which is intended to provide a means of taking action against vessels, whatever flag they are flying, that pose a danger to safety, to the environment or to the health and welfare of the crew", viz., against substandard vessels, ²⁸ contains certain provisions touching on the question of the engagement of seafarers for employment on board ship:

1) Art. 2 (d) defines the measures that each country that has ratified the Convention should take in order to ensure that the recruitment of seafarers for employment on board ship is conducted through procedures securing fair employment opportunities to seamen; it distinguishes between ships registered in the territory of a ratifying Member and ships flying any other flag:

A) Seafarers engaged on board ships registered in the territory of a Member. Measures provided for relate to: "adequate" procedures for the engagement of seafarers and investigation of complaints arising in that context. The nationality of the seafarer is irrelevant.

B) Seafarers engaged on board ships registered under a foreign flag in the territory of a Member. Measures provided for include, for:

i) Nationals: "adequate" procedures for the investigation of complaints in connection with the engagement of these seafarers; report of such complaint to the competent authority of the flag State.

ii) Seafarers of foreign nationality: report of such complaint to the competent authority of the flag State. ²⁹

2) Art. 3., is a new article and it was included in the Convention after a proposal submitted by the Government of France had been accepted at a later stage during the deliberations of the Committee on Substandard Vessels, Particularly Those Registered Under Flags Of Convenience appointed by the 1976 Conference. ³⁰ This Article provides that a Member that has ratified the Convention should draw the attention of its nationals to the possible problems that might arise from their engagement for employment on board ships registered in countries which have not ratified the Convention, unless it is satisfied "that measures equivalent to those fixed by this Convention are being applied".

²⁸See the speech of the Reporter of the Committee on Substandard Vessels, Particularly Those Registered Under Flags of Convenience at the 1976 Conference (henceforth Committee on Substandard Vessels), 62 *R.P.*, p. 244. For previous ILO action concerning flags of convenience and the preliminary discussions, which led to the adoption of Convention No. 147, see *infra* Chapter 6, Section 6.1.1., pp. 435-444.

²⁹The distinction made in Art. 2 (d) between seafarers engaged on board ships registered in the territory of a ratifying country and seafarers engaged on board ships flying a foreign flag was supported by a number of countries, such as West Germany and the Netherlands, during the preliminary proceedings, see International Labour Conference, 62nd (Maritime) session, 1976, Report V (2), *Substandard Vessels*, 5th item on the Agenda, pp. 37-38.

³⁰62 *R.P.*, p. 192. The application of Article 3 is not limited to a particular ship but its provisions apply to any ship, *ibid.* This Article is based on the same idea as that which led to the adoption of para. 1 of the operative part of Recommendation No. 107 but the wording of the new Article is superior to the one used in the Recommendation.

2.2.1.4. Conclusions

2.2.1.4.1. Problems concerning the interpretation of Convention No. 9

a) Prohibition of Fee-Charging Employment Agencies

At the Plenary Conference, in 1920, many amendments were moved, but the draft finally adopted was almost identical to that of the Committee. However, some controversial issues were raised by various delegates. Though the Convention reflects the wishes of the majority of the delegates, certain of its provisions call for some clarification. First, when the Convention says that "the business of finding employment for seamen shall not be carried on by any person, company, or other agency" as a commercial enterprise for monetary gain and that no fees shall be charged "directly or indirectly" by the above mentioned persons and agencies for finding employment for seamen it is not clear to what kind of persons or agencies it refers. The President of the Unemployment Committee, replying to the U.K. Workers' delegate, said that this provision would not apply to employment agencies under the control of trade unions, since these agencies do not have a commercial character, since they did not charge any fees for these operations.³¹ The same delegate raised the question again at the Plenary Conference.³² The Reporter explained that it would not apply to a federation of shipowners or a union of seamen, where the placing of seamen is incidental to the work and not the main or sole work of these organisations, but an amendment was moved to insert the words "either directly or indirectly" before the word "fees" so that the operation of an employment agency charging fees for its work either directly or indirectly would be prohibited. This would include any person who charged a seaman "the price of suit of clothes for a pair of boots". The seamen's representatives considered - and they were supported in this by the Reporter of the Unemployment Committee - that the word "fees" would not include the dues paid to a trade union.³³ The British Shipowners' delegate then raised the question of the shipping master. The shipping master is a person who receives a "reasonable" fee for finding employment for seamen. Until a system of free employment offices proved workable, these people could assist the offices in their work. He proposed the deletion of the words "for monetary gain", since the shipping master otherwise would be excluded. It was obvious that the adoption of that proposition would give rise to abuses and it was finally withdrawn after a compromise formula had been suggested by the Reporter.³⁴ The delegates speaking after this meeting defended the Committee draft as it stood. Dr. Colmo, the Argentine Government delegate, best summarised their views³⁵: a) a federation of employers or a workers' union could not be considered a "commercial enterprise" within the meaning of the article, b) the words "monetary gain" could not be

³¹ *C.C.*, p. 4.

³² *R.P.*, p. 205.

³³ *Ibid.*, pp. 206-208.

³⁴ *Ibid.*, p. 213.

³⁵ *Ibid.*, p. 217.

regarded as including trade union fees ³⁶ and c) the words "directly or indirectly" could be omitted as self-evident. As a result the Committee draft was approved without any modifications.

b) The Control over the Procedures of the Engagements of Seafarers

Mr Henson, the U.K. Workers' delegate proposed another amendment to the effect that as a third possibility the employment offices envisaged by the Convention would be solely under the control of seafarers' organisations. This matter had been discussed thoroughly in the Committee. It had been decided there that these offices should be set up either jointly by shipowners' and seafarers' organisations or by the State itself. The reasons were that the establishment of employment offices not jointly controlled by the shipowners and the seamen would give rise to competition (each party would offer employment opportunities to the persons it wished without any international control). Moreover, if trade unions had absolute control over the placing of seamen, they might decide that only members of their unions would be offered employment opportunities or be given priority. ³⁷ Many delegates opposed the amendment at the Conference. The French Government delegate said, *inter alia*, that a trade union charging fees for membership could not be regarded as a commercial enterprise and he declared himself against the amendment "because the danger of the proposed employment agencies becoming instruments of domination in the hands either of the employers or the workers can only be avoided by giving them a joint character". ³⁸ The Henson amendment was rejected and the original Art. 2 was adopted as drafted by the Committee. ³⁹ This amendment was rightly rejected. Its inclusion in the Convention might give rise to abuses. It did not even refer to representative seafarers' organisations. Under the proposal a few people might form a syndicate of minor importance with the result that fictitious workers' organisations could administer and control important employment issues. ⁴⁰ On the other hand, as pointed out, the joint system envisaged by the Convention is subject to the control of a central authority; ⁴¹ if the Henson amendment were accepted, the intervention of the State or any central authority would be precluded.

³⁶However, Art. 1 of the Committee draft included the word "agency" besides "commercial enterprises". Moreover, the Colmo case is sound only if trade unions do not charge special fees for the placing of seamen. It is another question, if these are to be included or taken into account in the calculation of the seamen's annual membership fees. If a trade union required for the placing of its members fees not justified by its non-commercial nature, those fees could be regarded as an indirect attempt to obtain pecuniary gain.

³⁷1 C.C., p. 5, see also 5 C.C., pp. 2, 5-6, 6 C.C., pp. 5-7.

³⁸2 R.P., p. 223. It has been reported that in Chile a recruitment system was introduced whereby the union legislation system ("matricula") which used to give job priority to workers on the register was abolished and since 1981 seamen were engaged individually and directly by the employers; see Chile: *Deregulating the employment system of seafarers and port workers* in SLB, 4/81, pp. 401-2.

³⁹Ibid., p. 237.

⁴⁰Ibid., pp. 225, 236, see also 7 C.C., p. 6. It should be noticed that Art. 4 of the Convention refers to "representative" associations of shipowners and seamen.

⁴¹The words "central authority" were preferred to other formulae, since they would encompass all possible kinds of authorities to suit different circumstances in the ratifying countries. So, a central authority under Art. 2 of the Committee draft (Art. 4 of the Convention) could be either the State or an official (maritime) Joint Board or administrative or local authorities or a joint organisation composed of seafarers and shipowners and supervised by the State; see ILO Conference, 2nd session, Report II, op. cit., p. 34, 2 R.P., p. 201.

c) The role of the "central authority"

The utility of supervision by a central authority lies in the fact that accurate, unbiased unemployment statistics will be available in the absence of which it would be difficult to establish an efficient system of unemployment insurance.⁴² Furthermore, the central authority can prevent abuses in the regulation and the organisation of the maritime labour market, for example, it can control the influx of foreign labour into the country; it could be the case that agreements between shipowners' and seafarers' representatives would take no account of the country's manpower and unemployment policies. The role of a central authority will ensure, to a certain extent, the "efficacy" and "adequacy" of the system envisaged in Art. 4 of the Convention.

d) The right of the State to intervene

In the absence of such joint action the system may be organised and maintained by the State. The Office draft proposed use of the phrase "failing that" instead of "in the absence of such joint action". The latter wording is retained in Art. 4 and is far from satisfactory. This article stipulates that an efficient and adequate system of free public employment offices shall be organised and maintained either 1) by the seafarers' and the shipowners' associations jointly under the control of a central authority or 2) in the absence of such joint action by the State itself. What "such joint action" means is less than clear. From the place which these words occupy in the text, "such" seems to refer to the joint action specified under heading 1, namely the "controlled" joint action and not to the "efficient" joint action. According to this interpretation, if a central authority is in charge, the State would not be able to judge the efficacy of the system. This is absurd. Consequently, "such" joint action connotes an efficient joint action. Whether a system is efficient or not is a matter for Governments to decide. This teleological interpretation is to be preferred and it is in accordance with what the members of the Unemployment Committee at the Genoa Conference had in mind.⁴³

Hence, the position under the Convention is as follows: Persons, companies or other employment agencies are not allowed to carry on their business for purposes of making money. Contraventions must be punished (Art. 1). However, all the above mentioned agencies can carry on their business temporarily under Government licence. All "practicable"⁴⁴ measures shall be taken to abolish fee-charging agencies as soon as possible but no exact phasing out period is prescribed (Art. 3). Existing trade unions or shipowners associations alone can control the labour market but if they

⁴²1 C.C. , pp. 4-6, 2 C.C. , p. 5, 2 R.P., pp. 229, 234, 235. The necessity for impartiality in drawing up unemployment statistics is evident in the event that a country decides to follow Recommendation No. 10 concerning Unemployment Insurance for seamen in national practice, namely to establish an effective system against unemployment.

⁴³2 R.P. , p. 532. It is submitted that this interpretation is correct if one takes into account the *travaux préparatoires* of the Conference whose examination, as pointed out in the Introduction, is a major method of interpretation of ILO Conventions. It is also in accordance with the ordinary meaning of the words "joint action" in the context of Art. 4 para. 1 of the Convention (Art. 31 of the VCT).

⁴⁴The word "necessary" might be preferable.

charge unreasonable fees for this job, Arts. 2 and 3 will be applicable to them.⁴⁵ Moreover, there is no phasing out provision for these associations with the result that they can carry on their business in a country, even if the Convention is ratified by the country concerned. However, if there are no such non fee-charging professional associations at the time the Convention is ratified and the country concerned wishes to establish a system of free employment offices, this system must⁴⁶ be organised or maintained either by the joint controlled system referred to above or by the State. Of course, the administration and the execution of these joint decisions can be delegated to competent seamen's organisations.

According to Art. 4 (2), the work of all such employment offices must be administered by persons having practical maritime experience. Persons outside the restricted class of seamen could be regarded as "persons having practical maritime experience" within the meaning of this provision, if, in the special circumstances of the case, they have a knowledge of maritime work.⁴⁷

e) The co-ordination of various existing systems of employment agencies

The last paragraph of Art. 4 is of great significance. As shown by the above analysis, different types of employment offices might exist in the ports of a country: 1) the state system, 2) the joint system, 3) the surviving private employment agencies system disapproved of in the Convention, 4) bureaux controlled by seamen's organisations and 5) bureaux controlled by shipowners' associations. This paragraph provides for the co-ordination of these different types of employment offices on a national basis. Unfortunately, this provision is a part of Art. 4 and, therefore, seems to apply to the employment offices mentioned in this article, viz., the free "public" employment offices established jointly or by the State. It leaves out all the systems mentioned above under categories nos. 3, 4, 5. An amendment which would include all the existing systems of employment offices, whether public or private, was moved in the Committee of Unemployment by the Government delegate of Netherlands but since its importance was not fully appreciated in the Committee, it was rejected.⁴⁸ The adoption of the amendment would have as a result the drawing up of more complete statistics and other information concerning unemployment (this is covered by Art. 10) and, by far the most important, the co-ordination on a national basis of all systems of employment agencies. As the provision stands now, it is possible that trade unions will find employment for nationals that are members of the trade unions, shipowners' associations will try to recruit Asian or Indian crews, with the result that the joint or the State system laid down in the Convention will not have much to do. Moreover, the absence of

⁴⁵It should be noted that, under Art. 2, the charging of fees for finding employment for seamen, either directly or indirectly, is prohibited. A distinction should always be made between membership fees and "placing" fees. The charging of the latter is disallowed in any case, unless it is reasonable. Nevertheless, the criterion of reasonableness is not mentioned anywhere in the preliminary proceedings. As this criterion might complicate the matter and lead to unnecessary labour disputes, it is desirable, if not imperative under the Convention, that it should be gradually abandoned.

⁴⁶Despite the word "may" in Art. 4, the language of this Article seems to be too restrictive.

⁴⁷Interpretation of Convention No. 9 by the Office in *O.B.*, Vol. III, pp. 624-7.

⁴⁸7 *C.C.*, p. 5.

co-ordination will sow the seeds of competition among the different employment agencies, thus hampering the rational organisation of the labour market of seafarers. It would have been better if the last paragraph of Art. 4 had been set out in a separate article referring to the co-ordination of all employment agencies.

f) Expenses incurred under the Convention for the establishment and organisation of the employment offices

The Convention while laying down that no fees shall be charged for the placing of seamen, it is silent as to the expenses that the establishment of the employment offices system will entail.⁴⁹ This is a matter to be decided by agreement between seafarers' and shipowners' organisations. For example, it may be thought that expenses incurred by the seaman to join a ship abroad as a consequence of his placement will be defrayed by the shipowner. Alternatively, the Government may undertake the financial burden, especially in cases, where the system of employment agencies is set up by the State itself. As far as the joint "controlled" system is concerned, the controlling authority may intervene for purposes of financing.

g) The application of Convention No. 9 to foreign seafarers

One remaining important question is whether the facilities provided for in the Convention (the finding of employment for seamen through the various types of national employment offices, as set out above, which are established in the territory of a State party to the Convention) should be extended to foreign seamen employed on board ships registered in the territory of a Member State even if the country of nationality of these seamen has not ratified it. If the answer were in the affirmative foreign seamen employed on board ships to which the Convention applies would be secured the same employment opportunities as those secured to nationals. Art. 8 replies affirmatively in the case of countries where "the industrial conditions are generally the same" and provided that both countries have ratified the Convention. This provision was meant to prevent unfair competition from foreign seafarers, whose general conditions of employment, particularly wages were lower than those of the nationals of the ratifying Member State (flag State). It would also prevent labour from being regarded as an article of commerce or a commodity (the first principle of the old Art. 427 of the Treaty of Peace); the shipowners would not be able under the Convention to employ cheap labour to man their ships. Considering the provisions of Art. 8 in connection with the question of union membership, it is clear that if a seafarer is a national of the State providing the facilities, he is entitled to the same facilities as trade union members, even he is not a member of a trade union.⁵⁰ If the seafarer is a na-

⁴⁹5 C.C. , p. 4, 6 C.C. , pp. 3-4, 2 R.P. , p. 208.

⁵⁰This was in the minds of the members of the Unemployment Committee when they approved a joint system of employment offices, see 5 C.C. , p. 6, 6 C.C. , p. 5. Nevertheless, under the surviving system of employment offices controlled by seafarers' organisations, it may be decided that members of the Union should be given priority. This is not in accordance with the purposes which the Convention aims to achieve and the importance given by it to the joint and the State system. The lack of adequate co-ordination is to be considered as an aggravating circumstance.

tional of a country other than that of the State in the territory of which the ship is registered, a distinction must be made. If the industrial conditions in that country are "generally the same" as those in the State of registration and it has ratified the Convention, then the foreign seaman should be given the same facilities, even if he is not unionised;⁵¹ when arrangements between seamen and shipowners do not have this result, the government has the right itself to undertake the establishment of a system which it thinks is "efficient" within the meaning of the Convention. Otherwise, the Convention is not applicable to foreign seamen; in this case, the consular authorities are responsible for finding employment for those seamen.

Art. 8 demands that the government or the central authorities of a ratifying State take some difficult interpretative decisions. In what circumstances could they say that industrial conditions in any given two countries were "generally the same"? The President of the Unemployment Committee thought that it meant "substantially" the same⁵² but no analysis of the meaning of that phrase was attempted either in that Committee or by the plenary sessions of the Conference. Apart from the vagueness of the term, it is unfortunate that in an international instrument intended to abolish all previous abuses, the very persons most likely to be used were left out; the Convention thus could open the way to unfair competition, because foreign seafarers, not being able to avail themselves of the advantages of the Convention, will try other means to secure employment.

At the Genoa Conference an amendment to Art. 8 was proposed by Mr de Michelis, Italian Government delegate:

"Each member ratifying the present Convention agrees that the same employment facilities shall be available for all seafarers without distinction of nationality and that the guarantees provided for in Article 5 shall be extended to them, and they shall at the same time be subject to the same conditions in regard to terms of engagement as the seafarers of the countries concerned."⁵³

This amendment, however, was opposed by the Reporter of the Unemployment Committee because, in his opinion, it did not carry the matter as far as the original text. The intervention of the Reporter was decisive and the proposed amendment was rejected by 27 votes to 27. The rejected proposal had obvious advantages over that adopted. In the first place, it encompassed all seafarers without distinction of nationality.⁵⁴ Moreover, the words "generally the same" were left out. It might

⁵¹This, of course, is subject to the control of the "central authority" established under Art. 4 and to the manpower policies of the Government. For discussion on the position of foreign seafarers, see 2 *C.C.*, pp. 3-4, 2 (suite) *C.C.*, p. 2, 4 *C.C.*, p. 2, 5 *C.C.*, pp. 2, 4.

⁵²2 *R.P.*, p. 202. However, the real point was made by the same President during the deliberations of the Committee: "This will not mean that Lascars (or other seafarers in similar position) will not be given jobs, but that each country will determine the conditions, under which this will be done" (translation from the French by the writer), 9 *C.C.*, p. 4. Consequently, under Art. 8, each country, according to their own needs, could adopt preferential tactics that would undermine the Convention.

⁵³2 *R.P.*, p. 252.

⁵⁴The Declaration of Philadelphia lays down as a fundamental objective that "all human beings, irrespective of race, creed or sex have the right to pursue both their material well being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".

be objected that it is impossible to subject Panamanian or Chinese crews to the same conditions of engagement as those of the U.S. or the U.K. It would be very difficult for every seaman to sign the same agreement. The proposal was to some extent unrealistic. It is clear that if Asian crews were given wages equal to those paid to European crews, the shipowners of a developed country often in agreement with trade unions would give priority to the engagement of nationals.⁵⁵ On the other hand, it is probable that these Asian crews would not receive the same high wages on a vessel registered in their countries; these seamen would prefer to be employed on board foreign ships with the result that there would be a shortage of manpower supply in their countries.⁵⁶

Art. 8 of Convention No. 9 lacks an international flavour. The article requires that the industrial conditions of the Member State and of the State of nationality of the seafarer are compared but this inevitably must be done on a case to case basis and the industrial conditions prevailing in the territory of the different Members are not the same in every case; accordingly, the treatment of seafarers of the same nationality might vary according to the industrial conditions prevailing in the Member State in whose territory they seek employment; this prevents the Convention from being uniformly applied at the international level. A solution could be found by requiring that the facilities provided for in the Convention be made conditional upon the signing of an agreement satisfying certain minimum standards of conditions of employment. The standards concerned could be the minimum maritime labour standards adopted by the ILO, which enjoy a certain degree of acceptance among ILO members. These standards can be included in an Appendix to a revised Convention concerning the engagement of seafarers; alternatively, reference to them could be made in the text of the Convention itself. In this way, the question of foreign labour from developing countries being admitted to employment on board ships registered in the territory of developed countries would present less difficulties to the competent authorities referred to in Art. 4 (agreement between the shipowners and the seafarers would be more likely to be reached), while at the same time the developing country could retain seamen of its own nationality for employment on board ships registered in its territory, if a reasonable parity between the conditions of employment on board ships registered in developed and underdeveloped countries were maintained.⁵⁷

⁵⁵Nonetheless, this argument loses its force in times when, because of the relationship of the manpower needs of the shipping industry to the level of trade, there is considerable room for employment of trained and certificated personnel on ships of the national fleet, and not a sufficient number of national seafarers is available for various reasons (for example, because, in developed countries, the seafaring profession, despite the facilities it affords, is not sufficiently attractive compared to jobs available on shore).

⁵⁶The above problems relate to the question of FOC and substandard vessels; for this question, see *infra* Chapter 6. For the question of wages, especially those paid on board ships registered in developing countries, see *infra* Chapters 4 and 6. For the diminishing importance of wages in relation to the total operating costs of a ship, see *infra* Section 7.6.2.

⁵⁷This would happen only in so far as the developing country, despite adverse conditions, like competition from F.O.C. vessels, has been able to build up a considerable national fleet. However, no shortage of manpower supply will be observed in developing countries where, because of overpopulation, it is considered that national shipping cannot absorb all seafarers available for employment on board national ships, see Asian Maritime Conference, 1953, Second

2.2.1.4.2. Convention No. 9: The need for revision

Although Convention No. 9 was a significant step in the regulation of the question of fee-charging agencies at the time it was adopted, it has become apparent over the years that it is an out-dated instrument which does not take account of recent developments which have taken place at the national and international level since 1920.⁵⁸ Certain recommendations concerning possible methods of revising this Convention will be found below.

1) Convention No. 9 and the Resolutions adopted by the Asian Maritime Conferences

As pointed out earlier,⁵⁹ there are two systems of providing free public employment offices for the engagement of seafarers under the the Placing of Seamen Convention, 1920 (No. 9): a) the joint "controlled" system (established by representative organisations of seafarers and shipowners) and b) in the absence of such system, the State system. The Convention does not appear to take account of recent trends in the development of engagement procedures for seafarers e.g. the introduction of the "one company service" contracts, the "hiring hall" system, the trade union controlled system of securing employment to seamen.⁶⁰ A country which has ratified the Convention cannot, as explained above, introduce a system of employment offices solely controlled by seafarers' organisations. Furthermore, the employment service cannot be organised only by representatives of shipowners and seafarers without any control exercised by the central authority of Art. 4 (a).⁶¹

The Asian Conference Resolutions adopted in 1953 and in 1965 do not exclude the possibility of the establishment in the Asian region of recruitment offices organised solely by *bona fide*⁶² national organisations of shipowners and seafarers.⁶³ At the 18th session of the Joint Maritime Com-

Item on the Agenda, Report II, op. cit., p. 39. Reduction of the number of the unemployed seafarers is a question of successful employment and manpower policies, which is outside the scope of this chapter.

⁵⁸The need for the revision of Convention No. 9 has been emphasised more than once at ILO Conferences; see 55 R.P., p. 38; 74 R.P., p. 6/13; see also Resolution concerning the recruitment of seafarers and the regulation of fee-charging employment agencies, adopted by the ILO Conference, at its 74th session in 1987. The Resolution notes, *inter alia*, that, despite the adoption of Convention No. 9 a long time ago, fee-charging employment agencies continue to exist and requests the GB to include on the agenda of the next session of the JMC the question of the desirability of the revision of this Convention, taking into account certain provisions of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), which applies to shore-workers. For the text of the Resolution see 74 R.P., p. LXXVII. For a discussion of the question of fee-charging manning agencies see *ibid.*, pp. 9/2, 11/10, 16/10-16/13.

⁵⁹See *supra* pp. 145, 153-155.

⁶⁰A system of employment offices solely controlled by seafarers' organisations was rejected during the discussions of the Unemployment Committee, see *supra* p. 153.

⁶¹For the position in different countries, see Asian Maritime Conference, 1953, Report II, op. cit., pp. 5-7; see also the replies of the Governments to the questionnaire formulated by the Office requesting information on national law and practice with regard to questions concerning the systems of recruitment and placement of seafarers in various countries. The Office Report with the replies of the Governments was submitted to the J.M.C. at its 24th session, Sept. 1984, J.M.C./24/5, pp. 8-10.

⁶²This expression probably carries the same meaning as the word "representative" in Art. 4 (1) (a) of Convention No. 9; see also *supra* note 40.

⁶³See Resolution V (1953) concerning the Machinery for the Recruitment of Asian Seafarers (para. 2 (b) in connection with para. 4) and Resolution No. 4 (1965) concerning the Recruitment of Asian Seafarers (second paragraph of the operative part). These provisions, as explained above, are not in accordance with Art. 4 (1) of Convention No. 9.

mission, the representative of the Secretary General of the ILO interpreting the No.9 Convention, stated that "countries which ratified Convention No. 9 were responsible for ensuring that seafarers, regardless of their nationality or the flag of the vessel concerned, were not engaged through any fee-charging agencies on their territory; however, there appeared to be nothing in the Convention requiring seafarers to be engaged through an official employment agency provided that such engagements were not made for pecuniary gain and so long as the provisions concerning the establishment of official agencies were fulfilled".⁶⁴ As pointed out in the preceding paragraph, this is not exactly what the drafters of Convention No. 9 had in mind and this interpretation was questioned by the Seafarers' group; later, the ILO Office stated that the "main purpose of the instrument is to ensure that the recruitment of seafarers is carried out free of charge and to set forth standards governing the establishment and operation of an adequate system of *public* employment offices for the placing of seamen..."⁶⁵ The use of the word "public" indicated that a certain degree of control by an official authority was required.

2) Need for strong seafarers' organisations; the broadening of the principle of public employment offices

Convention No. 9 should be revised to take account of the trends mentioned earlier. However, the possibility of including provision for a trade union controlled system of employment offices in any Convention presupposes the existence and satisfactory operation of strong representative seafarers' organisations. This is the reason why all the resolutions adopted by the Asian Maritime Conferences attach considerable attention to the development of strong seafarers' organisations.⁶⁶ Thus, there should be three possibilities of establishing a non-fee charging employment office under a future revised instrument on the placing of seamen: a) the joint controlled system under the control of a public authority, b) the State system and c) a system established and organised by the professional organisations of the parties concerned. The employment offices established under the third system could be controlled i) by the seafarers' organisations only, ii) by joint bodies consisting of an equal number of representatives of national organisations of shipowners and seafarers or iii) by shipowners' organisations only, if certain safeguards exist that secure fair employment opportunities for seamen free of charge.⁶⁷ The system can be set up either by national laws or regulations or under collective

⁶⁴J.M.C./18/6/1, pp. 1-2.

⁶⁵Ibid., p. 28, emphasis added.

⁶⁶Para. 3 of Resolution IV (1953); third paragraph of the operative part of Resolution No. 4 (1965) concerning the Recruitment of Asian Seafarers.

⁶⁷For example, approval of the system by the State (e.g. by registration, official licence), national regulations laying down the conditions under which this system will operate, and the sanctions for non-compliance with them; see para. 5 of Resolution V (1953), also J.M.C./24/5, p. 9 (under question 5). Likewise, the disquietening recent phenomenon of the appearance of private agencies providing crew members or entire crews which levy exorbitant registration fees with no guarantee of employment and offer contracts which lay down low labour standards or prohibit union membership (see ILO, *Report of the Director-General*, 74 (Maritime) Session, 1987, pp. 38-39) could be adequately dealt with if in a future revised instrument such agencies are placed under Government control.

agreements agreed between the organisations concerned. The existence of strong representative professional organisations of shipowners and seafarers is indispensable and can be inserted in the Convention as a *condicio sine qua non* of the operation of this system. Finally, it may be thought desirable to allow the ratifying country either to adopt one of the systems enumerated above under a), b) and c) or all of them simultaneously to satisfy the needs or special conditions of different areas under its jurisdiction.⁶⁸

3) Co-operation between the various employment agencies and the bodies responsible for the establishment of manpower policies: The need for a more comprehensive Convention No. 9

If countries are given the option of introducing a system of recruitment agencies solely controlled by organisations of seafarers or shipowners or both, there should be a corresponding provision in the new instrument requiring co-ordination between the agencies themselves and between these agencies and the general employment policy of the ratifying country.⁶⁹ The role of governments in establishing manpower plans for the shipping industry should also be taken account when, for example, a trade union controlled system of employment agencies is introduced in a country.⁷⁰ The problem is particularly acute in certain areas; the Report of the Director General to the First Asian Maritime Conference reflected the preoccupation that existed since 1953 in tackling recruitment problems in the shipping industry: "In the case of maritime labour in this region, it is considered that even the maximum development of national shipping cannot absorb the services of all the seafarers, or would-be seafarers, available for employment, while the demand from external sources is not considered likely to increase appreciably beyond the present level".⁷¹ Problems such as this would be better addressed if the regulation of the engagement of seafarers was linked to a comprehensive network of provisions dealing with the organisation of the employment service. This could be done in one of three ways:

a) Convention No.9 could be revised to include provisions similar to those existing in other more detailed instruments concerning the organisation of the employment service and the development of manpower policies such as: Convention No. 88 (Arts. 1 para. 2, 5, 6⁷², 11) and Recommendation No. 83 (especially sections II, III, IV, V concerning employment market information, manpower

⁶⁸It should be noted that Art 4 (1) (b) provides for the organisation of a system of employment offices by the State in the absence of a joint action by the shipowners' and the seafarers' organisations. States have introduced different systems of employment offices according to their needs, see J.M.C./24/5, pp. 9-10.

⁶⁹The lack of co-ordination and the likelihood that such system would instigate competition among the different employment agencies was the main reason why the idea of a union controlled employment agency was rejected during the early discussions in the Committee on Unemployment; see *supra* notes 37 and 38.

⁷⁰No relationship between recruitment and manpower policies is discernible in Convention No. 9 concerning the Placing of Seamen.

⁷¹Asian Maritime Conference, 1953, Report II, *op. cit.*, p. 39.

⁷²For example, Art. 6 (c) and (d) would facilitate the collection of data concerning unemployment, such as unemployment statistics and, therefore, the establishment and development of a system of unemployment insurance. Under Convention No. 9 the intervention of the central authority would guarantee the availability of unbiased unemployment statistics. However, under this Convention there is no obligation imposed on Members to collect the above-mentioned information, though all available information should be communicated to the Office (Art. 10).

budget, referral of workers -para. 12 is of particular relevance⁷³ - and mobility of labour respectively). In adapting these two instruments to the needs of the maritime employment market, it should be pointed out, first, that the duties of the advisory committee established under Art. 5 of Convention No. 88 could easily be performed by the committees established under Art. 5 of the Employment Facilities (Seamen) Convention No. 9. As to para. 12 (b) of Recommendation No. 83, it could be made the task of a research group to forecast the consequences and effects of the insertion of this provision in an ILO maritime instrument (whether a Convention or a Recommendation) on the employment market of seafarers and on freight rates.⁷⁴ In any case, this idea would be workable only if the coming into force of that instrument were made subject to ratification by a substantial number of maritime countries; certain provisions of Recommendation No. 139 concerning Employment Problems Arising From Technical Developments On Board Ship could also be included in a future instrument revising Convention No. 9 (for example, paras. 5 and 6). These provisions establish a relationship between the recruitment of seafarers and "existing manpower plans",⁷⁵ which is absent in the Convention. It was the consistent view of the Seafarers' group at the Preparatory Technical Maritime Conference held in Genoa in 1969 that "there must be a relation between the intake into the industry and future requirements of seafarers."⁷⁶

b) A country could ratify both Conventions (Nos. 9 and 88) and apply to seafarers the provisions of the two above mentioned Recommendations (Nos. 83 and 139); in this case there is no need to revise Convention No. 9. It should be noted that there is nothing in Convention No. 88 and Recommendation No. 83, that excludes seafarers from the scope of these instruments.⁷⁷ Ratification of both Conventions referred to above will not result in double standards in the ratifying country, since the purpose of the two instruments is different: The main purpose of Convention No. 9 is to abolish

⁷³For the text of this paragraph, see *supra*, p. 146.

⁷⁴The J.M.C., at its 24th session in 1984, examined the question of the revision of Convention No. 9. The Office sent a questionnaire to the Governments seeking information on national laws dealing with the question of the placing of seamen. Though many countries gave information on the protection of seafarers against employment under conditions falling below the "national standards", only 3 countries (France, Mexico and Philippines) out of 23, referred to national laws and regulations requiring the employment service not to refer seafarers to employment in respect of which the wages or conditions of work fall below the standards "defined by law or prevailing practice"; see J.M.C./24/5, p. 24.

⁷⁵The expression "existing manpower plans" does not refer to national manpower plans *stricto sensu*; manpower plans not strictly national in scope, those providing, for example, for foreign seafarers on national ships and vice versa could be taken into account, see 55 R.P., p. 137.

⁷⁶55th session, 1970, Report IV (1), op. cit., p. 9.

⁷⁷See J.M.C./24/5, p. 2. Para. 4 (a) of Recommendation No. 83 specifically refers to the "merchant marine" as a sector where special employment offices can be established within the general framework of the employment services. The Shipowners' group suggested at the Preparatory Technical Maritime Conference in 1969, during the discussion of Recommendation No. 139, that references to Convention No. 88 and Recommendation No. 83 should be deleted on the grounds that they were not specifically directed to the maritime industry; 55th session, 1970, Report IV (1), op. cit., p. 9. Besides the fact that this proposal reflects a persistent attitude of the Shipowners' group towards instruments of a "general nature", the inclusion of the latter two instruments, together with Convention No. 9, in the Preamble of Recommendation No. 139 indicates the relevance that these instruments may have to the regulation of an employment service specifically related to seafarers.

fee-charging employment agencies for seafarers, whereas Convention No. 88 aims to regulate in detail the organisation and operation of a public employment service.⁷⁸

c) The detailed provisions concerning the organisation of the employment service can be included in a Recommendation supplementing Convention No. 9;⁷⁹ in this case Convention No. 9 would continue to be the standard.⁸⁰

4) Convention No. 9 is outdated, insofar as it does not take account of recent developments in the field of continuous employment

As already mentioned,⁸¹ Convention No. 145 concerning Continuity of Employment of Seafarers provides for contracts guaranteeing continuous or regular employment to seamen and also for the establishment of registers or lists as measures to promote continuous or regular employment of qualified seafarers. If the latter method is adopted, Art. 4 para. 2 establishes priority for engagement of seafarers who have been included in the lists or registers. It is obvious that this right of preference would interfere with the freedom of the shipowner and the seaman in the choice of the crew and the ship respectively. This is the reason why under para. 3 (2) of supplementing Recommendation No. 154 this freedom of selection is qualified by the addition of the words "in so far as practicable". In Convention No. 9 the right of freedom of choice accorded to both the shipowner and the seaman seems to be absolute,⁸² since the system of registers for the engagement of seafarers was not taken into account.

2.2.1.4.3. The effect of Recommendation No. 107 (1958)

1) The scope of Recommendation No. 107; its relationship to Convention No. 9

Recommendation No. 107 concerning the Engagement of Seafarers for Service in Vessels Registered in a Foreign Country (1958) was adopted as a result of allegations made by the Seafarers'

⁷⁸Up to now, 44 countries which have not ratified Convention No. 9 have ratified Convention No. 88 (among them, Bahamas, Brazil, Canada, Ecuador, Costa Rica, Cyprus, Czechoslovakia, India, Malaysia, Nigeria, Philippines, Portugal, Singapore, Thailand; the U.K., Italy and Bulgaria have, however, denounced the Convention). However, only 14 of these 44 countries replied to the questionnaire sent by the Office for the purpose of obtaining information on national law concerning employment facilities for seamen. Countries which have not replied include Bahamas, Costa Rica, Cyprus, Ecuador, Iraq, Lebanon, Malta, Nigeria and Singapore. Out of the 14 countries that replied (Algeria, Austria, Belize, Brazil, Canada, Czechoslovakia, Ghana, India, Malaysia, Philippines, Portugal, Switzerland, Thailand and Venezuela), two (Austria and Switzerland), being land-locked states, have no specific regulations concerning the recruitment of seafarers. In Czechoslovakia the seafarers are employed on a permanent basis according to the needs of the shipping industry; in other 5 countries (Algeria, Belize, Brazil, Thailand and Venezuela) no employment service for the recruitment and placement of seafarers exists. In the remaining countries it was reported that no fees were charged to the seafarers and the shipowners, with the exception of the Philippines, where recruitment costs are charged to the shipowners. For the replies of these countries, see J.M.C./24/5, pp. 7-26.

⁷⁹It should be remembered that far-reaching provisions, like those relating to the referral of workers, were included in Recommendation No. 83 and not in Convention No. 88, see *supra* notes 8 and 9.

⁸⁰Here it should be noted that the supplementing Recommendation will deal only with the organisation of the employment service. As far as the system of the non-fee charging agencies for seafarers is concerned, Convention No. 9 can, of course, be revised along the lines suggested above.

⁸¹See *supra* p. 150.

⁸²Compare the wording of Art. 6 of Convention No. 9.

group that, though Convention No. 9 had come into force, certain shipowners still engaged crews outside the regular channels for engagement; this practice was leading to the revival of employment agencies working for pecuniary gain.⁸³ At the Preparatory Technical Maritime Conference held in London in 1956⁸⁴ the Seafarers' representatives were contemplating a new international instrument, which would ensure a) that all seafarers without distinction of nationality were engaged through recognised employment offices and b) that its provisions applied to officers.⁸⁵ Since the need for a new instrument eliminating abuses in this respect was linked by the Seafarers' group to the revision of Convention No. 9, it is desirable to define the exact scope of the two instruments. The view that the engagement of all seafarers regardless of nationality through official or approved employment agencies is outside the framework of Convention No. 9 is not accurate.⁸⁶ Convention No. 9 applies in cases, where foreign seafarers are to be employed on board a ship registered in a country which has ratified the Convention; the foreign seafarer will be offered the same employment facilities as those offered to nationals, if, in the country of registration and the country of nationality of the former, the industrial conditions are *generally* the same (Art. 8). The scope of Recommendation No. 107 is different: it applies only when seafarers within the territory of a Member are seeking employment on board ships registered in a foreign country and the conditions under which these seafarers are to be engaged do not meet certain requirements.

The two instruments differ in other two respects:

a) As to the criteria employed in Art. 8 of Convention No. 9 and para. 1 of Recommendation No. 107 for the application of their provisions to a specific case. A change in the ILO's handling of "engagement" questions containing a foreign element is discernible;⁸⁷ the expression "industrial conditions (which) are generally the same" has been changed to conditions of engagement "generally equivalent to those applicable under collective agreements and social standards accepted by bona fide organisations of shipowners and seafarers of maritime countries where such agreements are traditionally observed".⁸⁸ Though in 1920 the decisive criterion was the industrial conditions of a country -

⁸³See supra pp. 149-150.

⁸⁴Complete records of the proceedings of this Preparatory Conference have not been published. For an extract from the Report of the Committee on the Engagement of Seafarers appointed by the Conference, see International Labour Conference, 41st session, 1958, third item on the Agenda, *Engagement of Seafarers Through Regularly Established Employment Offices*, pp. 5-9.

⁸⁵Ibid., p. 5.

⁸⁶See the interpretation of the Convention by the Office in J.M.C./18/6/1, p. 27. Later the Office noted that the main purpose of the Convention was to ensure the establishment of non-fee charging public employment offices and "not to ensure that the engagement of all seafarers, regardless of their nationality and that of the ship on which they are to be employed, is done by the official employment offices"; *ibid.*, p. 28. However, this interpretation was different from the view previously expressed by the representative of the Secretary-General that "countries which ratified Convention No. 9 were responsible for ensuring that seafarers, regardless of their nationality or the flag of the vessel concerned, were not engaged through any fee-charging agencies in their territory..."; *ibid.*, p. 1.

⁸⁷The fact that the two instruments differ in scope is not of any significance in comparing their provisions. The criterion used in Recommendation No. 107 could have been used in Convention No. 9 (Art. 8) and vice versa; see *infra* note 89.

⁸⁸For the problems engendered by the expression "industrial conditions generally the same", see supra pp. 156-158.

and this certainly does not refer to the conditions of engagement⁸⁹ -, in Recommendation No. 107 the latter criterion is substituted for the former.

b) If the conditions of Art. 8 of Convention No. 8 are not fulfilled, the consequence is that the seafarers of countries where the industrial conditions are *not* generally the same will not be given the same facilities for employment as those where they are, since the main objective of the Convention is the establishment of a system of non-fee charging public employment offices. This, however, does not mean that no facilities at all will be available for those seafarers but perhaps that national seafarers will have priority over such seafarers with the result that they will probably be engaged outside the channels envisaged in the Convention. On the other hand, the sanction imposed in para. 1 of Recommendation No. 107 consists of "discouraging" seafarers within the territory of a Member from joining a ship; what is the meaning of this word and the means whereby this "discouragement" is to be achieved is not clear.

2) The disadvantages of Recommendation No. 107

Though para. 1 of Recommendation No. 107 evidenced an improvement in the drafting philosophy behind ILO maritime instruments, when comparable situations prevailing in two or more countries produce certain legal effects, by abandoning the technique used in Art. 8 of Convention No. 9 and subjecting these effects, however dubious this result, to an internationally accepted minimum standard, a number of major drawbacks are apparent that reduce the significance of this provision and, therefore, its usefulness:

i) Even if the wording of the paragraph appears superficially to be satisfactory, this is undermined by the fact that a kind of "gentlemen's agreement" was concluded by the delegates at the Preparatory Conference in 1956, by means of which the acceptance of the draft by all the delegates was secured and on which the future adoption of the draft Recommendation was made dependent; the effect of the consensus thus achieved, which it should be noted was based on a decision of the JMC was further to complicate the situation. This informal agreement was recorded as follows: "Consideration should be given to the adoption of an international instrument to ensure that the engagement of national seafarers for the purpose of crewing foreign ships would only take place through approved employment offices. During the discussion it was made clear that the proposed instrument would not be intended to interfere with *accepted recruitment or replacement practices applicable to the seafarers of traditional maritime countries*, either in their own country or abroad, nor with the replacement of seafarers by the consular offices of the traditional maritime countries in

⁸⁹Though the meaning of the expression "industrial conditions generally the same" was never clarified, it is clear that it does not refer to the conditions of engagement *stricto sensu*, as the rejection of an amendment referring to the "terms of engagement" indicates, see 2 R.P., p. 252 and the discussion which ensued. Recommendation No. 107 adopts the criterion used in the rejected amendment moved at the Genoa Conference in 1920 with the sole difference that it does not subject all seafarers to the same conditions in regard to the terms of engagement, as the amendment did but introduces a new concept, namely that the conditions under which the seafarers covered by the Recommendation are to be engaged, are "generally equivalent" to conditions of engagement fulfilling certain conditions.

foreign ports, but would be designed to prevent malpractices in the placing of national seafarers for crewing foreign-flag vessels".⁹⁰ The Recommendation does not go as far as it could have gone, since it intends to eradicate the abuses or malpractices of the past without disturbing the *status quo* in the engagement of seafarers. There is no indication of what these accepted practices are (for example, collective agreements giving priority to members of trade unions over those seafarers who are not unionised is an accepted practice?);⁹¹ the effect of these "accepted practices" on the engagement of seafarers thus is not clearly established. It may be argued that the main purpose of the Recommendation is to regulate the recruitment of nationals for employment on board foreign flag vessels and that the regulation of the engagement of seafarers generally is outside its scope. This may be true but the Recommendation does not even make a cross-reference to Convention No. 9, which applies to cases to which the former instrument does not apply, thus leaving some doubt as to the exact relationship between the two instruments.⁹²

ii) The Recommendation refers only to standards provided for in collective agreements or accepted by bona fide organisations of shipowners and seafarers. It would have been better, if it had also mentioned national laws and regulations, since provisions for nationals seeking employment on board foreign vessels are contained in national laws and regulations.⁹³ Moreover, para. 1 does not contain substantive law dealing with the engagement conditions of seafarers but merely attempts to compare conditions of engagement prevailing in two different countries -the country of nationality of the seafarer and the country of the flag - whereas all possible sources of provisions relevant to the issue should be taken into account.

iii) If the argument *ex contrario* is applied to para. 1, when the conditions of engagement described therein are "generally equivalent", a Member should *not* discourage seafarers within its territory from joining foreign flag vessels. The Recommendation is silent as to the means by which these

⁹⁰ILO Conference, 1958, Report III, op. cit., pp. 1-2, 6.

⁹¹It should be noted, that at the request of the shipowners, "the Committee (on the Engagement of Seafarers appointed by the Preparatory Conference) agreed - thus, there was a consensus between the interests participating in the work of the Conference - that the proposed instrument should in no way interfere with accepted recruitment or replacement practices applicable to the vessels of traditional maritime countries."; *ibid.*, p. 7.

⁹²It is undisputable that Recommendation No. 107 supplements Convention No. 9, since the latter does not provide for the engagement of nationals on foreign-flag ships. However, the wording of the Preamble of a previous J.M.C. draft of the Recommendation would be preferable. Whereas the Preamble of the final draft refers to "certain proposals concerning the engagement of seafarers", the J.M.C. draft noted that "fresh problems have arisen since the adoption of the Placing of Seamen Convention, 1920..." and "it is, therefore, desirable to supplement these provisions..." Thus, the latter draft recognised Convention No. 9 as a standard to be supplemented; for the draft prepared by the J.M.C., see Preparatory Technical Maritime Conference, 1956, P.T.M.C., II/1, pp. 71-72 and ILO Conference, 41st session, Report III, op. cit., p.4. No information is available concerning the reasons for the deletion of this paragraph from the Preamble, but this does constitute the first step towards a gradual disengagement of ILO maritime instruments from Convention No. 9. As will be seen later, other steps followed.

⁹³Convention No. 9, on the contrary, did not mention collective agreements, as they did not constitute a generally accepted means of implementation of ILO maritime instruments at that time. More recent Conventions offer the option to ratifying countries of implementing their provisions, *inter alia*, by means of collective agreements, see Art. 22 of Convention No. 109, Art. 7 of Convention No. 145, Art. 1 of Convention No. 146.

seafarers will be engaged.⁹⁴ The result is that, since Convention No. 9 does not apply to seafarers within the territory of a Member seeking employment on board foreign-flag vessels, these seafarers are not expressly guaranteed engagement through approved employment agencies; this can only be achieved if the collective agreements and the social standards referred to in the paragraph provide for a system of free employment agencies⁹⁵ and the "conditions under which such seafarers are to be engaged" mentioned therein include the question of non-fee charging employment agencies.⁹⁶ If this is the case the usefulness of the device of "generally equivalent" is questionable: either no fees at all will have to be paid or certain fees will be charged.

iv) The Recommendation in an effort to establish generally accepted provisions, contains certain cryptic expressions, without providing any indication as to how these are to be interpreted: a) the clarification of the meaning of the words "generally equivalent" was not even attempted during the preliminary discussions.⁹⁷ Consequently, each Member is left without any guidance whatsoever as to the exact meaning of the term and each will have to interpret it subjectively; moreover b) the use of the word "discourage" as a sanction in cases where the conditions set out in the Recommendation are not met, is not effective. It is left to national law to determine the measures that must be taken to deter seafarers from joining the foreign-flag ship (for example, possession of identity documents and the signing of the agreement before the maritime authorities; the obtaining by the foreign shipping company of a licence or permit obtained from the competent authorities before it can employ foreign seamen; guarantees concerning the repatriation and the medical care of such seamen, etc).⁹⁸

v) In contrast to Convention No. 9, which applies to seamen of all countries that have ratified the Convention (Art. 8), para. 1 of Recommendation No. 107 encompasses all seafarers within the

⁹⁴An amendment moved by the Workers' Members in the Committee on the Engagement of Seafarers, appointed by the 1958 Conference at its 41st session, to the effect that "seafarers are engaged for service on foreign vessels only through regularly established offices, and that engagement carried out by other means would be considered a punishable offence" was rejected by 38 votes to 41, with 6 abstentions. However, this amendment might well have been adopted, if the punitive clause had been omitted and the role of consular authorities clarified, see 41 *R.P.*, p. 235; see also para. 1 of the J.M.C. draft.

⁹⁵The Recommendation does not provide a solution when the system of free employment offices is not established and organised by means of collective agreements in a traditional maritime country. Even if such a system is established, this system may not be "the free of charge system of *public* employment offices" required by Convention No. 9. Again, the principle of Convention No. 9 is not adhered to in its entirety.

⁹⁶This is another obscure expression in the Recommendation. An indication of what is meant thereby is given in para. 2; repatriation and medical care issues, are, therefore, included in the term "conditions under which such seafarers are to be engaged". Other possible such *conditions* could include certificates of competency, training qualifications, wages, fair contract provisions, etc.

⁹⁷The draft prepared by the Office used the phrase: "equal to". For this draft, see 41st session, 1958, Report III, op. cit., 10-12. Many alternatives were suggested in the Committee on the Engagement of Seafarers in order to render the text more flexible: addition of the phrase "in accordance with" was proposed by the Shipowners' member of Greece and supported by the Government of Greece, and by the U.K. Government. Since no agreement could be reached, the Drafting Committee recommended the final wording of the paragraph, 41 *R.P.*, p. 235.

⁹⁸It may be that the mere effect of para. 1 is that when substandard conditions exist on a foreign vessel, these must be made known to applicants for employment. If para. 1 is interpreted in this sense, however, it is down-graded to a provision of a merely informative character. The J.M.C. draft was clearer: conformity with accepted international standards was an indispensable condition for obtaining permission to serve as a seaman on board a foreign vessel, see para. 4 of the J.M.C. draft.

territory of a Member, even if the country of nationality of these seafarers has not adopted the Recommendation. Though this comprehensive approach has been repeated in more recent instruments (see, for example, Art. 4 of Convention No. 147), its application to questions relating to the engagement of seafarers can create confusion. It may be that under the national law of a country the consular authorities or port officers appointed by the country of the nationality of the seafarer are responsible for the recruitment and the engagement of nationals abroad.⁹⁹ Consequently, the Recommendation does not make clear who is the authority competent to inspect the conditions on board the foreign vessel and discourage the said seafarers from joining it. It is true that, as mentioned above, Recommendation No. 107 is not intended to interfere with the accepted recruitment practices of traditional maritime countries but this is not immediately apparent from the text. Either the Recommendation should be made clearly to apply only to national seafarers¹⁰⁰ or addition of a provision clarifying the role of the consular or the maritime authorities appears necessary.

⁹⁹See the view of the Greek Government, which, together with the Greek Employers, abstained from voting on the Recommendation 41 *R.P.*, pp. 112-113. Since there is nothing in Convention No. 9 implying geographical limits to its application, if a country that ratified Convention No. 9 wishes to extend its application to seafarers engaged on national ships outside the national territory, it can secure compliance with its provisions through the consular or other appointed maritime authorities or through Joint Boards consisting of shipowners and seafarers.

¹⁰⁰This is what had been decided in the J.M.C., see *supra* under heading i).

3) Need for revision

To sum up, first Recommendation No. 107, though it represents a decent attempt at international regulation of the engagement of seafarers¹⁰¹ for service on board vessels registered in a foreign country, contains provisions which because of their vagueness can be interpreted in different ways, and secondly, it is incomplete, since it does not specify the method of engagement of the seafarers covered by it.¹⁰² This instrument thus could be improved in certain respects: a) the relationship between it and Convention No. 9 should be clearly established, b) it should refer not only to collective agreements but also to national laws and regulations, c) the engagement through recognised channels of the seafarers encompassed by the Recommendation should be expressly stated, d) the expressions "discourage" and "generally equivalent . . . traditionally observed" should be replaced by less ambiguous terms; in particular, the measure of comparison of conditions of engagement prevailing in different countries should not now be standards accepted only by the traditional maritime countries but should be the internationally accepted standards.¹⁰³ In order that uniformity of law at the international level can be achieved and doubts as to the identification of the international standards be dispelled, these standards should be the international minimum maritime standards adopted by the ILO and e) it should be made clear whether or not the Recommendation applies to foreign seafarers; in the first case the powers of the bodies competent to deal with these matters in the territory of a Member and the country of the flag should be delimited.

2.2.1.4.4. Convention No. 147: Advantages and Disadvantages

This Convention represents a significant, though not fully successful attempt to improve the ILO standards concerning the engagement of seamen.

¹⁰¹It should be noted that, unlike Convention No. 9 (see Articles 1 and 9), the Recommendation applies to officers, see 41 *R.P.*, p. 235.

¹⁰²This instrument has had a limited effect: following a Resolution adopted by the 55th session of the Conference, reports from a number of countries were received providing information on the implementation of the provisions of Recommendations Nos. 107 and 108. The Conference Committee of Experts on the Application of Conventions and Recommendations in 1972 made a general survey of these reports and submitted its conclusion to the 21st session of the J.M.C. For the history of the question, see J.M.C./21/4, pp. 1-7, *P.T.M.C.*, Oct. 1975, Report V, pp. 1-2. "The response (of the governments) to the survey was not encouraging" *P.T.M.C.*, 1975, Report V, op. cit., p.9; see also the Concluding Remarks of the Office in J.M.C./21/4, p. 7. Only 62 countries replied. No reports were received from Liberia, U.S.S.R., Panama, Denmark and Yugoslavia. Therefore, the Committee of Experts was of the opinion that the replies do not give a complete picture of the situation in the world's shipping industry, see International Labour Conference, 57th session, 1972, Report III (Part 4C), p. 6. However, Liberia and Denmark sent their replies later. Not all of the Governments which replied applied the Recommendation to their territory, see Report of the Committee of Experts in *P.T.M.C.*, Oct. 1975, Report V, op. cit., Annex IV, pp. 51-58 at p. 52.

¹⁰³See also *supra* p. 158.

1) The advantages of Convention No. 147

Articles 2 (d) and 3 of Convention No. 147, whose provisions show an intention of superseding para. 1 of Recommendation No. 107, rectify the mistakes of the latter instrument to a great extent:

a) The delegates who voted for these articles declared themselves in favour of their application only to nationals of a Member; thus, the danger of the overlap of powers of various relevant authorities referred to above is eliminated. On the other hand, the solution offered by Art. 3 is less radical than the one proposed by the Recommendation, for the same reason as outlined above, since a Member in whose port a ship calls cannot intervene if the country of the nationality of the seafarer does not intend to rectify abuses in regard to the engagement of its nationals in the territory of that Member for employment on board a foreign-flag ship. However, any complaint arising in this context must be promptly reported to the competent authority of the country in which the ship is registered (Art. 2 (d) (ii), second part, which successfully supplements Art. 3 of the Convention).

b) The wording of the article has been altered to the effect that the phrase "the conditions . . . traditionally observed" has been replaced by the words "standards equivalent to those fixed by this Convention . . ." Thus, under Art. 3, ILO maritime standards have been substituted for standards observed in traditional maritime countries. Unfortunately, the text is not clear as to which these standards are. If the article were meant to refer to the standards included in the Appendix to the Convention (No. 147), it should clearly have said so.¹⁰⁴ It should be noted that Convention No. 9 concerning the Placing of Seamen is not listed in the Appendix.

2) The disadvantages of Convention No. 147

These relate to its a) general wording, b) the limited powers of the country of the seaman's nationality to intervene, when necessary, and c) the fact that Convention No. 9 is completely disregarded. Convention No. 147 still retains two undesirable characteristics of Recommendation No. 107; viz:

a) General wording

As in Recommendation No. 107, no indication of the meaning of the word "equivalent" in Art. 3 is given.¹⁰⁵

b) Limited powers of intervention

If the standards mentioned in Art. 3 are not applied on board the foreign ship, the sole consequence is that the ratifying State shall advise its nationals on the possible problems of signing on such

¹⁰⁴Elsewhere the Convention makes express reference to the Appendix (Art. 2 (a)). It is probable that the Article refers both to the Appendix and to the provisions of the Convention (for example, to Art. 2 (e) relating to the qualifications and training of the seafarers). It is not clear whether the "standards fixed by this Convention" denote the instruments listed in the Appendix or the "substantially equivalent" thereto mentioned in Art. 2 (a). In the second case it suffices that the standards referred to in Art. 3 are equivalent to the "substantially equivalent" standards of Art. 2 (a).

¹⁰⁵For the meaning of "substantially equivalent" in Art. 2 (a), see *infra* Chapter 6, Section 6.1.2. 2), pp. 447-450.

a ship, *in so far as practicable* (Art. 3, emphasis added). Even the word "discourage", which we have earlier accused of lacking precision,¹⁰⁶ would have been capable of producing more satisfying results. Art. 2 (d) (ii), first part, in addition, empowers the ratifying State to investigate any complaint made in this context and to report this complaint to the competent authority of the flag-State. Consequently, the powers that a Member has to supervise the engagement of its nationals for employment on board ships registered in a foreign country are a) the investigation of any complaint arising therefrom and the right to report this complaint to the competent authority of the state of the flag and b) if no complaint has been reported, the right to advise its nationals on the possible problems of signing on a ship registered in a country which has not ratified the Convention, if the standards fixed by the Convention are not applied by that state. It is clear that a Member does not possess any substantial control over the engagement of its nationals on board foreign vessels. Under Recommendation No. 107 a Member could at least "discourage" its nationals from joining a ship;¹⁰⁷ the wording of the JMC draft of Recommendation No. 107¹⁰⁸ was even stronger: a Member could refuse the seaman permission to join the foreign ship. The defects in Convention No. 147 are exacerbated by the fact that a Member in whose port a ship calls cannot intervene effectively to protect its nationals if no rectifying measures have been taken by the country of the seafarer's nationality after repeated complaints have been received.

Finally, the purpose of Art. 2 (d) (i) is to ensure that adequate procedures for the engagement of seafarers - whether nationals or foreigners - on board ships registered in its territory exist and for the investigation of complaints arising in this context. These procedures are subject to "overall supervision by the competent authority, after tripartite consultation amongst that authority and the representative organisations of shipowners and seafarers where appropriate".¹⁰⁹

c) Disregard of Convention No. 9

The provisions of Art. 2 (d) (i) lack clarity and do not take account of previous ILO maritime instruments dealing with the question of the engagement of seafarers. First, it is not clear what is meant by the expression "adequate procedures". The scope of Convention No. 9 and the scope of subpara. (ii) do not differ substantially. Both deal with the engagement of seafarers on ships registered in the ratifying State. Even though this is so, it is not clear from the text whether the "adequate procedures" for the engagement of seafarers are identical with the "efficient and adequate system of public employment offices for finding employment for seamen" envisaged in Art. 4 of Convention No. 9. It is submitted that Convention No. 147 ignores completely the provisions of Convention No.

¹⁰⁶62 R.P. , p. 192.

¹⁰⁷See supra p. 167 and note 98 for the possible interpretations of the word "discourage".

¹⁰⁸See supra note 98.

¹⁰⁹The phrase added to Article 2 was a result of an amendment moved by the Workers' Group in the Committee on Substandard Vessels, which was intended to ensure government control over engagement procedures, see 62 R.P. , 191. The addition bears some resemblance to Art. 4 (1) of Convention No. 9.

9. The latter is neither included in the Appendix to the Convention nor in Art. 2 (d) (i), though it was included in Art. 4 (c) of the Conclusions concerning Substandard Vessels, Particularly Those Registered under Flags of Convenience, prepared by the Office for the Preparatory Technical Maritime Conference, where ratifying States were asked to take account of the provisions of the Placing of Seamen Convention 1920, No. 9 and of the Seafarers' Engagement (Foreign Vessels) Recommendation, 1958.¹¹⁰ The inclusion of Convention No. 9 in Convention No. 147 might impede ratification of the latter and the delegates who voted for the text as it stands,¹¹¹ wished to disengage themselves from the rigid provisions of the former Convention and, probably, to give subpara. (ii) a wider scope. In relation to the last point, if the words "adequate procedures" are meant to refer to other aspects of the engagement of seafarers as well as, in addition, to the question of non-fee charging employment agencies, one would expect that other instruments relevant to the issue (Convention No. 145, Convention No. 88, Recommendations Nos. 83, 107, 139 and 154) would have found their way into the Convention. None of the instruments referred to above is mentioned in Convention No. 147 either in the text or in the Appendix thereto.¹¹² Countries ratifying Convention No. 147 can themselves determine the procedures which seem to them to be *adequate* for the engagement of seafarers on ships registered under their national flag. "Adequate procedures" is one more term that is left undefined in an ILO maritime instrument. Moreover, Art. 2 (d) (i) by being so general and by failing to establish the relationship between the different instruments relevant to the engagement of seafarers runs the risk of creating double standards in international maritime labour law.

2.2.1.5. Summary of Conclusions

In the light of the above conclusions concerning the engagement of seafarers, it is argued that further action by the ILO in the field of the recruitment and engagement of seafarers is necessary. Since 1920 the trend undoubtedly has been towards the adoption of more comprehensive instruments comprising more elastic terms than those of Convention No. 9. All the drafts that contained Convention No. 9 as a standard of reference were outvoted in favour of proposals that took no account of it. This has happened in more than one instance: The reference to Convention No. 9 was deleted from Recommendation No. 107, transferred from the operative part of Recommendation No. 139 to its preamble and deleted from Convention No. 147.¹¹³ Moreover, as pointed out, the reluctance even to mention Convention No. 9 in the latter instruments has resulted in some cases in flaws in the reason-

¹¹⁰See International Labour Conference 62nd session, 1976, Report V (1), p. 5.

¹¹¹*Ibid.*, p. 18.

¹¹²However, it should be noted that, for reasons which will be explained later in Chapter 6, no Recommendations were accepted in the Appendix to Convention No. 147.

¹¹³See *P.T.M.C.*, 1956, II/1, Appendix IV, p. 71, 41st session, 1958, Report III, op. cit., p.6; 55th session, 1970, Report VI, op. cit., pp. 18, 22, 23; and 62nd session, 1976, Report V (1), op. cit., pp. 5, 18 respectively.

ing and in bad drafting of these instruments. There is a need for revision of Convention No. 9. Since this Convention still constitutes the basic instrument concerning the engagement of seafarers, it should be taken as the starting point in drafting a future instrument dealing with this question. The following points should be taken into account:

1) The principle of the non-fee charging employment agencies has to be broadened to take account of recent developments in the field of the engagement of seafarers such as those relating to continuous employment, trade union controlled engagement procedures, joint systems of employment offices established and organised by shipowners and seafarers without the intervention of the public authorities but subject to certain guarantees. If it is considered that the organisation of a system of non-fee charging employment agencies no longer constitutes an absolute principle, Convention No. 96, which does not apply to seafarers, may serve as an example. Nevertheless, certain criticisms mentioned earlier should not be underestimated.¹¹⁴

2) Provisions concerning the organisation of the employment service and the establishment of manpower policies can be included in the revised instrument. As a result, the freedom of choice accorded to the shipowner and the seaman as well as the free movement of workers should be subject to these policies.

3) A number of distinctions should be drawn in the future instrument between the different classes of seafarers, viz.: i) seafarers engaged on board ships registered in the territory of a Member. There will be no difficulty in regulating the engagement of these seafarers. Art. 2 (d) (i) of Convention No. 147 will have to be revised to take account of the revised form of Convention No. 9. The latter should be included among the instruments listed in the Appendix to the former Convention. In this way the "adequate procedures" of this article will be specified;

ii) nationals of a Member engaged in its territory for employment on board foreign vessels. More extensive powers should be given to the competent authorities of the Member in whose port a ship calls, if the flag-State is unwilling to rectify certain abuses after repeated complaints. The authorities of that Member could even be accorded the right, after consultation of the representative organisations of shipowners and seafarers, to prohibit the signing of articles of agreement on foreign ships on board which internationally accepted standards are not applied. Alternatively, seamen's associations could be given a say in these cases and, possibly, the right to prevent their members from joining such ships. This will in no way interfere with the right of the flag-State to initiate judicial proceedings in cases where the reported complaints are found not to be well-founded. Accordingly, it is suggested that Art. 3 of Convention No. 147 should be revised to the effect that if a Member is satisfied that the internationally accepted standards are not applied on board a foreign ship, it will have the

¹¹⁴See supra p. 147, n. 13. Convention No. 96 revised the Fee-Charging Agencies Convention No. 34 (1933), which had received only ten ratifications. On the other hand, Convention No. 9 has proved more successful having received 32 ratifications since Nov. 1923, when it came into force.

right to take such measures as appear necessary.¹¹⁵ Such a provision would be flexible enough to take into account all national practices while, at the same time, possibly proving more effective than Art. 3.

iii) foreign seafarers engaged in the territory of a Member for employment on board foreign vessels. The provisions of Art. 2 (d) (ii), second part, of Convention No. 147 provide sufficient protection in this case.

4) All the internationally accepted standards above should be regarded as representing ILO maritime standards. The Appendix to Convention No. 147 provides a good example. A similar Appendix to the new comprehensive instrument dealing with the engagement of seafarers would be useful to elaborate the standards. If the revised instrument is not as comprehensive as suggested above, reference to the major ILO instruments relevant to the engagement of seafarers appears necessary.

5) The same facilities for employment will be available in the territory of a Member for seafarers of all the countries, which ratify the new instrument. If this instrument does not have an Appendix, following the example of Convention No. 147, these facilities should be made available to seafarers of the countries where a number of specified ILO maritime standards are applied. If these are applied, it might be thought desirable that seafarers of countries which have not ratified the Conventions may be provided with the same facilities for employment subject perhaps to the principle of reciprocity.

6) A provision concerning the facilities for finding employment for officers should be included.

7) Finally, the new instrument should contain a clause providing for penalties, when its provisions are not complied with.¹¹⁶

¹¹⁵Some of these measures are mentioned at p. 143 under iv). Other measures might include registration of all national seafarers with shipping offices or marine authorities, and directives to marine or consular authorities for the engagement and placing of seamen.

¹¹⁶Art. 2 (d) (ii) of Convention No. 147, does not have a provision similar to the one contained in Art. 2 (2) of Convention No. 9.

2.2.2. Seamen's Articles of Agreement

2.2.2.1. Historical Review

As pointed out in the first chapter,¹ an American proposal submitted to the Commission on International Labour Legislation contained the principle "That the seamen of the merchant marine shall be guaranteed the right of leaving their vessels when the same are in safe harbour." In the discussion which ensued, the question of the establishment of an international seamen's code was raised. Since the members of the Commission thought that it was not desirable to insert in the Treaty of the Peace concluded at Versailles in 1919 a proposal dealing with the situation of a particular class of workers, they adopted a resolution submitted by the French delegation, namely that "The Commission considers that the very special questions concerning the minimum conditions to be accorded to seamen might be dealt with at a special meeting of the International Labour Conference devoted exclusively to the affairs of seamen."²

The Genoa Conference

To give effect to the above decision, a maritime Conference was held at Genoa in 1920. After the Governing Body had decided at its 2nd session to place on the agenda of the Genoa Conference as its fourth item the consideration of the possibility of drawing up an international seamen's code, the Conference set up a Commission to deal with the question. The Commission on the International Seamen's Code considered that certain subjects were ripe for further investigation and possible codification, *inter alia*, questions concerning seamen's articles of agreement³ and discipline and it, therefore, proposed that the Conference should adopt i) a resolution requesting the ILO Office to carry out the investigations "necessary for establishing an International Seamen's Code" and expressed the hope that after the work of the Office was accomplished, the Governing Body would be able to place on the agenda of a future Conference draft instruments advancing the idea of such code,⁴ and ii) a Recommendation urging upon the Members of the ILO the desirability of undertaking the systematic codification of the relevant national laws in each country.⁵ The underlying idea was that in

¹See, *supra* p. 57 et seq.

²See, *supra* p. 58.

³For the liberalisation of the regulation of the seamen's engagement in France before the ILO embarked on the regulation of this question at the international level, see Robert Zoete, *Du Recrutement des Gens de Mer*, 1919, from p. 42 onwards.

⁴Here, it should be noted that by the words "International Seamen's Code" was and is still implied a comprehensive international code relating to seamen's affairs consisting of ILO Conventions, e.g. instruments of binding character, or ILO Recommendations, e.g. instruments of a formal but non-binding character. The role of codes of practice or codes of conduct in the field of maritime employment will be analysed later in Chapter 7, Section 7.2.2., but it must be said here that these codes, in all ILO relevant documents, do not form part of the International Seamen's Code. For the legal status of these codes, see *supra* p. 16.

⁵2 R.P., pp. 555-558.

that way the establishment of an International Seamen's Code could be "advanced and facilitated". Both the resolution and the Recommendation were adopted by the Conference.⁶

Minority Report of the Commission on the International Seamen's Code

However, some members of the Commission thought that the Genoa Conference should adopt more concrete measures for the amelioration of the position of the seaman. In their Minority Report, in recalling that the seamen's status was a little better than that of a serf, they insisted on the necessity of recognition of strict equality between the shipowner and the seaman.⁷ The Conference decided to adopt a resolution combining two motions presented by the French Shipowners' and the Italian Seamen's delegates respectively.⁸ This was drafted in a less harsh language but contained the substance of the Minority Report. The resolution made a distinction between clauses of a public character, inserted in the articles of agreement in the public interest, and clauses of a private character inserted in support of the private interests of the parties to the contract. Only violations of the provisions contained in clauses belonging to the first category would be dealt with as criminal offences and even then only at the instance of the public authorities. On the other hand, as regards the interpretation of clauses concerning private interest, seamen and shipowners were placed upon a footing of strict equality.

The deliberations in the J.M.C.

Following the decisions of the Genoa Conference the Joint Maritime Commission devoted a considerable part of its first five sessions to the discussion and drafting of an acceptable instrument concerning Seamen's Articles of Agreement.⁹ During the deliberations of the Commission the diametrically opposite views of the shipowners' and the seamen's representatives became manifest. There were two points on which the seamen and the shipowners were equally divided:

1) The interrelationship between the Articles of Agreement and questions concerning discipline; the shipowners thought that these two issues were inseparable and, therefore, should be treated by one and the same session of the Conference. They were also in favour of a single instrument dealing with both of them. On the other hand, the seamen could not admit the connection between the questions of Articles of Agreement and discipline. Questions concerning the latter could be settled between employers and workers by mutual agreement or, alternatively, in view of the wide divergences in national legislation their regulation should be left to national law (the seamen were supported on this point by Mr Ripert the legal expert who assisted the Office to prepare the draft instrument). Since discipline was an unexplored issue, its examination in detail at that point would involve considerable delay in the organisation of the Office's work. It was decided, therefore, that only

⁶*Ibid.*, pp. 173, 594 and 182, 575 respectively.

⁷*Ibid.*, pp. 559-560.

⁸*Ibid.*, pp. 196, 466, 594.

⁹For a brief account of these sessions, see International Labour Conference, 9th session, Geneva 1926, *International Codification of the rules relating to seamen's articles of agreement*, Questionnaire I, pp. 12-21.

questions of discipline directly connected with the articles of agreement i.e., those relating to seamen entering and leaving the ship's service should be considered by the Office.¹⁰

2) The shipowners preferred that the proposed instrument should contain a limited number of generally accepted and broad principles which would make it acceptable to a large number of countries. In a letter addressed to the ILO Office they expressed the view that the Office's draft was too detailed, while the framers of the Code of which the codification of rules relating to seamen's articles of agreement would constitute a part, should endeavour to produce a draft laying down principles universally adopted (the British Government was of the same opinion).¹¹ Consequently, they submitted a counter-draft, which by leaving most matters to national legislation, could form an acceptable basis for discussion.

The Office draft

The shipowner's draft was not accepted by the seamen's representatives and a sub-committee was appointed to find a solution. The sub-committee draft proved to be unacceptable to the seamen's representatives, as it was based largely on the shipowners' draft.¹² The three drafts were sent to the governments together with a questionnaire. The Office based on the replies of the governments decided to divide the subjects to be submitted to the Conference leaving the idea of a general codification by which it had been led until then. Moreover, in accordance with views of the majority of the governments the new Office drafts did not make a general reference to national law like the sub-committee draft but comprised specific proposals concerning a) articles of agreement properly so-called, b) repatriation,¹³ and c) discipline on board ship.¹⁴

Aims of the International Seamen's Code

At the maritime Conference in 1926 two Committees (the Committee on Seamen's Articles of Agreement and the Committee on Discipline) were entrusted with the task to consider the Office drafts together with any amendments that might be moved thereto. The Committee on Seamen's Articles of Agreement according to its report to the Conference was led by two considerations in the accomplishment of its work: "1) that the object was to draw up a more or less complete seamen's code, which would codify the provisions in force in the different countries, but which would nevertheless make some advance on the present position, i.e., 'to provide on the basis of the more advanced legislations a solution to some of the problems arising in connection with seamen's articles of agreement' which were engaging the attention of the seafaring world, and 2) that the code should be 'confined to

¹⁰See 2 *J.M.C.*, p. 12, 3 *J.M.C.*, pp. 17-21.

¹¹See 5 *J.M.C.*, pp. 65-68, Questionnaire I (1926), op. cit., p. 19.

¹²For the Office, the Shipowners' and the Sub-committee draft, see 5 *J.M.C.*, pp. 71-86 and Questionnaire I (1926), op. cit., pp. 1*-50*.

¹³Repatriation issues will be examined in Chapter 4, Section 4.2.

¹⁴For a collection of laws and regulations on the engagement, dismissal, repatriation and discipline of seamen in 1926, see ILO Office, Studies and Reports, Series P (Seamen), No. 1, Geneva, 1926.

general principles already incorporated in the various legislations, and that it should be left to national legislation to apply these principles in detail." ¹⁵ Accordingly, and as a result of many amendments moved during the deliberations of both Committees the drafts submitted to the Plenary Conference were confined to a number of general principles leaving details to national law.

The 1926 Conference

At the Plenary Conference both drafts were considered. The draft of the Committee on Seamen's Articles of Agreement, subject to some amendments, was adopted by 78 votes to 13 and when the final recorded vote was taken it was adopted unanimously. ¹⁶ The Convention contains provisions concerning the entering into, the form of and the particulars that should be included in the articles of agreement, the expiry and the termination of the agreement. The Committee's draft on discipline comprised provisions concerning breach of obligations imposed by considerations of public interest, guarantees in regard to the criminal proceedings and the record of offences and assurances for the seaman in cases where he was liable to arrest or preventive detention; the penalties inflicted, far from being of a vindictive or a military character, were analogous to the gravity of the offences. Finally, punishment of offences, whether disciplinary or criminal, was made subject to rules preserving the dignity of the seaman. Nevertheless, the Conference was unable to reach an agreement and on the final recorded vote being taken the Draft Convention was rejected by 62 votes to 36. ¹⁷

2.2.2.2. Articles of Agreement and Discipline: These are two questions that have given rise to much controversy

a) Comparison of the various drafts

The question of articles of agreement has proved to be one of the most controversial issues in the 'maritime' history of the ILO. Before the final draft was adopted by the Conference, no less than five drafts had had to be considered: the Office draft, the Shipowners' draft, the Sub-Committee draft, the new Office draft and the Conference Committee draft. Among them, the Office draft contained specific and detailed regulations relating to the entering and leaving of the ship's service and it was supported by the seamen. The Shipowners' draft omitted several articles included in the Office draft and in at least 38 cases referred matters of crucial importance for the seafarers to national law. As an example, the safeguards in connection with the signing of the agreement, the form and record of the agreement, irregular discharge, etc may be cited. Although the Sub-Committee draft presented a number of advantages over the Shipowners' draft (for example, Art. 29 of the original Office draft providing that the agreement shall be recorded in or annexed to the list of crew was retained and Art. 38 of the Shipowners' draft providing for the arrest of the seaman in case of desertion according to na-

¹⁵*R.P.*, p. 512.

¹⁶*Ibid.*, pp. 339, 385.

¹⁷*Ibid.*, p. 363 (a two-thirds majority is required for the adoption of a Convention).

tional law was deleted), the references to national law were too numerous to make the instrument acceptable to the seamen's representatives. The new Office draft did not take very much account of the previous work of the Joint Maritime Commission but it again contained detailed proposals based on the replies of the governments.¹⁸ The Committee at the 1926 Conference once more extensively re-drafted the new Office draft with the result that national law was again the leading feature of the Convention. Hence, one notes a sequence of events in drafting during which extensive reference to national law was substituted for a detailed regulation of the seamen's contract. This was due to two factors: a) The hostile attitude of the shipowners, who refused to accept any specific proposal not universally adopted (in particular, in their opinion a Seamen's Code could not contain provisions constituting an advance over the existing regulations; they were in favour of a codification *stricto sensu* of the *status quo*). They also preferred both questions of seamen's articles and of discipline to be treated in a single instrument.¹⁹ b) The strong attachment of governments exercising a considerable influence at the Conference to usages, customs and regulations followed in national practice by reason of their maritime tradition.²⁰

b) The degree of comprehensiveness of the proposed instrument

Another difficulty related to the actual form of the proposed instrument: should it be a comprehensive single instrument comprising every aspect of maritime work, which could be updated and revised, as soon as more information on the working conditions of seamen became available, or should the specific questions concerning seamen's affairs be treated in separate instruments? As has been mentioned earlier, the first Office draft, the Shipowners draft and the Sub-Committee draft were based on the first idea; they even contained, though different in form and substance, articles relating to the physical * and intellectual qualifications of seamen required for sea-service, the minimum age of seamen *, the status of the master on board ship and his obligations and powers vis-à-vis the members of the crew, the capacity of minors and married women to enter into an agreement for service on board ship, repatriation-unemployment indemnity and facilities for finding employment for seamen *²¹, and, finally, provisions dealing with discipline were also inserted.²² Most of these matters were

¹⁸Here it should be noted that the Joint Maritime Commission is a body of a consultative character and the Office, while having the right to take notice of its conclusions, is not limited thereby.

¹⁹While the Conference did not align itself with the shipowners' views, the latter successfully supported their position in the Conference Committee with the result that the draft submitted to the Conference did not resemble in the least the (second) Office draft; for the shipowners' views, see *supra* pp. 166-7 and accompanying footnotes; see also 9 *R.P.*, pp. 17-73.

²⁰This was the case with regard to the position of the U.K. Government; for an exposition and discussion of its attitude, see 5 *J.M.C.*, pp. 65-66; International Labour Conference, 9th session, Geneva 1926, *Report I on International Codification of the rules relating to seamen's articles of agreement*, pp. 28-29, 48, 175; *Committee on Discipline* (Commission des sanctions, 9ème session, Genève 1926, Procès verbaux (hereafter cited as C.S./ P.V.) P.V. 4, Appendix to the Minutes of the Fourth Sitting.

²¹Provisions relating to subject-matters marked with an asterisk were included only in the Office draft.

²²See Articles 3-9, 10-12, 13-19, 23, 39-41 and 48-73 of the Office draft; Articles 3-4, 5-7, 9, 22-44 of the Shipowners' draft; Articles 3-4, 5-7, 22-42 of the Sub-committee draft.

left out in the Convention as finally adopted as they were thought to be either extraneous to the question of the articles of agreement or to be covered by previous ILO Conferences.

In the new Office draft, the Conference Committee draft and the final Convention the idea of a single instrument was abandoned. The position as regards seamen's articles of agreement is peculiar. It is arguable that questions concerning discipline are largely bound up with questions relating to the seaman's contract and as such should be treated together.²³ Nevertheless, two important considerations sufficed to turn the scales in favour of the opposite view: a) ratification would be impeded; if both questions were dealt with in a single instrument, States wishing to ratify an instrument containing provisions relating to one of the questions mentioned above but not in favour of the rest for several reasons would be prevented from ratifying the whole instrument, unless it was divided; and b) in view of the divergent national practices and regulations treating the question of discipline most countries favoured the idea of separate instruments.²⁴

2.2.2.3. Analysis of the provisions of the Convention

1) Art. 3. Art. 3, para.1 of the Convention provides that the "articles of agreement shall be signed both by the shipowner or his representative and by the seaman".²⁵ Reasonable facilities shall be given to the seaman or his adviser to examine the contract before it is signed. According to para. 2 national law must provide for adequate supervision of the signing of the agreement by the competent authority.²⁶ Thus, in these paragraphs the formal nature of the seaman's contract is recognised; fraud or force in obtaining the seaman's consent is rendered difficult. The word "signed" indicates that the agreement should be in writing.²⁷ Proof of the signing of the agreement is, therefore, facilitated. On the other hand, it is clear from the wording of para. 2 of Art. 3 that the underlying principle is a "public authority" system of control of the signing of the contract. Subpara. 2 of para. 1 of Art. 3 provides that reasonable facilities shall be given to the "adviser" of the seaman to examine the contract. This term includes a trade union official, who can thus examine the agreement before signature but it is doubtful whether he can intervene otherwise than by notifying the competent *public* authority, mentioned in para. 2, of the existence of vague or unfair clauses in the contract. Moreover, the pres-

²³See 3 *J.M.C.*, pp. 17-21; see also *supra* note 19.

²⁴See 3 *J.M.C.*, p. 21, Report I (1926), *op. cit.*, pp. 184-188, 211.

²⁵Emphasis added.

²⁶An amendment moved in the Committee on Articles of Agreement at the 1926 Conference to add the words "if in writing" after the words "articles of agreement" was rejected; see *Conférence Internationale du Travail, IX^E Session, Genève 1926, Commission du contrat d'engagement des marins, Procès Verbaux* (henceforth *C.S.A.A./P.V.*), 6th meeting, p. 10.

²⁷The paragraph does not require that the representative of the public authority should be present at the time of signing of the agreement or that it should be countersigned by him. These matters are left to national law. For example, it is possible under national law that supervision by the competent authority is exercised not at the time of signing but at the time of drawing up the list of the crew. For more concrete proposals, see Articles 24, 28 of the first Office draft, Art. 3 of the second Office draft (for the text of the second Office draft, see Report I (1926), *op. cit.*, pp. 243-251, 9 *R.P.*, pp. 505-511); see also for discussion of Art. 3, Report I (1926), *op. cit.*, pp. 231-232, *C.S.A.A./P.V.* 6 and 7.

ence of a representative of the trade union at the time of signing of the agreement or the examination of the contract by him is not obligatory, if the seaman does not wish it.²⁸

Art. 3 para. 3 has a further weakening effect on both supervision and trade union intervention. It reads: "The foregoing provisions shall be deemed to have been fulfilled if the competent authority certifies that the provisions of the agreement have been laid before it in writing and have been confirmed both by the shipowner or his representative and by the seaman."²⁹ It should be noticed that the fact that the agreement must be laid before the competent authority in writing does not preclude the previously verbal conclusion of the agreement and this is the reason why this paragraph was inserted in the Convention (it should be noted that para. 3 speaks of confirmation of the agreement by the shipowner and the seaman and does not require prior signature of the agreement).³⁰ It would have been better if the possibility of trade union intervention had been expressly stated, as was done in para. 1, in view of the need for advice and assistance, whenever agreements are concluded orally. Furthermore, it is not clear, whether the competent authority has the right to refuse to endorse the agreement and, if so, in what cases. It is suggested that para. 6 of Art. 3 (which empowers national law to provide for further safeguards for the protection of seamen) should be used to supplement para. 3.³¹

Para. 4 makes it obligatory that national law ensures that the seaman understands the agreement. There is no requirement that the language in which the articles are concluded should be the native language of the seaman or that a certain proportion of the crew should possess knowledge of the language in which orders are given, though the latter especially would promote the safety of the vessel.³² However, adoption of these proposals could have an effect on questions of manning, since it might exclude seamen from signing on a vessel registered in a country other than their own. The matter is best left to national law as its regulation would involve consideration of manpower policies, which cannot be determined by contractual provisions. To national law is also left the question of the engagement of a seaman in circumstances that *force majeure* renders compliance with the provisions of Art. 3 impossible.³³

The last question, under this head, relates to the purport of the term "competent public authority" employed in Art. 3. The task of this authority is to supervise the conditions under which the seaman's contract is concluded, to identify possible discrepancies and to refuse to endorse the agree-

²⁸C.S.A.A./P.V. 7, pp. 2-3, *ibid.*, P.V. 6, pp. 5-6, 8-9. Consequently, any kind of trade union intervention is really weak.

²⁹Emphasis added.

³⁰Para. 3 was inserted to satisfy countries, like Germany and Japan where verbal conclusion of the contract was allowed, provided that it was registered with the competent authority, see C.S.A.A./P.V. 6, p. 6, *ibid.*, P.V. 7, pp. 9-10, *ibid.*, P.V. 10, pp. 6-7.

³¹This consideration applies to the whole article.

³²See Art. 11 (1) of the old Office draft; For discussion see C.S.A.A./P.V. 7, pp. 12-13, *ibid.*, P.V. 10, p. 4.

³³Here, para. 5 of Art. 3 of the second Office draft, laying down adequate safeguards for the protection of seamen against forced or unwanted engagement, would be recommended, see Report I (1926), *op. cit.*, p. 245, 9 *R.P.*, p. 506.

ment if the national law so provides. A problem arises in the case of a seaman engaged in a country other than the country in which the ship is registered. It might be thought that if, for example, a seaman signs an agreement on a British vessel in a Chinese port, the competent authority responsible for the supervision of the conclusion of the seaman's contract would be the Chinese authority (especially, if the seaman is of Chinese nationality) but this solution has obvious disadvantages:

a) It results in a lack of uniformity in the treatment of foreign seamen on board the same vessel; they would be subject to different laws, any inequality of treatment being solely due to their nationality.

b) It is contrary to the generally accepted principle that matters affecting the interior economy of the ship are regulated by the law of the flag state.³⁴

c) It cannot be accepted as an interpretation of Art. 3 of the Convention, as it diverges from the intentions of the ILO Office, as expressed in the Director's Report submitted to the Joint Maritime Commission at its 3rd session.³⁵

On the other hand, it is difficult to imagine how a public authority could apply foreign law. The only solution remaining is that the law of the flag be universally applicable to seamen engaged on board the same ship, but that the consular authorities be entrusted with the responsibility for operating the system abroad.³⁶ However, it should be remembered that Art. 3 is based on the notion of "public" official control of the maritime contract. If trade unions are in charge of the control of the seaman's articles of agreement, then it would be difficult for a consular authority to refuse, for example, to endorse an agreement signed by a foreign seaman and found to be acceptable to the trade union responsible for its supervision. If it is thought desirable to insert in an international Convention a provision introducing trade union control, the 1926 Convention will have to be revised in this respect; of course, public control would remain as an alternative³⁷ under the Convention for countries where trade unions are not strong enough to exercise effective control in such cases.

Finally, it is suggested that in order to expedite the procedures for the engagement of seamen and to avoid waste of time, the requirement that the supervisory competent authority be present at the signing of the agreement should be eliminated and a system of forwarding the relevant information to the competent authority should be devised; this authority will have the necessary powers to act in the particular circumstances of each case, for example, to detain a ship on receipt of information that the crew on board ship does not have sufficient knowledge of the language to be able to understand the orders of the master or officers.³⁸

³⁴For this question, see *infra* Chapter 6, Section 6.2.1., pp. 435-437; Section 6.2.2., pp. 441-442.

³⁵*J.M.C.*, p. 61.

³⁶This view is in accordance with the practice followed in many countries, among them maritime states, before the adoption of the Convention at the 1926 Conference; see International Labour Conference, II session, 1920, Report IV, *Seamen's Code*, pp. 28-30.

³⁷See 1 *J.M.C.*, p. 10.

³⁸See F.J.J. Cadwallader, "The U.K. Mariner's Contract", 9 *West. Aust. Law Rev.* (1969-70), pp. 269-283, at pp. 274-5.

2) Art. 4. The idea behind Art. 4 is that the inclusion in the contract of clauses referring disputes arising therefrom to a judge or arbitrator not chosen in accordance with the ordinary rules of law concerning jurisdiction should be prohibited. This notion is evident from the general principles of law and the sole reason for its inclusion in the Convention was to make it possible for both parties to the agreement to defend their case before the courts or any other competent authorities (as an example, administrative bodies existing in the ports of some countries for the brief settlement of disputes might be cited).³⁹ However, para. 2 of Art. 4 stipulates that the provisions contained in the first paragraph "shall not be interpreted as excluding a reference to arbitration." This might lead to the conclusion that the parties to the agreement are free to insert in the contract arbitration clauses derogating from compulsory jurisdictional rules laid down by national law. If the purpose of the article is not to be nullified, para. 2 should be taken to mean that voluntary arbitration clauses shall be valid, if they are either in accordance with national law or, as far as disputes arising out of collective agreements are concerned, permissible thereunder.⁴⁰

3) Art. 5. The purpose of Art. 5 is to protect the interests of both seamen and shipowners. The document containing a record of the seaman's employment will constitute a proof of his prior engagements and will, therefore, facilitate his further employment by another shipping company. Furthermore, para. 2 provides that this document must not contain any statement as to the quality of the work of the seaman (or his wages). This is a commendable attempt to prevent the master from putting in the document observations on the conduct and the quality of work of the seaman, since even a slight blemish recorded therein would remain in the document forever and would affect his chances of further employment.⁴¹ Such observations cannot be entered in the document, even if the seaman so desires.⁴² However, he can obtain from the master a *separate* certificate as to the quality of his work. In the interests of the seaman himself the master has the right, in lieu thereof, to give the seaman a certificate indicating whether he has fully discharged the obligations arising out of the agreement (Art. 14 para. 2). On the other hand, the shipowner or his representative will be able to decide from the record of the seaman's employment whether he will employ him or not.⁴³

All other matters, such as the form of the document or the particulars to be recorded, are left to national law. Though it is not clear from the wording of Art. 5, an important question is also left to

³⁹For example, to disallow a clause in the contract to the effect that any dispute arising therefrom shall be decided by a court in the place where the shipowners' headquarters are situated; see Questionnaire I, 1926, op. cit., p. 43, Report I, 1926, op. cit., p. 233, C.S.A.A./P.V. 8, p. 4.

⁴⁰It is clear from the history of the article, though not from its wording, that this paragraph was inserted to accommodate countries in which an arbitration committee composed of both of the interested parties was set up under collective agreements to deal with the disputes arising therefrom; see C.S.A.A./P.V. 8, p. 4, *ibid.*, P.V. 10, p. 8, 9 *R.P.*, pp. 518, 299-300.

⁴¹The seaman's record could "be marred by a single entry made at the whim of a spiteful master", 9 *R.P.*, pp. 306-307.

⁴²*Ibid.*, pp. 305-307, C.S.A.A./P.V. 8, pp. 7-10; see also Interpretation of the Decisions of the International Labour Conference: Seamen's Articles of Agreement, 1926 (No. 22) in *O.B.*, Vol. XXXVIII, pp. 374-375.

⁴³With respect to this point, Art. 6 of Convention (No. 9, 1920) for Establishing Facilities for Finding Employment for Seamen provides, *inter alia*, that freedom of choice of crew shall be assured to the shipowners.

national law, namely in whose possession the document concerned is to remain. Consequently, the document can be kept either by the seaman himself or by the master. The question may have a considerable impact on the regulation of desertion.⁴⁴ Finally, the document mentioned above should not be confused with the national identity document or the passport issued under Art. 2 of the Convention concerning Seafarer's National Identity Documents (No. 108), 1958. The former was intended to establish the identity of the seafarer, to provide a proof of the conclusion of all the agreements entered into by the seaman during his seafaring career, thus enhancing his employment chances, to enable the shipowner to form an opinion about the persons to be employed on board the ship, and possibly to deal adequately with cases of desertion.⁴⁵ The latter aimed to "alleviate the difficulties and inconveniences which arose when seafarers took shore leave in foreign ports or in the connection with their travel in transit or in the course of repatriation",⁴⁶ in other words, to facilitate the movement of the seafarers in certain cases; that is why under Art. 3 of the National Identity Documents Convention the seafarer's identity document must remain in his possession. In contrast, as pointed out earlier, the question concerning the possession of the document of Art. 5 of the Seamen's Articles of Agreement Convention is left to national law.

4) Art. 6. Art. 6 of the Convention enumerates the particulars to be contained in the seaman's contract. These particulars must be included in the contract "in all cases".⁴⁷ Since the agreement signed by both the shipowner or his representative and the seaman under the supervision of the competent authority will constitute almost conclusive evidence of the terms of the contract, it is important that the list of the particulars mentioned should be as comprehensive as possible. This is achieved in Art. 6, the provisions of which in this respect appear to be satisfactory.⁴⁸ However, certain observations must be made:

a) Para. 2 of Art. 6 of the second Office draft providing for a term (18 months) beyond which an agreement for a definite period could not be extended, was deleted during the deliberations of the Committee on Seamen's Articles of Agreement.⁴⁹ The purpose of the inclusion of such a provision in the Convention was clearly to prevent a seaman from binding himself for an indefinite period. The matter is left to national law but the Convention does not require national law to provide for such a limitation. If it is thought improper to insert in a revised instrument a provision laying down a maxi-

⁴⁴For the relationship between the document of Art. 5 and the regulation of desertion, see *infra* Section 2.2.3., p. 194.

⁴⁵Questionnaire I, 1926, *op. cit.*, pp. 42, 51, Report I, 1926, *op. cit.*, p. 233.

⁴⁶41 *R.P.*, p. 246.

⁴⁷This condition is not met if certain particulars of the particulars enumerated in Art. 6 are not mentioned in the contract, even if the seaman is provided, by other means, with information concerning his rights and obligations; see Interpretation of the Decisions of the International Labour Conference: Seamen's Articles of Agreement, 1926 (No. 22) in *O.B.*, Vol. XXXVIII, pp. 375-376.

⁴⁸A proposal that mention of particulars in the agreement should be optional was rejected in the Committee on Seamen's Articles of Agreement, C.S.A.A./P.V. 9, p. 7.

⁴⁹*Ibid.*, p. 6; 9 *R.P.*, p. 519.

imum period to which agreements for a definite period can extend, at least a provision could be included to the effect that national law must lay down a maximum period.

b) Art. 6 para. 3 (3) stipulates that the agreement must contain the name of the vessel or vessels on board which the seaman is to be employed. The original article did not refer to vessels in the plural. The advantage of this provision for the seaman - or the seamen's organisations - is that he is able before his engagement to have information on the quality of the ship's accommodation, the personal record of the master and the seaworthiness of the vessel, so that he can decide whether to consent to the engagement or not. The singular was used to indicate that the seaman could only sign on for one specified vessel. The seaman might find himself in a disadvantaged position; though the vessels mentioned in clause 3 of the paragraph may belong to the same shipowner and the name of the vessels may be sufficient for their specification,⁵⁰ it will be difficult for the seaman to have a knowledge of the conditions on board the ships on which he agrees to be employed at the time the articles of agreement are signed.⁵¹

Clause 4 provides that mention of the number of crew must be entered in the contract, if that is required by national law. This provision was included in the Convention to give an indication of the number of the crew because it was desirable that the seaman should know how many men were going to be employed in the department in which he was engaged to serve; it was not intended to regulate the manning scale.⁵² The shipowner is bound by ILO manning requirements only in so far as the country in whose territory the ship is registered has adopted any of the ILO instruments relating to the regulation of manning questions.

5) Art. 9. The termination of the agreement is regulated in Art. 9. Termination of an agreement for an indefinite period shall be subject to notice. Unlike the Office drafts,⁵³ the notice must be in writing. Although the national law of certain countries provided for a verbal notice,⁵⁴ this practice is not recognised in the Convention. While the provision might seem inflexible, it certainly has the

⁵⁰He could, for example, be forced to serve on an unseaworthy vessel. The insertion of the words "or vessels" in Art. 3 was decided in the Committee on Seamen's Articles of Agreement after the principle that an agreement to serve on more than one vessel should not be permissible had been rejected by 17 votes in favour and 17 against; for discussion and vote, see C.S.A.A./P.V. 9, pp. 8-11.

⁵¹Here, the intervention of the seamen's organisations, which must provide the seaman with information concerning the vessels specified in the agreement, is mandatory. It should be remembered that, under Art. 3, para. 1, subpara. 2, "*reasonable* facilities shall be given to the seaman or *his adviser* to examine the agreement *before* it is signed" (emphasis added); also Art. 7 of the Seamen's Placing Convention No. 9 provides that "*proper* facilities shall be assured to seamen for examining the contract before and after signing" (emphasis added).

⁵²C.S.A.A./P.V. 9, pp. 11-13. The Reporter of the Committee on Seamen's Articles of Agreement was very explicit on this point: "Relativement à ces mentions mêmes, notamment au N° 4, qui concerne l' effectif de l' équipage, il a été précisé - et l' on a demandé qu' on insistât bien sur ce point - que lorsqu' on dit dans le contrat que l' effectif de l' équipage doit être mentionné, cette mention ne peut constituer aucune obligation contractuelle de l' armateur vis-à-vis de l' équipage. Donc, si le nombre des membres de l' équipage indiqué sur le contrat n' est pas atteint, ce fait ne peut pas constituer pour le restant de l' équipage un motif de rupture de contrat", 9 R.P. , p. 289.

⁵³See Art. 33 para. 3 of the first Office draft and Art. 9 (c) subpara. 2 of the second Office draft; especially, the former article contains a more elaborate provision for the proof of the actual terms of the notice (acknowledgement of the notice by the master or, failing that, witnessing of the notice).

⁵⁴See for discussion, C.S.A.A./P.V. 10, p. 12, 9 R.P. , pp. 313-315.

advantage of facilitating evidence of the giving of the notice, thus diminishing the possibility of disputes arising as to the actual terms of the notice. Moreover, it is prohibited under the Convention to give notice in a place other than a port of call; this is a welcome provision making sure that the voyage will not be hampered by formalities as to the termination of the agreement. Notice for the termination of the agreement may be given in any port; it is clear that a law restricting possible ports in which a notice for the termination of the agreement may be given only to national ports is not in accordance with the provisions of Art. 9.⁵⁵ Of the three kinds of agreements mentioned in Art. 6, para. 1 only the termination of an agreement for an indefinite period is dealt with in this Article. The question may arise as to when an agreement for a definite period is terminated, if this period is reached while the vessel is still at sea. It would be preferable that the Convention provide for the termination of the agreement at the first port of call (subject, perhaps, to exceptions necessitated by the success of the voyage); under Art. 9 in its present form seamen are not adequately protected against unnecessary extensions of the validity of the agreement until the end of the voyage.

Among the reasons bringing about termination of the agreement is the "total unseaworthiness" of the vessel. In the first place, it should be noted that the wording is not very clear. What is meant by the word *total* ? An intention to distinguish between total and partial unseaworthiness is not evident throughout the work undertaken by the ILO Office and no indication is given as to the meaning of the term. Since the Convention leaves the question of the definition of unseaworthiness to national law - which may not recognise such a distinction -, the word *total* should have been left out. Secondly, if, in the opinion of a seaman or a seamen's organisation a vessel, whether at sea or not, is unseaworthy, it is not clear whether the contract can then be terminated. The answer must be that it cannot. In the case of a vessel at sea the seaworthiness of the vessel can be tested at the first port of call by the competent authorities;⁵⁶ if it is declared unseaworthy the agreement will be terminated.⁵⁷ Consequently, any boycott ordered by trade unions requiring their members to leave a vessel said to be unseaworthy is not permissible under the Convention until there is an official declaration of unseaworthiness.

Finally, the important question of specification of the circumstances in which the shipowner will have the right to dismiss the seaman and the seaman to demand his immediate discharge are left to national law (Arts 11 and 12 respectively).⁵⁸ In this respect, Art. 13 lays down that the seaman may,

⁵⁵ Interpretation by the Office of Convention No. 22 in *O.B.*, Vol. XIII, pp. 26-28, at p. 27.

⁵⁶ In the case of a ship calling at a port abroad these seem to be the consular authorities of the country in which the ship is registered. It is not clear from the discussions held at the Conference who the competent authorities are. It might be thought that as the unseaworthiness of a vessel touches upon matters of safety and as considerations of public interest are involved, the port authorities would be able to intervene. However, the subject-matter of the Convention is not the reciprocal recognition of the right of port authorities to take measures in cases of unseaworthiness but the regulation, *inter alia*, of the termination of the agreement, and according to the ILO Office philosophy the law of the flag regulates the articles of agreement, see *supra* p. 182 and n. 35.

⁵⁷ C.S.A.A./P.V. 11, p. 9.

⁵⁸ *R.P.*, pp. 327-336. For an example of protective provisions concerning dismissal of seamen see *SLB*, 4/1975, Spain: Amendments to the Ordinance respecting employment in the merchant marine, pp. 397-398; 3/1977, France: *Increased protection for dismissed seamen*, pp. 253-254.

subject to strict conditions that have to be fulfilled, claim his discharge for the purpose of ameliorating his position or when "any other circumstance has arisen since his engagement which renders it essential to his interests..." (for example, important family reasons). To prevent any abuses arising out of the application of this article it was understood that the relevant decision rests with the master.⁵⁹

2.2.2.4. Conclusions

The main criticism that can be leveled against the final Convention is that, although it is not so general an instrument as the Shipowners or the Subcommittee draft, references to national law are still numerous (13 references to national law are made in 13 articles of substance). It should, however, be understood that these references to national law confer an obligation upon national legislature to provide for the proper carrying out of the provisions contained in the Convention. This interpretation should be given to the term "shall" appearing in the Convention before or after the words "national law" and it is supported by the history of the question.⁶⁰ Thus, while there is some uncertainty as to what "national law" may provide, the making of such provision is binding upon the competent authorities.

1) Possible improvements in Convention No. 22

As shown above, the Convention contains a number of protective provisions relating to the regulation of the seaman's contract. The protective nature of the Convention is manifested by the deletion therefrom of an article providing that any agreement for a period beginning to run before the expiry of a previous similar agreement should be void. While this article (Art. 2 of the second Office draft) was based on general principles of law and purported to be a safeguard for the shipowner against desertion by the crew, it was left out when it was realised that a regulation of this kind "would make a deserter an outlaw".⁶¹ On the other hand, there certainly are areas where the Convention can be improved in order to lead to a greater uniformity in the international regulation of seamen's articles of agreement: the clarification of the term "adequate" qualifying supervision by the competent authority [signing of the agreement before the competent authority, countersignature by the same authority]; the possibility of trade union control of the signing of the agreement as an alternative; the inclusion of a provision concerning the possession of the discharge book or any other document mentioned in Art. 5 [document in the custody of the master or in the possession of the seaman subject to the right of the master to inspect it]; a provision for a limit beyond which an agreement for a definite period cannot be extended; the regulation of the termination of an agreement for a definite period;

⁵⁹*R.P.*, p. 326, C.S.A.A./P.V. 12, p. 7.

⁶⁰See Questionnaire I, 1926, *op. cit.*, pp. 41*-42*. Although this interpretation refers to previous drafts, nothing in the subsequent proceedings evidences a different intention.

⁶¹*Ibid.*, p. 32*, C.S.A.A./P.V. 6, p. 4.

more detailed regulation of the discharge of seamen either by the shipowner or on their own initiative [specification of the grounds for discharge; desertion, absence without leave, serious breach of discipline, etc., compensation in case of irregular dismissal, enumeration of the circumstances in which the seaman can claim his immediate discharge (sickness through no fault of his own, changes in the ship's route, serious breach of obligations of the shipowner of the master towards the crew, etc ⁶²), discharge approved by the competent authorities, entry of the discharge in the ship's documents, compensation due to the seaman when his discharge is necessitated by the interruption of the voyage through an act of the shipowner or possibly through no act of his own]. ⁶³

2) Agreement for several voyages

The Convention recognises three kinds of agreement: For a definite period, for an indefinite period and for a voyage. It may be desirable to make provision for an agreement for several voyages. This would cover time spent on land; the regulation of such agreement might be useful in cases where a shipping company wished to have relief crews or they have adopted the two-crew system. ⁶⁴

3) Special Indemnity Clause: A desirable provision

At the Conference in 1926 the following amendment was moved by Mr Brandt, the Belgium Workers' delegate: "A special indemnity shall be paid to any master, officer or seaman who has been in the service of the same shipowner for a prescribed period, if any such person is dismissed by reason of circumstances for which he is not to blame. The amount of such indemnity, the mode of its payment and the conditions under which it should be granted shall be determined in each country by the national law." ⁶⁵ The amendment was finally withdrawn, as some delegates who had a strong influence at the Conference were opposed to it. ⁶⁶ It may be thought that the amendment was out of order, since indemnity issues should be treated in an instrument dealing with social security. However, the indemnity due to the seaman under the amendment was that due as a result of his dismissal by the shipowner i.e., it was connected with the termination of the agreement. As such, it is not improper to think that it could be included in an instrument dealing with the articles of agreement. The Brandt proposal would be beneficial to the shipowner; it would induce seafarers to remain with the same

⁶²It should be noted that under Art. 12 (b) and (c) of the second Office draft the seaman could demand his immediate discharge in the cases of changes in the nationality of the vessel and non-compliance by the master with laws and regulations relating to the safety of the vessel. This article, however, referred to national laws and not to internationally accepted safety standards (though the latter could be mentioned in a more elaborate form of the article). If the seamen are unionised, adoption of the above-mentioned provision might result in effective trade union controlled boycott of ships not satisfying certain standards of safety, manning and other conditions of employment recognised in international instruments.

⁶³There are other questions not regulated in the Convention and indirectly connected with the articles of agreement, such as the question of the professional qualifications of the masters, officers and persons with special duties on board ship (doctors, radio telegraphists) which are required to be evidenced before an agreement is signed; or the question of wages due to the seaman in the case of an agreement brought to an end through no fault of his own. These issues will be discussed later in Chapters 3 and 4 when the relevant ILO instruments are examined.

⁶⁴As to this practice, see 62 R.P. , pp. 81,91.

⁶⁵9 R.P. , p. 316.

⁶⁶Though the delegates thought the amendment to be out of order, the President of the Conference had a different opinion; *ibid.*, pp. 320-321, 317.

shipping company for a long period and would make the seafaring profession more attractive (this would attract in consequence more experienced crew to come on board ship). On the other hand, the above indemnity would provide the seaman with financial aid as a reward for the "steady" seaman in the employment of the same shipowner for a long time, where by reason of the special circumstances of the case the former is left unemployed without having a legal claim against the latter. It is regrettable that a similar provision has not been included in any ILO maritime instrument to date.⁶⁷

4) Vague enforcements provisions

No specific measures to ensure compliance with the provisions of the Convention are laid down in it. The matter is left to national law (Art. 15). Of course, the organ qualified to substantiate assertions that the terms of the Convention have not been complied with is the "competent public authority" mentioned in Art. 3 para. 2 and Art. 14. In this context, Art. 7, which stipulates that the agreement shall be recorded in or annexed to the list of crew, is of great importance, since the exercise of the supervision by the competent authority is facilitated by its right of access to the list of crew.⁶⁸ What happens in the case where the competent authority has come to the conclusion that the provisions of the Convention have not been complied with, for example, that an agreement contains an arbitration clause contrary to the stipulations of Art. 4? The Convention lays down in para. 5 of Art. 3 that "the agreement shall not contain anything which is contrary to the provisions of national law or of this Convention" but that does not mean that when certain terms of an agreement are contrary to the provisions of the Convention, *ipso facto* they are null and void.⁶⁹ The matter is left to national law. National law is also to decide whether a clause declared void thereunder would involve the annulment

⁶⁷Provisions in ILO social security instruments for seafarers are not based on the philosophy of the amendment as set out above. Art. 2 of the (Shipwreck) Indemnity Convention, No. 8 differs from the above-mentioned amendment in giving to the seaman an indemnity only when out of employment as a result of shipwreck (loss or foundering of the vessel). It does not purport to be a reward for services rendered to the same shipowner over a long period. The same observation applies to Convention No. 55 concerning the liability of the shipowner in cases of injury, sickness or death. In the first place, there are restrictions on the liability of the shipowner (see Art. 2 para. 2 (a)) (national law may make exceptions in the case of an injury incurred otherwise than in the service of the ship). No such restrictions appear in the amendment; the seaman receives the indemnity when out of employment for reasons *for which he is not to blame* (for example, a seaman on shore-leave injured through no fault of his own). Secondly, Convention No. 55 (Art. 4) provides for the defrayment by the shipowner of the expenses of medical care and maintenance incurred by the sick or injured person; it is not, therefore, a question of indemnity *stricto sensu* within the meaning of the Brandt proposal. Finally, the wording of Art. 2 (b) of the Social Security (Seafarers) Convention, No. 70 is very general (an analogy is drawn there between unemployment benefits and benefits in cases of incapacity for work received by seafarers on the one hand, and those received by industrial workers on land on the other); moreover, the rewarding element, as found in the amendment, is absent in this article.

⁶⁸See Report I, 1926, op. cit., p. 235. Nevertheless, Art. 7 is subject to national law, which may provide that the list of the crew will not necessarily be carried on board ship, see C.S.A.A./P.V. 10, p. 9. It would be advisable to lay down that the list of crew must be compulsorily be carried on board ship so that it is accessible to the competent authority for purposes of supervision.

⁶⁹Compare the first and the second Office draft; there are two methods of prescribing the consequences of non-compliance with the terms of the Convention. First, to stipulate in a special article that clauses contained in the agreement which are contrary to the provisions of the Convention shall be null and void (Art. 21 of the first Office draft). As pointed out above, the Convention, by referring many important matters to national law, rendered this solution pointless. Secondly, in the few cases where a question dealt with in an article of the Convention is not referred to national law, a provision to the effect that a clause contrary to the terms of the specific article shall be null and void could be included in that article (see Art. 3 para. 3 cl. 2 of the second Office draft).

of the agreement as a whole. It would be better if the Convention provided that the sanction for non-compliance of certain clauses of a seaman's agreement with the terms of the Convention would be that these clauses be nullified or any other sanction that might seem appropriate to be included in the Convention or both, when such clauses touch upon matters the regulation of which has not been referred by the Convention to national law (particularly, if it is thought desirable to revise the Convention along the lines suggested above). This would result in the elimination of divergencies in national laws concerning the implementation of the standards laid down in the Convention and lead to uniformity in the treatment of seafarers internationally.⁷⁰

5) Recent trends with respect to the seaman's contract not taken into account

Continuity of employment for seafarers is showing a tendency to be among the basic objectives of the international regulation of seamen's affairs.⁷¹ The Convention concerning Continuity of Employment of Seafarers (No. 145) 1976 aims to establish a system of continuous or regular employment for *qualified* seafarers. Appropriate measures to achieve this end include, *inter alia*, "contracts or agreements providing for continuous or regular employment with a shipping undertaking or an association of shipowners..." (Art. 3 (a)); similarly para. 14 (2) of the Employment of Seafarers (Technical Developments) Recommendation 1970 recommends that schemes for the regularity of employment for seamen might include "contracts of employment with a company or with the industry for seafarers with *appropriate qualifications*."⁷² There are three kinds of contract for the engagement of seamen permissible under Art. 6 of the Seamen's Articles of Agreement Convention: For a definite period, for an indefinite period (if permitted by national law) and for a voyage. Though this article does not exclude the possibility of the conclusion of a contract for continuous employment with a company, it is suggested that the latter Convention should be updated to take account of the recent trends mentioned above; this might necessitate the insertion in the Convention of a provision concerning the professional qualifications of the seafarers under a contract for continuous employment, since the instruments referred to above presuppose that the seafarers concerned possess certain qualifications.⁷³

2.2.3. International Disciplinary Code for Seamen

As mentioned earlier, the Conference was not able to adopt an instrument regulating discipline on board ship.⁷⁴ Consequently, the question of the penalties to be inflicted in cases of breach of the

⁷⁰For the different opinions of the governments on the question of arbitration clauses contrary to Art. 4 of the proposed draft, see Report I, 1926, op. cit., pp. 56-104, point 9; Supplementary Report I, 1926, pp. 25-39, point 9.

⁷¹See 62 R.P., pp. 145-147, 179.

⁷²Emphasis added.

⁷³Proposals for inclusion in the Articles of Agreement Convention of provisions relating to the professional qualifications of seamen were rejected in the Committee on Seamen's Articles of Agreement, see C.S.A.A./P.V. 10, pp. 5-6.

⁷⁴See *supra* p. 178, n. 17.

contractual obligations imposed on both the shipowner and the seaman is left to national law. Since the history of the question and the reasons for the failure of the attempts at an international regulation of discipline have been explained in the previous section, this section will be confined to the considerations that should be taken into account in laying down international rules for penalties for breach of the articles of agreement.⁷⁵

A. It might be wondered why the adoption of an instrument concerning discipline on board ship seems to be indispensable. The regulation of discipline on board ship is necessitated by the exigencies of the seafaring profession.⁷⁶ Breaches of the obligations imposed on the seaman under the contract may endanger the safety of the community of the ship, which forms a separate society under the command of the master who is not only a representative of the shipowner but also a representative of the flag state's public authorities on board ship and has to account to them for the maintenance of law and order on the vessel under his charge. Moreover, he is responsible for the accomplishment of the voyage. The above instrument would constitute a disciplinary code for seamen. On the other hand, violations of the agreement by the shipowner or the master would also constitute a danger to the community of the vessel (for example, abandonment of the ship by the master, engagement of an unqualified master by the shipowner, etc). Consequently, it may be thought desirable to take account of these factors in the drafting of a future instrument.⁷⁷

B. The form of the future instrument will also have to be considered. It could be either a Convention or a Recommendation. This will depend on the attitude of the States and of the degree of consensus achieved by the interests concerned. It may seem convenient to include detailed provisions in a Recommendation. However, it should be noted that the idea of a Recommendation was rejected at the 1926 Conference as it was opposed even by the Workers' representatives.⁷⁸ Another question is

⁷⁵For information on disciplinary questions, see Questionnaire I (1926), op. cit., pp. 68-91, 12*-19*, 2 J.M.C., p. 12, 3 J.M.C., pp. 14, 17-21, 65, 4 J.M.C., pp. 66, 71, 72-74, 5 J.M.C., pp. 64-66; Report I, 1926, op. cit., pp. 209-228, 239-243, 252-255; International Labour Conference, 9th session, Geneva 1926, *Committee on Discipline*, procès verbaux, ten sittings; 9 R.P., pp. 555-575, 611, 233-250, 254-281, 361-363, 386-390.

⁷⁶The Report of the Director of the Office to the 3rd session of the J.M.C. was explicit on this point: "The seaman cannot, in fact, regard himself as a workman whose relation to his employer is that of an ordinary contract for the hire of his services, because the very conditions of his employment involve his removal from the sphere in which ordinary law applies", 3 J.M.C., p. 65.

⁷⁷See Articles 53, 54, 58, 62 and 63 of the first Office draft. It has been suggested that the reevaluation of the position of the master in the shipboard environment will have beneficial effects on the number of casualties which occur yearly. In particular, it has been argued that authoritarianism by officers (and, especially, by masters) is institutionally ingrained in the American shipping industry and there is a link between the personality of the Master and its interaction with the crew, with one type of detrimental outcome, namely casualties due to human error; see R. Hershey, "The Primacy of the Master and its consequences", *Marit. Pol. Mgmt.*, 1988, Vol. 15, No. 2, pp. 141-146. It is suggested that academics in training institutions "can make a contribution during the formative years of tomorrow's Captains by stressing the values of co-operation and communications on the bridge. Students should be taught to identify undesirable bridge behaviours of both watchkeepers and Masters"; *ibid.*, p. 144. An important issue, not yet discussed in an international forum, is the distinction between the criminal and the civil liability of a master and the extent of the former; for cases which resulted in a questionable criminal prosecution of the master under English law see, *inter alia*, S. Taylor, "The criminal liability of ships' masters: Provisions and changes", *LMCLQ*, 1984, pp. 446-458, especially at pp. 450-458.

⁷⁸Mr Brautigam, the Netherlands delegate, on behalf of the Workers' Group offered three reasons for the rejection of the proposed Recommendation by the Workers: a) if a Recommendation were accepted, this would finally settle the matter,

whether questions of discipline should be treated together with questions relating to the seaman's contract in the same instrument, whether that be a Convention or a Recommendation, or in separate instruments. The shipowners were in favour of the first view, the seafarers of the second.⁷⁹ Treatment of these issues in separate instruments would facilitate ratification while the adoption of the opposite technique would result in the elimination of the phenomenon of having uniform rules relating to obligations arising out of an agreement and divergent national regulations prescribing penalties for the breach of such obligations. Inclusion of provisions relating to disciplinary questions in an instrument concerning articles of agreement would require revision of this instrument; in any case the Seamen's Articles of Agreement Convention needs be revised along the lines suggested in the previous section.

C. The future instrument may contain either broad principles or specific provisions dealing with discipline. The shipowners and some Governments supported the first view, the seafarers were opposed thereto.⁸⁰ The future instrument could be limited to a number of general principles (for example, guarantees for seamen ensuring that the power of the master for arrest and preventive detention of seamen shall not be arbitrarily exercised) or may specify offences and penalties for violation of the clauses of the contract. While the two Office drafts contained specific provisions on this point, the Conciliation Committee set up by the Committee on Discipline at the 1926 Conference redrafted the Office text by leaving important matters to national law, to such an extent that the proposed Convention was eviscerated and its title had to be modified.⁸¹ While the enunciation of certain broad principles would lessen the difficulties that might be encountered in the adoption of an international instrument, frequent reference to national law might nullify the purpose of the Convention.⁸²

D. The Office draft concerning discipline on board ship was largely based on the Genoa Resolution adopted in 1920.⁸³ The resolution, as pointed out earlier, made a distinction between clauses of a public character inserted in the public interest and clauses of private character inserted in the private interests of the parties concerned (para. 1). Criminal penalties were inflicted only in the case of

whereas the Workers intended to raise the question at a future Conference, b) a Convention would be a stronger instrument codifying existing legislation, while a Recommendation would contain only suggestions for future action, c) the provisions of the proposed Recommendation did not go as far as the Workers would have wished (in fact, they were of such a general nature that they could not compare with the specific provisions of the proposed draft Conventions), see 9 *R.P.*, pp. 386, 389, 573-575.

⁷⁹See *supra* notes 10 and 19.

⁸⁰See *supra* notes 11 and 20.

⁸¹C.S./P.V. 5, pp. 5-7; Art. 3 of the second Office draft, which prescribed disciplinary and criminal penalties, was finally deleted. The title was changed from "Convention concerning the disciplinary and criminal penalties applicable to seamen" to "Convention concerning the guarantees to be provided for seamen in regard to disciplinary and criminal penalties".

⁸²Detailed procedures concerning discipline on board ship could be laid down in Codes of Conduct made binding on both parties under collective agreements. In this case, an international Convention could make the adoption of such Codes at the national level compulsory. Alternatively, an international Code of Conduct on board merchant ships could be adopted. For a draft Code of Conduct see Department of Trade, *Report of the Working Group on Discipline in the Merchant Navy*, November 1975, (hereinafter cited as *Report of the Working Group on Discipline*), pp. 33-37.

⁸³See Questionnaire I, 1926, op. cit., pp. 68-72.

violations of clauses of a public character (para. 4). It is suggested that the Genoa policy should be abandoned. First, not all countries recognise such a distinction. Secondly, the term "clauses of public character" might be interpreted in a different way in different countries. Thirdly, the meaning of that expression, despite the considerable discussion to which it gave rise, was never clarified either in the Joint Maritime Commission or in the Committee on Discipline and finally it was decided at the Plenary Conference to substitute for it the words "provisions (that) cannot be derogated by the freewill of the parties" with the result that clause 1 of Art. 3, as redrafted by the Drafting Committee, read as follows: "Only violations of legal provisions from which it is not permitted to depart in the articles of agreement may constitute criminal or disciplinary offences by virtue of the national law."⁸⁴ To avoid ambiguity it would be advisable that a future instrument dealing with disciplinary questions should identify the provisions from which it is not permitted to depart or indicate how a distinction between clauses of private interest and clauses of public interest can be established if the latter method seems more appropriate.

E. An international instrument concerning discipline should distinguish between civil and criminal sanctions for breach of obligations under the agreement. As pointed out above, criminal or disciplinary penalties, according to the Office draft, are prescribed only when considerations of public interest are involved. However, it might be that a violation of a clause of the seaman's contract, though affecting public interest, could be dealt with in a satisfactory manner, if civil sanctions only were applied.⁸⁵ A case study illustrates this; suppose that a seaman deserts;⁸⁶ there are two ways of dealing with the offence committed:

- a) The seaman may be fined or may be imprisoned according to the gravity of the offence or both.
- b) A civil action may be instituted by the shipowner making it difficult for the seaman who deserted to find another ship. It might be that desertion constitutes a ground for discharge of the deserter under the national law of a country (Art. 11 of the Seamen's Articles of Agreement Convention

⁸⁴Compare Art. 4 of the first Office draft, Art. 2 of the second Office draft and Art. 22 of the Sub-committee draft; see for discussion of the question, 5 *J.M.C.*, pp. 64-65, C.S./P.V. 2, pp. 6-17, 9 *R.P.*, pp. 235-242.

⁸⁵For the pros and the cons of the application of criminal or civil sanctions in the case of absence without leave, see Questionnaire I, 1926, op. cit., pp. 79-80. Sometimes, the application of criminal sanctions to seamen can be contrary to certain international instruments, such as the European Social Charter. It has been reported that the provisions, encountered in certain countries, which threaten criminal sanctions against seamen in cases of breach of their contractual obligations or bad behaviour can be contrary to Art. 1 of the European Social Charter which implicitly prohibits forced labour; see H. Wiebringhaus, "L'État d' Application de la Charte Sociale Européenne", in *Ann.*, 1973, Vol. XIX, pp. 928-940, at p. 933.

⁸⁶For an account of the history of the question of desertion, from the era of the Rhodian Law to the beginning of the 20th century, see C. Clee, "Desertion and the Freedom of the Seaman", *ILR*, Vol. XIII, No. 5, May 1926, pp. 649-672; Vol. XIII, No. 6, June 1926, pp. 808-831. From the above review it can be seen that forfeiture of wages had been envisaged in the early maritime codes either as the sole consequence of desertion or as a complementary financial sanction besides corporal punishment; *ibid.*, pp. 650-656. For the connection between desertion and the equalisation of wages see *ibid.*, pp. 808-816; for the legal consequences of desertion in various countries at the beginning of this century see *ibid.*, pp. 822-827 and Appendices A and B to the article; for examples of treaties and national laws concerning the role of the consular authorities in cases of desertion and their interpretation see L.T. Lee, "Consular Role in the Desertion of Seamen", *RHDI*, Vol. 13, 1960, pp. 51-59.

No. 22). Under Art. 14 para. 1 of the same Convention, in the document referred to in Art. 5 (which may be the discharge book), the fact is entered that the seaman has been discharged but no entry is made showing the reason for the discharge of the seaman. Thus, if a seaman deserts and presents his discharge book⁸⁷ to the next shipowner, the latter might be unable to establish the circumstances under which the seaman's contract has been terminated. It was pointed out earlier that the questions concerning the possession of the discharge book or any other similar document under Art. 5 are left to national law. This document can be kept by the seaman subject to the right of the master to inspect or it may be required to remain with the master.⁸⁸ If the document is to remain in the possession of the master, he can deliver it to the competent authorities in the case of desertion of the seaman. In that case, the latter, not being in possession of the discharge book, may experience difficulties in finding another ship. Moreover, the financial consequences of desertion for the seaman (civil action for damages, deductions from wages)⁸⁹ may deter him from deserting.

F. i) Enumeration of the punishable offences should be the next step. It may be desirable that only offences connected with the articles of agreement should be included in a maritime instrument dealing with the contract of the seaman. The rest would be dealt with by the general criminal law.⁹⁰ Possible offences committed by the seaman may include absence without leave, refusal to work, desertion, engagement of a seaman using a forged identity document or a forged certificate of qualifications (if the latter question is dealt with in an instrument concerning articles of agreement), complicity in bringing stowaways on board, refusal to obey orders, mutiny. Offences committed by the shipowner or the master or both may include irregular engagement of the master by the shipowner, irregular engagement of the seaman (contrary to the provisions of the Articles of Agreement Convention), irregular dismissal of seamen, refusal to allow the seaman to leave on the termination of the contract, abandonment of the ship by the master.

ii) A distinction should be made between serious offences carrying criminal penalties and other slighter offences punished by disciplinary measures. The question can either be left to national law or dealt with in a future instrument. In the latter case, a number of criteria should be laid down for

⁸⁷The issue of the document of Art. 5 to the seaman is compulsory, even if he does not so desire, see 9 *R.P.*, pp. 303-304.

⁸⁸It should be noted that the majority of the countries disapproved of the principle that the discharge book should be kept by the seaman, see Report I, 1926, op. cit., pp. 56-104, point 14 (c).

⁸⁹Civil sanctions for damages may be available for the shipowner, irrespective of any criminal penalties prescribed for the breach by the seaman of obligations under the contract according to general principles of civil law. It is contended here that it may be convenient to substitute civil sanctions for criminal sanctions in the case of certain specified offences.

⁹⁰See supra note 10. Furthermore, a comprehensive instrument concerning discipline might be envisaged, which would deal with maritime offences committed by the seaman and the shipowner not only connected with the articles of agreement (for example, violations of provisions concerning liability of the shipowner for sickness insurance). In this case, it is necessary that a "maritime offence" or "an offence of maritime character" should be defined. For difficulties in reaching an agreement as to the definition of the words "offence of a purely maritime character" (only in connection with the question of the articles of agreement), see C.S./P.V. 7, pp. 11-15, 9 *R.P.*, pp. 263-264.

the classification of the offences as criminal or disciplinary.⁹¹ The instrument may lay down that certain offences are criminal and others are disciplinary;⁹² or it may provide that certain acts (absence without leave, refusal to obey orders) constitute disciplinary offences, unless accompanied by aggravating circumstances.⁹³ These circumstances should be defined to include: a) acts endangering the safety of the vessel or of those on board the ship; b) offences committed while the ship is still at sea or in a foreign port; c) breaches of obligations arising out of the contract by a person holding a significant position in the community of the ship (master, deck officer, etc.) or a person assigned with special duties (watch-keeping seamen). On the other hand, it seems that certain acts, like mutiny or attacks against a senior officer, would constitute only criminal offences. Finally, the question may be considered concerning whether any mitigating circumstances should be taken into account in imposing the prescribed penalties, such as, for example, that a deserter returns to the ship of his own free will or after an act of disobedience a seaman complies with the orders of a senior officer.⁹⁴

G. Disciplinary penalties will be inflicted for disciplinary offences while criminal offences will carry criminal penalties. The question is who is authorised to impose these penalties.⁹⁵

a) *Disciplinary penalties* These will be imposed mainly by the master but the following distinctions should be drawn. It must be decided whether the master will have the right to inflict penalties only in the case of slight breaches of discipline⁹⁶ or whether his power to impose penalties for disciplinary offences will be unlimited. In the first case, the courts or the naval or consular authorities (as the case may be) will be competent to consider more serious incidents. In any case, a right of ap-

⁹¹The 1926 Conference in view of the failure of the efforts to adopt an acceptable instrument concerning discipline adopted a Resolution urging the ILO Office "to study the question of penalties inflicted in respect of the violations of seamen's articles of agreement and in particular the manner in which the national laws classify and punish the various acts in which a violation of such articles of agreement may consist...", 9 *R.P.*, pp. 361, 611. No action following the resolution has been taken so far.

⁹²Method followed in the first Office draft, see Articles 53-65.

⁹³Art. 3 of the second Office draft.

⁹⁴Questionnaire I, 1926, op. cit., p. 78.

⁹⁵In 1966 a Court of Inquiry was appointed under Lord Pearson to study the law relevant to seamen's affairs. The Pearson report recommended, as regards discipline on board ship, the retention of statutory disciplinary criminal penalties and the master's jurisdiction to impose fines but with modifications and safeguards. It recommended abolition of imprisonment for offences committed under the MSAs, except for those offences where the safety of the ship or life at sea was endangered; the treatment of offences such as assault, damage, embezzlement, theft and receiving under the general law, the treatment of many offences as civil breaches of contract; and that jurisdiction for imposing fines should be vested in disciplinary tribunals aboard ship as an alternative to the authority of the master; see Final Report of the Court of Inquiry into certain matters concerning the Shipping Industry (Chairman: Lord Pearson), Feb. 1967, London, HMSO, Cmnd. 3211. These suggestions were partly embodied in the MSA 1970. The provisions of the MSA 1970 concerning discipline have been criticised as "harsh, providing the possibility of at least four concurrent sanctions for the same activity". Moreover, it has been argued that "[t]he infrequent incidence of criminal prosecutions also makes the retention of most of the offences the more difficult to justify"; N. Lewis, "The Merchant Shipping Act 1970", *MLR*, Vol. 34, pp. 55-61, at p. 59. It is clear that Lewis is against the penalisation of breaches of the maritime contract, safety considerations apart.

⁹⁶Under Art. 6 (1) of the second Office draft, disciplinary penalties can be inflicted by the master "for minor offences or for any offence committed at sea which requires to be dealt with immediately"; the draft of the Committee on Discipline referred to "minor offences requiring to be dealt with immediately", see C.S./P.V. 7, pp. 4-8, 9 *R.P.*, p. 565. This paragraph was finally deleted at the Conference, see 9 *R.P.*, p. 261.

peal against the decision of the master to the public or judicial authorities might be envisaged.⁹⁷ It could even be considered desirable that the powers of the master be taken over by shore-based disciplinary committees.⁹⁸

b) *Criminal penalties* The infliction of these penalties falls within the competence of the judicial authorities of each country. These may be either ordinary courts or special maritime courts according to the requirements of the relevant national law. However, when the offence is committed while the ship is at sea or in a foreign port, the master should have special powers to maintain discipline on board ship. He may arrest the seaman or place him in preventive detention but the extent of these rights should be clearly defined to prevent abuses of authority; for example, these powers might be exercised when the offence committed is a criminal offence punishable with imprisonment;⁹⁹ when the seaman cannot be handed over immediately to the competent authority; or in cases where the act of the seaman constitutes a danger to the safety of the vessel or of those on board. These conditions can be either conjunctive or disjunctive.¹⁰⁰ Moreover, the master may not have the right to arrest the seaman (a deserter) on shore without the intervention of the public authorities.

H. Finally, other bodies competent to try seamen who break their contract of engagement may include seamen's courts, Joint Boards or Committees of seamen's representatives on board ship as may be agreed under collective agreements.¹⁰¹

⁹⁷For modern procedures regarding discipline on board ship, see NUS, *Shipboard representative's handbook*, Section 5, Discipline. According to the Code of Conduct which forms the basis for the National Maritime Board agreement in the U.K., the master's sanctions against a seafarer consist of either a *reprimand* or warning of some kind, or *dismissal*. Warnings may be verbal or written; there are three levels of verbal warnings depending on the gravity of the seaman's act. A written reprimand is more serious; it is given by the master and is recorded in the log-book; repeated breaches of the Code of Conduct to a lesser degree may lead to dismissal; see also *Report of the Working Group on Discipline*, op. cit., p. 11.

⁹⁸The Working Group on Discipline in the Merchant Navy in the U.K. was faced with this question, namely whether a shipboard or a shore-based system of discipline was to be preferred. It recommended, *inter alia*: "... that the present system of shipboard fines ... should be abolished. In its place a new disciplinary system should be instituted involving a record at the time of the offence with more effective action imposed by a joint committee soon after the offending seafarer has returned to the U.K. On the rare occasions when a crew member behaves in a way which endangers the ship or any person aboard, or is not deterred by warnings, masters should be prepared, and should be encouraged by their shipping companies and supported by the seafarers organisations, to repatriate the offender. To achieve this masters should be provided with wider powers of discharge abroad with a view to repatriation", *Report of the Working Group on Discipline*, op. cit., p. 11.

⁹⁹It may be desirable to lay down in a future instrument whether imprisonment should be inflicted for disciplinary offences, see C.S./P.V. 7, pp. 9-11.

¹⁰⁰For discussion, see C.S./P.V. 6, pp. 11-18, 9 R.P., pp. 236-237, 242-260.

¹⁰¹For a premature resolution adopted by the International Seamen's Conference at Hamburg in 1924 urging for the establishment of Ship's Councils consisting of a body representative of the crew, see 4 J.M.C., pp. 66-67, 71. In modern practice, penalties inflicted by shore-based joint disciplinary committees include: caution the seafarer about future conduct; instruct the competent authority to suspend the Establishment of the seaman concerned or cancel the seafarer's registration; suggest that the competent authority withdraws the seafarer's Discharge Book, NUS, *Shipboard representative's handbook*, op. cit., pp. 22-23. Here, it should be noted that seafarers' representatives on board ship, according to Codes of Practice on Discipline, are in an advantageous position as far as disciplinary action against them is concerned: serious disciplinary measures may be taken only after a trade union official has been given all relevant information. For the question of union representation on board ship and the problems caused by its introduction in the British Merchant Navy, see J. MacFarlane, "Shipboard Union Representation in the British Merchant Navy", *International Review of Social History*, 15 (1), 1970, pp. 1-18.

In conclusion, a useful method of drafting an instrument concerning discipline on board ship would be to identify all possible violations of provisions included in ILO maritime Conventions, to define the respective offences and to prescribe penalties for them. This procedure would result in a comprehensive "discipline" instrument leading to uniformity of laws and regulations dealing with questions of discipline on the international plane, which is certainly not the situation at present.

2.3. Seafarers' Identity Documents

2.3.1. Historical Review

The last issue in the field of entry into maritime employment with which the ILO has been concerned is the facilitation of the exercise of the right of the seaman to enjoy leave on shore, while the vessel is in port, and of the movement of seafarers across various countries at whose ports they disembark for various purposes. To this effect, Convention No. 108 concerning Seafarers' National Identity Documents was adopted by the 41st session of the ILO Conference in 1958.¹ The attempt at the international regulation of the seafarers' identity documents originated in a proposal put forward by the Seafarers' group at the 18th session of the J.M.C. The Seafarers referred to two resolutions adopted by the I.T.F. and the Navigators' and Engineer Officers' Union in the United Kingdom respectively which pointed out the necessity for an internationally recognised document aiming to establish the seafarer's identity. Subsequently, the J.M.C. recommended the adoption of an international instrument concerning the reciprocal or international recognition of a seafarer's national identity card.

2

a) The objectives of the Convention. Convention No. 108 is intended to facilitate compliance with the formalities required for admission of a seafarer to the national territory of a country. The seafarer may find himself in a foreign country either because i) he has obtained a shore leave during the stay of the vessel in port or because ii) he has to enter a foreign country in order to join a ship; or in case of repatriation; or in the case where he left one ship in a port of a country to join another in some other port of the same country. In any case, he will have to establish his identity in order to be accepted in that country. However, in doing this he may experience difficulties if the only document he possesses is, for example, as is the case in some countries, an employment or discharge book. The reason is that these documents usually remain in the possession of the master.³ Consequently, the seaman, in order to be admitted to a foreign country for the purpose of shore leave, may have to obtain a pass from the port authorities or a permit from the master of the ship. The issue of an identity document would facilitate the access of the seaman in this respect. Moreover, the identity document

¹The classification of Convention No. 108 under the heading "entry into employment" in the official publication of the ILO Office "International Labour Conventions and Recommendations, 1919-1981" is questionable, because, as will be seen later, the provisions of this Convention can hardly be regarded as relevant to the entry of a seaman into the seafaring career.

²For the text of the resolutions and the J.M.C.'s proposal for the adoption of an international instrument, see Preparatory Technical Maritime Conference, 1956, *P.T.M.C.* VI/1, pp. 1-2.

³The first Office draft submitted to the Preparatory Conference in 1956 was based on the replies of 27 countries which supplied information on national law with regard to the seaman's identity document. In most of the countries, where the seaman was issued with a discharge book either alone or in conjunction with an identity document, the former is retained by the master. For the Reports of the Countries see *ibid.*, pp. 4-75; for the tables summarising the information see *ibid.*, pp. 75-82.

could serve as a passport entitling the seaman to stay in a foreign country for a longer period in the cases mentioned under ii) above.⁴

b) The Office draft.⁵ The Office draft submitted to the Preparatory Conference was largely based on the replies of the 27 Governments. The draft provided for the issue of an identity document - called the Seafarers' Identity Document - by the competent authority which would usually remain in the seafarers' possession (Art. 2). Art. 3 dealt with the form and the contents of this document. The main disadvantages of the Office draft were: i) that a Member could limit the issue of that document to nationals (Art. 1 (para. 3)) and, moreover, limit the recognition of the Seafarers' Identity Document to documents issued to nationals (Art. 7). The effect of these two provisions was to destroy the international character of the document. It is not clear how a seaman, being in a foreign country or serving on board a ship not calling at a port of the country of his nationality, could be issued with such document. No provision for the role of the consular authorities was made and the absence of such authorities in certain countries would defeat the purpose of the Convention. Furthermore, Art. 7 rendered national law a superimposed system at the international level since i) a Member might decide to recognise only documents conforming to the national regulations and ii) the effect of such documents for the purpose of longer stay in a foreign country was limited. Whereas Art. 4 entitled the seaman to enter a foreign country while the vessel was in one of its ports without any qualifications, Art. 5 gave the bearer of the identity document, *either alone or in conjunction with an employment or discharge book*,⁶ the same rights for the purpose of permitting him to enter the country in order to join another ship or to be repatriated. This means that in some cases the identity document did not suffice alone to establish the identity of a seafarer in cases of longer stay. The result was that the movement of the seafarer not in possession of a passport or a discharge book would raise difficulties. It is true that Art. 5 was based on the replies of the governments⁷ but Art. 5 (1) was in conflict with Art. 6 which conferred obligations on the ratifying country to recognise the identity document as a substitute for a passport.

c) The P.T.M.C. draft. The P.T.M.C. draft,⁸ which was based on a slightly modified form of the Office draft submitted by the U.K. government, eliminated the two defects of the Office draft. First, it made it possible for the ratifying country to extend the issue of the identity document to non-

⁴*Ibid.*, pp. 86-87.

⁵For the text, see *ibid.*, pp. 90-92; see also International Labour Conference, 41st session, 1958, Seventh item on the Agenda, *Reciprocal or International Recognition of Seafarers' National Identity Cards*, Report VII, pp. 3-4.

⁶Emphasis added.

⁷The effectiveness of the Seafarers' Identity Document as regards its acceptance by other countries for the purpose of entry of nationals of the countries which replied to the questionnaire into the former countries both for short or longer stay was at the time lower compared to that of the discharge book. Out of 17 countries which supplied information 6 countries stated that this document in possession of their nationals was recognised for purposes of shore leave and 2 (in one of which the identity document was also a passport) that they were accepted for a longer period. In the case of the discharge book the numbers were 9 and 1 respectively (other 4 accepted it if it was so provided in bilateral agreements); see *P.T.M.C.* VI/1, p. 80. However, out of 22 countries which replied to the question whether they accept Identity Documents of seafarers from other countries, though national practices differed widely on the subject, the majority (9) stated that they accepted the identity documents of other nationals for purpose of shore leave and in some cases for longer periods if these documents were substitutes for passports, *ibid.*, pp. 81-82.

⁸See 41st session, Report VII, 1958, *op.cit.*, pp. 18-23.

national seafarers serving on board vessels registered in its territory or registered at an employment office within its territory who apply for such document (Art. 2 (2)).⁹ Secondly, it deleted the reference to the discharge book as an additional requirement of the permission to enter a foreign country for a longer period (Art. 6 (2)); moreover, a welcome provision entitled the bearer of the identity document issued by the competent authority of a territory for which the Convention is in force to readmission to that territory (Art. 5). On the other hand, the P.T.M.C. draft included a number of new important provisions: a) Art. 2, para. 1 was supplemented by a provision to the effect that if it was "impracticable to issue such a document to special classes of seafarers, the Member may issue instead a passport... and this shall have the same effect as a seafarers' identity document..."; b) Art 6, para. 4 provided that nothing "in this Article shall be construed as restricting the right of a Member to prevent any particular individual from entering or remaining in its territory".¹⁰

2.3.2. Analysis of the provisions of Convention No. 108

a) Art. 1 (2) of the Convention provides the competent authorities of ratifying States with wide discretion as regards the determination of the persons who would come under the definition "seafarer". In particular, the competent authority, after consultation with the shipowners' and seafarers' organisations, is free to decide that fishermen are excluded from its application.¹¹

b) Art. 2 para. 1 of the Convention, providing for the issue of a passport and for its assimilation to an identity document in certain cases, should be interpreted *stricto sensu*: First, it applies only to special categories of seafarers to whom identity documents could not normally be issued, and secondly, the word "passport" denotes a passport only and not any other document which could serve as a substitute for it.¹²

c) Subject to paras. 1 to 5 of Art. 4, which contain certain mandatory provisions in regard to the form and the content of the identity document, any other question concerning these two issues will be decided by the Member after consultation of the shipowners' and the seafarers' organisations (para.

⁹It is not clear whether the words "may issue" conferred an obligation on a Member to provide a seaman covered by the Article with an identity document on application or left the matter to the former's discretion; see *ibid.*, p. 8.

¹⁰Though this provision originated in a proposal of the Japanese Government, which was of the opinion that a government should have the power to exclude seafarers from its country for reasons of hygiene and security, this is not obvious from the wording of Art. 6 para. 4; *ibid.*, pp. 5, 13.

¹¹Interpretation of Decisions of the International Labour Conference: Seafarers' Identity Documents Convention, 1958 (No. 108), *O.B.*, Vol., XLVI, 1963, No. 2, Supplement II, pp. 466-7. To prevent the shrinkage of organised seafarers, caused by the engagement of unqualified persons for employment on board ship, it has been suggested by the Workers' delegate of India at the 1987 Conference that a seafarer in Art. 1 of Convention No. 108 should be defined as "a person in possession of valid seafarer's document issued by the maritime administration or competent authority of a member State"; 74 *R.P.*, p. 7/11.

¹²Report VII, 1958, p. 8. The reference to "other document" in the U.K. draft was deleted and rightly so. Assuming that a country interpreted the term as including a discharge book, it is very doubtful whether the discharge book could according to the Article have the same effect as the identity document, as it usually remains in the possession of the master.

6). This provision is elastic enough to secure ratification by countries where obligatory regulations concerning the form and the content of the identity document exist.¹³

d) Art. 4, para. 5 of the Convention says that if the national law provided for a period of validity of the said document this "shall be clearly indicated therein." This is useful in view of Art. 5 para. 2 according to which "the seafarer shall be....readmitted during a period of at least one year after any date of expiry indicated in the said document." These paragraphs provide the necessary flexibility in the case of countries where identity documents are issued for an indefinite period. In this case no period of validity will be stated in the document while at the same time countries where it is issued for a definite period will not be under an obligation to accept the bearer thereof after one year from the date of expiry.¹⁴

e) Art. 6, para. 1 entitles the seafarer who holds a valid identity document to enter the territory of a Member while the ship is in a port of another country, while the phrase "any other purpose approved by the authorities of the Member ..." in Art. 6 (2) (c) may include the case of a seafarer entering the territory of a Member for the purpose of receiving medical care.¹⁵

2.3.3. Conclusions

Convention No. 108 is an almost flawless instrument in achieving the purpose of the facilitation of movement of seafarers.¹⁶ The cornerstone of the Convention is certainly Art. 3, which provides that the seafarers' identity document "shall remain in the seafarers' possession at all times". This principle is unqualified and entitles a seaman to possession of the document even if he has also been issued with a discharge book which remains in the possession of the master.¹⁷ Thus, the facilitation of the movement of the seafarer is fully guaranteed. On the other hand, the facilities given to seamen under Arts 2 and 4 are qualified by paras. 3 and 4 of Art. 6, which protect a Member from being compelled to admit into its territory persons who would constitute a danger to it for reasons of hygiene, security, etc. Certain criticisms were made of the Convention. They came from the Governments of the United States, Australia and India, none of which has ratified the Convention until now:

¹³This deals adequately with the case of the United States, where the identity document consisted of a plain card and the inclusion in the Convention of a mandatory provision requiring the document to have additional space for the purpose of frontier control would render this country unable to ratify the Convention (as will be seen later the U.S. Government was finally opposed to the Convention for other reasons). Additional space for "appropriate entries" is required only in the case of Art. 6 para. 2 and is strictly limited to that case, *ibid.*, p. 10.

¹⁴For the discussion on the period of validity, see *ibid.*, p. 11, 12, 41 *R.P.*, p. 247.

¹⁵*Ibid.*, p. 248.

¹⁶It was adopted by 137 votes to 6, with 8 abstentions, *ibid.*, p. 159; it has been ratified by 47 countries so far, including some major maritime countries (Liberia, Panama, Greece, Norway, the U.K. and the USSR).

¹⁷Compare the wording of Art. 3 of the Convention to Art 2 (2) of the Office draft and, especially, to Art. 2 (3) of the U.K. draft which formed the basis of the new Office draft.

i) The sole objection of the U.S. Government to the Convention was its desire to insert a provision therein making Arts 5 and 6 (4 and 5 of the Office draft) applicable "to the extent permitted by the Member's national laws and regulations".¹⁸

ii) Australia stated that it was opposed to Art. 3, since under national legislation the competent authorities were entitled to hold the seaman's identity document in the case of a seafarer who had a record of desertion.¹⁹

iii) The Indian Government expressed its opposition to Arts 2 (2) and 5, giving certain facilities to foreign seamen with respect to the issue of an identity card. It did not want foreign seamen to have the same facilities of movement as nationals thus reducing the employment opportunities of the Indian seamen. This was so, especially because in India the identity card was issued for an indefinite period and under Art. 5 a great number of foreign seamen frequenting Indian ports would have the unlimited right to be readmitted to the territory of India for an indefinite period. It was impracticable for India to issue identity documents for a limited period (for unspecified reasons). Moreover, if this document were to serve as a substitute for a passport, this was prohibited by the Indian Passports Act and the visa regulations. A special clause catering for the special case of India was proposed as a solution.²⁰

No special analysis of the proposal of the U.S. Government is necessary, as its acceptance in the Convention would nullify the latter's purpose. The point of Australia can be met if account is taken of the fact that the identity document does not aspire to constitute the employment record of a seafarer entering a foreign country but simply facilitates his movement. As pointed out earlier, the employment record and, consequently, the record of desertion is contained in another document, the document mentioned in Art. 5 of Convention No. 22 concerning Seamen's Articles of Agreement, which can be the discharge or the employment book. The latter, as explained above, may remain in the possession of the master, who could deliver it to the competent authorities whenever necessary. The problem only arises in the rare case of a country in which no discharge book is issued by the competent authorities and the identity document serves two purposes: the proof of the record of employment of a seafarer and the establishment of his identity for purposes of his movement across foreign countries. In this case, it is submitted, the country concerned should amend national legislation to provide for the issue of a separate identity document. This document would not require extensive amendment of existing legislation as it could merely consist of a plain card not necessitating inclusion of such comprehensive entries as in the discharge book.²¹ Finally, concerning the allegations of India, apart from the fact that they were specifically directed to Pakistani seamen, it must be observed that its representatives confused two separate issues: The facilitation of the movement of seafarers

¹⁸See 41st session, Report VII, op.cit., p. 11, 41 R.P., p. 247.

¹⁹41st session, Report VII, op.cit., p. 9, see also the speech of Captain Bull, 41 R.P., p. 108.

²⁰41st session, Report VII, op.cit., pp. 8, 12, see also the speech of Nagendra Singh 41 R.P., pp. 108-109.

²¹It should be remembered that under Convention No. 108 no discharge or similar book can be issued in the place of an identity card, see *supra* p. 200, n. 12. On the other hand, if it is thought desirable to include in the identity document particulars required by national law, this can be done under Art. 4, para. 7.

(which would include the cases of a 'repatriated' seaman or of a seaman simply passing through India to join another ship neither of whom would adversely affect the employment opportunities of Indian seamen) at the international level and the facilities for the engagement of such seafarers. The fact that a foreign seafarer will be able to move without any obstructions in a foreign country does not necessarily mean that he will be given the same facilities for finding employment.²² It is suggested that countries in the same position as India should endeavour first to ratify maritime instruments concerning the engagement of seafarers. Then they can issue identity documents to all seafarers, while at the same time refusing seamen of other countries the same employment facilities in so far as this is permitted by the relevant instruments. Alternatively, these countries can ratify Convention No. 108 while, on the other hand, not extending the issue of the identity card to foreigners.²³ As a last option, the country concerned could issue to foreigners, as opposed to its nationals, an identity document of a limited period of validity. This, it is submitted, is not prohibited by the Convention if Art. 2 para. 2 is not regarded as a mandatory provision.

Art. 6 para. 4 deserves special consideration. It reads as follows: "Nothing in this Article shall be construed as restricting the right of a Member to prevent any particular individual from entering or remaining in its territory." At first sight, it could be said that this provision renders the Convention meaningless. This is not the case. First, as pointed out earlier, it originated in a Japanese proposal and its aim was to protect a Member in certain special cases. A reference to reasons of hygiene and security was not included finally in the Convention because there might be other preponderant reasons justifying refusal of admission into the territory of a Member and because this was a standard clause in relevant international instruments.²⁴ Furthermore, it should be noted that para. 4 applies only to Art. 6, which means that if a Member issues an identity document to a seafarer, the appropriate time for the exercise of the power given by para. 4 is the time of issuing the document. The Member will not have the power to refuse this seaman his readmission to its territory at a later stage if it has provided him with such document;²⁵ however, under Art. 6, as it stands, it appears possible for a ratifying country to prevent a seaman holder of an identity card from entering its territory for reasons of public interest if this card has been issued by the authorities of another

²²India has not ratified any of the instruments relevant to the question of engagement facilities for seafarers (Conventions Nos 9, 145 and 147). While these instruments were not ratified by India for other reasons, the fact remains that India by choosing not to ratify them deprives itself of the opportunity to regulate successfully the engagement of both its own and foreign seamen.

²³In so far as Art. 2 para. 2 can be interpreted as having a permissive character.

²⁴See *supra* n. 10.

²⁵Two amendments to the effect that para. 4 of Art. 6 should form a separate article applicable to the whole Convention and that a similar provision should be inserted in Art. 5 were both rejected in the Committee on Identity Cards at the 1958 Conference, see 41 *R.P.*, pp. 247, 248-249.

country.²⁶ Finally, para. 4 refers to a particular individual, thus minimising the risk of a country which would be prepared to take advantage of this provision for reasons of protectionism.

To sum up, Convention No. 108 offers a fine example of what good will and able drafting can achieve in the international forum. On the one hand, this Convention and, especially, Art. 3 will have the desired effect, namely to facilitate the movement of the seafarers; on the other, Art. 5 of Convention No. 22 will enable the authorities of a Member to deal with cases of seafarers that have a record of desertion. However, Convention No. 108 could be improved upon in certain respects:

a) The international character of the document. It should be noted that the identity document issued under Art. 2 of the Convention is a national document. The establishment of an International Identity Document, having a standard format, would facilitate movement of seafarers across national boundaries. A model of such document can be provided by the Specimen Travel Document annexed to the Schedule to the Convention relating to the Status of Refugees of 28 July 1951.²⁷

b) It should be made clear whether or not Art. 2 (2) confers an obligation upon ratifying Members to issue non-nationals with identity documents.²⁸ If it does the inclusion of a clause in the Convention concerning mutual recognition of identity documents could be envisaged. This would be facilitated by the establishment of an International Identity Document.

c) The possibility should be considered of including in the Convention a provision to the effect that a seaman must be landed in the territory of a ratifying Member without any other formalities and regardless of the seaman's possessing a valid identity document if his mental or physical health require so.²⁹

d) No sufficient account is taken in Convention No. 108 of the need for the harmonisation of of national legislation concerning the facilitation of the movement of foreign seafarers in transit.³⁰ If

²⁶Compare the more restrictive wording of Art. 13 (1) of the Hague Agreement relating to Refugee Seafarers (hereinafter cited as the Hague Agreement) which provides that a Contracting Party may consider itself released from the obligations under the Agreement "for compelling reasons of national security and public order".

²⁷189 UNTS 137.

²⁸It is suggested that such an obligation should be imposed. Art. 2 (1) obliges a ratifying Member to national seafarers identity documents. It might be thought that this obligation is absolute but under Art. 1 (1) of the Convention the latter is applicable to every seafarer engaged on board a vessel registered in a territory of a State for which the Convention is in force. It follows that this obligation does not exist as regards those national seafarers who are employed on board a ship registered in a territory of a State for which a Convention is not in force. If the legislation of the latter State does not cover foreign seamen these will never be able to be issued with an identity document.

²⁹Compare Art. 9 of the Hague Agreement. If treatment of seafarers ashore (i.e. hospitalisation) were made dependent on the possession of an identity document by the seafarer the purpose of the ILO Conventions concerning social security for seafarers would be defeated (see for example Art. 3 (4) of Convention No. 56). This provision, of course, would be subject to the sanitary regulations of the coastal State.

³⁰Resolution XVI concerning the Treatment of Foreign Seafarers in Transit, adopted at the 62nd session of the ILO Conference, draws attention to the fact a) that "there is a continual increase in the number of seafarers visiting various countries in transit in connection with their employment or as a result of such exceptional circumstances as shipwreck, ship accidents or ship repairs, personal illness or accidents, family or other emergencies" and b) that "there is a need for bringing about a greater uniformity in the treatment of these seafarers by national authorities in connection with such questions as transit visas and other immigration formalities; customs clearance and control procedures; the period seafarers are allowed to remain in a country; restrictions on travel, on visits to certain areas or on lodging in certain seafarers' hostels; emergency medical attention; retention of seafarers' documents and special local regulations" The Resolution recommended that the question be studied by the ILO with a view to adoption appropriate international labour

Convention No. 108 is revised to take account of the above circumstances, this will, of course, necessitate an alteration of its title.

e) The status of refugee seafarers.³¹ Although the question was briefly discussed at the 1956 Preparatory Conference, it is not clear whether these seafarers are entitled to an identity document under the Convention. It could be argued that since there is no differentiation in the treatment of these seafarers in the Convention, they are covered by it.³² Since, according to para. 4 of Art. 4, the identity card of a foreign seafarer does not necessarily include a statement as to his nationality, in the case of a refugee seafarer the space under nationality can be left blank. However, a provision clarifying the position of those seafarers seems desirable.³³

Supplement: The Hague Agreement Relating to Refugee Seamen

standards; see 62 *R.P.*, p. 331. The Resolution was adopted unanimously by the 1976 Conference and was supported by both the Employers' and the Workers' groups; for discussion see *ibid.*, p. 217. In this respect, the Convention on Facilitation of International Maritime Traffic, which was adopted by the International Conference on Facilitation of Maritime Travel and Transport, 1965 and amended in several instances since then, contains a number of provisions that are relevant to the facilitation of the movement of seafarers. According to Art. I a contracting part undertakes to adopt all appropriate measures to facilitate and expedite international maritime traffic and to prevent unnecessary delays to ships and to *persons* and property on board. A crew member is defined as "any person actually employed for duties on board during a voyage in the working or service of a ship and included in the crew list. While this definition may give rise to controversy as to the meaning of the phrase "actually employed for duties on board", it seems that its wording would include persons not employed by the shipowner, but it would exclude persons actually engaged on board ship who are not entered on the crew list and persons employed on board ships where no crew list exists. The Convention contains useful Standards and Recommended Practices concerning the facilitation of the movement of ships calling at ports in order to put ashore sick or injured crew members; measures to facilitate the arrival and departure of the crew; measures to facilitate foreign crew members to come ashore for the purpose of shore leave see Section 2, H; Section 3, A, Standards 3.10.1, 3.10.2; B and F of the Annex to the Convention. Nevertheless, state practice as regards a number of the above Standards and Recommended Practices, is not uniform; see *Supplement Relating to the Annex to the Convention on Facilitation of International Maritime Traffic, 1965*, London, 1979 Edition, pp. 16-18, 28-30, 47-48, 57-58. As of 31 Dec. 1988 57 States have accepted, acceded to, or signed the Convention, including all important maritime countries except Panama, Japan, China and the Philippines.

³¹Resolution III concerning Refugee Seafarers adopted by the JMC at its 16th session recommended, *inter alia*, that a solution should be given to problems such as the consideration of whether it is possible for the governments of ILO Members, and, especially, of those suffering from a shortage of seafarers, "to provide employment on board ship, as occasion arises, for refugee bona fide seafarers, and to facilitate the acquisition by these seafarers of a country of residence and a travel document, more especially by enabling them to reckon any period spent on board ship to count as residence in the territory of the country whose flag the ship flies"; see *O.B.*, Vol. XXXIV, pp. 139-140; at the 18th session of the JMC the question of refugee seamen was discussed thoroughly and a similar resolution was adopted; see Resolution concerning Refugee Seafarers, adopted by the JMC at its 18th session, *O.B.*, Vol. XXXVIII, pp. 322-3. For the efforts of the ILO to deal with the problems of refugee seafarers, the impact of the refugee status on labour conditions and state practice (based on the replies of 20 Governments) before the adoption of the Hague Agreement Relating to Refugee Seamen see International Labour Office, Joint Maritime Commission, 18th Session - Oct. 1955, Seventh Item on the Agenda, *Refugee Seafarers*, JMC/18/7/1, pp. 1-55. For a picturesque description of the status of refugee seamen in the pre-Hague era and possible solutions see G.J. van Heuven Goedhart, "Refugee Seamen", *ILR*, Vol. LXXII, 1955, pp. 138-150, especially pp. 145-6. The question of refugee seafarers has not been dealt with in any ILO instrument but was regulated by the Agreement relating to Refugee Seamen, concluded at the Hague on 23 November 1957 which was drawn up and signed by 8 Western European countries; see Resolution I concerning Refugee Seafarers, adopted by the ILO Conference at its 41st session in 1958 which urges ILO Members to consider the possibility of acceding to this Agreement.

³²The Memorandum on Refugee Seamen prepared by the Migration Section of the ILO stated that, since most ILO maritime Conventions apply to seamen irrespective of nationality, "countries which have ratified these conventions must apply the provisions thereof to refugee seamen serving on ships registered in their territory, in the same way as to their own nationals or seamen of any other nationality serving on such ships"; JMC/18/7/1, p. 21.

³³The status of refugees who flee their country by sea but are not refugee seamen is a special case which is outside the scope of the present subsection. For the legal issues involved see, *inter alia*, J. Pugash, "The Dilemma of the Sea Refugee: Rescue without Refuge", *Harvard International Law Journal*, Vol. 18, 1977, pp. 577-604.

This Agreement ³⁴ was signed on 23 November 1957 and aims at regularising the status of refugee seamen on board ships flying the flag of a Contracting Party. It applies to any seaman who is a refugee according to the definition in the Convention relating to the Status of Refugees and is serving as a seafarer in any capacity on a mercantile ship, or habitually earns his living as a seafarer on such a ship (Art. 1 (b)). ³⁵ Moreover, it attributes refugee seamen specific rights when certain conditions are met and is not confined to the enunciation of a general principle.

A person to whom the Agreement is applicable and who is not entitled to admission to any State other than one where he has a well-founded fear of being persecuted for reasons of race, religion, nationality, or membership of a particular social group or political opinion (Art. 10), must be entitled to stay in the territory of the flag State of the ship in which he has served while a refugee for a total of 600 days within the three preceding years, or in ships calling at least twice a year in ports in that country, or in the territory of a Contracting Party where he, while a refugee, has been lawfully resident in the three preceding years (Art. 2). ³⁶

A Contracting Party is obliged to grant a refugee seaman who possesses a travel document issued by another Contracting Party valid for return to that country, the same treatment as regards admission in pursuance of a previous arrangement to serve in a ship, or for shore leave, as is granted to seafarers who are nationals of that Contracting Party, or at least treatment not less favourable than is granted for alien seafarers generally (Art. 6).

Art. 7 requires a Contracting State to give sympathetic consideration to a request for temporary admission to its territory by a refugee seaman who holds a travel document valid for return to the territory of another Contracting Party with a view to facilitating his establishment in another State or for other good reason. ³⁷ Moreover, a refugee seaman must be allowed off a ship if his physical or mental health would be seriously endangered by his remaining aboard (Art. 9). ³⁸ It should be noted

³⁴7 ICLQ, p. 344 ff; 506 UNTS 125. It came into force on December 27, 1961. This Agreement supplemented the Refugee Convention, 1951. Art. 11 of the latter provides: "In the case of refugees regularly serving as crew members on board ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country." This Article was included in the Refugee Convention on the suggestion of the ILO; see JMC/18/7/1, pp. 19-20. It was pointed out at the preparatory stages of the above Convention that this provision was intended "to benefit only genuine seamen and not refugees who were escaping by sea from their country."; cited in A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. II, p. 271. Thus stowaways are excluded from the application of the Convention; for an interpretation of Art. 11 of the Refugee Convention see *ibid.*, pp. 271-2. It is pointed out by the same author that, although Art. 11 contains more than merely a formal recommendation, it does not require the flag State to grant refugee seamen specific rights and benefits. It imposes a general obligation on it to give sympathetic consideration to the status of refugees, guided by considerations of humanity; the flag State cannot refuse these rights as a matter of principle. On the other hand, it is entitled to weigh its national interests against the interests of the refugee seaman and to decide accordingly.

³⁵This definition is broader than the definition of the seafarer in Art. 11 of the Refugee Convention.

³⁶For the question of the lawful stay and establishment of a refugee seaman in international law see Grahl-Madsen, *op. cit.*, Vol. II, pp. 389-398.

³⁷There are two differences between Art. 7 of the Agreement and Art. 11 of the Refugee Convention: a) the obligation under the latter instrument is addressed to the flag State while under the former to any Contracting State; and b) this obligation is not made dependent upon possession of a valid travel document under the Refugee Convention as it is the case with the Agreement.

³⁸Under the terms of Art. 9 a Contracting Party is required to admit a refugee seaman to its territory if it is necessary for his medical treatment or his hospitalisation or for his recuperation from illness, accident, or physical or mental strain

here that Arts. 6 and 7 of the Hague Agreement do not prevent a refugee seaman who has been issued with a travel document with a valid return clause by a Contracting Party from being readmitted to the territory of that Party.³⁹

of a severe nature. For the respective obligations of the flag State and the State to which the refugee seaman is admitted see Grahl-Madsen, *op. cit.*, pp. Vol. II, 273-4.

³⁹*Ibid.*, pp. 274-5.

Chapter 3

MARITIME TRAINING AND CERTIFICATES OF COMPETENCY

Though the training of seafarers and the certificates of competency are classified in the ILO publication "International Labour Conventions and Recommendations 1919-1981" under different categories (training is combined with the conditions for entry into employment and the certificates of competency form a special category), these two questions are treated together in this chapter, since they are closely interrelated.¹ Five instruments adopted by the ILO deal with the questions of the training and the certification of seafarers: a) Training: The Vocational Training (Seafarers) Recommendation, 1946 (No. 77) and Recommendation No. 137 concerning Vocational Training of Seafarers, 1970, which superseded Recommendation No. 77; b) Certificates of competency: Convention No. 53 concerning the Minimum Requirement of Professional Capacity for Masters and Officers on Board Merchant Ships, 1936, Convention No. 69 concerning the Certification of Ships' Cooks, 1946 and Convention No. 74 concerning the Certification of Able Seamen, 1946. In addition, the IMO has adopted a number of instruments relevant to the questions under examination: The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 and the Safety of Life at Sea Conventions with the subsequent Protocols and Amendments (SOLAS Conventions 1960, 1974, the 1978 SOLAS Protocol and the 1981 and 1983 Amendments). Other instruments of more or less importance will be referred to during the examination of the questions mentioned above, since they contain provisions directly relevant to the question of maritime training.

¹The conditions for entry into employment, the question of maritime training and the question of certification of certain categories of seafarers are closely linked to each other. Both the Committee appointed by the Preparatory Conference in 1945 (the Copenhagen Conference) and the ILO Conference in 1946 (the Seattle Conference) were called Committees on Entry, Training and Promotion of Seafarers. Only in the case where the instruments concerning certificates of competency were simply intended to prescribe certain conditions indispensable for the examination of these seafarers and for the granting of the certificates and did not make the engagement of the seafarers concerned conditional upon the possession of such certificates, separation of the two issues would be justified. However, as will be seen later, this is not the case. The examination of the question of the certificates of competency in a separate section of this study was necessitated purely by reasons of expediency.

3.1. Maritime training

3.1.1. Historical review

The JMC was convened to meet for the second time since the outbreak of the 2nd World war in January 1945. It devoted its session to a general survey of the conditions of employment in the merchant marine and adopted a resolution recognising, *inter alia*, the importance of training and promotion for seafarers. The Commission recommended in para. 3 of the resolution to the Governing Body that it should authorise the establishment of special tripartite committees to "examine and report upon the following subjects: (c) entry, training and promotion."² The conditions for entry into maritime employment have been examined in Chapter 2. Here, the question of maritime training is examined. This section should be read in conjunction with the next section (3.2.) concerning certificates of competency.

A) Reasons for the adoption of an instrument concerning maritime training

i) To introduce a predominantly inland-living population to life at sea (by means, *inter alia*, of pre-sea training).

ii) The specialisation of seafarers necessitated by the nature of maritime employment and the structure of the ship as well as technological developments on board ship (closed environment away from shore, different departments: deck, engine, catering, radio etc, general purpose (GP) crews and officers, automation on board ship).

iii) Training enables the seafarer who wishes to reach the top of the profession to realise his aspirations.

iv) Seafarers will be able to qualify for more responsible posts and to keep their knowledge and proficiency up-to-date by means of the institution of retraining, updating and refresher courses.

v) To secure the safety of the crew, passengers and the ship, which represents a substantial investment; and the prevention of pollution, which can result from insufficiently trained crews.

vi) To promote the maximum efficacy and competitive position of national shipping industries.

vii) To attract young people to the maritime profession which availability of training courses will do.³

B) Recommendation No. 77. Two ILO instruments are concerned with maritime⁴ training: Recommendation No. 77 and Recommendation No. 137, which superseded the former (IX, para. 28). Recommendation No. 77 is an old instrument and does not call for extensive examination. The Recommendation does not attempt to frame binding and detailed international regulations, as this was thought impracticable by the Committee on Entry, Training and Promotion; it confines itself to the

²ILO, Maritime Preparatory Technical Conference, 1945, Report VIII, *Entry, Training and Promotion of Seafarers*, pp. 1-2. For the history of the question of maritime training and other relevant instruments adopted by the ILO before 1970 and not applying to seafarers, see J.M.C./20/3/1, pp. 2-9.

³PTMC, Report VIII, 1945, pp. 5, 16; for the objectives of maritime training see J.M.C./20/3/1, pp. 5, 45; see also para. 1 of Recommendation No. 77 and Part. II, para. 2 of Recommendation No. 137.

⁴The training of fishermen, like the status of fishermen on the whole, is not examined in this study.

enunciation of certain general principles.⁵ Among those of particular importance are that: a) training for sea-service should be co-ordinated on the basis of a general programme, the elaboration of which could be entrusted to a central authority (paras. 1 and 3), b) there should be no substantial financial burdens on trainees (para. 6)⁶ and c) refresher and special upgrading courses, including correspondence courses should be provided (para. 5). It should be born in mind that para. 4 (2) contained an important provision combining the age of entry with the school-leaving age.⁷ For no apparent reason this provision has not been included in Recommendation No. 137. In the early deliberations of the Committee it was thought desirable that provision should be made in the Recommendation for the approval or formal recognition of the existing national private training schools (in this way any doubts as to the quality of the training offered by these institutions would be dispelled). This idea was expressed in the final text in para. 7 (2) and conforms to the provisions of other ILO instruments.⁸

In general, Recommendation No. 77 did not contain detailed regulations, like Recommendation No. 137, but constituted a decent first attempt at the international regulation of maritime training.

3.1.2. The Competence of the ILO with regard to the training of seafarers

Recommendation No. 39, which had been adopted by the international Conference of Life at Sea in 1960 recognised the importance of the education and training of masters, officers and seamen and urged the contracting governments to ensure that the education and training of seafarers in respect of certain enumerated *safety matters* was *sufficiently comprehensive* and that such training and education was kept up to date by refresher and other courses. In the second paragraph of the operative part it suggested that the ILO and the IMO should co-operate closely with each other within their respective spheres of activity to the above ends.⁹ Following the adoption of the Recommendation the IMO asked the parties to the 1960 SOLAS Convention to furnish information on the action which they had taken or they proposed to take to give effect to the Recommendation. The JMC took notice of these developments at its 19th session and recommended the institution of a joint ILO/IMCO Committee on Training. In this way the long experience of the ILO in the field of maritime training would be made available to the IMO. The Governing Body approved the decision of the JMC and contacted the Secretary General of the IMO. The Committee was set up and held its first session in

⁵*PTMC*, Report VIII, 1945, op. cit., pp. 53-54.

⁶It should be noticed that the Shipowners' group was opposed to the inclusion of the words "the granting of paid study leave" in para. 6 (2) of the Recommendation for the reason that this would constitute an additional burden on the industry, see ILO Conference, 28th session, 1946, Report V, *Entry, Training and Promotion*, p. 20, 28 R.P., p. 274. By 1967 the practice of the payment of wages, indemnities and allowances by shipowners during periods of training was being followed by the shipowners in at least 15 countries, see J.M.C./20/3.1, p. 19.

⁷As to this point, see *supra* Chapter 2, Section 2.1.1.2., pp. 124, 127-128.

⁸See, for example, Art. 4 para. 4 of Convention No. 69.

⁹For the text of the Recommendation, see International Conference on Safety of Life at Sea, 1960, Final Act of the Conference, IMCO, London, 1973 Reprinted, pp. 482, 484 (English text).

Geneva in 1964.¹⁰ In the meantime, in 1964 the IMO had become a member of the Technical Assistance Board of the United Nations and proposals were drawn up relating to questions whose regulation had fallen up to then, traditionally within the competence of the ILO. The above joint Committee, which so far is the first and only Committee giving effect to Art. III of the Agreement between the ILO and the IMCO,¹¹ has devoted all its sessions to the study of maritime training in connection with safety questions and produced in 1970 (a revised version of a document first appeared in 1968) a sort of an international maritime training guide called "document for guidance". This document was published in a revised form in 1975 and the last version of this jointly prepared document appeared in 1985 as a result of the work of the 7th session of the joint Committee.¹² The culmination of the co-operation of the ILO and the IMO in the field of maritime training was the adoption of the International Convention on Standards on Training, Certification and Watchkeeping for Seafarers by the IMO in 1978 (hereinafter cited as STCW Convention). As will be seen later (see Conclusions), this instrument refers in many instances to the ILO and sanctions in a way the close collaboration of the two organisations. This instrument which amounts to 146 pages is analysed in more detail in subsections 3.1.3. and 3.2.4. in comparison with relevant ILO instruments. Conclusions concerning the conflict of competence between the ILO and the IMO are to be found later under 3.3. For the purposes of the present brief historical account it should be noted that during the proceedings of the 1978 IMO Conference it was requested that the ILO because of the role it had played in the development of an international system of maritime training should be mentioned in Art. XI (2) concerning Technical Cooperation Programmes. The Secretary General of the IMO accepted this view saying that cooperation between the IMO and the ILO was established within the U.N. system, though "he felt bound to stress that the primary responsibility for maritime training lay with the IMCO."¹³

¹⁰Until the time of writing seven sessions of the joint ILO/IMO Committee have been held: 1) 14-19 December 1964, Geneva, (JCST/1/1964/1), 2) 4-8 May 1970, Geneva, (JSCT/2/1970/2), 3) 2-6 July 1973, London, 4) 27-31 January 1975, Geneva, (JSCT/4/1975/1), 5) 14 June-7 July 1978, London, 6) 16-20 March 1981, Geneva, (JCT/6/1981/D. 8), 7) 16-20 December 1985, London, JCT 7/5.

¹¹This Article provided for the establishment of ILO-IMCO Joint Committees to which "any question of common interest" might be referred by the two organisations. For the Agreement Between the International Labour Organisation and the Intergovernmental Maritime Consultative Organisation, see Third Report of the International Labour Organisation to the United Nations, ILO, Geneva, 1949, pp. 188-192; *O.B.*, Vol. XLII, pp. 261-265.

¹²See a) "THE DOCUMENT FOR GUIDANCE - 1970", An International Maritime Training Guide, Prepared Jointly by the ILO and IMCO, Geneva, 1971, JCST/2/1970/3, b) Document for guidance, An international maritime training guide, 1975, Geneva, 1976 and c) Document for guidance, An international maritime training guide, 1985, IMO, London, 1987. Certain observations can be made concerning the scope and the legal status of the 1985 Document (these observations apply to all above documents): a) most sections of the Document [except sections 10 (Fire prevention and fire fighting), 11 (Personal survival and life-saving), 16 (training for crew on board certain specialised vessels) and 17 (First-aid and medical care) which apply to all departments including catering personnel] apply only to the deck and engineer departments; b) the Document is intended to apply to general purpose crews; c) it is to be used as a complement of other relevant international or national regulations concerning training and certificates of competency; d) it does not have any formal legal status (notice the continuous use of the word "should" therein) and its force rather lies in the potential influence which it may exercise at the national level.

¹³STW/CONF/SR/11, p. 5. This statement should be read in conjunction with the ILO views on the question, see *infra* Section 3.2.2. and note 54.

3.1.3. Recommendation No. 137 and the STCW Convention

A) Analysis of the provisions of Recommendation No. 137. Recommendation No. 137, in contrast to Recommendation No. 77, contains more elaborate and comprehensive provisions relating to maritime training. The Recommendation consists of 8 sections which deal with the scope of the Convention; the objectives of training; the national planning and administration (organisation and co-ordination, financing and training standards); training programmes; general training schemes for seafarers; advanced training; training methods and international cooperation respectively and an one-paragraph chapter which says that the Recommendation has the effect of superseding Recommendation No. 77. Some of the provisions of the Recommendation require special analysis:

i) Para. 1 (2) at the end contains an extremely important innovatory provision, namely that the Recommendation applies, *inter alia*, to "training for the performance of the duties ... of *general purpose crews*." ¹⁴ Thus, the Recommendation recognises recent trends in the organisation of the crew and the assignment of duties on board ship according to which the distinction between deck, engine, radio or catering department on board ship will be gradually eliminated and replaced by the distinction between the vessel's operation and maintenance. This would result (and this has already been the case in certain shipping companies ¹⁵) in the appearance of dual purpose officers and crew. ¹⁶ This category is not mentioned in any other ILO instrument nor is it recognised in the STCW Convention. Since Recommendation No. 137 only deals with maritime training, and assuming that an applicant for a post requiring the execution of "dual" duties has undergone the necessary training courses following the guidelines of the Recommendation, there are no provisions in any instrument concerning the training and examination syllabi nor the conditions for the granting of a certificate of competency of general purpose crews. With the development and the proliferation of this kind of seafarers on board ship (automation on board ship would accelerate this process) the question of the certification of dual purpose crews should be considered in a subsequent revision of the relevant ILO instruments. Alternatively, the adoption of a new instrument dealing with this question should be considered. ¹⁷

¹⁴Emphasis added.

¹⁵For developments in this area in 8 countries (Norway, Holland, Japan, the U.K., Sweden, West Germany, Denmark and the United States) in respect of four work innovations arising from the introduction of automation on board ship (role flexibility, continuity in employment and assignment, delegation/participation, and social integration), and the ranking of the respective countries according to the degree of automation achieved, see R. Walton, *Innovating to Compete*, 1987, pp. 65-94. For more information concerning the reorganisation of work on board ship in an automated shipping industry see *infra* Chapter 7, Section 7.9.1.

¹⁶See JMC/20/3/1, p. 5. Relevant to the distinction between ship's operation and maintenance are subparas. (a) and (d) of para. 12 of the Recommendation. For the effects of automation on the organisation of work on board ship see G. Bonwick, *Automation on Shipboard*, 1967, pp. 73-75.

¹⁷Even before 1967 certain countries supplied information on training requirements for crews possessing double qualifications: in France a single type of training for officers had been created and the institution of the new system would result in the disappearance of separate certificates of competency for deck and engineer officers; in the U.S. another scheme would enable trainees to qualify both as deck and engineer officers. In a few countries special courses were provided for preparing trainees to execute combined duties on board ship in view of the development of a sort of "integrated crew" on board modern vessels, see JMC/20/3/2, pp. 50, 221, JMC/20/3/1, p. 33. Since 1966 the U.S.

ii) Though training courses in ship automation are covered by the wording of para. 2 (f) of Ch. II (see also para. 18 (1)), this is not the case as regards the facilitation of the re-entry of a seafarer desirous of ending his sea-career in employment ashore.¹⁸ A special provision concerning this should have been included in Ch. II of the Recommendation. Of importance is para. 2 (i) which provides that training schemes should *ensure*, as far as possible, the entry of all trainees into the seafaring profession.¹⁹

iii) Para. 6 (f) provides that bodies which draw up training programmes should "participate in establishing...*national* certification standards..."²⁰ It is clear from the wording of the paragraph that the Recommendation presupposes the existence of different national certificates. As will be seen later, the establishment of an international model certificate is recommended. Accordingly, Recommendation No. 137 should be revised to point to the necessity of training as a condition for the granting of such a certificate. Para. 6 (g) is also significant, since the interrelationship between training and recruitment (engagement) of seafarers is clearly shown therein. This provision is all the more important inasmuch as training tends to constitute an indispensable condition for the granting of the certificate and, therefore, for the engagement of seafarers. This provision in conjunction with para. 8 (b) conveys the important practical consequence of the undergoing of training courses: A priority in engagement is established for trained seafarers "other things being equal".

iv) Para. 9 (1) provides for the keeping up to date of training programmes while para. 18 refers to retraining, refresher and upgrading courses. These, in themselves, are welcome provisions reflecting the practice of some countries where a system of maritime training has been in force but it should be noticed that, as the title of Ch. IV (Advanced Training) indicates, para. 18 rather refers to training facilities given to experienced seafarers²¹ and does not intend to make the continuation of the employment of the seafarer conditional upon obligatory retraining or refresher courses. Such a provision could not possibly have been included in a Recommendation but the provision, except for its value as a policy-provision, seems incomplete. In this respect the relevant provisions of the STCW Convention are preferable and a similar provision appropriately amended to fit the limitations imposed by the legal nature of the Recommendation should be added to para. 18 (assuming that the new revised instrument on training will take the form of a Recommendation).²²

Merchant Marine Academy has begun experimentally to train groups of "omnicompetent officers"; see Aaron W. Warner, "Future of Maritime Manpower", *Monthly Labour Review*, March 1966, pp. 268-271, at p. 270.

¹⁸However, para. 12 (g) will be an aid in this direction.

¹⁹Emphasis added. The word "ensure" has been substituted for the word "assist", 55 *R.P.*, p. 106.

²⁰Emphasis added.

²¹JMC/20/3/1, pp. 29-30.

²²The relevant STCW provisions are Regulations II/5, III/5 and IV/2, see also *infra* Section 3.2.4., pp. 231-232. For the relationship between retraining and refresher courses and the duration or validity of the certificate of competency, see *infra* under 3.2.5. B).

v) Though para. 10 (3) confirms the principle that the seafarers should not through lack of financial resources find themselves unable to reach the highest ranks on board, how this end will be achieved is less than clear. In contrast to para. 10 (5), under which retraining courses necessitated by technical innovations should be provided free of charge,²³ there is no obligation on any other body, governments included, to finance all other training schemes.²⁴ The granting of paid study leave is not mentioned in para. 10 as it had been in para. 6 (2) of Recommendation No. 77. Furthermore, provisions concerning payment of wages, lodging, meals, unemployment benefit, medical care and recreation during training are absent.²⁵ On the other hand, the STCW Convention deals with mandatory training minimum requirements and does not contain any provisions concerning the organisation and the financing of training schemes.

vi) In the Office draft a provision had been included concerning the minimum age required for entry into training schemes (para. 16 (a); this would have been para. 11 (a) of the final instrument). This provision was deleted by the Working Party during the deliberations of the 1970 Preparatory Conference.²⁶ Reference to minimum age requirements here would have confirmed the need for the co-ordination of national laws and regulations relating to the establishment of a minimum age limit for admission to employment, the school leaving age limit and the minimum age limit for entry into training schemes.²⁷

vii) Para. 12 (f) refers, *inter alia*, to the important question of training in medical care. It should be noticed that by 1967 not many countries had established a compulsory system of training in medical care. Considering that Recommendation No. 137 is an instrument of policy the question of training in medical care is dealt with adequately therein.²⁸ Recent instruments do now draw attention to the need for training in medical care.

viii) The question of the relationship and the establishment of an hierarchy between sea-experience and training (including pre-sea training ashore and training on board training or operating vessels, for which see paras. 21 and 22) is not cleared up in the Recommendation. As far as advanced training is concerned, para. 19 provides that "where training is facilitated thereby, shipowners should release suitable seafarers employed on board their ships for training periods ashore..." Though the shipowner in doing this will take account of the operational needs of his fleet, it seems that there is some kind of obligation (in so far as the Recommendation can contain obligatory provisions) on him

²³55 R.P., p. 106.

²⁴The governments of Australia, Canada, France, the U.K. and the U.S.S.R. objected to any obligation on governments to finance training schemes, G.B. 177/6/6, p. 72. Consequently, the words "where appropriate" were included in para. 10 (2).

²⁵As to these points, see PTMC, 1945, Report VIII, pp. 11-13, 15, 17-18; see also JMC/20/3/1, pp. 17-19.

²⁶G.B./177/6/6, p. 71. Compare para. 4 (2) of Recommendation No. 77.

²⁷See also *supra* Chapter 2, Section 2.1.1.2., pp. 124, 127-128.

²⁸See G.B./177/6/6, pp. 70, 72. Training in medical care is dealt with in two recent international instruments, namely Convention No. 164 concerning Health Protection and Medical Care for Seafarers, 1987 and the Document for guidance, An international maritime training guide, 1985.

to comply with the provisions of para. 19.²⁹ The STCW Convention strikes a balance between sea-experience and training as conditions for the granting of a certificate of competency. Sea-experience is offered as an alternative option to training requirements.³⁰ Finally, the significance of the coordination of national training schemes on a regional basis is recognised in para. 26.³¹

B) Conclusions

Recommendation No. 137 is a more comprehensive and detailed instrument than Recommendation No. 77. Nonetheless, it is a "nationally" oriented instrument, attaching much importance to national training and certification standards.³² Moreover, the instrument has some major drawbacks, particularly the absence of any useful provisions concerning the organisation of the training of "general purpose" crews, the obscure provisions on refresher or retraining courses as well as the lack of any provisions clarifying the role that the undergoing of such courses should play before and during the career of the seaman, unclear provisions concerning the financing of training schemes, and the unwillingness to decide whether or not pre-sea training should be an indispensable preparatory maritime training course. In this respect, as in others, it is clear that the drafters of the Recommendation were reluctant to pronounce themselves for or against specific proposals, with the result that in some instances it serves only as a very general guide for countries wishing to institute a maritime training system rather than offering clear-cut proposals. Compared to the STCW Convention, it has the advantage of being a policy-instrument, thus covering aspects of maritime training not dealt with in the latter Convention. Questions such as the organisation, the financing of training schemes and the promotion of seafarers are not found in the STCW Convention. On the other hand, as regards the issues dealt with in both instruments, these are treated very generally in Recommendation No. 137 in contrast to the STCW Convention, which contains specific proposals. As will be seen later under 3.2.4., questions such as minimum age limits, examination and training syllabi, training programmes and, generally, training standards are dealt with in considerable detail in that Convention. Even in these circumstances, the significance of Recommendation should be not underrated, since it serves as a basis and a guide for countries unable to implement the strict and rigid standards of the STCW Convention.³³

²⁹See 55 *R.P.*, p. 107. Though paras. 21 and 22 touch on the question of pre-sea training ashore or on board training or merchant vessels, they do not attempt to determine the significance of this kind of training in connection with sea-experience nor do they aim to define the role and the possible limits that such training should have within an integrated system of maritime training. It seems that pre-sea training is not a standard in Recommendation No. 137.

³⁰Two amendments by the ICFTU and the U.S. to delete the words "sea-experience" in para. 2 (c) (i) of Regulation II/7 of the draft (para. 2 (d) (i) of Regulation II/6 of the STCW Convention) were not taken into account in the drafting of the final Convention, see STW/CONF/6/14, p. 3 and 6/15, p. 17 respectively.

³¹2 *R.P.*, p. 107.

³²See especially paragraphs 11 and 13.

³³It should be noted that the provisions of Recommendation No. 137 were almost identical with the Conclusions adopted by the Asian Maritime Conference in 1965 and the adoption of this instrument satisfied the aspirations of the developing countries for the institution of a national maritime training system; see for the Proposed Points for Discussion Second Asian Maritime Conference, Tokyo, April 1965, Report II, VOCATIONAL TRAINING OF ASIAN SEAFARERS, pp. 36-44; for the summary of proceedings, the report of the Committee of the Whole on Vocational Training and the Conclusions adopted see *O.B.*, Vol. XLVIII, pp. 268, 269-276.

3.1.4. Maritime training and technical developments on board ship: Recommendation No. 139

Apart from the question of technical developments on board ship in connection with the proliferation of automation on board ship,³⁴ the concern of the seafaring world in the metamorphosis of the organisation of life at sea that these developments would bring about,³⁵ since a change in the allocation or a transformation of duties on board ship would seem imperative, led to the adoption of Recommendation No. 139 concerning Employment Problems Arising from Technical Developments on Board Ship. Here, only Part III, which refers to training and retraining, will be examined.

Para. 9 of Recommendation No. 139 provides that where technical developments on board ship call for reconsideration of training programmes and standards, account should be taken of Recommendation No. 137 concerning the Vocational Training of Seafarers. In this connection, the latter instrument a) stipulates that one of the goals that the national administrations should aim at is to provide the training facilities "necessary in order that technical developments in the fields of operation, navigation and safety can be put into effect" and b) urges governments to include in training programmes "theoretical and practical instruction in the operation, maintenance and repair of main propulsion installations and auxiliary machinery, with emphasis on the type of equipment, including electronic equipment, ...".³⁶ Both provisions, though entirely of a guiding character, are of importance with regard to training in automated equipment on board ship.

Next, paras. 10 and 11 refer to the question of training and retraining of seafarers which is necessitated by technical developments on board ship, while para. 12 provides for the consultation of shipowners' and seafarers' organisations when these developments are likely to affect manning standards or certification requirements.

Again, it should be remarked that the provisions mentioned above are of a very general nature and do not answer or even give guidance on crucial issues concerning the reorganisation of the training and the certification of seamen as result of the introduction of automation on board ship. Certain issues deserve special mention:

³⁴See supra under 3.1.3. A), i) and ii) and notes 15 to 17.

³⁵The social implications of the introduction of automation on board ship can be far-reaching. Automation on board ship would require the training of officers in the handling of new equipment and the training of unskilled workers who want to enter licensed categories. However, trade unions are faced with two problems: a) the financing of training schemes (here, the establishment of training and automation funds would be of great assistance) and b) the lack of agreements governing pension entitlements at an inter-union level. It is reported that many seamen are discouraged from seeking promotion because it would entail moving *de novo* into another pension scheme; see Warner, *op. cit.*, p. 270. Thus, the introduction of automation on board ship and, as a result thereof, of general purpose crews may lead to jurisdictional disputes among trade unions. For an early look at the implications of modern technology in the shipping industry and a brief summary of the 1970 ILO proceedings, see Joseph P. Goldberg, "Seamen and modernisation of merchant shipping", *Monthly Labor Review*, February 1971, pp. 49-54; see also P.B. Buck, "Technological Change and the Merchant Seaman", *ILR*, Vol. 92, No. 4, Oct. 1965, pp. 298-313, especially pp. 305-313.

³⁶Pars 2 (f) and 12 (d) respectively.

i) The determination and the classification of training courses according to the new or revised duties to be assumed by seamen on board automated vessels is not attempted in the Recommendation (for example, training with radar simulator apparatus, training in the use of electronic navigational aids, courses in the elements of control engineering). ³⁷ This means that the functions to be performed by the various categories of seamen should be defined in some detail.

ii) It should be decided whether the technical developments on board ship would affect all seamen without any distinction of status (master, officers, petty officers, junior officers, ratings) or seamen who are employed in all departments of the ship (deck, engine, catering and radio department). Moreover, the Recommendation does not elucidate the problem concerning whether the traditional distinction of crews will be retained or the development of a new type of general purpose integrated crew would result in more effective operation and maintenance of automated ships so that training courses would be adjusted accordingly. ³⁸ Two aspects of the institution of general training courses which would enable a seaman to undertake multiple duties on board ship, should be considered: a) the effect of such courses on reducing or increasing unemployment; and b) whether the undergoing of such courses would facilitate the employment ashore of seamen after a certain period of service at sea. ³⁹

iii) The need for retraining to enable seamen to occupy posts which call for additional training in automation is pointed out in para. 11 of the Recommendation. However, the possibility of re-training redundant employees (as a result of reductions in manning) in one occupation for posts in another should have merited special mention. ⁴⁰

iv) Since Recommendation No. 139 is a policy instrument, it avoids any specific reference to certification standards. As pointed out above, none of the instruments adopted by the ILO lays down conditions for the certification of integrated crews.

Most amendments put forward by the Governments to the part of the Office draft which concerned the training and retraining of seafarers were not accepted on the grounds that they would be more suitable for inclusion in Recommendation No. 137 concerning the vocational training of seafa-

³⁷Most of these training techniques are mentioned in para. 12 of Recommendation No. 137 to which Recommendation No. 139 refers but without any reference to the categories of seamen who should undergo the specified courses or to the impact that this training will have on seamen's certification.

³⁸Compare the amendment submitted by the French Government at the Preparatory Conference in 1970, which read as follows: "Training should be so organised as to enable those trained, including ratings and in certain cases officers, to perform work in all the departments on board ship", see International Labour Conference, 55th session, 1969, Report IV (1), *Problems arising from Technical Developments and Modernisation on Board Ship in connection with ... (b) training and retraining for employment at sea...*, p. 15; see also 55 R.P., pp. 137-138.

³⁹As regards the latter aspect, para. 16 (2) of Recommendation No. 139 provides, *inter alia*, for retraining of seafarers for other industries. It should be noted that, as the text of the paragraph stands (in accordance with the objectives of the Recommendation), retraining for other industries is recommended only when difficulties in adjusting to technical change are encountered by seafarers. No suggestions are made for the retraining of seafarers for other industries as a general means of facilitation of employment of seafarers ashore.

⁴⁰For information on State practice as regards training and retraining necessitated by technical developments on board ship see JMC/20/2, pp. 43-52, 53-54 and PTMC, Genoa, Sep. 1969, Report III, *Employment Problems Arising from Technical Developments and Modernisation on Board Ship*, pp. 49-77, 92-95.

rers.⁴¹ Questions which will have to be considered in the future are i) whether training or retraining of seafarers or both necessitated by technical developments on board ship will form a separate item of the agenda of a maritime session of the ILO Conference or should be included in a revised instrument concerning maritime training,⁴² and ii) whether this instrument should take the form of a Convention or a Recommendation. By 1970 the impact of technology on employment on board ship had not been fully rationalised; it was thought that certain provisions of the Recommendation should be included in an annex thereto or even in a resolution.⁴³ As will be explained later (see Conclusions), the STCW Convention and, especially, certain resolutions adopted by the International Conference on Training and Certification of Seafarers, contain a number of provisions which could provide the basis for the reconstruction of the ILO regulations concerning maritime training in respect of technical developments on board ship.⁴⁴

⁴¹International Labour Conference, 55th session, 1970, Report IV (2), pp. 10-11.

⁴²It will be seen later that quite apart from the training of seafarers all ILO instruments concerning certificates of competency need to be revised. The views of the Shipowners' and the Seafarers' group differed on this point; the former preferred the Vocational Training Recommendation to cover the question while the latter believed that "the new training requirements were not merely an aspect of the general question of vocational training of seafarers but constituted one of the main considerations to be taken into account by governments and shipowners when attempts were made to adjust employment and the organisation of work to the requirements of ships on which new sophisticated methods and equipment were used." ILO Conference, 55th session, Report IV (1), p. 20; see also *ibid.*, p. 13.

⁴³See for discussion, ILO Conference, 55th session, Report IV (1), pp. 4-6, 16, Report IV (2), pp. 3-5, 55 *R.P.*, pp. 136.

⁴⁴See also para. 6 of the Proposed Conclusions on the Implications of Technical Developments for the Vocational Training of Seafarers, *PTMC*, 1969, Report III, *op. cit.*, pp. 103-104. It provided for retraining or adaptation courses for, *inter alia*, seafarers who are transferred to work on three different types of ships: a) automated ships, b) vessels manned by polyvalent or alternating crews and c) specialised vessels such as tankers, bulk carriers and container ships equipped with advanced loading, unloading and stowage equipment and installations. This important paragraph was deleted at the Preparatory Conference, as its inclusion in the Vocational Training Recommendation, No. 137 was thought more appropriate; however, the specific and explicit provisions of that paragraph do not appear in Recommendation No. 137.

3.2. Certificates of competency

3.2.1. Historical review

The 1936 Convention originated in a proposal submitted to the Governing Body of the ILO by the International Mercantile Marine Officer's Association as a result of the legal implications of the decision of the International Court of Justice in the *Lotus* case. In that case a certificated officer was arrested and condemned by a Turkish court for damages and loss of lives resulting from a collision occurred on the high seas between the French liner "Lotus" and the Turkish collier "Boz-kourt". It followed from the decision of the Court that the officers or seamen of the vessel held responsible for the collision would be exposed to criminal proceedings not only before the courts of the country in which the vessel causing the collision was registered but also in the countries to which the other vessel belongs by reason of the asserted extra-territorial competence of their courts with regard to certain offences committed by foreigners and affecting the citizens or property of the other state. The Association pointed out in a letter to the Governing Body that the ILO should not remain indifferent to the question and that it should consider the laying down a) of international rules for the penalties to be imposed and defining the competent jurisdictions in such cases and b) of international standards concerning the professional capacity of officers. The ILO considered that in view of the difficulties that the treatment of the first question would involve (examination of the competence of the ILO with regard to the question, divergencies in national laws) it should only proceed to the international regulation of the second issue.⁴⁵

A) Reasons for the adoption of an international instrument concerning the certificates of competency of officers and ratings

It had been contended that an international attempt to regulate the question of the certification of the seafarers would be useless, since national laws could deal with the matter adequately.⁴⁶ However, an international instrument concerning certificates of competency would constitute international legal obligations requiring ratifying countries to exercise supervision whenever necessary. Moreover, it would bring about uniformity in the legislation of many countries, thus facilitating supervision. The presence of certificated officers and seafarers is desirable both from the aspect of the need for safety of vessels and of the passengers aboard, and as regards the material and moral protection of the crews. The certificate constitutes a proof of the seaman's or officer's competence (both for administrative and supervision purposes) and it would maintain the morale of the crews as it is a recognition of long service at sea or of the completion of a special training course or both.⁴⁷

⁴⁵As will be seen later, the inclusion of a provision for penalties was felt necessary in subsequent instruments concerning certificates of competency. For the incidents, which led to the ILO's involvement and discussion, see 8 *J.M.C.*, pp. 43-45; 9 *J.M.C.*, pp. 11-12, 51; International Labour Conference, 13th session, 1929, Grey Reports, First Discussion, *The Minimum Requirement of Professional Capacity in the case of captains, navigating and engineer officers in charge of watches on board merchant ships*, pp. 1-3.

⁴⁶See the statement of the Netherlands Government delegate in XIII^{ME} Session, Genève, 1929, *Commission du Minimum de Capacité Professionnelle* (hereinafter cited as C.M.C.P.), Procès-verbaux, M.3, p.3.

⁴⁷See 13 *R.P.*, p. 419, 20 *J.M.C.*, pp. 34-35.

B) Preliminary discussions and drafts

i) The preliminary proceedings were characterised by attempts of the Shipowners' group to minimise the impact of the Conventions by moving numerous amendments to the effect, *inter alia*, that the proposed instrument should be a Recommendation rather than a Convention or that questions of detail would be better dealt with in a Recommendation.⁴⁸ Most of these amendments were rejected.

ii) The Office and Committee drafts: a) Convention No. 53.

The first drafts concerning the minimum professional capacity of officers provided that no person shall be engaged on board ship as a master or skipper, navigating officer in charge of a watch, engineer officer in charge of a watch and chief engineer⁴⁹, unless he holds a certificate issued by the competent authority of the country in which the ship is registered. The following conditions must be fulfilled: (a) a minimum age, (b) a certain period of professional experience and (c) the passing of an examination organised by the competent authority. An adaptation period of three years from ratification was laid down, which enabled ratifying countries to issue, under certain conditions, certificates to persons who were not normally so entitled under the Convention. The drafts also provided for sanctions to be applied in cases of contravention of their provisions and laid down that an effective system of supervision must be established in each ratifying country, including the power of these countries to detain a vessel *flying the national flag* in the case where the provisions of the Convention have not been respected, *if the national laws and regulations provide so*.⁵⁰ In general, the Office and the preparatory Committees were preoccupied by questions such as the allowance of exceptions temporary or otherwise, the acceptance of foreign certificated officers, and the nature of supervision and classification of the offences against the provisions of the Convention.

b) Conventions Nos. 69 and 74. Both drafts provided that no person would be engaged as a ship's cook or an able seaman on board ship, unless he held a certificate of competency issued by the competent authority after three conditions have been fulfilled: a minimum age, service at sea for a minimum period and the passing of an examination. The difference between the draft dealing with the certification of able seamen and that dealing with the certification of ships' cooks is that the former contained specific provisions concerning the minimum age to be attained and the practical experience or the training which should be obtained before an able seaman could be issued with a certificate of

⁴⁸For the Shipowners' views in the preliminary discussions, see C.M.C.P./M.5., p. 3; *ibid.*, M.7., p. 7; 13 R.P., pp. 421-422; 21 R.P., pp. 289-291 (as to the 1936 Convention concerning the professional capacity of officers); 28 R.P., p. 76 (as to the 1946 Convention concerning the certification of ship's cooks).

⁴⁹The category of the chief engineer was included during the preliminary discussions as it was pointed out by the Workers' group that it constituted a particular category of officers and should be mentioned separately, 13 R.P., pp. 425, 116-118.

⁵⁰For the early Conclusions and the drafts of the Office and the Committees appointed to deal with the matter, see, *inter alia*, 13 R.P., pp. 417-418, 498-429; International Labour Conference, Report IV, Second Discussion, *The Minimum Requirement of professional Capacity in the case of captains, navigating and engineer officers in charge of watches on board merchant ships*, 1931, pp. 100-105, 21 R.P., pp. 288-289, 291-294.

competency. The latter drafts simply left the matter to the competent authority.⁵¹ Again, the allowance of exceptions proved to be a controversial issue.

3.2.2. The competence of the ILO with regard to the certificates of competency

It has been pointed out earlier that the Secretary General of the IMO was of the opinion that questions of training fell mainly within the competence of the IMO. Here, however, the views of the ILO Office will be examined. At the 13th session of the ILO Conference the Shipowners' group questioned the competence of the ILO to deal with the certification of officers, maintaining that this was rather a matter of safety of the passengers and the cargo and thus was within the competence of the Conferences concerning Safety of Life at Sea.⁵² This view was also supported by certain governments.⁵³ However, the majority of the delegates, including the Workers' group, were of the opinion that the ILO was competent to deal with the question. This was also the firm view of the Secretary General of the ILO. He reminded the delegates during the preliminary discussions and at the plenary meeting of the fact that the provisions relating to the certificates of competency had been included in the Office draft of the Seamen in 1926 and that, though they had not been finally included in the final draft of the Convention, despite an amendment of the Workers' group to that effect, because it was thought that the question was outside the agenda of the Conference, the question of the competence of the ILO had not been raised.⁵⁴

3.2.3. Analysis of the provisions of Conventions Nos. 53, 69 and 74

⁵¹For the drafts concerning the certification of able seamen and ships' cooks, see Preparatory Technical Maritime Conference (henceforth PTMC) 1945, Copenhagen, Report IV, *Food and Catering*, pp. 19-21, 24-25, Report VIII, *Entry, Training and Promotion of Seafarers*, pp. 99-101; International Labour Conference, 28th session, Report IV, *Food and Catering on Board Ship*, pp. 5-6, 32-37, Report V, *Entry, Training and Promotion of Seafarers*, pp. 8-11, 36-43; 28 R.P., pp. 263-264, 266-267 and 276, 279-280 respectively (the first Reports and pages quoted refer to the drafts concerning the certification of ships' cooks).

⁵²Two Conferences had already been held before the end of 1929 in London: one in 1914 and the other in April-May 1929. These Conferences produced two Conventions, which were the predecessors of the 1949, 1960 and 1974 SOLAS Conventions. Art. 48 of the London (1929) Convention for the Safety of Life at Sea provided that "The contracting governments undertake, each for the ships, to maintain, or, if it is necessary, to adopt, measures for the purpose of ensuring that, from the point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned." Though proposals concerning the certification of seamen had been forwarded, it had not been thought necessary at that stage to include any provisions with regard to this matter. The Finnish Government held the view that the ILO was the competent body to draft an instrument concerning certificates of competency, since the above-mentioned article was "very indefinite...simply mentioning that ships are to be sufficiently and efficiently manned, and each ratifying Government being left to see that this provision is applied in respect of its own ships", 21st session, Second discussion, Report IV, 1931, op. cit., p. 12.

⁵³For the views against the competence of the ILO with regard to the question of certificates of competency, see C.M.C.P./M.3, op. cit., pp. 2-4, 13 R.P., p. 420, 118. The Governments, which considered the ILO incompetent to deal with the matter were Netherlands, Denmark, Norway and Sweden. However, the last three governments did not finally oppose the adoption of an international instrument by the ILO Conference, see for discussion 21st session, Report IV, Second discussion, op. cit., pp. 57-59.

⁵⁴C.M.C.P./M.3, op. cit., p. 8, 8 J.M.C., pp. 19-20. At the Conference the Secretary General, Mr Albert Thomas said: "...nous avons communiqué à tous les gouvernements l'inscription de la question actuelle à l'ordre du jour de la présente Conférence. Or, aucun gouvernement n'a contesté, comme il le pouvait d'après le Traité de Paix, la compétence du Bureau. La question est donc jugée. Notre Organisation, en accord avec tous les gouvernements souverains, dans la cadre du Traité de paix, traite une question qui est de sa compétence.", 13 R.P., p. 121.

A) Convention No. 53

1) The scope of the Convention: (a) as to the ships ⁵⁵: even though the Convention does not mention anything about fishing vessels, it is not to be assumed that Convention No. 53, unlike, for example, the maritime Conventions adopted by the 1920 and 1921 Conferences, does not apply to these vessels. The certification of officers in charge of fishing vessels is regulated by Convention No. 53; ⁵⁶ (b) as to the persons included: in Art. 2 (b) and (d) of the Convention, where the definitions of a navigating or engineer officer in charge of a watch are given, the words "any person,... who is for the time being actually in charge of..." are used. These words appear in the final text as a result of many amendments moved at the preliminary stages. Para. 2 of the Conclusions of the Office in 1929 defined those persons as "any person, ...who , for a definite time, is actually and duly responsible for ..." The words "for a definite time" and "actually and duly" had been suppressed in the 1929 Committee, which dealt with the matter, for completely different reasons. ⁵⁷ The Office reinserted the words "actually" and "for the time being" again for other reasons. It wanted to make sure that no other persons "besides the person, who is actually in charge of the watch and on whom rests for the time being the special responsibility" for directing the ship's movements or running the ship's engines are covered by the Convention. ⁵⁸ Consequently, the Office, referring to vessels of a certain kind and of small tonnage, took the view that "there would of course be nothing in the Draft Convention to prevent an uncertificated person being on watch duty and actually doing the work of watch officer so long as he was acting under the immediate charge of the watch." ⁵⁹ However, as will be seen immediately below, when the exceptions to the Convention are discussed, the engagement of uncertificated officers on board vessels of certain types (i.e., sailing vessels) and of small tonnage, under the conditions mentioned above by the Office, is not allowed under the Convention.

2) In Art. 3 of the Convention the engagement of the persons to perform the duties prescribed in Art. 2 is conditional upon the holding of a certificate issued in accordance with the provisions of Arts. 3 and 4 of the Convention. Exceptions are allowed only in case of *force majeure*. Special circumstances, as defined by the national laws and regulations and national considerations, are not sufficient reasons for the allowance of exceptions to the Convention. Japan moved an amendment to the

⁵⁵In ratifying Convention No. 53 the United States stated that "the United States Government understands and construes the words "maritime navigation" appearing in this Convention to mean navigation on the high seas only."; *O.B.* , Vol. XXXIII, p. 129. This interpretation, however, is not correct. Convention No. 53, unlike other ILO Conventions, does not exclude coastal navigation from its application. Maritime navigation within the meaning of Art. 1 of the Convention seems to exclude river or inland navigation but not coastal navigation.

⁵⁶The Shipowners' group was against the inclusion of fishing vessels in the Convention, the Workers' group in favour. Government delegates were divided; see for discussion and the decision taken, C.M.C.P./M.6., pp. 13-17; *ibid.*, M.7., pp. 1-3; 13 *R.P.* , pp. 422-423; 21st session, Second discussion, *op. cit.*, pp. 75-77.

⁵⁷The relevant amendments had been moved by the Japanese Government delegate and the Workers' group. The former thought that the deletion of these words would enable persons not qualified to be in charge of watches under the control of certificated officers on board vessels of small tonnage. The latter aimed at the presence of a qualified person on board ship at all times, who could not be replaced by an uncertificated person in any case, see C.M.C.P./M.6., pp. 9-11.

⁵⁸21st session, Report IV, *op. cit.*, pp. 64-65.

⁵⁹*Ibid.*, p. 79.

effect that exceptions should be allowed a) in special circumstances which shall be regulated by the national regulations and b) in certain cases (according to the kind of ships, for example, sailing ships, area of navigation, small tonnage etc.), if an uncertificated officer is under the supervision of a competent officer holding due certificates. The amendment was rejected,⁶⁰ with the result that the engagement of uncertificated persons to perform duties of a master, chief engineer or of a deck and engineer officer in charge of a watch on board any kind of ship engaged in any kind of trade (apart from the vessels excepted under Art. 1 of the Convention) is prohibited under the Convention even if these persons are supervised or act under instructions of duly certificated officers.⁶¹

3) Art. 4 of the Convention lays down three conditions for the granting of a certificate of competency for officers by the competent authority⁶²: a) minimum age; b) professional experience; and c) the passing of a test prescribed by the competent authority. Unfortunately, the provisions of Art. 4 are very general leaving the details of their application to the national law of the ratifying country. It would have been better if the Convention had prescribed a minimum age limit, the period of professional experience required for the granting of the certificate, and had laid down in detail the particulars of the examination and the contents of the training syllabi. As regards the first two conditions, Convention No. 74, adopted in 1946, contains more elaborate and detailed provisions. In 1936 the Office had not yet decided to embark on a brave and original regulation of the question of seamen's certification internationally (this was due, *inter alia*, to the hostile attitude of certain governments and the Shipowners' group) but confined itself to the enunciation and the recognition of a general principle.⁶³ This happened despite the availability of concrete proposals urging for a more detailed regulation of the question.⁶⁴ Art. 4 is not satisfactory in two other respects: i) since the ILO had not yet adopted by 1936 an instrument on training, training as an additional requirement or as a substitute for the professional experience required by Art. 4 (1) (b) is not mentioned; and ii) medical examination of the candidates as an indispensable condition for the granting of the certificate is not required.

4) Art. 5 of the Convention deals with supervision. Art. 5 (1) imposes on ratifying countries the obligation to establish an effective system of inspection. In this paragraph only a general principle is laid down.⁶⁵ The question arises concerning the content of the system of supervision and, in particular, whether ratifying countries will be empowered under the Convention to detain vessels whose

⁶⁰Conférence Internationale du Travail, XXIIe Session, 1936, *Commission du minimum de capacité professionnelle*, Procès-Verbaux (henceforth C.M.C.), 5th meeting, pp. 2-5.

⁶¹The question of the exceptions with regard to the required number of the certificated officers on board ship will be considered later.

⁶²According to Art. 3, para. 1 of the Convention the certificate of competency need not necessarily be issued by the competent authority if it has been approved by it.

⁶³See 13th session, First discussion, op. cit., pp. 4-5, C.M.C.P./M.3., p. 9 (speech of the Secretary General).

⁶⁴21st session, Report IV, op. cit., pp. 82-83.

⁶⁵This is a welcome provision in itself, since other early ILO maritime Conventions had not expressly imposed on ratifying countries such obligation; see, for example, the Conventions concerning Minimum Age and Medical Examination.

officers do not hold the certificates required by the Convention. An important issue had been raised during the preliminary discussions viz: whether the power of detainment would encompass foreign vessels as well or only vessels registered in the territory of the ratifying country.⁶⁶ After the replies of the Governments on the specific point had been received,⁶⁷ the Office decided a) to limit the power of the ratifying countries to detain a ship not carrying duly certificated officers to national vessels and b) that in case of foreign vessels the consul of the Flag-State should be informed. National regulations would determine the cases where the competent authority can detain national vessels (Art. 5 (2)). The question of the detainment of foreign vessels registered in a country which has not ratified the Convention was not even considered. The Office relied on maritime practice and the general international law in the case of a foreign vessel not carrying duly certificated officers that passes through the territorial waters or calls at a port of a ratifying country.⁶⁸ Compared to the supervision procedures of instruments which will be examined later, it is clear that Art. 5 of the Convention is far from radical and does not aim at establishing an effective network of supervision at the international level. The power of detention is reserved to the authorities of the flag State. Moreover, the system of inspection depends entirely on the national regulations.⁶⁹ If there were no other instruments concerning the certification of masters and officers, Convention No. 53 would have to be revised in this respect but the STCW Convention dispenses with this procedure. On the other hand, admittedly the Conference could not have done much more. It is impossible to lay down in a Convention a comprehensive system of co-ordinated supervision of certificates of competency when the conditions for the granting of such certificates are not prescribed in detail therein; and (this is another disadvantage of the Convention) Convention No. 53 does not contemplate the establishment of an international certificate of competency for officers. As to the penalties and disciplinary measures envisaged in Art. 6, it should be noted that an uncertificated person who performs the duties of a certificated officer, is *not* penalised, the reason for this being that he might be subject to penalties for breach of discipline if he is ordered to do this by the master and does not obey.⁷⁰ Finally, the withdrawal or the suspension for a certain period of the certificate of competency of an officer in cases of serious breaches could have been contemplated.⁷¹

⁶⁶It was pointed out that in certain cases, for example, where consular authorities of the country of the flag do not exist in a port, the authorities of the Port State would have the right to intervene, see C.M.C.P./M.7., p. 10.

⁶⁷24 countries replied to the questionnaire, see 21st session, Report IV, op. cit., pp. 46-51.

⁶⁸Ibid., p. 91.

⁶⁹Some countries have decided to improve the supervisory effect of Art. 5, para. 3. In ratifying Convention No. 53 the United States stated that "Nothing in this Convention shall be so construed as to prevent the authorities of the United States from making such inspection of any vessel referred to in Art. V, paragraph 3, within the jurisdiction of the United States, as may be necessary to determine that there has been a compliance with the terms of this Convention, or to prevent such authorities from withholding clearance to any such vessel which they find has not complied with the provisions of the Convention until such time as any such deficiency shall be corrected"; *ibid.*, O.B., Vol. XXXIII, p. 130.

⁷⁰C.M.C./P.V./5., pp. 8-9.

⁷¹For this question see *infra* Chapter 6, Sections 6.2.1. C), p. 465; 6.2.2., pp. 468-469; 6.3. C), pp. 481-482.

5) Two last observations can be made: a) the number of certificated officers required on board the vessel is not regulated by Convention No. 53 as this was thought to be outside the agenda of the Conference.⁷² Thus, under Convention No. 53 the officers mentioned in Art. 3 must hold a certificate issued by the competent authority but there is nothing in the Convention to prevent the shipowner from engaging a smaller number of certificated officers than that required by the type of the vessel and other relevant factors nor does the Convention require national law to make a provision concerning the number of officers required. The Convention leaves this matter to the instruments concerning manning and the associated question of the hours of work;⁷³ and b) no provision is made for "equivalent" certificates. This resulted again from the fact that the Conference was unable to produce a Convention which would define with more precision the conditions for the granting of an "international certificate of competency". Though the Office thought it premature to deal with this matter,⁷⁴ it is to be regretted that in an international instrument the recognition of foreign certificated officers is left to national law or to bilateral agreements.⁷⁵

B) Convention No. 69

Convention No. 69 makes the engagement of ships' cooks on board ship conditional upon the holding of a certificate issued or approved by the competent authority. Not every person employed in the galley has to be certified, only the person who is actually in charge of the cooking is required to be in possession of a due certificate.⁷⁶ The observations made above under 3) with regard to the Officers' Competency Certificates apply to Convention No. 69: The Convention recognises a general principle. The detailed application of this principle is left to the competent authorities in each country. Furthermore, the following observations can be made:

1) The question of penalties and supervision was completely disregarded during the preliminary discussions, with the result that the Convention does not contain any enforcement provisions.

2) Though the question of training was discussed in the Committee on Entry, Training and Promotion it was nearly ignored in the Committee on Food and Catering. Thus, training does not appear as a requirement for the granting of a ship's cook certificate and may cause certain countries in which this condition is compulsory to adopt a less positive attitude towards the Convention.⁷⁷ The Convention should be revised to take account of training requirements (particularly, of the relationship

⁷²C.M.C.P./M.4, pp. 2-4; M.8., pp. 6-7.

⁷³However, as will be seen in Chapter 4, these instruments do not deal with the question of manning in connection with the question of certificates of competency.

⁷⁴13th session, First discussion, op. cit., p. 106.

⁷⁵It is another question whether the engagement of such officers on board national vessels is authorised. This will depend on whether the country concerned makes available for foreign officers the same facilities for employment as those available for nationals. As to this point, see *supra* Section 2.2.1.4.1., pp. 156-159; see also pp. 168, 171, 173-174.

⁷⁶PTMC, 1945, Report IV, op. cit., p. 19.

⁷⁷An amendment by the U.S. Government (the U.S. has not ratified the Convention) proposing to insert in Art. 3 (2) of the Office draft (Art. 4 (2) of the Convention) a new para. (d) which read: "(d) he has previously satisfactorily completed a training course approved by the competent authority" was submitted to the Committee on Entry, Training and Promotion for further action, see 28 R.P., p. 261. No action was taken on it, however. There is merely a cursory reference to training in para. 4 of Art. 4.

between training and professional experience) which must be satisfied before a certificate of competency can be issued to a seaman.

3) Instead of providing for the case of *force majeure* as Convention No. 53 did, Convention No. 69, Art. 3, para. 2, lays down that exemptions can be granted by the competent authority if in its opinion there is an inadequate supply of certificated ships' cooks. This provision is framed in better terms than either Art. 3 (2) of Convention No. 53 or the original amendment submitted by the Employers' group at the Conference,⁷⁸ as the maritime expression "force majeure" is limited by Art. 3, para. 2 to one situation only (shortage of certificated cooks) and the power to allow an exemption lies solely with the competent authority.

4) Convention No. 69 contains the kind of provision that should have been included 10 years earlier in Convention No. 53 concerning the Officers' Competency Certificates. Art. 6 provides that "the competent authority may provide for the recognition of certificates of qualification issued in other territories." Despite its permissive character, this provision at least encourages the States to accept other certificates of competency but it is doubtful whether it dispenses with the need for bilateral agreements since again Convention No. 69 does not contemplate an international certificate for ships' cooks.

C) Convention No. 74

In the beginning the Office thought that two different courses of action were open to it: it could either draft an instrument laying the minimum conditions for the granting of a certificate of competency for able seamen or prohibiting the employment of uncertificated able seamen. The Office submitted two texts to the Copenhagen Conference for consideration. All the members of the Committee on Entry, Training and Promotion at that Conference agreed to a draft making the engagement of able seamen on board ship conditional upon the holding of a certificate of able seaman in accordance with the provisions of the Convention.⁷⁹

1) It is important to notice that, unlike Convention No. 53, the Certification of Able Seamen Convention does not apply to the engine department as the Office thought that the regulation of the certification in this department would present considerable difficulties.⁸⁰ Furthermore, it is not clear whether the STCW Convention covers this category of seamen (able seamen in the engine department). Though Regulation III/6 does not expressly exclude able seamen, as Regulation II/6 does, it is presumable that "Ratings Forming Part of an Engine Room Watch" (Reg. III/6) or the "Assistant Engineer Officer" (Resolution 9)⁸¹ do not correspond to the definition of an able seaman in Art. 1 of Convention No. 74, namely a person "competent to perform any duty which may be required of a

⁷⁸28 R.P. , pp. 78-79.

⁷⁹PTMC , 1945, Report VIII, op. cit., pp. 80-87; 28th session, Report V, op. cit., p. 23.

⁸⁰PTMC , 1945, Report VIII, op. cit., p. 80.

⁸¹According to Regulation I/1 (j) "Assistant Engineer Officer" means a person under training to become an engineer officer and designated as such by national law or regulations.

member of the crew serving in the *engine*⁸² department. The minimum requirements for the certification of these three categories of seamen (ratings forming part of an engine room watch, assistant engineer officer and able seaman) are totally different (for example, the minimum age limit is set at 16, 17 and 18 years respectively). If it is thought desirable that a special category for the able seaman in the engine department should be designated minimum requirements for the granting of the certificate of competency should be laid down in an international instrument. The STCW can serve as an example for the classification of different types of engine and fuel used.

2) Convention No. 74 differs from previous Conventions concerning the certification of seamen in that it prescribes in more detail the minimum conditions for the granting of the certificate of competency (Art. 2 (3) (4) and (5)). The reference to the lifeboatman's certificate is welcome, since it would enhance the efficiency of the able seaman. However, the reference to Art. 22 of the 1929 SOLAS Convention no longer stands. Until 1978 the question of the certification of lifeboatmen had been dealt with in the SOLAS Conventions.⁸³ Since the adoption of the STCW Convention the 1974 SOLAS Convention, as amended by the 1978 Protocol and the 1981 and 1983 Amendments, no longer contains a provision concerning the certification of lifeboatmen; it simply refers to the STCW Convention.⁸⁴ Consequently, Art. 2 (5) of Convention No. 74 should be revised to refer either to the SOLAS Conventions adopted before 1978 or to Regulation VI/1 (Chapter VI) of the STCW Convention.⁸⁵

3) Though the provisions of paras. 3-5 of Art. 2 of Convention No. 74 are more specific than the provisions of other relevant ILO Conventions, still they can be further improved by providing that medical examination of an able seaman should be a condition precedent for the granting of the certificate; and by requiring that an able seaman should have experience or training in certain matters (Regulation II/6 of the STCW Convention could serve as the minimum and Regulation II/4 as the maximum basis for discussion).⁸⁶ The question of the relationship of sea experience and training (whether pre-sea or on board) should be reconsidered. The Convention does not offer the ratifying countries the possibility of providing in their national legislation for training, as an alternative requirement to sea experience, as a precondition of the granting of the able seaman's certificate. The United States Government had a strong view on this point. Normally its national law at the time would not enable it to ratify the Convention.⁸⁷ Though a declaration of the U.S. Government dele-

⁸²The word "engine" is substituted for "deck" since Convention No. 74 only applies to the deck department.

⁸³See Chapter III, Regulation 32 (c) of the 1960 SOLAS Convention.

⁸⁴See Chapter III, Regulation 3 (1) of the 1974 SOLAS Convention as amended.

⁸⁵It should be noted that the provisions of the STCW Convention impose stricter obligations on the ratifying countries than those of the SOLAS Conventions.

⁸⁶The Appendix to Section 26 of the 1985 Document for Guidance provides that able seamen, before they are eligible for an able seaman certificate, should, in addition to holding an appropriate certificate of proficiency in survival craft (Section 11 of the Document), receive training in at least certain subjects, *inter alia*, fire-fighting, first aid, knowledge of certain navigation devices, ability to keep a proper lookout, etc.

⁸⁷For example, for graduates of approved school ships no further experience was required in US law; see *PTMC*, 1945, Report VIII, op. cit., p. 84. The issue of the relationship between training and sea-experience as prerequisites for the

gate⁸⁸ enabled it later to ratify the Convention, when the question of vocational training was discussed in the 1969 Preparatory Conference the same Government contended that the Convention was out of date.⁸⁹ The according of greater significance to the role of training as a precondition for the granting of the certificate is reflected in recent developments in the field of vocational training of seafarers.⁹⁰

4) Unlike other similar Conventions, Convention No. 74 does not contain any provisions relating to exceptions in cases of *force majeure* or in cases where there is an adequate supply of able seamen. Nor can it be sustained that such an exemption is implied.⁹¹ Convention No. 74 permits no exceptions and, therefore, a ratifying government is under an obligation to comply strictly with the provisions of the Convention, with the result that it might decide to ignore manning standards if it intends to render them ineffective.⁹²

D) Resemblances and differences between the various ILO maritime Conventions concerning the certification of able seamen

There are four common characteristics of Conventions Nos. 53, 69 and 74 of which one only constitutes a successful attempt to regulate the question of the certification of seamen: the engagement of officers, ships' cooks and able seamen is conditional upon the holding of a certificate issued in accordance with the provisions of the Conventions. There are, however, three disadvantages common to the Conventions: i) they do not aspire to establish an international certificate of competency for the categories of seafarers covered by them.⁹³ A uniform model certificate, apart from the uniformity it would bring about, would facilitate supervision; ii) with the exception of Convention No. 74, the lack

granting of a seaman's certificate was also pressed at the Conference Committee where the U.S. Government moved an amendment to that effect; see 28 *R.P.*, p. 273.

⁸⁸For this declaration see *ibid.*, p. 274. The U.S. Government withdrew the third paragraph of the amendment which it had put forward in the Conference Committee (proposing the grant of certificates to persons with a period of actual sea service of not less than 12 months on deck) on the understanding that the limited category of the so-called "blue ticket" able seamen were considered to have an intermediate rating which was outside the scope of the Convention.

⁸⁹The first two paragraphs of the U.S. statement were as follows:

"ILO Convention No. 74 adopted by the ILO Conference at its 28th Session in 1946, substantially restricts the use of training as a means of qualifying young men with no prior sea experience for certification as able seamen.

This 23-year-old Convention is currently out of date and completely unrealistic in the limits it places on the combination of prior sea service and training prescribed for granting certification as able seamen." The U.S. government was in favour of a 12-months sea service requirement together with appropriate maritime training; for the U.S. statement see G.B. 177/6/6, pp. 72-73; see also 55th session, 1970, Report VI, p. 13. However, it should be noted that this view was no more than a slightly altered version of that taken by the U.S. on the subject in 1946; see *PTMC*, 1945, Report VIII, *op. cit.*, p. 84.

⁹⁰See para. 2 (c) of Regulation II/4 and para. 2 (c) (ii) of Regulation II/6 of the STCW Convention.

⁹¹28 *R.P.*, p. 116; the reason for the non-allowance of the waiver clause was that the Convention does not provide for manning requirements and, therefore, uncertificated seamen could be employed if no able seamen were available. This point, of course, applies to all Conventions concerning the certification of seamen but it was pressed for the first time by the Government delegates of U.K. and Panama at that stage of the 1946 Conference. The Panamanian delegate said: "The position is that no one can be employed as an able seaman unless certificated. Therefore, unskilled seamen can be taken on as such without contravention of the terms of the Convention as such.", *ibid.* It is submitted that this interpretation is legally correct.

⁹²See the opinion of the Government delegate of Panama in the previous footnote.

⁹³Though this possibility was considered by the Office, no final decision has been taken on this point; see 21st session, Report IV, *op. cit.*, pp. 37, 85.

of precision in the provisions of the Conventions could make them valueless, and iii) there is nothing in the Conventions which would prevent ratifying States from evading manning standards and rendering the certification requirements laid down in them meaningless.

The main difference relates to the provision for penalties and supervision. Such provision is made only in Convention No. 53. Though the employment of uncertificated masters or officers on board ship may constitute a grave offence compared to the engagement of unskilled ratings, there is no reason why disciplinary or even (in serious cases) criminal offences should not be prescribed against offenders in both cases.⁹⁴ Moreover, the Officers' Competency Certificates Convention does not provide for the recognition of certificates issued in other territories. The differences between Conventions Nos. 69 and 74 (no exceptions are allowed, training has been allotted a more important role and more detailed standards are laid down in the latter Convention), though adopted at the same Conference, can be attributed mainly to the fact that the two draft Conventions were discussed in different Committees (the Committee on Food and Catering and the Committee on Entry, Promotion and Training respectively). Unfortunately, there was a lack of coordination between the two Committees.

⁹⁴For example, if a shipowner or a master employs on board ship an uncertificated able seaman. It should be noted that though the STCW Convention contains provisions concerning supervision the question of penalties imposed by the flag-State has not been dealt with therein.

3.2.4. Other instruments relevant to the certification of officers and ratings

A) International Convention on Standards on Training, Certification and Watchkeeping for Seafarers, 1978

It was pointed out earlier that the joint deliberations of the ILO and the IMO through the joint ILO/IMO Committee resulted in the adoption of the STCW Convention by the IMO.⁹⁵ This Convention does not apply to able seamen and to ships' cooks. For a number of reasons it opens a new era in the regulation of the certification of seafarers:

1) For the first time training and certificates of competency dealt with in one instrument thus emphasising and upholding the close connection between the two questions.⁹⁶ The instrument is much more comprehensive than the relevant ILO Conventions which, compared to the STCW Convention, can be said to be Conventions merely laying down policy; *inter alia*:

i) The STCW provides for a more elaborate classification of officers and ratings on board ship. The category of the chief mate (Regulation I/1 (f)) is introduced in the deck department and the requirements for the certification of the master and the chief mate on board ship are distinguished from those of officers of lower rank. In the engine department the categories of the second engineer officer and the assistant engineer officer are regulated (Regulation I/1 (i) and (j)).⁹⁷ The minimum requirements for certification of the chief and the second engineer officers on the one hand and the engineer officers in charge of the engine room watch on the other are different. Assistant engineer officer is placed in a special category. The Convention regulates the certification of ratings in the engine and the deck department of a rank lower than that of the able seaman;⁹⁸ it contains provisions concerning the training and certification of seafarers in the radio department (Chapter IV);⁹⁹ finally, it provides for training in and the certificates of proficiency in survival craft (Chapter VI and Resolution 19). All these questions are outside the scope of the relevant ILO Conventions.

ii) It contains more detailed provisions as to the type of ships to which it applies. There are special requirements for tankers (Chapter V), for ships carrying hazardous cargo (Regulation II/8); Resolutions Nos. 1-20 contain detailed provisions on matters dealt with in the Regulations of the Convention. Though most of these matters are not outside the scope of relevant ILO instruments they

⁹⁵For an account of this Convention and the relevant resolutions, see S. Mankabady, *The International Maritime Organisation*, 1986, Vol. I, pp. 176-195.

⁹⁶The ILO has adopted a different method: the question of certification of seafarers has been dealt with in three Conventions, and separate Recommendations have been adopted for the purpose of providing guidance for training; see also *supra* note 89 for the opinion of the U.S. Government.

⁹⁷See Resolution 9: "Recommendation on Minimum Requirements for a Rating Nominated as the Assistant to the Engineer Officer in Charge of the Watch" adopted by the 1978 Conference.

⁹⁸However, it does not go as far as to lay down manning requirements or to link safety and social considerations; compare Regulation II/1 of the STCW Convention with the text of the ILO Seafarers' members of the Joint ILO/IMO Committee on Training; see JCT III/4, ANNEX III, p. 1.

⁹⁹See also Resolutions 5, 6, 7, 14 and 15. Although the development of the Future Global Maritime Distress and Safety System (FGDMSS) by the IMO was said to dispense with the presence on board ship of fully trained radio officers, a decision was taken at the World Radio Administrative Conference (Mobile Services) of the International Telecommunications Union to the effect that a Radio/Electronic Officer's Certificate, either 1st or 2nd class, would be required on all deep sea ships; "ITU decision seen by ITF as major victory for maritime safety", *SLB*, 4/87, p. 649.

are not even mentioned in them.¹⁰⁰ Classification of types of ships and engines in the STCW Convention is elaborate and in the engine department the criterion of the propulsion power of the engine was preferred to that of gross registered tonnage¹⁰¹ (deck: less than 200 grt, 200-1600 grt, and 1600 grt or more; engine: propulsion power between 750 and 3000 kW, 3000 kW or more). Then, the minimum requirements for the certification of masters, chief mates and certain officers vary according to the type of ship or engine.¹⁰²

iii) There is a detailed enumeration of the requirements of minimum knowledge, examinations and training syllabi for the certification of masters, chief mates, officers and certain ratings. Definite minimum periods of sea experience and/or training are laid down as requirements for the granting of a certificate of competency. Minimum age as a minimum requirement for the granting of a certificate is laid down specifically in the Convention and this matter is not left to national law as is the case with Conventions Nos. 53 and 69.¹⁰³

2) The STCW Convention provides for updating or refresher courses, thus successfully answering the question of whether the certificate will be valid after the master or the officer concerned has spent some time on shore before returning to sea or, even when he is serving at sea, technological or other changes have necessitated further special training. Medical examination appears as a requirement for the granting of the certificate of all masters, officers and ratings covered by the Convention and for the continued proficiency and updating of the knowledge of masters and officers.

¹⁰⁰For example, the question of the certification of radio operators is not dealt with in any ILO instrument; see Resolution 7 of the STCW Convention.

¹⁰¹Compare Art. 1, para. 2 of Convention No. 53. It should be remembered that one of the reasons why Convention No. 74 does not apply to the engine department is that no generally acceptable classification of types of engine could be arrived at.

¹⁰²There are also special provisions concerning mandatory minimum certification requirements for officers engaged on board ships engaged on near-coastal voyages, which are generally lower than those laid down for officers engaged on ships not engaged on near-coastal voyages. The Sub-Committee on Standards of Training and Watchkeeping (subdivision of the Maritime Safety Committee) has prepared guidelines for the application of principles governing near-coastal voyages under Regulation I/3 of the STCW Convention; see STW 18/WP.5/Rev.1. However, the definition of a "near-coastal voyage" is determined by the Administration and a proposal that the guidelines should recommend that, if a Party to the STCW Convention includes voyages off another Party's coast within the limits of its definition of a "near-coastal voyage", it should inform the IMO of the details, was not supported; IMO, *Sub-Committee on Standards of Training and Watchkeeping*, 19th session, 9-13 September 1986, STW 19/13, p. 6.

¹⁰³The periods of sea experience and training and the minimum age limits vary according to the rank of the seafarer and the type of ship or engine. As an indication, the minimum age requirements are a) 16 years for the ratings forming part of a watch in the deck and engine department [Regulations II/6 para. 2 (a) and III/6 para. 2 (a) respectively]; b) 17 years for the rating nominated as the assistant to the engineer officer in charge of the watch [para. 1 (a) of the relevant Recommendation in Resolution 9]; c) 17 1/2 years for a seafarer issued with a certificate of proficiency in survival craft [Regulation VI/1 (a)]; d) 18 years for all officers other than the master and the chief mate in the deck department, for engineer officers in charge of an engine room watch, for radio officers, radiotelephone operators and radio operators [Regulations II/3 para. 2 (b) (ii) (1), II/4, para. 2 (a), III/4 para. 2 (a), IV/1 para. 2 (a), IV/3 para. 2 (a) and Resolution 7: "Recommendation on Minimum Requirements for Certification of Radio Operators" para. 2 (a) respectively]; e) 20 years for the master of ships less than 200 grt engaged on near-coastal voyages [Regulation II/3 para. 2 (a) (ii) (1)]. For the officers of higher rank, chief mates, and masters other than that specified under e) an additional period of sea experience or sea experience and training is required from the age of 18. A proposal to substitute 23 and 20 years for the minimum age limits prescribed in Regulation II/3 was rejected, see STW/CONF/6/2/, p. 1. It should be noted that in the STCW Convention sea experience is considered so important in the case of officers that it cannot be substituted completely by undergoing special training. Only in the case of ratings forming part of a navigational or an engine room watch training can be a substitute for sea experience.

None of the relevant ILO instruments contains similar provisions with the result that a) if a country wishes to impose a requirement of medical examination for the granting of a certificate it will have to ratify not only one of Conventions Nos. 53, 69 or 74 but also Convention No. 73 in which case it might feel that an undue burden is imposed on it by Art. 5 (1) of the last Convention;¹⁰⁴ and b) the provisions of the ILO instruments do not shed any light on the question of the validity of the certificates.

3) A very important feature of the STCW Convention is that it establishes for the first time a uniform international model of certificates of competency having a standardised title (see Art. VI (2) and Regulation I/2)), thus greatly facilitating supervision.¹⁰⁵ Any requirements concerning the physical characteristics of the seaman are justifiably not contained in the model form but whether the same is true for the photograph of the certificated officer or seaman is questionable. It is certain that the affixation of a photograph to the certificate would provide an additional and reliable means of identification of the certificated person. The Convention could have provided a solution in cases where after the lapse of some time the correspondence of a seaman's physical characteristics to the photograph is doubtful; it could have required the "Administration" to update the certificate in respect of the photograph at fixed intervals. Alternatively, no photograph at all would need to be provided if the correct connection with Convention No. 108 concerning the seafarer's identity document were established. Art. 4 (3) (e) of the latter Convention includes as an indispensable requirement for the issue of the document the photograph of the seafarer. If in the certificate of competency reference was made to the number of the identity card issued under Convention No. 108 or, alternatively, to the number of passport or discharge book where appropriate, the identification of the certificated person would present no difficulties.¹⁰⁶ Unfortunately, the STCW Convention does not do this. Account should be taken of this point in giving effect to Resolution 21 which provides for the development of a standard form and title for an international certificate of competency.

4) It is clear that under the Convention only certificates issued under Art. VI and Regulation I/2 of the Annex thereto are recognised; no equivalents with regard to the issue and the form of the

¹⁰⁴A country will have the option in relation to certification of officers either of ratifying the STCW Convention or Conventions Nos. 53 and 73. The advantage of the first solution is that a ratifying State can provide for medical examination every five years (Regulations II/5, para. 1, III/5 para. 1) instead of every two, as required under Convention No. 73. On the other hand, the second solution offers the ratifying state the possibility of not having to adopt specific minimum requirements for the granting of the certificates of officers.

¹⁰⁵See the opinion and the proposals of the League of Arab States in STW/CONF/7/1 and 2; STW/CONF/SR/2 at p. 9. The detailed proposals of the League of Arab States have not been endorsed by the Conference in their entirety. The delegations of other countries were divided on the question: Germany, Japan were against the unified form of the certificate of competency; the U.S. in favour. Other countries, though not opposed to the proposed model form of the certificate, either insisted on the certificate including additional means of identification (e.g. Canada, a photograph) or questioned the value of the photograph and the reference to the physical characteristics which are subject to change (GDR, New Zealand); see STW/CONF/7, 7/3, SR/2, p. 10, 7/4, 7/5, 7/6 and 7/7 respectively.

¹⁰⁶However, it should be remembered that Convention No. 108 does not establish an international model seafarer's identity card and, therefore, reference to the numbers of the documents issued by the various national "competent authorities" might lead to confusion. It would be otherwise if that Convention aimed at the establishment of a uniform identity card; for comments on this point see *supra* Chapter 2, Section 2.3.3., at p. 204.

certificates are accepted.¹⁰⁷ On the other hand, this requirement is counterbalanced by the availability of transitional provisions and dispensation facilities. For a period of five years a party may continue to issue certificates of competency in accordance with its previous practices.¹⁰⁸ Art. VIII of the STCW Convention deals with dispensation. No ILO instrument concerning the certification of seafarers contains similar provision. Many amendments were moved to clarify the purpose and to improve the wording of Art. VIII. Of particular importance was the amendment proposed by the government of New Zealand to the effect that the number of dispensations granted should be restricted.¹⁰⁹ This amendment did not find its way into the Convention with the result that there is no limit to the number of dispensations granted on board the same vessel. It is beyond doubt that the exceptions allowed under the relevant ILO Conventions are of more limited a nature: Conventions Nos. 53 and 69 allow, in fact, exceptions only in cases of *force majeure* (dispensations solely in cases of *force majeure* are granted only to masters and chief engineer officers under Art. VIII (1) of the STCW Convention) while Convention No. 74 contains no exceptions at all. Generally, the system of dispensation is unknown in ILO maritime terminology and its use should be avoided.

B) The 1974 SOLAS Convention as amended by the 1978 Protocol and the 1981 and 1983 SOLAS amendments.

Apart from the supervision procedures which are discussed later under Section 3.2.5. A), the SOLAS Convention contains a number of provisions the inclusion of which may be considered useful in a future revision of the ILO instruments concerning the certification of seafarers:

a) Regulation 13 of Chapter I provides for the issue of a certificate (it should be remembered that the certificates of the SOLAS Conventions are ship certificates and not certificates of persons, since it is the STCW Convention and the relevant ILO instruments which mainly concentrate on the human factor) by another contracting government at the request of a country, which is a party to the Convention, in which the ship is registered. As many developing countries send seafarers abroad for training, the inclusion of a provision similar to this regulation in an instrument concerning the certification of seafarers would facilitate the certification of those seafarers. Thus, these developing coun-

¹⁰⁷Art. IX which deals with "equivalents", refers only to "other educational or training arrangements" and not to certificates of competency. An amendment by Canada and the U.S. to add at the end of Art. VI the words "or in accordance with Art. VII were rejected; see STW/CONF/5/9, p. 2 and 5/10, p. 2. Moreover, the certificates issued under Art. VII (Transitional Provisions) shall be recognised "as valid" for a period of five years but not as "equivalent" to the ones issued under the provisions of the Convention; see CONF/5/9, p. 3.

¹⁰⁸During this period national practices do not have to be in compliance with the provisions of the Convention. Furthermore, the 5-year period does not run from the date of its coming into force but from the date of entry into force of the Convention for the country concerned; see relevant amendments by Canada and the U.S. which were not taken into account STW/CONF/5/9, p. 3, 5/10, pp. 3-4. Compare the more restrictive wording and the lesser period of Art. 4 (3) of Convention No. 53 and Art. 5 of Convention No. 69. No similar provision is met in Convention No. 74.

¹⁰⁹STW/CONF/5/12.

tries will not be burdened with the task of instituting a system of certification of national seafarers which may require the provision of funds not available in these countries. ¹¹⁰

b) Regulation 17 of Chapter I establishes in clear terms the obligation of other contracting governments to accept certificates issued under the Convention by the authorities of a Party to the Convention. As pointed out earlier, the fact that the ILO instruments dealing with the question of certification of seafarers did not aim at the establishment of an international certificate prevented the Office and the delegations from allowing such binding provision in the text of the Conventions. ¹¹¹ If these instruments are revised along the lines suggested later (see Conclusions), the inclusion of this provision will not present any difficulties. However, the STCW Convention is not unambiguous in this context: despite the spirit of this Convention (the 'international model' form of the certificate in Regulation I/2 aims, *inter alia*, to facilitate supervision and it would thus be senseless were certificates issued by other contracting governments not to be recognised) and of certain provisions, like Art. X (1), which provides that for the purposes of control the certificates issued under the Convention "shall be accepted...", unlike the SOLAS Convention, no clear provision is made for the recognition of certificates issued under the provisions of the Convention by other ratifying countries. Moreover, para. 1 (a) of Regulation I/4 of the former Convention says that control shall be exercised to verify "that all seafarers serving on board who are required to be certificated by the Convention hold *a valid certificate ...*" and under Art. II (c) of the same Convention "certificate" means a valid document issued by or under the authority of the government whose flag the ship is entitled to fly or "*recognised* (by such government) *authorizing the holder to serve as stated in this document or as authorised by national regulations.*" ¹¹² Consequently, there is no clear obligation imposed by the Convention on ratifying countries to recognise certificates issued by other contracting governments. Moreover, even if such an obligation does exist, the wording of Art. VI (1), which imposes on the flag State the obligation to *issue* officers or ratings with certificates if the requirements laid down by the Convention are met, is far from satisfactory. ¹¹³

c) Regulation 13 of Chapter V together with Resolution A. 481 (XII) adopted by the IMO provide for manning. As pointed out earlier, the question of manning was considered to be outside the agenda of the ILO Conferences which adopted the instruments concerning certificates of compe-

¹¹⁰The STCW Convention does not contain a similar provision, though Art. VI (1) does not exclude the certification of foreign seafarers if the requirements of the Convention for such certification are met.

¹¹¹Convention No. 53 does not contain a similar provision. Art. 6 of Convention No. 69 and Art. 4 of Convention No. 74 give the competent authorities of a ratifying country the option to recognise certificates issued in other territories.

¹¹²Emphasis added.

¹¹³This article reads as follows: "Certificates...shall be issued to those candidates who, *to the satisfaction of the Administration*, meet the requirements... in accordance with the appropriate provisions of the Annex to the Convention.", emphasis added. Of course, it is the flag State that is supposed to make the necessary arrangements for training, examination syllabi, etc. prescribed in the Convention. But the wording may lead to the implication that the flag State is the sole judge for the issue of certificates (in any case no power of appeal is given to candidates). If the article is interpreted in this sense it may instigate discrimination among candidates from different countries. An amendment by Canada to the effect that the words in italics should be deleted was not taken into account.

tency. Later, the question of manning was connected with the question of hours of labour in ILO instruments. Regulation 13 provides that all ships shall be sufficiently and efficiently manned, from the point of view of safety of life at sea. Since the question of certificates of competency is closely linked, *inter alia*, to questions of safety and, as pointed out earlier, the provisions of the relevant instruments can be by-passed if the flag State does not apply manning requirements to its ships, the inclusion of a provision dealing with manning in instruments concerning certificates of competency should be considered.

3.2.5. Port State Control and Validity of Certificates of Competency

A) Port State Control

1) Convention No. 53. It was explained earlier that among the ILO instruments concerning the certification of officers and seamen only Convention No. 53 concerning the officers' competency certificates contains provisions dealing with supervision. It will be recalled that under the Convention the power of the port authorities of a ratifying Member to detain a ship is reserved to cases in which uncertificated officers are on board ships *registered in its territory*. The conditions for the exercise of that power are not laid down in the Convention but left to be decided by national laws or regulations. In cases where a contravention of the provisions of the Convention is observed in the port of a Member on board a ship registered in the territory of another ratifying country the only sanction is to communicate this to the consular authorities of that country. No provision is made for action on breaches of the provisions on board a ship registered in the territory of a non-Party.

2) The STCW Convention. The International Conference on training and certification of seafarers, before the decision on the final form of the article dealing with control was to be taken, had had two options: either to adopt the control procedures of the 1974 SOLAS Convention as amended by the 1978 Protocol or to accept those of the Minimum Standards Convention. It preferred not to incorporate either of these procedures in the text of the STCW Convention. Art. X of the Convention taken in conjunction with Regulation I/4 of the Annex constitute a substantial improvement over the supervision procedures of Convention No. 53. First, in certain cases and under certain conditions, the port authorities of a Party to the Convention are empowered to detain a ship registered in the territory of another Member.¹¹⁴ Secondly, the cases where the Port State is entitled to intervene are clearly laid down in para. 1 of Regulation I/4 and the question is not left to national law. Thirdly, there is a provision, though obscure, dealing with control procedures with respect to ships registered in the territory

¹¹⁴This is the meaning of the phrase "ships ... are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers serving on board *who are required to be certificated by the Convention* are so certificated or hold an appropriate dispensation." in Art. X (1). It is clear that the certificates of the certificated persons referred to in the article must have been issued by or under the authority of the Flag State party to the Convention; see Art. II (b) and (c). The power of the port State to detain these ships had not originally been included in the draft Convention but its inclusion was the consequence of a number of amendments presented by the delegates of certain governments; see STW/CONF/5/1 (Australia), 5/9, pp. 4-5 (Canada), 5/10, pp. 5-6 (U.S.), 5/12, p. 2 (New Zealand).

of a non-Party.¹¹⁵ A number of observations can be made with regard to the control procedures of the STCW Convention:

i) It is questionable whether para. 1 of Regulation I/4, however concrete a provision it may be in specifying the circumstances in which control may be exercised in a restrictive manner, is superior to a more general wording like that of the former draft Art. X (2),¹¹⁶ which contained expressions such as "on the basis of substantial evidence", "clear grounds for believing that such performance may pose a danger..." instead of enumerating the circumstances in which control may be exercised. Since in para. 1 (b) of that Regulation an important limitation of the power of supervision of the Port State is introduced,¹¹⁷ it is doubtful whether a Port State party to the Convention, which has received, for example, reliable information by a national or an international organisation (ITF) that a specified, for instance a "bad-record" ship, does not conform to safety standards, can exercise the control allowed under Art. X if the circumstances enumerated in para. 1 (b) did not arise near the port of that Party. The wording of Regulation 19 of the 1974 SOLAS Convention as amended by the 1978 Protocol or of Art. 4 of Convention No. 147 would be preferable in this respect.¹¹⁸

ii) The power of the port authorities to detain a ship is limited under the STCW Convention to the control of the validity of the certificates of the master, chief engineer officer and officers in charge of a navigational or an engine watch (Reg. I/4, para. 3) despite the fact that the amendments of the governments referred to above¹¹⁹ contained no qualifications following the example of the SOLAS Convention. Moreover, while Art. 19 of the 1974 SOLAS Convention as amended by the 1978 Protocol and, as will be seen later, Art. 4 of Convention No. 147 empower a ratifying country to exercise the necessary control and notify *forthwith* the nearest consular or diplomatic representative of the flag State, under Art. X (2) and (3) of the STCW Convention the port State has to notify the authorities of the flag State and wait to see whether any deficiencies are corrected before exercising

¹¹⁵In this respect the 1974 SOLAS Convention (Art. 19) is not so progressive, as it does not contain any supervision provisions in respect of ships registered in the territory of a non-Party.

¹¹⁶See for the text of this STW X/7, ANNEX II, Page 6. The comparison is strictly limited to the use of general or specific terms in the two texts and in no way affects the justified view held by many States at the Conference that the port state control envisaged in the draft article X was less than adequate.

¹¹⁷Para. 1 (b) of Regulation I/4 reads as follows: "Control exercised by a duly authorized control officer under Article X shall be limited to the following: ... (b) assessment of the ability of the seafarers of the ship to maintain watchkeeping standards as required by the Convention if there are grounds for believing that such standards are not being maintained because, *while in the port of a Party or in the approaches to that Port* " (emphasis added), certain circumstances have arisen, such as collision, stranding, illegal discharge of substances, navigational errors, etc.

¹¹⁸It is possible that this neoterism in the STCW Convention was the result of an amendment presented by the USSR. No other country had questioned the traditional wording. The USSR government pointed out, *inter alia*, that the general terms mentioned above "would permit an arbitrary interpretation by the controlling officers". It is felt that widespread rights enjoyed by the controlling officers may not be used in the interests of maritime navigation but for political objectives or unfair competition.", STW/CONF/5/13, p. 2. It is submitted, however, that this danger would be obviated by the application of Art. X (4) which provides for compensation for any loss or damage resulting from undue delay or detainment. Such an article appears in all the above-mentioned Conventions.

¹¹⁹See supra note 114. The relevant provisions of the Guidelines for Surveyors, contained in the Memorandum of Understanding, are less strict than those of the STCW Convention: on the one hand, if the master, the chief engineer officer or the chief mate do not hold appropriate certificates the ship may be detained; on the other, as regards the absence of qualifications of officers in charge of navigational or engineering watches, "[d]etention should not be considered unless the extent of the deficiency is such as to render the ship unsafe" (Annex 1, paras. 3.3.2 and 3.3.3).

the control prescribed in Regulation I/4. It is clear that the control provisions of the STCW Convention are not as far reaching as those of the SOLAS or the MS Conventions in this connection and should not be preferred over those of the two above Conventions should Conventions Nos. 53, 69 and 74 be revised.¹²⁰

iii) The provisions concerning control over ships flying the flag of a non-Party may puzzle the responsible port authorities. Art. X (5) reads: " This Article shall be applied as may be necessary to ensure that no more favourable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party." If the Conference had wanted to establish unequivocally the right of the port State to detain in certain cases ships registered in the territory of a non-Party, it should either have adopted a provision with wording similar to that of the first two lines of para. 1 of Art. 4 of Convention No. 147 or have accepted the amendment of the U.S. which unquestionably extended the control and the power of detention of the port authorities to these ships.¹²¹

3) Convention No. 147. Though the control provisions of Convention No. 147 will be examined in Chapter 6, where this instrument is analysed, it should be noted that this Convention contains certain provisions relevant to the supervision of certificates of competency. The Convention stipulates that ratifying countries should exercise effective jurisdiction or control over ships which are registered in their territory in respect of, *inter alia*, safety standards, *including standards of competency* prescribed by national laws or regulations and should have laws or regulations for ships registered in their territory providing for "safety standards, *including standards of competency* ..." ¹²² and the provisions of *such* laws or regulations should be substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to the Convention. In the Appendix to the Convention are listed, among other instruments, Arts. 3 and 4 of the Officers' Competency Certificates Convention (No. 53). ¹²³ Finally, Art. 2 (e) requires a ratifying Member to ensure that seafarers

¹²⁰In addition, the STCW Convention requires the port State to specify "the grounds on which the Party determined that these deficiencies pose a danger to persons, property or the environment." Art. X (2) (emphasis added). Despite the explanations of the President at the Conference (see STW/CONF/SR/13, p. 7), it is clear that if a seaman or an officer does not hold the appropriate certificate the necessary control should be exercised and notification to the flag State would be required even if there are no reasons for believing that the deficiencies pose a danger to persons, etc. The grounds referred to are necessary only for the detainment of the ship (Art. X (3)). It would have been better if the amendment proposed by the Greek delegate, namely to insert the words "if any" after the word "reasons" in the draft, had been accepted; *ibid*.

¹²¹For the amendment, see STW/CONF/5/10, pp. 5-6.

¹²²Arts. 2 (b) (i) and (a) (i) respectively; emphasis added.

¹²³Footnote no. 2 to the official text of Convention No. 147 stipulates: "In cases where the established licensing system or certification structure of a State would be prejudiced by problems arising from the strict adherence to the relevant standards of the Officers' Competency Certificates Convention, 1936, the principle of substantial equivalence shall be applied so that there will be no conflict with that State's established arrangements for certification." One wonders whether the use of the criterion of "substantial equivalence" in this context has not the effect of nullifying the purpose of Convention No. 53. In fact, this Convention contains, compared to all other relevant instruments examined, the most flexible provisions, see *supra* 3.2.1. under B) and 3.2.3. under A 3). The only improvement that Convention No. 53 achieved was the establishment of a compulsory system for the granting of the certificate of competency according to which certain minimum conditions have to be fulfilled before an officer is issued with it; and this without any specific provisions as to age limits, etc. The criterion of "substantial equivalence" here has really the effect of minimising the importance of the already "conciliatory" provisions of the Convention.

employed on board ships registered in its territory are "properly qualified ¹²⁴ or trained for the duties for which they are engaged, due regard being had to the Vocational Training (Seafarers) Recommendation, 1970". ¹²⁵ Two observations can be made here:

i) Other Conventions should be included in the Appendix to the Convention. First, as has been explained earlier, the STCW Convention provides for the control (but not for detention of the ships that do not comply) of certificates of competency of ratings of lower rank than that of the able seaman. Consequently, the Certification of Able Seamen Convention could be included in the Appendix to Convention No. 147. Since the former Convention does not contain any control procedures, those of Convention No. 147 would fill the gap. Finally, the inclusion in the latter of the STCW Convention, which was adopted later than Convention No. 147, should be considered. This could be done by the inclusion of the STCW Convention in Art. 5 of Convention No. 147 where other IMO Conventions are listed, ¹²⁶ in which case the inclusion of Convention No. 53 in the Appendix would not serve any substantial purpose. However, this solution would impose an additional burden on prospective ratifying countries of the MSC, since they will have to be parties to the STCW Convention. If, despite this, the inclusion of the STCW Convention in Art. 5 of Convention No. 147 is thought desirable to tighten the control of substandard ships, an option could be offered at the first stage to countries wishing to ratify the latter Convention either of becoming Parties of the former before ratification or, instead, of implementing the provisions of the relevant ILO instruments, revised along the lines suggested above.

ii) Art. 2 (a) provides that the standards laid down by national laws and regulations should be substantially equivalent to the Conventions or articles of the Convention listed in the Appendix, "in so far as the Member is not otherwise bound to give effect to the Conventions in question." Consequently, if a country that has ratified Convention No. 53 desires to avoid strict control in respect of the certificates of competency of officers, unless other reasons are considered predominant (for example, that the criterion of "substantial equivalence" will enable the country concerned to avoid ratification of other Conventions), it will not ratify Convention No. 147 because in that case not only will that criterion be of no avail, but the country concerned will have to implement the strict control provisions

¹²⁴The word "qualified" was inserted before the word "trained" at the 1976 Conference to emphasise that, according to this provision, the Government should ensure that seafarers acquired the necessary qualifications without necessarily being directly responsible for their training; 62 *R.P.*, p. 191.

¹²⁵It is clear that no obligation is imposed on ratifying Members to conform to the provisions of this Recommendation. The Legal Adviser of the ILO stated in this respect that the purpose of the reference made to this Recommendation in Art. 2 (f) of the Office draft (Art. 2 (e) of the Convention) was "to call to the attention of States the standards foreseen in that instrument so that they would feel obliged to take account of them; however, the States did not thus lose their liberty of decision on the extent to which they would apply that Recommendation, whose obligations were not as binding as those of a Convention"; *ibid.*, p. 188.

¹²⁶In this connection it should be noted that IMO Conventions were not allowed in the Appendix to Convention No. 147 nor in the text of the Convention because fears were expressed that this would result in a confusion of the supervisory machineries of the two organisations; for discussion see *infra* Chapter 6, pp. 442, 454.

of Art. 4 as well. For the sake of uniformity the control provisions of Convention No. 53 should be revised to conform to the control procedures of Convention No. 147.

B) Validity of certificates of competency

No period of validity is laid down in Conventions Nos. 53, 69 and 74. The matter is apparently left to national law. The SOLAS Convention, in Regulation 14, contains a number of provisions dealing with the duration and validity of certificates of competency. If it was considered necessary to include such provisions in an instrument dealing with safety of life at sea, it is even more necessary to do so in instruments concerning certificates of competency where technological developments on board ship necessitate continuous review and constant updating of training requirements, examination syllabi and, therefore, of the conditions for the granting or for the continuation of the validity of the certificate of competency. Though, as pointed out earlier, refresher or updating courses are provided for in Recommendation No. 137 (para. 18), the possibility of the inclusion of a provision to the same effect in ILO instruments concerning certificates of competency was not considered. As a consequence, in Conventions Nos. 53, 69 and 74 both the question of the validity and the question of refresher and retraining courses (which could dispense with the necessity of the issue of new certificate or of the renewal of its validity if the fact that a seaman underwent successfully these courses were mentioned therein) are left to national law. The competent authority is under an obligation to "make arrangements for the holding of examinations and for the granting of certificates of qualification" ¹²⁷ but nothing in these Conventions requires the competent authorities of ratifying countries to review training and examination requirements (this should be reflected in the certificate of competency) at certain intervals. ¹²⁸

The STCW Convention once again contains welcome, but in themselves inadequate, provisions. Regulation I/4 para. 1 (a) provides that control may be exercised to verify "... that all seafarers serving on board who are required to be certificated by the Convention hold a *valid* certificate..." Under paras. 2 (a) and 3 of the same regulation failure of the master and certain officers "to have an appropriate *valid* certificate..." may constitute a reason for detaining the ship. ¹²⁹ What by a "valid" certificate is meant, is less than clear. No duration of validity of the certificate is laid down in the

¹²⁷Art. 4 (1) of Convention No. 69 and 2 (1) of Convention No. 74; see also Art. 4 (1) (c) and (2) (b) of Convention No. 53.

¹²⁸The Minimum Standards Convention (No. 147) contains more complete provisions in this connection, at least as far as the certification of officers is concerned. On the one hand, control of the certificates of competency of officers is envisaged (Arts. 2 (a) (i) and (b) (i) in conjunction with Art. 4 and the Appendix to the Convention). On the other hand, ratifying countries should have "due regard" to the Vocational Training (Seafarers) Recommendation, 1970, which makes provision for refresher and updating courses (Art. 2 (e)). Nevertheless, as pointed out earlier, the expression "due regard" does not amount to the exact application of the provisions of the Recommendation in national law.

¹²⁹Emphasis added. It is not clear why the word "valid" was inserted in Regulation I/4, since Art. II (c) defines the certificate as "a valid document...", although it was explained by some delegates that the insertion of this word would lead to a stronger port state control. Moreover, though a certificate might be valid as such, it may be held by an inappropriate person. The inclusion of this word would deal adequately with both these cases; see STW/CONF/SR/13, p. 8.

Convention. The international model certificate of Regulation I/2 does not specify, among other particulars, the period of validity of the certificate. Instead, the STCW Convention contains Regulations for "the Continued Proficiency and Updating of Knowledge" of masters and officers. If we take one of these Regulations (Reg. II/5) as a case study, the first paragraph provides that the proficiency of masters and deck officers should be examined every 5 years. Though the fulfilment of the conditions of Art. 1 (b) subparas. (i) and (ii) (sea-service) can be easily ascertained by other means (for example, the log book or the seafarer's book when appropriate), this is not the case with the requirements laid down by subpara. (iii) ¹³⁰ as well as with those of para. 2 (providing for refresher and updating courses). Since a provision for the period or for the renewal of the validity is not laid down in the Convention, the successful undergoing of training or other courses should occupy a separate space in the model certificate of Regulation I/2. This is not required in the Convention and the question still unanswered is how the passing of obligatory approved tests can be ascertained by the controlling officers. ¹³¹ Therefore, in a future revision of the relevant ILO instruments either the period of validity should be specifically included in the model certificate or mention of the passing of the necessary tests therein should be required.

¹³⁰The conditions laid down in subparas. (i), (ii) and (iii) are alternative options. Compliance with one of these is enough for the purpose of Regulation II/5.

¹³¹The President of the Conference said that it was his understanding that "if a Control Officer was unable to find evidence to substantiate the validity of a certificate, he should report to the Port State that the seafarer concerned had been unable to provide evidence that he had had the required amount of sea service or had attended an up-dating course, and that the onus of providing such proof rested with the seafarer." STW/CONF/SR/9, p. 4. This interpretation was accepted by the whole Conference but besides the fact that it was the subjective view of one person and is not clear from the provisions of the Convention, it may lead to judicial disputes as to the required amount of evidence and the onus of proof. The inclusion in the international certificate of a statement by the competent authority to the effect that the undergoing of approved courses have been successfully completed could constitute a presumption that would be defeated only by production of evidence that the contents of the certificate have been forged.

3.3. Conclusions

From the above it is clear that the international instruments concerning maritime training and certificates of competency and, particularly, the relevant ILO instruments need to be revised in certain respects. The most important issue that has to be decided is whether the ILO should stick to its traditional method of adopting "policy" instruments or whether the IMO style of drafting detailed and long instruments would be preferable. Though the number of ratifications is not, and should not be the sole standard by which the effectiveness of international maritime instruments is judged, an analysis of the ratifications which the STCW Convention and the relevant ILO instruments have received would provide some indication. The STCW Convention has received twice as many ratifications as Conventions Nos. 53, 69 and 74 adopted by the ILO.¹³² All the important maritime countries have ratified the STCW Convention (except Panama and the United States).¹³³ On the other hand, Convention No. 53 has not been ratified by Japan, Greece, the USSR, China, the U.K. but has been ratified by all other important maritime countries including Panama and the United States; Convention No. 69 has been ratified by most important maritime countries except Liberia, the United States and China. Since the IMO's involvement in the question of maritime training the trend has been towards the adoption of detailed Conventions, Recommendations and Resolutions on this subject. What the ILO can do in the future is incorporate parts of these instruments in future ILO Conventions and Recommendations.¹³⁴ However, in adopting this policy the ILO should always take into account that a system of maritime training should be flexible enough to accommodate the needs of developing countries.¹³⁵ It is hoped that the seminars and technical assistance programmes instituted by the ILO and the IMO in the field maritime training would enable in the near future developing countries to implement the provisions of the relevant ILO and IMO instruments.

¹³²As of 31 Dec. 1988 the STCW has received 69 ratifications, accessions or approvals (the reservations deposited with the Secretary General of the IMO mostly concerned certain territories in respect of which the Contracting States qualified the obligations assumed under the Convention rather than the substance of the Convention) while the number of ratifications for Conventions Nos. 53, 69 and 74 is 27, 26 and 21 respectively. The combined merchant fleets of the States which have ratified, acceded to, or approved the STCW Convention constitute approximately 75% of the gross tonnage of the world's merchant fleet. The percentages of the gross tonnage of the world's merchant fleet for Conventions Nos. 53, 69 and 74 are 43.77%, 43.88% and 26.59% respectively.

¹³³It is reported that the training requirements in the USSR fully conform to the provisions of the STCW and currently exceed those of the basic convention, D.M. Long, *The Soviet Merchant Fleet*, 1986, Chapter 3, Soviet merchant recruitment, training and professional standards of personnel, pp. 29-38, at p. 32.

¹³⁴This took place for the first time in 1987 when, as result of amendments submitted in the Committee on Medical Care, Convention No. 164 concerning Health Protection and Medical Care (Seafarers), 1987 was made to include, almost verbatim, provisions concerning training in medical care from the joint IMO/ILO international maritime training guide, adopted by the ILO/IMO Committee on Training in 1985.

¹³⁵It was reported at the 2nd Asian Maritime Conference in Tokyo that "there were wide divergencies in respect of methods and extent of training, and these were due to many factors including the relative importance of shipping to the national economy, the type of trade, and the general state of development in vocational training facilities for industry as a whole; it was therefore agreed that a rigid pattern of vocational training could not be established for all Asian countries"; see Second Asian Maritime Conference (Tokyo, 21-30 April 1965), *O.B.*, Vol., XLVIII, 1964, No. 3, pp. 264-291, at p. 268. At the same time the seafarers and the shipowners could not agree on the significance to be attached to pre-sea training (the former thought it was indispensable, the latter were of the opinion that its successful application would depend on the particular circumstances; *ibid.*, pp. 270-2.

It should be noted that the successful regulation of maritime education and training will contribute considerably towards a more effective international shipping regime in the 90s. International maritime law has evolved considerably in the 20th century and hundreds of laws, regulations, statutory instruments, marine notices, presidential decrees, codes of practice or conduct have emerged in various countries. Masters, officers and ratings are in constant need for retraining and refresher courses. The effective regulation of most aspects of shipping nowadays such as marine pollution, safety at sea, professional competence, job satisfaction, preservation of capital, etc. depend on the existence of adequate training schemes which will enable seafarers to deal with mounting problems arising from the emergence of complex and, sometimes, conflicting national and international regulations.¹³⁶ Finally, adequate training combined with manning requirements will improve the safety record of certain fleets and will reduce maritime accidents due to human error.¹³⁷

As regards the international regulation of maritime training the following suggestions can be made with a view to enhancing the effectiveness of the existing regime:

1) Correspondence courses do not appear to be the established practice. From the replies of the governments to the IMO questionnaire it seems that only one country has established maritime training courses by correspondence.¹³⁸ Though convenient, training courses by correspondence can hardly dispense with the need for qualified personnel whose experience ensures satisfactory training standards and with the need for active participation of trainees in the national training programmes.¹³⁹ In the revising instrument either certain methods of training should be made compulsory or if the list of training methods is not exhaustive, training courses by correspondence should be excluded. In countries which lack maritime training facilities, technical assistance programmes would facilitate the development of training institutions. Use of the provisions of para. 27 of Recommendation No. 137 should be made.

On the other hand, it is believed that the use and teaching of English language in maritime training institutions will improve the understanding of non-English speaking seamen as regards the identification of international signals and will facilitate co-operation between members of the crew of

¹³⁶See in this context E. Gold, "International maritime law in transition", *Mar. Pol.*, Vol. 13, 1989, pp. 178-192. Gold thinks that, in view of the profound impact that evolving maritime law has on the nautical profession, the latter should try to influence evolving law; *ibid.*, p. 181.

¹³⁷Gold says: "Although a certain maritime 'chauvinism' often attempts to lay blame in the direction of certain national flags, this is a fallacious approach dodging the central issue which is that there has been a general reduction in training standards in many fleets. Although maritime education today is generally improved, it has often not kept pace with technological advances and complexities, and training periods and sea time have also been shortened, often leading to premature promotion"; *op. cit.* p. 183. A high percentage of maritime accidents (about 80% according to one source) can be attributed to human error; see I. Millar, "The need for a structured policy towards reducing human-factor errors in marine accidents", *Marit. Pol. Mgmt.*, 1980, Vol. 7, No. 1, pp. 9-15, at p. 9, n. 1. Millar argues that in order to reduce human error greater emphasis should be placed on bridge procedural training, and radar simulator training for all bridge ratings, refresher courses for senior officers and improvements in ship design; *ibid.*, pp. 10-15.

¹³⁸In Singapore there are training courses by correspondence open to deck cadets, see Appendix 1 footnote reference to Singapore.

¹³⁹See paras. 11 (e) and 21 of Recommendation No. 137. It should be noted that Recommendation No. 137, unlike Recommendation No. 77, does not list training by correspondence among the training methods provided for in Section VII. On the other hand, this kind of training is not explicitly excluded.

various nationalities with beneficial effects on safety at sea.¹⁴⁰ Teaching of English in maritime training institutions or its inclusion as a compulsory subject in training syllabi is recommended; this has been the practice in certain maritime countries (see Appendix 1). Generally, adequate training (including language training) should be combined with efficient recruitment procedures and general education. The ship's efficiency is reduced when no proper procedures for the selection of trainees are established, the general educational level of the crew is low and communication difficulties exist between officers and ratings, and between ratings themselves.¹⁴¹

2) In the revising instrument concerning maritime training a provision should be included to the effect that training courses should take into account the difficulties that a seafarer might experience in adapting himself to shore employment after a period of sea-service.¹⁴² Subjects of general educational value and theoretical and practical instruction of general nature should be introduced in national training syllabi for seafarers. Para. 16 (2) (a) of Recommendation No. 139 should be transferred to the revising instrument in an amended form to the effect that not only retraining in *special* cases but training courses for other industries should be available for seafarers in *all* cases.

3) Training requirements for modern automated ships should be discussed in the ILO and the IMO.¹⁴³ Likewise, the regulation of the training and certification requirements of "general" purpose

¹⁴⁰Some welcome provisions of the STCW should be noted in this respect; they impose certain obligations on ratifying States in respect of a) officers in charge of a navigational watch on ships of 200 GRT or more and b) ratings forming part of a navigational watch: as regards the former, sufficient knowledge of English to enable them to use charts and other nautical publications, to understand information concerning the ship's safety and operation and to express himself clearly in his communications with other ships or coast stations is required (Appendix to Reg. II/4, Point 16). No clear obligation requiring a knowledge of English adequate to enable the above officers to communicate comfortably with the crew is imposed, but such requirement will probably be fulfilled if the terms of Point 16 are respected. As regards the latter, Regulation II/6, para. 2 (d) (ii) includes as a mandatory minimum requirement "the ability to understand orders and make himself understood by the officer of the watch in matters relevant to his duties" (an identical obligation is imposed in respect of ratings forming part of an engine room watch; see Regulation III/6, para. 2 (c) (ii)). If the officer and the rating of the watch do not have the same nationality, an obligation to have sufficient knowledge of English to enable the seaman to perform his duties and to communicate with the officer may be implied under the terms of the Regulation. Unfortunately, Regulation II/6 does not apply to able seamen and other lower ratings in respect of which no similar obligation is imposed by the STCW or any other Convention. Canada, in ratifying the STCW Convention, reserved its position with regard to its provisions concerning the requirements for adequate knowledge of English since in Canada both English and French have equal status. This reservation was rightly not accepted by the USSR; see IMO, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions, as at 31 December 1988, pp. 325-6. For the primacy of English in maritime affairs and the need for a simplified version thereof see M.A. Bakr, "Maritime language: quest for simplicity", *Marit. Pol. Mgmt.*, 1978, 5, pp. 133-140. This author pronounces in favour of a limited, "controlled", readily understood and short version of maritime English.

¹⁴¹A study carried out in 1973, despite its limitations due to the limited number of interviews on which it was based, showed that the selection and training methods of Indian crews in the British Merchant Navy were not adequate, the educational standard of the crews was very low and language difficulties existed since the existing language training system adopted by the shipping company had practical shortcomings; all these factors had adverse effects on crew performance; see C. Dasgupta, *Selection and Training of Indian Crews in the British Merchant Navy: A Feasibility Study*, 1973, pp. 21-25, 38-41.

¹⁴²Another aspect of successful training methods is reducing wastage in seafaring through specific use of training ashore, by developing training on a "sandwich scheme" basis; J. Hill, *The seafaring career*, London, 1972, pp. 104-105. Hill also argues that it seems probable that the level of recruits to the Merchant Navy might be improved if there were more systematic attempts to select and train them for their next job. The general compatibility between seafaring and other occupations needs to be more systematically explored; *ibid.*, p. 108.

¹⁴³The USSR has introduced an "automated and computer systems facility" in the training syllabi of higher educational institutions; see D.M. Long, *op. cit.*, p. 33.

crews could be contemplated.¹⁴⁴ First, it has to be decided whether this question will be dealt with in a separate instrument or not. It is suggested that, as a first step, the question should form an item of the agenda of the joint ILO/IMO Committee and recommendations should be included in a revised version of the joint IMO/ILO training guide. If the question is dealt with in a single comprehensive instrument, difficulties in ratifying this instrument might be encountered by countries which do not yet possess ships on board which dual-purpose crews are employed or in which the development of such system of employment is unlikely in the immediate future.¹⁴⁵ In this case, the countries concerned would also be unable to ratify the future instrument in respect of the provisions which they might be unable to implement at the national level. It is suggested that the problem should be tackled in a special instrument. It should be remembered that a satisfactory solution of the regulation of the training of general purpose crews would necessitate decision on the following points: the drawing up at a first stage of national training schemes for GP crews, which, at a later stage, would facilitate the international codification of training requirements in a single international instrument; drafting of examination syllabi for GP crews; setting up certification requirements for such crews at the international plane.¹⁴⁶ Implementation of the last task would require: a) classification of variable categories of GP crews, b) establishment of international "model" certificates for all the various categories and grades of these crews similar to the form of endorsement of certificates of para. 3 of Regulation I/2 of the STCW Convention, c) successful resolution of such questions as pre-sea training (which is of importance in the case of automated vessels), if required (including simulator training), the amount of sea-experience and the interrelationship between the former and the latter.

Quite apart from the question of GP crews, it is obvious that the ILO instruments concerning certificates of competency cover only limited categories of seafarers. If the ILO continues to adopt instruments concerning certificates of competency it is recommended that gradually ILO instruments regulate certification of other categories of seafarers. In this respect it is clear that the SCTW Convention is much more comprehensive than the ILO instruments as it regulates the training¹⁴⁷ and cer-

¹⁴⁴For a brief analysis of the organisation and training of the crew on board nuclear-powered ships see R. Godwin and others, "Safeguards for Crew Members of the Nuclear Ship "Savannah", *I.L.R.*, Vol. LXXX, No. 3, Sept. 1959, pp. 236-250, at pp. 244-246.

¹⁴⁵Certain countries, such as the United States and Denmark, have introduced a much lower degree of automation than countries such as Norway, Holland and Japan, while countries such as West Germany and Sweden were in the middle position; see R. Walton, *op. cit.*, supra n. 15. In Japan the training system for deck and engine room ratings was changed to a unified system for GP crews; 55 *R.P.*, p. 79. Many ships in that country are manned by less than 20 member-crew, while experiments are carried out to put into operation a super manpower-saving vessel that has no more than 11 crew members; *ibid.*, p. 74 *R.P.*, 9/1.

¹⁴⁶For the effects of automation on training and retraining requirements of officers and ratings and on manning scales, see Bonwick, *op. cit.*, pp. 75-81.

¹⁴⁷In the STCW Convention a general clause is included in almost every Regulation to the effect that training to achieve the necessary (theoretical) knowledge and practical experience must be based or must take account, *inter alia*, of relevant international regulations and recommendations; see Regulations II/3, para. 3, II/4, para. 5 (b), III/2, para. 3, III/3, para. 3 (the first two regulations use the term "shall be based" while the other two the word "shall take into account"). Probably these provisions refer to the relevant instruments concerning training adopted by the IMO and the ILO analysed above. Interestingly, the above provisions refer not only to binding instruments but also to recommendations (for example, Regulation II/6, para. 2 (c) (ii) refers to the ILO/IMO training guide); moreover, the application of

tification requirements for seamen employed in the deck, engine and radio departments and takes into account special requirements necessitated by the type of ship (oil tankers, chemical tankers, and liquefied gas tankers and ships carrying dangerous and hazardous cargo other than in bulk).¹⁴⁸ Other categories of seafarers, the certification of which could be regulated in the future, include electricians, radar operators,¹⁴⁹ and lower officers and ratings of the catering department.¹⁵⁰ Finally, the introduction of a special education officer on board ship could be envisaged. This person could be the representative of the trade union on board ship and his duties would include providing assistance to seamen in matters relating to training, general education, promotion. In addition, from his position on board ship he will be able to identify problems regarding the organisation of training on board ship, the effectiveness of existing training and certification schemes and the operational efficiency of the ship in relation to these schemes, and whether existing arrangements provide seamen with adequate career opportunities and possibilities of alternative employment ashore.¹⁵¹

4) In a future revised instrument provisions should be included facilitating re-entry to employment ashore of those seafarers who after a long sea-carrier desire to be employed ashore. The seafaring profession constitutes a closed environment which might render onshore employment impossible at a later stage. These provisions would be of a two-fold nature: a) by the aid of education and psychology to make the seaman adaptable to the new exigencies of life on shore and b) provide the

these provisions does not seem to be restricted by references to qualifications, such as "generally accepted" or "international applicable" standards. On the other hand, it seems that, at least those provisions which employ the term "shall take into account", do not impose obligations to implement these requirements; STW/CONF/6/1, p. 2.

¹⁴⁸See Chapter V and Resolutions 10, 11, 12, 13 and 16 of the STCW Convention.

¹⁴⁹Resolution 18 of the STCW Convention concerning Radar Simulator Training recommends that "radar simulator training be given to all masters and deck officers". Radar simulator training contributes greatly to safety at sea because it reduces the possibility of "radar-assisted" collisions. Knowledge of the fundamentals of radar and ability in the operation and use of radar is required for the certification of masters, chief mates of ships and officers in charge of a navigational watch on ships of 200 GRT or more; see Point 4 of the Appendix to Regulation II/2; Point 3 of the Appendix to Regulation II/4 of the STCW Convention. However, it is very important that seafarers are also trained in radar maintenance so that they are able to detect cases where the equipment is not performing properly or is giving inaccurate information; see JSCT/I/1964/1, pp. 4, 113. It has been suggested that Convention No. 53 could be revised to include provisions requiring certificated navigation officers to hold a radar certificate and to attend an approved fire-fighting course; likewise Convention No. 74 might be revised to include a provision requiring able seamen to undergo an approved fire-fighting course; *ibid.* p. 115. Gold argues that although seafarers are today well trained in the use of radar, it still remains an option, and their practical knowledge of the reliability and viability of such equipment is a neglected area. He concludes that research and equipment development should be part of maritime training; *op. cit.*, pp. 182-3.

¹⁵⁰Examples of the duration of training courses for the above seafarers is given in Appendix 1. For other training courses not envisaged or not sufficiently developed in international instruments relating to training and certification of seafarers see Appendix 1, II. C). The new proposed amendments to the 1974 SOLAS Convention concerning the safety of roll-on/roll-off passenger ferries contain certain draft guidelines for fast rescue boats. These guidelines point out the need for "training by a duly authorized agency ... to all helmsmen and crew of a fast rescue boat in all aspects of rescue, handling, manoeuvring and driving..."; *IMO News*, Number 3: 1988, p. 15.

¹⁵¹The education or another officer would also be in a position to assist in the implementation of the important Resolution 22 concerning Human Relationships, adopted by the STCW Conference. This Resolution, *inter alia*, invites all Governments (a) to establish or encourage the establishment of training programmes aimed at safeguarding good human relationships on board ships; (b) to take adequate measures to minimize any element of loneliness and isolation for crew members on board ships; and (c) to ensure that crew members are sufficiently rested before commencing their duties.

seaman with a knowledge of the basic requirements of professions ashore. For example, an engineer officer would be able to work in a factory as an engineer, if he is given the motivation and a knowledge of the basic differences between employment on board ship and employment on shore. Another solution would be for the seaman concerned to be required by national regulations to possess experience of shore-based employment before he is eligible for examination for a certificate of competency. Some national legislatures have adopted this system in the case of engineer officers.¹⁵²

The question of certificates of competence should be taken into account in the formulation of manpower policies. It may be thought desirable that national manpower schemes gradually establish a priority for employment of certificated seamen when all other requirements are met by both certificated and uncertificated applicants. This policy would have two advantages: a) it would enhance safety on board ship and b) it would induce the seaman to obtain certificates which would eventually guarantee him jobs, and it could produce good results, from a psychological point of view, since it would have immediate effect on the seaman's professional status and prestige.

5) As has been explained in this Chapter, existing international instruments concerning maritime training and certificates of competency ironically lack an "international" character. The relevant ILO instruments clearly leave the drawing up of training requirements to national authorities and the STCW Convention does not go so far as to establish an international model certificate. The drawing up of a model certificate at the international level as well as the need for recognition of national certificates (before an international model certificate is widely established) issued in the territory of a ratifying country by the competent authorities of another contracting country,¹⁵³ point to the need for an eventual assimilation of national training schemes along the principles agreed upon in an international instrument. A future ILO or IMO international instrument on training should refer to international compulsory provisions setting up common training syllabi and other training requirements for all seafarers employed on board vessels registered in the territory of a ratifying country.¹⁵⁴ Thus, references to national training schemes and policies should be eliminated,¹⁵⁵ unless they deal with matters

¹⁵²See Appendix 1, II. B), b).

¹⁵³As pointed out earlier, no obligation for such recognition is laid down in Convention No. 53; recognition is optional in Conventions Nos. 69 and 74; and no such clear obligation exists in the STCW Convention. A provision concerning the establishment of an international model certificate in a future revised instrument should be complemented by a provision to the effect that, at the request of a party to this instrument, any other party may issue a certificate of competency to nationals of the first party who meet the requirements laid down by it.

¹⁵⁴As the state practice set out in Appendix 1 reveals there are substantial discrepancies between the number of grades statutorily recognised in different countries for the purposes of the certificates of competency. These discrepancies already existed before the 2nd World War; see *PTMC*, Report VIII, p. 25. Since an international instrument on maritime training could not encompass all existing categories of seafarers at the national level, an international model certificate would be of great value if differences in existing grades of seafarers were eliminated. The issue of an international certificate would be restricted to internationally recognised grades of seafarers. This question is related to the "promotion of seafarers" which has not yet been sufficiently dealt with in an international instrument. For early attempts to regulate the promotion of seafarers see *PTMC*, Report VIII, pp. 24-28. Para. 54 of the ISC provided for three grades of certificates for navigating, engineer and radio officers, and for the establishment of grades for electric engineer officers. State practice shows that the grade of electricians exists in some maritime countries.

¹⁵⁵Such as paras. 3 (1), 5 (1), 6 (f) and 11 of Recommendation No. 137.

of detail or necessity ¹⁵⁶ to be left to the competent authorities. It should be pointed that the establishment of international certificates would facilitate regular inspection and would, therefore, improve safety of life at sea. At the same time, the inclusion of the photograph of the seafarer in the certificate as an additional means of his identification should be considered.

6) Retraining, refresher and upgrading courses should be a prerequisite for the continued employment of seafarers on board ship if such courses are necessitated by newly emerged job requirements for the various grades and categories of seafarers; or from long absences from sea; or from the need for refreshing theoretical and practical knowledge concerning existing job requirements. The need for such refresher courses would result from periodic tests or examinations of employed seafarers. These courses should not be limited to advanced courses or courses for masters, officers and experienced seafarers but they should be compulsory for any category of seafarer if this were thought necessary. ¹⁵⁷

A question akin to that of refresher courses is that of the validity of the certificates of competency. No duration of validity of these certificates is laid down in Conventions Nos. 53, 69 and 74 while the relevant provisions of the STCW Convention are incomplete. First, the future international model certificate should state its period of validity. Secondly, two systems of supervision of the validity of the certificates can be envisaged in a future revised instrument, namely that either: a) each certificate would cease to be valid after a specified period and would be renewed at specified intervals after the requirements laid down in this instrument for such renewal were met; or b) the seafarer would undergo refresher or retraining courses and would pass the necessary examinations at specified intervals; these events will be entered on the certificate of competency as a proof of his ability to perform the duties required as the holder of the certificate concerned.

7) The question concerning whether a future international instrument on training should be a comprehensive instrument should be resolved. In the latter case, provisions concerning the organisation and financing of training schemes should be included therein. Alternatively, such provisions could be included in a separate instrument concerning not training and certification standards as such, but, specifically, the operating conditions and financial background which would permit the development of sufficient and efficient training schemes at the international level. Here, a special chapter

¹⁵⁶The national training schemes and policies of countries that have developed training strategies for seamen may be available to countries which, for several reasons, are not financially in position to establish adequate training schemes of their own (compare paras. 4, 26 and 27 of Recommendation No. 137).

¹⁵⁷The success of maritime retraining depends, as in the case of other strategies such as manpower policies, on the accuracy of sociological data. It was found that in Israel during the 1970s there had been a drastic decline in the number of ratings certificated as officers with very few enrolling in retraining courses. It was suggested that a) "Ratings who satisfy the admission requirements of a retraining course but have a low level of expectancy of success, may be considered as potential retrainees, provided that their expectancy can be improved by appropriate consultation" and b) "Ratings who satisfy the motivational criteria but not the admission requirement, should undergo psychometric tests at the selection stage in order to determine their potential ability of learning"; see M. Erez, "Retraining of ratings for officer rank: biographical characteristics and motivational determinants of willingness to be retrained", *Marit. Pol. Mgmt.*, 1978, 5, pp. 307-313, at p. 313.

could be added relating to the job requirements (training, sea-experience, teaching experience) of training personnel quite apart from training requirements concerning seafarers. Questions, such as payment of wages (with a possible differentiation in the treatment of young and adult trainees), lodging, meals, unemployment benefit, medical care and recreation (particularly in cases of specialist training) during training should be considered for inclusion in the revised instrument on the organisation and financing of training.¹⁵⁸

The question of financing of national or international training schemes should be cleared up. The main burden of financing could be laid on national Administrations or on the shipowners. Moreover, it might be that both governments and shipowners and, possibly seafarers, would be required to finance training schemes so that the financial implications of maritime training can be distributed among different parties (State, shipowners, seafarers).¹⁵⁹ For example, in the case of a seaman detached from a ship to get advanced or specialist training on shore, the shipowner could finance his training; this could be achieved by granting to the seaman a paid "training" leave¹⁶⁰ or paying him wages normally as being "on service". The question of financing may depend on the nature of the training institution concerned or of the training given.¹⁶¹ Here, the close interrelationship between effective training policies and organised financing can be seen. On the other hand, an International Fund for Maritime Training could be set up, which could be financially supported by contributions from all parties concerned. In turn, this Fund could finance national training institutions (mainly public or institutions offering maritime training free of charge) or, eventually, have national branches in all ratifying countries giving a kind of international maritime training.¹⁶² Finally, as state practice shows (see Appendix 1) no discrimination between nationals and foreigners as regards the payment

¹⁵⁸Recommendation No. 137 contains a separate chapter (III) on the organisation and financing of national training policies (sections A. and B.) but it goes on to add in the same chapter a special section (C.) on training standards which is a quite different question. On the other hand, the STCW Convention deals with mandatory training minimum requirements and does not contain any provisions concerning the organisation and financing of training schemes.

¹⁵⁹The need for the education and training of seafarers is recognised in Arts. 9 (5) and para. 5 of Resolution 1 of the UNCTAD Convention on Conditions for Registration of Ships. The relevant provisions provide for the co-operation of the State of registration, the shipowners and appropriate international organisations in order to promote the education and training of seafarers. Whether this would imply participation in the financing of training schemes is less than clear although Resolution 2 recommends that a number of international organisations and bodies should, upon request, provide financial assistance aimed at meeting the financial implications of the implementation of the provisions of the Convention.

¹⁶⁰Compare para. 6 (2) of Recommendation No. 77.

¹⁶¹Compare para. 10, subparas 4 and 5 of Recommendation No. 137. The problem of training costs will not be so acute in the future if recruitment methods are optimised. Research carried out by experts shows that the tests applied to recruit seamen (such as the aptitude and motivation scales) cannot sometimes explain adequately wastage in the shipping industry; see R. Booth and K. Newman, "Social Status and Minority Recruit Performance in the Navy: Some Implications for Affirmative Action Programs", *Sociological Quarterly* : 18 (Autumn 1977), pp. 564-573. It follows that if the appropriate recruitment methods are selected, the long run costs of training will be significantly reduced.

¹⁶²This idea could be further advanced in the development of an International Examination and Certification Authority which (with its national branches in ratifying countries) would grant international certificates having force in all ratifying countries after the "international maritime training" has been undergone and the approved examinations have been successfully passed. For the activities of the World Maritime University (WMU) in this respect, see *IMO News* , No. 4: 1988, pp. 12, 16; *ibid.*, No. 1: 1989, p. 19.

of tuition fees should be admitted in an instrument concerning the organisation and financing of maritime training.

8) The coordination of national laws and regulations relating to the establishment of a minimum age limit for admission to employment, the school leaving age limit and the minimum age limit for entry into training schemes would facilitate the international regulation of maritime training in connection with the uniform application of international instruments concerning minimum age and with national regulations laying down age-limits for entry into educational institutions. A provision connecting the above-mentioned age-limits or obliging ratifying countries to establish such national educational age-limits so that they conform to international regulations relating to minimum age and training should be included in a future revised instrument.

9) The training requirements for all categories of seamen, such as officers in charge of a watch, able seamen, ship's cooks, etc., should be laid down in connection with the issue of appropriate certificates of competency in future revisions of the relevant ILO instruments. Moreover, the question of the relationship between sea-experience and maritime training should be regulated along the lines of the STCW Convention which contains detailed provisions on this issue. Recommendation No. 137 does no more than include a passing reference to pre-sea training and sea-experience required, thus leaving the actual determination of the question to national law. Moreover, the inclusion of medical examination of the candidates as an indispensable condition for the granting of a certificate of competency in a revised instrument should be considered.

10) The question of manning on board ship should at last be regulated at the international level.¹⁶³ The appropriate place for the regulation of manning scales is a future revised IMO or ILO instrument concerning certificates of competency for many reasons: a) as will be seen later in Chapter 4, the inclusion of manning in ILO instruments concerning hours of work has not been successful and is likely to cause additional difficulties of ratification of these instruments, which, after all, have failed, for various reasons, to come into force many years after their adoption; b) certificates of competency and manning are aspects of safety of life at sea and could be regulated in the same instrument to best advantage; and c) the lack of manning requirements in instruments concerning certificates of competency leaves the door open to ratifying countries to circumvent certification requirements by changing manning scales.

This does not mean, of course, that the regulation of manning scales should be confined to its safety aspects. Manning is a question related to hours of work, wages and manpower policies and has a social aspect which, apart from safety considerations, could justify higher manning scales on board a

¹⁶³As pointed out earlier, the ILO Conventions concerning training and certificates of competency do not contain provisions on manning. Moreover, it was decided in the Maritime Safety Committee and the Joint ILO/IMO Committee on Training before the STCW Conference that the question of the international regulation of manning should not be taken up despite the objections of the Seafarers' members of the Joint Committee; see JCST/4/1975/1, pp. 3, 4-5.

specific ship. Regulation of social manning could be included in an Annex to the revised instrument on certificates of competency.¹⁶⁴

11) The control procedures of Convention No. 53 should be revised to provide for an international system of supervision which would be carried out by the port state and not only by the flag state as envisaged in the Convention. Provisions concerning control procedures should be included in Conventions No. 69 and 74. Also, the provisions of the STCW are inadequate for an effective inspection of certification requirements at the international level; inspection (including the possibility of detention) should not be limited to incidents which have occurred in or near the port of a ratifying state and it should be extended to the examination of certification requirements of all seafarers required to hold a certificate under the Convention. It is submitted that the control provisions of the 1974 SOLAS Convention, as amended by the 1978 Protocol, or of Convention No. 147 should be substituted for them as regards supervision of certificates of competency; in fact, for the sake of uniformity it has been argued that all the control procedures contained in ILO instruments should be amalgamated to constitute a coherent body of control procedures constructed along the lines of the supervision procedures of Convention No. 147.¹⁶⁵ Although the endorsement of such a view would present dangers,¹⁶⁶ it is submitted that, in the area of certificates of competency, the adoption of the MSC control procedures in preference to those of all other Conventions on this subject is desirable, subject to three conditions: a) more instruments concerning certificates of competency should be included in the Appendix to the MSC; b) either the STCW Convention should be included in Art. 5 of the MSC or a way should be found whereby compliance with its requirements will be ascertained through the MSC procedures; and c) the criterion of "substantial equivalence" in the MSC should not apply to certification requirements but only to social questions concerning seamen as suggested in Chapter 6.¹⁶⁷

Epilogue: The ILO, the IMO and maritime training

Though no decision of the ICJ relates to the issue of the competence of the ILO with regard to certificates of competency, it is clear that, at least from certain points of view this matter *is* within the competence of the ILO.¹⁶⁸ The question of the certificates of competency has labour aspects: the

¹⁶⁴For questions relating to social manning; see *infra* Chapters 4, 6, and 7, Sections 4.1.5.3.4.; 6.1.2. 5) c); and 7.1.5.

¹⁶⁵This had been pointed out by the ISF in an amendment presented at the STCW Conference in 1978, see STW/CONF/5/14, p. 2.

¹⁶⁶It is argued by the present writer, in Chapters 4 and 6, Sections 4.1.5.3.4, 6.1.2. 5) and 7), 6.3 B) and C) that Convention No. 147 is seriously flawed as regards the supervision of social requirements on board ship.

¹⁶⁷As regards the question of the jurisdiction for the suspension of certificates of competency, see *supra* references in n. 71.

¹⁶⁸By 1967 the members of the JMC felt that there was little co-operation and consultation with the IMO on matters of direct concern to the ILO, i.e. training of seafarers. In expressing its dissatisfaction, the JMC, at its 20th session in 1967, identified four areas in which difficulties in delimiting the respective competence of the two organisations had occurred, and made the following distinctions: 1) As regards the safety of the ship, questions of structure, the provision of safety equipment and instruments, and the movement of the ship in relation to other ships and to the land, are matters of the IMCO (IMO) alone; 2) The question of prevention of industrial accidents to seafarers on board ship and ashore is a matter for the ILO; 3) The subject of vocational training, standards of professional competence, manning, and methods and organisation of work on board ship are matters for the ILO alone, provided that in the field of vocational

safety of seamen on board ship, the promotion and the better pay of certificated officers and seamen and the social recognition of the efforts of those seamen to achieve a higher status and to reach the upper class of the social hierarchy of the ship. On the other hand, as will be seen later, the safety of the passengers and the cargo ¹⁶⁹ and the protection of the environment are questions closely linked to the certificates of competency. ¹⁷⁰ Therefore, the certification of officers and seamen also falls within the competence of the IMO and the question arises concerning which organisation has the competence to regulate the certification of officers and seamen. It should be noted that despite the diametrically opposite views of the Secretary Generals of the two organisations ¹⁷¹ neither of them has contested the competence of the other organisation. It was simply contended by the two agencies that the primary responsibility for the regulation of the matter lies with the one and not the other organisation. The adoption of the STCW Convention in 1978 by the IMO gives the lead to the IMO but only by a small margin. It should be remembered that the STCW Convention does not apply to able seamen and to ships' cooks; in fact, the IMO recognised the competence of the ILO to adopt instruments on the certification of the able seamen. ¹⁷² Moreover, during the discussion of Art. V of the STCW Convention, it was made clear that the Conference did not intend to interfere with ILO

training and professional competence, where safety equipment or instruments of the ship are involved, there should be joint consultation between the two bodies; 4) Consultation and co-operation should be real and effective, and not merely formal. While the methods of consultation and co-operation must vary according to the subject-matter and to its importance, there will be cases where the only effective way of securing adequate co-operation will be by way of a joint body; see Statement concerning Relations between the International Labour Organisation and the Intergovernmental Maritime Consultative Organisation, *O.B.*, Vol. LI, No. 1, pp. 102-103. Of course, after the adoption of the STCW Convention by the IMCO in 1978 the views of the JMC under heading 3) are no longer valid as far as the exclusive jurisdiction of the ILO over matters relating to maritime training is concerned.

¹⁶⁹The STCW Convention is classified under the Maritime Safety instruments in IMO documents; *IMO news*, Number 4: 1987, pp. 8-9.

¹⁷⁰It is clear that the activities of the IMO in the field of maritime training are directed towards its technical and safety aspects. This view is corroborated by an examination of the instruments adopted by the IMO in this respect: Resolution A. 124, Recommendation on Crew Training, superseded by Resolution A. 437; Resolution A. 286, Recommendation on Training and Qualifications of Officers and Crews of Ships Carrying Hazardous or Noxious Chemicals in Bulk; this Resolution was formally adopted by Resolution 11 of the STCW Conference; Resolution 8 of the International Conference on Tanker Safety and Pollution Prevention, 1978; this Resolution was formally adopted by Resolution 10 of the STCW Conference; Resolution A. 337, Recommendation on Principles and Operational Guidance for Deck Officers in Charge of a Watch in Port (specially par. 3 (a)); Resolution A. 438, Training and Qualifications of Persons in Charge of Medical Care Aboard Ship; Resolution A. 482, Training in the Use of Automatic Radar Plotting Aids and Resolution A. 483, Training in Radar Observation and Plotting; Resolution A. 485, Training, Qualifications and Operational Procedures for Maritime Pilots other than Deep-Sea Pilots; Resolution A. 537, Training of Officers and Ratings Responsible for Cargo Handling on Ships Carrying Dangerous and Hazardous Substances in Solid Form in Bulk or in Packaged Form; Resolution A. 538, Maritime Safety Training of Personnel on Mobile Offshore Units (this is the only international instrument laying down training syllabi for persons employed on board floating objects other than ships); see also Resolution A. 624.

¹⁷¹See *supra* notes 13 and 54. It should be noted that while in the early IMO Resolutions (A. 89 and A. 188), a close relationship of the ILO and the IMO was envisaged, the IMO later followed a more independent approach towards maritime training. In the field of labour in the fishing industry the IMO recognised the primary competence of the ILO; see Resolution A. 116, Arrangements with the FAO and the ILO, Annex, Agreement between executive heads of the ILO, FAO and IMCO on the principles of collaboration in respect of fishing vessels and fishermen. As regards the certification of engineer officers of fishing vessels beyond 750 kW power, see Resolution A. 623 and the Document for Guidance on Fishermen's Training and Certification.

¹⁷²The footnote in para. 1 of Regulation II/6 of the STCW Convention concerning the Mandatory Minimum Requirements for Ratings Forming Part of a Navigational Watch reads as follows: "Reference is made to ILO Certification of Able Seamen Convention, 1946 or any successive convention." (emphasis added).

instruments covering the same subjects. The Chairman of the Committee which had dealt with it stated formally at the Plenary Conference that the members of the Committee had made sure that there was no conflict between the new Convention and ILO Conventions.¹⁷³ On the other hand, both the ILO and the IMO have published studies (compilations of national laws) on the vocational training of seafarers¹⁷⁴ and, as regards technical cooperation projects, they have both assisted in the preparation of maritime training and education programmes.¹⁷⁵

As will be seen in the Conclusions (Chapter 7, Section 7.10.), the idea is advanced that international organisations having competence in the maritime field should cooperate more closely than they have in the past and their policies should eventually converge on matters of common interest. This might require the restructure of certain of these organisations (for example, the UNCTAD might eventually merge with the IMO). But it is the opinion of the author that the ILO, because of its unique tripartite structure and its vast amount of experience in questions concerning workers in general (not only maritime workers), should be looked upon as the primary organisation when instruments concerning maritime training are adopted in the future.¹⁷⁶ This policy will have the following advantages: i) the obsolete ILO instruments will be reviewed through ILO procedures; ii) the employers and the workers will have the opportunity to discuss matters of direct concern to them which are not only questions of governmental policy;¹⁷⁷ iii) the adoption of instruments on training and certificates of

¹⁷³STW/CONF/SR/5, p. 3; see also GB. 208/10/4/4.

¹⁷⁴See the IMCO/ILO Guidelines For Training in the Packing of Cargo in Freight Containers, IMO (72), London, 1978; ILO Office, Monographs of Seafarers' Vocational Training Programmes in Various Countries, JMC/20/3/2, Geneva, 1967, 271 pp; IMO, Compendium of Maritime Training Facilities, London, 1980, 336 pp; IMCO: Training of Masters, Officers and Seamen in the Use of Aids to Navigation and Other Devices, 1961.

¹⁷⁵While the ILO is organising seminars and plans technical assistance programs, the IMO follows its own way by cosponsoring seminars on training (with the WMU or certain countries such as Norway, Australia, etc.) largely based on the STCW Convention; see, for example, *IMO News*, Number 4: 1988, p. 12.

¹⁷⁶This statement in no way prejudices the value of the work of the IMO in areas such as technical assistance projects, seminars concerning maritime training, etc. The Understanding between the Director-General of the International Labour Office and the Secretary-General of the Inter-Governmental Maritime Consultative Organisation concerning the Convening of a Conference(s) on Maritime Training, Qualifications or Certification of Mariners allows either the convening of a conference on maritime training jointly by both organisations or the convening of such a conference by or under the auspices of one of the organisations; however, in the latter case, the other organisation should be able to participate actively and fully in the conference concerned; *O.B.*, Vol., LIX, 1976, Series A, No. 1, p. 31. It should be noted that the contribution of the ILO to, and its influence in, the STCW Conference has been minimal.

¹⁷⁷It seems that although the STCW Convention was a result of the deliberations of the Joint ILO/IMO Committee on Training, it was the direct influence of Governments which down-graded the final draft in certain important respects. Two factors contributed to this situation: a) the low-key participation of the ILO in the STCW Conference; b) the reluctant attitude of certain IMO members of the Joint Committee towards certain proposals of its ILO members. Many examples of this attitude are provided by the records of proceedings of the Joint Committee but one would suffice: at the 3rd session of the Committee in 1973 a discussion was being held concerning the minimum requirements for the certification of engineer officers in charge of a watch in a traditionally manned engine room or the designated duty engineer in periodically unmanned engine rooms. A proposal was put forward jointly by the Shipowners' and Seafarers' members of the Committee to the effect that the introductory paragraph of the relevant regulation (at that time it was named STW II/10, Annex III) be amended to read as follows: "There shall be an engineer officer in charge of a watch in a traditionally manned engine room ... who shall hold an appropriate certificate of competency ...". This amendment was opposed by the IMO members and finally rejected; for a discussion of the questions involved see JCT III/4, pp. 4-6. The relevant provision of the STCW Convention (para. 1 of Regulation III/4) reads as follows: "Every engineer officer in charge of a watch in a traditionally manned engine room ... shall hold an appropriate certificate." It is obvious that if the ILO members' amendment had been passed and had found its way in all relevant provisions of the STCW Convention, the question of manning scales on board ship would to a great extent have been solved at the international level. All interpretations which would imply a manning requirement in the second of the above texts do not stand to legal

competency will be instigated by prior adoption of similar instruments covering general workers; and iv) if the question of manning is included in an instrument concerning certificates of competency, as is suggested here, the views of the employers and the workers on the burning issue of manning (a safety as well as a social question) will have a direct effect on the form and contents of the final instrument. This view will not preclude joint consultation of the ILO and the IMO on questions relating to maritime safety.¹⁷⁸

scrutiny. For other examples of disagreement between the IMO and ILO members of the Joint Committee which reduced the effect of the STCW Convention see *ibid.*, pp. 6-7; GB. 198/10/9/3; JCST/4/1975/1, pp. 2-7. For the difference of opinion between the ILO and IMO members of the Joint Committee as to the procedure which should be adopted for the discussion of proposals until the STCW Conference see JCT III/4, Appendices A and B. The procedure, which was actually adopted, resulted in the IMO having absolute control over the final drafting stages of the instrument.

¹⁷⁸In this respect, Para. 3 of the Understanding between the Director-General of the International Labour Office and the Secretary-General of the Inter-Governmental Maritime Consultative Organisation concerning the Terms of Reference, Responsibilities and Working Arrangements of the Joint IMCO-ILO Committee on Training (London, 22 May 1974) provides that: "The training, qualifications and certification of sea-going personnel are fundamental factors in promoting the safety and efficiency of navigation and the protection of the marine environment as well as in improving the occupational safety, professional qualifications and career structure of the crews" and further provides that the activities of the ILO and the IMO in this area should be complementary and not exclusive; for the text of the Understanding see *O.B.*, Vol., LVIII, 1975, Series A, No. 3, pp. 254-5.

Chapter 4

GENERAL CONDITIONS OF THE EMPLOYMENT OF SEAMEN

In this chapter an evaluation of the ILO's contribution to the international regulation of the general conditions of employment of seafarers will be attempted. Such a review requires close examination of the following issues: a) wages, hours of work and manning, b) repatriation, and c) paid vacations and annual leave with pay. As will be seen, a full and effective analysis of these questions necessitates consideration of a wide variety of issues, which, nonetheless, are of vital importance to the seaman's profession. For this reason this chapter, despite its great significance, has not been placed after the introductory comments made in Chapter 1, although at first sight this might be seen more proper, since it is the intention to consider the seaman's affairs in the order in which they appear in the seaman's life, starting with his admission to the seafaring profession and ending with his retirement and pension. Having dealt with the conditions governing his admission to employment in Chapter 2 and his training requirements and certificates of competency in Chapter 3, we come now to those regulating a vital part of his working life.

PART I: WAGES, HOURS OF WORK AND MANNING

4.1. Wages, hours of work and manning

The question of the seaman's wages and hours of work and the related question of manning precede those of repatriation and paid leave, though it would be more properly placed between them were a chronological order to be respected, because of the first question's extreme factual and, no less, psychological importance in relation to the seaman's professional status, and the substantial controversies in which the parties concerned have over the years been embroiled in this respect.

A considerable number of instruments have been adopted on wages, hours and manning, as follows: a) the Hours of Work and Manning (Sea) Convention, 1936 (No. 57), b) the Hours of Work and Manning (Sea) Recommendation, 1936 (No. 49), c) the Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76), d) the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93), e) Convention No. 109 concerning Wages, Hours of Work on Board Ship

and Manning (Revised 1958) and f) Recommendation No. 109 concerning Wages, Hours of Work on Board Ship and Manning.¹ But not one of these Conventions has come into force so far. However, since all of the above-mentioned Conventions are still open to ratification, since all the relevant instruments have not entered into force, it is still necessary and interesting to examine their main objectives, their exact interrelationship and the pros and cons of the framework they offer to prospective ratifying countries. These could be viewed either as encouraging a country to ratify a *certain* Convention or enabling it to ratify or to apply or both the provisions of all relevant Conventions or Recommendations nationally on a gradual basis, applying the less demanding provisions first. First, the unsuccessful attempt of the 1920 Conference at the international regulation of wages and hours of work will be briefly discussed and the whole issue will be analysed in the light of the more recent developments that have taken place in this field since 1958 onwards.

4.1.1. 1920 - 1936: Struggles and impasse

A) The 1920 Conference

The Office draft

The question of wages and hours of work was transferred to the Genoa Conference from the preparatory meetings of the Peace Conference held in 1919 and the first International Labour Conference held the same year,² which adopted Convention No. 1 on Hours of Work (Industry), 1919, applying to shore-workers. The ILO Office prepared a draft which was submitted to the Genoa Conference³ and which gave, as have done all its successors, rise to passionate and uncompromisingly ruthless discussions. The main points of the draft were: a) it established the 8-hour working day or the 48-hour working week or "an equivalent limitation calculated over a period of time other than a week", which would be applicable to both private and public vessels and to all persons employed thereon;⁴ b) however, it qualified in the case of a vessel of more than 2500 tons at sea the so-called 'principle' of the 48-hour a week where the seaman could be required to work up to 56 hours a week; c) an adjustment period was provided for vessels between 700 and 2500 GRT built before the

¹The texts of the first four instruments can be found in 21 *R.P.*, p. 340, *O.B.*, Vol. XXI (1936), p. 199; 21 *R.P.*, p. 352, *O.B.*, Vol. XXI (1936), p. 209; 28 *R.P.*, p. 382, *O.B.*, Vol. XXIX (1946), p. 178 and 32 *R.P.*, p. 724, *O.B.*, Vol. XXXII (1949), p. 107 respectively. The texts of Convention No. 109 and Recommendation No. 109 are found in ILO, *International Labour Conventions and Recommendations 1919-1981*, pp. 974-985.

²For the disputes that have arisen there and the application of the concept of the 8-hour-a working day to sea workers, see Chapter 1, Section 1.4., pp. 63-76.

³See 2 *R.P.*, pp. 501-504.

⁴Here, the influence of the all-embracing approach of the Peace Conference can be detected. The wording of the draft would cover even masters and supervising officers who do not keep a watch but who are, by virtue of their supervising position, required to offer active services on board ship any time. During the deliberations of the Commission on Hours of Labour set up by the Genoa Conference, however, these categories were exempted from the application of the Convention. Furthermore, the Convention was made to apply to all other persons irrespective of nationality. At the same time an amendment to the effect that a 44-hour working week limit should be introduced was defeated by 16 votes to 14, *ibid.*, p. 505.

coming into force of the Convention, and in cases where they could not be suitably converted: a 12-hour day-work was to be applied to them; thus, the 8-hour a day principle was further limited; d) as regards vessels of less than 700 tons or fishing vessels, these limitations would be applied by means of regulations issued by the competent authority after consultation of with the organisations of the parties concerned; and e) hours of work could be prolonged without limitation in cases of salvage, fog, stranding, fire or other circumstances affecting the safety of the vessel and sickness of a seaman who cannot be replaced. Furthermore, permanent or temporary exceptions could be provided for by the competent authority in cases of necessary complementary or preparatory work and in other exceptional cases. These regulations could only be issued after consultation with the respective organisations of shipowners and seafarers and, more interestingly, should fix a limit for the additional working hours required in each case.

It can be seen from the outset that the 'principle' of the 48-hours basic requirement was drastically modified. Moreover, two questions had not been dealt with in the Office draft: i) how was compensation for work done beyond the 48-hours limit to be fixed, and ii) though Art. 1 of the Office draft recognised the 48-hours a week or *an equivalent limitation calculated over a period of time other than a week* as a general rule, it proceeded, in Art. 2, to lay down that working hours when the vessel was at sea should not exceed 56 hours per week. Interpretation of the two articles taken together could lead to two different conclusions: either that 56-hours a week was the standard time limit for work at sea or that *the equivalent limitation* of Art. 1 encompassed the provisions of Art. 2 and in subsequent weeks the working hours would be less than 48 hours a week to compensate for the additional hours worked over a longer span of time, i.e. a month. In the latter case, questions of overtime and compensatory rest would not arise.

The Commission draft

The draft of the Commission on Hours of Labour⁵ had an even more restrictive effect on the 8 hours a day or 48 hours a week principle, limiting the scope of the Convention to foreign-going mechanically propelled vessels of over than 2000 tons and to persons employed in the deck and engine departments only. Work on Sunday was allowed, but must be compensated by rest or payment, or by use of extra personnel.⁶ Application of the provisions of the draft to other types of vessels not within its scope was to be effected by regulations of the competent authority on principles "similar" to those laid down in the draft, "so far as circumstances will permit".⁷ On the other hand, some positive provisions were included in the Commission draft: a) a limit of 14 hours a week or 60 hours per month was set to overtime ordered by the master, b) working hours at sea were fixed at 48 hours a

⁵*Ibid.*, pp. 507-509.

⁶However, the period of compensatory rest or the method and calculation of payment had not been laid down in the Commission draft. Moreover, no accommodation provisions had been included with regard to the extra hands engaged.

⁷Art. 4 (1) of the Commission draft.

week, though Sunday work was allowed and c) a statement concerning the hours of work should be inserted in the articles of agreement.

The Commission draft marked a significant change in the philosophy underlying the 48-hour principle: Until then this principle was regarded as a standard to be modified only to the extent deemed necessary. The Preamble that was added to the draft⁸ proclaimed the over-all importance of the 48-hour principle but Art. 1 then subjected it "to the provisions and exceptions contained in the following Articles." The result was that, though the 48 hours principle appeared to be respected, the restrictive scope of the draft linked with the insubstantial *right* of the competent authority to regulate for other classes of vessels or persons not covered by the draft on *similar* lines, divested it from its original power. Vessels serving national needs, even those of substantial tonnage, sailing vessels, fishing vessels and coast-traders were not covered by the draft. Similarly, masters, supervising officers not keeping a watch, wireless operators, radio operators and officers and persons employed in the catering department were not covered by the 48 hours principle. Furthermore, provisions concerning overtime and compensatory rest were included but with no exact reference to the limit of hours of work beyond which compensatory rest or overtime was to begin.

The Genoa Conference

Among Governments, though many were in favour of the 48 hours limit⁹ others were against it.¹⁰ The U.K. put forward a comprehensive amendment to the effect that a 48 hours limit should be agreed upon for all categories of seamen in port, abandoning the 45 hours limit of the draft. This amendment was defeated. The effect of the amendment would have been, as far as work at sea was concerned, that the only exception to the 48 hour principle would be in case of deck hands working on board ship at sea, while for the stewards' department a 10 hours a day limit was proposed. Later, a 56-hour limit was proposed for this last category. This proposal too was rejected.¹¹ An important amendment was carried to the effect that the Convention be made applicable not only to foreign-going but to *all* ships.¹² Furthermore, the qualified 48 hours principle was made to apply to *all* ratings and it was reinstated for working hours in port, in place of the 45 hours limit.¹³ In most other respects the Commission draft remained unchanged.¹⁴

The 1920 draft Convention stuck, despite certain crucial exceptions, to the 48 hours limit. It had some disadvantages, namely that not all persons employed on board ship would have been covered by it, for example wireless operators and cattle men, sailing, fishing and non-mechanically pro-

⁸As to this point, see *supra* Chapter 1, p. 91.

⁹Netherlands, 2 *R.P.*, p. 311, Argentina, *ibid.*, pp. 338-339, France, *ibid.*, p. 358-9, Japan and Italy, *ibid.*, pp. 359-360, Belgium, *ibid.*, p. 370.

¹⁰Great Britain, *ibid.*, pp. 347-9 (though for reasons of vagueness of the draft and not of principle).

¹¹*Ibid.*, pp. 371-387, 509-510.

¹²*Ibid.*, pp. 370, 406.

¹³*Ibid.*, pp. 407 and 408 respectively.

¹⁴For the text of the 1920 Convention limiting working hours on board ship, see 2 *R.P.*, APPENDIX VIII, pp. 587-592, *O.B.*, Vol. I, pp. 560-564.

pelled vessels would have been outside the scope of the Convention, even if they were of substantial tonnage and embarked on international voyages and, finally, it was open to subjective interpretation concerning the relationship between the 8 hours a day, the 48 hours a week and the "equivalent limitation" calculated over a longer period of time.¹⁵ Art. 8 of the draft Convention provided for extra working hours in cases of salvage, fog, stranding, fire or other circumstances affecting the safety of the vessel. An unanswered question remained concerning whether these extra hours would be compensated with extra money and at what rate (wages or overtime).¹⁶ Provisions regarding wages, and especially, the amounts and rates of wages, were not included in that first draft Convention and, at that stage, the effect which manning could have on working hours was not fully appreciated. Finally, the question of the application of the above limits to ship's officers remained unresolved.

Despite the exceptions allowed to the 48 hours principle the draft Convention failed to be adopted. The reasons for this can be traced to the unwillingness of certain government delegates to commit themselves to the 48 hours limit, to the failure of the Conference to establish a workable "hours of work-overtime-payment-rest" regime, to the lack of any provisions making allowances for countries where a three watches system was not fully applied¹⁷ and, of course, to the concerted opposition it encountered from the shipowners' group.¹⁸

B) The 1929 Conference

After the failure of the Genoa Conference it was decided that the question of the hours of work should be discussed at the special maritime Conference to be held in 1928 (which was not held until 1929).¹⁹ At the preparatory meetings of the 1929 Conference some interesting preliminary²⁰ decisions were made: whaling vessels should be treated as ships engaged in the shipping industry, because of the similarity of working conditions on board both these kinds of vessels;²¹ the draft Convention was to apply to pleasure yachts, salvage and ice-breaking vessels;²² possible exceptions from the scope of the draft Convention were allowed in the case of non watch-keeping officers and

¹⁵Sunday work was not expressly prohibited in the draft Convention. Thus, if the 8 hours a day limit were to apply, it would be tantamount to 56 hours and not 48 hours per week. The result was that it was unclear whether a seaman was entitled to overtime payment or to normal payment for work between the 48 and 56 hours.

¹⁶See 2 *R.P.*, p. 428. Would, for example, the crew of a ship which would normally encounter fog in her ordinary route be paid extra money for what would have been their normal duty?

¹⁷It was the Japanese Government which was faced with this problem, see 2 *R.P.*, pp. 372, 378.

¹⁸It was clear from the beginning of the discussion that the draft Convention would encounter great difficulties in securing the required voting majority: Art. 1 of the draft Convention was adopted by 48 votes to 30. The 45 hours limit in port had been adopted in the Commission by 14 votes to 12 and still remained in the draft Convention. Art. 2 was adopted by 46 votes to 32, art. 5 by 39 to 26, art. 8 by 48 to 18. The Convention failed to secure the necessary two-thirds majority by the fraction of only one vote, 2 *R.P.*, p. 478. The whole shipowners' group, except the French and Dutch delegates, voted against the Convention. All the seamen's representatives voted for the Convention; the following Governments voted against: Denmark, Great Britain, Japan, Norway, Portugal, Siam and Spain.

¹⁹For discussion and adoption of the relevant resolution, see 9 *R.P.*, pp. 88-116; see also International Labour Conference, *The regulation of hours of work on board ship*, Questionnaire I, Geneva, 1931, pp. 3-31.

²⁰This is why, according to the then introduced double-discussion procedure, the question had to be finally considered at the next session of the Conference. However, this Conference was not held until 1936.

²¹However, it was decided that the question of hours of work in the fishing industry should be reserved for later consideration by a special Conference devoted to problems concerning that industry, 13 *R.P.*, p. 330.

²²*Ibid.*, pp. 331-332.

persons the nature of whose work was not directly related to maritime employment and who were not employed by the shipowner or his representative.²³ Nonetheless, it seemed that the most controversial issues, *inter alia*, hours of work, weekly rest and compensation were left open for later consideration.²⁴ No changes having been made by the 1929 Conference to the Conclusions which had been drafted by the ILO Office, they were adopted at that session of the Conference²⁵ and were sent to Governments for further enquiries.²⁶

C) The JMC deliberations

In the meantime the Joint Maritime Commission was involved in the task of studying the methods by which hours of labour in the shipping industry could be reduced and reconciling the opposite views held by the shipowners' and the seamen's groups.²⁷ The shipowners remained rigidly firm in their opinion that the regulation of hours of work on board ship on an 8 hour a day and 48 hour a week basis was undesirable and impracticable. The seamen's representatives, on the other hand, held the opposite view.²⁸

D) Developments prior to the 1936 Conference

The Preparatory Maritime Conference held in Geneva in 1935

²³Ibid., pp. 334-335.

²⁴Ibid., pp. 326-337. For the complete deliberations of the Committee on the Regulation of Hours of Work on Board Ship, appointed by the 13th session of the Conference, see INTERNATIONAL LABOUR CONFERENCE, 13TH SESSION, 1929, CONFERENCE COMMITTEES, *Committee on Hours of Work on Board Ship*, C.H.T., (12 sittings).

²⁵13 R.P., pp. 182-229. The ILO proposals had taken the form of Conclusions which would serve as a guidance to the Governments in their replies to the relevant ILO Questionnaire. They had not been submitted in the form of a draft Convention and contained only general points concerning the scope of the future Convention, the method of the regulation of hours of work on board ship for the deck, engine-room and catering department, and the possibility of exceptions to the rule of the limitation of working hours or the compensation therefor in cases of 'safety' work.

²⁶For a comprehensive collection of laws and practices relating to hours of work on board ship in 30 countries, mainly principal maritime countries, by 1929, see International Labour Office, *Studies and Reports*, Series P (Seamen) No. 3, "Hours of Work on Board Ship, Collection of Laws, Regulations and Collective Agreements", Geneva, 1929, 280 pp. It is interesting to note that many national laws, regulations or collective agreements contained provisions concerning manning: *ibid.*, the U.K., pp. 2-3, 10, France, pp. 18-21, Germany, p. 38, Norway, pp. 69-74, Sweden, pp. 78-80, Netherlands, pp. 108-9, Belgium, pp. 123-4, Italy, pp. 130-4, 138-9, 145-7, Spain, pp. 148-9, Portugal, pp. 155-8, Greece, pp. 160-5, Rumania, pp. 166-7, Estonia, pp. 175-180, Latvia, pp. 182-3, U.S.S.R., pp. 200-1, U.S., pp. 212-7, Argentina, pp. 218-221, Brazil, pp. 224-6, Dutch East Indies, pp. 228-230, Australia, pp. 231-6, 249, New Zealand, pp. 254-9. In some cases, manning regulations were more comprehensive than regulations relating to hours of work. More importantly, in some cases manning was connected with certificates of competency. Another crucial consideration is that manning was in the majority of the cases dealt with in laws and regulations and not in collective agreements; this might imply a) that manning as an aspect of safety should be regulated by State Acts and b) that shipowners and seafarers were unable to agree on the actual number of men carried on board ship. Though these laws, regulations and collective agreements differed in many respects (calculation of the number of men per watch, rights and obligations of supervising officers and the relevant administrative provisions, etc.), many countries provided for penalties in case of breaches and legislated that a ship could only be detained when undermanning is likely to cause a serious danger to life or to the safety of the ship; also, exceptions to manning requirements were allowed if life on board ship was not endangered thereby. Nevertheless, it should be noted that manning in most cases was regulated as an aspect of safety and not as a social question in connection with hours of work. Manning, as will be seen later in this Chapter, has not been regulated adequately so far at the international level.

²⁷For the history of the question between 1920 and 1928 see 7 J.M.C., pp. 94-98.

²⁸7 J.M.C., pp. 18-35; for the views of the shipowners' and the seamen's groups and the grounds on which they were based see *infra* Section 4.1.5.2., pp. 315-316.

On the basis of the replies of the 22 Governments concerning hours of work ²⁹ the Office submitted to the Preparatory Maritime Conference a draft Convention and two draft Recommendations. ³⁰ Meanwhile, important developments concerning the regulation of hours of work on board ship had taken place: The shipowners' and the seamen's representatives at the 10th session of the Joint Maritime Commission had agreed that the regulation of the hours of work on board ship could not be effected without the simultaneous consideration of the question of manning and that both questions should be included in the Agenda of the 1936 Conference with a view to a final decision. ³¹ For the first time hours of work and manning were viewed as a combined problem. At that time the Office was not contemplating production of a comprehensive draft on manning, because of the existing differences "in the scope, methods, criteria and substance of the manning scales and rules in force in the different countries", which made it impossible to arrive at such a document. ³² Its purpose was to find an international formula which would give effect to the principle that merchant ships should have adequate manning standards conforming to the requirements of safety as well as of social progress.

Because of the importance of the questions involved the Preparatory Maritime Conference decided to appoint a Committee, the Hours and Manning Committee so that these would be adequately dealt with. The seamen's representatives defended in the Committee the international regulation of hours of work and manning on the grounds of social justice, safety and international competition. ³³ The British shipowners' representative was clearly against such regulation for economic reasons, unless wages were taken into account, which it was not proposed to regulate at that stage. Other shipowners, with the notable exception of the French delegate, held similar views. ³⁴ The majority of

²⁹The first Office draft merely contained points for discussion at the Preparatory Conference rather than presenting a complete Convention. As points of departure for discussion, it proposed, on the basis of existing information, a) apart from exceptions regarding types of vessels and trades, there should be 3 deck officers, in addition to the master, 3 engineer officers, 6 or 9 other ratings in the deck department and sufficient other ratings in the engine department so that work could be organised in three watches, b) a minimum of 50% of the lower deck staff should be able seamen (at least 36 months previous sea service in the deck department), c) a Recommendation concerning manning scales for lower deck staff in cargo ships on the basis of some advanced national laws, d) a number of points that could possibly be included in an international instrument: i) sea service and minimum requirements for lower deck ratings, ii) limitation of boys and apprentices on board ship, iii) provision for an assistant for engineer officers on board ship, iv) fixing of the minimum number of firemen in relation to the number of fires on board ship and/or the daily coal/oil consumption, v) number and minimum requirements for the catering staff. For the ILO Office "points for discussion" and the relevant text, see Preparatory Maritime Conference, Geneva, November 1935, *Hours of Work on Board Ship and Manning*, Report I, pp. 27-35, 46 and 48.

³⁰For a short analysis of the lines of thought which led the ILO Office to give its conclusions the form of a Convention and of the actual provisions of the draft see International Labour Conference, *The Regulation of Hours of Work on Board Ship*, Report I, 1931, pp. 193-218. For the text of the draft Convention and the draft Recommendations, see, *ibid.*, pp. 220-231.

³¹*PTMC*, 1935, *Hours of Work on Board Ship and Manning*, Report I, pp. 6-7.

³²*Ibid.*, p. 24. As to the reasons which, apart from the JMC deliberations, induced the Office to believe that the matter was ripe for international agreement, and for the safety and social aspects of manning, see *ibid.*, pp. 23-26.

³³Preparatory Maritime Meeting, Geneva, November-December 1935, Report and Record of the Meeting, pp. 14, 105.

³⁴Here, it should be noted that the preparatory stages of the Genoa Conference held in 1920 had had a profound effect on French policy as regards the regulation of hours of work. The French Government had introduced the 8-hour working day in the French mercantile marine as early as 1919 and in its efforts it had been supported by the seamen's and the shipowners' associations. For the 8-hour working day in the French mercantile marine and the subsequent problems of the French Government in its implementation, see ILO, *Enquiry concerning the Application of the Eight-Hour Act in the French Mercantile Marine*, Geneva, 1921, especially pp. 7, 8-9, 11, 14, 17-23, 26-29, 36-37, 38, 40,

the Governments seemed to be in favour of the international regulation of these issues.³⁵ Comparison between the attitudes of the seamen's and of the shipowners' representatives shows that while the latter declined to put forward any specific proposals, the former provided the Committee with specific and very detailed proposals concerning manning and hours of work.

As regards manning,³⁶ in contrast to the Office's points, the seamen proposed specific manning scales, according to the tonnage of the vessel, for the deck, the engine and the catering department. Moreover, provisions dealing with minimum age and minimum professional requirements and other provisions irrelevant to the question of manning were included in the seamen's proposal.³⁷ In the Hours and Manning Committee only 2 Governments (France and Spain) expressly supported the 3-watches system,³⁸ which was opposed by the shipowners' group, though it was favoured by the seamen's group. Similarly, the need for professionally qualified seamen and for the grading of lower ratings in the deck department was pointed out by the seamen's group but the shipowners held the opposite view and the Governments seemed to be indifferent. With regard to the fixing of manning scales in the engine department many representatives from all three groups thought that they should be based on the horse power of the ship's engine and not on tonnage and the shipowners' representatives pointed to several factors which would make establishing of manning scales in the engine department impossible.³⁹ Seamen and shipowners were equally divided on the necessity of providing a doctor and more than one wireless operator⁴⁰ on board ship (for certain classes of ships in the former case) and on the need to prohibit employment of seamen in a dual capacity.⁴¹

As regards hours of work, it should be noted that the seamen's group in the same Committee came up with proposals much more specific, far-reaching and advantageous for the seaman than those in the Office draft. They were, in their entirety, opposed by the shipowners' group which thought that

43, 49-51, 62-68. The application of the 8-hour working day to French ships generally resulted in an increase in the manning scales and in the operating costs of the vessels concerned.

³⁵Preparatory Maritime Meeting, Geneva, November-December 1935, Report and Record of the Meeting, pp. 15-16.

³⁶Certain governments either were opposed to, or did not commit themselves with regard to the question of manning being considered together with the question of hours of work for several reasons, mainly because the former was only regarded in the light of the safety of the ship; *ibid.*, U.K., pp. 81-82, Sweden, p. 84, Japan, pp. 84-85, Portugal, p. 107. Other countries agreed that hours of work and manning should be regulated together, Norway, *ibid.*, p. 113, Denmark, p. 124.

³⁷*Ibid.*, pp. 50-54.

³⁸*Ibid.*, pp. 131, 142-143, 196.

³⁹Shipowners thought it would be very difficult to work out a manning scale in the engine department, especially in the case of engineer officers. Spain was of the view that, owing to the different types of engines in steamers and the differing relationship between tonnage and horse power in various ships, it would be difficult to agree on an acceptable proposal. Sweden and Japan favoured the exclusion of ships under 2000 tons from the scope of the Convention on Hours of Work and Manning, *ibid.*, pp. 161-181.

⁴⁰The shipowners and certain governments, such as the Netherlands, Sweden and Denmark thought that the question was adequately dealt with in other Conventions (at the time two Conventions were in force regarding wireless operators: the London Safety of Life at Sea Convention, 1929 and the Madrid Convention, 1933 dealing with radio-telegraphic installations on board ship) while the seamen believed that no social protection was afforded to the seaman by these Conventions, *ibid.*, pp. 184-193.

⁴¹For a synopsis of the discussions held on manning, see *ibid.*, pp. 17-27.

the application of the 8 hour day to maritime employment was premature.⁴² The seamen, on the other hand, proposed a 48 hour week instead of the 56 hour week proposed by the Office.⁴³ Also, they suggested a 48 hour week for the catering department, to be arranged on lines similar to the suggestions made for the deck and the engine department, whereas the shipowners preferred the Office's draft which only laid down a compulsory minimum rest. Finally, according to the seamen, the regulation of hours of work and manning did not require consideration of economic factors, such as wages, food scales, accommodation, etc; the shipowners held the opposite view. Again, governments seemed to be indifferent: some of them, while favouring the 8 hour day, suggested that questions such as rates of compensation and minimum compulsory rest should be left to national law (Japan),⁴⁴ while others (France and Spain, as in the case of manning) whole-heartedly supported the 48 hour week.⁴⁵

After a long discussion concerning whether the Preparatory Conference was to produce a Convention or whether a Questionnaire should be addressed to all governments on the basis of whose replies the Office would provide the 1936 Conference with a draft Convention,⁴⁶ it was decided that the outcome of the discussion held at the 1935 Preparatory Conference would form the basis of a report prepared by the ILO Office containing a draft Convention or Recommendation.

The 1935 Conference despite the long discussions which took place on hours of work and manning failed to produce any satisfactory results, the main reasons being the diametrically opposed views of the shipowners' and the seafarers' groups and the fact that the issues were discussed in the wrong order.⁴⁷

The 1936 draft

Compared to the 1931 draft, the 1936 Office draft attempted to introduce a number of important restrictions regarding the scope of the Convention and its provisions of substance but in certain respects, as will be seen below, surprisingly it contained more advanced provisions, sometimes not based on state practice as evidenced by the governments' replies. It gave ratifying countries the option to exclude ships trading within certain limits, not farther than nearby ports of neighbouring countries, to be defined by national laws or regulations, thus meeting the wishes of a strong minority of governments. Furthermore, whaling ships were excluded, though the prevailing view up to 1931 had

⁴²*Ibid.*, p. 201.

⁴³The U.S seamen's delegate held a somewhat different view from that of the other seamen's delegates; he emphasised the importance of adequate manning and the 3 watches system while he expressed doubts as to the practicality of the 48 hour-overtime rule, *ibid.*, pp. 211-212.

⁴⁴The Japanese Government was in favour of the 8 hour principle on condition that ships under 2000 tons would be excluded from its scope, *ibid.*, pp. 209-210.

⁴⁵For a synopsis of the discussions held on hours of work see *ibid.*, pp. 28-35.

⁴⁶*Ibid.*, pp. 81-102.

⁴⁷In fact, the question of manning was discussed first, the number of watches second and, lastly, the hours of work. However, on the basis of the information available the question of hours of work should have been discussed in the first place so that its implications for the organisation of manning scales and for the number of watches would have been more apparent.

been that whaling vessels should be treated as vessels engaged in maritime navigation. On the other hand, the 1936 draft applied the 8-hour day and the 50-hour week to vessels of between 700 and 2500 tons; the inclusion of such a provision was not justified by the replies of the governments. Unlike the 1931 draft, it expressly provided that if a seaman is at the disposal of a superior, he can add this time to his working hours provided that he is outside his quarters, thus deciding this hitherto ambiguous issue. Both drafts, as regards the deck and the engine department, adhered to the 8-hour day rule ⁴⁸ allowing for overtime provided that no more than 12 hours per day are worked. However, while the 1931 draft permitted up to 14 hours overtime per week the 1936 draft, for no apparent reason devious from any of the governments' replies, allowed only 6. In addition, the latter, for the first time, provided for an 8-hour day and a 50-hour week for daymen ⁴⁹ in both departments; it provided, with the exclusion of night and day watchmen, for a 8-hour day and a 48-hour week in port when watches are not maintained, the latter being left to the discretion of the master. As regards the catering department, both the 1931 and the 1936 drafts proposed a compulsory minimum rest of 12 hours per day, including rest of eight consecutive hours, but the latter went further in providing for a 10-hour day at sea for the catering crew in attendance on the crew and an 8-hour day in port for the all catering crew subject to exceptions in the case of catering staff in the service of passengers.

For the first time the employment of young persons under 16 at night was prohibited by the 1936 draft.

Again, for the first time, the draft proposed that, in addition to the master, 2 deck officers should be carried on board vessels of between 700 and 2500 tons and 3 on board vessels of more than 2500 tons. There should be a minimum of three deck ratings per watch on board vessels of more than 700 tons. The tonnage categories for determining the minimum number of deck ratings on board ship were 700 tons or more, 2500-6000 tons and over 6000 tons. The minimum manning scales for deck ratings fixed for each category were 6, 9 and 12 respectively, out of which, in each tonnage category, 4, 5 and 6 respectively should be more than 19 years old and have a 3 years' sea service or an equivalent professional qualification. The number of ratings with less than 1 year sea service on board ship should be limited according to national scales and ratings signing on in a dual capacity were not to be included in the manning scale. The manning scales in the engine department should be such as to allow the three-watch system to be applied on board ship. If in case of death, sickness or accident the number of the crew diminishes, the master should make up the deficiency as soon as possible.

As regards supervision, the draft contained adequate provisions concerning control of national ships, requiring ratifying governments to determine the responsibility of the master in respect of the

⁴⁸Nonetheless, the 1936 draft adopted the 56-hour week while the 1931 draft seemed to allow a 70-hour week.

⁴⁹A dayman or dayworker aboard ship is a crewman who does not work watch hours. The eight-hour day of daymen in the deck and engine department usually starts at 8 a.m. and finishes at 5 p.m., Monday through Friday.

matters dealt with in the draft, to provide for adequate public supervision, including provision for penalties, to keep records of overtime and compensation granted and to ensure that seamen's recovery of overtime payments is secured in an easy way. On the other hand, as regards control of foreign ships calling at national ports, the measures proposed by the draft were confined to reporting to the consul of the flag-state. ⁵⁰

Conclusions concerning the evaluation by the ILO Office of information available on hours of work and manning in 1931 and the drafting of relevant international regulations ⁵¹

Hours of work

The Office, in submitting the draft Convention to the Preparatory Maritime Conference, took very little account of the views of the minority of Governments and of the wide divergencies in national laws and practices, especially in the case of near trade and medium trade whose meaning remained undefined. Moreover, the interrelationship between hours of work on one hand and manning and wages on the other was not fully appreciated at the time, though hints in this direction were included in the governmental reports. For example, it was argued that "it would make little difference in practice whether *the principle* was a forty-eight-hour week, or one of fifty-six hours with compensation for the weekly rest." ⁵² This, *inter alia*, disregarded a) the differing opinions of the Governments, which were divided on the relationship between the 8 hour a day and the 48 hour a week limitation, and b) the fact that different rates of overtime payment could apply for work done between 48 and 56 hours.

With regard to the limitation of overtime in the engine room department, though it was generally agreed that a limit should be placed, no consistent methods or generally accepted views at that time justified mention in the draft Convention of a limit of 14 hours per week, unless deliberately included as proposal aimed at changing the law. Moreover, with regard to the limitation of overtime at sea the inclusion of the above limit in the Office draft was partly dictated by reasons of practicality and expediency; especially, the introduction of the proposed new daily limit of 12 hours maximum work was entirely a gesture by the Office staff, designed to make new international law, based purely on grounds of expediency. ⁵³

On the important question of the regulation of working hours for the deck department at sea, the Office proceeded to adopt the 8 hour day followed by a tonnage requirement despite several important factors, namely i) the wide existing divergencies in national laws, ii) the absence of precise

⁵⁰It should be noted that the Office drew up a Recommendation which contained more advanced and radical provisions on issues such as weekly rest, dual employment, hours of work and manning of wireless operators and engine-room manning; for the texts of the 1936 draft Convention and Recommendation, see Report I, 1936, pp. 160-179.

⁵¹Henceforth, observations made in respect of the evaluation by the Office of the state practice for the purpose of producing a draft will be limited to points where the Office draft departed either significantly or in minor aspects from state practice. It follows that in all other respects than those mentioned the inclusion of the respective provisions in the draft was justified.

⁵²Report I, 1931, p. 149.

⁵³Ibid., pp. 153-157.

indications from many Governments to suggest a tonnage limit, iii) the incompatibility of the various tonnage limits and methods of calculation for distant trade suggested, and iv) the existence of a number of countries (Finland, Italy, Norway, Netherlands, Poland, Sweden and Yugoslavia), which were opposed to the 8 hour day with or without any qualification.⁵⁴ In another instance, the Office, faced with impossibility of reconciling divergent views, decided to adopt the 8 hours day in the deck department on sailing and arrival days on the basis of a dubious majority;⁵⁵ finally, the 8 hour day limit on sailing and arrival days was not included in the Office draft, though the latter made no distinction between working hours in port and at sea on the basis of existing information. The ILO Office, in proposing the same provisions for the weekly rest for the deck department as for the engine room department, did not take sufficiently into account the facts that i) all governments had stated that the staff would be required to perform work necessary for the navigation of the ship, and b) 5 Governments (Finland, Germany, India, Japan and Norway) thought that no compensation for a weekly rest day worked should be granted, since they regarded the working week at sea as a seven day-week. The Office was wrong in applying to the deck department the same rules concerning limitation of overtime on sailing and arrival days as those applied to the engine room staff on the basis of existing information, though this inconsistency was later rectified, with the result that no limitation of overtime in respect of the deck staff on sailing and arrival days was imposed in the draft.⁵⁶ No account has been taken of the laws of 4 countries, which differed from the majority of 9, which considered that overtime by the deck staff on sailing and arrival days should not give rise to compensation.

In view of the differences between various national laws concerning the limitation of working hours in the catering department (in attendance on passengers) at sea, on arrival and sailing days, and in port, the ILO Office very wisely decided not to include any provisions on this point in the draft but the reasons why it proposed to fix a compulsory minimum rest of 8 hours plus a total of 4 hours rest intervals between working hours are less than clear.⁵⁷ As regards the weekly rest in the catering department (staff in attendance on passengers), the same observations as those made in respect of the deck department apply here, as they do with regard to the weekly rest in the catering department (staff in attendance on the crew).⁵⁸

⁵⁴Ibid., pp. 161-164.

⁵⁵It was, in fact, a majority within a minority, *ibid.*, p. 166.

⁵⁶Compare information, *ibid.*, pp. 156-157, 168-169, 211.

⁵⁷Ibid., p. 175.

⁵⁸The above conclusions are based on the international position with regard to hours of work on board ship, as it existed in 1931. From 1931 to 1936 developments took place as regards the regulation of working hours at sea in a few countries, which do not, however, diminish the significance of these conclusions. For a brief analysis of these developments, see Preparatory Maritime Conference, 1935, Report I, pp. 16-22. Particularly, information on United States law and practice showed its tendency towards the establishment of the 8-hour day at sea and in port both for the deck and the engine staff, *ibid.*, pp. 20-21.

The Office explanations made numerous references to the Genoa draft in an attempt to justify its own choices and to enhance the chances of its general acceptance.⁵⁹ What it failed to notice, however, was that the Genoa Conference had failed to adopt an international instrument.

Conclusions concerning the evaluation by the ILO Office of information available on hours of work and manning in 1936 and the drafting of relevant international regulations

Some further observations can be made in respect of certain provisions which had been included in the 1936 draft: The 8-hour day proposed for deck ratings at sea was supported by an insufficient majority of governments to justify its unqualified inclusion in that draft. As regards hours of work on arrival and sailing days, this argument was stronger. Moreover, only one country had suggested limitation of overtime on a daily, weekly or monthly basis. Almost all countries favoured the 8-hour rule for the deck personnel in port but not the 48-hour week. It should be remembered that the 1931 draft did not mention the 48-hour week at all.

The 700 tons limit was unjustified in the case of hours of work in the engine room and the stokehold.⁶⁰ As far as the limitation of hours of work in the engine department at sea, in port and on arrival and sailing days was concerned, the same observations applied here as those made in respect of the deck department. In addition, 5 countries, including the U.K., were opposed to the international regulation of hours of work of the engine room staff at sea. The information concerning the working hours of the catering staff on which the draft was based was too limited to justify mention of the 10-hour day at sea and a 8-hour day in port.⁶¹ Only a few countries had made definite propositions while some countries were opposed to international regulation. The 10-hour limit could equally have been 12 and the state practice revealed in the more detailed 1931 Report justified the omission of these two limits. The 16-year minimum age limit for work at night did not command a satisfactory majority of governments.⁶²

Information was insufficient to justify the Office in specifying the minimum number of men per watch in the case of vessels more than 2500 tons. In the case of ships in the region of 6,000 tons state practice would indicate that the number should be 10 rather than 12 men on board ship.⁶³ Finally, the number of able seamen required to be on board ship in proportion to the rest of the crew, according to different tonnage categories, as proposed by the Office was somewhat subjectively arrived at.⁶⁴

E) The 1936 Conference

Committee on hours of work and manning

⁵⁹For example, see Report I, 1931, pp. 207-208, 211-212.

⁶⁰Report I, 1936, p. 122.

⁶¹Ibid., pp. 123-124; the United States did not send any information regarding the catering staff, *ibid.*, p. 98.

⁶²Ibid., p. 142.

⁶³Ibid., pp. 130-131.

⁶⁴Ibid., p. 133.

The first important decision taken by the Committee was that officers were to be included in the Convention.⁶⁵ Accordingly, a definition of an "officer" as "a person other than a master ranked as an officer by national laws or regulations, collective agreement or custom" was adopted (Art. 2 (b) of the 1936 Convention). The seamen put forward an amendment to the effect that time at the disposal of a superior inside the crew's quarters could be counted as normal hours of work. This amendment was rejected.⁶⁶ It became clear from the beginning of the discussions that the shipowners' and the seamen's representatives held different opinions on almost every point of the proposed Convention. The tonnage limit below which vessels were to be excluded from the Convention was set at 3,500 tons by the employers and at 400 by the workers (later, the limits became 2,500 and 1,000 tons respectively). The latter supported the 56-hour week without any additional hours of work and the inclusion of officers in the Convention, while the shipowners had the opposite opinion. It was for the first time suggested that whatever provisions were finally adopted, they should be reviewed three years after the adoption of the Convention. Proposals concerning revision of the Convention were rejected by the Committee. The tonnage limit beyond which the provisions of the Convention concerning the regulation of hours of work in the ship's engine-room would apply, namely 700 tons, despite its controversial character, was retained by the Committee.⁶⁷

The question of hours of work in the catering department was discussed at length in the Committee. The proposal of the French Government to apply the 8-hour day in the catering department, as in the deck and the engine-room departments, was rejected by 51 votes to 47.⁶⁸ The Office draft applied the 8-hour rule in port to ratings of the catering and clerical department subject to exceptions allowed by national laws for ratings employed in the service of passengers. An amendment of the British Government was adopted to the effect that exceptions made under national laws should be allowed for all ratings employed in the catering department (in the service of either passengers or the crew).⁶⁹ The amendment would enable national administrations to provide for wide-ranging exemptions from the 8-hour day in port in this department.

The proceedings of the Committee show that only a few governments participated actively in the Committee's deliberations (the U.K., Japan, France, Australia), mainly by moving amendments which would render the Office's draft more flexible. Sometimes, it seemed, as in the case of the catering department, that, employers and workers apart, all the proposed amendments were the work of one government (the U.K.). Most of these amendments were rejected. In short, as can be seen from a comparison between state practice and the new provisions of the 1936 Convention below, the outcome

⁶⁵21 R.P., pp. 210, 224-226. Most governments and the workers' group were in favour of the inclusion while the shipowners' group and, notably, the U.K. Government held the opposite view.

⁶⁶*Ibid.*, p. 213.

⁶⁷*Ibid.*, pp. 215-218.

⁶⁸*Ibid.*, p. 220.

⁶⁹*Ibid.*, p. 221.

of the Committee's deliberations had a distorting effect on certain provisions of the 1936 draft, which had been based on existing state practice.

The 1936 Conference

At the plenary Sitting of the 21st session of the Conference, the seamen's representatives declared that they were not satisfied with the text of the Convention but they were prepared to accept it in a spirit of conciliation.⁷⁰ On the other hand, the shipowners' group stated that it would oppose the Convention on the grounds that it would have adverse economic effects on the shipping industry.⁷¹ As regards the attitude of governments towards the Convention, certain Government delegates would vote for the Convention⁷² while others thought that the text, as it stood, would present grave difficulties of ratification for several reasons.⁷³ Questioning the significance of the Convention for their countries some delegates argued that the exclusion of coasting trade from the scope of the Convention would virtually mean that most or all national seamen would be excluded from the protection of the provisions of the Convention.⁷⁴ Convention No. 57 was adopted by 62 votes to 17. All Workers and Governments, except the U.K. and Japan, voted for the Convention. U.K., Japan and the Employers' group, the Australian, French, Russian and Yugoslavian delegates apart, voted against the Convention. The following Governments abstained: Canada, Estonia, Finland, Greece, India, Siam, Hungary and Venezuela. If those governments had voted against the Convention, it would not have been adopted, as had happened in 1920. In addition, Recommendation No. 49 was adopted by 61 votes to 15, with same abstentions as above; this urged governments to investigate the conditions obtaining in ships not covered by the Convention with a view to preventing overwork and insufficient manning in such vessels.⁷⁵

The 1936 Convention

The provisions of the Convention are in many respects identical with those of the 1936 draft (for details of which see above); nonetheless, mention should be made of the following new provisions: The draft was made applicable to vessels employed in the transport of cargo or passengers for the purpose of trade (Art. 1 (b)). This would exclude salvage vessels, training ships, tugs, etc. However, this provision was interpreted as bringing within the scope of the Convention "large tugs built for

⁷⁰Ibid., pp. 119, 130, 132-133.

⁷¹Ibid., pp., 121, 124, 125, 126.

⁷²Sweden, *ibid.*, p. 121, U.S.S.R. (though it considered the text quite inadequate), p. 129, Argentina, p. 136, Spain and the United States, p. 137.

⁷³Netherlands (countries unable to give subsidies to shipping companies would suffer from the diminution of their national fleets if they ratified the Convention), *ibid.*, p. 122; India, p. 129; the U.K. (national collective agreements had just been concluded which would be upset by the provisions of the Convention before experience of their working was available), pp. 130-131.

⁷⁴So Argentina (Workers) *ibid.*, p. 119, Mexico (Government), p. 120, China (Government), p. 127.

⁷⁵*Ibid.*, pp. 174-175. For the texts of Convention No. 57 and Recommendation No. 49, see *ibid.*, pp. 340-352. Nonetheless a supplementary Recommendation containing significant provisions of substantial law on hours of work and manning, based on the more advanced legislation of maritime countries, had been rejected as a whole in the Committee by 49 votes to 48; *ibid.*, p. 228.

ocean-going voyages" which fulfilled the conditions it laid down.⁷⁶ It was decided that certain persons, such as officers not keeping watch, pilots, doctors, persons working exclusively on their own account etc., should be excluded from the Convention.⁷⁷ The lower tonnage limit below which vessels would be excluded from the Convention, as far as the regulation of hours of work in the deck department is concerned, was lowered from 2,500 to 2,000 tons. The working hours of daymen per week were lowered from 50 to 48 in both the deck and the engine departments. Instead of providing for specific maximum daily or weekly hour limits, as the 1936 draft did, the Convention just prescribed that excess hours of work may be worked on sailing and arrival days in both the deck and the engine departments, leaving the details to be determined by national law (Arts 4 (3) and 5(3)). As regards hours of work in port, exceptions to the 48-hour week in port were made in the Convention in the case of ratings required for the safety of the vessel, cargo or passengers on board the ship (Art. 8 (1) (c)). Time worked beyond 8 hours per day or 48 hours a week in port is regarded as overtime unless watches are maintained for purposes of safety or within twelve hours after arrival or before sailing (Art. 8 (3)).

As regards the catering department, the compulsory minimum rest of 12 hours (including 8 consecutive hours) was made applicable only to vessels in respect of which there is in force a safety certificate issued in accordance with the Safety of Life at Sea Conventions in force at the time or a passenger certificate (Art. 9 (1)). The 10-hour day at sea laid down by the 1936 draft for catering staff employed in the service of officers or other members of the crew on board vessels of more than 2,500 tons was made applicable to all vessels other than those covered by para. 1 and to all ratings employed in the catering and clerical departments for both work at sea and on arrival and on sailing days (para. 2).

As to hours of work of deck and engineer officers, new Arts 6 and 7 of the Convention, which resulted from the relevant decisions of the Committee on hours of work and manning, dealt with this issue respectively: They applied the 8-hour day and the 56-hour week both at sea and on arrival and sailing days:⁷⁸ a) to deck officers on board vessels more than 2,000 tons, ⁷⁹ b) to engineer officers on board ships required to carry three or more engineers under the Convention.

Art. 14 of the Convention provides that vessels of over 700 but not exceeding 2,000 tons should carry 2 deck officers while on vessels of more than 2,000 tons there shall be 3 deck officers, in addition to the master. It should be noted that the article refers not to any or all officers but to certifi-

⁷⁶*Ibid.*, p. 212. This interpretation was confirmed by only 57 votes to 41.

⁷⁷With regard to the last category, it was made clear that only such persons as employees in shops, hairdresser's establishments, etc. should be excluded from the Convention's provisions; *ibid.*, p. 214.

⁷⁸As regards the limitation of hours of work in port, the provisions applying to ratings also apply to officers in both the deck and the engine department (Art. 8 (1)).

⁷⁹Allowing for additional hours per day to be worked: a) 1 for navigational and clerical purposes (navigational purposes include taking the ship's position, 21 *R.P.*, p. 224) (Art. 6 (2)), b) up to a maximum of 12 hours if the master deems it necessary that two officers should keep watch simultaneously (Art. 6 (3)) and c) on sailing and arrival days excess hours may be permitted to be worked by national law (Art. 6 (5)).

cated officers. A provision of this kind is missing from the ILO and IMO instruments on maritime training and certificates of proficiency and, it is submitted that its inclusion would make them more effective.⁸⁰

Finally, the Convention included provisions concerning the exclusion, under certain circumstances, of existing ships (Art. 21)⁸¹ and entry into force (after ratification by 5 countries possessing a fleet tonnage of not less than 1 million tons, Art. 24).

Analysis of the provisions of the Convention

The following examination is restricted only to those provisions which require special analysis. Further information on the provisions of the Convention and their effects will be found immediately below under the subsection on conclusions and the reasons for the failure of the Convention.

As the text concerning the scope of the 1936 Convention stands, it makes the Convention applicable to vessels engaged on an international voyage. Coasting trade is excluded no matter whether or not it is long-distance. Exceptions can be allowed for ships trading between the country from which they trade and the nearby ports of neighbouring countries (Art. 1, paras. 1 and 3) within geographical limits to be defined by national laws. No definition or interpretative glosses on the meaning of the words "country from which they trade" and "neighbouring countries" exist. Consequently, a large number of vessels can be excluded from the Convention. For example, national ships trading between United States' ports on the Atlantic or the Pacific coast or along the Canadian coasts are excluded from its scope. The situation is less clear in the case of a British vessel exclusively trading between the United States and Mexico or between Greece and Turkey, since there is nothing in the Convention pointing to the country from which a ship trades as the country of its registration.⁸²

Art. 17 of the 1936 Convention provides, as did Art. 13 of the 1936 draft, that if, as a result of death, accident or any other cause, the number of the crew decreases, the master must make up the deficiency at the first opportunity. The Committee, at the instance of the U.K. Government, added the word "reasonable" between "first" and "opportunity". The idea underlying the amendment was that the duty of the master was to find not any man but a suitable man.⁸³ However, the wording of the Article does not reveal the intention of the Committee and may give rise to difficulties of interpretation burdening national courts with the inappropriate task of adjudicating on the reasonableness of the master's decision whether to call at a certain port or not. Furthermore, the Convention expressly provides that work performed under these circumstances by the rest of the crew beyond the allowed

⁸⁰The same observations apply to Art. 16 which refers, with certain exceptions concerning existing ships, to 3 certificated engineer officers on board ships of more than 700 tons or 800 horses indicated horse-power.

⁸¹The exemptions allowed refer to existing ships where accommodation changes or installation of equipment necessary for an increased crew are not reasonably possible. The word "necessary" would prevent abuse of this Article, 21 *R.P.*, pp. 147-148. Exemption certificates, which according to Art. 21 (3) are valid for four years, could be renewed, 21 *R.P.*, pp. 148-149.

⁸²The workers and the Netherlands Government delegate proposed to delete the paragraphs imposing the international voyage and 'neighbouring countries' requirement unsuccessfully, *ibid.*, pp. 211, 138.

⁸³*Ibid.*, p. 224.

maximum daily or weekly hour-limit will not be regarded as overtime or give rise to extra payment (Art. 12 (d)). Thus, the delegates who participated in the work of the Committee on hours of work and manning decided this controversial issue against the wishes of the workers.

As regards overtime, the Convention, as a result of a workers' amendment aimed to meet the views of the U.S Government, leaves to national laws the question as to how overtime must be compensated (Art. 10 (2)). The question of overtime is dealt with inadequately in the Convention. As pointed out earlier, the U.S. Government was not concerned about the manner of compensation but suggested that the provisions on overtime should be deleted entirely since they were likely to ruin the morale of seamen on board ship and to reduce safety. As the text stands, on the one hand, it fails to follow the U.S. rationale and, on the other, it does not afford protection to seamen by down-grading the social aspect of the limitation of hours of work on board ship and raising the economic considerations to equal status. A provision similar to that of the 1931 Office draft, namely that overtime should be compensated primarily by time off, and only where circumstances make this impossible, by extra payment, would be preferable.⁸⁴

No adequate provisions on weekly rest were included in the Convention. While it was provided that the requirement of weekly rest, if occurring in port, must be observed, no provision was made for the weekly rest at sea or for the compensation if it is not allowed. The reason is obvious: the Convention adopted the 56-hour week at sea for the deck and the engine department and, since only two governments supported a 24-hour rest for every seven days' work, it is clear that the Office intended to allow weekly rest only in port and not at sea. However, the same majority of governments that had supported the weekly rest in port (6) was in favour of limiting work on Sundays and holidays only to what was strictly necessary. A provision to this effect would have been welcome in the 1936 Convention, counterbalancing the omission of specific provisions on the weekly rest.

As the text of the Convention stands, it only lays down the manning scales for deck ratings and for deck and engineer officers (Arts 14-16). The 1936 Office draft contained an identical provision for both ratings and officers in the engine room. While the draft provision concerning the manning scale for engine ratings had been deleted by the Committee on Hours of Work and Manning, the same provision as regards officers, was retained and so modified as to give the impression that the question of the manning scale for ratings in the engine-room had never been considered.⁸⁵ Though it would be desirable that the Convention should contain a specific manning scale for engine ratings, since, with the introduction of a detailed manning scale for engineer officers, the reason for the omission of provisions on manning scales for the engine department, namely slow ratification, was elimi-

⁸⁴Despite the principle that labour should not be regarded as a commodity, it is the practice in some countries which have advanced maritime laws that seamen work long hours of overtime (up to 18 hours a day, including normal working hours) on board modern ships to earn more money and to be entitled to more holidays at home. This attitude is sometimes indirectly provoked by the terms of a special contract concluded between the company and the seamen's union, see Schrank, *Industrial Democracy at Sea*, 1983 pp. 20-32.

⁸⁵Compare Art. 16 of the Convention with Art. 12 of the 1936 Office draft.

nated, it nonetheless cannot be said that manning scales for engine-room ratings are completely left outside the Convention: manning requirements are applied to these ratings indirectly as a result of the application of the 8-hour day and the 3-watches system to them.

Unlike earlier Office drafts which contained provisions of a general or indicative nature concerning the regulation of hours of work and manning on board ships not covered by the Convention, Convention No. 57 does not make any such provision. It was thought that a provision to this effect might impede ratification.⁸⁶ Furthermore, the 1936 Convention does not contain any provisions concerning hours of work and manning of wireless operators.⁸⁷ While regulation of these issues, as will be seen later, would be desirable it can hardly be asserted, in view of the state practice at that time, that the Office's doubts over the acceptability of such provisions in the Convention was unwarranted.

Finally, it should be remembered that the provisions of Convention No. 57 cannot be applied in national territories by means of collective agreements, since this possibility was considered but postponed i.e. left open for consideration at a later Conference.⁸⁸

Conclusions

Convention No. 57 deals with hours of work and manning. As pointed out earlier, the regulation of wages in the same Convention was not thought possible at that time.⁸⁹ Unfortunately, this Convention was not purely an instrument concerning one aspect of the seamen's conditions of employment. It contained provisions on minimum age limits, night work of young persons and qualifications of able seamen. These questions were either partially dealt with in other special instruments, though the specific provisions of the Convention do not appear therein, or would be treated in later ILO instruments, as would the question of the qualifications of able seamen, as more information on these points became available. The effect of the inclusion of these provisions on the ratification process cannot readily be ascertained but, it is submitted, information on these points was scarce at the time and the proposed age limit for night work of young persons was not supported by a large majority of countries.

It is worth examining whether the Convention has achieved its main objective, namely establishing the standard of the 8-hour day for all persons on board ship (leaving aside the unattainable 48-hour week). It is submitted that it has not: as regards the catering department, no compulsory 8-hour limit is provided for. Instead, the limits laid down are an 8-hour day in port "subject to such exceptions as may be permitted by national laws or regulations", and a 10-hour or an indirect limit in other cases. As regards the other departments, the provisions of the Convention concerning hours of work,

⁸⁶Art. 22 of the 1936 Office draft requiring ratifying countries generally to adopt national legislation for ships not covered by the Convention was deleted at the Conference, 21 *R.P.*, p. 151.

⁸⁷An amendment moved by the seamen's group to include wireless operators in the regulation of the hours of work was rejected by 46 votes to 44, 21 *R.P.*, p. 225; the manning scale for wireless operators proposed by the seamen was also voted down by 62 votes to 36, *ibid.*, p. 226.

⁸⁸21 *R.P.*, p. 228.

⁸⁹However, the delegates, realising the importance of the question, adopted a resolution urging the Governing Body and the ILO Office to take it into consideration and to compile information on the wages of seamen, 21 *R.P.*, p. 159.

overtime and manning are either vague or not effectively interrelated. Arts 4, 5, 6, 7 and 8 lay down basically an 8-hour day as a starting point. Exceptions to this rule are allowed only in the cases of a) deck and engine-room ratings on sailing and arrival days (no limitation of overtime) (Arts 4 (3) and 5 (3)); b) engine room ratings for the normal relieving of watches and the hoisting and dumping of ashes (no limitation of overtime) (Art. 5 (1)); c) deck officers for navigational or clerical purposes and two officer-watch duties (maximum 12 hours per day) (Art. 6 (2) and (3)); and d) work in port for ratings required for the safety of the vessel, persons or cargo on board. These alone are substantial exceptions to the 8-hour rule and the situation is worsened by Art. 12 (e) and (f) which provide that the Convention does not apply to extra work for the purpose of customs, quarantine or other health formalities and to work by officers for the determination of the position of the vessel at noon.

In addition to all that, Art. 10 provides that "Ratings and deck and engineer officers ... may be required to *work* in excess of the limits of hours prescribed by or permitted under the *preceding* Articles of this Part of the Convention, subject to the conditions that (a) all *such* time worked shall be regarded as overtime for which they shall be entitled to be compensated ..." ⁹⁰ It is not clear to what work the Article refers. Does it refer to the unqualified 8-hour day or to the 8-hour day as considerably modified by the *preceding* Articles? Though the initial and, perhaps, the unchanged desires of the Office and many delegates would render the first interpretation imperative, it is the second interpretation which is most likely to be adopted by international or maritime lawyers. Art. 10 refers to work in excess of the limits prescribed by the preceding Articles without any reference to specific paragraphs. It follows that it would apply to all paragraphs of the preceding Articles. If this interpretation is correct, overtime would be allowed without any limit for all persons employed in the deck and engine department beyond the 8-hour day and even beyond the substantial exceptions to this rule laid down by Articles 4, 5, 6, 7 and 8. Moreover, Art. 10 (a) which refers to all such time, apparently meaning time spent on work in excess of these Articles according to the preceding paragraph, would render extra payment for overtime almost impossible in many cases.

Let us take as an example a deck rating working on board a ship of 2,001 tons on an arrival day and let us assume that the law of the country in whose territory the ship is registered lays down 6 hours as a limitation of overtime on sailing and arrival days. ⁹¹ Initially, he would have to work 8 hours per day (Art. 4 (1)). Then, under national law he would be obliged to work 14 hours on the arrival day (Art. 4 (3)). According to Art. 10 overtime would be allowed beyond 14 hours without any limit, since no compulsory minimum rest for the deck and the engine department is laid down in the Convention, and extra payment for overtime would start running only from the 15th hour! If no limit is laid down by national law, Article 10 is useless. It is arguable that the effect of Art. 10 of the Convention in connection with certain preceding Articles is that of nullifying its aims.

⁹⁰Emphasis added.

⁹¹Ironically, Art. 4 (3) does not require ratifying countries to fix a limit on working hours on sailing and arrival days.

Even though it may be possible to make a strong case against this argument, the failure of the Convention is inevitable in another respect: Though this is not clearly expressed, the Convention's regime is based on the notion of the three-watches system and it was this system which at the 1936 Conference reassured the otherwise disquieted and distrustful delegates. Despite this extraordinary omission, Art. 13 (b) provides that vessels over 700 tons shall be sufficiently and efficiently manned for the purposes of ... making possible the application of the rules relating to hours set forth in Part II of the Convention. This means that, given the qualified limit of 8-hours per day, 3 watches are needed per day.⁹² Then, Art. 15 (1) lays down that in ships of over 700 tons the number of deck ratings shall be sufficient to allow for the availability of three ratings for each navigational watch. Further, Art. 15 (2) stipulates that in vessels between 700 and 2,000 tons there shall be a minimum (likely to be regarded as a maximum by some governments) of 6 deck ratings. 6 men divided into two watches (in view of Art. 15 (1) they cannot be divided into three watches) results in 12 and not 8 working hours per day. Though these vessels are not covered by Art. 4, which applies to vessels of over 2000 tons, this conclusion hardly accords with the objectives of the Convention and the supplementary Recommendation.

⁹²In view of Art. 10, however, which allows overtime without limit, the 3 watches assumption is demolished. Again, the text of the Convention was based on a false hypothesis.

Reasons for the failure of the 1936 Convention ⁹³

Convention No. 57 on Hours of Work and Manning (Sea) was adopted in 1936. Since then, it has been ratified only by four countries (Australia, Belgium and the United States in 1938, and Bulgaria in 1949, notably after the adoption of the 1946 Convention). Therefore, it has not yet come into force.

A reasonable guide to the controversial issues involved is provided by an examination of the size of majorities in the votes taken in the Committee on hours of work and manning. The main characteristic of the work of the Committee was that most issues on points of importance were decided by very small majorities. Most of the amendments rejected could equally have been carried, had it not been for 2 or 3 votes against. Though no detailed records of votes in the Committee are available, the trifling voting differences indicate that not only shipowners and seamen but also Governments were divided on most points of the draft. Here, it should be noted that most of the government amendments were put forward by the U.K. government, whose views on most points differed from the provisions of the Office draft. It was the most important maritime country at that time (especially in terms of influence in round table negotiations) and it can be seen that its opinion had an influence on the voting and, perhaps, administration policies of other countries. The U.K.'s amendments nonetheless were defeated on many occasions. Among the reasons why Convention No. 57 failed to achieve international acclaim are differences between existing practice and the Office's draft as they appear in the Conclusions of the evaluation by the Office of the relevant information referred to earlier in this section. Certain observations made there apply to the present text of the Convention on points such as the 8-hour day for deck ratings at sea, the 12-hour limit for deck officers, the 48-hour week in port, the 700 tons limit for working hours in the engine room, hours of work in the engine-room, hours of work in the catering department, night work for young persons, minimum number of men per watch and number of able seamen per ship. In addition:

1) Though the Office, owing to the lack of sufficient information on the part of the governments, presumed that both the questions of hours of work and manning should be treated in the same Convention, the proceedings of the Geneva Preparatory Conference in 1935 show that Governments disagreed on the question concerning whether hours of work and manning should be studied together, while shipowners seemed to believe that they should be. ⁹⁴

⁹³The observations under this heading concern the results of the Convention in terms of lack of ratification. However, it has been argued that nonetheless "the Convention has exercised a decisive influence on the regulation of hours of work on board ship, both by national legislation (as in Norway and Sweden, which before the war enacted laws based on the Convention) and by national collective agreements, especially on those that have been concluded in the last two or three years", *PTMC*, 1945, Report I, p. 20. Nevertheless, the subsequent examination by the Office of whether state practice until 1945 conformed to the requirements of Convention No. 57 shows that great discrepancies between national laws and the provisions of the Convention still existed. The areas in which these differences existed may be outlined as follows: the U.K. and Poland (hours of work of officers), the U.K., Belgium, Norway (tonnage limit), manning. It seems that the Convention exercised a considerable influence and brought uniformity to national laws as regards hours of work of ratings in all departments; for details see *ibid.*, pp. 20-26.

⁹⁴*PTMC*, 1935, Report and Record of the Meeting, pp. 90, 111.

2) Certain important maritime countries had serious objections to the tonnage limits adopted by the Conference.⁹⁵

3) Coasting trade was excluded and decided certain governments not to ratify the Convention.

96

4) While the 1936 Office draft represented a true compromise between opinions held by different delegates, it seems that the deliberations of the Committee on hours of work and manning, owing to the plethora of amendments moved and the resulting confusion, disturbed this balance.⁹⁷

5) The 1936 Convention does not contain provisions concerning a daily, weekly or monthly limit of maximum working hours, unlike the 1936 draft, which did. It has been pointed out earlier that the inclusion of such provisions was not justified by existing state practice, so that the Convention by effecting this change would have enhanced its ratification prospects. Nonetheless, this otherwise welcome provision had its bad side because it allowed excess working hours only on sailing and arrival days and not at sea, as state practice seemed to indicate.⁹⁸ The 1936 draft allowed excess hours to be worked at sea. In the engine-room the Convention allowed excess hours of work for the relieving of watches and for the hoisting and dumping of ashes (Art. 5 (3)). This provision, however, was adopted by 54 votes to 50 in the Committee and might in the event have affected adversely the progress of ratification.

6) Art. 9 para. 2 applied the 10-hour day at sea to all ratings in the catering department. It was argued earlier that information on this point was insufficient to justify its inclusion in the Convention even with regard to catering staff in attendance on the crew, as in the 1936 Office draft. But application of this limit to all catering staff without any qualification whatsoever was against state practice at the time. On the other hand, the British amendment to the effect that exceptions to the 8-hour day in port should be allowed for all catering staff by national laws (Art. 9 para. 3 of the Convention), though it rendered the text weaker, was more in accordance with state practice than was the Office draft text.

7) As regards the hours of work in the engine department at sea and on arrival and sailing days, it must acknowledged that, despite a few governments replies to the contrary, Arts 6 and 7 of the Convention seem to have been in accordance with state practice at that time. However, a minority of governments supported the 48-hour week, for the working hours of officers in port (Art. 8). Moreover, from the information available, no consistent international practice would seem to exist, as far as manning scales for engineer officers are concerned (Art. 16).

⁹⁵Japan was opposed to the 700 tons limit laid down by Art. 13 as a general limit for the regulation of manning scales on board ship and preferred a 2,000-2,500 tons limit, Report I, 1936, p. 45, 21 *R.P.*, p. 222; Great Britain could not accept a limit lower than 2,500 tons in the case of the 56-hour week for ratings, *ibid.*, p. 216.

⁹⁶(China) 21 *R.P.*, p. 127. Interestingly, it had voted for the Convention.

⁹⁷*Ibid.*, pp. 126, 129.

⁹⁸For the different views of governments, seamen and shipowners on the limitation of hours of work of ratings, see *ibid.*, pp. 234-236.

8) Though the number of able seamen in proportion to the crew was a question of manning, the 1936 Convention proceeded to lay down also their qualifications, namely that they should be at least 18 (19 Office draft)) years of age and have three years' sea service or an equivalent qualification) (Art. 15 (4)). As a result, the Convention was saddled with a provision on a question that was totally outside its originally intended scope confined to hours of work and manning, though seamen seemed to hold a different view.⁹⁹ The question was not resolved until 1946 when Convention No. 74 concerning the certification of able seamen, which also fixes the minimum age of able seamen to 18 years, was adopted. However, the 1936 Convention called governments additionally to ratify an instrument containing provisions on qualification requirements, a matter not settled until 1946, and this has certainly diminished its ratification chances (plus the fact that, according to the governments' replies, an age limit of 19 seemed to be the one most in use).

9) It should be noted that, according to the Shipowners, one of the reasons why the 1936 Convention failed was that the absence of any provisions on wages tended to accentuate rather than minimise international competition, though this reasoning was not fully substantiated.¹⁰⁰

10) The absence of any possibility of applying the provisions of the Convention by means of collective agreements has prevented the ratification of the Convention by the U.K., even though it was claimed that existing conditions in that country were at least as favourable as those laid down by it.¹⁰¹

Finally, another reason why ratification was impeded was the actual number of ratifications required for the Convention to enter into force, though not in the sense it has been argued elsewhere.¹⁰² It is true that the Convention would not be likely to enter into force until 5 major maritime countries ratified it but the reasons why these 5 countries have not done so have to be found elsewhere: In the Committee on Hours of Work and Manning many Governments, including the U.K., proposed more onerous ratification requirements aimed at avoiding international competition but it was the Workers' amendment that was adopted.¹⁰³ If these 5 countries had in those circumstances ratified the Convention, it would have entered into force between them and restricted them while there might be other important maritime countries which did not ratify and thus would still have been free from its obligations.

4.1.2. 1936 - 1946: A repeated story

The Joint Maritime Commission decided at its second post-war session, held in London from 8 to 12 January 1945, that the question of wages, hours of work and manning should be examined by

⁹⁹PTMC, 1935, Report and Record of the Meeting, pp. 155-159.

¹⁰⁰Report IX, 1946, p. 27.

¹⁰¹28 R.P., p. 298.

¹⁰²Valticos rightly argues that the entry into force of these Conventions was delayed by the ratification requirements of the Hours of Work Conventions, N. Valticos, *International Labour Law*, 1979, p. 194.

¹⁰³21 R.P., pp. 228-229.

the forthcoming Preparatory Conference to be convened in Copenhagen from 15 November to 1 December 1945 and a final decision should be taken at the 1946 ILO Conference. The Governing Body at its 94th session endorsed the proposals of the Commission.¹⁰⁴

A) The International Seafarers' Charter (ISC)

In general, the ISC¹⁰⁵ which represented the seafarers' views on most aspects of maritime labour, in 1945, contained very advanced provisions going, in almost every respect, beyond Convention No. 57 and the Office's suggestions that the new Convention should be drawn up on broad lines leaving details to be settled by national action. It proposed: 1) that provisions on wages, hours of work and manning should apply to all classes of ships (para. 19); 2) specific figures of minimum rates for most categories of seamen irrespective of classes of ships (paras. 21, 22, 24, 25); 3) a daily limit of 8 hours in all cases, a 40-hour week in port and on arrival days, compensation for a 7-day, 56-hour week with 3 days off in port for every month (paras. 68, 71, 74); 4) subject to modifications in the case of the catering department, an 8-hour day and a 48-hour week at sea and on sailing days for all departments (paras. 73, 75, 76); 5) far-reaching provisions for overtime (paras. 35-38); and 6) detailed provisions as regards manning, especially in the engine-room (paras. 79-92).

B) The preparatory work of the Office

For the first time the Office decided to tackle the problem of wages. Though it was admitted that no substantial information was available on the proportion the wages of the crew bear to the total costs of the running of the ship, the Office stated that "as the argument of 'undercutting' is so frequently used in the course of discussion on wage and other claims, it must be assumed that the fraction of total costs represented by wage costs is at any rate substantial enough to make rates of pay a not inconsiderable factor in international competition."¹⁰⁶ Despite the difficulties involved in the fixing of internationally accepted rates of pay in the shipping industry,¹⁰⁷ it was thought desirable from the social point of view that international *minimum* rates of pay should be fixed following trends in national shipping industries (as in the U.K. and in the U.S.A.). Subject to reservations concerning the reliability of the tables concerned, it can be said that between 1936 and 1944 able seamen's wages showed a tendency towards uniformity in rates of pay in European countries. The gaps in rates of pay in South America, India, Australia, New Zealand, Indian crews on British vessels and, less so, Chinese crews on British vessels had not materially altered.¹⁰⁸ Insufficient statistical information was available concerning the rates of pay of other categories of seamen. Questions which, according to the Office, could be subjected to international regulation included seniority and continuous service pay, long-voyage allowances, compensation for overtime and war risk bonuses. It was pointed out by

¹⁰⁴PTMC, 1945, Report I, pp.1-2.

¹⁰⁵For the text of the ISC, see *ibid.*, pp. 67-75.

¹⁰⁶*Ibid.*, pp. 3-4.

¹⁰⁷*Ibid.*, pp. 4-5.

¹⁰⁸*Ibid.*, p. 7. For the table of comparison of pay of A.B. during the period 1936-1944, see *ibid.*, pp. 18-19.

the Office that an attempt at the international fixing of minimum wage rates on a regional rather than on a world basis would not have any chances of success owing to the considerable differences in the rates of pay in the different regions of the world.¹⁰⁹

The 1945 Office draft

As regards hours of work and manning, from a perusal of the provisions of the 1945 Office draft and the accompanying Office explanations it can be seen that it constituted quite a progressive instrument compared to the 1936 Convention and aspired to international regulation of such questions in detail, eliminating the flexibility of the respective provisions of the latter. It included provisions on hours of work and manning of officers and ratings in all departments, including radio operators, on both near and distant trade ships, and proposed a 48-hour week for them as the maximum. If the number of hours worked exceeded 8 hours a day or 48 hours a week compensation for overtime should be provided. Finally, the draft based on the Australian legislation introduced a new system of overtime and compensation in cases where this not given. Hours of work in excess of the daily limit would be compensated in cash while work in excess of the weekly limit should be compensated by time off duty and off the ship. Compensatory time off was regulated in detail and imposed costly requirements on shipowners that were unable to grant time off to officers and ratings. Working hours in the catering department were based on the 8-hour day. Unlike the 1936 Convention, the 1945 Office draft contained detailed provisions concerning overtime and proposed to raise the minimum age for able seamen from 18 to 19 years. Finally, a method of ratifying the proposed Convention by means of collective agreements was envisaged.¹¹⁰

C) The Copenhagen Conference and the 1946 Office draft

The Preparatory Maritime Conference held in Copenhagen in 1945

The conflicts between the shipowners' and the seamen's groups continued at the Preparatory Conference: as regards the scope of the Convention, the shipowners preferred the wording of the 1936 Convention while the seamen argued that vessels engaged in home trade and short sea international trade should be included in the Convention. The 100 tons limit below which vessels should be excluded from the Convention had been proposed by the seafarers and it was adopted despite the opposition of the shipowners group and the abstention of certain governments. It was decided by the Committee, following a shipowners' proposal that only the minimum rates of pay for able seamen should be fixed and that the other rates would be fixed by collective agreements in proportion thereto. Between the £ 12, £ 16 and £ 18 figures for the fixing of minimum rates of able seamen the last was accepted as being likely to secure relatively greater acceptance. As regards hours of work, the shipowners would prefer a text based on the 1936 Convention while the seamen would accept as a basis for discussion the more progressive 1945 Office draft outlined above. It was decided that over-

¹⁰⁹Ibid., p. 83.

¹¹⁰Ibid., pp. 85-104.

time should be limited to a maximum of 24 hours per week. Despite strong opposition from the shipowners' group, the Conference expressed itself in favour of the 48-hour week in the catering department. Finally, because of lack of time, the Conference deleted all articles in the Office draft that related to manning on the understanding that they would be considered anew at the following Maritime Conference in 1946.¹¹¹ From the proceedings of the Conference it can be concluded that on many points of major importance, such as the tonnage limit, the fixing of a minimum monthly wage for able seamen, hours of work in all departments, maximum weekly limitation of overtime, compensatory time off and the coming into force of the Convention, the 3 groups, were divided.¹¹²

The 1946 Office draft

In view of the narrow majorities by which most important issues had been decided at the Preparatory Conference, the Office draft departed from the original PTMC draft: it raised the proposed minimum tonnage limit from 100 to 500 tons; it excluded whaling vessels from the scope of the Convention but made the exclusion dependent not on the kind of the vessel but on whether a whaling agreement governed the relations of the crew or not;¹¹³ it lowered the minimum wage limit for able seamen from £ 18 to £ 16, though this decision was partly based on misapprehension of the voting tactics at the Preparatory Conference (in fact, the Office took little account of the abstentions in the votes taken); it maintained the distinction between near-trade and distant-trade ships both of which would be covered by the Convention, but it applied the 56-hour week to officers employed in distant-trade ships at sea and on arrival and sailing days; it lessened the rigidity of the 1945 draft as regards compensatory time off by providing for guide-lines which should be followed by national administrations in granting time off duty in port; in view of the controversial situation on the question of fixing limits on overtime, it rightly omitted the stipulation in Art. 15 of the PTMC draft providing for a 24-hour weekly limitation of overtime in the case of officers;¹¹⁴ it applied the 9-hour instead of the 8-hour day to the catering department and reintroduced the distinction between catering staff serving passengers and the rest thereof as regards hours of work in port; it contemplated application of the Convention by means of collective agreements and provided for a system of enforcement of the provisions of the Convention similar to that of the 1936 Convention; finally, the Convention included exemption provisions for existing ships similar to, but more elaborate than, those of the 1936 Convention. In general, the Office draft tried to simplify the PTMC text and enhance its ratification chances by eliminating the provisions which had secured very small majorities at the Preparatory Conference and by taking into account to a certain extent the views of the shipowners.

¹¹¹International Labour Conference, 28th session, 1946, *Wages; Hours; Manning*, Report IX, pp. 16-26.

¹¹²For the report of the Committee on Wages, Hours of work and Manning appointed by the Copenhagen Conference and the record of proceedings, see *ibid.*, pp. 14-26, 42-49.

¹¹³*Ibid.*, p. 57. However, this modification did not produce any results since no whaling country ratified the 1946 Convention. However, Norway was able to ratify the 1958 Convention when an important amendment proposed by it was carried to the effect that persons employed in whaling could be excluded from the scope of the Convention under conditions regulated by legislation.

¹¹⁴*Ibid.*, pp. 62-63.

*D) The 1946 Conference*The Conference Committee on wages, hours of work and manning

The Committee discussed in detail all questions concerning the substance of the Convention and the questions of the entry into force-requirements and the application of the Convention by means of collective agreements. A general observation should be made here: as in the deliberations of the similar Committee appointed by the 1936 Conference, the votes taken show wide divergencies of views. Most of points of importance, such as the number and the shipping tonnage of countries whose ratification was required for the Convention to enter into force, the exclusion of national coasting trade from the scope of the Convention, the exclusion of certain classes of officers and persons in supervisory positions, hours of work in the near-trade and distant-trade ships in all departments were decided by narrow majorities.

The ambiguous question as to the number and the shipping tonnage of ratifying countries required for the Convention to enter into force was decided by 86 votes to 60; it was considered that the Convention should be ratified by nine countries out of a proposed list, 5 out of which should possess at the date of registration at least one million GRT, before it comes into force. Later, at the Conference, a more onerous qualification was added to the effect that the aggregate tonnage of shipping possessed at the time of registration by the Members whose ratification have been registered should not be less than 15 million GRT.¹¹⁵ This became Art. 26 of the Convention which ironically included the Copenhagen statement of good will that the above provisions aimed at facilitating ratification (para. 3).¹¹⁶

Sailing vessels were excluded from the scope of the Convention. A maximum of 24 hours at sea in any period of two consecutive days was adopted for watch-keepers employed in near-trade ships. In port, an 8-hour days was prescribed for work on Saturdays and a 2-hour day for work on Sundays. As regards distant-trade ships a 56-hour week was provided for watch-keepers at sea and on arrival and sailing days while, in port, hours of work could not exceed 2 on Sundays. In the catering department an 8-hour day in port was laid down, while a 10-hour day was provided for work at sea and in port when passengers are on board ship. Art. 23 of the Office draft, which provided for exemptions in the case of existing ships, was deleted by the Committee.¹¹⁷

The 1946 Conference

Certain important amendments were moved at this Conference. First, a joint proposal by the Government delegates of China, Egypt, France, Greece and Turkey to the effect that the extension of

¹¹⁵28 R.P. , pp. 297, 311.

¹¹⁶It is difficult to imagine in which manner onerous ratification requirements could enhance the ratification process of a Convention. Valticos argues on this point: "Bien que les conventions contenant des dispositions finales de cet ordre indiquent que celle-ci ont "pour but de faciliter, encourager et hâter la ratification" des conventions par les États Membres, les conditions posées ont manifestement retardé et parfois empêché l'entrée en vigueur de certaines de ces conventions."; N. Valticos, N., *Droit international du travail*, Paris 1983, at p. 483.

¹¹⁷*Ibid.*, pp. 300-313. For the text of the Committee draft, see *ibid.*, pp. 313-318.

the international minimum wage provided for in Art. 5 of the Convention to the vessels "engaged in the national coasting trade within its territorial waters is left to the discretion of the Governments in consultation with the organisations concerned" was finally rejected after it had been adopted twice (once on a recorded vote) and a proposal to reconsider the question had been upheld. The amendment was strongly opposed by the Workers' delegates, who declared that were it to be carried, they would not have any interest in the Convention. The amendment was rightly rejected, since it would leave a considerable number of seamen outside the international minimum wage regime of the Convention. It was claimed by the U.S. Employers' delegate that its adoption would exempt from the relevant provisions 71% of the American merchant marine.¹¹⁸

Secondly, an amendment was moved jointly by the Government delegates of the U.K. and India to the effect that Art. 12, concerning hours of work on board near-trade ships, should provide for overtime payment or time off in port if hours are worked in excess of 112 hours in a period of two consecutive weeks. This would recognise the 8-hour day and the 112-hour fortnight (similar in terms of the amount of working hours to the 56-hour week). The Office draft provided that overtime would start to run after the completion of 96 hours of work in a period of two consecutive weeks. Though the amendment was opposed by the U.S. and Australia as rendering the 8-hour principle meaningless, surprisingly it was supported by the Workers' group as a gesture of compromise and was finally adopted by 64 votes to 24. However, an amendment to a similar effect, as regards hours of work on board distant-trade ships, namely that overtime should start running after 56, and not 48 hours per week have been worked, was rejected by 31 votes to 46.¹¹⁹

The U.K. Government, which had recently adopted new maritime labour legislation excluding from the regulation of hours of work certain officers enjoying special status, put forward an amendment to the effect that certain officers be excluded from the provisions of the Convention relating to hours of work subject to a number of safeguards (see below for a short analysis). This amendment was adopted by 50 votes to 0¹²⁰ and provides ratifying States, which have adopted advanced legislation concerning the regulation of hours of work of officers, with the option of excluding these officers from the application of this part of the Convention provided that the competent authority certifies that full compensation for this is secured. Convention No. 76 concerning wages, hours of work on board ship and manning was adopted by 55 votes to 21 with 7 abstentions.¹²¹

The 1946 Convention

¹¹⁸Ibid., pp. 152-156.

¹¹⁹Ibid., pp. 164-170.

¹²⁰Ibid., p. 172.

¹²¹Ibid., p. 184. The Employers as a body, the Polish delegate apart, voted against the Convention. Most Governments (including Australia, Canada, China, the U.K., India and Norway) and the whole Workers' group voted for the Convention. Greece and Chile voted against while the U.S., Panama and Cuba abstained. However, it should be noted that in the first Record Vote on the Convention Panama and Cuba had voted against the Convention.

Convention No. 76 applies to "mechanically propelled" vessels of more than 500 GRT engaged in the transport of cargo or passengers for the purpose of trade by sea. Fishing vessels are excluded (Art. 2). Furthermore, it does not apply to certain categories of persons (Art. 3), particularly, to a pilot not a member of the crew (b), persons working exclusively on their own account or remunerated exclusively by a share of profits (f), "persons, excluding those in the service of a wireless telegraphy company, who are employed on board by an employer other than the shipowner (h) and persons who are employed in whale-catching for the purpose of whaling or similar operations and are subject to a special whaling or similar agreement (emphasis added).

The Convention establishes a minimum international wage of £ 16 or \$ 64 per month (Art. 5) and provides for special cases where "larger groups of ratings" are employed on board ship than would otherwise be employed (this provision was aimed mainly at dealing with the cases of Indian and Chinese seamen on board foreign ships or similar situations, though this is not clearly stated). An "adjusted equivalent" of the minimum wage will be fixed for these seamen (Art. 6). Art. 9 provides for a "national" system for the supervision of wages.

As regards hours of work, the Convention lays down both for officers and ratings in the deck, engine and catering departments:

a) for near-trade ships: i) 24 hours of work at sea in any period of two consecutive days, ii) an 8-hour day in port (a 2-hour weekly rest day), iii) a maximum of 112 hours in a period of two consecutive weeks, iv) overtime payment if hours of work under i) and ii) are exceeded and, preferably, time off in port if hours of work under iii) are exceeded (Art. 12).

b) for distant-trade ships: i) an 8-hour day at sea and on arrival and sailing days, ii) an 8-hour day in port (a 2-hour weekly rest day), iii) overtime payment when the above hours are exceeded and, preferably, time off in port, if more than 48 hours per week are worked (Art. 13).

As regards hours of work in the catering department, the Convention regime is more elaborate. It distinguishes between passenger vessels and non-passenger vessels: a) in the former case a ten-hour day at sea is laid down, on arrival and sailing days and in port when passengers are on board, b) in the latter, a 9-hour day at sea, and on arrival and sailing days is laid down. In all other cases (in port) hours of work should not exceed eight but special provisions exist for hours of work on Saturdays and Sundays. If hours of work exceed 112 in a fortnight, time off in port or other compensation, as agreed, is granted (Art. 14).

Art. 16 of the Convention exempts certain officers from its provisions subject to a number of safeguards while Art. 18 includes the usual provisions concerning maritime work "in the interests of safety", which is exempted from the application of the part of the Convention dealing with hours of work (compare Art. 12 of the 1936 Convention). Art. 19 of the Convention prohibits the employment of ratings under 16 at night and is identical with Art. 11 of Convention No. 57.

Arts 22 and 23 repeat the provisions of Art. 19 of the 1936 Convention concerning the establishment of a system of national and international supervision with one important difference: while the 1936 Convention applied the system of reporting to the consul of the flag State to cases of insufficient manning, Art. 23 of Convention No. 76 applies the same system for contravention of any of its provisions dealing with wages, hours of work or manning.

Finally, the Convention contains some harmless provisions on manning (Art. 20), a provision to the effect that it revises the 1936 Convention, though the latter is not closed to ratification thereby (Art. 24) and more cumbersome provisions than those of the 1936 Convention concerning entry into force (ratification by 9 countries, of which 5 should possess 1 million of GRT each, 15 million GRT aggregate). ¹²²

Analysis of the provisions of the Convention

The following examination is restricted to those provisions only which require special analysis. Further information on the provisions of the Convention and their effects will be found immediately below under the headings collective agreements, conclusions and reasons for the failure of the Convention.

Convention No. 57, *inter alia*, regarded as hours of work time spent by a seaman at the disposal of a superior outside the crew's quarters (Art. 2 (d)). Art. 11 (d) of the 1946 Convention, following acceptance of an amendment of the Workers deleting reference to the crew's quarters does not contain a similar clause. ¹²³ Consequently, what is crucial for the determination of the working hours of the crew is not the place of work but whether the seaman is under orders given by a superior at the disputed time.

Art. 18 of the Convention refers to work that is not to be counted in the application of the provisions regarding hours of work and overtime. Para. 3 of the Article refers to the right of the master to require to be performed any work necessary for the safe and efficient operation of the ship. This seems to be a very wide provision which could be interpreted differently in ratifying countries and it was unsuccessfully opposed by the Workers' group. However, the historical method of interpretation of this paragraph would not regard as "work necessary for the safe and efficient operation of the ship" work necessitated by i) sickness of, or injury to, an officer or rating and ii) reduction in the number of the crew during the voyage due to unforeseen circumstances. ¹²⁴

Art. 6 of the Convention deals with minimum basic pay for certain kinds of crews. It provides for an adjusted equivalent of the minimum basic rates laid down by Art. 5 of that Convention. Para. 3 stipulates that this equivalent must be fixed by collective agreement between the organisations of the shipowners and the seafarers concerned and, failing such agreement, by the competent authority of the

¹²²For the text of the Convention, see *ibid.*, pp. 382-394.

¹²³*Ibid.*, p. 303.

¹²⁴*Ibid.*, p. 306.

group of the seafarers concerned, only if both the countries concerned have ratified the Convention.

¹²⁵ Unfortunately, the Article does not provide any answer to the question concerning the identity of these organisations and how "the competent authority of the group of the seafarers concerned" can be ascertained. Let us take an example of an Indian seaman employed on a British ship. Probably, the parties required to reach an agreement are the association of the British shipowners and the British or Indian seafarers depending on the scope of the collective agreement concerned. In the absence of such an agreement, two possibilities are open, either: a) the British Government could fix the equivalent and b) the Indian Government could fix the equivalent, again depending on the scope of the collective agreement concerned. The scope and the effectiveness of the Article is restricted by the proviso that both the countries of the territory of the seaman and the flag of the ship must have ratified the Convention before it comes into operation. Furthermore, assuming that some competent authority fixes an adjusted equivalent, the further issue left undecided by the 1946 Conference concerns how this equivalent will be adjusted in relation to the minimum basic rates prevailing in the countries of the nationality of the seaman and the flag of the ship.

Para. 3 provides that, failing an agreement between the organisations concerned, the adjusted equivalent shall be fixed by the competent authority of "the territory of the group of the seafarers concerned." This territory could be any territory: the territory where the seaman abides or has its permanent residence or the territory of the nationality of the seaman. Though it is the latter interpretation which gives effect to the intentions of those responsible for the drafting of the Convention, the clearer wording of Art. 5 of the 1946 Office draft, which speaks of the territory of the origin, would have been preferable.

Minimum wage rates are fixed only for able seamen. It was presumed by the delegates who participated in the Conference that if a minimum basic rate for able seamen were determined, wages for the rest of the crew would be fixed in relation to the minimum thus established. However, Art. 5 of the Convention seems to be incomplete. No provision is made for seamen of similar status in other departments. Moreover, minimum wages for able seamen may differ given the wide definition of an "able seaman" accepted into the Convention whereby he does not necessarily need to be certificated (Art. 5 read in conjunction with Art. 4 (c)).

As regards enforcement of the provisions of the Convention, the observations made in respect of Convention No. 57 apply here also with the exception of the welcome provisions of Art. 23 sub-

¹²⁵A reference to the obligation of the competent authority of the territory of origin of the ratings concerned to fix the equivalent failing such agreement had been deleted in the Committee on Wages, Hours of Work and Manning but was reinserted by the Drafting Committee, although the discussion on this point had not been reopened, *ibid.*, p. 307, 319. The requirement for ratification by both countries does not apply to the whole Article but only to the case where a collective agreement cannot be concluded between the organisations concerned (compare Art. 6 (3) of the Convention to Art. 6 (2) (b) of the Committee draft), *ibid.*, p. 160-161. It should be noted that Art. 5, para. 3 of the 1946 Office draft on wages, hours of work and manning did not make any reference to ratification by both the countries concerned.

jecting to supervision, however uninspired it may be, obligations arising out of the whole network of the provisions relating to wages, hours of work and manning.¹²⁶

The 1946 Office draft contained provisions exempting existing ships from the application of the Convention provided that certain conditions are fulfilled (Art. 23). This provision was deleted by the Committee on wages, hours of work and manning¹²⁷ with the result that no flexibility is provided for certain cases where changes in accommodation on existing ships are not possible.

As regards manning, the general nature of the provisions finally adopted precludes any serious assessment of their significance. One observation can be made in this connection: The Convention applies to vessels of 500 GRT or more (Art. 2 (a)). Art. 20 imposes the manning requirements on "every vessel to which this Convention applies." The reason why tonnage limits are fixed in ILO Maritime Conventions is that different countries disagree on the degree of application of detailed provisions to small tonnage vessels. Since, however, no detailed regulation of manning is included in the Convention the tonnage limit for manning should be smaller, since manning problems in small ships can be at least as acute as in larger ships.

Collective agreements

For the first time, the application of the provisions of the Convention in the territory of a ratifying country was allowed to be effected by means of collective agreements. As pointed out earlier, no provision to this effect had been included in the 1936 Convention. Application of the provisions of the Convention by means of collective agreements follows a three or, eventually, a four-stage procedure: a) the organisations of shipowners and seafarers of the Member concerned must conclude a collective agreement, b) the Member concerned must supply to the ILO Office information on measures taken to apply the Convention, including particulars of the relevant collective agreements, c) it must participate, by means of a tripartite delegation, in a Committee consisting of Governments', shipowners', seafarers' representatives and members of the JMC, set up for the purpose of considering the measures taken to apply the provisions of the Convention in each particular country and d) in cases where discrepancies are detected by this Committee between the provisions of the Conventions and the clauses of the national collective agreements, the Member concerned should take account of any observations made by the Committee in this respect (Art. 21). A number of points require clarification:

1) It should be pointed out that Art. 21, para. 6 of the Convention, as modified, requires ratifying States to give "full effect" to the provisions of the Convention applied by means of collective agreements. Thus, the Conference rejected the notion of substantial equivalence suggested in the 1945 Office draft. It was the first time that the term "substantial equivalence" was used in an official ILO document, albeit in a sense other than that in which it was employed in Convention No. 147: it

¹²⁶As to the enforcement of collective agreements, see *infra* under collective agreements.

¹²⁷28 R.P. , p. 310.

was thought that if collective agreements as a means of application of the Convention were to be allowed, the obligations laid thereby on ratifying countries might not be identical or defined in detail. It was the view of the Office that "in deciding on the nature of the obligations to which the Convention gives rise, the test should be, not the degree of identity of obligations which the Convention may provide, but whether one or other form of Convention is more likely to result in positive progress." ¹²⁸

2) Since collective agreements depend on the conciliatory spirit of the organisations concerned, it was thought that if a Member decided to apply the Convention by means of collective agreements, these must, in the interests of certainty, be in force before the ratification was registered with the ILO Secretariat. Art. 21 (3), which resulted from the deliberations of the Drafting Committee, provides that a Member ratifying the Convention must supply to the ILO Office, *inter alia*, particulars of any collective agreements *in force* which give effect to any of its provisions. Apart from the obligations under the ILO Constitution of Members which ratified a Convention, this paragraph should be interpreted in the sense that these agreements must be in force before the ratification of the Convention. ¹²⁹

3) The wording of paras. 4 and 6 of Article 21 concerning the examination of national collective agreements by an international tripartite Committee is so weak that it should deserve the status of a Recommendation: a) this Committee may be set up and b) when and if the Committee makes any observations or suggestions concerning any lacunae in collective agreements, the Member concerned undertakes to give consideration to these observations or suggestions. What this provision means is less than clear. It should be noted that a special Committee as envisaged by the Convention has not yet been set up until now, since the Convention has not entered into force, but meanwhile any questions raised are considered by the the competent ILO organs within the framework of the ILO's supervisory system.

4) Art. 1 of the Convention provides that "nothing in this Convention shall be deemed to prejudice any provision concerning wages, hours of work on board ship, or manning, by law, award, custom or agreement between shipowners and seafarers, which ensures the seafarers conditions more favourable than those provided for by this Convention." It might be thought that this provision was unnecessary in view of Art. 19 (11) of the 1946 ILO Constitution which at that time provided that "In no case shall any Member be asked or required, as a result of the adoption of any Recommendation or draft Convention by the Conference, to lessen the protection afforded by its existing legislation to the workers concerned." However, it can be seen that the latter referred to "existing legislation" and did not refer to collective agreements by means of which most matters covered by the Convention would

¹²⁸It was considered by the Office that the inclusion of the possibility of application of the Convention by means of collective agreements would overcome ratification-difficulties in countries where collective agreements were the established method of regulating these questions; for the justification of, and problems posed by, the application of the provisions of the Convention by means of collective agreements, see Report IX, 1946, pp. 71-75.

¹²⁹This interpretation was upheld by the Committee on Wages, Hours of Work and Manning, 28 R.P. , p. 299.

be dealt with nationally (especially the minimum wage rates).¹³⁰ Although some delegates might have thought that Art. 1 of the Convention forbids states to introduce by collective agreements lower minimum wage limits than those already in force at the time of the entry of the Convention into force if such limits are above the limit fixed by the Convention, the correct view is that this and similar articles in ILO instruments do not involve any obligation necessarily to maintain these customs or agreements.¹³¹

The collective agreement-regime of the Convention cannot be considered satisfactory for the following reasons:

i) The enforcement provisions of the Convention do not apply to collective agreements. Art. 21 (2) disengages a country which intends to apply the Convention by means of collective agreements from the obligation to ensure that a system of supervision of the rates of wages exists in that country (Art. 9). This addition to Art. 21 had been proposed by the U.K. Government member and was supported by an overwhelming majority of the delegates in the Committee.¹³² However, it would have been better if such an exception had been allowed when the collective agreements themselves provided for a satisfactory system of enforcement and settlement of disputes and did not relegate enforcement, entirely or partially, to legislation.

ii) The question concerning the position when a collective agreement lapses or ceases to exist is not resolved by Art. 21. A possible solution would be found if the Committee referred to in Art. 21 could release a country from its obligations under the Convention for a specified period. Apart from the fact that this Committee does not exist at the moment and its establishment is not compulsory, a provision to this effect could have been included in the final provisions of the Convention concerning ratification. No such provision was made.

iii) The position of foreigners in national ships to which the Convention applies by means of collective agreements was not cleared up either at the Conference or in the Convention. Particularly, the possibility of having *positive* or *negative* conflict of laws relating to the application of collective agreements to different groups of seafarers on board ship has not been avoided.

iv) No flexibility in relation to the application of the regime is provided for countries where no compulsory application of collective agreements exists. Three categories of countries can be identified according to the way in which collective agreements function therein: a) countries where a Convention, once it has been ratified becomes the law of the land (with a status superior or at least equal to

¹³⁰Report IX, 1946, p. 70. This omission has been rectified since; Art. 19 (8) of the 1988 Constitution provides that "In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation."

¹³¹*O.B.*, Vol. XXIII, Jan.-Dec. 1938, Interpretation of the Decisions of the International Labour Conference, Hours of Work and Manning (Sea) Convention, 1936, pp. 30-3; see also *O.B.*, Vol. XXIX, 1946, Interpretation of the Decisions of the International Labour Conference, Convention concerning Vacation Holidays with Pay for Seafarers (1946), pp. 496-8.

¹³²28 *R.P.*, p. 299.

that of other laws of that land), b) countries where collective agreements are legally binding on all organisations of employers and workers irrespective of whether they are parties to them or not and c) countries where collective agreements are the sole means of dealing with the question of wages, hours of work and manning and there is no compulsory application of these agreements to all the employers and workers concerned.¹³³ Here, it should be added that Art. 21 dealing with the application of the Convention by means of collective agreements should be interpreted as requiring ratifying States to afford complete coverage to seamen on ships registered in their territory (para. 1, subpara. 2). The Copenhagen text included a proposal that the Convention should be applied by means of collective agreements to a substantial percentage (3/4ths or more) of the workers of ratifying countries and a similar amendment was moved in the Committee by the U.K. to the effect that provisions thus applied could cover 90% of the workers concerned.¹³⁴ This amendment was withdrawn, as it was thought by some delegates that it was likely to impair the nature of the obligations of the Member States under the Convention with the result that countries where there was no compulsory application of collective agreements to non-parties thereto would have difficulties in ratifying it.

Conclusions

Convention No. 76 is a more comprehensive instrument than Convention No. 57, since it comprises the question of wages. It also omits certain provisions of the latter Convention which might have impeded ratification and were irrelevant to the subject-matter of the Convention, such as the qualifications of able seamen. Manning was regulated by general provisions which would eliminate some of the difficulties encountered in ratification because of certain rigid manning scales laid down in the 1936 Convention. On the other hand, Convention No. 76 is a much more specific instrument than Convention No. 57 and, therefore, more difficult to apply. Hours of work are regulated in more detail while the employment of young persons at night still finds a place in the Convention. Moreover, the elimination of the provision exempting, under certain conditions, existing ships from its scope may have hampered immediate ratification of the Convention. Finally, as a result of the deliberations of the Committee on wages, hours of work and manning the ratification requirements of the Convention have been strengthened. The conclusions drawn below are divided into four categories based on subject matter, namely wages, hours of work, manning and general provisions.

(i) Wages

An objective aimed at when negotiating this Convention was the establishment of an international minimum basic rate of pay aimed at the minimisation of inequalities in the payment of wages or, at least, the reduction of irregularities as regards the payment of seafarers in different countries: Art. 6 fails to achieve this objective. If the organisations concerned do not come to an agreement, the authority of the nationality of the group of seafarers concerned will probable fix the adjusted equivalent.

¹³³This was the case in the United States, *ibid.*, p. 298.

¹³⁴*Ibid.*, pp. 299-300.

This means that if there are three or more groups of different nationalities on board the same ship, they will be paid different wages. But even so far as the same group of employees is concerned, say Chinese employed on board two British vessels, they will still be paid different wages, since Art. 6 adopts the unacceptable criteria of the repercussions of the employment of these seamen on manning scales or on the additional or reduced cost to the individual shipowner consequent on such employment.

It may be argued that an international minimum wage is unattainable because of the many difficulties involved in determining the factors to be taken into account and the shipowners held views similar to this criticism at the 1946 Preparatory Conference. Since the idea of taking into account the cost of living and the general level of wages in the country from which the seamen concerned were recruited was rejected,¹³⁵ it was hoped that the draft Convention would take into account the different purchasing power of the same money in the countries where it was spent. No consideration was given to this variable, since "the proposals of the Office were probably as satisfactory a solution as any that could be found, there being no perfect solution of all the problems involved."¹³⁶

Quite apart from all this, if the justification for this special treatment of certain categories of seafarers is that they are less efficient than other seafarers, inclusion of a provision could have been envisaged which would have made the wages paid to those seafarers dependent only on the principle of equal pay for equal work, which was professed, by those most concerned, namely the Indian Government and the Indian Workers, to be the principle upon which the Article had been based.¹³⁷

The Convention, by eschewing the regulation of this question, compromised the effectiveness of its provisions on wages in favour of continuing the cheap labour employed on board the ships of traditional maritime countries.

¹³⁵*Ibid.*, p. 307.

¹³⁶*Ibid.*, p. 309.

¹³⁷*Ibid.*, pp. 160, 163. An amendment to this effect, moved by the Government delegate of Cuba, was rejected at the plenary sitting of the Conference; *ibid.*, pp. 159-162.

(ii) Hours of work

Again, the answer to the question whether the Convention has provided seamen with an 8-hour day or a 48-hour week must be in the negative. As regards near-trade ships, a limit of 24 hours in a period of two consecutive days is laid down. The limit applied to the catering department is a 10 or 9-hour day. As far as hours of work on distant-trade ships are concerned an 8-hour day is provided for the deck, engine and radio departments. In port, apart from the case of the catering staff when passengers are on board (10 hours), an 8-hour day is recognised. However, as in Convention No. 57, Arts 12 (4), 13 (5) and 14 (4) allow limitless overtime. Two maximum limits of working hours are fixed by Arts 12, 13 and 14: 112 hours in two consecutive weeks for near-trade ships and the catering department, and 48 hours per week for distant-trade ships, as regards all other departments. These maximum limits function on a different plane from that contemplated by the proceedings in 1936. At that time they had been regarded as absolute limits in the sense that they could not be exceeded in any case whatsoever. In 1946 these limits served only as the baseline for the purpose of calculating overtime. No limit is placed on the hours of work on board ship but if the above limits are exceeded, compensation in the form of time off or otherwise, as may be determined by collective agreements will be granted. In other words there is no limitation on overtime.¹³⁸ On the other hand, two significant improvements on the 1936 Convention have been introduced: a) the radio department has been included in the regulation of hours of work and b) overtime in the deck, engine and radio departments on distant-trade ships runs from the completion of the 48th hour of weekly work, and not the 56th hour as it was the case with Convention No. 57.

As in the case of the 1936 Convention, the 1946 Convention does not contain any satisfactory provisions concerning weekly rest for time worked on the weekly rest day. To a certain extent, this is compensated by the provisions of the Convention concerning the granting of time off in port. Though time off in port has gained ground since 1936 (see the above-mentioned paragraphs and Art. 15), the connection between overtime payment and compensatory time off is not clear and it makes granting of time off hopeless. Let us take the example of a deck rating on board a distant-trade ship of more than 500 tons. Without overtime this seaman would, according to Art. 13 (1-3), normally have to work 56 hours per week at sea or 50 hours per week in port. According to para. 4 the 8-hour daily limit can be exceeded without limit. Then, para. 5 comes into operation which provides for the granting of time off, if 48-hours weekly are exceeded but excluding hours regarded as overtime. This provision may result in the bizarre situation where hours worked between 48 and 56 per week would entitle the seaman to a day off in port, but hours worked between 56 and, say, 70 or more, would be

¹³⁸A 24-hour maximum limit on overtime per week had been adopted by 19 votes to 18 at the Preparatory Conference. An addition was made to this provision at the Plenary Sitting of the Preparatory Conference to the effect that in countries where no such limits were fixed overtime worked should be compensated in cash. This provision required that payment should be at a rate equivalent to at least one and a half times the basic rate, Report IX, 1946, p. 47.

compensated by the overtime payment of para. 4 which would prevent para. 5, and thus time off, from coming into operation. Similar observations apply to Arts 12 and 14.

(iii) *Manning*

Only one conclusion can be drawn here which acquires significance in relation to the manning provisions of the 1936 and 1958 Conventions. It may be thought that manning is not regulated in detail by the 1946 Convention because such regulation was found impossible. However, as the 1936 proceedings revealed, this is not the case, the only reason for this incomplete regulation being that neither at the Copenhagen Conference in 1945 nor at the Plenary Sitting of the Conference in 1946 was there any time available for the consideration of this question.

(iv) *General provisions*

i) Art. 16 of the Convention excludes certain officers from the application of the Convention provided that some conditions are fulfilled: a) they must be entitled by means of collective agreements to conditions of employment at least as advantageous as those of the Convention, b) these agreements must have been concluded before 30 June 1946 and they, or a renewal thereof, must be in force at the time of ratification, and c) the Member concerned must supply to the Director of the Office full particulars of collective agreements. The Director will then lay a summary of the information received before the Committee referred to in Art. 21, which will examine these collective agreements to ascertain whether they give full compensation for non-application of the part of the Convention dealing with hours of work and, if the Committee thinks so, make the necessary observations or suggestions.

Thus, Art. 16 establishes an alternative system of application of the provisions of the Convention relating to hours of work to certain officers by means of collective agreements. This option would facilitate ratification of the Convention. Nevertheless, it has two major drawbacks: a) the sole judge of whether the collective agreements provide full compensation for the non-application of the provisions of the Convention is the competent authority of the ratifying State, and b) the counter-balance to this "national judgement", envisaged in the intervention of the Committee of Art. 21, is ineffective in view of the drawbacks of that Committee, which have been explained earlier (see subsection on collective agreements).

Despite the above remarks, Art. 16 could prove useful in a modified form. Particularly, it would facilitate ratification by countries where certain classes of officers, enjoying special conditions of employment, are excluded from the application of national laws and regulations dealing with hours of work. Three forms of modification of Art. 16 could have this effect that : a) the collective agreements need not have been concluded before 1946 but before the ratification of the Convention by the Member concerned and they or a renewal thereof must be in force at the time of the formal registration of the act of ratification, b) supervision of the decisions of national authorities be entrusted either to the Committee of Experts on the Application of Conventions and Recommendations according to the ILO Constitution or to the Committee similar to that under Art. 21 of the Convention;

the establishment of this Committee could be compulsory and its decisions binding on ratifying States, and c) either one or other of the above Committees should reexamine the position of the Member concerned, at regular fixed intervals, with a view to applying the provisions of the Convention to the territory of the Member concerned.

ii) Art. 23 of the 1946 Office draft, which gave the right to ratifying States to exclude existing ships from the application of the Convention under certain conditions, was deleted by the Committee on wages, hours of work and manning, though there were some delegates who thought that such an "escape clause" should be included in the Convention.¹³⁹ This Article aimed at facilitating the ratification of the Convention. If a provision of this kind is thought desirable, then Art. 23 of the 1946 Office draft provides a perfect basis for discussion. It is clearer and more specific than the similar Article of the 1936 Convention. It laid down that in the cases where the application of the provisions of the Convention to certain existing ships was not possible because it would necessitate additional accommodation or additions to the numbers of the crew or of these with qualifications which are not available, an exemption certificate, not valid for a period of more than four years, must be issued by the competent authority. The position on each vessel would be reconsidered aa) at the end of the period fixed and bb) whenever substantial alterations or repairs are made to the vessel or the vessel is reregistered.¹⁴⁰ In addition, a very useful provision was included in Art. 23 of the Office draft: The exemption certificates would be granted in respect of ships existing at the date of the first coming into force of the Convention and not at the date of ratification of the Convention by the Member concerned. Thus, a Member would not be able to exempt existing ships from the provisions of the Convention by postponing its ratification.

Reasons for the failure of the 1946 Convention

Convention No. 76 concerning wages, hours of work on board ship and manning was adopted in 1946. Since then, it has been ratified only by one country (Australia, in 1949, before the adoption of the 1949 Convention). It has not, therefore, yet come into force.

The analysis of the voting during the deliberations of the Committee on wages, hours of work and manning shows that most of the important issues were decided by narrow majorities (see the observations made earlier in respect of the 1936 Convention). In addition, apart from state practice, no details of which are available for the 1946 Convention, the voting procedures in the Committee on wages, hours of work and manning show that the questions which gave rise to most controversy were those dealing with hours of work in respect of all departments in near-trade and distant-trade ships, and overtime (votes: 71 to 62, 65 to 61, 60 to 66, etc). One or two conclusions can be drawn from these votings: a) the time was not yet ripe for the adoption of the 8-hour day and the 48-hour week at

¹³⁹28 R.P. , p. 310.

¹⁴⁰The repairs and alterations referred to mean any repairs and alterations and not only those primarily affecting crew accommodation. Reregistry means change of flag when a ship has been transferred from ownership in one country to ownership in another, Report IX, 1946, p. 78.

sea plus overtime payment for hours worked in excess of 96 hours in two weeks, and b) no crystallised views on how hours of work in the catering department could be organised existed to facilitate international regulation of this question.

In contrast to the preparatory discussions held in 1936, a close examination of the recorded votes taken on most points in the Committee on wages, hours of work and manning and at the plenary sitting of the Conference in 1946 reveals that many delegates, especially from governments, abstained from voting and adopted a neutral attitude toward the Convention. The impression is left that these governments entertained doubts concerning the outcome and the feasibility of the objectives of the Conference and this renders evaluation of their position with regard to the Convention more difficult. However, certain points may be singled out providing possible reasons for the poor record of the Convention in terms of ratification:

1) The preparation for the Convention was incomplete. Proposals had been made at the Preparatory Conference that information should be made available on the financial and economic repercussions that the 96-hour fortnight might have on the shipping industry.¹⁴¹ The Office replied that the information requested depended upon the replies of the governments being received early by that Office. These replies were never in fact received. Furthermore, the preparatory work of the Office itself was undoubtedly insufficient: No questionnaire was sent to the ILO members and the resulting proposed Convention consisted entirely of a text devised by the Office alone, taking into account the confused guide-lines laid down by the Preparatory Conference. Compared to the preliminary stages of the 1936 Convention, the 1946 Convention started from a particularly disadvantageous position. The former was meticulously drafted after the opinions of most governments on all important points of the draft had been considered, though not all points were utterly respected, while the latter attempted to base itself on a fortnight's work.

2) Difficulties were encountered at the preparatory stages of the Convention in reaching an agreement on the position of Asiatic, African and other seamen and on an internationally accepted minimum monthly wage for an able seaman. Only 12 governments (compared to an opposed group of 11) were in favour of Art. 6 of the Convention which aimed to establish an international minimum wage limit for certain categories of seamen, mainly the Indian and the Chinese (though 20 delegates abstained from voting). The 11 opposed preferred to insert only a simple reference to the principle of equal pay for equal work.¹⁴² The £ 16 minimum rate finally adopted was not universally acceptable but it must be admitted that it had been supported by the majority of the governments at the Preparatory Conference and was preferable to the £ 12 limit and the £ 18 limit which had been adopted by the Copenhagen Conference.¹⁴³ At the 1946 Conference, the question of fixing the actual minimum ba-

¹⁴¹Ibid., pp. 22-23.

¹⁴²28 R.P., p. 162.

¹⁴³Report IX, 1946, pp. 19-21, 29-31.

sic rate for able seamen proved a very controversial issue. Two countries, Italy and Chile, declared themselves against the proposed minimum of £ 16 for economic reasons, while in the voting the other 6 governments abstained (however, one among them, the U.S. was in favour of the principle of an internationally fixed minimum wage.¹⁴⁴ Only 3 Governments expressly favoured the inclusion of a minimum overtime rate of one and a quarter times the basic pay or wages per hour.¹⁴⁵

3) The inclusion of the national coasting trade in the Convention undoubtedly inhibited many countries from considering ratification.¹⁴⁶ The inclusion was decided after a motion to the opposite effect had been rejected by 63 votes to 75, with one abstention.¹⁴⁷ The recorded vote on the question of the application of the international minimum wage limit to seamen employed in national coasting trade shows that 8 governments were against such application while 13 were in favour. Ratification by these 8 countries may thus have been impeded.¹⁴⁸ The issue was eventually decided by 24 votes to 45 with 21 abstentions. Many Governments, whose future attitude toward the Convention cannot, therefore, be predicted, abstained from voting.¹⁴⁹

4) The 2-hour day for work in port on Sundays was not supported by a substantial majority of Governments. In the Committee it had been adopted by 62 votes to 54.¹⁵⁰ There was a difference of opinion as to whether overtime on distant-trade ships should be compensated after the completion of 48 or 56 working hours per week.¹⁵¹

5) Art. 19 of the Convention prohibits the employment at night of young persons under 16. At least, one Government, Norway, was of the opinion that this issue was irrelevant to the questions dealt with in the Convention.¹⁵²

6) As pointed out earlier, reference to existing ships was deleted during the deliberations of the Committee by 70 votes to 44. Opinions were divided on the admission of such an escape clause into the Convention. The omission, however, of the old Art. 23 of the Office draft may have affected the ratification progress of the Convention. Also, it would be very difficult for countries where collective agreements are not legally binding on non-parties thereto, to ratify the Convention. It should be noted that in 1949 certain governments, like Sweden and Norway, expressed their difficulties as regards

¹⁴⁴28 R.P. , p. 308.

¹⁴⁵Report IX, 1946, p. 23.

¹⁴⁶For the problems which were posed by the application 48-hour week to the Lakes in Canada at the end of World War II onwards, even though shore workers and deepsea merchant seamen had long enjoyed it, see Jim Green, *Against the Tide* , 1986, especially, pp. 128-137, 175-184, W. Kaplan, *Everything that floats* , 1987, pp. 41-48.

¹⁴⁷9 Governments (including Greece, Norway and China) were against the inclusion, while 12 Governments (including the U.S., the U.K., Canada, France, India) voted for inclusion, while Sweden abstained.

¹⁴⁸Difficulties of ratification because of this reason were alleged by Denmark, International Labour Conference, 32nd session, Partial Revision of Four Conventions Adopted by the 28th (Maritime) Session of the Conference, Seattle, 1946, 12th item on the Agenda, Report XII, 1949, p. 17.

¹⁴⁹28 R.P. , p. 156.

¹⁵⁰Ibid., p. 304.

¹⁵¹Ibid., pp. 169-170. The second solution was supported by, at least, the U.K. and India among governments and by the Employers' group while the first was supported by the Workers' group and certain governments. The latter was finally adopted by the Conference which rejected the 48-hour week by 31 votes to 46.

¹⁵²Ibid., p. 306.

ratification based on collective agreements and stated that it would be practically impossible in these countries to ensure 100% coverage by collective agreements.¹⁵³

7) One of the main characteristics of free collective bargaining was thought to be that it provided the possibility for the parties concerned to amend, renew or deal in whatever way they desired with the collective agreements concluded. However, a country ratifying the Convention on the basis of collective agreements was bound for 10 years under Art. 27 of the Convention. This would mean that it would have to resort to legislation, if collective agreements expire or lapse within the period of these 10 years, although the matters covered by the Convention had been traditionally dealt with in collective agreements in that country.

Finally, it was alleged by the Workers' group that the inclusion of burdensome requirements regarding entry into force might result in impeding ratification. Nonetheless, in view of the substantial agreement of governments over the figures of Art. 26 (2)¹⁵⁴ this argument has apparently no validity but it certainly constitutes one of the main reasons why the Convention has not come into force.

4.1.3. 1946-1958: The years of moderate revision

4.1.3.1. 1946-1949: The failure of attempts at major revision

Despite a Resolution adopted by the 1946 Conference which, *inter alia*, aimed to encourage early and simultaneous ratification of the instrument adopted at Seattle in 1946, only one ratification had been registered by 1949. The Governing body eventually decided that the partial revision of Convention No. 76 should be placed on the agenda of the 32nd Session of the ILO Conference. Revision would be considered in respect of a) the consistent working of overtime (Art. 18, para. 2) and b) the period for its denunciation (Art. 27).¹⁵⁵

A) The deliberations of the subcommittee appointed by the JMC at its 14th session

It was decided by 73 votes to 4 that ratification of the Convention by means of collective agreements should as a principle aim at 100% coverage. If this goal were not attained, any country, which had initially ratified the Convention by means of collective agreements, would have to have recourse to national legislation to ensure that seamen not covered by collective agreements were covered.¹⁵⁶ Several countries proposed amendments to Articles of the Convention which they considered obstacles to ratification. The majority of the amendments was put forward by the Scandinavian countries. They regarded as obstacles to ratification a) Art. 14 (2) (b) (ii) and (3) (b) dealing with hours of work of the catering staff in port, b) Art. 18 (1) prohibiting the consistent working of over-

¹⁵³Report XII, 1949, p. 15.

¹⁵⁴28 R.P., p. 297.

¹⁵⁵Report XII, 1949, pp. 2-3, 5-6, 23-24. The JMC, at its 14th session in December 1947, adopted a resolution which recommended that governments should report on the difficulties encountered in the ratification of the Seattle Conventions. After reports by 28 countries had been received, a tripartite sub-committee appointed by the JMC adopted a resolution to the effect that the question of allowing partial revision of the Seattle Conventions should be placed on the agenda of the 32nd Session of the ILO Conference.

¹⁵⁶*Ibid.*, pp. 16-17.

time and c) the absence of a provision similar to Art. 21 of the 1936 Convention concerning the exemption of existing ships under certain conditions. It was argued that the hours of work prescribed by Art. 14 could not be respected without considerable overtime. All the specific amendments were lost but it was agreed that Art. 18 (1) should be amended as follows: The words "Consistent working of overtime shall be avoided whenever possible" were substituted for the words "There shall be no consistent working of overtime."¹⁵⁷ From the proceedings of the Sub-committee it became apparent that the Seafarers' and the Shipowners' groups continued to be divided on most issues on the agenda even on such questions as the procedure for revision of the Convention.

B) The 1949 Conference

Two questions concerning partial revision of Convention No. 76 were before this Conference: a) amendment to Art. 18 (1) and b) establishment of a shorter period for the denunciation of the Convention than the 10 years prescribed in Art. 27 of the Convention.¹⁵⁸ At the Conference the Netherlands Government Delegate while accepting that the proposed amendments constituted an improvement over the existing text, emphasised that uncertainty surrounded the question of the application of the Convention by means of collective agreements.¹⁵⁹ The first amendment was adopted by 84 votes to 24, with 28 abstentions. Most of the Employers and the Governments Delegate of Italy voted against.¹⁶⁰

Conclusions

The 1949 attempt at revision was simply a failure. Only two amendments proposed by the Governments were accepted. The change of the period for the denunciation of the Convention was a welcome amendment. As regards the amendment to the effect that consistent working of overtime should be avoided whenever possible, it is arguable that it ruined the only control-switch existing in the Convention. As pointed out earlier, there is no limitation of overtime in the 1946 Convention. The only safeguard, if any, against the use of overtime to the disadvantage of time off in port was the former Art. 18 (1). As modified, Art. 18 (1) lost most of its original meaning. A better solution would have been to reinsert a provision concerning the exemption of existing ships. Overtime would then not have been resorted to very often while Art. 18 would maintain its value in the Convention. As regards other, more important, points which were, as indicated above, found to constitute possible reasons for non-ratification of the Convention, none was either discussed or taken into account.

The Wages, Hours of Work and Manning (Sea) Convention (Revised) (No. 93) was adopted in 1949. Since then, it has been ratified by only six States (Australia and Uruguay (1954), Cuba

¹⁵⁷Ibid., p. 19.

¹⁵⁸In the Committee on Revision of Maritime Conventions it was agreed that the period for the denunciation of the Convention should be altered from 10 to 5 years, 32 *R.P.*, p. 659.

¹⁵⁹Ibid., p. 87. He entertained doubts concerning the residual obligations of governments which had ratified the Convention by means of collective agreements in cases where no collective agreements were concluded or the agreements concluded had lapsed.

¹⁶⁰Ibid., p. 108.

(1952), Philippines (1953), and Brazil and Iraq (1965 and 1985 respectively), notably after the adoption of the 1958 Convention). It has, therefore, not yet come into force.

4.1.3.2. 1949-1958: The loss of a golden opportunity for complete reexamination and the compromise formula

A) The preparatory work of the Office

Following consideration of information submitted by the ILO Office to the JMC concerning the working of Conventions Nos. 76 and 93, the latter body recommended, at its 18th session in October 1955, *inter alia*, that a new maritime session of the ILO Conference should be convened to examine the revision of these Conventions as first suggested in 1954.¹⁶¹ In the meantime, a questionnaire on the possible revision of Convention No. 93 and on the conditions of employment of seafarers employed in smaller ships had been prepared for the purpose of eliciting information on the law and practice of different countries on this question. The following conclusions can be drawn from the replies of the 27 Governments to this Questionnaire:¹⁶²

1) 5 Governments (Ceylon, Colombia, Luxembourg, Haiti, Iran) replied either that they had no particular interest in the revision of the Convention or that, in view of the type of vessels and the small number of seafarers employed, it would have little application in their territory. Information on state practice in these countries is not available. Australia and Ireland, which had ratified the Convention by that date, did not make any comments.

2) The law or practice or both of Canada and New Zealand seemed to be in substantial accord with the provisions of the Convention.

3) The law or practice or both of Canada and New Zealand also seemed to provide more advanced conditions of employment than those laid down by the Convention.

4) Haiti stated that no special legislation had been adopted covering seafarers and that legislation of a general nature only applied to them while in Switzerland special legislation was in the process of adoption.

5) All governments thought that the wages provision of the Convention constituted an obstacle to ratification while most of the few governments (including the F.R.G., Japan and Norway), that sup-

¹⁶¹This step had been suggested earlier by a Resolution adopted by the Tripartite Sub-committee of the JMC on Hours of Work and Manning in the Short-Sea Trades of North West Europe convened in Geneva in April 1954; see ILO, Preparatory Technical Maritime Conference, London, Autumn 1956, *General Revision of the Wages, Hours of Work and Manning (Sea) Convention (Revised) No. 93*, First Item on the Agenda, PTMC, 1956, Report I/1, pp. 1-3. For the texts of the Questionnaire and the Resolution see Appendix to PTMC, Report I/1. It should be noted that the Sub-committee for North West Europe considered the possibility of a tripartite regional conference at which an agreement could have been reached on hours of work and manning in the short sea trades in North West Europe. However, it decided that the question was of general application and proposed the consideration of the question at a special Maritime Conference through the usual JMC-PTMC procedure; see the text of the Resolution. For a historical review of the question of revision of Conventions Nos. 76 and 93, see *ibid.*, pp. 4-9.

¹⁶²Only observations of a general nature are made here. For the actual state practice in 1954 the reader is referred to the ILO publication mentioned in the previous note. The term "Convention" applies only to Convention No. 93 and not to previous Conventions.

plied information on the question concerning whether the provisions of the Convention on hours of work taken as a whole had impeded ratification, replied in the affirmative.

6) On a comparison of Articles of Convention No. 93 with the state practice by 1954 the situation on each Article was as follows:

(i) Art. 1: The law or practice or both in the majority of countries did not differ from the provisions of this Article and did not constitute an obstacle to ratification. ¹⁶³

(ii) Art. 2: Most national laws either did not contain provisions similar to those of the Article or they differed from the latter in certain respects. However, the majority of the Governments (apart from Japan, Norway and, partially, the F.R.G.) thought that the provisions of this Article did not constitute an obstacle to ratification. ¹⁶⁴

(iii) Art. 3: The same as above, though the U.K. and the Netherlands expressed reservations.

(iv) Art. 4: The law and the practice of most governments seemed to be in conformity with this Article.

(v) Art. 5: The law or practice or both of all governments did not conform to the requirements of this Article or did not contain any similar provisions. All considered this Article, as it stood, to be an obstacle to ratification. ¹⁶⁵

(vi) Art. 6: The same as above except that two countries did not regard this Article as an obstacle to ratification.

(vii) Art. 7: The law in the majority of the countries was in accordance with the provisions of this Article. It did not constitute an obstacle to ratification according to the opinion of most governments, though two governments (F.R.G. and Norway) thought that it should be deleted in view of the observations made in respect of Arts. 5 and 6 of the Convention.

(viii) Art. 8: The national law in the majority of the countries did not contain provisions similar to this Article; governments were of the opinion that this Article should be deleted.

(ix) Art. 9: No sufficient information was available. It seems that some countries did not have legislation on this point though others did. Some governments stated that in accordance with their attitude toward Art. 5, this Article should be deleted.

(x) Art. 10: Though the legislation of most governments differed from those of this Article in minor respects, they did not regard this Article as an obstacle to ratification.

(xi) Art. 11: The law or practice or both of some countries differed from the provisions of this Article while in other countries it virtually conformed to them. The former group regarded the Article as an obstacle to ratification. ¹⁶⁶

¹⁶³PTMC, 1956, I/1, pp. 30-32.

¹⁶⁴Ibid., pp. 33-39.

¹⁶⁵Ibid., pp. 47-59.

¹⁶⁶Ibid., pp. 89-92.

(xii) Art. 12: The majority of the Governments did not favour the distinction made between near- and distant-trade ships. However, in the majority of states no more hours of work on near-trade ships were prescribed than those laid down in this Article; the majority did not regard this Article as an obstacle to ratification.¹⁶⁷

(xiii) Art. 13: In the majority of states no more hours of work on distant-trade ships were prescribed than those laid down in this Article. However, many important countries opposed the 48-hour week. Governments were divided concerning whether this Article constituted an obstacle to ratification.¹⁶⁸

(xiv) Art. 14: Laws and collective agreements in various countries differed in many respects from the provisions of the Convention. Governments were divided concerning whether this Article constituted an obstacle to ratification.¹⁶⁹

(xv) Art. 15: The provisions of this Article were in harmony with state practice at the time¹⁷⁰ and no government regarded it as an obstacle to ratification.

(xvi) Art. 16: Law and practice in various countries either did not contain a similar provision or did not differ from the provisions of this Article. None of the Governments regarded it as an obstacle to ratification. However, the U.K., on whose collective agreements this Article was modelled, and whom it aimed to satisfy, did not reply to the relevant question.

(xvii) Art. 17: Laws and practice in different countries varied considerably and differed from the provisions of this Article. However, the majority of the countries who fixed overtime rates on the basis of hourly wages provided for rates higher than those laid down in this Article. Not many countries supplied information concerning whether this Article constituted an obstacle to ratification but, except for one, all those from whom information was available replied in the negative.

(xviii) Art. 18: Law and practice in the majority of countries was in conformity with the provisions of this Article. The majority of governments did not regard it as an obstacle to ratification.¹⁷¹

(xix) Art. 19 of the Convention: As above.

(xx) Art. 20 of the Convention: As above.¹⁷²

(xxi) Art. 21 of the Convention: As above.¹⁷³

(xxii-xxxii) Arts 22 to 32 of the Convention: In general, no observations were made by Governments concerning the effective implementation or revision of these Articles.

¹⁶⁷Ibid., pp. 94-103.

¹⁶⁸Ibid., pp. 104-110.

¹⁶⁹Ibid., pp. 112-119.

¹⁷⁰In the U.K., collective agreements at the time specified certain cases where time off in port could count as leave, *ibid.*, p. 120.

¹⁷¹Japan proposed additional cases to be included in the Article to enable it to ratify the Convention, *ibid.*, p. 132. It can be seen that these proposals weakened the Article considerably and resembled the early 1920-36 Office proposals.

¹⁷²Ibid., pp. 135-141.

¹⁷³Ibid., pp. 142-149.

7) Almost all Governments considered that Convention No. 93 should be revised in one respect or another.

B) The 1957 Preparatory Maritime Conference

As regards the interrelationship between wages and hours of work, opinions were divided at the Conference. The seafarers' group argued that the revised instrument could be divided into two parts which could then be ratified separately so that ratification might be facilitated. On the other hand, the shipowners' group was totally opposed to such a division. The U.K. Government was of the opinion that a division of this kind would not raise the low standards of conditions of employment prevailing in certain countries, unless both shipowners and seafarers were agreed upon such a measure, which, it was pointed out, was not the case.¹⁷⁴ A number of governments pointed to the difficulties encountered in the ratification of Convention No. 93. Some of the reasons for this were that governments were unwilling to interfere with questions traditionally dealt with in collective agreements; that certain Asian countries would not proceed to ratification before the countries on whose ships their seamen were employed ratified the Convention; and that the international minimum wage seemed to be unacceptable to most governments.¹⁷⁵ Again, seamen and shipowners were divided on all the main issues discussed: the tonnage limit below which vessels would be excluded from the Convention; the division of the revised instrument into two or more parts; even the form this instrument should take (the shipowners preferred a Recommendation while the seamen a Convention).¹⁷⁶

It was decided that the tonnage limit of Convention No. 93 should stand. The definition of "basic pay or wages" was clarified to exclude the cost of food. An important amendment proposed by Norway was carried to the effect that persons employed in whaling could be excluded from the scope of the Convention under conditions regulated by legislation. Moreover, musicians on board ship were excluded from the scope of the Convention.¹⁷⁷

A discussion which ensued at the Conference centred on whether a Convention such as Convention No. 93 could be revised by means of a Recommendation in view of the U.K. Government and shipowners' group being in favour of a Recommendation. It was agreed, and this was also the opinion of the Legal Adviser of the ILO, that this was not possible. A Convention should be revised by a similar instrument and the Conference was in this respect bound by the terms of reference drafted by the Governing Body, although it could agree that revision was not possible and that other means of securing general agreement on the provisions of the future instrument could be adopted.¹⁷⁸ The proposal of the U.K. Government to the effect that a Recommendation be substituted for a Convention was defeated by a small margin. The shipowners' group plus Canada, the F.R.G., Portugal, the

¹⁷⁴International Labour Conference, 41st session, 1958, Second Item on the Agenda, *General Revision of the Wages, Hours of Work and Manning (Sea) Convention (Revised)*, 1949 (No. 93), Report II, pp. 5-6, 13.

¹⁷⁵*Ibid.*, pp. 7-8.

¹⁷⁶*Ibid.*, pp. 9-10, 12, 14-15, 18-19.

¹⁷⁷*Ibid.*, p. 10, 11.

¹⁷⁸*Ibid.*, pp. 13-16.

U.K. and the U.S. were in favour of the proposal while the seafarers' group and all other governments (including Greece, India, China, Australia, Netherlands and France) were against. Japan abstained. An amendment moved by the Scandinavian countries to the effect that the Convention should be split into two parts which could be ratified separately was adopted. Interestingly, Greece, a leading shipping state, voted against the amendment.¹⁷⁹ A Convention and a supplementary Recommendation containing more advanced provisions compared to the Convention were submitted to the 41st session of the ILO Conference.

After the idea of resorting to a Recommendation had been rejected, the shipowners declared that they would adopt a passive attitude in the following deliberations and that they would not move the amendments they had intended to. This was particularly regrettable because, from a comparison between the reasons for non-ratification of Convention No. 93 and a number of the shipowner's amendments, it becomes clear that had they been adopted, they would have removed certain obstacles to ratification.¹⁸⁰ In conclusion, the 1957 Preparatory Conference failed to achieve the desirable consensus between Governments, shipowners and seafarers. Most of the important issues of substance remained undecided and the revision attempted was superficial rather than real. The possibility of excluding from ratification the part of the Convention that dealt with wages did not secure general acceptance.

C) The 1958 Conference

The Conference Committee on Wages, Hours and Manning

Chaplains and persons engaged exclusively on educational duties were excluded from the scope of the Convention, the latter by a narrow majority only. An amendment proposed by Bulgaria, supported by the U.S.S.R., aiming to apply the 8-hour day and the 48-hour week to all departments on board all ships, was opposed by both the employers' and the workers' groups and it was, therefore, rejected. Four countries (the F.R.G., Japan, the U.S.S.R. and Spain) were added to the list of countries of Art. 27.¹⁸¹

The deliberations of the Committee did not illuminate the obscure issues which remained unresolved since the Preparatory Conference neither did it dispel the lack of confidence concerning the future of the Convention displayed by certain governments. It is interesting to note, however, that the text, as amended, was adopted by the Committee by 156 votes to 105 with 42 abstentions. The proposed Recommendation was adopted by 267 votes, with no votes against, but with 36 abstentions.¹⁸²

¹⁷⁹Ibid., pp. 19-20, 26-27. For the text of the revised instrument, as slightly amended by the Preparatory Conference in certain respects referred to above, see *ibid.*, pp. 33-64. For the text of the supplementary Recommendation see *ibid.*, pp. 64-70. The Recommendation raised the international minimum wage and applied the 8-hour day to all departments.

¹⁸⁰For the shipowners' amendments, see *ibid.*, pp. 22-25.

¹⁸¹41 R.P., pp. 223-224.

¹⁸²The result of the vote for the Convention was as follows: Governments: for, 51 (Belgium, Bulgaria, Canada, Denmark, Finland, France, Indonesia, Italy, Netherlands, Norway, Poland, Rumania, Sweden, Ukraine, U.S.S.R., United States, Yugoslavia); against, 0; abstentions, 42 (Argentina, Brazil, Burma, China, the F.R.G., Greece, Japan, Liberia, Pakistan, Portugal, Spain, Tunisia, Turkey, the U.K.); 4 Governments (Colombia, Cuba, Ghana, India) were absent.

The 1958 Conference

Certain countries drew attention to their difficulties in accepting an international minimum wage based on foreign currencies.¹⁸³ It was argued by certain delegates at the 1958 Conference that though Conventions Nos 76 and 93 had not been widely ratified they had exercised a considerable influence on national policies in various countries.¹⁸⁴ However, the exact effect of these Conventions on national policy-making is not verifiable. No amendments were moved at the Conference and the proposed Convention was adopted by 104 votes to 22, with 22 abstentions.¹⁸⁵

The 1958 Convention

Convention No. 109 concerning Wages, Hours of Work on Board Ship and Manning (Revised 1958) is almost identical to Convention No. 93 and the reader is referred to the analysis given earlier and the conclusions drawn in respect of the latter Convention. For the purposes of this subsection it is sufficient to point out the main differences between Convention No. 93 and Convention No. 109; they are twofold:

a) chaplains, persons exclusively engaged on educational duties, musicians, and persons employed in whaling under conditions regulated by legislation¹⁸⁶ were excluded from the scope of the Convention, and

b) Convention No. 109 provided ratifying States with the possibility of excluding from ratification Part II of the Convention, dealing with wages, by means of a declaration appended to ratification (Art. 5, para. 1). A Member availing itself of this escape-clause must supply to the Office information concerning the monthly basic pay or wages of able seaman (para. 3). Such a Member is, however, at a later stage free to notify the Director-General of the ILO that it wishes to be bound by

Shipowners: for, 0; against, 105; abstentions, 0. Seafarers: for, 105; against, 0; abstentions, 0, *ibid.* p. 225. In addition, a Resolution was proposed by the U.S.S.R. Government which requested the Governing Body to include seafarers in any future consideration of measures aiming to reduce working hours with a view to applying the principle of a 40-hour week to them. This Resolution was adopted by 141 votes to 129, with 30 abstentions. For the text of the Convention, the Recommendation and the Resolution as amended by the Committee, see *ibid.*, pp. 226-233. It has been reported that by 1976 the 40-hour five-day week for seafarers was in force in 11 industrialised countries. In the eighties the 40-hour week was adopted either by legislation or, more frequently, in collective agreements in the following countries: Austria, Greece and Spain. France, Finland and Australia adopted a 39, 38 and 35-hour week for seafarers respectively; see ILO, *Report of the Director-General*, 74 (Maritime) Session, 1987, p. 45. However, the report concluded that "... the number of countries in which reductions of normal working hours have been achieved appears to be relatively small; most of the countries concerned are industrialised countries, where the comparability factor with hours of work in shore-based occupations has a strong influence." *ibid.*

¹⁸³*Ibid.*, pp. 139 (Brazil), 141 (Mexico), 142 (Argentina).

¹⁸⁴*Ibid.*, pp. 140 (Sweden, Government), 142-3 (U.K. Workers).

¹⁸⁵Most Governments and the Workers' group voted for the Convention. The Employers' group as a whole voted against the Convention (apart from the Employer delegates of Poland, Rumania, Spain, Ukraine, the U.S.S.R. and Yugoslavia who voted for it). The following Governments abstained from voting: Argentina, the F.R.G., Greece, Ireland, Japan, Panama, Portugal, Tunisia, Turkey and the U.K. The Recommendation was adopted by 127 votes to 0, with 20 abstentions and the Resolution by 71 votes to 32, with 35 abstentions, *ibid.*, pp. 188-190, 146.

¹⁸⁶In contrast to Convention No. 93, Art. 3 (m) of Convention No. 109 provides ratifying States with the option to exclude from the scope of the Convention persons employed in whaling by means of legislation, Report II, 1958, p. 11. This would, of course, facilitate ratification by certain countries such as Norway, France or Canada who had encountered special difficulties in ratifying the former Convention.

Part II of the Convention (para. 4). A Member who has made such a declaration may also declare that it accepts Part II of the Convention as having the force of a Recommendation (para. 5). This last paragraph is particularly important, since for the first time a provision appears in an ILO maritime instrument which attempts a fusion of two different notions of commitment: those of a legal obligation and of a formal suggestion.

Reasons for the failure of the 1958 Convention

Convention No. 109 has been ratified only by 11 countries (Brazil, France, Guatemala, Mexico, Norway and Yugoslavia between 1960-1970; Australia and Spain in 1972 and 1971 respectively; and Iraq, Italy and Portugal after 1980). Therefore, it has not yet come into force. Ratifications by Brazil, France and Norway were accompanied by a declaration to the effect that Part II of the Convention dealing with wages was excluded therefrom; moreover, ratification by Norway was conditional.¹⁸⁷ None of these three countries has accepted the Wages Part of the Convention by later notification.

The reasons for the failure of the Convention set out above in respect of Convention Nos. 76 and 93 equally apply to Convention No. 109 as regards the identical provisions therein. In addition, the following observations can be made:

1) It was apparent that great divergencies of view as regards the proposed tonnage limit existed.¹⁸⁸

2) At the Preparatory Conference the U.K. Government delegate made it plain that in the absence of agreement between seafarers and shipowners on the division of the Convention, which was the subject of collective bargaining in that country, the U.K. Government would be unable to support or ratify either a revised Convention on the lines of Convention No. 93 or a Convention split into two or more parts. Moreover, it seemed that certain countries, such as the U.K., were in favour of adoption of a Recommendation in lieu of a Convention.¹⁸⁹

3) The fixing of the international minimum wage in terms of foreign currencies has constituted an obstacle to ratification.¹⁹⁰

¹⁸⁷The ratification was made subject to the condition that the Convention will become applicable to Norway after its entry into force for Denmark, the FRG, Sweden and the UK; *O.B.*, Vol. XLIX, p. 409. As a result, until this is done Norway considers itself not to be bound by the Convention even if it comes into force by virtue of other ratifications. It is submitted that this conditional ratification by Norway, since it is not allowed by Convention No. 109, is not permissible. The question of conditional ratification of ILO Conventions is similar to the question of the admissibility of reservations thereto. It has been the consistent view of the ILO, and this has pointed been out in many instances by the Director-General of the ILO, that no such reservations are admissible; for a comprehensive account of the views of the Office on this question, see *O.B.*, Vol. XXXIV, pp. 274-312; for cases in which conditional ratifications (ratifications subject to suspensive conditions, geographical limitations permissible under the relevant Conventions and understandings which have not been regarded by the ILO as constituting reservations) have been considered to be acceptable, see *ibid.*, pp. 308-312; especially with regard to ILO maritime Conventions, see *ibid.*, pp. 309, 310; for the question of conditional ratifications of ILO Conventions see also C.H. Dillon, *International Labor Conventions: Their Interpretation and Revision*, 1942, pp. 114-120.

¹⁸⁸Report II, 1958, p. 10.

¹⁸⁹*Ibid.*, pp. 13, 19-20.

¹⁹⁰Report II, 1958, p. 21 (Argentina), 41 *R.P.*, p. 139 (Brazil), p. 141 (Mexico), p. 142 (Argentina).

4) The controversial distinction between near and distant-trade ships was not removed and the 48-hour week on distant-trade ships still remained in the Convention despite statements of important maritime countries that it should be deleted.¹⁹¹

5) The position regarding hours of work in the catering department was not improved and no alternative method to calculation of overtime rates on the basis of hourly wages was offered in the Convention.¹⁹² Thus many obstacles to ratification and hence entry into force of the relevant Conventions remain.

4.1.4. 1958-1988: Revision of the Minimum Basic Wage for Able Seamen: No change in the substantive law of hours of work, manning and wages

A) The Preparatory work of the Office

The JMC at its 20th session (Geneva, Sept.-Oct. 1967) decided, *inter alia*, that Recommendation No. 109 should be revised "having regard solely to the fall in the value of money since 1958".¹⁹³ The JMC, after examining a survey of legislation concerning conditions of employment of seamen in Asian countries, had discovered that wages of most Asian seamen were below the minima laid down in Recommendation No. 109.¹⁹⁴ The ILO Office assembled information on the levels of wages of able seamen in 46 countries during 1958 and 1968 and on the percentage increase in consumer price indices since 1958 in the same countries.

Conclusions concerning the revision of the minimum basic wage in 1969¹⁹⁵

Subject to the reservations expressed by the ILO Office regarding the accuracy of the data,¹⁹⁶ the following conclusions were drawn by it on the situation concerning the minimum basic wage:

1) During the period 1958-1968 there was a general increase in the real value of basic wages¹⁹⁷ of able seamen in all but two countries (India and Nigeria).

2) In 15 countries the basic wages paid to able seamen were lower than those laid down in Recommendation No. 109.

¹⁹¹For problems of interpretation which have arisen in respect of the distinction between near and distant-trade ships, see Interpretation of the Decisions of the International Labour Conference: Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109) (Articles 13, 14 and 15), *O.B.*, Vol., XLIII, 1960, pp. 569-574.

¹⁹²For a comprehensive list of the reasons for the non-ratification of Conventions Nos. 76, 93 and 109, see Appendix 2.

¹⁹³International Labour Organisation, Preparatory Technical Maritime Conference, Genoa, September 1969, *Recommendation 109 concerning Wages, Hours of Work on Board Ship and Manning, Paragraph 2: Revision of the Minimum Basic Wage for Able Seamen*, Report II, p. ii.

¹⁹⁴*Ibid.*, p. 4.

¹⁹⁵It should be noted that the minimum monthly basic pay or wages of an able seaman laid down by para. 2 of Recommendation No. 109 was UK £25 or US \$70.

¹⁹⁶*PTMC*, 1969, Report II, pp. 8-9, 12, 15. These observations are based on three tables prepared by the ILO Office showing the basic monthly wages of able seamen in 46 countries in 1958 and in 1968 with their equivalents in US dollars, the percentage increase in the consumer price indices in the same countries, and a comparison of percentage change in the basic wage with percentage increase in consumer price indices respectively, *ibid.*, pp. 13-19.

¹⁹⁷In this subsection basic wages indicate basic pay excluding seniority pay and all other special allowances. No account is taken of variations in the number of hours worked per week in different countries.

3) The increase in basic wages in industrialised countries ranged from 11.2 to 151%, giving a spread of 139.8%; however, if four countries were excepted, the spread was reduced to 76.3%.

4) The increase in basic wages in developing countries ranged from 8.2 to 123% giving a spread of 114.8% but if four countries were excepted, the spread was reduced to 41.8% (from 8.2 to 50%).¹⁹⁸

5) It seems that in 10 countries the wages paid to certain categories of able seamen had not kept pace with the rise in retail prices, while in 27 countries the wages paid reflected the higher cost of living in the respective countries and, in fact, constituted a more than adequate compensation for the increase in retail prices between 1958 and 1968.

In addition, we can draw the following conclusions:

a) All countries where the minimum basic wage was lower than that laid down by Recommendation No. 109 were developing countries, including Hong Kong, India (low), Malaysia (very low), Philippines (low) and Singapore.

b) No information concerning minimum wages for 1968 was available from two countries, Chile and China (Taiwan) but the extremely low wages paid to seamen in these countries in 1958 (more than three times below the minimum laid down in Recommendation No. 109) indicates that minimum wages paid to seamen in these countries in 1968 were well below that minimum.

c) In at least another 4 countries (Colombia, Ghana, Ivory Coast, Pakistan) the minimum wages paid were very close to the minimum limit laid down by Recommendation No. 109 and could easily fall below that limit were there a slight change in the exchange rates of the U.S. dollar and the national currencies of these countries.

d) No information was available on wages paid on board ships "in which are employed such groups of ratings as necessitate the employment of larger groups of ratings than would otherwise be employed" (Recommendation No. 109 (para. 2, period 2), Convention No. 109 (Art. 7, para. 1)).

e) In 14 out of 46 countries minimum basic pay fluctuated according to service time (4), and more importantly, according to trade conducted, waters navigated and company worked for. This practice ran against the demands of the seamen's representatives at the Maritime Conferences, who claimed that a standardisation of seamen's wages in various countries should be effected irrespective of trade, waters and company.

B) The 1970 Preparatory Maritime Conference and the 55th session of the ILO Conference

At the Preparatory Conference the seamen's delegates made a number of important statements:

a) In fixing a minimum wage account should be taken of countries which supplied a large number of seamen and of the rise in the cost of living in these countries.

b) An international minimum basic wage should be related to the hours of work in each country.

¹⁹⁸PTMC, 1969, Report II, p. 11.

c) The increased productivity of newly built ships because of the introduction of automation and new technological developments was a factor to be taken into account.

The Seafarers' group proposed a formula according to which the revision of the minimum basic wage should be based on the fall in the value of the money since 1958 in countries which "are most affected by the application of the minimum basic wage for able seamen and which account for a significant supply of maritime labour, namely Singapore, Hong Kong, Pakistan, Philippines, China (Taiwan), Spain and India. ¹⁹⁹

The views of the Shipowners' group were completely opposite; shipowners contemplated an increase in the minimum wage based on the rise in the cost of living in the U.K. and the U.S. In fact, the minimum wage limits proposed at the Conference, expressed in US dollars, were \$111 (Seafarers), \$83 (Shipowners), \$ 91 (the higher minimum submitted to the Preparatory Conference by the ILO Office and supported by the U.K., Canada, the F.R.G., Japan, the U.S., China and, eventually, by the U.S.S.R.); the lower minimum proposed by the ILO Office had been \$84. When discussions reached an impasse, due to the inflexible positions of the Shipowners and the Seafarers, a vote was taken and the minimum wage proposed by the Office was adopted. ²⁰⁰

In the Committee on Wages, appointed by the 55th session of the ILO Conference, it was decided that the appropriate organ for the revision of the minimum basic wages from time to time was the JMC and, in the light of the up-dated statistics, the minimum wage was raised to US \$100 or £42 p.m. The revision would take the form of a Resolution referring to this Recommendation and Governments were given the assurance that the Governing Body would examine the reports and the resolutions adopted by the JMC. However, some governments indicated that they could only accept the Resolution placed before the Conference if note were taken of their reservations. It was agreed to do this. ²⁰¹

At the Plenary Sitting of the 55th session of the ILO Conference all delegates from the three groups agreed on the minimum basic wage which had been adopted by the Committee as a compromise formula. However, certain governments (Bulgaria, the U.S.S.R., the Ukraine, Poland, Czechoslovakia, Cuba, France, Greece) were opposed to the system of revision envisaged in the proposed Resolution on three grounds: a) the only organ appropriate to revise a Recommendation was the ILO Conference, b) the bipartite structure of the JMC excluded the participation of governments which were concerned with the fixing of national wages, c) the JMC could not adequately represent

¹⁹⁹International Labour Conference, 55th session, Geneva 1970, 3rd Item on the Agenda, *Recommendation No. 109, para. 2, Revision of the 1958 Wage Figures of £25 or US \$70 to Their Present Equivalent, Having Regard Solely to the Fall in the Value of Money since 1958*, Report III, pp. 3-4.

²⁰⁰Ibid., pp. 5-9. However, from the ensuing glosses of the shipowners' and the seafarers' group on their votes, it is clear that neither was really in favour of the adopted minimum, which was the outcome of adoption of a conciliatory attitude, *ibid.*, pp. 9-11.

²⁰¹55 R.P., pp. 186-187. The Governments which entertained doubts over certain aspects of the Report of the Committee were Bulgaria, France, the U.S.S.R. (on the structure of the JMC); Bulgaria, the U.S.S.R., India (on the competence of the JMC to deal with wages); India (because the proposed minimum wage considered too high).

the interests of many countries, especially the developing states, because of its limited membership. As no objections were raised, the resolution was adopted by the 1970 Conference.²⁰²

*C) The 21st, 22nd, 23rd, 24th and 25th Sessions of the JMC, the 1976 and the 1987 Conferences*²⁰³

Taking into account changes in consumer prices, foreign exchange rates and the purchasing power of the US dollar, the international monthly minimum wage laid down in para. 2 of Recommendation No. 109 was raised to £48 or US \$115 (1972), £78 or US \$187 (1976), £115 or US \$276 (1980 and 1984), £176 or US \$286 (1987) during the period 1970-1988.²⁰⁴

A resolution adopted at the 62nd session of the ILO Conference introduced new factors to be taken into consideration in fixing an international minimum wage for seafarers. They included workers' productivity, taxation, social security benefits and the cost of living in various countries.²⁰⁵

From 1980 onwards an attempt was made by the ILO Office to encourage the JMC to reconsider the usefulness of the mechanical readjustment of the international minimum basic wage for able seamen based on the fall in the value of money. To this end, it was suggested by the ILO Office that the Commission should re-examine the question of the revision of the minimum basic rates for able seamen in the light of new considerations of a social and economic nature.²⁰⁶ Despite these steps the practical outcome of the deliberations of these recent sessions of the JMC was the revision of the minimum basic wage for able seamen based on fluctuations in the exchange rates. Nonetheless, the JMC at its 24th and 25th sessions adopted, *inter alia*, two resolutions which simply suggested that the ILO Office should undertake a study with a view to reviewing the list of countries that were to be used as a basis for establishing the wage figures and proposing a new formula for minimum wage fixing. Moreover, the JMC in these resolutions advised the setting-up of a bipartite wage committee to be convened every alternative year between sessions of the JMC.²⁰⁷

At the 74th session of the ILO Conference in 1987 a Resolution was adopted concerning conditions of employment of seafarers.²⁰⁸ The Resolution referred to the small number of ratifications

²⁰²Ibid., pp. 211-213. The countries which questioned the suitability of the JMC to undertake such a review did not express identical views as to its structure. For the text of the Resolution see *ibid.*, pp. 289-290.

²⁰³The 21st-25th sessions of the JMC took place in Nov-Dec 1972, Oct 1976, Oct 1980, Sept 1984 and Oct 1987.

²⁰⁴See, JMC, 21st session, Geneva, Nov.-Dec. 1972, *The Minimum Basic Wage of Able Seamen*, JMC/21/5; JMC, 22nd session, Geneva, Oct. 1976, *The Minimum Basic Wage of Able Seamen*, JMC/22/1; JMC, 23rd session, Geneva, Oct. 1980, *The Minimum Basic Wage of Able Seamen*, JMC/23/4; JMC, 24th session, Geneva, Sep. 1984, *Wages, Hours of Work and Manning (Sea) Recommendation, 1958 (No. 109), Updating of Minimum Basic Wage of Able Seamen, Review and Possible Revision*, JMC/24/4; JMC, 25th Session, Geneva, October 1987, *Wages, Hours of Work and Manning (Sea) Recommendation, 1958 (No. 109), Paragraph 2: Minimum basic wage of able seamen: (a) updating of wage figure; (b) preliminary discussion on possible alternative formula for revising wage figure*, JMC/25/1, pp. 1-5; GB. 239/3/3, p. 2; JMC/25/3, pp. 2-3.

²⁰⁵62 R.P., p. 219. For the text of Resolution XI concerning the Minimum Basic Wage for Able Seamen adopted by the 1976 Conference, see *ibid.*, p. 329. The text of the Resolution did no more than embody the contradictory views of the shipowners and seafarers on the question of wages as reiterated since 1920.

²⁰⁶JMC/23/4, pp. 12-13, JMC/24/4, pp. 4-8, 20-21, JMC/25/3, pp. 5-7.

²⁰⁷228 G.B., p. V/1, 68 O.B., Series A, No. 1, p. 34, JMC/25/3, pp. 3-4, 7.

²⁰⁸74th session of the ILO Conference, Provisional Record, p. 18/18.

that Convention No. 109 had received so far but did not express the need for amending or revising either this instrument or the relevant Recommendation. It seems that the work of the JMC remained unconnected to the deliberations of the Conference. No proposals concerning revision of the minimum wages for able seamen were put forward in the Resolutions Committee. The Resolution was primarily concerned with the possible effects of technological developments on board ship on the conditions of employment of seamen and proposed that they should be studied by the JMC and the IMO/ILO Joint Committee. Two points in the Resolution are important to the question of wages, hours of work and manning: a) its reference to reductions in manning scales following technological advances on board ship and b) the suggestion that the IMO/ILO Committee should consider "the question of fatigue in the manning and safety of ships", a question now highly relevant not only to the welfare of seamen but to prevention of marine pollution resulting from human error in the operation of ships. These points have been discussed since 1958 with no as yet positive results and, in any case, their resolution is unlikely to improve the poor ratification record of the Wages Conventions, but their continued discussion will presumably bring into the wider discussions the problem of hours of work and will hopefully eventually initiate a comprehensive review of the whole question.²⁰⁹

²⁰⁹In the Resolutions Committee a distinction was drawn between the technical aspects of fatigue to be studied by the IMO and its social aspects to be dealt with in the ILO, 74 *R.P.*, p. 16/15. Presumably, the former refer to effects of advanced equipment on fatigue while the latter connote the relationship between hours of work, fatigue and manning. For the text of the Resolution, see *ibid.*, p. 16/25. The Resolution concerning the First Watch on Sailing Days combines the questions of safety, fatigue and manning. It states that "in the interests of safety and efficiency and of the professional interests of seafarers, the first watches upon departure of a ship should be manned by personnel who, where this is necessary to prevent over-fatigue, have had an adequate rest period"; *O.B.*, Vol. XLV, pp. 72-3.

D) Conclusions concerning the fixing of a minimum wage in 1983 for able seamen

1) In many countries the provisions or the spirit or both of Convention No. 109 and Recommendation No. 109 were not respected: i) no minimum wages for able seamen or seamen in general were fixed (3) ii) no category of able seamen existed (2), iii) no account was taken of the wage figures contained in the Recommendation as amended (19).²¹⁰

2) By 1980 the minimum basic wage fixed in 32% of the countries who supplied information on the actual basic wages for able seamen (24 out of 35) was lower than the one recommended by the JMC in 1980. However, since 8 countries did not give any indication of the actual minimum basic wage for able seamen this percentage could be as high as 43% (26 out of 45). By 1983, however, the wages paid in 25 out of 36 countries (69%) were higher than the minimum recommended by the JMC. The observations made above concerning the year 1980 also apply here. 11 countries, both in 1980 and 1983 (out of which 9 are the same), applied a figure lower than that recommended by the JMC. It seems that the influence of the recommendations of that body with regard to the readjustment of the minimum basic wage for able seamen has been minimal. One country has adopted the US \$276 figure which could have been based on the JMC suggestions.

3) From the state practice available it seems that i) the minimum wage contained in the Recommendation was considered useful in a minority of countries and ii) a minority of governments approved of the method of revising the minimum basic wage on the basis of the fall in the value of money and, even on the basis of the proposed additional criteria of economic and social nature.

4) On the other hand, the dearth of sufficient information, the diversity of replies received and the complex formulae suggested as to how the method of revising the minimum basic wage could be improved upon, render any satisfactory conclusion impossible.²¹¹ A strong minority among the governments which supplied information referred to the need for taking into account national or regional conditions.

5) It appears that para. 2 (period 2) of Recommendation No. 109 and Art. 7 of Convention No. 109, which provide for exceptions in respect of ships where extra number of ratings are employed, are not supported by existing state practice.²¹²

²¹⁰This is so despite the ITF's policy in the 1970s which insisted that in no instance should seafarers receive wages lower than those prescribed by Recommendation No. 109, R.L. Rowan, H.R. Northrup and M.J. Immediata, "International enforcement of union standards in ocean transport", *British Journal of Industrial Relations*, Vol. XV, No. 3, pp. 338-355, at p. 344. ILO wage minima were also used in the ISF-ITF agreement but this has been a short-term arrangement. ILO minima and, generally, increases in wages have been vigorously opposed by certain Asian Governments, such as India, Pakistan and Bangladesh and other Asian countries, and by the ITF affiliates in these countries. Moreover, the ITF wage policy faces substantial problems in view of the growing surplus of Asian seamen; see H. Northrup and R. Rowan, *The International Transport Workers' Federation and Flags of Convenience Shipping*, 1983, pp. 96-102, 106-109. Here, it should be added that the ITF basic minimum monthly rate for able seamen, according to the ITF Collective Agreement World Wide and Far East Wages Scales, has over the years provided for minimum wages limits substantially higher than ILO minima as revised by the JMC; see *ibid.*, pp. 123-127.

²¹¹JMC/24/4, pp. 16-17, 18.

²¹²*Ibid.*, pp. 17-18. At the 2nd Asian Maritime Conference the Seafarer Members stated that Asian crews should be treated like European crews in terms of wages in view of the slight differences in the manning scales applied to ships employing the former and ships employing the latter, 48 *O. B.*, No. 3, July 1965, Report of the Committee of the

6) It seems that since 1967 the JMC and the ILO have attached more importance to Recommendation No. 109 rather than to Convention No. 109 and the reasons for this decision are obvious. Convention No. 109 has not come into force and Members could not be instructed to update the wage figures laid down in an ineffective instrument. Accordingly, attention has been centred on the Recommendation. The question arises why it was decided that the latter instrument should be revised by means of a Resolution. The answer lies in the uncertainty which would result in having to define the exact interrelationship between an old and a revised Recommendation. Moreover, the position as regards Convention No. 109 would be peculiar if the minimum wages contained in the Recommendation were updated at regular intervals while the minimum wages in Convention No. 109 remained at the 1958 levels. However, the solution adopted cannot be regarded as satisfactory in as much as the revision of minimum basic wages is effected by a Resolution. This is a Resolution adopted not by the ILO Conference but by the JMC; thus, the revision of minimum wages is presently carried out by means of an informal suggestion. It should be noted that the Governing Body is free not to communicate the JMC's Resolution to governments if it thinks it desirable. In fact, as pointed out above (under 3)), the minimum wage recommended by the JMC is not taken into account by the large majority of countries in fixing wage levels nationally. Two solutions are possible with regard to enhancing the legal or moral sense of obligation among ILO Members: a) Convention No. 109 may come into force; the question of revision of the minimum wages would then be tackled within it,²¹³ b) this Resolution may be adopted by the ILO Conference either at a general (in which a maritime expert may accompany the usual delegation) or at a maritime session, provided that, in the latter case, the maritime sessions of the Conference are in future held more frequently.²¹⁴

7) No real revision of the question of wages and hours of work was attempted during the period 1958-1988. The JMC's role has been confined to adjusting minimum wages taking into account solely the fall in the value of money. The JMC, during the period 1967-1988, in fixing the minimum wage, did not take into account other factors affecting wages. Its terms of reference precluded it from considering the following important questions: a) an acceptable definition and purpose of minimum wages adapted to the seafarer's profession²¹⁵ (protection of low-paid workers, "fair" wages, minimum basic rate below which wages cannot fall (the system adopted so far), etc., b) the criteria to be

Whole on Wages, Hours of Work and Manning, p. 278. However, these statements were disputed by the Shipowners' Group, which thought that on average ships manned by Asian seafarers continued to employ larger crews than would be the case otherwise. This was partly due to the employment policies of developing countries, *ibid.*, pp. 279-280.

²¹³However, the question is raised as to the position of a State which abides by the rate originally fixed but declines to be bound by any newly fixed rate. In this case, the new rate would have the effect of an amendment to the Convention. It could be provided that this amendment, if adopted by means of an accepted procedure, would come into force for such a State, unless objected to within a specified period of time.

²¹⁴It is generally accepted that reviews of wage figures as a result of changes in the purchasing power of money can only be effective for a period from three to five years, JMC/24/4, p. 20.

²¹⁵For the special characteristics of seamen's wages, see *PTMC*, 1969, Report II, pp. 6-7.

selected for minimum wage fixing (such as the cost of living in the respective countries, the general level of wages in the country concerned, the interrelationship between wages of seafarers and those of other workers in various countries, special allowances, etc.), c) the methods used for determining minimum wages (participation or not of groups or persons concerned in minimum wage fixing machinery), d) variables which should be taken into account in, and methods of, revising the minimum wages (wage rates and conditions of employment in a particular country, the labour force, etc., frequency of regular adjustments, automatic adjustment or not following increases in the cost of living).²¹⁶ The method adopted by the JMC in adjusting the minimum rates laid down in Recommendation No. 109, having regard solely to the fall in the value of money, was criticised as being too mechanical on the grounds that such important factors as the maritime labour force in various countries, technological changes on board ship were disregarded, and because, on the other hand, important maritime countries were omitted while less important countries were included.²¹⁷

8) Finally, there is the question of the structure of the JMC, a question that has been discussed elsewhere.²¹⁸ Specifically, in connection with minimum wage fixing, it seems that, as long as the JMC's work is restricted to the revision of minimum wages in association with the loss in purchasing power, its structure, combined with its limited powers in this respect is not an important issue. Nevertheless, if it is decided that an in-depth review of the question of wages is to be undertaken, having regard to multiple factors, the best body to deal, initially, with the issues involved is a tripartite sub-committee of the JMC in which the countries which appear in the list of states which are to ratify Convention No. 109 before it enters into force or any future revision thereof or the countries whose seafarers the revised instrument aims to protect or both, might be invited to participate. The list of the countries forming the basis for wage calculations should include the important maritime countries, the countries appearing in the articles of the 1958 Convention, or any revision thereof, concerning their entry into force and the countries whose interests the wage provisions are intended to protect. For the purpose of a comprehensive review of the question of minimum wages, as suggested above, the bipartite wages committee proposed by the JMC may prove either insufficient or ineffective.

²¹⁶JMC/23/4, pp. 6-11.

²¹⁷55 R.P. , p. 185. These criticisms emanated mainly from the Workers' group while the Shipowners referred to the limited terms of the Committee on Wages, *ibid.*, p. 186.

²¹⁸See *supra* Chapter 1, Section 1.7, pp. 104-110.

4.1.5. Conclusions

The conclusions drawn in this section are necessarily of a general nature and serve two purposes: a) they aspire to offer a guidance to ratifying States regarding the current international position on the question of wages, hours of work and manning in the light of their negotiating history and b) they attempt to make a contribution towards a more rationalised regulation of the issues involved. For conclusions involving particular aspects of wages, hours of work and manning in respect of each Convention the reader is referred to the conclusions at the end of each particular section in this chapter.

Reflecting upon the supposed impact of international law on state practice and, particularly, on the need ultimately for uniform application of similar legal provisions in national territories, one is tempted to say that, in the case of wages, hours of work and manning, it was state practice that circumscribed and defined the limits of international law-making. What was not desired by states was left either to national law (there are several references to national law, national measures and collective agreements in Convention No. 109) or remained unregulated (wages, in earlier times; manning). State practice formulated the proposals which led to the adoption of international instruments, and changes in the ILO instruments have been gradual and were mostly aimed at reflecting existing state practice. As regards the relevant ILO instruments, whether adopted or not, from a legal point of view none was perfect but none was negligible either, since they contained provisions commendable in one respect or another.

4.1.5.1. The prons and cons of Conventions Nos. 57, 76, 93 and 109 and the prospects of their ratification

In terms of both ratifications and of the aggregate of shipping tonnage registered in countries which have ratified Conventions Nos. 57, 56, 93 and 109, the last Convention takes the lead, having been ratified by 11 countries. However, none of these countries is a traditional maritime country with substantial registered tonnage apart from Norway, whose ratification is conditional. On the other hand, two of the countries who ratified earlier Conventions are worth mentioning: the U.S. in respect of Convention No. 57, and the Philippines in respect of Convention No. 93. The greater number of ratifications of Convention No. 109 is partly due to the revisionary character of that Convention; every subsequent Convention has a revising effect on every prior Convention, which ceases to be open to ratification, should the revisionary come into force.²¹⁹ In fact, the official ILO publication of International Labour Conventions and Recommendations 1919-1981 (English text) does not include the text of Conventions Nos. 57, 76 and 93. This means that the ILO regards these Conventions as obsolete.

²¹⁹Art. 28 of Convention No. 57, Arts. 24 and 31 of Convention No. 76, Arts 24 and 31 of Convention No. 93, and Arts 25 and 32 of Convention No. 108.

While for fuller details reference must be made to the earlier sections of this chapter, a general comparison of the texts of the non-adopted 1920 Convention and the above Conventions leads to the following conclusions:

i) The scope of the Conventions. A distinction should be drawn between ships and persons:

As regards the former, Art. 1 (c) of the non-adopted 1920 Convention (hereinafter cited as the 1920 draft) left the determination of maritime navigation, as distinguished from inland navigation, to national law and, although this brings an element of vagueness into the Convention, it could be adapted to the distinction found in later instruments between near and distant-trade ships which, as pointed out earlier, impeded its ratification in certain countries. None of the instruments applies to fishing vessels but the later Conventions (1946, 1949 and 1958) have been more strict in excluding ships from the scope of the Convention: The tonnage limit is now 500 tons compared to the 700-2000 tons of the 1920 and the 1936 Conventions; near-trade ships were included in the later Conventions but seem to be excluded from the earlier Conventions. As regards whaling vessels, they were completely excluded from the latter while the former contain a complex formula referring to persons on board ships under whaling agreements.²²⁰ Among the later Conventions, the 1958 Convention is less strict than the 1946 and 1949 Conventions in this respect.

As regards the latter, the 1920 draft and, to a lesser degree the 1936 Convention, clearly attempted to cover all persons on board ship. The 1946, 1949 and 1958 Conventions allowed for more exceptions than any other but they covered wireless operators, who were not included in the scope of the earlier Conventions.

ii) Wages and ratification by means of collective agreements. Provisions on these issues are only included in the 1946, 1949 and 1958 Conventions. They are identical in these three instruments but the 1958 Convention is less rigid in that it provides the option of a separate ratification. This, however, has only partly facilitated ratification.

iii) Hours of work. In certain respects the 1920 draft was the most advanced of all: though it evidenced clear signs of the influence of an earlier non-elaborate ILO instrument (especially with regard to questions of overtime and rest), it laid down an 8-hour day and a 48-hour week for persons employed in the deck, engine and catering department on board ship and provided for a daily and weekly limitation on overtime (provisions which have yet to appear in an ILO Maritime Convention). Among the other Conventions, the 1946, 1949 and 1958 Conventions were drafted in identical terms and contain stricter provisions regarding hours of work than the 1936 Convention. The last provides for a 56-hour week in the deck and engine departments, eschews regulating hours of work in near-trade ships, regulates hours of work in the catering department only indirectly and leaves overtime unlimited. The former Conventions provide for a 48-hour week on board distant-trade ships at sea and lay down hour maxima for work in the catering department and work in near-trade ships.

²²⁰In any case, whaling vessels are much less important now than they were in the hey-day of that industry.

iv) Manning. Here the situation is completely different from that set out above in respect of hours of work: the 1920 draft does not contain any provisions on manning. Among the other instruments it is the 1936 Convention which contains the more advanced and elaborate provisions by laying down manning scales for the deck and the engine departments. In the 1946, 1949 and 1958 Conventions the provisions on manning are no more than an exposition of general principles.

v) Exemption of existing vessels. The 1920 draft and the 1936 Convention contained provisions exempting, under certain conditions, existing ships from the application of these instruments. None of the later Conventions contains such provisions.

vi) Final provisions. The requirements for the entry into force of the 1936 Convention are less onerous than the respective provisions of the 1946, 1949 and 1958 Conventions, which are identical.

Countries might in future be guided in their decision whether or not to ratify these Conventions by the above observations. It would also be possible to draft an instrument encompassing different parts of all or some of the above Conventions, which would include the more or less advanced provisions (whether modified or not) on specific aspects of conditions of employment of seamen according to the degree of progressiveness aimed at. Despite this academic or "national" possibility, from an international point of view this mixture would probably not reflect the current state practice, or would it, therefore, eliminate ratification difficulties, which, for the purposes of the study of the question of wages, hours of work and manning, are the two considerations that should be the main guides in formulating ideas and suggesting proposals and, therefore, such a synthesis will not be attempted here.

4.1.5.2. Shipowners' and seamen's views

Before suggestions on the possible amendments and revisions of the current ILO instruments on wages, hours of work and manning are made, it is useful to survey and take into account the views of the shipowners and seafarers during a period of 60 years are kept in mind; these are summarised below:

1) The Shipowners' views: generally, the arguments made by the shipowners²²¹ were directed at the plausibility of the 48 hours rule as a general and compulsory principle²²² and the inapplicability of the 8 hours a day or 48 hours a week limit to the shipping industry for several reasons, such as that: a) reduction in working hours would result in an increase of the crew and necessitate changes in accommodation which it would be difficult to realise, b) such a reduction would have a demoralising effect on the crew so far as discipline was concerned, which is necessary for the safety of the ship and c) it would entail undesirable financial burdens on the shipowners and cause a drastic

²²¹For the views of the Shipowners' group see the Declaration of the Shipowners' Delegates on the Draft Convention concerning Hours of Labor in 2 *R.P.*, pp. 512-515; see also 13 *R.P.*, pp. 341-344.

²²²This question was profoundly analysed and argued in Chapter 1 where certain conclusions were formulated.

reorganisation of personnel on board ship on a more costly basis which would affect wages rates, d) as regards wages, an international minimum wage rate should take account of the cost and standard of living in the respective countries, ²²³ e) they denied that the only obstacle to the ratification of the Hours Conventions was the provisions on wages and argued that the three questions of wages, hours of work and manning should be examined together; moreover, at the 1958 Conference they stated that any revised instrument should take the form of a Recommendation rather than that of a Convention. ²²⁴

2) The Seamen's views: These included that: a) the ruining of the shipping industry as a result of the introduction of the 8 hours a day or the 48 hours a week was a frequently used argument that had no valid basis, b) discipline standards were not likely to be lowered, if proper regulations were introduced, c) "you cannot apply law without making some sort of reforms, any more than you can make omelettes without breaking eggs" ²²⁵, d) reduction in working hours would increase the number of seamen and thus enhance the ship's safety and would allow the seaman free time for educational purposes, ²²⁶ e) the poor ratification of the Hours Convention was due to the provisions on wages and a future Convention would secure a larger number of ratifications if the possibility were given to ratifying States of ratifying separately the parts dealing with wages, hours of work and manning; furthermore, at the 1958 Conference seamen were in favour of adoption of a Convention instead of a Recommendation. ²²⁷

Finally, it should be noted that until recent years the shipowners and the seafarers disagreed on the actual minimum wage to be laid down and on the method of calculating this minimum.

4.1.5.3. The "ideal instrument"

Searching for ideal solutions to complex issues may prove futile unless the following distinction is drawn: An ideal instrument must be regarded as an instrument, which from an international and legal point of view, seems to be convincing; or as an instrument likely to enter into force for a long period of time which does not require revision immediately after it comes into force. In the latter case, notions such as the need for precision and certainty in the law, the progressive development of international law rather than mere codification of the existing law, and respect for a dominating social element, all of which ideally should permeate the law of conditions concerning employment of seamen are limited by more practical necessities. In the case of wages, hours of work and manning, it is submitted that codification of existing law, coupled with certain cautious advances likely to be acceptable to the majority of the countries whose ratification is essential to the coming into force of the Con-

²²³2 R.P. , pp. 314-317, 335, 9 R.P. , pp 92-93, 13 R.P. , pp. 186-188, 7 J.M.C. , p. 19, specially PTMC , 1935, Report and Record of the Meeting, pp. 205-208, Report IX, 1945, p. 43.

²²⁴Preparatory Technical Maritime Conference, 1956, PTMC I/1, pp. 6, 8, 23, Report II, 1958, pp. 6, 12, 18-19.

²²⁵2 R.P. , pp. 330-331 (translation by the Office of the original French text).

²²⁶9 R.P. , p. 97, see also 13 R.P. , pp. 193, 211-213, 345-347, 7 J.M.C. , pp. 19-20.

²²⁷Preparatory Technical Maritime Conference, 1956, PTMC I/1, p. 6-7, Report II, 1958, pp. 5-6, 12, 19.

vention and its satisfactory operation, is the best approach to drafting of a revised instrument. The following conclusions are directed to achievement of this end.

4.1.5.3.1. Recommendations concerning the effectiveness of the ILO Office and the Committees' preparatory work relating to wages, hours of work and manning

Amendments in Conference Committees should be moved only after full consideration of their effects, as they have invariably tended to disturb the balance between conflicting governmental views achieved in the ILO Office drafts.

As a general remark, it must be said that the ILO Office's task in collecting, comparing and analysing information since 1920 has for the most part been competently executed. However, it is disappointing that all the post-war Conventions (1946, 1949 and 1958) were regarded and treated as merely revisions of prior ILO Conventions on the same subject. This means that in drafting these Conventions the ILO Office has only taken into account suggestions of a restricted nature made by a limited number of countries at the Preparatory Conferences. It is concluded by the writer that only the Office's work during the period 1929-1936 has been thorough and can be considered as a model for the area concerned. The questionnaire which was sent to governments was comprehensive, covering almost all aspects of hours of work and manning and a similar procedure should be adopted by future Conferences. The adverse consequences of having to work on the basis of insufficient and inadequate information have been considerable:

- a) The 1946, 1949 and 1958 Conventions did not take into account serious amendments which had been proposed by a considerable number of countries. Thus, ratification has been slowed down.
- b) In contrast to the 1936 Convention, manning in the above Conventions was only regulated by general provisions. The reason, it is submitted, was not that countries disagreed on any proposed provisions but the lack of time available for consideration of any of the proposals and bad preparation and misinterpretation of the Preparatory Conference's powers concerning the revision of the relevant ILO instruments. In future the word "revision" should be used cautiously. Review or re-examination could produce more useful results, and the recent JMC's efforts with regard to the question of wages point in this direction.

- c) The 1949 and 1958 Conventions do not reflect the actual state practice at the time but are based on views of delegates expressed at preparatory meetings.

Finally, as pointed out earlier in the conclusions concerning the evaluation by the ILO Office of state practice relating to hours of work and manning, there has been a tendency on the part of the Office, especially in the early years, to include in the drafts it prepared certain provisions that were progressive compared to state practice at the time. While the expertise of the Office in drawing up the drafts to be submitted to the Conference is undeniable and shows considerable meticulousness and sense of judgement in most respects, the slow progress of ratification and the consistent reluctance of

the ILO Members to commit themselves fully to the various requirements imposed indicate that in the future inclusion of such provisions in ILO drafts should be considered cautiously.

4.1.5.3.2. Recommendations concerning the revision of the ILO instruments concerning wages, hours of work and manning for seamen taking into account trends in state practice during 1920-1987

An account of state practice regarding wages, hours of work and manning has been given earlier in this chapter. Here, the conclusions drawn are supported by identifiable common threads in state practice in an attempt to single out established concepts in this field:

i) Evaluation of tendencies in state practice and in the drafting of ILO maritime instruments on hours of work, manning and wages

In general terms, it appears that national laws and practices between 1920 and 1958 have made some progress in establishing standards for these aspects but not considerable. The attitude of the governments has been favourable to the inclusion of more topics in the relevant instruments (manning, wages and collective agreements) but actual improvements on the substance of each topic have been gradual and slow. It is also worth mentioning that none of the Conventions adopted is more progressive than others in all respects. Taking into account all the provisions of the relevant instruments, the most advanced instrument is undoubtedly the 1946 Convention which brought about considerable improvements on the 1936 Convention but was watered down at the 1958 Conference in certain respects.

It seems that the distinctions drawn in earlier instruments and reflected in the replies of governments to the relevant ILO questionnaires such as the those between hours of work of officers and ratings, hours of work at sea and on arrival and sailing days, hours of work in the deck, engine and radio department, have been abandoned in recent years and no particular importance should be attached to them. In this respect, it can be asserted that both state practice and the drafting of the later ILO instruments on hours of work have made positive steps towards the elimination of differences in the working hours of persons employed on board the same ship. On the other hand, as shown above, not all countries have taken steps to apply certain provisions of the relevant ILO Conventions and Recommendations.²²⁸

ii) The form of the instrument

²²⁸By 1965, namely 7 years after the adoption of Convention No. 109 and Recommendation no. 109, no positive action on these instruments had been taken by Asian maritime countries. Some Governments did not offer any explanation for their attitude while others gave a number of reasons for the impossibility of the implementation of their provisions, such as "the mounting costs of operation" (Republic of China), settlement of the relevant issues by bipartite agreements, absence or incompatibility of national laws with the provisions of the two instruments, employment of national seamen on board foreign vessels and the necessity for the ratification of Convention No. 109 by the countries on whose ships these seamen are employed (India), differences between national laws and the relevant ILO instruments (Japan), International Labour Organisation, Second Asian Maritime Conference, Tokyo, April 1965, *Wages, Hours of Work on Board Ship and Manning in Relation to Asian Seafarers*, Third item on the Agenda, Report III, pp. 106-112, 48 O. B., op. cit., p. 279.

Most Governments favoured the adoption of a Convention rather than a Recommendation and thought that the option for separate ratification of different parts of the Convention would facilitate its ratification. Points on which agreement was not secured could then be included in a Recommendation. However, it was alleged from time to time that the relevant ILO instruments had not been ratified by maritime countries though the conditions prevailing in these countries were far in advance of the provisions laid down by these instruments.²²⁹ If this is true, which is easily verifiable from the replies to an appropriate ILO Questionnaire were one to be circulated, the way could be open toward the adoption of an instrument of a protective nature which would come into force after ratifications by the countries most concerned. However, this instrument could become valid on a regional basis and more than one instruments of a regional character could then be contemplated.²³⁰ The question might be discussed at the 3rd Asian Maritime Conference, should one ever be convened, with a view to proposing relevant resolutions. It should also be noted that, as pointed out earlier, a strong minority of governments would be in favour of taking into account national and regional conditions in fixing minimum wages for able seamen. The above recommendations are made, however, subject to some reservations concerning the desire of developing countries to build up a merchant fleet, problems of unemployment and economic depression in these countries and the repeated statements of certain countries (India, Pakistan) that they would be unable to ratify an instrument on wages, hours of work and manning, unless the countries on whose ships the seamen of the former are employed ratified the same instrument.

iii) Scope of the Convention

It does not seem necessary to exclude many kinds of ships from the scope of the Convention. The exclusion of whaling ships has not been, and is even less likely now to be, a controversial issue, apart from a few countries whose ratification in earlier days would have been facilitated by their total exclusion. The exclusion of training ships and pleasure yachts was not supported by many countries even as early as 1931 but it is recommended that the position on coverage of trainees and cadets by national collective agreements be re-examined.

From the very beginning of the ILO's involvement in the question of hours of work, governments have consistently been against the distinction drawn between near-trade and distant-trade ships. Therefore, it seems desirable that this distinction be eliminated in the future. Adoption of an appropriate tonnage limit would dispense with the need for such a distinction.²³¹ The latter solution is also preferable from a technical point of view, since it would eliminate the existing differences in defining near-coasting and distant trade. As to the preferred limit, it does not appear that the 500 tons limit should be lowered. In fact, if it were raised, the Convention would be more likely to be ratified

²²⁹41 *R.P.* , pp. 137, 142, 144.

²³⁰A similar approach, though on a smaller scale, had been suggested by the ILO Office, *PTMC* , 1945, Report I, p. 83.

²³¹This was in 1954 the opinion of the Japanese Government, see *PTMC* , 1956, op. cit., p. 83.

by certain countries. However, if a substantial percentage of seamen were excluded from the Convention because of a higher limit, the only solution would be to adopt a separate Convention for smaller vessels. This procedure has not been followed by the ILO until now but it is consistent with the separate ILO questionnaire sent to ILO members in 1954 asking for information on conditions of employment of seamen on board smaller vessels. In any case, the applicable tonnage limit should be considered with the greatest attention, since it has been shown earlier that it constituted an obstacle to ratification of all ILO Convention in this area. It is suggested that after research has been undertaken, a kind of schedule to the Convention should be prepared specifying for each country definite geographical limits within which ships trading solely might be excluded from the Convention.²³²

Finally, there is no provision in the ILO Conventions on seamen's hours of work that defines the scope of the Convention in the case of mixed (sea and inland) navigation.²³³

iv) Hours of work

Liberated from the 8-hour principle the ILO can proceed to the adoption of any limitation it likes of hours of work for seamen.²³⁴ It seems that the 8-hour day at sea in the deck, engine and radio²³⁵ departments on distant-trade ships is a universally accepted principle but that the same is not the case with the 48-hour week.²³⁶ At sea, a 48-hour week implies compensation for work on Sundays. It would be better, if this question were left to national law or collective agreements between shipowners and seafarers or both. The 8-hour day and the 48-hour week must be regarded as a generally agreed limitation of hours of work in port on board any ship. This is not the case with the 8-

²³²A first step towards this direction is provided by Regulation 3 (b) of Chapter I of the 1974 SOLAS Convention which excludes from the application of its provisions certain ships trading within specified limits in the U.S. and Canada.

²³³See 2 R.P., pp. 269-272. Compare Regulation 4 of Chapter I of the 1974 SOLAS Convention.

²³⁴As shown in Chapter 1 the 8-hour working day cannot any more be regarded as a principle. As early as 1928 the ILO Office decided to ask Governments for additional information and not to proceed on the lines of the Treaty of Peace, 8 J.M.C., pp. 22-26. The Director's Report to the JMC said: "The position is not the same as when the Genoa Conference opened. It is not now proposed to adapt the Washington Convention to the work of seamen, but to draw up international rules for hours of work.", 8 J.M.C., p. 52.

²³⁵Regulations 6 and 7 of Chapter IV of the 1974 SOLAS Convention recognise the 8-hour watch for radio officers and radiotelephone operators on board ship but the regulation of hours of work and watches of these categories of seamen therein is incomplete: i) if a ship is not fitted with a radiotelegraph auto alarm, it is required to carry at least one radio officer; since this officer will have to listen continuously on the distress frequency, it is clear that the 8-hour limit cannot be respected, if only one officer is employed (compare paras. (a) and (b) of Regulation 6), ii) in cargo ships of less than 1600 GRT fitted with a radiotelegraph auto alarm the establishment of a listening 8-hour watch is not compulsory (para. (c) (ii)); this limit is much higher than the tonnage limit below which ships are exempted from the provisions of the relevant ILO Conventions, iii) if a ship is fitted with a radiotelephone station the listening watch must be continuous with the result that even if one operator is employed (Regulation 7), the 8-hour limit cannot be applied; furthermore, if the operator is an officer or a member of a crew, no provision exists defining the relationship between his radio-safety and his normal duties, iv) finally, the SOLAS Convention having regard to safety questions renders the 8-hour listening watch obligatory as a minimum. Therefore, radio officers and radio operators are not guaranteed a maximum 8-hour working day, unless the Administrations decided that an appropriate number of radio officers or operators (certainly more than one) should be carried on board each ship.

²³⁶By 1965 the 8-hour rule was applied to Asian seafarers employed in the deck and the engine departments at sea and in port. The 56-hour week was usual at sea and on arrival and sailing days while certain categories of ratings would be required to work up to 10 hours per day on sailing and arrival days. Ratings employed in the catering department might be required to work up to 63 hours per week. Compensation for work on the weekly rest day while at sea was not usually granted, Second Asian Maritime Conference, Report III, op. cit., pp. 103-104.

hour day on near-trade ships and the existing divergencies in national laws would provide a further argument against the drawing of a distinction between near and distant-trade ships.²³⁷

As regards hours of work in the catering department, the distinction drawn between passenger and non-passenger vessels in the 1958 Convention is not accurate: a) the Convention does not define these kinds of ships, b) passengers are sometimes carried on board cargo ships²³⁸ and c) the advantages of fixing a proportion between the crew and the passengers, which could possibly determine the nature of the ship and, thus, the respective duties of the catering staff, have not been studied adequately.²³⁹ All limitations of hours of work in the 1958 Convention should be reconsidered in view of the considerable divergencies in national laws and practices. A 9-10 hour day applicable to all catering staff on board ship without any further distinction may be the starting point.

Generally, proposals for further reductions of working hours below the 8-hour day or the 48-hour week with free Sundays should be considered cautiously.²⁴⁰

v) Wages

²³⁷It was reported that by 1958 the working week of 48 hours, or less, had been applied in the following countries: France, 41 *R.P.*, p. 39; Yugoslavia, *ibid.*, p. 40, U.S.S.R., p. 54; Poland, pp. 67-68; F.R.G., p. 76; Australia, p. 77; Spain, p. 103. The working week of 56 hours, or more, was applied in the following countries: Tunisia, *ibid.*, p. 65; Pakistan, p. 83; the Un. Ar. Emirates, 74 *R.P.*, p. 6/11. The 48-hour week was introduced in Japan in 1962, 55 *R.P.*, p. 37 and about the same time in Yugoslavia; see R. Pesic, "International labour standards and Yugoslav legislation", *I.L.R.*, Vol. 96, Nov. 1967, No. 5, pp. 443-467. In 1968 working hours per week for seamen were reduced from 45 to 42 1/2 in Norway; 55 *R.P.*, p. 59. Around 1970 the following countries had adopted the working week of 48 hours, or less, either by legislation or by means of collective agreements: Nigeria (44), 55 *R.P.*, p. 47; Italy (40), p. 93; India (44), p. 99. By 1976 the working week of 48 hours, or less (40-hour working week), had been applied in the following countries: Belgium (40), 62 *R.P.*, p. 45; G.D.R. (40), *ibid.*, p. 63; Japan (40), p. 66; Greece (44), p. 85; India (44), p. 98; G.D.R. (40), p. 140.

²³⁸Compare the more accurate wording of Regulation 2 (f) and (g) of Chapter I of the 1974 SOLAS Convention according to which a passenger ship is a ship carrying more than twelve passengers while any other ship is a cargo ship. It follows that if on board a ship carrying cargo there are more than twelve passengers, apart from the master and the crew, this ship is considered to be a passenger ship for the purposes of the Convention.

²³⁹In contrast, Art. 9 (1) of the 1936 Convention contained a definition of passenger vessels. On the other hand, the differences in hours of work in the 1958 Convention depending on whether or not there are passengers on board, should be retained.

²⁴⁰This statement is based on a comparison of minimum standards for hours work in Conventions of general nature and the progress of their ratifications. By 1st January 1990 the ILO Conventions on Hours of Work had received the following ratifications: a) The Hours of Work (Industry) Convention, No. 1, 1919 49 ratifications (came into force in 1921), b) the Hours of Work (Commerce and Offices) Convention, No. 30, 1930 30 ratifications (came into force in 1933), c) the Hours of Work (Sheet-Glass Works) Convention, No. 43, 1934 12 ratifications with one denunciation (came into force in 1938), d) the Hours of Work (coal Mines) Convention (Revised), no. 46, 1935 3 ratifications (has not yet come into force), e) the Reduction of Hours of Work (Glass-Bottle Works) Convention, No. 49, 1935 9 ratifications (came into force in 1938), f) the Reduction of Hours of Work (Public Works) Convention, No. 51, 1936 none (has not yet come into force), g) the Reduction of Hours of Work (Textile Industry), No. 61, 1937 none (has not yet come into force), h) the Hours of Work and Rest Periods (Road Transport) Convention, No. 67, 1939 four ratifications (came into force in 1955), i) the Hours of Work and Rest Periods (Road Transport Convention, No. 153, 1979 seven ratifications (came into force in 1983). Among these Conventions the first two adopt an 8-hour day and a 48-hour week with certain exceptions, the third and the fifth an 8-hour day and a 42-hour week with few exceptions, the fourth a 7.45 hour day with certain exceptions and the obligation for the adoption of lower limits in some cases, the sixth and the seventh a 40-42 hour week with exceptions, and the eight and the ninth an 8 (9)-hour day, a 48 (48)-hour week, a maximum 5 (4)-hour limit on continuous employment and a 12 (10) hour consecutive rest respectively with exceptions. It should be noted that the Forty-Hour Week Convention, no. 47, 1935 lays down the 40-hour week as a principle and asks ratifying States to approve this limit as a principle but it needs other special ILO Conventions (to be adopted in the future) to be given full effect. Even so, this Convention has been ratified only by 9 countries and came into force in 1957.

Fixing of an international minimum wage seems to be sufficiently warranted following national developments in minimum wage fixing in almost all five continents, specially after the 2nd World War.²⁴¹ However, a number of points should be kept in mind, as regards minimum wages for seamen. It should be remembered that certain countries have not ratified the ILO instruments on hours of work because they were unable to accept a minimum basic rate linked to foreign currencies.²⁴² The JMC in its recent sessions seems to have forgotten this aspect of the problem of minimum wage fixing and it should be discussed in one of its next sessions.

The 1946, 1949 and 1958 Conventions lay down a minimum basic pay for able seamen. The relevant provisions do not deal adequately with the case of a country where the category of able seamen has not been introduced. It is suggested that a minimum basic pay for an officer in the deck and in the engine department should be fixed. Furthermore, no provisions dealing the choice of forum when a seaman sues the master for wages or the time at which the wages are payable are included in these instruments.²⁴³ Finally, no clear connection was established in these Conventions between the minimum basic wages and the minimum hours of work laid down therein. To cite an example, Art. 6 of Convention No. 109 prescribes the minimum basic wages "for a calendar month of service of an able seaman". However, even if this minimum is confined to an able seaman, the minimum wage laid down by the Convention is likely to lead to confusion. It is not clear whether they apply to an able seaman on distant or near-trade ships,²⁴⁴ to what hours of work per month they refer (normal hours of work per day or per week, overtime on Sundays at sea)²⁴⁵ what difference it makes if a seaman is paid wages on a regular basis irrespective of whether he is employed at sea and if he himself bears the expense of any time he spends on shore between two engagements.

In fixing the international minimum wage the observations made earlier in 4.1.4. D) should be taken into account. Special emphasis should be put on minimum wage fixing taking account of re-

²⁴¹Gerald Starr, *Minimum Wage Fixing, An international review of practices and problems*, ILO Geneva, 1981, pp. 1-15. In Asia the growth of minimum wage regulation has been less significant than in developing countries in other regions of the world, *ibid.*, pp. 10-12. For the purposes of minimum wage fixing, see ILO, "Minimum wage fixing and economic development", *Studies and Reports*, New Series, No. 72, Geneva 1968, pp. 5-9; for the connection between "adequate" or "minimum living" wages and the attainment of ILO's principal goal of social justice see also the Preamble of the ILO Constitution, the third of the General Principles listed in Art. 427 of the Treaty of Peace in *The Treaty of Peace*, HMSO, London 1919, p. 205 and the Annex to the ILO Constitution under the title "Declaration concerning the aims and purposes of the International Labour Organisation", Section III (d) in *The Constitution of the International Labour Organisation*, Geneva, January 1988, p. 24.

²⁴²Other countries have been of the opinion that the establishment of an international minimum wage from a social point of view without reference to any actual figure would be preferable, *PTMC*, I/1, 1956, France p. 48, Argentina, p. 57-58, Netherlands, p. 59.

²⁴³See 2 *R.P.*, pp. 430-431. Compare Art. 12 of Convention No. 95 concerning the Protection of Wages, Paras. 4 and 5 of Recommendation No. 85 concerning the Protection of Wages, Art. 33 of Convention No. 110 concerning Conditions of Employment of Plantation Workers.

²⁴⁴If the minimum basic wage for able seamen on both ships is the same, it is clear that the minimum wage of the Convention will result in inequality of payment within the same grade, since an able seaman on near-trade ships is required to work more hours according to Art. 13 of the Convention.

²⁴⁵Here it could be argued that Art. 6 of the Convention lays down a minimum wage and, therefore, these considerations are irrelevant. However, it is likely that this minimum will be taken as a basis for the fixing of the actual wage rates in developing countries, see Starr, *op. cit.*, pp. 47-53.

gional factors. ²⁴⁶ The method hitherto adopted by the JMC consists in adjusting minimum wages with regard solely to the value in the fall of money. This does not take account of other variables which are included in the calculation of the labour costs, such as social security benefits and training expenditures. Also, no account is taken of the purchasing power of the money in different countries, in other words, no attempt has been made to define the "real" wages of seamen in various countries and then to work out an acceptable international minimum. ²⁴⁷

A number of methods of fixing an acceptable living wage ²⁴⁸ have been suggested:

1) The needs of the workers measured, *inter alia*, by the undertaking of family budget enquiries. ²⁴⁹

2) Comparison between the wages of seamen and other "comparable" wages ²⁵⁰ of other categories of workers in various countries. ²⁵¹

3) The ability of the employer to pay. Wages in each country should not be raised beyond the capacity of the industry to pay.

²⁴⁶In addition, the relationship between the legal and bargaining position of seafarers' associations where they exist, as related to that of other categories of workers in certain countries, the financial and administrative resources of the countries concerned, especially developing countries and the purpose of fixing an international minimum wage for seamen with special regard to developing countries should be among the factors to be considered in revising the international minimum wage for seamen. The establishment of a specific system of minimum wage fixing in industrialised countries may not serve the same purpose and may not be as effective when the same system is applied in developing countries. For a discussion of the implications of the use of different systems of minimum wage fixing from an international point of view, see, *inter alia*, Starr, op. cit., pp. 17-59, 78-80.

²⁴⁷It was the opinion of the Office that a more accurate comparison of the purchasing power of money wages between different countries would be possible if it were expressed as the total number of hours of labour required to buy a given quantity of specified consumer goods, PTMC, 1969, Report II, p.9.

²⁴⁸For a definition of the "living wage" see ILO, *Wages, A Worker's Education Manual*, op. cit., pp. 12-13, 16-17. For an account of the legislation of various countries relating to the criteria for fixing national minimum wages, see Starr, op. cit., pp. 91-95; see also for a critical view of the whole concept, Meeting of Experts on Minimum Wage Fixing and Related Problems, with Special Reference to Developing Countries in ILO, *Minimum wage fixing and economic development*, op. cit., pp. 147-164, N.N. Franklin, "The concept and measurement of 'minimum living standards'", in *I.L.R.*, Vol. 95, No. 4, April 1967, pp. 271-298.

²⁴⁹ILO, *Wages, A Workers' Education Manual*, 1982, op. cit., pp. 15-16; Starr, op. cit., pp. 97-100; ILO, *Minimum wage fixing and economic development*, op. cit., pp. 60-65.

²⁵⁰Starr, op. cit., pp. 100-105; ILO, *Minimum wage fixing and economic development*, op. cit., pp. 69-74; ILO, *Wages, A Workers' Education Manual*, op. cit., p. 20-22. In fixing the minimum wage for seamen in relation to the minimum wages of other categories of workers in the country concerned, it should be noted that seamen may remain unemployed for more or less time with the result that their actual earnings may be lower, *ibid.*, p. 5. Here, the question of wage fixing bears a relation to the effectiveness of national or company manpower planning schemes.

²⁵¹It is reported that in 1965 the wages paid to Asian seamen were higher than those paid to other categories of workers ashore, Second Asian Maritime Conference, Report III, op. cit., p. 3, 48 *O. B.*, op. cit., p. 278, Para. 13.

4) Regular adjustments of wages, ²⁵² taking into account, *inter alia*, changes in the cost of living and in real wages. ²⁵³

The ILO has adopted a number of instruments concerning minimum wage fixing and the protection of wages. ²⁵⁴ It should be noted that Convention No. 109 and Recommendation No. 109 are the only examples of ILO instruments where reference to a specific minimum wage is made. All other instruments contain provisions dealing with the methods of wage fixing and the establishment of the necessary machinery. On the other hand, the recent trend in ILO instruments is to provide for specific methods of, or factors to be taken into account in fixing a minimum wage for a specific industry, though no exact minimum wage is laid down. ²⁵⁵

In conclusion, apart from the question whether the fixing of an internationally accepted minimum wage rate will prove feasible in the future, a revision of Convention No. 109 could contemplate the establishment of compulsory methods of minimum wage fixing for seamen, particularly taking into account the needs and the established practices of the developing countries. Nonetheless, very little will be achieved without the co-operation of the parties concerned. As the ILO Office pointed out: "There is no doubt a danger that a wage prescribed as a minimum may tend to become a standard or even a maximum wage; that danger, however, cannot be avoided by any form of words in an in-

²⁵²Nevertheless, the frequency and the timeliness of such adjustments and the criteria used for their determination are controversial issues, see Starr, *op. cit.*, pp. 119-124, 127-134. Answers to these questions would determine how often the JMC should convene to propose adjustments of minimum wages for seamen. It seems that in most developed countries and in Latin American countries, especially those with inflationary conditions, the frequency of adjustments ranges from twice a year up to once every three years. In many developing countries, however, adjustments of minimum wages are held irregularly, *ibid.*, pp. 120-123. The institution of an international system of minimum wage revision for seamen through the JMC at regular intervals would facilitate the elaboration of relevant national policies in developing countries and could even lead to the adoption of the minimum proposed at the national level provided it were arrived at through criteria more or less acceptable to these countries.

²⁵³For the last two methods of minimum wage fixing see ILO, *Wages, A Workers' Education Manual*, pp. 26-31, 36-38; Starr, *op. cit.*, pp. 105-110; ILO, *Minimum wage fixing and economic development*, *op. cit.*, pp. 65-69. In this connection, the suggestions of Section V of Recommendation No. 135 concerning Minimum Wage Fixing would be helpful. Of particular interest is para. 13 of the Recommendation, urging for periodical surveys of national economic conditions. The undertaking of such surveys by Governments would facilitate the work of the JMC in respect of the periodical adjustment of seamen's wages. In particular, the identification of the categories of workers whose wages can be considered "comparable" to those of seafarers in each country should be a first step. Unfortunately, no comparative studies concerning minimum wage fixing for seamen exist.

²⁵⁴For the international instruments relating to wages, minimum wage fixing and the protection of wages, see *ibid.*, pp. 148-172; ILO, *International Labour Conventions and Recommendations*, 1919-1981, pp. 225-242.

²⁵⁵Art. 3 of Convention No. 26 concerning the Creation of Minimum Wage-Fixing Machinery, 1928 and Art. 3 of Convention No. 99 concerning Minimum Wage Fixing Machinery in Agriculture, 1951, leave the question of the nature and the methods of minimum wage fixing to national law, subject to consultation with the representative organisations of employers and workers concerned or their participation in the machinery to be established. In contrast to the above Conventions, Art. 3 of Convention No. 131 concerning Minimum Wage Fixing, with Special Reference to Developing Countries, 1970, enumerates specific factors to be taken into account by the competent authority of a ratifying Member. These include factors which have been proposed by the Shipowner and Seafarer representatives from time to time with a view to revising the minimum wage figures for seamen in Recommendation No. 109, viz., factors such as the general level of wages in the country concerned, the cost of living, wages and benefits of other social groups in the same country, etc; see also Paras. 3 (virtually reiterating Art. 3 of Convention No. 131 in stronger language) and 6 of Recommendation No. 135 concerning Minimum Wage Fixing which suggests the possible methods of fixing minimum wages, such as statute, decisions of competent authorities, decisions of wage boards or councils, industrial or labour tribunals. It should be noted, however, that while the methods of minimum wage fixing are readily identifiable, their use in a specific context may become a major area of disagreement; for the different views of the Employers' and Workers' Groups concerning the suitability of certain criteria for determining the level of minimum wages, see 53 *R.P.*, pp. 682-683.

ternational instrument but only by the good sense of the employers, the intelligent determination of the workers and the benevolent vigilance of Governments". ²⁵⁶

vi) Manning

To the critical observations made earlier in respect of the ILO's preparatory work, the following recommendations can be added:

a) Art. 21 of the 1958 Convention and the similar Articles in the 1946 and 1949 Conventions refer to a "vessel to which this Convention applies". It is recommended that the necessity for applying to manning the same exceptions as applied to hours of work by the general provisions of these Conventions should be examined. For example, the limit of Art. 2 (2) of the 1958 Convention expressed in tonnage may seem inappropriate as regards manning scales in the engine department.

b) It does not seem that the manning provisions in the ILO Conventions on seamen's wages constitute an obstacle to ratification but this is due, to a great extent, to the general character of these provisions. The 1936 experience showed that governments could agree on certain points concerning manning scales on board ship. However, since it should be the aim of those responsible for a revising instrument not to overburden the Convention with provisions likely to lead to further disputes, it is suggested that provisions on manning should be included in a future revision of the ILO/IMO instruments relating to maritime training. ²⁵⁷ The advantages of and the necessity for such action have been argued earlier in Chapter 3. Here, it could be added that the 1936 experience showed that the laying down of manning scales in an international instrument is feasible. ²⁵⁸

²⁵⁶PTMC, 1945, Report I, p. 76.

²⁵⁷The fixing of manning scales would be facilitated by the relatively slight differences in manning scales applied to ships registered in Asian countries and ships registered in European countries, see Second Asian Maritime Conference, Report III; JMC, 19th Session, Geneva, 25 Sep.- 5 Oct. 1961, *Manning of ships*, JMC/19/2.

²⁵⁸In this connection, the IMO has made the first steps towards the international regulation of manning on board ship. Regulation 10 of Chapter III of the 1974 SOLAS Convention provides for manning requirements of survival craft; Regulation 13 of Chapter V of the 1974 SOLAS Convention provides that "from the point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned": according to para. 1 of the Guidelines on Control Procedures in Appendix 1 to Resolution A. 466, the surveyor should take into account Regulation 13 of Chapter V of the SOLAS. Moreover, para. 22 of Appendix 1, which refers to radio equipment, recommends, *inter alia*, that surveyors should ensure that "appropriate certificated personnel are carried for its operation and for listening periods. The radio log should be examined to confirm that mandatory safety radio watches are being maintained". Unfortunately, as pointed out earlier, no compulsory international regulation of manning scales and minimum watches in the radio department exists. Resolution A. 481 adopted by the IMO in 1981 evidences a slight change in the way manning has been regulated in international instruments: i) it establishes a connection between safe manning, training and certification, hours of work and rest, and crew accommodation (Preamble, especially para. 4 of the operative part) and ii) it provides for the issue of a national manning certificate on board ship which would certainly facilitate inspection. On the other hand, the common characteristics of all the above provisions are the following: a) they speak of an efficient number of trained persons or a sufficiently and efficiently manned ship without actually laying down manning scales, b) they are principally concerned with manning from a safety point of view and c) they leave their implementation either to the master or to the Administration. For a discussion of Resolution A. 481 and the respective views of shipowners and seafarers see International Labour Organisation, Joint IMCO/ILO Committee on Training (Sixth Session, Geneva, March 1981), JCT/6/1981/D. 8, pp. 2-8. The main areas of disagreement between the Seafarers' Members of the Joint Committee on the one hand and the Shipowners' members and the IMCO members on the other were the following: a) the extension of the substantive provisions of the Resolution to catering personnel; b) the inclusion of a requirement concerning the need to maintain up-to-date navigational charts and publications; c) consultation of representatives of shipowners and seafarers before safe manning requirements are laid down; d) the establishment of safe manning requirements in conjunction with the 8-hour working day and the 3-watch system; and e) the use of overtime and men off watch as a

c) One of the issues which will have to be considered is whether a limitation of the number of young boys or apprentices on board ship or both should be laid down and whether these persons would be counted in the fixing of manning scales. Provisions to the above effect would prevent such persons from taking the place of an able or an experienced seaman on the ship.

d) The regulation of manning in automated or nuclear-powered ships may not present serious difficulties. The manning level would be lower, so more space and accommodation would be available for seafarers. That space could be partly used for the accommodation of seafarers and not wholly for the storage of cargo.²⁵⁹ The actual manning scales in automated ships could be laid down in an international instrument (preferably, maritime training instrument). However, it should not be overlooked that the effectiveness of such scales depends on the availability of highly trained "omnicompetent" crews. This presupposes a) that the necessary training facilities exist and b) that a rational manpower policy for skilled and less skilled workers is established.²⁶⁰

e) It is advisable that provisions which contain guidelines with a view to resolving manning disputes at the national level should be included in an ILO Recommendation. These may provide either for instructions to persons empowered under national law to resolve such disputes or inspect manning requirements, or for a kind of international arbitrators adjudicating on manning disputes.²⁶¹

vii) Weekly rest and overtime compensation

The consistent opinion of the majority of governments since 1931 was against the inclusion of a specific overtime rate in the Convention which was to be dealt with preferably in national collective agreements. Therefore, Art. 18 (1) of the 1958 Convention should be reconsidered. Two possibilities are open: a) the future instrument could eschew the fixing of a specific minimum overtime rate or b) the option might be given to countries where overtime rates are calculated on a basis other than the

substitute for safe manning. The above proposals were opposed by the Shipowners' members and the IMCO members of the Joint Committee and, therefore, were not adopted.

²⁵⁹The question concerning what is the effect of automation on manning scales should be examined. In the United States automation on board ship was reported to change work requirements and work assignments and complicate union jurisdiction while reducing job availability, see Anonymous comment entitled "Recommendation for Maritime Labor Relations Policies" in *Monthly Labor Review*, Jan. 1966, pp. 19-21, at p. 21.

²⁶⁰Less skilled workers who, as a result of automation and of the subsequent reduction of openings for them, would experience difficulties in finding jobs in automated ships should be transferred to maintenance branches or other jobs ashore. The establishment of retraining facilities will be crucial to the achievement of this end. Moreover, the hastening of retirement of older unskilled workers would facilitate the admission to sea-service of seamen trained in automation. On the other hand, manning scales on board ship may be affected by extraneous factors such as government emergencies and seamen whose employment in the maritime sector is only temporary see Aaron W. Warner, "Future of Maritime Manpower", *Monthly Labor Review*, March 1966, pp. 268-271, at pp. 268, 269.

²⁶¹According to Paras. 65 to 69 of the 1945 Office draft, Boards of Reference for the Determination of Manning Scales should be established. In the case of a complaint the Board would hear the case and would be empowered to propose a new manning scale for the specific ship; the requirements of the manning scale so laid down should have effect as if they were requirements of the instrument. These internationally accepted guidelines would facilitate the fixing of the actual manning scales at the national level. For the conflicts which arose in the United States in respect of manning scales in automated ships the fixing of which had been simply left to collective bargaining, see L. Pressman, "Case Study in Labor-Management Relations: Maritime Industry-1965", *Boston College Industrial and Commercial Law Review*, 1965, pp. 805-820.

hourly wages to apply the provisions of this instrument by other means, i.e. fractions of monthly pay, lump sums or flat rates equivalent to the minimum rate prescribed therein.²⁶² The question concerning whether overtime should be remunerated at higher rates in certain cases, such as holidays, remains undetermined.

The 1958 Convention enumerates certain cases where hours worked in the interests of safety do not give rise to overtime compensation. In a future revision of this Convention a more advanced system could be envisaged: no compensation would be due for overtime worked in cases where, for example, the safety of the ship, cargo and those on board is endangered (absolute exceptions) while extra money for overtime will be given when more hours of work are necessitated by requirements of navigation (relative exceptions).²⁶³

Though this Convention contains provisions concerning compensation for overtime, it does not deal sufficiently with the question of the weekly rest. If a definite limit on hours of work on board ship is fixed, then the future revising instrument could proceed to the regulation of the weekly rest in conjunction with the question of time off in port as compensation for overtime work or work on specific days. These days should be fixed (Sundays or portions of Saturdays or both). Moreover, the new instrument might determine whether the weekly rest is actually given either at sea or in port and, in the latter case, within what period of time it should be given. The limit of two hours placed on work on Sundays by the 1958 Convention should be reexamined in view of the fact that by 1958 most governments had not adopted this limit.²⁶⁴

viii) General observations concerning Port State Control

More information on Port State Control in respect of wages, hours of work and manning can be found below under 4.1.5.3.4., where the provisions of Convention No. 147 relating to the above questions are scrutinised.²⁶⁵ Here only certain conclusions of a general character are drawn:

²⁶²It was the understanding of the U.S. Government that the practice used in maritime collective agreements in the United States of basing overtime rates on the monthly earnings of seafarers was not in contravention of this Article, 41 *R.P.*, p. 224.

²⁶³See 13 *R.P.*, pp. 329, 337. It should be noted that many countries were of the opinion in 1931 that certain circumstances should not be regarded as overtime or give rise to compensation. Examples of work necessitated by safety requirements which should, for this purpose, be classified under absolute or relative exceptions are given below: Overtime in cases of fire or boat drill, making fast ship and clearing, customs formalities, mooring and unmooring, closing of water-tight doors in bulkheads, preparatory work for unloading and loading, all work connected with the navigation of the ship, (engine manoeuvres, helm and look-out duty, taking the log, soundings, observations), heaving ashes, reduction in crew, obtaining fuel, fire, fog, ice, breakdown, leaking, collision, assistance to other vessels or saving life at sea, see Report I, 1931, pp. 84, 86, 107-109, 112-113, 186-188. However, it should be determined whether overtime in certain of the above circumstances comes within the normal duty of a seaman employed on board a specific vessel (for example, a salvage vessel, ice-breaker). This may depend on the terms of the contract or the specific collective agreement.

²⁶⁴It should be noted that the Art. 8 of 1936 Convention made the granting of weekly rest dependent upon the suspension of watches and the satisfaction of safety requirements. A similar provision could be substituted for Art. 14 (3) (a) of the 1958 Convention.

²⁶⁵For other developments concerning Port State Control, such as the MOU, ILO Rec. No. 28, etc., see Chapter 6.

While Arts. 10 and 23 of the 1958 Convention seem adequate in laying down national measures for the supervision of wages, hours of work and manning, ²⁶⁶ Art. 24, which provides for international cooperation in respect of the enforcement of the provisions of the Convention, has adopted the less far-reaching of the available solutions. International control merely consists in reporting the failure to the authorities of the flag State. More effective methods can be recommended: the carrying on board ship of a wages, hours of work and manning certificate which could be national in the beginning and, hopefully, developing to an international certificate, especially as regards manning. ²⁶⁷ As far as the powers of the port authority of a ratifying State are concerned, the possibility of the detention of an undermanned ship, contrary to safety requirements, registered in the territory of a ratifying state, at a first stage, or in the territory of any state, at a later stage, would contribute to the effectiveness of the international control of hours of work and manning. Here, the existence of a manning certificate would facilitate supervision by the port authority. However, a manned ship which conforms to manning safety requirements does not necessarily conform to "social" demands which, as pointed out earlier, have been the underlying idea of all ILO instruments on seamen's hours of work and manning. It is doubtful whether a port authority would lawfully exercise its powers in detaining a ship registered in a non-ratifying country which does not abide by social requirements included in an international Convention.

ix) Ratification and transitional provisions

Ratification by means of collective agreements has proved an indispensable element of the Convention, if it is to be an internationally acceptable instrument. ²⁶⁸ The position of foreign seamen on a ship to which the Convention applies by means of collective agreements is not clear. ²⁶⁹ The major issue which has to be resolved is the position of a ratifying state when a collective agreement lapses or ceases to exist. An obligation of the ratifying State to adopt legislation in the meantime

²⁶⁶See, however, as regards enforcement of wages provisions, the more complete para. 14 of Recommendation No. 135 concerning Minimum Wage Fixing. In particular, this paragraph suggests the employment of adequately trained inspectors in contrast to Convention No. 109, which excludes wages and hours of work agreed to in collective agreements from public supervision (Arts. 22 (2) and 23 (c)); the shortage of adequately trained inspectors has been one of the main reasons for the non-observance of legal minimum wages in most developing and certain developed countries; Starr, *op. cit.*, pp. 141-142.

²⁶⁷An addition to Art. 23 of the 1958 Convention is suggested to the effect that a manning certificate is kept on board ship in addition to the record of hours worked. Many countries have suggested different methods of supervision more effective than those contained in the ILO 1958 Convention (posting up notices (compare Regulation 16 of Chapter I of the Annex to the 1974 SOLAS Convention), recording of overtime and the compensation therefor, recording of hours of work and weekly rest, national or international manning certificate), but they were not adopted because it was considered that they were all likely to have adverse effects on ratification, see Report I, 1931, pp. 214-216, Report I, 1936, pp. 147-149, 32, 58, 68, 95, 21 *R.P.*, p. 227. An international manning certificate would be better included in an IMO/ILO instrument on training. For details, see *supra* Chapter 3, Section 3.2.3., pp. 225, 228-229; Section 3.2.4., p. 235; Section 3.3., pp. 249-250.

²⁶⁸It was thought by the Office that collective agreements could be of assistance in securing early ratification of the Conventions, see Report IX, 1945, pp. 71-75.

²⁶⁹The Seafarer's adviser of Japan suggested that, in order to improve the conditions of employment of Asian seafarers, European shipowners should settle the relevant issues with seamen's organisations in Asian countries and that Asian seamen should be able to participate in European trade unions, 48 *O. B.*, *op. cit.*, p. 281.

could be envisaged but this may not be a solution acceptable to all countries.²⁷⁰ In my opinion, a provision should be inserted in the final Articles of the future instrument to the effect that the obligation of the ratifying State is suspended for a specific maximum period. If this period expires and no legislation is passed, the State concerned will have either to denounce the Convention temporarily²⁷¹ or the obligations of other ratifying States under the Convention may be suspended, if they so wish, until that State is in position to apply the provisions of the Convention again.²⁷²

Until a provision permitting the entry into force of specific parts of the Convention is included, problems will arise as to how Part II of the Convention dealing with wages is to come into force for countries which have not excluded it from ratification when the necessary number of ratifications for the entry of the Convention into force has been registered, but some of the countries which ratified it have excluded from ratification Part II of it, with the result that this Part should not normally come into force.

It would be interesting to consider whether the practice, followed in ILO instruments on seamen's hours of work, of requiring the ratification of the Convention by a number of countries possessing a specified percentage of the world's total tonnage before it enters into force does serve its intended purpose, namely "facilitating and encouraging early ratification of the Convention by member States" (Art. 27 (3) of Convention No. 109). Governments have been unanimous since 1936 that increasing the combination of states and shipping tonnage would ensure that international competition is not accentuated as a result of the coming of the Convention into force (parity of economic sacrifice).²⁷³ On the other hand, while it may be thought that the ratification of the Convention by the majority of the countries concerned before it enters into force would prevent unfair competition, delay on the part of one or a few maritime States would nullify the effect of the action taken by others.²⁷⁴ The lesson, after almost 60 years of international regulation of seamen's wages, hours of work and manning, is that the above requirement will probably delay the coming of the Convention into force for an indeterminate period. Thus, the opportunity to obtain some information on how this Conven-

²⁷⁰As was pointed out by the Japanese Government delegate, if the collective agreements are not in accordance with the provisions of the Convention, corrective measures should be taken by the administration. Thus, "if Japan ratified this Convention on the basis of collective agreements, the Government would be primarily responsible for implementing its provisions and, so far as the Government is concerned, ratification of the Convention on the basis of collective agreements would be meaningless", *PTMC*, 1956, Report I/1, p. 146, also Argentina, p. 147.

²⁷¹This may be done after prior consultation of the representative organisations of employers and workers; see K. Widows, "The Denunciation of ILO Conventions", *ICLQ*, Vol. 33, Oct. 1984, pp. 1052-1063, at pp. 1054-6. It should be noted that no denunciation of ILO Conventions has taken place as a result of problems encountered by ratifying States in regard to ratification of ILO Conventions by means of collective agreements, *ibid.*, pp. 1056-63.

²⁷²The possibility that the organisations concerned may later conclude collective agreements in which the minimum wage rate is lower than the Convention rate to be observed by a ratifying Member is remote but it cannot be precluded. However, recently it was agreed that the freedom of collective bargaining may not be observed if it results in lowering minimum wages which have the force of law in the country concerned (Art. 2 of Convention No. 131, 1970 concerning Minimum Wage Fixing). This Convention has been ratified by 32 countries so far but no important maritime country apart from Japan has ratified it. It should be noted that failure to apply the minimum wages having the force of law may, according to the Convention, subject employers to penal sanctions; for a discussion, see 54 *R.P.*, p. 379.

²⁷³Nonetheless, the 1920 draft required only two ratifications (Arts 14 and 15).

²⁷⁴Report I, 1931, p. 200.

tion is working in the countries willing to implement its provisions nationally has always been missed. Moreover, since the Convention is not in force, other countries are not encouraged to ratify it. It is suggested that amendment of the final provisions of Convention No. 109 should be attempted to the effect that the Convention would come into force after two ratifications have been registered. This is the only alternative solution to failure and conforms to the practice followed in other recently adopted maritime Conventions and other ILO Conventions of general nature on Hours of Work and Wages.
275

x) Miscellaneous

Signing on in a dual capacity

The question of signing on in a dual capacity has been abandoned by the ILO in its later instruments. It may seem desirable to clarify the question as to whether a seaman, after his signing, is allowed to be employed in work other than that for which he had been engaged and its effects on manning scales, especially if such scales are included in an ILO instrument in the future.

Hours of work and limitation of the number of young seafarers on board ship

As regards the prohibition of employment at night of young persons on board ship, it has to be decided whether the existence of such provision is appropriate in an instrument dealing with hours of work. Nonetheless, it does not seem that ratification has been impeded thereby.²⁷⁶

The 16-year limit of Convention No. 109 was raised to 18 in 1976. The 1976 Conference adopted Recommendation No. 153 concerning the Protection of Young Seafarers. Para. 4 of the Recommendation, *inter alia*, applies an 8-hour day and a 40-hour week to young persons under 18 years of age. Moreover, the employment of persons under 18 years at night is prohibited (Para. 4 (1)). However, these obligations are subject to exceptions in cases of impracticability (assignment to watch-keeping duties, rostered shift-work²⁷⁷) or operational necessity and in cases where the effective training of these seafarers, or the safety of the crew, the passengers and the ship or its cargo are compromised (Paras. 4 (2), 5).²⁷⁸

In a future revision of the 1958 Convention a provision concerning the limitation of number of boys and apprentices on board ship might be included. This would prevent ships from being manned by inexperienced boys (paid lower wages) instead of able seamen.²⁷⁹

Employment of doctors on board ship

²⁷⁵For example, Conventions Nos. 131, 153 and all maritime Conventions adopted at the special (maritime) session of the ILO Conference in 1987. Also, compare Art. 24 of the 1946 Office draft on wages, hours of work and manning of seamen; for a discussion see Report IX, 1946, pp. 79-81.

²⁷⁶However, in none of the ILO instruments on wages, hours of work and manning since 1936 has the question concerning whether work at night for young persons would include ordinary night watch duty been clarified, see Report I, 1936, p. 142.

²⁷⁷This exception applies to the employment of young seafarers in ferries and similar short-voyage vessels with special shift arrangements, 62 *R.P.*, p. 124.

²⁷⁸The Office draft provided for a 7-hour day and a 42-hour week but this provision was opposed by the Shipowners, Report III, 1976, pp. 11-12.

²⁷⁹*PTMC*, 1935, Report and Record of the Meeting, pp. 160-161.

It should be remembered that doctors are excluded from the scope of all ILO Conventions dealing with hours of work. In the light of developments in medical care for seafarers and the insistence on the part of the seafarers that a doctor should be a member of the crew, hours of work and manning scales for doctors (presumably, the number of doctors on board ship could be adjusted to the number of persons carried on that ship and the length of the voyage) could be laid down. Note that none of these questions was discussed at the 1987 Conference.

4.1.5.3.3. Conditions of employment and technical developments on board ship

It should be remembered that only the 1936 Convention contains provisions regarding the exemption of existing ships. It does not seem that the absence of these provisions in later ILO instruments hampered the ratification process substantially, a few examples apart. If, however, it is decided that the ILO should embark on the examination of conditions of employment on board ships where advanced technical equipment has been installed (automated, nuclear-powered ships, computerised engine-room, distinction between operational and maintenance personnel), then the inclusion of such provision might be recommended. A model of a provision concerning the exemption of existing ships is provided in the 1946 Office draft, as analysed above.

As regards the effects of technical developments on board ship on conditions of employment, these can be multiple: a) reduction in manning as a result of the introduction of dual-purpose crews and computers in the engine room, b) adverse consequences on working hours, unless a successful shift system is established, c) accentuated fatigue after the giving of constant required attention to operation controls and d) possible changes in wages connected with reductions in manning. The question of wages of seafarers of developing countries on board foreign ships will not be so acute, since they would only be employed if they have the necessary qualifications acquired in training centers, and wages would take account of this fact.

It is not recommended that the conditions of employment of seafarers serving on such ships should be regulated in a revision of Convention No. 109. A separate instrument will be required to give effect to the suggestions of Recommendation No. 139 concerning Employment Problems Arising from Technical Developments on Board Ship. This Recommendation, however, does not make any explicit reference to the questions of wages, hours of work and manning and, though many ILO instruments are referred to in its Preamble, no instrument concerning the above questions was suggested during the preliminary discussions.²⁸⁰

4.1.5.3.4. Conditions of employment in Convention No. 147 and Recommendation No. 155: These are a hodgepodge of unconvincing innovations

²⁸⁰55 R.P., pp. 135-136. Indirect references to manning scales appear in paras. 2 (b) (ii) and 12 of the Recommendation in connection with manpower planning and the consultation of shipowners' and seafarers' organisations.

A) Art. 2 (a) (i) and (iii), (b) (i) and (iii), (c) and Art. 4 of Convention No. 147

As regards the international supervision of hours of work, manning and wages, certain provisions of Convention No. 147 concerning Minimum Standards in Merchant Ships are worth mentioning:

Art. 2 (a) of the Convention provides that every Member which ratifies the Convention undertakes "to have laws or regulations laying down, for ships registered in its territory

(i) safety standards, including standards of competency, hours of work and manning, so as to ensure the safety of life on board ship"; *and ...*

iii) *shipboard conditions of employment and shipboard living arrangements*, in so far as these, in the opinion of the Member, are not covered by collective agreements or laid down by competent courts in a manner equally binding on the shipowners and seafarers concerned; *and*

to satisfy itself that the provisions of *such laws and regulations* are substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to this Convention ..." ²⁸¹

According to Art. 2 (b) (i) and (iii) the same Member undertakes "to exercise *effective* jurisdiction or control over ships which are *registered in its territory*," in respect of the cases referred to above in Art. 2 (a) (i) and (iii). ²⁸²

Art. 2 (c) requires the ratifying Member to satisfy itself that measures for the effective control of other shipboard conditions and living arrangements, where it has no effective jurisdiction, are agreed between shipowners' and seafarers' organisations constituted in accordance with the Freedom of Association and Collective Bargaining Conventions.

Finally, Art. 4 refers to the possible detention of the ship as one of the measures which a ratifying Member may think necessary to rectify any conditions on board ship which are clearly hazardous to safety or health and do not conform to the standards of this Convention.

B) Analysis and criticism of the relevant provisions

Though the meaning of "substantial equivalence" and "minimum standards", the possibility of the inclusion of Recommendations or Conventions which have not entered into force in Convention No. 147 and the supervisory system adopted in Convention No. 147 are discussed later in Chapter 6, the following observations can be made in connection with wages, hours of work and manning:

1) Convention No. 109 is not included in the Appendix to Convention No. 147. Consequently, no rectifying measures can be taken by any ratifying Member, if wages, hours of work and manning on board a ship do not conform to the standards of Convention No. 109. ²⁸³ Moreover, neither Convention No. 109 nor Recommendation No. 109 are included in the Appendix to Recommendation No. 155.

²⁸¹Emphasis added.

²⁸²Emphasis added.

²⁸³This is the result of the combination of Arts 2 (a) and 4 (1) and (2) of Convention No. 147.

2) Even if, in the future, Convention No. 109 comes into force and either this Convention or Recommendation No. 109 are included in the Appendix to Convention No. 147, there is a grave lack of social requirements in the latter Convention. This instrument appears more like one adopted by the IMO not the ILO. Paras. (a) and (b) refer to safety standards, including hours of work and manning,²⁸⁴ and para. (a) adds the words "so as to ensure the safety of life on board ship". Art. 4 empowers a ratifying State to take rectifying measures when conditions are clearly hazardous, *inter alia*, to safety.²⁸⁵ It has been pointed out earlier that the intention behind the Hours Conventions for seafarers was the establishment of certain "social standards" for them. Accordingly, Convention No. 147 is incompatible with Convention No. 109 and Recommendation No. 109 in this respect.²⁸⁶

3) It is difficult to imagine how the formula of "substantial equivalence" will be applied to a complex question such as the international minimum wage when, as pointed out earlier, shipowners, seafarers and governments disagreed even on the method of the minimum wage fixing.²⁸⁷

4) The regulation of seamen's conditions of employment by means of collective agreements in Art. 2 (a) (i) and (iii) of Convention No. 147 is not well founded:

a) The Convention requires a ratifying Member to have laws or regulations laying down safety standards, including hours of work and manning and shipboard conditions of employment. It has been pointed out earlier that one of the reasons why certain countries have not ratified the 1936 Convention on Hours of Work and Manning was the absence of any provisions therein dealing with the application of that Convention by means of collective agreements. Art. 2 (a) (i) of Convention No. 147 does not offer this option to ratifying Members, since it requires them to enact national laws or regulations²⁸⁸ with the result that this paragraph may prove unacceptable to a number of countries.

b) The Convention requires a ratifying Member to have laws or regulations laying down shipboard conditions of employment, in so far as these, in the opinion of the Member, are not covered by

²⁸⁴For the IMO recommendations on safe manning, see S. Mankabady, *The International Maritime Organisation*, 1986, Vol. I, pp. 170-171.

²⁸⁵The Shipowners emphasised at the 1976 Conference that references to manning in the Convention implied "minimum safe manning", Report V (1), 1976, p. 17. This view was not contested at the Conference and, in the writer's opinion, is legally accurate.

²⁸⁶As a result, the interpretation given by the Committee on Substandard Vessels (appointed by the 1976 Conference) to the terms "safety" or "safety standards" as referring to "the standards contained in the ILO Conventions listed in the Appendices (to the Convention and the Recommendation) as well as in the two instruments themselves" cannot be regarded as authoritative in this respect: First, no ILO instruments dealing with hours of work and manning are listed in the Appendix and, secondly, the emphasis laid on hours of work as a safety standard was due to the confusion that followed an amendment by the Shipowners' group to delete "hours of work" from the Convention, 62 R.P., p. 190. The fact that hours of work and safety could not be considered separately, as the Workers emphasised, does not imply that the hours standards adopted by the ILO Conferences from time to time were solely aimed at preserving safety on board ship. It should be noted that hours of work had not originally been included in Art. 2 (a) (i) and (b) (i) as a safety standard alongside manning, Report V (1), 1976, p. 23.

²⁸⁷It is assumed that "wages" are covered by the words "shipboard conditions of employment and shipboard living arrangements" in Art. 2 (a), (b) and (c) of Convention No. 147.

²⁸⁸The shipowners were in favour of the inclusion of collective agreements as a means of ensuring substantial equivalence with the standards of Convention No. 147. The seafarers were against this idea in view of the danger of company-controlled unions, Report V (1), p. 16. It is a matter of interpretation whether Art. 2 (a) (iii) encompasses apart from wages, the "social" aspect of hours of work and manning as distinct from the safety aspect mentioned in para. (a) (i). No authoritative interpretation of the meaning of this paragraph is provided by the preparatory discussions.

collective agreements. But it does not stipulate to what standards the conditions agreed to in national collective agreements should conform or be equivalent.²⁸⁹ Accordingly, if in a ratifying Member collective agreements are in force which provide for conditions of employment inferior to the standards of Convention No. 147, the whole Convention is meaningless in respect of this Member; these agreements are not affected by any compulsory provisions of the Convention.

5) As regards the application of the provisions of Convention No. 147 relating to the conditions of employment of seafarers, the writer prefers to use Art. 21 of Convention No. 109 as an example of how ILO instruments concerning conditions of employment can be applied through Convention No. 147. It seems that the same observations would apply to most of the provisions of the ILO Maritime Conventions relating to conditions of employment. To clarify the issues involved two possibilities can be examined:

²⁸⁹ According to the draft submitted to the 1976 Preparatory Conference, collective agreements should be substantially equivalent to the standards referred to in the Appendix and they should be of a standard of conditions appropriate to the flag State. Compare the various Office drafts and the Seafarers' and Shipowners' amendments, *ibid.*, pp. 5, 18, 23, 27, Report V (2), 1976, p. 50. It may be that the Office was prompted to disengage collective agreements from the obligation of the "substantial equivalence" in view of the disapproving opinions of certain government and shipowner representatives, see Report V (2), 1976, pp. 37, 40, 62 *R.P.*, p. 187. However, the fact remains that Art. 2 (a) (iii) of the Convention acts as an escape-clause.

a) Convention No. 109 is included in the Appendix of Convention No. 147

In this case a Member which has ratified Convention No. 147 but not Convention No. 109 is required: i) to have laws or regulations laying down, for ships registered in its territory minimum safe manning scales, and ii) to ensure substantial equivalence between the relevant national and international provisions. But Art. 21 (b) and (c) of Convention No. 109 lays down that manning scales should be fixed after taking into consideration such questions as hours of work, the prevention of excessive strain upon the crew and the minimisation of overtime, namely social questions.²⁹⁰ The relationship between the "safety" element and "substantial equivalence" is not clear but the combination of the two is likely to lead to the degradation of the whole principle envisaged in Art. 21 of Convention No. 109.

Even if "social" manning is interpreted as being covered by Art. 2 (a) and (b) (iii) where safety is not mentioned, the Member will be unable to enforce these provisions since rectifying measures, including detention, are justified only in cases clearly hazardous to safety (Art. 4 (1) and (2)).

b) Convention No. 109 is not included in the Appendix to Convention No. 147.

The fact that no Convention concerning hours of work, manning and wages is included in the Appendix to Convention No. 147 does not rule out the possibility of the application of the latter.²⁹¹ In fact, the conviction that Convention No. 147 is only active through its Appendix is wrong. In this case, Art. 2 (b) (i), (iii) and (c) comes into operation. In our example, these paragraphs would require a ratifying State which has not ratified Convention No. 109 to exercise effective jurisdiction or control over ships which are registered in its territory in respect of minimum safe manning standards prescribed by national laws or regulations. The following observations can be made:

(i) In the first place, the wording of the above provisions presupposes the existence of national laws dealing with manning scales, which is not always the case. It does not seem to require ratifying States to lay down any manning scales or, even more to the point, *safe* manning scales with the result that the absence of such laws or regulations would delay the application of Art. 2 (b) and (c) indefinitely.

(ii) Secondly, it demands that ratifying States exercise effective control only in respect of safe manning. If a ratifying State has established manning scales going beyond strict safety requirements, it is not bound by the Convention to enforce such laws insofar as they proceed to lay down social standards. Of course, it has always been a principle of the ILO that nothing in the ILO Conventions can affect legislation, customs etc., in a ratifying country which ensure the workers concerned conditions more favourable than the respective provisions of the Convention ratified and this has been in-

²⁹⁰From its earliest days, the ILO Office has asserted that the social aspect of manning had induced countries to establish more advanced standards than those required by safety. It seems that in certain countries (France, Spain, Germany) manning was regarded as a social corollary of hours of work, see *PTMC*, 1935, Report I, p.26. At the same time Great Britain was of the opinion that manning was a question of safety, not of hours of work, *PTMC*, 1935, Report and Record of the Meeting, pp. 81-82.

²⁹¹Report V (1), 1976, p. 17.

cluded in the ILO Constitution and in certain ILO Maritime Conventions.²⁹² However, it is unlikely that this principle extends to supervision of this legislation, unless supervisory provisions are included in the legislation concerned, in which case the obligation to exercise effective control in respect of social requirements, such as the manning scales mentioned above, exists nationally quite independently of the obligations imposed by Art. 2 (b) of Convention No. 147.

(iii) Thirdly, it is highly questionable in what such effective jurisdiction or control consists. On the one hand, it is clear that, unlike Convention No. 109, Convention No. 147 does not lay down specific methods of supervision even at the national level. The situation could be rectified if, as an improvement on Convention No. 109, Convention No. 147 provided for the international control of seamen's conditions of employment irrespective of whether an instrument dealing with this question appears in the Appendix or not. However, this is not the case: Art. 4 of Convention No. 147 applies to ships which do not conform to *the standards of this Convention*. But Art. 2 (b) and (c) does not lay down any standards at all; it refers to "national" standards prescribed by national laws or regulations.²⁹³ The result is that under Convention No. 147 a ratifying State is not entitled, authorised or required to take measures against or detain a ship which does not conform to the manning scales laid down by the country in which the said ship is registered or to those of Art. 21 of Convention No. 109, even if the the flag-State has ratified the latter Convention, merely because it is not included in the Appendix to Convention No. 147.

C) Conclusions

As long as no ILO instrument concerning wages, hours of work and manning is included in the Appendices to Convention No. 147 and Recommendation No. 155,²⁹⁴ they do not constitute, as they stand, useful instruments in the application of national or international provisions relating to this aspect of seamen's conditions of employment. Nonetheless, if the existing ILO instruments concerning wages, hours of work and manning are revised along the lines suggested earlier and come into force, the new instrument as revised would enhance the effectiveness of Convention No. 147 as an "umbrella" instrument. Apart from these considerations, it has been shown immediately above that Convention No. 147 is seriously flawed from the legal and technical point of view in its attempt to establish methods of international control relating to seamen's conditions of employment. The following remedies may be suggested:

²⁹²For example, Art. 1 of Convention No. 109.

²⁹³An interpretation which would encompass in "the standards of this Convention" not only standards laid down by or referred to in it but also national standards prescribed in consequence or, even in advance, thereof would dangerously expand the obligations imposed by international instruments. The wording of a non-adopted French amendment to Art. 4 of the Convention would have been preferable in this respect: It referred to a ship which does not conform "to the standards applicable under Article 2, subparagraph (a), of the present Convention ...", 62 *R.P.*, p. 192.

²⁹⁴Recommendation No. 109 concerning Wages, Hours of Work on Board Ship and Manning had been initially included in the Appendix to Convention No. 147 but it was opposed by the Shipowners' group and certain Governments and was deleted by the Office at a later stage, Report V (1), 1976, pp. 6, 20, 25, 27, Report V (2), 1976 p. 44. The maintenance of Recommendation No. 109 in the Appendix to Recommendation No. 155 was rejected by 1634 votes to 1663 with 253 abstentions, 62 *R.P.*, p. 196.

1) The notions of "safety" and "social standards" should be clearly delimited.²⁹⁵ The first question to be decided is whether Convention No. 147 contemplates the implementation of social or safety standards at the international level and, in the latter case, how the combination of the "substantial equivalence" and a safety-aimed exercise of port State control would be compatible with the existence of labour standards in the Appendix to the Convention. It seems that the goal which Convention No. 147 purports to achieve is to embody in one instrument most existing ILO maritime labour standards but to require supervision only of their safety aspects. Again, it requires countries to have laws relating to the safety aspect of hours and manning, so that the inclusion of any existing or future relevant ILO instruments in the Appendix to the Convention would be rendered purposeless, unless it is assumed that in the field of seamen's hours of work and manning, excluding wages, the respective ILO maritime labour standards are down-graded to safety requirements through the concept of the "substantial equivalence". In fact, only this interpretation would justify the existence and the practicality of Art. 2 (a) (i) in the Convention.

A revision of Convention No. 147 might envisage the establishment and international regulation of two categories of standards: a) safety standards and b) labour standards.

As regards the former, the existing provisions of the Convention regarding port State control are satisfactory with the following qualifications: i) the reference to ILO Maritime Standards should either be eliminated, since it would be very difficult for the port authorities to establish unequivocally the safety aspect of the above standards as qualified by the notion of "substantial equivalence", or a special study should be undertaken by the Maritime Branch of the ILO in collaboration with the IMO to define the "safety" provisions of existing ILO standards.

As regards the latter, they would refer to the ILO standards included in the Appendix to the Convention. In fact, the national labour standards could be "substantially" or, at a later stage, "at least" equivalent to the standards of the Appendix, since they would not then point to safety standards. This would require elimination of the references to safety in Art. 2 of the Convention.²⁹⁶ Hours of work and manning would be treated as labour standards together with other conditions of employment.

²⁹⁵The Employers interpreted "working hours" in Convention No. 147 as relating only to safety, excluding, therefore, questions such as compensation for overtime, 62 *R.P.*, p. 191; see also the view of the Reporter of the Committee on Substandard Vessels, *ibid.*, p. 245. Nevertheless, this view is questionable. The notion of safety in Convention No. 147 was confirmed by the Committee on Substandard Vessels to refer to standards contained in ILO Conventions, *ibid.*, p. 190; and the standards adopted by the ILO in this connection, namely all the ILO Conventions and Recommendations dealing with wages, hours of work and manning, are not safety but labour standards. Furthermore, it is dubious whether the concept of "substantial equivalence" would exclude the application of a provision relating, for example, to time off as a compensation for overtime if such a provision were to be included in a revised Hours Convention and the latter was included in the Appendix to Convention No. 147. In other words, there is no authority to justify the substitution of "safety" for "social standards" through the operation of the "substantial equivalence". On the other hand, social advances could improve safety effectiveness; for example, an increase of the number of crew as a result of the reorganisation of manning scales would reduce fatigue and enhance a seaman's ability to maintain a proper look-out.

²⁹⁶Here, it is argued that the notion of "substantial equivalence" should not be allowed to reduce the impact of international maritime social standards by down-grading them to mere "safety" requirements; it could, however, be applied to labour standards if the nature of these standards as social requirements is not disturbed thereby. On the other hand, the above notion should not apply to safety standards; as for this question see *infra* Section 6.1.2. 2), pp. 449-50.

2) Accordingly, a revised Convention No. 147 would contemplate two levels of supervision, one for safety standards and another for labour standards. The international supervision of the safety standards, defined as suggested above, would not differ from the provisions of Art. 4 of Convention No. 147. However, the port control of ships which do not conform to the labour standards laid down therein should be limited to ships registered in a country which has ratified the Convention in its revised form. Furthermore, it is advisable that the port State control of international maritime labour standards relating to conditions of employment be facilitated by the inclusion of a provision enabling port authorities to obtain reliable information concerning whether ILO standards or even national standards dealing with seamen's conditions of employment are respected on board a particular ship. The suggestions made above under 4.1.5.3.2. viii) could serve as a basis for discussion.²⁹⁷

3) National standards agreed to in collective agreements should be related to the labour standards included in the Appendix to the Convention, thus securing the effectiveness of the Convention in countries where the relevant questions are settled by the parties concerned. The international control of the relevant ILO standards applied through collective agreements could then be relegated to the national systems of control envisaged in these agreements.

The ILO Office has relied for the drafting of the Wages, Hours of Work and Manning instruments on the replies of the governments. However, the important requirement is to have a Convention the text of which would be adapted in vital matters to the law and practice in countries likely to appear in the list of countries whose ratification is required before the Convention enters into force. It is true that the contents of such a text may be distorted during the deliberations of the Committees and of the ILO Conference and this has been the case up to 1946. Nevertheless, the Office draft has always exercised a considerable influence on the subsequent proceedings leading toward the adoption of the final instrument and, given the restrained intervention of delegates in relation to the moving of amendments since 1946, it is possible that such procedure will enhance the likelihood of a future revised Convention coming into force.

Furthermore, the lesson to be learned from the ILO Conferences held since 1920 is that an international Convention on Hours, Manning and Wages which aspires to wide ratification and international acceptance should contain only those provisions that are acceptable to the large majority of important maritime countries and other countries at the meetings.²⁹⁸ All other regulations, which have only been approved by 'relative' majorities, should be left to national laws at the first stage or be

²⁹⁷It is obvious that no problems regarding the lawful exercise of the power of the port authorities to take rectifying measures against a ship which does not conform to "agreed" labour standards would arise, since the port State and the flag State would be bound by the provisions of the same Convention, as revised. The question as to whether the international control of the labour standards envisaged in a revised form of Convention No. 147 could be extended to ships registered in countries which have not ratified it, is discussed in Chapter 6 where the supervision system of this Convention is examined.

²⁹⁸This was the view of certain Governments, such as Great Britain, Norway and Netherlands from the early times of the ILO's involvement in the question of wages, hours of work and manning, Report I, 1936, p. 109.

promulgated only as an ILO Recommendation. Improvements in the existing instruments can then be effected on the basis of evaluation of information regularly supplied both to the ILO and to the IMO.

PART II: REPATRIATION AND ANNUAL PAID LEAVE

4.2. Repatriation

In general terms, repatriation can be defined as the return of an employed person from the country in which he has been abandoned or discharged to his homeland, to the place in which he was engaged, or to any other agreed place.¹ Four instruments concerning the repatriation of seamen have been adopted by the ILO: a) Convention No. 23 (1926) concerning the Repatriation of Seamen, b) Recommendation No. 27 concerning the Repatriation of Masters and Apprentices, c) Convention No. 166 (1987) concerning the Repatriation of Seamen and d) Recommendation No. 174 (1987) concerning the Repatriation of Seafarers. The first two instruments were adopted by the ILO Conference at its 9th session in 1926 while the other two instruments were adopted at the 74th session of the ILO Conference in 1987. The above instruments will be examined in this section.

4.2.1. Convention No. 23 and Recommendation No. 27 (1926)

A) The JMC and the preparatory work of the ILO Office

The first sessions of the JMC

Following the adoption of a Resolution by the 1920 Conference which suggested, *inter alia*, that the "question of repatriation of seamen discharged in foreign ports" should be included in the future International Seamen's Code, the JMC became the appropriate forum for the discussion of this issue.² By 1923 the draft of the International Seamen's Code included a separate article concerning the repatriation of seamen. Art. 31 of this draft provided the seaman with a right to repatriation if he was landed "during the period of his agreement or on its expiry or determination". In the case where no extra expenses were involved, the seaman, at his own request, could be discharged in his own country. As regards the expenses incurred in repatriation, they would not be charged to the him, unless he had been dismissed for "sufficient motives" and included the cost of transport, accommodation

¹In its etymological sense repatriation means return to the "home country" of the seafarer. However, if this interpretation is adopted, problems might arise in the case of a seaman who was not engaged in his home country when, according to national legislation, the seaman's "public" right to repatriation presumes his engagement in his home country, International Labour Conference, 9th Session, Geneva 1926, First item on the Agenda, *International Codification of the Rules Relating to Seamen's Articles of Agreement*, Report I, 1926, p. 131, note 1. As to the reasons why repatriation is considered necessary, it was pointed out by France that it is part of the essence of a labour contract that when it expires or is terminated, the employed person should be left in the same position as when his services were hired; it also has a beneficial effect on the family life of the seaman and he is given a guarantee that he will not be left alone in a country where it would be difficult for him to obtain a fresh engagement, *ibid.*, pp. 129, 131.

²1 *J.M.C.*, pp. 26-27.

and food and the maintenance of the seaman on land up to the beginning of his voyage of repatriation. The flag-State was responsible for the repatriation of the seamen without distinction of nationality.³

The I.T.F. proposed modifications to the above Article to the effect that the expenses of repatriation should be born by the shipowners, and wages should continue until the seaman's return to his home port. On the other hand, the shipowners argued that they could not accept the inclusion of such a provision and contended that it should be included in an ILO instrument dealing with wages.⁴ Thus, one major issue arose as early as 1924, namely the continuation of wages during the repatriation travel. This issue was not solved until 1987 by an amendment devised by the present writer and put forward by the Greek delegation at the 1987 Conference. However, as will be seen later, it provided no more than a half-way solution.⁵

The preparatory work of the Office

The ILO Office decided not to take the question of wages into consideration and prepared a questionnaire requesting the ILO Members to supply information concerning repatriation. Four important aspects of repatriation could be discerned in the ILO's questionnaire: a) the port to which the seaman was to be repatriated, b) the bearer of the repatriation expenses, c) the definition of these expenses and d) the supervision of the repatriation procedures.⁶

As explained earlier in Chapter 2 where the question of the articles of agreement was discussed, the Office in preparing the final draft for the 1926 Conference had to compare three drafts: its own draft and the drafts submitted by the representatives of the shipowners and the Sub-committee appointed by the JMC respectively. As regards the question of repatriation, the shipowners had not submitted any specific proposal while the Sub-Committee's draft accorded with the Office draft.⁷ Taking into consideration the unanimity of the governments over most aspects of repatriation, the ILO Office submitted to the 9th session of the Conference, a draft similar to that which it had submitted to the JMC, as outlined above. It was decided that Art. 31 of the ISC should form a separate instrument, namely a Convention dealing with repatriation.⁸

B) Positions of the shipowners and seafarers in 1926

In general, the issues involved in the regulation of the repatriation of seamen did not give rise to much controversy. Nonetheless, the shipowners and the seafarers held opposite views on certain aspects of this question.

³Emphasis added, 3 *J.M.C.*, p. 72.

⁴4 *J.M.C.*, p. 65, 71.

⁵See *infra* the analysis of Art. 4 (4) (c) of Convention No. 166.

⁶International Labour Conference, 9th Session, Geneva 1926, First item on the Agenda, *International Codification of the Rules Relating to Seamen's Articles of Agreement*, Questionnaire I, pp. 65-67.

⁷For the text of the first Office draft see, *ibid.*, pp. 11*, 24*, 36*.

⁸Report I, 1926, pp. 208-209, 238-239. For the text of the Office draft submitted to the ILO Conference, see *ibid.*, pp. 251-252, 9 *R.P.*, pp. 538-539.

I) Shipowners' views

These were as follows:

- i) The question of wages could only be dealt with in the part of the ISC dealing with wages.⁹
- ii) Since the Conference delegates did not possess the expertise to deal with questions concerning the fishing industry, they were opposed to the idea of applying a Convention dealing with repatriation to fishermen. The inclusion of fishermen might impede ratification. Moreover, vessels only touching ports of the flag State and pleasure yachts should be excluded from the scope of the Convention.¹⁰
- iii) Foreign seamen should be excluded from the scope of the Convention.

II) Seafarers' views

These were as follows:

- i) Coasting trade, deep-sea fishing vessels and pleasure yachts should not be excluded from the scope of the Convention.¹¹
- ii) It should be clear in the text a) that the repatriation expenses will be borne by the shipowners and b) that wages should continue to be paid during repatriation.

C) The 1926 Conference

The Committee on the Repatriation of Seamen

In the Committee on repatriation appointed by the 1926 Conference it was decided that pleasure yachts should be excluded from the scope of the Convention. Vessels engaged in the coasting trade between ports of the same country were also excluded.¹² As regards fishing vessels, it was agreed that they were to be excluded from the Convention provided that a Resolution concerning the repatriation of fishermen was adopted at the Conference.¹³ Considerable discussion ensued as regards the right to repatriation, the port to which the seaman should be re-conveyed and the question of who would bear the expenses incurred in the repatriation travel. A compromise formula was finally arrived at: the destination port could be either the port of engagement or the port of the home country or the port at which the voyage commenced, the choice being left to national law. Moreover, an additional provision was included to the effect that in certain cases where the seaman has been landed in the country to which he belongs, or in the country to which the vessel belongs, or at the port at which he was engaged, etc., the repatriation provisions of the Convention would not apply to him.¹⁴

The deliberations and conclusions of the Repatriation Committee had a devastating effect on the repatriation provisions of the Office draft. The concept of repatriation was down-graded to re-

⁹4 J.M.C. , p. 71.

¹⁰International Labour Conference, 9th Session, Geneva 1926, *Committee on the Repatriation of Seamen* , CR/PV.2, pp. 3-4, 12.

¹¹CR/PV.2, pp. 9, 11-12, PV.3, p. 3.

¹²CR/PV.2, p. 13, PV.3, p. 11.

¹³CR/PV.3, pp. 8.

¹⁴CR/PV.4, pp. 5-14, PV.5, pp. 6, 13.

conveyance to *a* (i.e. any) port. The destination port as well as the repatriation expenses were matters to be decided by national law. Foreign seamen engaged in a country other than their own were excluded from the "protective" provisions of the Convention and their lot was left to national law or to the pressure they could exercise at the conclusion of the articles of agreement. A provision, however, was adopted which can be regarded as the only important shield available to the seaman against possible disputes concerning whether he has himself to bear the repatriation expenses: He could not be charged with these expenses if he had been discharged for any cause which could not be attributed to him.¹⁵

There was a certain degree of apprehension concerning who was to bear the repatriation costs with the Government delegates denying any definite obligation and the shipowners arguing that Governments are responsible for repatriation in general.¹⁶ As will be seen later, this attitude on the part of the shipowners and the governments was repeated at the 1987 Conference in the Repatriation and the Medical Care Committees. It was decided that the question of the repatriation of masters and apprentices should be dealt with only in a Recommendation.¹⁷

The 1926 Conference

At the Conference two important amendments were carried: i) the repatriation benefits envisaged in the Convention were applied to foreign seamen engaged in a port of their own countries and ii) Government vessels not engaged in trade were excluded from the scope of the Convention.¹⁸

D) Brief account and analysis of the provisions of Convention No. 23 (1926) and conclusions

A) Scope of the Convention

1) The Convention does not apply to pleasure yachts and fishing vessels of whatever nature (no distinction is made between coast and deep-sea fishing vessels (Art. 1).

2) It does not apply to Government vessels not engaged in trade but it applies to seamen entered normally on seamen's articles of agreement on board Government - owned vessels (Arts. 1 (2) (b) and 2 (b)).

3) The Convention covers any person employed on board ship and entered on the ship's articles. If a seaman does not appear in the ship's articles or the list of the crew, the provisions of the Convention do not apply to him. Finally, masters and apprentices are excluded.

B) Destination and expenses incurred in repatriation

1) Art. 3 (1) reads: "Any seaman who is landed during the term of his engagement or on its expiration shall be entitled to be taken back to his own country, or to the port at which he was engaged, or to the port at which the voyage commenced, as shall be determined by national law, which

¹⁵CR/PV.6, pp. 6-7.

¹⁶CR/PV.6, pp. 13-16.

¹⁷CR/PV.7, pp. 3-4, 8-10. For a brief account of the proceedings of the Committee on Repatriation see 9 R.P., pp. 539-547. For the texts of the drafts of the Repatriation and the Drafting Committees, see *ibid.*, pp. 547-555.

¹⁸See *ibid.*, pp. 227-228, 230-232.

shall contain the provisions necessary for dealing with the matter, including provisions to determine who shall bear the charge of repatriation." The following comments can be made:

a) The seaman cannot be repatriated, if he does not wish so. Moreover, the intention of the Committee on Repatriation was that he cannot waive his right to repatriation in advance and Art. 3 (1) of the Convention should be interpreted likewise.¹⁹

b) Ratifying countries are obliged to see that a seaman is taken back to one of the destinations referred to above but it is left to national law to determine which destination this shall be.

c) The seaman is entitled to repatriation, if he is landed during his engagement or at its expiration. There is no limit to the period running from the expiration of the agreement or from the landing of the seaman, after the expiry of which the seaman will not be entitled to this right any more. Of course, such a limit can be provided by national law. If no such limit is laid down by national law, the Convention does not require shipowners or ratifying countries to repatriate the seaman but it seems that he forfeits his right to be repatriated as a seaman.²⁰

d) The Convention does not decide the question who will bear the cost of repatriation. The question is left to national law. This could be either the shipowner or the Government.

e) As the text stands, the right of the seaman to get repatriated seems to be general. A great deal of discussion was held with regard to the question whether any seaman, even a deserter, was entitled to repatriation. The seamen's group and the legal adviser of the ILO in 1926 were of the opinion that a deserter is not entitled to repatriation. The Government delegate of U.K. was of a different opinion. According to him, the wording of Art. 3 (1) of Convention No. 23 covered the case of the deserter as well. Other Government delegates held similar views.²¹ The question was not clarified at the Conference.

In the writer's view, the Convention does not cover a deserter. It is doubtful whether a deserter is "landed" within the meaning of the Article. Accordingly, a deserter is not one of the cases "where this Convention applies" according to Art. 6 of the Convention.

2) Art. 3 (2) lays down that a seaman provided with suitable employment on board a vessel proceeding to one of the destinations mentioned above shall be deemed to have been repatriated. The meaning of the word "suitable" has not been clarified at the Conference. This provision was deleted during the preliminary proceedings of the 1987 Conference and was not included in the 1987 Office draft. The Seafarers' members at the Preparatory Conference held in Geneva in 1986 pointed out that a seafarer need not be working on board in order to receive his repatriation entitlements.²²

¹⁹The words "shall be entitled to be taken back" were substituted for the words in the ILO Office draft "shall be taken back", CR/PV.4, pp. 12.

²⁰CR/PV.4, pp. 11-12.

²¹9 R.P., pp. 201-202.

²²International Labour Conference, 74th Session, *Revision of the Repatriation of Seamen Convention, 1926 (No. 23), and of the Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27)*, Report V, 1987, p. 22.

3) Art. 3 (3) provides that "a seaman shall be deemed to have been repatriated if he is landed in the country to which he belongs, or at the port at which he was engaged, or at a neighbouring port, or at the port at which the voyage commenced." The Seafarers' group in 1926 was against this provision. According to the Article, a Greek seaman engaged in New York and employed on an American or any other vessel is deemed to have been repatriated, if he is discharged at a port in New York. If, on the other hand, the same seaman was engaged in New York but the voyage commenced in Buenos Aires and he is taken back to Buenos Aires, he must be deemed to have been repatriated. It should be noticed that para. 3 does not, as does para. 1 of Art. 3, make any reference to national law with the result that if the seaman is sent to one of the destinations mentioned in para. 3, for example, to the port at which the voyage commenced because the shipowner considers that this is more convenient for him, this seaman shall be deemed to have been repatriated and will have no further rights. Also, it would be difficult to imagine how para. 3 could be invoked successfully in national courts when it provides that a seaman shall be considered to have been repatriated if he is landed in the country to which the vessel belongs while, at the same time, para. 1 does not provide ratifying States with this option.

The diametrically opposite possibilities with which a seaman may be faced are amplified by the existence of reference to both the ports of engagement and of the commencement of the voyage in Art. 3 (3) of the Convention. Since these ports can be at a considerable distance from each other even within the same country, the seaman cannot recover the costs incurred in moving from the port of the commencement of the voyage to the port of engagement if he has been repatriated to the former but has his usual residence in the latter. Furthermore, the meaning of the phrase "neighbouring port" has never been clarified. In short, the relationship between paras 1 and 3 of this Article of the Convention is far from clear.

4) Under para. 4 of Art. 3 there is differentiation in the treatment of national and foreign seamen, as far as repatriation rights are concerned. To take the example of a Greek seaman employed on board a German vessel, this seaman would be taken back to Greece or to the port where the voyage commenced only if he had been engaged in Greece. If he had been engaged in a country other than his own, the whole article (Art. 3) does not apply to him. National law will determine whether and to where this seaman is to be taken back. It is not clear from the paragraph which national law is meant to deal with the question (in our example, the Greek or the German law). Moreover, the position of the word "abroad" in this paragraph is not clear, since it is not apparent whether it refers to the ship or the seaman discharged. In both cases, its application may result in inequalities.²³ Para. 4 of Art. 3

²³Employment of nationals on board FOC vessels has adversely affected repatriation entitlements. It was reported in 1958, at the 41st session of the Conference, by the Workers' delegate of Cuba that the Cuban competent authorities had promulgated General Order No. 2), which provided that "Cuban merchant seamen sailing under foreign flags must be guaranteed repatriation and assistance in the event of employment injury, in accordance with the provisions of the international Conventions adopted on this subject. This Order was never applied; in fact, it was immediately suspended at the request of the organisation of Cuban merchant seamen in order to avoid the immediate and wholesale discharge of Cuban seamen serving under flags of convenience ..."; 41 *R.P.*, p. 21. It should be noted that Cuba had ratified Convention No. 23 in 1928.

was adopted on the understanding that the consular authorities of each country will protect the interests of national seamen who are employed on board foreign vessels and are engaged and discharged abroad.²⁴

C) Persons responsible for the defrayment of the expenses of repatriation.

1) Art. 4 enumerates the cases in which the expenses of repatriation will not be a charge on the seaman: a) injury sustained in the service of the vessel, b) shipwreck, c) illness not due to his own wilful act or default, d) discharge for any cause for which he cannot be held responsible. Consequently, the seaman will have to pay the expenses incurred in cases such as illness or injury sustained by him while out of service, for example, on leave ashore. Again, it is difficult to interpret the words "any cause for which (the seaman) cannot be held responsible." This is thus a matter for the court to decide. Finally, as the article is worded ("the expenses of repatriation shall not be a charge on the seaman if...") the onus of proof lies on the seaman (he has to prove that one of the four reasons mentioned in Art. 4 entitles him to repatriation free of charge). It would have been better if the Convention had laid down as a general principle that the costs of repatriation must in no case be a charge on the seaman. Exceptions to the principle could then have been provided as, for example in the case where a seaman breaks the agreement. This was, in fact, done in the new Convention No. 166 (1987) under which the seaman is never responsible for the expenses of repatriation except in one case (if he is in serious default of his employment obligations, Art. 4 (3) of the Convention).

D) Definition of the repatriation expenses

In the costs of repatriation are included:

a) food and accommodation during repatriation travel and b) maintenance of the seaman on land up to the time fixed (by the public authority) for his departure. Departure here is meant to refer to the moment of departure fixed by the public authority for repatriation.²⁵

Expenses of repatriation do not comprise:

a) clothing, medical care during the repatriation travel and b) wages or salaries and allowances during the repatriation travel.

E) Supervision

The public authority of the country in which the ship is registered is responsible for the supervision of the repatriation of seamen employed on board such ship.²⁶ The following persons or authorities are not responsible for supervising repatriation:

²⁴CR/PV.6, p. 17, 9 R.P., p. 223.

²⁵CR/PV.6, p. 9. The list of the benefits included in the repatriation expenses seems to be restrictive, 9 R.P., p. 545.

²⁶The responsibility of governments for supervision of the repatriation procedures does not extend to the defrayment of its cost. Governments are to pay the seaman his repatriation expenses only in cases of necessity which again are defined by national law, CR/PV.6, p. 17, 9 R.P., pp. 545-546. Accordingly, the question of the "financial" responsibility for the seaman's repatriation was not decided by the 1926 Conference.

a) the shipowner, b) seafarers' organisations and c) the authorities of the country of the nationality of the seafarer. This, of course, does not prevent a country from establishing a system of protection for its national seafarers employed on board foreign vessels.

E) Main points of Convention No. 23.

i) The Convention does not apply neither to fishermen nor to masters and to pleasure yachts.

ii) The destination is determined by national law. There is no provision requiring a ratifying country to lay down in national law that a seaman entitled to repatriation should be sent to a place he prefers, if the costs of repatriation are not increased thereby.

iii) The nationality of the seaman plays an important role as far as his repatriation rights are concerned.

iv) It is not laid down as a general principle that the seaman is not responsible for the payment of the expenses of repatriation. National law is left to decide who shall bear the expenses of repatriation.²⁷ In cases of necessity (a matter which will be decided by the Government), for example, if a shipowner fails to pay the expenses, the government will pay but the amount of money paid is recoverable from the shipowner only if national law provides that the latter is responsible for the costs of repatriation.

v) Wages, salaries and allowances during the repatriation travel are not included in the costs of repatriation.

vi) The public authority of the flag-State, not the shipowner, is responsible for supervising the repatriation.

Convention No. 23 was overburdened with implicit or explicit references to national law. All important aspects of repatriation were left to national law and governments could apply a wide range of interpretations to its provisions. Uniformity in the application of national provisions on repatriation based on the Convention was only guaranteed in certain limited cases enumerated in Arts. 4 and 5 of the Convention.

F) Convention No. 23: its application during the past 60 years

Convention No. 23 was adopted by 75 votes to 22. All Government and Worker delegates voted for the Convention while the Shipowners' group in corpus (apart from the Shipowners' delegate of Brazil) voted against it. Since 1926 Convention No. 23 has received 37 ratifications.

Some important maritime countries have ratified Convention No. 23, viz: Liberia, Panama, Greece, the U.S.S.R., China, United Kingdom.

But several important maritime countries have not ratified Convention No. 23, viz: Japan, the U.S.A., Cyprus, Norway.

The 1926 Conference also adopted a Recommendation recommending that Governments should take steps to provide for the repatriation of masters and duly indentured apprentices and a

²⁷CR/PV.6, p. 3.

Resolution inviting the Governments which had not already done so to take the measures required to ensure the repatriation of fishermen left in a foreign port.²⁸

4.2.2. Convention No. 166 and Recommendation No. 174 (1987)

Since 1983 the ILO Office had been examining whether revision of Convention No. 23 was needed. Among the reasons which would justify this revision were reported to be "...the operation of ships in trades which exclude regular visits to the country of registry or of the seafarers on board, the extensive use of air travel to transport seafarers to and from ships, the multinational composition of crews of many ships, and the high number of seafarers from developing countries serving under foreign flags."²⁹

A) The Preparatory work of the Office and the 1986 Preparatory Conference

The preparatory work of the Office

The Office after reviewing state practice concluded that in view of the technical and social changes that had occurred in the shipping industry since 1926, the revision of the old ILO instruments on repatriation should be considered. It drafted a number of conclusions which were submitted to the 1986 Preparatory Technical Maritime Conference. The points concerned such questions as the scope of the Convention, the repatriation entitlements, the repatriation port, the expenses incurred in repatriation and the supervision of the repatriation procedures.³⁰

Some observations may be made in respect of the proposed conclusions of the Office:

a) Under the definition of the term "seafarer" a seaman was not, as he was under the 1926 Convention, required to be entered on the articles of agreement. Thus, the conclusions avoided the question whether the right to repatriation only applies to "articled" seamen.³¹

b) A new concept was introduced in Section II of the Conclusions. The cases in which the seaman was entitled to repatriation were specifically mentioned. This implied that no general right to repatriation was recognised.

c) A number of illuminating provisions established a simple regime for the responsibility for the repatriation costs.³²

The 1986 Preparatory Maritime Conference

The Shipowners' group adopted a more conservative attitude towards the Office's Conclusions. In many cases they preferred the wording of the old Convention No. 23. In contrast, the Seafarers were prepared to introduce improvements on major aspects of the question of repatriation, such

²⁸For the final votes on, and the texts of Convention No. 23, Recommendation No. 27 and Resolution No. 4 (1926), see 9 *R.P.*, pp. 346-349, 610, 621-626.

²⁹JMC/24/6, p. 1.

³⁰JMC/24/6, pp. 21-24, *PTMC*, 1986, Report V, pp. 27-35.

³¹According to the Office, the elimination of this requirement made clear that seamen not entered on articles of agreement had the same rights as the other seamen, Report V, 1987, pp. 33-34.

³²See Section IV of the Conclusions. This Section, with modifications, became Arts. 4 and 5 of the Convention No. 166. For an analysis of these articles see *infra* pp. 355-357.

as the inclusion of fishermen and masters in the new Convention.³³ It was decided that the question of the inclusion of fishermen in the new Convention should be postponed until the 1987 Conference to which Governments were advised to send experts and representatives of the fishing interests.³⁴ Despite these recommendations of the Working Group appointed by the Preparatory Conference, as usual, these interests were not adequately represented at the 1987 Conference. Hundreds of amendments, however, were moved at the Preparatory Conference, the effect of which is not always possible to verify. Only the following points are worth mentioning:

a) By a small margin it was decided that a seaman is entitled to repatriation after an uninterrupted period of service not exceeding six months.

b) The drawing, as a precondition of the right to repatriation, of a distinction between illness or injury due to the seafarer's wilful act or default and illness or injury not due to these reasons was deleted.

c) An additional clause was adopted providing that a seaman has the right to repatriation when, without his consent, he is on a ship bound for a warlike area.

d) The Office's text relating to the port of destination was amended to refer to specific ports. Consequently, the question was not left entirely to national law.

e) Repatriation costs could be recovered from a seafarer, if he was in serious default of his employment obligations.

f) At the instance of the Seafarers a provision was adopted which covered cases in which the flag State did not meet its repatriation obligations as the party ultimately responsible for the defrayment of the repatriation costs. Consequently, the port State and the State of nationality of the seafarer were in that order required to bear these expenses.³⁵

It is interesting to note that the Shipowners' and the Seafarers' groups had opposite views as regards certain obligations of the shipowners, namely the payment of wages during repatriation travel, but were unanimous in rejecting amendments moved by certain Government members to the effect that it should be left to each Government to decide who would have the ultimate responsibility for the defrayment of the repatriation expenses. Consequently, this responsibility continued, according to the Office text, to rest with the Governments despite the opposite views of a number of Government delegates.³⁶

The Preparatory Conference left certain issues undecided, such as the exact delimitation of the scope of the Convention and the question concerning who is to determine the port of destination. A

³³Report V, 1987, p. 9-10.

³⁴*ibid.*, p. 11.

³⁵*ibid.*, pp. 12-21. However, in view of the difficulties encountered in ascertaining the obligations of these countries under the Convention, the Office decided to submit an alternative text providing that these States would not be required to bear the repatriation expenses if they had not ratified the Convention, but could undertake these expenses if they wished so, pp. 34-35. This alternative text was favoured by the majority of the Governments at the 1987 Conference, 74 R.P., p. 15/8.

³⁶Report V, 1987, pp. 18-20.

number of other questions, such as the time-limit prescribed by Art. 2 (b) of the 1987 Office draft and the ultimate financial responsibility for repatriation between different States proved to be controversial and, therefore, likely to slow down the ratification progress.

B) Positions of the shipowners and seafarers in 1987

I) Shipowners' views

The views of the Shipowners' group had not changed substantially: a) a seaman who has deserted should not be repatriated at the expense of the shipowner; b) when the shipowner is unable to pay the expenses of repatriation, the Government should undertake the payment of the expenses; c) the principle of "no distinction of nationality" should apply only to national ships; d) detailed provisions should be left to national law; e) they opposed the inclusion of any bond or guarantee in the Convention compelling the shipowner to pay; f) fishermen should be excluded from the Convention, since the Conference had neither the mandate nor the necessary expertise to deal with such matters; g) they considered the question of wages and allowances to be outside the scope of the Convention;³⁷ h) the 6-month time-limit, after expiration of which a seaman would be entitled to repatriation, was not acceptable.³⁸

II) Seafarers' views

The views of the Seafarers' group had remained virtually unchanged for 60 years: a) Masters, apprentices and fishermen should be included in the Convention, b) all seafarers should have a right to repatriation in all circumstances, c) international funds should be established for repatriation purposes in cases where a seafarer was abandoned or in distress abroad, and d) wages and allowances should be paid before and during the repatriation travel.³⁹

C) The 1987 Conference

The Committee on Repatriation

An attempt by the Dutch and the Greek Governments to substitute the words "regularly employed" for the words "employed in any capacity" in Art. 1, para. 3 of Convention No. 166, which defined the term "seafarer", was defeated.⁴⁰ The question of whether a time-limit, after the expiration of which the seaman would be entitled to repatriation, should be laid down in the Convention gave rise to considerable discussion. Finally, a compromise formula was arrived at according to which the seaman was entitled to repatriation upon the expiry of the notice period given in accordance with the provisions of the articles of agreement or the seaman's contract of employment. The right to choose the repatriation port was conferred upon the seaman.⁴¹ After an impasse had been reached, the Committee, accepting an amendment moved by the Greek delegation, agreed that wages would be in-

³⁷Report V, 1987, p. 7, 74 R.P., pp. 15/1-2.

³⁸Report V, p. 28.

³⁹ibid., p. 8.

⁴⁰74 R.P., p. 15/3.

⁴¹ibid., pp. 15/3-15/6.

cluded in the repatriation costs, only if national laws, regulations or collective agreements so provided.

⁴² Finally, it was decided that a provision should be included in the text providing that ratifying Members should facilitate the repatriation of seafarers serving on ships which call at their ports or which pass through waters under their jurisdiction.

D) Brief analysis of the provisions Convention No. 166 and Conclusions

The ILO Conference at its 74th session adopted, apart from Convention No. 166, a Recommendation ⁴³ and a Resolution relating to the question of repatriation. ⁴⁴ The following analysis provides the main points of interest of the new Convention:

1) Scope of the Convention

The Convention applies to "every sea-going ship...ordinarily engaged in commercial maritime navigation" (Art. 1, para. 1). The phrase "commercial maritime navigation" appears for the first time in an ILO instrument and it would have been better if it had been avoided. Para. 3 empowers the competent authority to determine what is meant by the phrase "commercial maritime navigation". The paragraph, in comparison to the respective provisions of Convention No. 23, gives considerable freedom to the competent authorities to determine the scope of the term "commercial maritime navigation". Under the established practice in ILO instruments either the words "maritime navigation" are used and ships of war and Government vessels not engaged in trade are excluded, or the term "sea-going vessel" is employed and the same categories of ships are excluded.

The Convention seems to exclude yachts from its scope, since they are not "ordinarily engaged in commercial maritime navigation". ⁴⁵

The word "seafarer" in para. 4 of Art. 1 of the Convention was given a very broad meaning covering all persons employed in any capacity on board ship. The wording of Convention No. 23 was considerably stricter. According to the new Convention, persons not employed by the shipowner or employed by independent companies or even persons not regarded as seamen in national legislations, such as short-hired musicians, are entitled to repatriation. It seems that repatriation no longer depends on the conclusion of the articles of agreement; this, however, would be justified only if repatriation had acquired in the Convention the status of a *right of public law*. It is not clear that it

⁴² *ibid.*, pp. 15/6-15/7. This amendment was identical to the one proposed by the present writer to the Greek Delegation at the 1987 Conference, see E.C. Tsandis, Report on Repatriation (unpublished), p. 15.

⁴³ Convention No. 166 was adopted by 209 votes to 0 with 2 abstentions; Recommendation No. 174 was adopted by 206 votes to 0 with 2 abstentions (in both cases by the two Government delegates of Japan), see 74 *R.P.*, pp. 19/10-13. Convention No. 166 was ratified by Hungary on 14 March 1989; see *O.B.*, Vol. LXXII, 1989, p. 56.

⁴⁴ The Recommendation urges port-States or States of which the seafarer is a national to arrange for the repatriation of a seaman when the shipowner or the State of registry have failed to meet their obligations under the Convention. The Resolution concerns the expediting of legal procedures in cases of abandonment of seafarers and in the sale of arrested ships and urges States to make laws instituting speedy proceedings and the securing, *inter alia*, of the payment of wages, on a priority basis, from the sale proceeds. For the texts of Convention No. 166, Recommendation No. 174 and Resolution No. I adopted by the 1987 Conference, see 74 *R.P.*, pp. 15/11-15, 15A and 15B; see also *ibid.*, pp. L-LIX, *O.B.*, Vol. LXX, 1987, pp. 122-127, 133-134.

⁴⁵ Though the majority of the governments apply repatriation provisions to yachts, the text, as it stands, will facilitate the ratification of the Convention by such countries as the F.R.G., Panama and Philippines that do not, *PTMC*, 1986, Report V, pp. 8-9.

was the intention of the drafters to accord it such status, since even consideration of the question of the nature of the right to repatriation has been abandoned since 1926. On the other hand, the Convention applies to masters and apprentices and, thus, it gives, at last, binding legal force to the provisions of Recommendation No. 27 (1926) concerning the repatriation of masters and apprentices. The coverage of masters and apprentices is in accordance with State practice as shown in Appendix 3 which sets out state practice concerning repatriation.

2) Cases in which the seaman is entitled to repatriation

Art. 2 of the new Office draft enumerates the circumstances under which a seaman is entitled to repatriation. It will be seen that Convention No. 166 adopts a different method from that followed in Convention No. 23.

In the latter instrument the right to repatriation is enunciated as a general principle (it should be remembered that the British Government delegate expressed the view that even a deserter could have a right to be repatriated but in that case, of course, the seaman himself has to bear the expenses of his repatriation). So, under the 1926 Convention the main question concerned who should bear the expenses of repatriation and not in what circumstances is the seaman entitled to repatriation.

Convention No. 166 does not seem to recognise repatriation as a general principle. The seaman is entitled to repatriation only in the seven cases enumerated in Art. 2 (1). Its most important clauses are as follows:

i) Clause (b) in conjunction with Art. 2 (2) provides the seaman with a right to repatriation after a maximum employment period of 12 months. Though these provisions predetermine the outcome of deliberations concerning the revision of Convention No. 22 relating to Articles of Agreement, they will not pose substantial problems of application in the majority of countries and constitute a substantial improvement over Convention No. 23 in that they ensure that the seaman will not be required to serve for an indeterminate period of time before he is entitled to repatriation.⁴⁶

ii) Clause (c) stipulates that a right to repatriation exists in the case of illness or injury or other similar medical condition. A phrase qualifying the cases of illness or injury in which a repatriation right exists, namely, illness or injury "not due to the seafarers' (serious) wilful act or default", was deleted at the Preparatory Conference.⁴⁷ Consequently, as the clause stands, a seaman has a right to repatriation a) in cases of illness or injury sustained by the seaman while out of service (the Convention does not distinguish); in such cases the costs of repatriation will be defrayed by the shipowner at a first stage and b) in the case where such injury or illness was due to the fault (whether wilful or not) of the seaman. Again, in this case the shipowner will have to bear the expenses of repatriation;⁴⁸ the

⁴⁶However, a number of countries (such as Cyprus, the Philippines and India) may experience difficulties in applying this provision, 74 R.P., p. 15/5, para. 38.

⁴⁷Report V, 1987, p. 13.

⁴⁸Nonetheless, a historical interpretation of this paragraph reveals that these words were deleted because a) they could be interpreted to the detriment of the seafarers and b) the medical competence of the master to determine whether the illness or injury of the seaman was caused by default was questioned by the seafarers (but not by the shipowners), Re-

shipowner will not be liable for the costs of repatriation in the case of illness or injury only if the seaman is "in serious default of his or her employment obligations" according to Art. 4, para. 3.

iii) Clause (g) provides that a seaman is entitled to repatriation "in the event of termination or interruption of employment in accordance with an industrial award or collective agreement, or termination of employment for any other similar reason". The first Office draft read: "for any other reason causing the termination of the seafarer's employment through no fault of his own." It is evident from the comparison of the two texts, as well as from the comments made above, that the Convention no longer attaches much importance to the fault of the seaman. Accordingly, a deserter under the Convention has the right to be repatriated but, of course, he may, finally, have to pay for the costs of his repatriation under para. 3 of Art. 4. Art. 2 (g) establishes a general right to repatriation when the employment is terminated, even in cases where a seaman is at fault.⁴⁹

3) Destination port

While para. 1 of Art. 3 empowers national law to prescribe the destinations to which seamen can be repatriated, para. 2 sets important limits to that power. It reads as follows: "The destinations so prescribed shall include the place at which the seafarer agreed to enter into the engagement, the place stipulated by collective agreement, the seafarer's country of residence or such other place as may be mutually agreed at the time of engagement. The seafarer shall have the right to choose from among the prescribed destinations the place to which he or she is to be repatriated."⁵⁰

a) It is not clear whether these alternatives are all binding or whether the paragraph places an obligation on Members to ensure that national law stipulates one of the alternatives as a destination. As the text stands, a ratifying Member is obliged to stipulate in its national law that all the alternatives mentioned above shall constitute destinations for the purpose of the Convention.⁵¹

port V, 1987, p. 13. Accordingly, if a doctor on board ship or ashore unequivocally considers that the illness or injury was wilful or was caused by default, nothing in the Convention would prevent national laws from denying repatriation rights to such seamen. However, the text, as it stands, does not reflect this interpretation.

⁴⁹Here, it should be noticed that the three countries which proposed the deletion of the reference to the (serious) fault of the seaman (Argentina, Spain and Mexico) considered that "the decision regarding the existence of a serious fault could only be taken in accordance with the proper civil procedures of the country concerned and not by the master of the ship", Report V, 1987, p. 14. However, after the submission of the text to the Working Group and the final drafting of the clause by the Group, the final text as in the case of clause (c), no longer reflects the substance of the amendment proposed. It seems that only in serious cases (to be determined by national law) are the costs of repatriation recoverable from the seaman; for example, it may be that illness through negligence or injury sustained by the seaman while he is ashore and out of service but not in serious default of his obligations, since the safety of the ship in the specific case is not endangered by his absence, would give him a right to repatriation free of charge.

⁵⁰Compare Art. 3 (2) of the 1987 Office draft: "Destinations so prescribed shall in any case include the place of engagement of the seafarer, the place stipulated by collective agreement, the seafarer's country of residence, the seafarer's country of origin and any other place chosen by the seafarer for which the transportation costs do not exceed those entailed in the most costly alternative", Report V, 1987, p. 40.

⁵¹This is so despite the substitution of the word "or" for the word "and" between "the country of residence" and "such other place", and it reflects the intention of the Committee on Repatriation in 1987, see Report V, 1987, p. 16, 74 R.P., p. 15/5. However, as the text stands, it seems that if a repatriation port is mutually agreed, the seafarer cannot have recourse to national law to demand another destination, if he subsequently changed his mind.

b) National laws are not required to include the country of origin of the seafarers among the repatriation destinations.⁵²

c) The right of the seaman to choose the repatriation port is qualified:

i) One wonders by what procedure national laws would be regularly amended to take account of "such other place as may be mutually agreed at the time of the engagement". To this difficulty the only solution would be that they should include a provision drafted in identical terms to these of Art. 3 (2) of the Convention. It remains to be seen how many countries will embark on such action.

ii) The seafarer is limited in his choice, since he is restricted to choosing among destinations prescribed by national laws or mutually agreed in collective agreements (the effectiveness of the latter option would depend on the bargaining power of seafarers' associations in the country concerned). He cannot claim to be repatriated to a port which is convenient for him, because, for example, he could easily find employment at a specific port, which does not coincide with any of the destinations mentioned above, even if the transportation costs to it do not exceed those entailed in the most (or even less) costly alternative. The provisions of the 1987 Office draft were more favourable for the seaman.

iii) The first part of Art. 8 of the Convention lays down that a seaman "shall be deemed to have been duly repatriated when he or she is landed at a destination prescribed pursuant to Article 3 above ...:"⁵³ The meaning of this Article is less than clear. The destination under Art. 3 is primarily prescribed by national laws but ultimately chosen by the seafarer. By using the word "prescribed", Art. 8 can reasonably bear the interpretation that if a destination has been prescribed by some means in a ratifying Member and the shipowners repatriates the seaman to that destination, the seaman is deemed to have been repatriated irrespective of the fact that he might have possibly chosen another port. If this interpretation is correct, the situation as regards the repatriation port under Convention No. 166 is no better for the seaman than that under Art. 3 (3) of Convention No. 23 analysed earlier. Indeed, it is difficult to imagine what function this provision in Art. 8 is meant to serve other than qualifying the right of choice of the seafarer; since the first part of Art. 8, as will be seen later, also gives rise to other controversies, it should have been deleted at the 1987 Conference.

⁵²The 1987 Office draft listed among the obligatory destinations the country of origin of the seafarers and its inclusion was supported in the Committee on Repatriation by at least two countries (the USSR and Turkey), 74 R.P. , p. 15/5, para. 46.

⁵³Emphasis added. This Article was meant to refer to one destination, 74 R.P. , p. 15/9, para. 88.

4) Expenses of repatriation

Unlike Convention No. 23, Convention No. 166 clearly lays down that the primary responsibility for the defrayment of the repatriation costs lies with the shipowner (Art. 4, para. 2). A number of observations may be made with regard to Art. 4:

a) The second sentence of para. 1 of Art. 4 provides that the normal mode of transport must be by air. First, it should be observed that this provision may not be applicable to countries where air transportation is not widespread or, for some reasons, may not prove to be convenient. Then, the provision burdens the national courts with insignificant cases, namely to decide whether or not in a specific case transport by ship or train should be considered as normal, the question of damages which should be awarded to the seaman and how these could be assessed, etc.⁵⁴

b) The interpretation of the "serious default of *the seaman's* employment obligations" in Art. 4 (3) would vary in different countries. This might exclude negligence, but the situation as regards grave negligence is less than clear. Moreover, the right of the shipowner to recover⁵⁵ the costs of repatriation in these cases is limited *in persona* to the seafarer who may be destitute. An addition to this paragraph, after the word "seafarer", of words to the effect that the shipowner will have the right of recovery from national funds maintained by Governments to cover the expenses of repatriation in the case of a seaman's default would be desirable and is thus recommended.⁵⁶

On the other hand, the right of recovery in the case of a serious default of a seaman is connected with repatriation necessitated as a result of that fault. Art. 4, para. 3 does not seem to have been drafted so as to take into account the wording of Art. 2 (1) (g) as amended. The former Article does not require a ratifying Member to lay down provisions relating to the repatriation of a seaman when he is in serious default of his employment obligations. Let us take the example of a seaman who injures himself deliberately (and this is certified by a doctor on board ship) in order to be repatriated when the ship is in a port where it is impossible for the master to make up for the resulting deficiency in the manning scale and the voyage is delayed thereby. Presumably, this will constitute a serious default. Assuming that this case does not give a right to repatriation under Art. 2 (1) (c),⁵⁷ this seaman may not be able to claim repatriation under clause (g) because the latter presupposes that the agreement has terminated because of the injury incurred which may not always be the case under national law. It would have been better if the Convention had clearly decided the question whether a seaman is entitled

⁵⁴The Shipowner members and certain Governments were against the inclusion of this provision in Art. 4, Report V, 1987, pp. 17-18.

⁵⁵As the wording of this paragraph makes clear, the shipowner is liable to pay the repatriation costs in any case at a first stage. The serious default of a seaman will be determined by the national courts and not by the master. Art. 4 (3) is more specific and satisfactory for the seaman in this respect than Art. 4 of Convention No. 23.

⁵⁶Compare the similar amendment moved by the Dutch Government delegate in the Repatriation Committee, 74 R.P., p. 15/6.

⁵⁷See *supra* note 48. This interpretation may be given by governments which wish to ratify the Convention and where a right to repatriation by law is dependent upon the seaman not intentionally causing his injury or illness, such as is provided in the laws of Canada and France, PTMC, Report V, 1986, pp. 12-13.

to repatriation at his own cost in certain cases of serious misconduct irrespective of whether the agreement has terminated or not.

c) Art. 4 (4) (c) provides that repatriation costs shall include "pay and allowances from the moment he or she leaves the ship until he or she reaches the repatriation destination, if provided for by national laws or regulations or collective agreements". This clause refers to the payment of wages or salaries during the repatriation.⁵⁸ The addition of the phrase "if provided for by ... agreements" is not without significance.⁵⁹ First, it takes account of current national practice, as shown in Appendix 3 which analyses state practice with regard to repatriation. Secondly, it facilitates the ratification of the Convention; at the Conference the point eluded many Government delegates that if the shipowner does not pay then the State of registry is responsible for the payment of the costs of repatriation according to Art. 5 of the Convention, and that wages are included in these costs.⁶⁰ On the other hand, it is hoped that this provision will encourage seamen to exercise pressure when negotiating collective agreements in order to secure the payment of wages during repatriation travel.

5) Ultimate responsibility for the expenses of repatriation

Art. 5 of the Convention deals with the question of who is responsible for defraying the expenses of the repatriation of the seaman, if the shipowner, who is primarily responsible for these costs, is unable to meet them. According to this Article, the ultimate responsibility for the cost of repatriation lies with the Government (the competent authorities) of the country in which the ship is registered; only if they are unable to meet the expenses, can the country from which the seaman is repatriated and the country of the nationality of the seaman be held secondarily responsible, if they so

⁵⁸The word "pay" should not create confusion; it was included in an amendment moved by the Seafarer members and replaced the word "salaries". Moreover, an amendment by the U.K. Government, supported by Canada, which would have substituted the words "allowances to cover incidental expenses", was withdrawn, Report V, 1987, p. 19, 74 R.P., p. 15/7.

⁵⁹Many reasons may be offered for this amendment: a) in 1926 the question of the inclusion of wages was first considered but it has always been rejected since it was thought by some delegates that the question of wages fell outside the scope of the Convention and should be dealt with in an instrument concerning wages; b) no instrument dealing with wages has ever come into force. If a provision relating to wages were included in a Convention concerning repatriation, the chances of ratification would be substantially reduced; c) 22 out of 45 countries do not provide for the payment of wages during the repatriation travel, among them, Liberia, Greece, the U.K., Norway, France, Canada, Colombia. These countries thus would be unable to ratify the Convention unless they changed their laws. It should be noted that all but two (Norway and Canada) of the above countries have ratified Convention No. 23; d) the payment of wages may depend on whether the agreement has terminated and on the cause of the termination of the agreement. It cannot be argued that in the case of desertion the seaman will have to bear the expenses of his repatriation (he will probably be in serious default of his employment obligations) but he will be paid wages, since the agreement has terminated and wages are no longer due; e) Art. 8 provided that if the seaman is not paid the wages due, he shall not be deemed to have been duly repatriated. The reference to wages was deleted at the Preparatory Conference. As a result, the seaman if he is not paid the wages due, is not entitled to damages on the basis of a claim that he has not been duly repatriated. There are, however, two arguments in favour of the inclusion of wages in the Convention: a) Art. 5, para. 2 of Convention No. 23, provides that when a seaman is repatriated as member of a crew, he will be entitled to remuneration for work done during the voyage. This indicates that the question of wages was not exactly outside the scope of the Convention, and b) the ILO instruments concerning wages do not deal with the question of wages during repatriation travel.

⁶⁰Report V, 1987, p. 20. It might be argued that even so a ratifying Member would not be called to pay excessive amounts, since transportation by air would involve the payment of one day's wages. Nevertheless, these amounts can be considerable if: a) a great number of seamen seek to be repatriated, b) normal transportation is not by air for seafarers employed on ships trading within specific limits, c) flights from a specific country to a specific destination are infrequent, d) travel agents are idle and e) in the case of Art. 2 (1) (c) of the Convention, if a long period of time lapses from the time an ill or injured seaman has been landed up to the time he is found medically fit to travel.

wish. No obligation is imposed on the latter two countries. Compared to Convention No. 23, which does not decide the question of who is financially responsible for the repatriation, Art. 5 of Convention No. 166 represents considerable progress in protecting the interests of the seaman.

6) Miscellaneous

a) Art. 8 provides that a seafarer must be deemed to have been duly repatriated when he is landed at a destination prescribed pursuant to Art. 3. The first Office draft provided, in addition, that a seaman shall be deemed to have been duly repatriated, if he has been paid the balance of his wages and allowances, sums due in respect of accrued annual leave and any other entitlements due to him from the shipowner. This phrase was deleted at the Preparatory Conference.⁶¹ Consequently, it is unclear what is the actual effect of the inclusion of a reference to wages in Art. 4 para. 4 (c). It seems that under the Convention the shipowner (and ultimately the flag State) is under an obligation to pay wages to the seaman during the repatriation travel but if the seaman is not paid the wages due, he cannot claim that he has not been repatriated in accordance with the provisions of the Convention. He will, however, be entitled to the wages due, which he can recover according to the normal procedures laid down under his national law.

b) Art. 10 provides that a ratifying Member "shall facilitate the repatriation of seafarers serving on ships which call at its ports or pass through its territorial or internal waters ...". This Article was the result of a proposal by Cyprus aimed at securing that disputes between the shipowner and the port State or between the flag State and the port State would not interfere with the repatriation of the seafarers.⁶² Nonetheless, the wording of this Article is not satisfactory in that it may cause difficulties in drawing a distinction between the duty "to facilitate" and the duty to "make arrangements" for the repatriation of a seafarer under Art. 5 when the shipowner fails to meet his obligations. It should be noted that the first obligation is imposed on the port State while the second is imposed on the flag State. A complicated legal situation might arise if the shipowner and the flag State fail to arrange for and meet the repatriation costs under Arts. 4 and 5. The question then arises as to what this "facilitation" consists of (arranging means of transportation, maintenance of the seaman ashore?) and whether the port State would be able to recover the costs incurred in "facilitating" the repatriation of a seaman from the flag State under 5 (a), which does not refer to Art. 10. Again, it is not clear whether this Article implies that immigration and customs laws should not be rigidly applied in repatriation cases. It is submitted that the words "shall facilitate" should be construed as "shall not interfere with" or "shall not impede" and that this interpretation accords with the intention of the Conference in including Art. 10 in the Convention.

E) The main points of Convention No. 166

⁶¹By 8415 votes to 8160 with 4080 abstentions, Report V, 1987, p. 22.

⁶²74 R.P. , p. 15/9.

1) The Convention applies to seagoing ships ordinarily engaged in "commercial maritime navigation" but "commercial maritime navigation" remains undefined. It is up to the competent authority of the flag State to decide what is the meaning of this phrase; it thus has considerable freedom in this respect.

2) The decision concerning whether the Convention will apply to the fishing industry lies with the competent authority of the country in which the ship is registered (Art. 1 (2)).

3) Art. 2 (1) of the Convention enumerates the cases in which a seaman is entitled to repatriation and does not recognise unequivocally a general right to repatriation. It seems that clause (c) gives, in most cases, the right to a seaman to be repatriated in case of illness or injury, even if the this illness or injury was due to the seaman's fault or was sustained while the seaman was not in service; finally, clause (g) entitles a seaman a right to repatriation, if his employment has terminated for any reason (for example, desertion).

4) Art. 3 provides the seaman with a qualified right to choose the repatriation destination.

5) As a general principle, it is provided that the shipowner is responsible for the cost of repatriation, unless the seaman is in serious default of his employment obligations.

6) The shipowner is under an obligation to pay the seaman wages during repatriation travel only if national laws or collective agreements so provide. However, if the seaman is not paid the wages due, he must be deemed to have been duly repatriated under the Convention.

7) The ultimate responsibility for the cost of repatriation lies with the Government in which the ship is registered.

8) Time spent in repatriation travel is not deducted from annual paid leave.

4.2.3. Conclusions

Convention No. 166 is certainly a more progressive instrument than Convention No. 23. In particular, questions such as the the repatriation rights of foreign seafarers on board national ships, the destination port and the repatriation expenses are decided by the former Convention in a definite and unequivocal manner. Moreover, other arrangements, such as the prohibition of deduction of time spent awaiting repatriation and repatriation travel time from paid leave, the facilitation of repatriation by port States and the possession of passports or identity documents by the seafarer during repatriation constitute progressive provisions in favour of the seaman.⁶³ On the other hand, the nature of the right to repatriation, the exact determination of the cases where a seaman is entitled to repatriation and the right of choice of port accorded to the seafarer are not dealt with unequivocally therein, as explained above. However, the Convention is not a perfect solution to all the problems. Thus, in addi-

⁶³However, it would be difficult for some countries, such as Great Britain, to accept Art. 7 of the Convention relating to accrued paid leave, since it is contrary to current national law and practice; Report V, 1987, p. 22.

tion to the suggestions made earlier (under 4.2.2. D), certain conclusions regarding possible improvements that could be made in the existing text and speculations concerning the future of the Convention are set out below:

(i) Scope of the Convention

The Convention applies to all seafarers employed on board a ship to which the Convention applies. This means that the Convention applies to any seafarer who is employed on board a vessel registered in the territory of a ratifying country whether or not he is a foreigner. This is in conformity with Art. 5 of the Convention according to which the ultimate financial responsibility for repatriation lies with the flag State.

It is suggested that, taking into account current state practice, an advanced instrument on repatriation should provide that the following persons are entitled to repatriation under laws and regulations of the flag State: a) nationals serving in national ships, b) foreigners serving in national ships (as a first stage, if they are engaged in a national port; at a later stage, irrespective of the port of engagement, which is what Convention No. 166 does at the cost of compromising the ratification of the Convention by certain countries), c) national seafarers serving under a foreign flag provided they were engaged in a national port or under national articles of agreement.⁶⁴

If Convention No. 166 encounters any ratification problems, an alternative suggestion may be made: The two parties to the contract (shipowner and foreign seaman) would be free to make the necessary arrangements before the conclusion of the contract. A provision to this effect would have the following form: "In the absence of any clause to the contrary inserted in the articles of agreement in accordance with national laws and national regulations, a foreign seaman engaged during the voyage will have the same right to repatriation as the other members of the crew." This provision is flexible enough to accommodate the national laws of all countries while at the same time it does not lose sight of the principle that, if there is not anything to the contrary legally inserted in the articles of agreement, no distinction of nationality should be accepted on board ship.⁶⁵

As regards the repatriation of young seafarers, the Proposed Conclusions by the Office contained a provision concerning this issue. According to para. 5 (f), if a young seaman was found unsuitable for a carrier at sea, he was entitled to repatriation after a minimum employment of four months. This subparagraph was deleted at the Preparatory Conference.⁶⁶ The question of repatriation of young seafarers (under 18 years of age) is dealt with in Section V (para. 6) of Recommendation No. 153 (1976) concerning the Protection of Young Seafarers. Para. 6 (1) is a more elaborate version of para. 5 (f) of the Proposed Conclusions of the Office. Para. 6 (2) enables the young sea-

⁶⁴See *PTMC*, 1986, Report V, pp. 10-11. However, in the third case the ultimate responsibility of the State of the nationality of the seaman for repatriation would clash with that of the State of the "foreign flag". Accordingly, assuming that both countries ratify the Convention, an order of priority should be established in Art. 5 thereof.

⁶⁵However, such provision presupposes that foreign seamen have bargaining power to impose certain obligations on shipowners at the time of the engagement, which may not always be the case.

⁶⁶Report V, 1987, p.14.

farer to be repatriated after six months' service without leave in certain circumstances. The following points arise: a) A rare opportunity has been missed for para. 6 (1) of Recommendation No. 153 to be embodied in the text of Convention No. 166 and, thus for it to acquire a compulsory status; the relevant article of the Office draft should not have been deleted; b) Para. 6 (2) of the Recommendation requires a minimum employment of 6 months and, therefore, is more progressive than paras. 1 (b) and 2 of Art. 2 of Convention No. 166; c) Nowhere in Art. 1 of Convention No. 166, which defines the scope thereof, is there a hint that young seafarers are excluded from the scope of the Convention. According to Art. 1 (4) this Convention applies to *any* person employed on board a ship to which the Convention applies, and the deletion of an article relating to a special aspect of the repatriation of young seafarers at the Preparatory Conference is not a sufficient argument to establish that the contrary is the case. There are two main differences between Convention No. 166 and Recommendation No. 153 in this connection: i) The latter does not lay down who is to bear the expenses of repatriation in the cases described in para. 6 (however, these will not be a charge on the seaman) while the former contains specific provisions on this question and ii) the port of repatriation is either undefined in the latter (para. 6 (1)) or offers no option (it is set as the place of original engagement in his country of residence) while the former provides the seaman with many possibilities (Art. 3).

Para. 6 (1) of Recommendation No. 153 refers to a special situation 9 (unsuitability for a carrier at sea). However, it is submitted that para. 6 (2) is superseded by Convention No. 166 in as much as at Art. 2 (2) of the latter provides for minimum employment periods which must be less than 12 months. It remains to be seen how Governments will react to the obligation to meet the repatriation costs under Art. 5 of the Convention since in 1976 they pointed out that in several countries the expenses of repatriation of young seafarers are not met by the government.⁶⁷

(ii) Nature of the right to repatriation, repatriation entitlements and destination port

Convention No. 166 avoids the question of the juridical nature of the right to repatriation viz whether it is a private or a public right. The answer to this question entails important consequences: a) if the right of repatriation is of public nature, it cannot be disclaimed in the articles of agreement; b) in this case it can be said that the state is a party to the agreement (because of the nature of a "public right" a private person would have rights and obligations against the State itself apart from any other legal means of redress). It is true that Art. 5 of the Convention places on the flag State a secondary obligation to arrange for and meet the costs of repatriation. However, it is not clear from the Convention whether, for example, a French seaman engaged on board a Greek ship can claim damages against the Greek Government, if the latter fails to meet its obligations. An affirmative answer to this question should enhance the effectiveness of Art. 5.

With regard to the circumstances which give rise to a claim to repatriation, apart from the observations made above as regards certain clauses of Art. 2 of the Convention, it should be noted that a

⁶⁷62 R.P., p. 125.

number of countries do not provide for repatriation in the case of illness or injury sustained by the seaman outside his service or due to his own (wilful) fault or, in any case, on termination of the agreement caused by his (wilful) fault.⁶⁸ Ratification by these countries is unlikely in the near future but the Convention proceeds in the right direction: It initiates the assimilation of national laws in one important respect, namely that the right to repatriation should be afforded to the seaman in any case. Accordingly, only the question concerning who is to bear the expenses thereof is left to be contested in national courts. This solution presents less complex problems for the formulation of national policies and serves the interests of the seafarers, too. The next step in the same direction would be the inclusion of a right to repatriation on compassionate grounds. This is supported by at least as many countries as the right to repatriation in cases of sale or chartering of the ship, which has been included in the Convention.

As far as the port to which the seaman is repatriated is concerned, Art. 3 of the Convention conforms partly to existing State practice: Only ten countries out of 29, which provide for the port of engagement as the normal repatriation port, also make provision for the country of residence and this, in the majority of the cases, relates only to foreign seamen engaged on board national ships. On the other hand, the 13 countries which consider the country of residence as the normal repatriation port, do not provide for any other options, such as the port of engagement. It remains to be seen how this Article will work in the future.

(iii) Repatriation expenses

Unlike Art. 4 of Convention No. 23, Art. 4, para. 3 of Convention No. 166 seems to imply that the onus of proof that a seaman was in serious default of his employment obligation lies with the shipowner and this is a welcome progress in favour of the seaman. However, an addition to the effect that this default should be certified by the competent authority, which has to record the discharge, would facilitate the implementation of this Article and of Article 5 of the Convention.⁶⁹

The major drawback of Convention No. 166 is Art. 5, which places the ultimate responsibility for the cost of repatriation on the flag State. The overwhelming majority of the governments imposes this obligation on the shipowner but in a few countries the government or public authorities participate in the defrayment of the expenses, though only in certain cases. Moreover, when the seaman is at fault, governments do not seem to undertake responsibility; the seaman then has to pay the repatriation costs himself.⁷⁰ Accordingly, this Article coupled with the wide range of cases giving rise to repatriation, analysed earlier, is clearly contrary to existing State practice and, though favourable to the seaman, it would represent a major success in new international law-making if it is finally widely implemented at the national level.

(iv) Miscellaneous

⁶⁸See *PTMC*, 1986, Report V, pp. 12-14.

⁶⁹So Greece, Supplementary Report I, 1926, p. 49.

⁷⁰*PTMC*, 1986, Report V, pp. 23-24.

Despite the detailed provisions of Convention No. 166, the following questions relating to repatriation still remain to be decided in an international instrument:

a) If the expenses incurred in repatriation are to be borne by the shipowner, should the seaman have a lien or bond against the ship to recover these expenses? ⁷¹

b) The costs of repatriation should be borne by the seaman when he breaks the agreement; the situation is less clear when repatriation is necessitated by the order of the consular or naval authority (for example, the right of the State to requisition). Should it be provided that the expenses are met by the State when the agreement is terminated by order of the consular or naval authorities?

c) If a seaman receives social security benefits in the case of illness or injury, should they be deducted from wages due during repatriation travel? Norway, whose national insurance scheme applies to a seaman repatriated in the case of occupational injury and covers the repatriation expenses necessitated by such injury, does not, generally, provide a seaman with a right to wages during repatriation travel. ⁷²

d) Should full particulars regarding repatriation of seamen be given in the articles of agreement? This would facilitate supervision under Art. 11 of the Convention. ⁷³

⁷¹This was suggested by Australia as early as 1926, Supplementary Report I, 1926, p. 66.

⁷²*PTMC*, 1986, Report V, pp. 20, 24.

⁷³Cuba, Report I, 1926, p. 128.

4.3. Leave

The ILO has adopted four instruments concerning paid vacations for seafarers: a) Holidays with Pay (Sea) Convention, 1936 (No. 54),⁷⁴ b) Paid Vacations (Seafarers) Convention, 1946 (No. 72),⁷⁵ c) Paid Vacations (Seafarers) (Revised) Convention, 1949 (No. 91) and d) Seafarers' Annual Leave with Pay Convention, 1976 (No. 146). An analysis of these instruments is given below and certain remedies for deficiencies therein are proposed.

4.3.1. Seafarers' Leave in the ILO before the 2nd World War

The question of annual leave refers to the number of paid days or weeks to which a seaman is entitled after a specified period of service. This should be distinguished from the question of time off in port as a compensation for hours worked on Sundays and public holidays.⁷⁶

The 7th, 8th and 9th sessions of the JMC

The JMC began to express interest in the question of annual holidays as early as 1927.⁷⁷ In this connection, it considered proposals from professional organisations, such as the International Mercantile Marine Officers' Association who regarded the international regulation of this matter as one of great concern.⁷⁸ In the JMC the shipowners' group was against the placing of the question of annual holidays on the Agenda of a near Conference since the categories of workers on board ship were numerous and the subjection of them to a uniform international regulation would be impossible and impractical.⁷⁹ The Governing Body finally decided that the question of annual holidays should be placed on the Agenda of the 21st session of the Conference in 1936.⁸⁰

The 1936 Preparatory Conference

By 1935 existing laws, regulations, arbitration awards and collective agreements showed that there was a general tendency to provide for annual leave for all members of the crew. The extension of annual leave to higher ratings employed in the catering department and, especially, to lower ratings in all departments was less widespread. The majority of the countries made no distinctions with re-

⁷⁴This Convention has not come into force. It was revised in 1946 and 1949 by Conventions Nos. 72 and 91 respectively. Following the coming into force of Convention No. 91, Convention No. 54 is no longer open to ratification.

⁷⁵This Convention has not come into force. It was revised in 1949 by Convention No. 91. Following the coming into force of this Convention, Convention No. 72 is no longer open to ratification.

⁷⁶Time off in port is considered together with hours of work in Chapter 4.

⁷⁷For the history of the question of annual holidays with pay from the 1920s until the 62nd session of the ILO Conference in 1976, see International Labour Organisation, Joint Maritime Commission, 21st session, Geneva, Nov-Dec 1972, *Holidays with Pay for Seafarers*, JMC/21/2, pp. 3-17.

⁷⁸*J.M.C.*, pp. 15, 52, 100-102.

⁷⁹*J.M.C.*, p. 17. Competition was put forward by shipowners as a reason why the consideration of the question was premature, *9 J.M.C.*, p. 25. The JMC at its 9th session in 1929 rejected, by 10 votes to 8, a resolution drawing attention to the urgency of these questions; however, it recommended that the Office might continue to study them, *9 J.M.C.*, pp. 11, 49. For a summary of the state practice before 1935, see *ibid.*, pp. 97-99.

⁸⁰Preparatory Maritime Conference, Geneva, Nov. 1935, *Holidays with Pay for Seamen*, Report II, p. 5; the position of fishermen was not considered by the Office, *ibid.*, p. 7.

gard to tonnage and trade. In most cases the qualifying service for annual leave was one year; however, in certain companies seamen were entitled to leave after a service of 2-5 years. Differences existed as regards the criteria for fixing the rate of leave per year; different rates were fixed for various types of trade and rankings. Rates of leave per annum expressed in days ranged from 4 to 30 days for masters (14 to 30 being most common), 4 to 30 for officers (around 14 being most common) and 4 to 20 for lower ratings (around 7 to 8 being most common). Generally, the choice of the time for the granting of the leave lay with the shipowner but national schemes placed limitations on this right; some countries allowed for accumulation of leave. The pay during leave was in most cases equal to the ordinary pay for the rank concerned but excluding a food allowance in the majority of the cases. Many schemes provided for payment in lieu of leave. Pro rata leave or pay was not widespread. Finally, in the majority of the cases workers on board auxiliary or harbour vessels were entitled to annual leave.⁸¹

The Office thought that the international regulation of annual leave was desirable for the following reasons: a) annual leave would act as a compensation for the failure to grant weekly rest in certain countries, b) assimilation of the seamen's status to that of workers ashore and c) the unification of the rules and measures concerning annual leave at the international level. It drew up a number of suggestions to be considered by the Preparatory Conference.⁸²

At the Preparatory Conference the shipowners for no plausible reason were against the international regulation of the question while seamen and most governments held the opposite view. The seamen proposed very advanced provisions for annual leave (for example, one day for every month's service).⁸³ However, problems arose concerning the annual leave for lower ratings, wireless operators and the length of qualifying service.⁸⁴

The examination of laws, collective agreements and practice existing in 1936 reveals that, owing partly to administrative difficulties in the calculation of holidays with pay for seamen employed on board ships which only rarely touched national ports, and partly to different administrative practices, considerable divergencies existed in various countries as regards most issues connected with annual leave for seamen.⁸⁵

The Committee on holidays with pay for seamen and the 1936 Conference

⁸¹Ibid., pp. 64-83.

⁸²Ibid., pp. 84-85, 96-100.

⁸³Preparatory Maritime Meeting, Geneva, Nov - Dec 1935, Report and Record of the Meeting, pp. 38-41. For the Seamen's draft, see *ibid.*, pp. 69-70. The shipowners thought that the question of annual holidays could not be considered independently from wages (reiteration of the argument put forward in the case of hours of work); certain governments thought that the relationship between annual leave and compensatory time off allowed for the weekly rest should be examined, *ibid.* pp. 38, 42, 43, 70-71; for the full arguments of the shipowners', seafarers' and governments' delegates, see Preparatory Maritime Meeting, Geneva, Nov - Dec 1935, Report and Record of the Meeting, Part II, Record of the Proceedings of the Meeting, pp. 242-257 (especially pp. 255-256 for the connection between holidays with pay and wages). It should be noted that a number of Governments (Canada, Estonia, Netherlands, Norway) also held the view that holidays with pay was a question tied up with wages and hours of work, International Labour Conference, 21st (maritime) session, Geneva, Oct 1936, *Holidays with Pay for Seamen*, Report V, pp. 13, 15-16, 17, 22, 23.

⁸⁴PTMC, 1935, Report and Record of the Meeting, Part II, Record of the Proceedings of the Meeting, pp. 259-60.

⁸⁵Report V, 1936, pp. 11-52.

The 1936 Office draft was an advanced and very comprehensive instrument. It aimed at regulating most aspects of annual leave for seamen and left very few matters to national law (only pro rata and accumulative leave, calculation of pay during leave, cash payment in lieu of annual leave). The supplementary Recommendation elaborated on certain of the provisions of the draft Conventions including, the right to leave be not affected by changes in management or ownership; the principle of unbroken leave; cash payment be allowed only in exceptional circumstances; length of leave to increase with length of service; the place of leave; pro rata leave in cases where a continuous service of more than six months but less than one year has been completed.⁸⁶

As a result of an amendment adopted by the Committee, the draft was made to apply both to mechanically propelled and to sailing vessels.⁸⁷ After lengthy discussions, Art. 2 of the draft was adopted in an amended form. Two points are worth of mentioning: a) According to 2 (2) (c), the continuity of service was not to be affected by change in the management or ownership of the ship and b) under a new Art. 3 the place of leave was specified in the Convention (as the port of sailing or port of engagement or port of final destination); it could be given at any other port only by mutual consent.⁸⁸

At the Plenary Sitting of the Conference in 1936, as a result of an amendment, travelling dockers were excluded from the Convention.⁸⁹ After most of the amendments moved had been rejected, the Convention was adopted by 60 votes to 15.⁹⁰

Analysis of the provisions of Holidays with Pay (Sea) Convention, 1936 (No. 54)⁹¹

There were some gaps in the above provisions. Under Art. 2 (1) seamen were entitled to a specified period of leave (not less than 12 days for masters and officers, not less than 9 days for the rest of the crew) after one year of service "*with the same undertaking*".⁹² It appears that under this provision a seaman who had not completed 12 months of service with the same employer (whatever his legal personality) was not entitled to full annual leave with pay; and unless, national laws or collective agreements provided for a pro rata leave, the seaman concerned would not be entitled to leave at all.⁹³ Moreover, the question of whether cadets and apprentices on board ships or training ships were entitled to leave was not considered at the 1936 Conference.

⁸⁶For the 1936 Office draft Convention and the supplementary Recommendation, see 21 *R.P.*, pp. 295-297.

⁸⁷*Ibid.*, p. 298; an amendment moved at the Plenary Conference to the effect that sailing vessels be excluded was rejected by 30 votes to 28, *ibid.* pp. 102-103.

⁸⁸*Ibid.*, p. 300. The Committee decided not to take up the draft Recommendation in view of the fact that two of its provisions (Art. 2 (2) (c) and Art. 3) were included in the Convention, *ibid.*, p. 301. For the detailed proceedings of the Committee on Holidays with Pay, see International Labour Conference, 21st session, 1936, Committee on Holidays with Pay for Seamen, (C.C.P.M./P.V.), ten sittings.

⁸⁹21 *R.P.*, p. 101

⁹⁰*Ibid.* p. 170. All delegates voted for the Convention except the Shipowners' group and the Government delegate of Japan (Japan had not instituted a system of annual leave for lower ratings, Report V, 1936, p. 19, C.C.P.M/P.V. 3, III/4-5).

⁹¹For the text of Convention No. 54, see 21 *R.P.*, pp. 322-327.

⁹²*Ibid.*, p. 299. The phrase "the same undertaking" in Art. 2 (1) means "the same employer".

⁹³According to this provision a seaman employed on ships owned by the same person (physical or legal) was entitled to annual leave after one year of service, even if these ships were managed by different administrations. The opposite is not true: It seems that seamen employed on board ships managed by the same administration but technically owned by different owners were not entitled to annual leave under Art. 2 (1); for discussion see 21 *R.P.*, pp. 104-108. However, the question of charterers and joint owners was not examined. Here, it should be noted that this provision was not in-

On the other hand, Convention No. 54 constituted a serious attempt to regulate annual leave at the international level: all personnel on board ship was covered thereby (masters, officers, ratings in the deck, staff and catering departments, and wireless operators); ⁹⁴ service off articles (period of employment during which the seaman is not under articles of agreement) was included in the reckoning of continuous service and short interruptions of service of less than 6 weeks did not affect the continuity of service; ⁹⁵ also compensatory time off for work done at sea during weekly rest days and public holidays were not included in the annual holiday; ⁹⁶ and the usual remuneration to be paid during leave included subsistence allowance. ⁹⁷

Conclusions

The main disadvantage of Convention No. 54 was that the seaman expressly was entitled to leave after one year of continuous service with the same undertaking. The seaman thus was not adequately safeguarded against the possibility of being employed by different companies. Moreover, the definition of the word "undertaking" was not clarified at the 1936 Conference. Accordingly, the interpretation was left to national courts which might apply various interpretations in cases where the shipping company concerned is owned or managed, or both by more than one persons. In most other respects, the Convention was a progressive instrument. Unfortunately, it was ratified only by 6 countries and never came into force. ⁹⁸ The reasons for this are various:

a) The stringent ratification requirements: ratification by five countries each of which possesses at least 1 million tons (Art. 13 (2)), ⁹⁹ was required.

b) Wide divergencies existed in national laws as regards holidays with pay for seamen. The actual figures for the length of leave had not been unanimously adopted, ¹⁰⁰

c) As pointed out earlier, some countries, such as Japan, had not instituted annual holidays with pay for certain categories of seafaring personnel and,

d) The delays caused by the Second World War and the absence of a provision which would enable countries to ratify the Convention by means of collective agreements. ¹⁰¹

compatible with 2 (2) (c): The latter simply afforded protection to the seaman in the case of changes in the management or ownership of the ship. Moreover, Art. 7 which provided for cash payment in lieu of leave was limited to the special circumstances mentioned therein, namely that a seaman had left the company or had been discharged from the service of his employers before he had taken the leave due to him (the seaman would have to have earned entitlement to leave before this Article could come into operation).

⁹⁴Art. 1 (1).

⁹⁵Art. 2 (2) (a) and (b).

⁹⁶Art. 2 (3) (c).

⁹⁷Art. 4.

⁹⁸Belgium (denounced as a result of the ratification of Convention No. 91), Bulgaria, France (denounced for the same reason), Mexico, the United States and Uruguay. Bulgaria and Uruguay ratified the Convention in Dec. 1949 and 1954 respectively, notably after the adoption of Conventions Nos. 72 and 91.

⁹⁹See 21 *R.P.*, p. 301. This provision was included to align the ratification conditions of the Convention with those of the 1936 Hours of Work and Manning Convention.

¹⁰⁰The nine days' annual holiday for lower ratings had been adopted by 42 votes to 33, *ibid.*, p. 299; this was more than the amount of leave granted to such ratings in some countries; see for discussion of and the vote on this point, *ibid.*, pp. 108-111.

¹⁰¹The first reason was invoked by France, the second by the U.K., 28 *R.P.*, pp. 287, 85.

4.3.2. 1946 - 1949: Conventions Nos. 72 and 91 on Paid Vacations for Seafarers

By the end of World War II practices had changed in many states.

A) Paid Vacations (Seafarers) Convention, 1946 (No. 72)

By 1946 it was reported that national standards concerning annual leave were in a number of countries more favourable in certain respects than those of Convention No. 54.¹⁰² However, closer examination of state practice shows that the permitted interruptions which, under national laws and collective agreements, did not break the continuity of service were less than the 6 week-period laid down in Art. 2 (2) (b) of Convention No. 54.¹⁰³ In other areas, such as the duration of leave and cash payment in lieu of leave, progress had been made.¹⁰⁴ Finally, as regards other aspects of annual leave, such as the place and time of leave, subsistence allowances, agreement to forgo a right to leave, employment during holidays, enforcement, either information was scarce or national provisions differed in certain respects from the provisions of Convention No. 54.¹⁰⁵ An interesting progressive development also had taken place: the legislation and collective agreements of some countries provided for leave to be taken in the home or in another port between voyages, though different arrangements were in effect in various countries. This practice gave rise to the question whether this kind of inter-voyage leave could be included in a revised form of Convention No. 54 and whether it could be regulated independently from the provisions concerning annual leave and hours of work.¹⁰⁶

The International Seafarers' Charter and the 1945 Office draft

As with other aspects of maritime employment, the Charter provided for advanced provisions concerning annual leave: Para. 71 laid down that seamen were entitled to three days off in port for every month of service in addition to their annual holidays. This was a consequence of the seven-day week on board ship.¹⁰⁷ Para. 93 provided for a minimum annual leave of 12 days (or when appropriate one day per month's service) and for the accumulation of leave entitlements under different shipowners.

The 1945 Office draft, taking into account developments in state practice, brought about certain changes compared to the 1936 Convention: a) it provided ratifying Members with the option of exempting masters and chief officers from the scope of the Convention provided they were covered by national provisions not less favourable than those of the Convention, b) it increased annual leave to 18 working days for masters and officers and 12 for other ratings, c) it left to be determined by national law the port where leave was to be granted provided that the seaman would be able to enjoy his

¹⁰² Australia, Belgium, France, Great Britain, Netherlands, New Zealand, Norway, Panama, Poland, Sweden, the U.S.A. and Yugoslavia, see International Labour Organisation, Maritime Preparatory Technical Conference, Copenhagen, Nov 1945, *Leave*, Report II, p. 3.

¹⁰³ *Ibid.*, pp. 5-6.

¹⁰⁴ *Ibid.*, pp. 6-7, 9.

¹⁰⁵ *Ibid.*, pp. 10-11.

¹⁰⁶ *Ibid.*, pp. 12-14.

¹⁰⁷ *Ibid.*, p. 16. Thus, the ISC indirectly linked the question of annual leave to compensatory time off in port as a result of work done on Sundays and public holidays at sea.

annual leave without any inconvenience, d) it made possible ratification of the Convention by means of collective agreements, and e) it urged, in a supplementary instrument, the establishment of national systems whereby seamen employed by different undertakings for a period of less than a year were entitled to leave in respect of the aggregate period worked.¹⁰⁸

The 1946 Preparatory Maritime Conference (Copenhagen) and the 1946 Office draft

At the Copenhagen Conference it was decided that Art. 1 (3) (b) of the 1936 Convention, excluding from its scope members of the owner's family, should be deleted owing to the difficulties of interpretation of the word "family" in various countries.¹⁰⁹ Among opposing amendments, the one submitted by the Seafarers' group was adopted to the effect that a minimum period of leave per month of service be substituted for the reference to "annual leave".¹¹⁰ Finally, Art. 9 of Convention No. 54, requiring ratifying countries to provide for penalties in cases of contravention, was replaced by a provision aimed at ensuring the observance of annual leave provisions by the employers.

In short, the 1946 Office draft contained progressive provisions concerning the length of leave and its calculation, and the ratification of the Convention by means of collective agreements but its provisions relating to the port of leave should be regarded as a backward step.¹¹¹

The Committee on Holidays with Pay for Seafarers and the 1946 Conference

Amendments to impose a tonnage limit (200 or 500 GRT) below which ships were to be excluded from the scope of the Convention were defeated in the Committee. With some modifications, certain categories of vessels and persons were excluded from the Convention to align it with the respective provisions of the Wages, Hours of Work and Manning Convention.¹¹² The effect of the most important amendment was that the right of the seaman to leave again was made dependent on the completion of one year of continuous service as in the 1936 Convention. However, this time the seaman was protected if he had completed continuous service of not less than six months or had been discharged before service of six months was completed: He would be entitled to one and a half day of leave for one month's service.¹¹³

At the 1946 Conference the question whether a minimum tonnage limit should be inserted in the Convention was again discussed and it was decided that ratifying countries would be free to exclude vessels of less than 200 GRT from the provisions of the Convention; whaling vessels and

¹⁰⁸Ibid., pp. 26-28.

¹⁰⁹International Labour Conference, 28th session, 1946, *Holidays with Pay for Seafarers*, Report VI, p. 13. It is worth mentioning that it was the first time in the ILO's history that this exception was challenged. This has not been done in relation to other ILO instruments with the result that there is a lack of uniformity in ILO maritime instruments in this connection.

¹¹⁰Ibid. This important amendment had the effect of changing the basis on which seafarers' leave should be calculated. It was more favourable for the seaman, since a year of continuous service was no longer required. It also resulted in a minimum leave of 18 days for masters and officers and 12 days for other ratings per year.

¹¹¹For the text of the 1946 Office draft, see Report VI, 1946, pp. 20-30 (English text).

¹¹²28 R.P., p. 284.

¹¹³Art. 3 (1) of the Committee draft; for the Committee draft, see 28 R.P., pp. 287-288.

doctors who are members of the crew on board any vessel were included in the scope of the Convention.¹¹⁴ Convention No. 72 was adopted by 78 votes to 16 with 4 abstentions.¹¹⁵

Analysis of the provisions of Convention No. 72 and Conclusions

The following analysis is limited to certain points of the text which justify special mention:

1) It seems from Art. 2 (1) of the Convention that it applied only to members of the crew: if a person was not a) a member of the crew *and* b) employed by the shipowner, the Convention did not apply to him.¹¹⁶

2) Art. 3, para. 5 of the Convention, *inter alia*, laid down that interruptions due to sickness or injury must not be included in the annual holiday with pay. It seems that this provision refers to sickness or injury occurring during the holiday.¹¹⁷

3) Art. 4 (2) of the Convention was not as protective as the text of the 1945 Office draft. It left the question of the determination of the port of leave to national law provided this port could not be outside the country of engagement or the home country of the seaman.¹¹⁸ Consequently, if the port of leave was within the limits prescribed above, the seaman could not refuse the leave granted, although it was impractical for him to take the leave in the prescribed port.

4) The Convention did no more lay down that the seaman should have a minimum period of continuous service with the same undertaking. Therefore, the question arises whether under Convention No. 72 a seaman is entitled to leave after a period of continuous service (according to Art. 3 (1)) with different employers. It is undeniable that the seaman concerned was so entitled.¹¹⁹ At the same time there were no provisions in the Convention concerning the basis of calculation and award of leave entitlements in respect of an aggregated period of employment under different employers. These provisions could be related to a system of continuous employment or to the issue of a card to the seaman showing the periods in respect of which he was entitled to leave.¹²⁰

5) Art. 8 of the 1946 Office draft (Art. 8 of the 1936 Convention) which required employers to keep written records of leaves was deleted on the grounds that it would lead to unnecessary administrative complications.¹²¹ It is true that because of this deletion the actual annual leave granted would be difficult to ascertain by inspectors but the usefulness of this provision should not be over-

¹¹⁴Ibid., pp. 87-90.

¹¹⁵Ibid., p. 148. Only the Employers' group voted against the Convention. The Greek Government abstained. For the text of Convention No. 72, see *ibid.*, pp. 353-358.

¹¹⁶Radio officers and operators are covered by the provisions of the Convention, see Art. 2 (1) (f). In the preparatory meetings it was agreed that watchmen and repairers employed during the ship's lay up without a crew signed on are not covered by Art. 1 thereof, Report VI, 1946, p. 14.

¹¹⁷The similar provisions in Conventions Nos. 54 and 91 should be interpreted likewise; see *O.B.*, Vol. XXXIII, 1950, Interpretation of Decisions of the International Labour Conference: Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91), pp. 307-309.

¹¹⁸Compare Art. 3 (1) of the 1945 Office draft.

¹¹⁹The reinsertion of the phrase "with the same undertaking" in Art. 3 (1) was proposed by the shipowners twice in the Committee on Holidays and at the Conference but was defeated by 26 votes to 21 and 47 votes to 35 respectively, 28 *R.P.*, pp. 285 para. 21, 93.

¹²⁰Here, a provision similar to that included in the supplementary 1945 Office draft would be recommended, see *PTMC*, 1945, Report II, p. 28.

¹²¹28 *R.P.*, p. 286.

estimated. According to para. 3 (11) of Art. 6 of Convention No. 22 the articles of agreement must contain a statement as to the annual leave granted, if annual leave is provided by national law.¹²² Accordingly, the inspector, in any event, would have to examine the articles of agreement to see that the requirements of Convention No. 72 were respected and this probably covers the point sufficiently.

Convention No. 72 was ratified by 5 countries only and never came into force.¹²³ The reasons for this are various:

1) It was not ratified by the United States because it had ratified the 1936 Convention and did not intend to undertake further international obligations until other countries ratified the instruments concerned.¹²⁴

2) The six months' minimum period of continuous service was not universally acceptable.¹²⁵

3) Many Governments preferred that a qualifying period *with the same undertaking* be a prerequisite for a right to leave.¹²⁶

B) Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91)

In Nov-Dec 1948 a tripartite Subcommittee of the JMC decided that, in view of the slow progress of ratification of Convention No. 72, it needed to be revised in certain respects; it recommended that Art. 3 (1) and Art. 5 (2) concerning continuous service and subsistence allowances respectively should be revised at the 32nd (general) session of the ILO Conference in 1949.¹²⁷

In the Committee on Revision of Maritime Conventions appointed by the 1949 Conference, after long discussions and three votes, it was agreed that a) Art. 3 (1) of Convention No. 72 should not be changed and b) Art. 5 (2) of the same Convention should be revised to make the inclusion of subsistence allowance in the usual remuneration during paid leave optional.¹²⁸ The Convention, as amended, was adopted by the 1949 Conference.¹²⁹

¹²²Here, it should be noted that this paragraph has become somewhat obsolete in the light of recent developments in the field of paid leave. In fact, it requires that the articles of agreement contain the annual leave with pay granted to the seaman after one year's service with the same company, if such leave is provided by national law. In view of the above analysis, it is suggested that this subparagraph should be amended to the effect that the articles of agreement should contain the paid leave granted to the seafarers according to national laws, regulations or collective agreements.

¹²³Algeria, Bulgaria, Cuba, Finland and France. All countries apart from Bulgaria denounced this Convention as a result of the ratification of Convention No. 91.

¹²⁴Report VI, 1946, p. 18.

¹²⁵See for the votes taken 28 R.P., pp. 285-286.

¹²⁶See recorded vote taken on this question at the 1946 Conference, *ibid.*, p. 93.

¹²⁷Netherlands and Australia had encountered difficulties in ratifying Convention No. 72 because Art. 5 (2) required ratifying Members to include a subsistence allowance in the usual remuneration of the seafarer during paid leave. Similarly, some countries, such as the U.S. and Netherlands, found it difficult to ratify Convention No. 72 because the system of paid leave in use in these countries required a qualifying period with the same undertaking, see International Labour Conference, 32nd session, Geneva, 1949, Partial Revision of Four Conventions adopted by the 28th (Maritime) Session of the Conference, Seattle, 1946, Report XII, pp. 11, 26-27. For the texts of the proposed amendments, see *ibid.*, pp. 36, 38 (English text).

¹²⁸32 R.P., pp. 655-657.

¹²⁹*Ibid.*, pp. 90, 105. Convention No. 91 was adopted by 85 votes to 20 with 31 abstentions. The Employers and the Government delegate of Italy voted against the Convention.

Convention No. 91 has been ratified by 20 countries so far and came into force on 14 Sep. 1967.¹³⁰

4.3.3. The question of Paid Vacations for Seafarers revisited: 1967-1976

The 21st session of the JMC

In 1967 the Seafarers requested that Convention No. 91 should be revised. Following the adoption of a Resolution at the 55th session of the ILO Conference in 1970,¹³¹ they repeated this request in 1972 at the 21st session of the JMC¹³² and said that this revision seemed even more justified in view of the adoption of Convention No. 132 concerning Annual Holidays with Pay (Revised) which applied to all categories of employees except seafarers.¹³³ The Seafarers' Members reintroduced the issue of compensatory time off in port and argued that the new Convention should clearly distinguish between annual leave and compensatory leave. They also said that the minimum qualifying period of six months laid down in Convention No. 91 was no longer practical, as the operation of faster modern ships called for a revision of the frequency with which annual holidays were granted to seamen.¹³⁴ Finally, the JMC adopted a Resolution urging the Governing Body to place the question of revision of annual holidays for seamen on the Agendas of the following Preparatory Technical Maritime Conference and the Maritime Session of the ILO Conference.¹³⁵

State practice with regard to holidays with pay for seafarers

In most countries the method of regulating holidays with pay for seafarers is by means of collective agreements.¹³⁶ However, with regard to other aspects of paid vacations wide divergencies are encountered: the period of annual leave varies from 8 to 180 days depending on the position of the seafarer, the type of trade and the length of service.¹³⁷ Pro rata leave is given in certain countries while in others a minimum qualifying period is required. This varies from 1 to 8 months (most common are 6 months (six countries) and 1 year (seven countries)). Various conditions have to be

¹³⁰Algeria, Angola, Belgium, Brazil, Cuba, Djibouti, Finland, France, Guinea Bissau, Iceland, Israel, Italy, Mauritania, Netherlands, Norway, Poland, Portugal, Spain, Tunisia and Yugoslavia. It was denounced by France, Italy, Netherlands, Portugal and Spain as a result of the ratification of Convention No. 146. For the text of Convention No. 91, see 32 *R.P.*, pp. 690-699; ILO, *International Labour Conventions and Recommendations, 1919-1981*, pp. 970-3.

¹³¹This resolution (Resolution II) requested the Governing Body to ask the JMC to consider a revision of Convention No. 91, see 55 *R.P.*, p. 286. Resolution VI concerning Compensatory Leave also was of importance: it brought together with annual leave the question of time off for work done on weekends and public holidays at sea (para. a) and envisaged the possibility of special leave arrangements for various types of ships (tankers, bulk carriers and containers) (para. b), *ibid.*, p. 287.

¹³²Joint Maritime Commission, 21st session, Geneva, Nov-Dec 1972, JMC/21/8, p. 4.

¹³³Art. 2 (1). This Convention provides for a minimum leave of three working weeks per annum (Art. 3 (3)) and for a pro rata leave (Art. 4 (1)); and it contains more specific provisions concerning the time for the granting of leave (Arts. 7 (2), 8, 9 and 10).

¹³⁴JMC/21/8, p. 5.

¹³⁵*Ibid.*, Annex III, p. 19.

¹³⁶State practice is based on the replies of 57 Governments to the 1976 ILO Questionnaire, see ILO, *Preparatory Technical Maritime Conference, Geneva, October 1975, Holidays with Pay for Seafarers*, Report II, p. 1. For a comprehensive account of the replies of the Governments, see *ibid.*, pp. 18-77.

¹³⁷Divergencies exist even in countries who grant holidays without distinction as to grade, the size of the vessel and the type of trade; for the length of the leave granted in various countries, see *ibid.*, pp. 20-31.

fulfilled before a seaman is entitled to leave (whether or not pro rata).¹³⁸ The calculation of leave entitlements on the basis of time on and off articles varies considerably. It seems that in the majority of countries only time on articles entitles a seaman to leave but the details of the calculation are different in various countries. In the majority of countries small interruptions of service due to certified illness, required medical care, etc. do not affect leave entitlement. In 8 countries transfers from ship to ship do not affect the seaman's right to leave provided these ships belong to the same owner while in ten countries changes in the management or ownership do not have any effects on leave.¹³⁹

The relationship between weekly rest days and public holidays and the right to leave, the maximum period of interruption allowing a seaman to claim leave, and leave granted for professional training were treated in a different manner in various countries.¹⁴⁰ Similarly, apart from the inclusion of subsistence and food allowances in payments made during leave and the payment of the holiday compensation in advance, which are standard provisions in the majority of countries, the calculation of the amount, and the method of remuneration during leave differ widely.¹⁴¹ Some governments replied that holidays must be taken at one time (excluding exceptional cases), while in others the seafarer is entitled to take them in parts, sometimes not more than two.¹⁴² Many countries do not allow the accumulation of annual leave beyond the year following that in which it is earned, while the making of cash payments in lieu of leave not granted is not favoured in the majority of countries or is given only in exceptional cases. In the majority of the countries (19) annual leave is granted by mutual agreement but in a substantial number of countries (10) the actual time at which the seafarer is to take the holidays due is decided by the shipowner; in a few countries leave is given at the seafarer's request or upon his discharge.¹⁴³

In the majority of countries (26) the seafarer is not compelled to take his leave in a port other than the port of engagement or the port of his home country. Usually, if that leave is granted in another port, the seafarer is entitled to be taken back to the port of engagement or the home port at the shipowner's expense and travel time is not deducted from leave. In most countries (41) the seafarer is entitled to cash payment on a pro rata basis, if he leaves his employment before he is able to take the holidays earned. In most countries food and subsistence allowance plus wages are included in the cash payment. In most countries payment in lieu of leave earned is prohibited and in some countries is allowed only in exceptional circumstances.¹⁴⁴ In the majority of countries (at least 23) there are no legislative restrictions which prevent the seafarer from taking other employment during leave time but in a number of countries, this practice is not well received by representatives of the seafaring in-

¹³⁸Termination of the employment not due to the fault of the seaman, minimum service with the same employer, etc., see *ibid.*, pp. 31-37.

¹³⁹*Ibid.*, pp. 38-41.

¹⁴⁰*Ibid.*, pp. 41-49.

¹⁴¹*Ibid.*, pp. 49-58.

¹⁴²*Ibid.*, pp. 59-67.

¹⁴³*Ibid.*, pp. 67-71.

¹⁴⁴*Ibid.*, pp. 71-73.

dustry. Nonetheless, in some countries (7) such restrictions exist. The enforcement of leave regulations is entrusted to government agencies, joint committees of shipowners and seafarers and trade unions. Finally, in the majority of the countries (35) time off in port is not counted against leave.¹⁴⁵

The 1975 Office draft, the 1975 Preparatory Maritime Conference and 1976 Office draft

The first Office draft¹⁴⁶ was a simplified copy of Convention No. 132 mentioned earlier, adapted to the special conditions of seafarers.¹⁴⁷

In the Committee on Holidays with Pay for Seafarers at the Preparatory Conference the Shipowners stated that the new instrument should only lay down the basic principles for annual leave for seafarers while the details should be regulated by collective agreements. They added that the detailed regulation of such matters in Convention No. 91 was the main reason why this Convention had not been widely ratified. On the other hand, the Seafarers agreed with the Office draft but were of the opinion that an annual leave of 21 days (as in Convention No. 132) was inadequate for seamen because of the special nature of their work. They replied to the Shipowners saying that the main reason for non-ratification of the Convention was negligence on the part of Governments.¹⁴⁸

Some governments desired the exclusion of fishing and sailing vessels while one country could not accept that service off articles should be included in the calculation of annual leave. The Shipowners preferred the exclusion of certain kinds of vessels, such as sailing and fishing vessels, and thought that the Convention should differentiate between ships engaged in different types of trade. In contrast, the Seafarers preferred the Office text, which made the Convention applicable to persons employed "in any capacity on board a ship other than a ship of war".¹⁴⁹ With regard to the minimum length of annual leave, the Seafarers proposed a 48 working days annual leave, while the Shipowners proposed a 3 working weeks annual leave (at a later stage, they proposed a 36 and 24 calendar days annual leave respectively). Finally, a proposal by the Government of the Netherlands was adopted, which provided for a 5 calendar weeks minimum annual leave.¹⁵⁰

Another amendment, moved by the Seafarers, was adopted to the effect that, besides absence from work for reasons beyond the control of the seafarer such as maternity, injury and illness,¹⁵¹

¹⁴⁵Ibid., pp. 73-77.

¹⁴⁶For the text of the first Office draft, see *ibid.*, pp. 90-92. However, as regards the time at which leave is to be granted the draft adopted the text of Convention No. 91 (time fixed by mutual agreement).

¹⁴⁷For example, Art. 6 (3) provided that temporary shore leave granted to the seafarer while the ship is in port should not be counted against the minimum annual leave; also, according to Art. 10 (2), the seafarer could not without his consent be compelled to take the leave due in a port other than the engagement or the home port. The return transportation was to be paid by the shipowner and travel time was not deducted from annual leave.

¹⁴⁸This, as can be seen from previous comments on that Convention, is partly true. For the views of the two groups, see International Labour Organisation, 62nd (Maritime) Session, Geneva, 1976, *Holidays with Pay for Seafarers*, Report II, pp. 7-8.

¹⁴⁹Ibid., pp. 8, 10-11.

¹⁵⁰Ibid., pp. 13-16. It should be noted that most governments abstained from voting owing to the different systems of paid leave which existed in various countries. Finally, the 5 calendar week - minimum annual leave was not adopted by the Preparatory Conference in Plenary Sitting and was deleted from the Conclusions and the 1976 Office draft, *ibid.*, pp. 33, 35.

¹⁵¹Consequently, self-induced illness or injury fall outside the scope of this amendment which forms para. 3 of Art. 5 of the final Convention.

absence from work to attend a training course should be counted as a part of the period of service.¹⁵² Art. 10 (1) of the 1975 Office draft was amended so that it is line with Art. 10 (1) of Convention No. 132.¹⁵³

The final decision on the questions concerning whether fishermen should be included in the Convention and whether public and customary holidays should be counted as a part of the minimum annual leave was postponed until the 1976 Conference.¹⁵⁴ The 1976 Office draft, which was submitted to the 1976 Conference, was based on the Conclusions arrived at by the Preparatory Conference.¹⁵⁵

The 1976 Conference

In the Committee on Holidays with Pay appointed by the Conference the governments expressed very different views as regards the scope of the proposed Convention and the proposed minimum length of annual leave. Finally, after a considerable number of amendments had been examined, the Committee decided that the Convention would not apply to ships engaged in fishing or in operations directly connected therewith or in whaling or similar pursuits. Moreover, the option was given to ratifying countries a) to extend the application of the Convention to the categories of persons excluded under Art. 2, and b) to exclude from the application of the Convention "limited categories of persons employed on board sea-going ships".¹⁵⁶ It also became evident that governments were in disagreement as to the actual length of minimum annual leave. At last, the minimum annual leave was fixed at 30 calendar days.¹⁵⁷

The Committee also decided, by a narrow majority, that cash payment in lieu of leave should be allowed in exceptional circumstances.¹⁵⁸ The effect of several amendments to Art. 10 (2) of the draft¹⁵⁹ submitted by the shipowner, the seafarer and government delegates at the Preparatory Conference and in the 1976 Conference Committee was to diminish the protection it afforded to seafarers in two respects: a) the home port of the seafarer is not directly specified as the port where leave is to be taken (the place of engagement or recruitment, whichever is nearer his home, was substituted for it)

¹⁵²This amendment was meant to refer to all maritime training courses without any distinction as to level or grade, Report II, 1976, pp. 17-18. While this is a welcome provision and will induce seafarers to receive maritime training without any apprehensions about possible effects on continuity of service, it may have delayed the ratification progress of the Convention, since law and collective agreements in some countries do not provide for continuity of service during maritime training; especially the payment of salaries and allowances during training is a controversial issue, see *PTMC*, 1975, Report II, pp. 42-49. It should be noted that this provision may bring into the scope of the Convention apprentices and cadets, who in any case are not expressly excluded from it, unless the word "employed" in Art. 2 (1) and (2) is interpreted restrictively. This, of course, does not prevent a ratifying Member from excluding these categories of seafarers under Art. 2 (7).

¹⁵³The leave due is no longer given by mutual agreement at the first opportunity, as the requirements of service allow, but the time at which leave is to be taken is fixed by the employer after consultation and, as far as possible, in agreement with the seafarer, unless it is fixed otherwise by national laws, regulations or collective agreements.

¹⁵⁴Report II, 1976, pp. 12-13, 18-19, 30-33.

¹⁵⁵For the text of the 1976 Office draft, see *ibid.*, pp. 36-45.

¹⁵⁶62 *R.P.*, pp. 164-167.

¹⁵⁷*Ibid.*, pp. 167-168. The seafarers had proposed 36 calendar days and the shipowners 28. The proposals of the Governments varied from 28 to 32 days.

¹⁵⁸*Ibid.*, p. 173. These could comprise quarantine, illness, invalidity and when the time between the current and new employment does not permit the taking of leave.

¹⁵⁹For the original draft Article, see *supra* n. 147.

and b) national laws and regulations can provide for any other place not being bound by the provisions of Art. 10 (2).¹⁶⁰

In the Plenary Sitting of the Conference the Shipowners declared that they were opposed to Arts. 3 (3), 5 (3), 6 (a) and (c) and 7 (1).¹⁶¹ All Shipowners' amendments having been rejected the Convention was adopted as a whole.¹⁶² It should be added that, unlike all previous ILO Conventions on this subject, Convention No. 146 includes the standard final provisions regarding the entry of the Convention into force (registration of the ratifications of two Members).

Analysis of the provisions of Convention No. 146

The analysis of Convention No. 146 will be limited to certain of its provisions which call for special examination. As a general remark, it may be said that the concept of annual leave with pay was given a restrictive interpretation in this Convention as a : "... component of the total leave enjoyed by seafarers which represented the irreducible minimum corresponding to a year of service, to the exclusion of such components as compensatory leave".¹⁶³

1) The words "arbitration awards" in Art. 1 of the Convention refer to both compulsory and voluntary awards.¹⁶⁴

2) Art. 4 (1) lays down that a seafarer "whose length of service in any year is less than that required for the full entitlement prescribed in the preceding Article" shall be entitled to annual leave on a pro rata basis. The question arises as to the length of service to which this Article refers. Art. 5 (1) stipulates that "the manner in which the length of service is calculated for the purpose of leave entitlement shall be determined by the competent authority or through the appropriate machinery in each country". Accordingly, the competent authority may specify a minimum qualifying period of less than 1 year; or it may specify a minimum qualifying period of more than 1 year. In the first case, if the seaman concerned claims his leave after the he has completed the minimum service prescribed by the competent authority but before the completion of a full calendar year yet without having been discharged, it can be readily seen that none of Arts. 3 (3), 4 (1) and 7 (3) apply thereto. In the second case, if, for example, the minimum qualifying period is fixed at two years, the seaman will not be able to claim the 30 calendar day - leave for the first year of his service.

In short, the relationship of Art. 5 (1) to the other articles of the Convention is not clear.¹⁶⁵ It is submitted that the satisfactory working of the Convention presupposes that the minimum length of

¹⁶⁰Report II, 1976, p. 23, 62 R.P., pp. 173-174. For the text of the Committee draft, see *ibid.*, pp. 175-177.

¹⁶¹*Ibid.*, pp. 232-234.

¹⁶²*Ibid.*, pp. 236-238. Convention No. 146 was adopted by 183 votes to 25, with 18 abstentions. All Governments voted for the Convention except India and Nigeria, who voted against it, and Canada, Colombia, Liberia, Morocco, New Zealand, Pakistan, Panama, Sri Lanka and Surinam, who abstained from voting, *ibid.*, pp. 281-282. For the text of the Convention, see *ibid.*, pp. ; also ILO, *International Labour Conventions and Recommendations*, 1919-1981, pp. 986-989.

¹⁶³Report II, 1976, p. 25. This narrow definition prevented the Netherlands from ratifying the Convention because in that country the annual leave given to the seaman also consisted of other components such as compensatory leave, *ibid.*, p. 26.

¹⁶⁴Report II, 1976, pp. 9-10.

¹⁶⁵In this respect paras. 1 and 2 of Art. 3 of Convention No. 91, are much clearer.

service fixed by the competent authority is one year and from that moment onwards the leave is calculated on an annual basis.

3) According to Art. 5 (2) service off articles must be counted as part of the period of service under conditions to be determined by the competent authority. This Article leaves the details of the reckoning of service off articles to the competent authority but it requires that this service will not interrupt the continuity of service of seafarers which would entitle them to annual leave and will be counted as a part of the period of service. Consequently, it is contrary to the law and practice of countries where continuity of employment for seafarers has not been established.¹⁶⁶ Art. 5 (3) enumerates certain circumstances beyond the control of the seafarer which do not affect the continuity of service (illness, injury, maternity). It is not clear from the wording of this provision whether this list is exhaustive or not and this was not discussed at the Conference.¹⁶⁷

4) Art. 6 (c) provides that "temporary shore leave granted to a seafarer while on articles" shall not be counted as a part of the minimum annual leave. This is so even if the ship is not in port but anchored off the port waiting to unload.¹⁶⁸

5) Art. 7 (1) provides that the seafarer will be paid during the leave period "at least his normal remuneration". This phrase is not clarified in the Convention. Nevertheless, it does include certain bonuses given to seafarers, *calculated in a manner to be determined by the competent authority*, but it excludes overtime payment.¹⁶⁹ Art. 7 (3) lays down that if a seaman leaves or is discharged from the service of his employer before he has taken annual leave due to him shall receive an appropriate remuneration in accordance with Art. 7 (1). This does not preclude a seaman from claiming a proportion of his leave before the termination of the employment in addition to his normal remuneration.¹⁷⁰

6) Art. 10 (2) provides that "no seafarer shall be required without his consent to take annual leave due to him at *a place* other than that where he was engaged or recruited ...". This place does not necessarily have to be the port of engagement or recruitment.¹⁷¹ Under Art. 10 (3) the trans-

¹⁶⁶This was the position in India, see Report II, 1976, p. 17. It is submitted that the text is not as flexible as was intended in the original amendment moved by the Government of the F.R.G. (the word "shall" was substituted for the word "can" in the original amendment); for the situation in Sri Lanka see 62 R.P., p. 235. This paragraph only applies to countries where service off articles exist, *ibid.*, p. 169.

¹⁶⁷Another such circumstance could be temporary discharge caused by the laying up of the vessel, see PTMC, 1935, Report II, pp. 70-72. At present, this case could come under Art. 5 (2). Continuity could also be broken by lay-offs without the discharge of the seaman, military training and leaves of absence granted by the company.

¹⁶⁸Report II, 1976, p. 20. The word "temporary" implies a short period of time and does not apply to cases where a ship has been immobilised for a long period, *ibid.*, p. 19. In the latter case that period will be deducted from annual leave. This temporary leave has to be authorised by the master, 62 R.P., p. 170.

¹⁶⁹It also seems that this paragraph prevents ratifying countries from calculating the remuneration of the seafarer during leave on the basis of his average remuneration over a given period before the taking of the leave, Report II, 1976, p. 20. This provision must have caused problems in certain countries where payment during leave is so calculated, see PTMC, Report II, 1975, p. 84.

¹⁷⁰Report II, 1976, pp. 20-21. Compare Arts. 7 (3) and 11 of the 1975 Office draft to the same Articles of Convention No. 146. A similar provision in respect of most other categories of workers appears in Art. 11 of Convention No. 132. However, certain countries seem to think that the obligations of the employer under Art. 7 (3) of the Convention end with the payment of the sum due for the period of leave, 62 R.P., p. 172.

¹⁷¹This provision is favourable to the seaman, since he will not have to travel on his own expenses from the port of sailing to the place where he was actually engaged or recruited (which might not be a port).

portation to the place of recruitment or engagement is free of charge to the seaman only if he is required to take his annual leave from a place other than that permitted by Art. 10 (2).¹⁷²

7) The enforcement of the provisions concerning annual leave, according to Art. 13, is solely entrusted to the authorities of the flag State.¹⁷³

4.3.4. Conclusions

The question of paid annual leave for seafarers is one of vital importance to them.¹⁷⁴ Thus, it seems advisable that the reasons for the relative failure of Convention No. 146 should be identified¹⁷⁵ and some amendments to the Convention should be effected, if it is to constitute a workable regime covering annual leave for seafarers.¹⁷⁶

4.3.4.1. Comparison between Convention No. 91 and Convention No. 146

The only provision which is not ambiguous in Convention No. 146 and is more progressive than its similar provision in Convention No. 91 is Art. 3 (3) which lays down a minimum annual leave of 30 calendar days. In all other respects, Convention No. 146 is a general instrument: many matters are left to national practice.¹⁷⁷ Moreover, the Convention empowers national laws, regulations and collective agreements to derogate from the protective provisions contained therein.¹⁷⁸ The situation is further aggravated by Art. 2 (7) which empowers ratifying Members to exclude from the application of the Convention "limited categories of persons employed on board sea-going ships".

On the other hand, though Convention No. 91 may have been a more rigid instrument it does contain more specific provisions and does not give rise to contradictory or subjective interpretations of its provisions. As will be seen below, certain of its provisions, appropriately modified, would improve the text of Convention No. 146.

4.3.4.2. Possible remedies

An interpretation of the Convention, which would facilitate ratification by certain countries whose legislation and agreements provide for two annual leave standards (a lower minimum in legislation and a higher one in collective agreements), without compromising the text of the Convention, is the following: These countries can treat the legislative minimum annual leave (insofar as it is equal to

¹⁷²Accordingly, if a seaman has resigned his employment, he cannot take advantage of this provision, 62 *R.P.*, p. 173.

¹⁷³*Ibid.*, p. 174.

¹⁷⁴Reasons which should be taken into account in calculating the length of leave for seafarers are, according to Seafarers' representatives, that "the physical and mental health of seafarers was seriously affected by the dangers they faced and by the constant pressure to which they were subjected. In addition, the special characteristics of the occupation did not permit seafarers, as contrasted with shore-based workers, to enjoy a satisfactory social and family life. Finally, the technological changes which had occurred ..., had considerably increased the productivity of the maritime industry but, as a social consequence, had frequently resulted in the reduction of the number of persons working on board and in the lengthening of the time worked, 62 *R.P.*, pp. 163-164; but see different opinion of shipowners, *ibid.*, p. 167.

¹⁷⁵Convention No. 146 came into force on 13 June 1979 and has been ratified by ten countries so far: Cameroon, France, Iraq, Italy, Morocco, Netherlands, Nicaragua, Portugal, Spain and Sweden.

¹⁷⁶The most important objections of the governments to the Convention have been mentioned earlier in this section. Here, some possible remedies are suggested.

¹⁷⁷See Arts. 5, 6 (b) and (d), 7 (1), Art. 8 (1).

¹⁷⁸See Arts. 7 (2), 8 (2), 9, 10 (1) and (2).

or higher than the one laid down in Art. 3 para. 3 of the Convention) as minimum annual leave within the meaning of the Convention while the collective agreement minimum could not be regarded as a minimum annual leave within the meaning of the Convention with the result that certain provisions of the Convention would not apply to that minimum. The same can be suggested for countries which may provide or have provided for two annual leave minima in legislation and have declared the lower minimum as a minimum annual leave in accordance with the terms of the Convention.¹⁷⁹

Convention No. 146 is one of the few ILO Conventions concerning seamen's affairs which accords the competent authority or the appropriate machinery in each country a prominent role. In fact, without experienced decisions from the competent authority, the Convention is unlikely to work properly. In particular, the competent authority has to interpret Art. 5 (3) as giving it the right to impose time limits on the periods of training, illness, injury or maternity which are to be counted as a part the seafarer's service. Moreover, the competent authority should be empowered to ensure that Art. 5 (3) comes into operation only if the circumstances mentioned therein take place before the termination of the employment contract between the shipowner and the seafarer. This, it is submitted, is the meaning of this provision.¹⁸⁰

In conclusion, the language used in Convention No. 146 is vague in many respects. It is submitted, however, that if the Convention is applied at the national level, as interpreted above in 4.3.3., and if the competent authority acts in a responsible and efficient manner along the lines suggested in the above paragraphs some of the difficulties in the application of this Convention would be removed.

4.3.4.3. Possible improvements to the text of Convention No. 146

The text of the Convention can be improved in certain areas:

1) Food and subsistence allowance should be expressly included in the normal remuneration given to the seafarer during leave under Art. 7.

2) A limit could be placed on the possibility of accumulating leave under Art. 8 (transfer of the leave not beyond the year following that in which the leave has been earned).

3) Convention No. 146 does not make special provision for the impact on the annual leave of employment with different employers. In particular, the effect of changes in the ownership or management of the ship on annual leave is unpredictable. Convention No. 91 provides in this respect that such changes shall not affect the continuity of service. The establishment of clearing houses to deal with changes in employment could be envisaged in a future instrument.¹⁸¹

¹⁷⁹As a result, Art. 6 would apply only to the lower minimum specified in the declaration appended to the ratification of the Convention according to Art. 3 (2).

¹⁸⁰See 62 *R.P.*, p. 169.

¹⁸¹If such a provision is included in a future instrument the words "the same employer" may have to be defined (mergers, successors, transfers, joint owners, same management but different ownership, same ownership but different management), see *supra* the analysis of the 1936 and 1946 Conventions at pp. 365-6, 366-7 and 369-70; see also p. 372. It may seem desirable to evaluate the effect of changes in the seaman's employment status not only on the basis of changes in the ownership of the ship but also on the basis of whether the "next" ship is engaged in the same type of trade or is covered by the same labour-management agreement.

4) The text of the Convention as regards the calculation of leave should become more flexible to allow for the fact that in some countries the minimum length of the qualifying period and the length of paid leave are not calculated on an annual basis. To this end, Art. 3 (3) of Convention No. 146 should be supplemented to provide for a length of paid leave equal to 30 calendar days per year, although calculated on a different basis (for example, two and a half calendar days for each month of service). This would be achieved by the addition of the words "or an equivalent period of leave calculated in accordance with national laws, regulations or collective agreements" after the words "30 calendar days for one year of service". In contrast to Art. 3 (2) of Convention No. 91, the minimum length of service would be determined by the competent authority according to Art. 5 (1) of Convention No. 146.

5) As pointed out earlier, Art. 5 (2) of the Convention constituted an obstacle to ratification in certain countries.¹⁸² An "escalator" clause could be added to this provision to the effect, that if national circumstances do not permit the inclusion of service off articles in the qualifying period of service, short breaks of service between signing off at the end of a voyage and signing on for the next should not break the continuity of service. To these could be added periods during which the seafarer is at the disposal of the master before departure, periods before and after service on board, etc.

6) The scope of the reasons beyond the control of the seafarer which do not affect the continuity of service should be clarified.

7) Finally, in the light of state practice, as outlined above, in a future instrument the following possibilities should be considered: a) enumeration of the circumstances under which time off in port does not count against leave, which is the position in the majority of the countries, b) inclusion in the Convention of a maximum period of interruption allowing a seaman to claim leave, c) substitution of "mutual agreement" for the decision of the shipowner as the main method of determining the time at which leave is granted, d) express inclusion of joint committees of shipowners and seafarers, and of trade unions as optional means of enforcement of the provisions of the Convention and e) the gradual elimination of the too numerous references to national law which are unlikely to ensure uniform treatment of seafarers at the international level with regard to annual leave.¹⁸³

¹⁸²In the majority of countries only service on articles is counted as part of the period of service, *PTMC*, 1975, Report II, pp. 38-9.

¹⁸³This would be possible in respect of Arts. 7 (2), 10 (1) and (2).

In conclusion, despite some of the critical comments that have been made above with regard to some provisions of Convention No. 146, it must be recognised that, given the existing divergencies in the calculation of annual leave for seafarers, an international instrument which aims to regulate this question should be very cautious in laying down detailed provisions other than certain basic standards and safeguards against possible abuse of leave provisions. Details could be left to national law and practice.

Chapter 5

SOCIAL SECURITY

This Chapter will deal with the numerous instruments adopted by the ILO relating to social security for seafarers. These instruments are: a) Convention No. 8 (1920) concerning Unemployment Indemnity in Case of Loss or Foundering of the Ship, b) Recommendation No. 10 (1920) concerning Unemployment Insurance for Seamen, c) Convention No. 55 (1936) concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen, d) Convention No. 56 (1936) concerning Sickness Insurance for Seamen, e) Convention No. 70 (1946) concerning Social Security for Seafarers, f) Recommendation No. 75 (1946) concerning Agreements relating to the Social Security of Seafarers, g) Recommendation No. 76 (1946) concerning Medical Care for Seafarers' Dependants, h) Convention No. 71 (1946) concerning Seafarers' Pensions and i) Convention No. 165 (1987) concerning Social Security Protection for Seafarers (Revised). Since detailed analysis of these instruments would defeat limitations of space and patience (on the part of the reader) the writer follows another approach in this Chapter, that is to point out, analyse, and draw conclusions concerning the main points of these instruments, leaving aside the details. The existence of many instruments dealing with aspects of social security for seafarers will require a comparative analysis thereof at the end of the Chapter. At the same time certain thoughts will be expressed with regard to the question whether Convention No. 165 will be able to achieve its aim, namely the effective and, as far as possible, uniform regulation of every aspect of social security for seafarers at the international level.

The question of social security of seafarers is one of the most burning questions which the ILO has been called to deal with for many reasons: a) wide divergencies of national laws concerning this issue have existed and still exist as regards crucial aspects of social security law; b) the choice of applicable law is a matter of particular relevance to the question of social security of seafarers and its solution has encountered numerous difficulties within the ILO; the final answer, given by Convention No. 165, is no more than a "compromise" solution; c) the equality of treatment of seafarers on the basis of nationality and residence in connection with the applicable law has again presented ILO delegates with insoluble questions; none of the relevant ILO instruments results in complete coverage of seamen at the international level from a social security point of view. The satisfactory treatment of all these questions required the writer to go into some detail in examining attitudes of governments,

shipowners and seamen toward the question of social security of seafarers before he attempted to formulate certain conclusions concerning the improvement of the relevant international standards. Finally, the diversity of the social security benefits granted by various countries and the various requirements that have to be fulfilled before such benefits are granted provide a fine example of the impact of administration and administrative law on questions involving labour law.

5.1. Unemployment Indemnity for Seafarers in case of shipwreck

The regulation of unemployment insurance for seamen involves consideration of many questions:

- a) the type of unemployment insurance system (insurance system established by the Government or a system of Government subventions to associations whose rules provide for the payment of benefits to their unemployed members, compulsory or voluntary insurance scheme or a combination of the two),
- b) the ratio of employers', workers' and governments' contributions to the unemployment fund,
- c) whether there should be a special insurance scheme for seafarers or a general unemployment insurance scheme covering many categories of workers including seafarers (in the former case Government subventions may have to be reduced),
- d) the conditions to be fulfilled before a seaman is entitled to unemployment benefit (for example, minimum period of employment, minimum period of unemployment, minimum period of contributions, age of person entitled to benefits),
- e) the scope of unemployment benefit (whether there should be general covering of all causes of unemployment or special coverage in cases of shipwreck, acts of war, etc.),
- f) the duration of unemployment benefit and the rate of benefit in relation to wages or salaries,
- g) circumstances which cause the unemployment benefit to be discontinued (for example, if the seafarer refuses suitable employment offered to him by the appropriate employment agencies or if he is a deserter, or if he reaches a specified age), and
- h) the position of non-resident seamen as regards unemployment benefits granted by the flag State and the extension of unemployment benefits to foreigners under certain conditions (for example, domicile or residence in the flag State for a specified period, membership of national trade unions).

5.1.1. The history of the question of unemployment insurance for seamen

The Washington Conference had adopted in 1919 a Recommendation concerning Unemployment. Art. 3 of this Recommendation, adopted by 73 votes to 11, recommended that an effective system of unemployment insurance should be established in each country. Furthermore, Art. 3 of the

Convention which concerned international reciprocity in matters of unemployment insurance had been adopted by 51 votes to 15.¹

By 1920 the question of unemployment insurance for seamen was dealt with in national legislation only in a fragmentary and incomplete manner.² The replies of the governments to the 1920 ILO questionnaire showed that only a very few countries (such as the Netherlands) had established an unemployment insurance system for seamen. The Office decided that the international regulation of unemployment insurance for seamen was a step necessary to rectify the prevailing situation.³

The Genoa Commission on Unemployment

The Commission decided to restrict substantially the scope of the proposed Convention: it provided for unemployment insurance only in the case of loss or foundering of the ship.⁴

The Genoa Conference also adopted a Recommendation, namely Recommendation No. 10 concerning Unemployment Insurance for Seamen. Like the Washington recommendation on unemployment insurance, it envisaged the organisation of unemployment insurance for seafarers either by the State or by systems of subventions.⁵ Finally, the Conference adopted a Resolution urging the JMC to study the question of unemployment insurance for seamen.⁶ Convention No. 8 was adopted by 70 votes to 0 and Recommendation No. 10 by 66 to 0, with 3 abstentions.⁷

5.1.2. Analysis of the provisions of Convention No. 8 and Conclusions

1) The Convention applies to *all* persons *employed* on any vessel engaged in maritime navigation.⁸

2) Art. 2 (1) of the Convention provides that "in every case of loss or foundering of any vessel, the owner or person with whom the seaman has contracted for service on board the vessel shall pay to each seaman employed thereon an indemnity against unemployment resulting from such loss or foundering". This applies only in cases of loss or foundering of the ship. Consequently, the question of seaworthiness of the vessel is irrelevant to the application of the Convention.⁹ Total unsea-

¹For the discussions on unemployment insurance, the votes taken and the texts adopted, see 1 *R.P.*, pp. 235, 237, 145, 149-50, 258-9.

²International Labour Office, Genoa, June, 1920, *Unemployment*, Report II, Chapter II, pp. 38-46.

³*Ibid.*, pp. 47-50.

⁴2 *R.P.*, p. 534. For the text of the Commission draft, see *ibid.*, p. 536.

⁵According to the Report of the Commission on Unemployment, it is applicable "to every case of involuntary idleness through lack of employment", *ibid.*, p. 535.

⁶Especially, the means through which an effective system of unemployment insurance would be secured for seafarers employed under a foreign flag or whose unemployment arises in a foreign port or who are outside the scope of the national insurance schemes, *ibid.*, p. 535.

⁷*Ibid.* pp. 451-3. For the text of Convention No. 8, Recommendation No. 10 and Resolution on Unemployment Insurance, see *ibid.*, pp. 578-582, 593.

⁸Emphasis added. It does not make any distinction between nationals and foreigners employed on a ship registered in the flag State; also, it does not specify whether these persons should be employed by the shipowner or not; for these questions, see 1939 *S.A.R.* App. 10.

⁹2 *R.P.*, p. 534.

worthiness of the ship does not come within the scope of the Convention, unless it is due to loss or foundering of the ship.

3) The seaman is entitled to unemployment indemnity irrespective of whether the ship has been insured or not.¹⁰

4) The right of the seaman to a minimum of two months' wages (Art. 2, para. 2) can be claimed if two conditions are fulfilled: a) the seaman's unemployment comes as a consequence of the loss or foundering of the ship (Art. 2, para. 1) and b) the unemployment indemnity will be paid for the days during which the seaman remains in fact unemployed.¹¹

5) It is not clear to what kind of wages Art. 2, para. 2 refers. A gloss on the meaning of "wages" is given by the same provision, namely that the indemnity will be "at the same rate as the wages payable under the contract". Accordingly, the question whether food and subsistence allowances, travel, seniority and other bonuses, etc. are included in the term "wages" within the meaning of the Article depends on whether they are so included according to the law which governs the seaman's contract.

6) According to Art. 3 seamen shall have the same remedies for recovering such indemnities as they have for recovering arrears of wages. Such remedies may include a lien on the ship, if this is a means for recovering arrears of wages in the flag State.

The main disadvantage of Convention No. 8 concerning Unemployment Indemnity in Case of Loss or Foundering of the Ship is that it is an instrument of a very limited nature. It does not even comprise cases where the ship has become unseaworthy because of an accident and the crew has been landed.¹² Many issues of unemployment insurance such as the ones mentioned in the opening paragraph of this section were not resolved in this Convention and this is why Recommendation No. 10, which recommended the establishment of an effective system of unemployment insurance for seamen, was adopted.

¹⁰Ibid., p. 254-5.

¹¹Thus, it seems that if the seaman resumes employment ashore he will not be entitled to such indemnity.

¹²An amendment to the effect that the words "or in case of any other event as a result of which the crew has to be taken off the ship" be added to Art. 2 (1) was not adopted, 2 *R.P.*, pp. 256-259. Moreover, wide divergencies in various countries have been noticed in the annual reports with regard to the following questions: a) the meaning of "loss or foundering" of the ship, b) the meaning of "wages" and c) the position in various countries in the case of "loss or foundering of a vessel the crew of which would, had there been no loss or foundering, have had their contract of service terminated, owing to the completion of the voyage, within a period of less than two months from the loss or foundering which in fact resulted" (extract from the form of the ILO's annual report to ratifying Members), see ILO, *The International Labour Code*, 1951, Vol. I: Code, pp. 882-883. A statement was made by the Director of the ILO Office that these different practices in various countries did not seem to show that the provisions of the Convention were not observed. This statement was approved by the Governing Body, 73 *G.B.*, pp. 478-9, 74 *G.B.*, pp. 9-10. For conflicting views on the applicability of Convention No. 8 to cases in which the seaman is remunerated by the voyage, see 14 *R.P.*, pp. 655-6. For the interpretation of the provisions of Convention No. 8 by national courts see C.H. Dillon, *International Labor Conventions: Their Interpretation and Revision*, 1942, pp. 178-185.

5.2. The protection of seamen in case of sickness and injury before the 2nd World War

The question of the protection of seamen in the case of sickness was first discussed at the 13th session of the ILO Conference in 1929. The Committee on the protection of seamen in case of sickness appointed by the 1929 Conference examined two aspects of this question: a) the liability of the shipowner towards sick and injured seamen and b) sickness insurance for seamen; accident insurance for seamen was excluded from international regulation.¹³ In the Committee the shipowners were against the regulation of sickness insurance for seamen in a Convention, as opposed to a Recommendation. Also, they were of the opinion that fishing vessels, small vessels, vessels engaged in inland navigation and seamen not in direct employment of the shipowners, such as barbers, musicians, wireless operators, etc. should be excluded from the scope of the proposed instruments. On the other hand, the seafarers replied that the shipowners' views were not justified.¹⁴ It was decided that the proposed instruments should have the form of a Convention. Coastwise fishing vessels, small vessels and persons not employed by the shipowner were allowed to be excluded only from the instrument concerning the liability of the shipowner towards sick or injured seamen.

At the 1929 Conference in Plenary Sitting two amendments were submitted: a) by the seamen's group to the effect that the seaman would still retain his rights against the shipowner even if his sickness was caused by his own act as opposed to his wilful act¹⁵ and b) by the shipowners' group to the effect that the question of repatriation should be deleted from the draft Conclusions. Both amendments were defeated.¹⁶

After the examination of the replies of the Governments¹⁷ the Office decided to submit to the 1936 Conference for a second discussion, two draft Conventions in many respects similar to the texts adopted by the 1929 Conference.¹⁸ After many amendments had been moved, especially by government and shipowner delegates, the Committee on the protection of seamen in case of sickness or accident appointed by the 1936 Conference adopted the Office drafts with certain amendments.¹⁹

¹³International Labour Conference, 13th session, *The Protection of Seamen in Case of Sickness*, including the treatment of seamen injured on board ship, 1929, Questionnaire II, pp. 3-4. For the Committee's report, see *ibid.*, pp. 5-62, 13 *R.P.*, pp. 356-400.

¹⁴See Shipowners' special statement on matters dealt with by the Committee in their absence and the Observations of the Seamen's Group on the statement submitted by the Shipowners, Questionnaire II, 1929, pp. 55-59, 13 *R.P.*, pp. 376-381.

¹⁵For the meaning of the term "wilful act", see *infra* n. 53.

¹⁶13 *R.P.*, pp. 139, 141. The two draft Conclusions on the protection of seamen in case of sickness were adopted by 65 votes to 16 and 72 votes to 17 respectively; *ibid.*, pp. 142, 152.

¹⁷For the state practice as regards the question of the protection of seamen in cases of sickness and injury, see International Labour Conference, *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship*, 1931, Report II, pp. 2-108, 180-261.

¹⁸*Ibid.*, pp. 109-167, 262-314. For the text of the Office drafts, see *ibid.*, pp. 168-177 and 316-325, 21 *R.P.*, pp. 244-247.

¹⁹For the report of, and the drafts adopted by, the Committee, see *ibid.*, pp. 247-269.

The Conference adopted two Conventions: the first relating to the liability of the shipowner towards sick and injured seamen and the second relating to public sickness insurance schemes for seafarers.

20

5.2.1. The liability of the shipowner towards sick or injured seamen

This question is dealt with in Convention No. 55 concerning the Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen. Since 1936 the Convention has been ratified by 15 countries.²¹

Analysis of the provisions of Convention No. 55

1) The Convention applies to all persons employed on board a vessel registered in a territory for which the Convention is in force.²² Foreign seamen employed on board such vessels are covered by the Convention.²³ On the other hand, the Convention permits the exclusion of persons employed on board by an employer other than the shipowner (Art. 1 (2) (b)).²⁴

2) The Convention applies to pleasure yachts but it permits national laws to exclude coastwise fishing boats from its application (Art. 1 (2) (a) (ii)).²⁵

3) The liability of the shipowner in respect of sickness or injury occurs between the dates specified in the articles of agreement for reporting for duty and the termination of the engagement (Art. 2 (1) (a)).²⁶ It follows that the shipowner is not liable between the date of engagement and the date fixed in the contract for the commencement of work; he is, however, liable in respect of sickness or injury occurring after the date fixed for the commencement of work, whenever the actual commencement was delayed on the shipowner's account.²⁷

4) National laws or regulations may provide exceptions in three cases: a) injury incurred otherwise than in the service of the ship,²⁸ b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased seaman,²⁹ and c) sickness or infirmity intentionally concealed when the engagement is entered into (Art. 2 (2)).

²⁰These Conventions (Nos. 55 and 56) were adopted by 70 votes to 14 and by 60 votes to 5 respectively, *ibid.*, pp. 171-2. Most employers voted against Convention No. 55.

²¹Belgium, Bulgaria, Djibouti, Egypt, France, Greece, Italy, Liberia, Mexico, Morocco, Panama, Peru, Spain, Tunisia and the United States.

²²It seems that they do not have to be entered on the ship's articles as members of the crew, 13 *R.P.*, p. 360.

²³21 *R.P.*, p. 248. Moreover, it seems that the Convention also applies to apprentices, *ibid.*, p. 249.

²⁴This provision would exclude wireless operators despite the efforts made during the first discussion of the question to include them in the scope of the Convention, Questionnaire II, 1929, p. 11, 13 *R.P.*, pp. 360-1.

²⁵Questionnaire II, 1929, p. 9.

²⁶This provision was preferred to alternative proposals according to which the shipowner's liability would start with the departure of the ship, or the commencement of the voyage or the beginning of navigation and would end with the return of the seaman to the port of shipment, or the end of the voyage, or end of navigation.

²⁷21 *R.P.*, p. 249.

²⁸Questions such as whether an accident occurring on board is to be considered as having taken place in the service of the ship whether or not the seaman is actually on duty at the time are left to national law. Nevertheless, exceptions in respect of sickness incurred otherwise than in the service of the ship are not allowed, *ibid.*, p. 250.

²⁹This is the final form of this provision. For other proposals on this point, see Questionnaire II, 1929, pp. 13-14.

5) If the conditions of the Convention are met, the shipowner has five distinct obligations towards sick and injured seamen: a) the defrayment of the expenses for medical care and maintenance of the seafarer for a specified period,³⁰ b) payment of wages for a specified period, c) repatriation of the sick or injured seaman,³¹ d) if the seaman dies, the defrayment of burial expenses³² and e) the protection of the property of sick, injured or deceased seamen.

6) If a seaman refuses to be medically examined at the time of the engagement, national laws or regulations may provide that the shipowner is not liable in respect of sickness, or death directly attributable to sickness (Art. 2 (3)).³³

7) The shipowner is (subject to paras. 2 and 3 of Art. 4) under the Convention liable to defray the expense of medical care and maintenance a) until the sick and injured person has been cured, or b) until the sickness or incapacity has been declared of a permanent character.³⁴ On the other hand, the Convention enables national laws to limit the liability of the shipowner to a minimum of 16 weeks from the day of the injury or the commencement of the sickness. Finally, the liability of the shipowner ceases as soon as the seaman is entitled to medical benefits under various compulsory insurance schemes in force in the country in which the ship is registered. But the shipowner is still liable if the seaman concerned is excluded from those schemes because he is a foreigner or a non-resident.³⁵ It follows that the Shipowners' Liability Convention in respect of medical benefits, quite apart from foreigners, also applies to non-residents as long as they are not covered by any scheme established in the territory in which the ship is registered.

8) Medical care under the Convention includes medical treatment (Art. 3). It is not necessary under the Convention that this treatment should be given by a certified doctor.³⁶

9) Subject to the same conditions as those mentioned above under 7), a shipowner is liable, if the sickness or injury results in incapacity for work, to pay full wages as long as the seaman remains on board and wages in whole or in part from the time he is landed³⁷ until he is cured or the sickness

³⁰The shipowner is not, however, required to employ certificated medical staff, such as a qualified doctor, to deal with these cases, *ibid.*, p. 15, 21 *R.P.*, p. 251.

³¹A proposal to delete the provisions relating to repatriation of sick or injured seamen from the Convention, since repatriation was dealt with in Convention No. 23, was rejected by 29 votes to 26, 13 *R.P.*, pp. 368-9.

³²The death must have occurred either on board or on shore; in the latter case the seafarer's dependants or heirs can claim the burial expenses only if at the time of his death the seafarer was entitled to medical care and maintenance at the shipowner's expense (Art. 7 (1)). It follows that the right to claim burial expenses is not an absolute right *per se* but is dependent on the right to claim medical assistance. It should be noted that no such right is given under the Convention, if the death did not result from the sickness or injury (Art. 2 (1) (b)). The onus of proof is on the claimants according to the evidence requirements of national law.

³³Though some members thought that a more clear-cut exception should be allowed, the fact remains that in the case where a person does not agree to be medically examined, the shipowner is still liable under the Convention, unless national law provides for an exception.

³⁴The shipowner does not fulfil his obligations under the Convention, if he undertakes the expenses of medical care, until the seaman is returned to a proper port of return provided by national law, 21 *R.P.*, pp. 251-2.

³⁵*Ibid.*, p. 253.

³⁶*Ibid.*, p. 251.

³⁷The right of the seaman to claim wages after he has been landed exists only if he has dependants. Also, the seaman's right to wages exists irrespective of whether the sickness or injury arose out of his service or not, *ibid.*, p. 254.

has been declared of a permanent character (Art. 5).³⁸ The fraction of wages to be paid depends on the good faith of the ratifying countries.

10) Art. 6 provides for repatriation in the case of sickness or injury. It should be noted that the shipowner under Art. 6 is not under an obligation to pay the seaman wages during the repatriation travel. Again, by virtue of Art. 2, para. 2 of the Convention national law may provide that the shipowner does not have to defray the expenses for repatriation in the case of injury incurred not in the service of the ship or injury due to the seaman's wilful act, default or misbehaviour.³⁹

11) As to the property left by a sick, injured or deceased seaman on board ship, the shipowner has to take measures to safeguard it (Art. 8). The provision is very elastic and does not require the shipowner to take particular measures such as to draw up an inventory of the effects of the deceased or an account of wages due to him; the question is left to national law.⁴⁰

12) To accommodate divergent national laws the Convention enables ratifying Members to maintain their national insurance schemes, if the liability for the cost of medical care, repatriation and burial expenses is assumed by public authorities (Art. 10).⁴¹

13) Finally, no distinction on the basis of nationality or residence is recognised under the Convention. It applies to all seamen employed on board a vessel registered in a territory for which the Convention is in force (Art. 11).⁴²

5.2.2. Public sickness insurance schemes for seamen

In 1929 when the question of a public system of compulsory insurance for seafarers was first discussed, some countries had not instituted such systems and were cautious towards the proposed instrument.⁴³ This situation did not prevent the 1936 Conference from adopting Convention No. 56 concerning Sickness Insurance for Seamen.⁴⁴

Analysis of the provisions of Convention No. 56

1) The Convention applies to the master, the members of the crew and to other persons employed in the service of the ship (registered in a territory for which the Convention is in force) such as

³⁸The option given under the Convention to ratifying countries to provide that the shipowner shall cease to be liable from the time the seaman is entitled to medical benefits under an insurance scheme (Art. 4 (3) (a)) may deprive him from possible higher wages under the contract he has concluded. There is no provision to the effect that the shipowner should pay the difference to the seaman for a specified period.

³⁹The seaman does not have a right of choice among the ports specified in Art. 6 (2), see 21 *R.P.*, p. 255.

⁴⁰*Ibid.*, pp. 256-7.

⁴¹*Ibid.*, p. 257.

⁴²*Ibid.*, pp. 257-8. In the light of what has been said earlier, this Article was unnecessary.

⁴³Questionnaire II, 1929, p. 31, 13 *R.P.*, p. 382.

⁴⁴Convention No. 56 has been ratified by 14 countries: Algeria, Belgium, Bulgaria, Djibouti, Egypt, France, the F.R.G., Mexico, Norway, Panama, Peru, Spain, the U.K. and Yugoslavia.

the catering staff, who may not be employed by the shipowner.⁴⁵ Unlike Convention No. 55, Convention No. 56 applies to fishermen (Art. 1 (1)).⁴⁶

2) The main principle of the Convention is that all persons (subject to the exceptions of para. 2 of Art. 1) employed on board a vessel registered in a territory for which the Convention is in force are entitled to benefits under a compulsory sickness insurance scheme; interestingly, the Convention, unlike Convention No. 55, provides ratifying Members with the option to exclude from the scope of the Convention seamen not resident in the territory of the Flag-State.⁴⁷

3) A ratifying Member assumes the following obligations towards sick seamen: a) the payment of cash benefits, b) medical treatment, c) the payment of family benefits,⁴⁸ d) the payment of maternity benefits⁴⁹ and e) the defrayment of funeral expenses, unless there is in force a pension scheme for the survivors of deceased seamen.⁵⁰

4) Under Art. 2, when a seaman is rendered incapable of work and deprived of his wages because of sickness,⁵¹ he is entitled to a cash benefit for at least 26 weeks or one hundred and eighty days of incapacity; the right to the benefit may be made conditional on the completion of a qualifying period⁵² and a waiting period. The said benefit may be reduced or refused in the case of sickness due to the seaman's wilful misconduct (but not otherwise);⁵³ an amendment moved to the opposite effect by the Workers' group was withdrawn.⁵⁴

5) The seaman is also entitled, as from the commencement of his illness,⁵⁵ to medical treatment free of charge but he may be required to contribute to the cost of the medical benefit. If necessary, he may be sent to hospital where he will receive medical attention and care (Art. 3).

⁴⁵21 *R.P.*, p. 260.

⁴⁶This is due to the desirability of including fishermen in a scheme of compulsory sickness insurance, since the shipowner does not assume any obligation towards them under Convention No. 55, Questionnaire II, 1929, p. 34.

⁴⁷21 *R.P.*, p. 261. An amendment seeking to bring in the scope of the Convention non-resident seamen was rejected in the 1929 Committee on the Protection of Seamen in Case of Sickness by 24 votes to 23. This amendment would have entitled a seaman who had served "for an aggregate period of twelve months on board a ship flying the flag of the country in which the insurance institution is established" to sickness benefits in the flag State, see Questionnaire II, 1929, pp. 39-40, 13 *R.P.*, pp. 388-9; see also 21 *R.P.*, p. 261. On the contrary, under the Convention foreign seamen who are resident in the flag State are entitled to medical benefits under the laws of that State, *ibid.*, pp. 269-270.

⁴⁸The payment of these benefits is not obligatory under the Convention.

⁴⁹The payment of maternity benefits to the wife of an insured seaman is not obligatory under the Convention.

⁵⁰The seaman is not debarred from these rights, even if he has not undergone medical examination prior to the engagement, 21 *R.P.*, pp. 266-7; compare Art. 2 (3) of Convention No. 55.

⁵¹Cases of incapacity for work due to accidents are not covered by the Convention.

⁵²This could be either a fixed period or the payment of minimum number of contributions during the prescribed period or both 21 *R.P.*, p. 263.

⁵³Here, it should be noted that the intention of the drafters was that the cases of the seaman's own act in which the seaman would be denied his right to sickness benefits under Convention No. 56 would be more limited than the similar cases which would disqualify him from claiming his rights under Convention No. 55 against the shipowner. Compare the wording of Art. 2 (5) of Convention No. 56 to that of Art. 2 (2) (b) of Convention No. 55; see also Questionnaire II, p. 41. Furthermore, under the Convention sickness due to "wilful misconduct" is a broader concept than sickness "intentionally produced". The latter implies sickness contracted in consequence of a wilful act or omission intended to produce the sickness. The former connotes sickness due to "a fault committed wilfully and not simply by negligence, nor even a serious fault from the technical standpoint ... if committed unintentionally", Report II, 1931, p. 282.

⁵⁴21 *R.P.*, p. 263.

⁵⁵However, it is not clear whether this right legally exists from the commencement of the contract or service.

6) The duration of the benefits under Arts. 2 and 3 is qualified by Art. 7 which places upon ratifying countries the obligation to provide for the continuation of insurance benefits in cases of illnesses commencing in short periods between voyages.⁵⁶

7) Art. 4 (1) provides that "when the insured person is abroad and by reason of sickness has lost his right to wages, whether previously payable in whole or in part,⁵⁷ the cash benefit to which he would have been entitled had he not been abroad shall be paid in whole or in part to his family until his return to the territory of the Member." It should be noted that under the Convention cash and medical benefits may be withheld, if the seaman is on board or abroad. The Convention does not contain any provision concerning repatriation. It seems that repatriation is a question within the sphere of the shipowner's responsibilities; this is the reason why a provision concerning repatriation was included in Convention No. 55. Art. 4 (1) is not complete, since it does not provide for cases where the seaman abroad is not entitled to, or does not wish to, return to the territory of the flag State.

8) The persons who are primarily entitled to participate in the managements of the insurance institutions are the seamen; the shipowners have the same right only if the insurance institutions are set up specially for seamen.⁵⁸

5.2.3. Conclusions

Comparison between Convention No. 55 and Convention No. 56

Convention No. 55 (shipowners' liability in case of sickness etc) and Convention No. 56 concerning sickness insurance) are different in many respects:

- a) The former Convention applies to foreigners and to non-residents while the latter only to foreigners employed on a vessel registered in a territory for which the Convention is in force.
- b) The shipowners' liability may comprise the following items: Cash benefits (wages), medical benefits and burial expenses. A national compulsory sickness insurance scheme under Convention No. 56, on the other hand, includes: cash benefits, medical benefits (including medical care by a medical practitioner and hospitalisation), family and maternity benefits, and funeral expenses.
- c) In Convention No. 56 no provision concerning repatriation appears. This is not the case in Convention No. 55 which contains certain provisions concerning repatriation.

⁵⁶As to the reasons for the inclusion of this provision in the Convention, see 13 *R.P.*, pp. 143-4. These periods must be fixed by national laws and cover "the normal interval between successive engagements". It follows that if because of special circumstances the seaman concerned is unable to find employment within the period specified and he remains, in fact, unemployed for many years before he is reengaged, no obligation rests upon ratifying countries under the Convention to provide this seaman with illness benefits for the whole period of unemployment; see Interpretation of Decisions of the International Labour Conference: Sickness Insurance (Sea) Convention, 1936 (No. 56), *O.B.*, Vol. XXXIII, 1950, pp. 306-7.

⁵⁷For example, wages paid under the shipowners' liability scheme, 21 *R.P.*, p. 264.

⁵⁸*Ibid.*, p. 266.

d) While under Convention No. 55 the shipowner is liable in cases of sickness or injury, under Convention No. 56 the liability of the insurance institution must continue for a definite period after the termination of the engagement so that normal intervals between successive engagements will be covered. This protection for the seafarer may be graduated according to the time during which contributions had been paid in respect of the insured person. It may also be provided that the seaman must have completed a qualifying period in order to be entitled to benefits after the termination of the engagement.⁵⁹

e) Finally, in sharp contrast to the shipowners' liability schemes, the national compulsory insurance schemes envisaged in Convention No. 56 entitle a seaman to the benefits mentioned above, even if this seaman has refused to be medically examined at the time of the engagement. It was pointed out that national compulsory insurance should cover both good and bad risks.

Comments on the effectiveness of the regime established by Conventions Nos. 55 and 56

The main disadvantage of the system established by Conventions Nos. 55 and 56 is that the seaman is fully covered only if both the flag State and the State in which he is entitled to sickness benefits, which may be the same country, have ratified both Conventions.⁶⁰ If one of them chooses to ratify only one of these Conventions, then, there will be gaps in the seaman's entitlements to sickness benefits between voyages.⁶¹ Moreover, the combination of the two Conventions ensures reasonable continuity of the protection of the seaman in cases of sickness or accident but this is by no means absolute.⁶²

In addition, Convention No. 56 omits one important question, namely the international regulation of accident insurance.

Convention No. 56 allows ratifying Members to exclude from the application of the Convention non-resident seamen. This provision places in a disadvantageous position non-resident seamen employed on board foreign vessels (such as Asiatic crews).⁶³

The question of repatriation in Convention No. 55

In brief, Art. 6 of Convention No. 55 is incompatible with Arts. 2 (1) (c) and (g), 3 (2) and other provisions of Convention No. 166 concerning repatriation as analysed earlier in Section 4.2.2.

⁵⁹Ibid., p. 265.

⁶⁰Only 9 countries have ratified both Conventions: Belgium, Bulgaria, Djibouti, Egypt, France, Mexico, Panama, Peru and Spain.

⁶¹In fact, the Report of the Committee on the protection of seamen in case of sickness or accident stated at the Conference that Convention No. 56 was complementary to Convention No. 55, *ibid.*, p. 84.

⁶²To give an example, if in the case of an accident the shipowner's liability is limited to 16 weeks from the day of the injury under Arts. 4 and 5 of Convention No. 55, the seaman may not enjoy any protection, if the qualifying period for the granting of insurance benefits under Art. 2 (2) of Convention No. 56 is more than 16 weeks.

⁶³The regulation of the position of these seamen is left to reciprocal arrangements, see for a discussion, 21 *R.P.*, pp. 87-93.

As will be seen later, Convention No. 165 superseded only Convention No. 56 while Convention No. 166 replaced Convention No. 23. As a result Art. 6 of Convention No. 55 remains intact and its repatriation provisions taken together with the provisions of Convention No. 166 are likely to create double standards on repatriation at the international level.

Finally, no account has been taken in the Convention of the following distinction: a seaman in good health may find it more advantageous to return to the port of engagement or other ports specified in Art. 6, but a sick or injured seaman is in a more advantageous position if he is repatriated to the country where he is entitled to sickness or accident insurance benefits.

5.3. Social security for seafarers after the 2nd World War

Shortly after the end of the 2nd World War in 1946, the ILO Conference held its 28th session, which proved to be legislatively the most prolific with regard to the question of social security of seafarers: in the light of the progress which had taken in the field of social security for seafarers,⁶⁴ four instruments were adopted by that session of the ILO Conference, two relating to social security for seafarers, one to medical care for seafarers' dependants⁶⁵ and one to seafarers' pensions.

5.3.1. Social security for Seafarers: Convention No. 70 and Recommendation No. 75

5.3.1.1. Convention No. 70 concerning Social Security for Seafarers

The history of the question and the 1945 Office draft

The 1946 ILO instruments on social security for seafarers were based on a model devised by the ILO Office having regard to various instruments of national legislation. The main structural principles of the first ILO model concerning social security were as follows:⁶⁶

(a) Insurance under the general social insurance scheme, supplemented by insurance under a special scheme for additional benefits in respect of contingencies or needs peculiar to, or of particular importance for, seafarers;

(b) Transfer of the liability of the shipowner to a seafarers' insurance fund administering the special scheme;

(c) Compensation in respect of all illness, incapacity (including consequent death) occurring during the agreement on the same terms, whether or not these contingencies could be proved to arise out of and in the course of the employment;

⁶⁴For the law and practice in this field before 1945, see Maritime Preparatory Technical Conference, 1945, Report VI, *Social Insurance*; see also *Studies and Reports*, M 19, *Social Security for Seafarers*, 1945.

⁶⁵Here, it should be noted that medical care for seafarers relates to the questions of health and welfare of seafarers but medical care for the seafarer's dependants is an aspect of social security for seafarers.

⁶⁶International Labour Conference, 28th session, 1946, *Social Security for Seafarers*, Report II, p. 2.

(d) Unconditional equality of treatment for resident and non-resident seafarers (irrespective of nationality) for the purposes of the compensation referred to in (c), and, on behalf of seafarers not residing in the country of the ship, provision for continued insurance under the appropriate scheme of their country of residence, subject to reciprocity.

This ambitious scheme was abandoned in view of the divergencies encountered in various national laws.⁶⁷ Consequently, the first Office draft specified minimum rates of benefits for seafarers in case of illness aboard and retirement from sea service; as regards other benefits it merely provided that they should not be less than those of shore-workers; and contented itself for the protection of foreign or non-resident seafarers with the enunciation of the principle of equality of treatment and reference to the Maintenance of Migrants' Pension Rights Convention, 1935. This draft was submitted to the Preparatory Conference held in Copenhagen in November 1945.⁶⁸

The Copenhagen Conference and the 1946 Office draft

The Committee on Social Insurance appointed by the Preparatory Conference agreed that seafarers should be entitled to at least the same social security benefits as industrial workers ashore. After many amendments had been considered, the Committee agreed to a text which would entitle the seaman to medical care and maintenance during incapacity, to repatriation, to a cash benefit for a period of not less than 12 weeks and an unemployment benefit thereafter.⁶⁹ In the light of the observations of the two most important maritime countries at the time (the U.S. and the U.K.), which seemed to be opposed to specially favourable compulsory public schemes of pensions for seafarers, it was decided that the question of pension schemes for seafarers should be dealt with in a separate Convention.⁷⁰ The Committee also adopted two provisions ensuring the continuity of protection of seafarers with regard to social security. Finally, it was decided that the proposed Convention should not make any distinction on the basis of nationality or residence as regards the application of both shipowners' liability schemes and compulsory sickness and injury insurance schemes; this provision was made subject to reciprocal arrangements between the flag State and the country of residence or nationality of the seafarer under which he would be covered by compulsory insurance schemes of the latter countries.⁷¹ The Committee's draft, only slightly amended, was submitted to the 1946 Conference.⁷² Shipowners and seafarers, of course, held divergent views on the question of social security, as illustrated below.

⁶⁷Ibid., pp. 2-4.

⁶⁸For the 1945 Office draft, see *ibid.*, pp. 5-9; see also *PTMC*, Report VI, 1945, pp. 62-65.

⁶⁹Report II, 1946, pp. 11-13.

⁷⁰Ibid., pp. 13-4, 18, 23. The scheme envisaged in the draft Convention distinguished between seafarers who had reached the age of 55 and those who had reached the age of 60 and calculated the pension rates accordingly.

⁷¹Ibid., pp. 14-15. The Committee also adopted a Recommendation concerning reciprocal agreements relating to social security for seafarers and a Convention on seafarers' pensions.

⁷²For the 1946 Office drafts, see *ibid.*, pp. 32-55.

Position of the shipowners and the seafarers in 1946*A) Views of the shipowners*

These were as follows:

a) Social security benefits should be made conditional on practicability.⁷³

b) Benefits should be granted to seafarers to the same extent as they were granted to industrial workers.⁷⁴

c) Cash allowances should be paid only to residents of the country in the territory of which the ship was registered.

B) Views of the seafarers

These were as follows:

a) The country of the ship should be responsible for granting the benefits provided for in the Convention both to residents and to non-residents of that country.

b) Cash allowances for seafarers left behind abroad should be equally paid to residents and to non-residents.

Selected important points arising from the preliminary proceedings at the Copenhagen Conference

a) Although the delegates were in agreement on equality of treatment of national and foreign seafarers, there was a difference of opinion concerning the equality of treatment of resident and non-resident seafarers. A restricted proposal was adopted which would ensure equality of treatment only with regard to the shipowner's liability in respect of sickness, injury or death of seafarers.⁷⁵

b) The proposals adopted represented the lowest common denominator of existing laws rather than new and higher standards. Some members of the Committee (apart from the French Government delegate) were reluctant to go beyond the existing law of their country.⁷⁶

c) Art. 1 of the Convention dealing with the scope of the Convention was modified to correspond to the relevant article of Convention No. 55 concerning the Shipowners' Liability in case of sickness, injury or death of the seafarer.⁷⁷ Similarly, provision was made for maintenance after recovery from incapacity pending re-employment or repatriation.

Analysis of the provisions of Convention No. 70⁷⁸

⁷³This view was rejected at the Preparatory Conference, *ibid.*, p. 11.

⁷⁴28 *R.P.*, p. 213.

⁷⁵Report II, 1946, p. 23.

⁷⁶*Ibid.*, pp. 23-4.

⁷⁷*Ibid.*, pp. 26-7.

⁷⁸Convention No. 70 was adopted by 76 votes to 14 with two abstentions, 28 *R.P.*, p. 144. The votes against the Convention came from the Employers' group. The Convention permits ratification by means of collective agreements (Art. 10). For the problems which this Article poses, see *supra* Chapter 4, Section 4.1.2., pp. 286-289.

1) As far as the scope of the Convention is concerned, it applies to radio officers or operators and persons serving in the catering department even if they have been employed by independent contractors (Art. 1 (2) (d)).⁷⁹ As to the position of fishermen, the position is as follows:

- i) where the whole of any benefit up to the standard required by the Convention is provided for merchant seamen in virtue of the shipowners' liability as defined by legislation then benefit up to that standard must be granted also to deep-sea fishermen;
- ii) where, however, the whole of any such benefit is provided for merchant seamen in virtue of other arrangements such as social insurance, collective agreements, public funds, etc., deep-sea fishermen may be exempted;
- iii) where any complementary benefit for merchant seamen necessary in order to bring the benefit provided in virtue of the shipowners' statutory liability up to the required standard is furnished by means of other arrangements, then an exception may be made for deep-sea fishermen in respect of the complementary benefit.⁸⁰

2) From Art. 1 (a) it appears that "the Convention applies to seafarers⁸¹ on board vessels registered in that territory and that its purpose is to define the obligations of a Member responsible for such a territory which has ratified the Convention. ... It is, of course, open to the competent authorities of the territory in which the vessel is registered to conclude with the competent authorities of another territory agreements providing that the costs or part thereof shall be met by the latter. But the responsibility under the Convention for meeting those costs falls on the competent authorities of the territory in which the vessel is registered; if those costs are not met the competent authorities of the territory in which the vessel is registered alone could be considered as not having fulfilled the obligations arising out of the Convention".⁸²

3) The Convention ensures equality of treatment in respect of seafarers and industrial workers.⁸³ Moreover, seafarers are placed in a more advantageous position compared to workers ashore: even if a specific benefit is not available to shore workers, seafarers will be entitled thereto, viz. either to proper and sufficient medical care (medical benefit) or to benefits "at rates commensurate, having

⁷⁹Ibid., p. 212.

⁸⁰See the reply of the ILO Office to a question of the Netherlands Government concerning the position of fishermen other than coastwise under the Convention, in ILO, *The International Labour Code*, 1951, Vol. I: Code, p. 854.

⁸¹The Convention does not require that the seafarer should be employed on board ship as a member of the crew in order that he is entitled to the benefits provided for therein. It suffices that the seaman is in the service of the ship but in both cases he must have entered into a contract of employment with the shipowner (Arts. 1 (1) (a) and (2) (d), 2 (1)); see also 28 R.P., p. 213.

⁸²See reply of the ILO Office to a question of the Government of Bulgaria as to which country is responsible for the execution of the provisions of Art. 3 of the Convention in *The International Labour Code*, op. cit., p. 857.

⁸³According to Art. 2 the criteria used for the comparison between benefits granted to seafarers and to industrial workers are: conditions of award, extent and duration of benefits. It seems that in all three respects the benefits granted to seafarers should be not less favourable than those awarded to industrial workers, 28 R.P., p. 213.

regard to the standard of living in the territory (of the flag State), with their needs" (incapacity, unemployment and old age benefit, cash benefits in the case of death of the seafarer).⁸⁴

4) The benefits available to seafarers under the Convention can be divided into two categories (Arts. 2⁸⁵ and 3 respectively): i) benefits given to seafarers or seafarers' dependants who are present and resident in the territory in which the vessel is registered and ii) benefits given to seafarers resident in such territory who are left behind in another territory. In the first category the following benefits are included: a) medical benefits to seafarers or their dependants, cash benefits in respect of incapacity for work (*whether due to employment injury or not*),⁸⁶ of unemployment and old age and cash benefits to the seafarers' dependants on his death.⁸⁷ The second category comprises medical benefits, board and lodging, repatriation⁸⁸ and cash allowance equal to 100% of the seaman's wages, exclusive of bonuses for certain specified periods (the Convention entitles a seaman in the circumstances mentioned in Art. 3 (left behind in another territory by reason of injury in the service of the ship or sickness not due to his own wilful act) to full wages (100%) during a period of 12 weeks).⁸⁹

5) Though no distinction on the basis of the place of residence is made among seafarers for the purpose of the application of national laws and regulations relating to shipowners' liability in respect of sickness, injury or death of seafarers,⁹⁰ the same is not true in the case of national laws or regulations relating to compulsory insurance against employment injury, workmen's compensation, compulsory sickness insurance, compulsory invalidity insurance, old-age and widows' and orphans'

⁸⁴Only in the case of medical benefits for seafarers' dependants, if no provisions have been made in a ratifying country for this specific case as regards industrial workers, the country concerned is not under an obligation to grant these benefits to seafarers' dependants (Compare Art. 2 (c) to Art. 2 (a), (b) and (d)); see also *ibid.*, pp. 213, 102. A Recommendation was adopted by the Conference, namely Recommendation No. 76 concerning Medical Care for Seafarers' Dependants. This recommends that ILO Members should endeavour to ensure proper and sufficient medical care for seafarers' dependants pending the development of a medical care service covering all workers in general. For the text of the Recommendation, see 28 *R.P.*, pp. 348-9; ILO, *International Labour Conventions and Recommendations*, op. cit., p. 1065.

⁸⁵The Convention does not expressly state that no right to the benefits laid down in Art. 2 of the Convention exists in case of incapacity for work or unemployment due to the wilful misconduct of the seaman but the Convention was adopted on the understanding that national law may provide for exceptions in this respect; 28 *R.P.*, p. 213.

⁸⁶Whether these words mean injury incurred otherwise than in the service of the ship is less than clear: this is to be decided by the competent authority, *ibid.*, p. 213. However, as the text stands, it seems to extend the responsibilities of the flag State in respect of incapacity benefits beyond cases of "industrial injury".

⁸⁷It is not clear whether incapacity for work due to sickness entitles the seaman to cash benefits as distinct from medical benefits, *ibid.*, p. 213.

⁸⁸For the purpose of the Convention repatriation is defined as transportation to a port to which a seafarer is entitled to be returned in accordance with national laws or regulations (Art. 1 (c)). According to Art. 3 (1) (c) a seaman is not entitled to repatriation in the case of injury sustained while out of service and sickness due to his own wilful act. This provision is not in accordance with the 1987 Convention concerning Repatriation and it was justly revised by Convention No. 165 concerning Social Security for Seafarers (Revised).

⁸⁹Although the payment of wages is limited to a period of 12 weeks, there is no limit to the period during which a seaman is entitled to medical care and maintenance while he is left behind abroad, 28 *R.P.*, p. 214. Under para. 2 of Art. 3 payment of incapacity or unemployment benefit under a scheme of compulsory social insurance or workmen's compensation, paid to the seafarer's dependants, begins not later than the expiry of the period during which full wages are payable. On his return to his territory of residence the seaman will be entitled to the benefits of Art. 2, Report II, 1946, p. 28.

⁹⁰Art. 6 provides for equality of treatment of resident and non-resident seafarers for the purpose of the application of laws and regulations relating to shipowners' liability in respect of sickness, injury or death; see *ibid.*, pp. 28-29.

insurance.⁹¹ With the exception of Arts. 6 (2) and 7 which provide for equality of treatment of residents and non-residents of the country in which the ship is registered in limited cases, there is no such equality in respect of most of the benefits and allowances provided for in the Convention.⁹² The obligations imposed by Arts. 6 (2) and 7 concerning equality of treatment of resident and non-resident seafarers do not permit a ratifying country to discriminate against non-residents (in the case of Art. 7 this observation applies only to non-residents who are resident in other territories for which the Convention is in force) even in the case where benefits in cases of sickness, accident or death are provided under national legislation on insurance. Furthermore, when shipowners are required to insure against liability under national law, "the laws and regulations dealing with that liability do not cease to be "laws and regulations relating to the liability of the shipowners" for the purposes of the ... Convention, except where and in so far as the legislation frees shipowners from all liability" (for example, by transferring this liability to insurance funds).⁹³

6) Art. 5 provides for equality of treatment of nationals and non-nationals for the purpose of the application of laws or regulations relating to i) the liability of the shipowner in respect of sickness, injury or death of seafarers, ii) compulsory insurance against employment injury or workmen's compensation, iii) compulsory sickness insurance and iv) compulsory unemployment insurance. A ratifying country is not under an obligation to treat equally national and foreign seamen in respect of compulsory invalidity, old-age and survivors' insurance.⁹⁴

Convention No. 70 was one of the four Conventions submitted to the 32nd session of the ILO Conference for partial revision but it was decided that the text of the Convention should remain unchanged.⁹⁵

⁹¹Compare Art. 10 of the 1945 Office draft which was more protective of the seafarers' interests, *ibid.*, pp. 7-8.

⁹²This applies to both the benefits provided for in Art. 2 and 3 of the Convention. An amendment by the Workers' members to assure equality of treatment to non-resident seafarers in the matter of cash allowances payable pending repatriation was rejected, 28 *R.P.*, p. 214. As a result, the Convention does not decide questions such as whether all seafarers of whatever country of residence serving on the same ship should be entitled to the same amount of wages if they are left behind abroad. The only case in which non-resident seafarers are protected under the Convention is that laid down in Art. 6 (2). Under this provision, non-resident seafarers are entitled to the benefits of Art. 3 (1), if these are not provided under shipowner's liability schemes; in no case, however, are they entitled to the benefits of Art. 2 and Art. 3 (2). See also for discussion of the equality of treatment in respect of resident and non-resident seafarers, *ibid.*, p. 103.

⁹³Interpretation of the decisions of the International Labour Conference: Social Security (Seafarers) Convention, 1946 (No. 70), *O.B.*, Vol. XL, pp. 479-480.

⁹⁴28 *R.P.*, p. 214.

⁹⁵See Report XII, 1949, "Partial Revision of four Conventions adopted by the International Labour Conference at its 28th Session (Maritime), Seattle" and 32 *R.P.*, pp. 654-655.

5.3.1.2. Recommendation No. 75 concerning Agreements relating to the Social Security of Seafarers ⁹⁶

This Recommendation is very important, since it tries to complement the provisions of Convention No. 70 and contains provisions favourable to seafarers, especially to seafarers who do not reside in the territory of the country in which the ship is registered. ⁹⁷ These provisions had not been included in the Convention because of the opposition of different groups:

a) Agreements should be entered into by the flag-state and the country of the residence of the seafarers concerned to ensure that they are covered by the social insurance scheme of either country (Para. 1).

b) The administration of social insurance schemes in the case of seafarers entitled to benefits under the scheme of one Member but present in the territory of another Member is very much facilitated by para. 2; Members who apply para. 2 can, *inter alia*, act as agents, take claims, obtain evidence, make payments, receive or transfer contributions, etc.

c) Finally, the Recommendation protects non-resident seafarers in case of employment injury or entitles them to supplementary benefits available for resident seafarers (Paras. 3 and 4). ⁹⁸

5.3.2. Convention No. 71 concerning Seafarers' Pensions ⁹⁹

The main questions which arose during the discussion on seafarers' pensions in the Committee on social security appointed by the 1946 Conference were a) the desirability of having special pension schemes for seafarers and b) the form of the proposed instrument. The first question was not decided ¹⁰⁰ while it was agreed that the instrument should have the form of a Convention.

Analysis of the provisions of Convention No. 71

1) Interestingly, the Convention permits ratifying countries to exclude both foreign and non-resident seafarers (Art. 2 (2) (j) and (k)). ¹⁰¹

⁹⁶Recommendation No. 75 was adopted by 85 votes to 7 with 4 abstentions. The seven votes against the Recommendation came from the Employers' Group, 28 *R.P.*, p. 145. It should be added that Recommendation No. 76, mentioned earlier, was adopted by 92 votes to 2, with three abstentions, *ibid.*, p. 146.

⁹⁷For a discussion of the Recommendation, see *ibid.*, pp. 215-6.

⁹⁸These benefits should be extended to non-resident seafarers regardless of the conclusion of collective agreements by organisations of shipowners and non-resident seafarers, *ibid.*, pp. 215-6.

⁹⁹Convention No. 71 was adopted by 56 votes to 16 with 25 abstentions, *ibid.*, p. 147. Almost all employers voted against the Convention while many important maritime countries, such as Canada, the U.S., the U.K. and Greece abstained.

¹⁰⁰The majority of the governments favoured the inclusion of seafarers in general pension schemes. Several reasons were forwarded in support of this view: a) the cost of supplementary special pensions for seafarers outside the general scheme would impose heavy burdens on shipowners and seafarers, b) seafarers often switched from sea-service to shore employment and vice-versa and a general pension scheme applicable to all workers would ensure continuity of insurance. Some governments were of the opposite view: they were in favour of special schemes for seafarers a) because of the adverse working conditions of seafarers as compared to those of shore workers and b) because general and special schemes had co-existed in these countries for many years without difficulties, see 28 *R.P.*, p. 221.

¹⁰¹*Ibid.*, p. 221.

2) Art. 2 of the Convention does not distinguish between general and special pension schemes for seafarers. On the other hand, it is possible for a ratifying country to give effect to the provisions of the Convention by establishing private pension schemes.¹⁰²

3) Under Art. 3 of the Convention two conditions must be fulfilled before a seaman is entitled to pension: a) the completion of a minimum qualifying period of sea-service¹⁰³ and b) the attainment of either 55 or 60 years of age.

4) The pension provided under the scheme together with any other social security pension payable to the seafarer at the same time, must not be less than the total obtained by computing for each year of service 1.5% or 2% (depending on whether the seaman has reached the age of 55 or 60 years) of the remuneration on the basis of which contributions were paid in respect of him for that year. The contribution of the seafarer to the scheme should not amount to more than half of the total (Art. 3). The meaning of "other social security pension" payable to the seafarer has not been clarified at the Conference. It seems that it does not include social security benefits, if they are not defined as pensions under national law.¹⁰⁴

5.3.3. Conclusions

Convention No. 70 has been ratified only by 7 countries so far and has not yet come into force.¹⁰⁵ This is due to many factors, including its discrimination between resident and non-resident seafarers. Furthermore, it can be seen from the record votes taken in the Committee on social security that on most points of the Convention, Governments, Shipowners and Seafarers were not unanimous.¹⁰⁶ Convention No. 71 has been ratified by 12 countries so far and came into force in 1962.¹⁰⁷ Some of the reasons why it has not been widely ratified are a) the obligation it imposes on ratifying countries to provide for participation of shipowners and seafarers in the management of the pension schemes and b) the detailed financial arrangements of Art. 3 on the basis of which the pension rates are calculated.¹⁰⁸

Convention No. 70 aspired to be a more general and comprehensive instrument than the previous ILO instruments on this subject. It has only partly achieved this aim. In fact, it covers accident insurance, which had been excluded from Convention No. 56. On the other hand, the shipowners'

¹⁰²Ibid., p. 221.

¹⁰³This is to be determined by the competent authority.

¹⁰⁴On the other hand, whether this expression comprises all or some kinds of pensions payable to the seafarer (for example, invalidity pensions, allowances payable to the seafarer's dependants, survivor's pensions, etc.) is unclear.

¹⁰⁵Algeria, France, Netherlands, Peru, Poland, Spain and the U.K. According to Art. 12 of the Convention, it will come into force after the registration of its ratification by seven countries out of a list of 23 countries, including at least four countries each of which has at least one million gross register tons of shipping. This Convention was recently revised by Convention No. 166 concerning Social Security for Seafarers (Revised).

¹⁰⁶See 28 R.P., pp. 216-7.

¹⁰⁷Algeria, Argentina, Bulgaria, Djibouti, Egypt, France, Greece, Italy, Netherlands, Norway, Panama and Peru. Art. 6 regarding the entry of the Convention into force is identical to Art. 12 of Convention No. 70 with the substitution of the numbers 5 and 3 for 7 and 4, see 28 R.P., pp. 104, 111-2.

¹⁰⁸Ibid., pp. 222, 109-111.

liability in respect of sickness, injury and death of seafarers is not regulated therein except in Arts. 5 and 6, which contain the principle of non-discrimination between national and foreign, and resident and non-resident seamen,¹⁰⁹ a principle which had already been enunciated in Convention No. 55.

110

Convention No. 70, despite its comprehensiveness, dealt with certain questions in a general way:

- a) It did not lay down the conditions which have to be met before the seaman is entitled to the benefits prescribed in the Convention.
- b) It did not deal with family and maternity benefits.¹¹¹
- c) It did not prescribe the duration of the benefits except in Art. 3 (2) and did not contain any detailed provisions on repatriation.

Moreover, the Convention is defective in certain respects:

- a) Its scope differs from the scope of both Conventions Nos. 55 and 56, although, if uniformity were to be achieved, the scope of all these Conventions should be identical.¹¹² The same can be said for Convention No. 71 whose scope should have been identical to that of Convention No. 70.
- b) There is no provision concerning continuity of protection for the seafarer passing from the benefits under the shipowners' liability law to those of public social insurance in the Convention; there is no co-ordination between the two systems.
- c) The Convention does not provide for special arrangements which would ensure protection to non-resident seafarers whose country had no social insurance scheme.¹¹³
- d) There is no provision concerning inter-State assistance in the administration of national social insurance schemes.¹¹⁴

¹⁰⁹Article 3, which guarantees to seafarers certain benefits, namely, medical care, board and lodging, and repatriation in the event of their being left behind, by reason of injury or sickness, in a territory other than that in which the ship is registered, does not in any way specify that such benefits must be payable by the shipowner (see also para. 2 of Art. 6). In general, Convention No. 70 does not specify the method of payment of the benefits for which it makes provision. They may be provided out of compulsory social security schemes, or by virtue of laws or regulations relating to shipowners' liability, or, again, in the case of medical care, by a public service; see reply of the ILO Office to a question of the Belgian Government as to whether the Convention in general refers exclusively to the shipowners' liability in *International Labour Code*, 1951, op. cit., pp. 851-852.

¹¹⁰The Office believed that there should be no incompatibility between the two Conventions, Report II, 1946, pp. 26-27. However, it should be noted that this aim cannot be fully achieved if the benefits of Art. 3 are ensured to seafarers by means of shipowner's liability schemes in view of the differences between this Article and the relevant provisions of Convention No. 55.

¹¹¹Compare Arts. 4 (2) and 5 of Convention No. 56.

¹¹²Art. 1 (1) and (2) of Convention No. 70 should be identical to Art. 1 of Convention No. 56 while the whole Art. 1 of Convention No. 70 should be identical to Art. 1 of Convention No. 55. In fact, it should be noted that Convention No. 70 took little account of the discussions held and instruments adopted at the 1936 Conference.

¹¹³See Report II, 1946, p. 16. Art. 7 (1) and (2) of the Convention constitutes an exception to this position: if the country of residence of the seaman has not established a scheme of medical and cash benefits in respect of seafarers resident in that country, the country in the territory of which the ship is registered will treat equally resident and non-resident seafarers in respect of these benefits. This Article has two limitations: first, it comes in operation only if both countries mentioned above are parties to the Convention and, secondly, it ensures equality of treatment for all seafarers in the flag State only in respect of employment injury coverage, see for discussion 28 R.P., pp. 214-5.

¹¹⁴Report II, 1946, p. 9.

The implementation of the provisions of Recommendation No. 75 at the national level would eliminate the major drawbacks of Convention No. 70 but, as will be seen later, the development of agreements of the kind envisaged in the Recommendation has been remarkably slow.

Finally, it should not be overlooked that, although the aspirations of the first Office scheme relating to social security for seafarers (see the beginning of Section 5.3.1.1.) have not been fully realised, 6 countries ¹¹⁵ have ratified all three Conventions Nos. 55, 56 and 71 and the ILO has, therefore, contributed to uniformity of national laws relating to social security of seafarers in these countries, except in the field of compulsory accident insurance.

5.4. The Minimum Standards Convention, 1976 (No. 147) and Social Security for Seafarers

The question of social security in the context of Convention No. 147 was only discussed in a cursory manner at the 1976 Conference.

This Convention provides that a ratifying country should enact legislation laying down "appropriate social security measures" and satisfy itself that the provisions of such laws and regulations are substantially equivalent to the provisions of the Conventions referred to in the Appendix (Art. 2 (a) (ii)). ¹¹⁶

The Conventions concerning social security which are listed in the Appendix are Convention No. 55 (Shipowners' Liability), No. 56 (Sickness Insurance) (Sea) and Medical Care and Sickness Benefits Convention, 1969 (No. 130). However, a country which has ratified Convention No. 147 is only required to have laws and regulations "substantially equivalent" to the provisions of one of the above Conventions at its option.

Critical analysis of the provisions of Convention No. 147 concerning social security

The Appendix to Convention No. 147 is examined later in Chapter 6. Here, a number of observations and suggestions concerning the effectiveness of Convention No. 147 in respect of social security for seafarers may be made:

a) It is not clear what is meant by the words "appropriate social security measures". The meaning of this phrase has not been clarified at the 1976 Conference. ¹¹⁷

b) Convention No. 147 provides ratifying Members with the option to have laws and regulations which are "substantially equivalent" to either Convention No. 55 or 56. As pointed out earlier, these two Conventions are meant to be complementary and it is their combination which secures a re-

¹¹⁵Bulgaria, Djibouti, Egypt, France, Panama and Peru. Other countries have ratified two Conventions out of the three: Greece (55, 71), Italy (55, 71), Norway (56, 71), Algeria (56, 71).

¹¹⁶Art. 2 (b) (ii) requires a ratifying Member to exercise effective jurisdiction or control over ships which are registered in its territory in respect of social security measures prescribed by national laws or regulations.

¹¹⁷See 62 R.P., p. 191.

latively adequate social security regime for seafarers. Their optional application at the national level through Convention No. 147 results in a reduced protection of seafarers in the field of social security.

c) Convention No. 70 is not listed in the Appendix to Convention No. 147 though it does appear in the Appendix to Recommendation No. 155 concerning the Improvement of Standards in Merchant Ships.¹¹⁸ Though Convention No. 70 is an old instrument and has not yet come into force, it is suggested that some of its provisions which command general acceptance could be incorporated in Convention No. 147.¹¹⁹

d) Convention No. 147 requires ratifying Members to lay down appropriate social security measures but it also provides that these measures should be laid down by laws and regulations (Art. 2 (a) (ii)). Consequently, the ratifying Member cannot fulfil the obligations imposed by Convention No. 147, which relate to social security, by means of collective agreements. It is true that Convention Nos. 55 and 56 do not envisage application by means of collective agreements but Art. 1 (a) of Medical Care and Sickness Benefits Convention, 1969 (No. 130) lays down that in that Convention the term "legislation" includes any social security rules as well as laws and regulations. Moreover, Convention No. 70, which is included in the Appendix to Recommendation No. 155, expressly envisages the possibility of ratification by means of collective agreements (Art. 10).¹²⁰

e) It would suffice to notice here that Art. 4 of Convention No. 147 relating to port State Control is unlikely to be interpreted to empower port authorities to take "measures necessary to rectify" any social security conditions which do not conform to the standards of this Convention, viz. the provisions of Conventions Nos. 55, 56 and 130 as qualified by the criterion of "substantial equivalence".¹²¹ However, Art. 4 of the Convention may come into operation in so far as obligations concerning social security are not observed and, as a result, the health of a seaman is affected (for example, failure of the shipowner to discharge his obligation to provide a seaman with medical treatment).

Possible remedies

a) The effectiveness of Convention No. 147 in the field of social security for seafarers will be at risk until more Conventions concerning social security are included in its Appendix. The Appendix requires revision, since the Conventions listed cover only three aspects of social security (medical and

¹¹⁸The maintenance of this Convention in the Appendix to Recommendation No. 155 was decided by 1659 votes to 1413 with 478 abstentions, *ibid.*, p. 197.

¹¹⁹For example, Arts. 3 (1), 4, 5 and 6 (1). This idea is further developed in Chapter 6.

¹²⁰Also, if in the future it will seem desirable that Convention No. 165 concerning Social Security for Seafarers (Revised) be included in the Appendix to Convention No. 147, it should be noted that Art. 1 (b) of the former Convention is identical to Art. 1 (a) of Convention No. 130 mentioned above.

¹²¹This also applies to measures permitting detention of the ship. It would be very difficult for a port authority to establish a connection between non-compliance of "appropriate social security measures" and "conditions on board which are clearly hazardous to safety or health", which is necessary before rectifying measures can be taken. In this respect, the Memorandum of Understanding does not provide any solution either. Section 2.1 of the MOU merely enlists Convention No. 147 among other instruments while Section 4 of Annex 1 of the MOU does not include guidelines concerning the implementation of social security standards. The result is that even in progressive states there is a lack of adequate social security port State control. For an analysis of Art. 4 of Convention No. 147 and the Memorandum of Understanding, see Chapter 6; see also the analysis of the provisions of Convention No. 147 in relation to the question of wages, hours of work and manning in Chapter 4, Section 4.1.5.3.4.

sickness benefits and the shipowner's liability in respect of sickness, injury or death of seafarers). The inclusion of certain provisions of Convention No. 165 would be advisable.¹²²

b) The conclusion of collective agreements relating to social security should be recognised as a means of complying with the provisions of Convention No. 147, which should, therefore, be amended to this effect. This would facilitate ratification by countries where social security protection for seafarers is guaranteed by collective agreements and not by legislation.¹²³

c) The port State Control provisions of the Convention should be amended to enable port authorities to take measures against a ship to rectify social security conditions on board that are inferior to the standards contained in its Appendix, as amended. At the first stage, these measures may be taken only against ships registered in the territory of a ratifying Member.¹²⁴

5.5. Recent attempts to regulate social security for seafarers at the international level: Convention No. 165 (1987)

5.5.1. Introduction

At its 62nd (Maritime) Session in 1976 the International Labour Conference adopted a resolution inviting the Governing Body of the International Labour Office to instruct the Director-General to initiate a survey of the extent to which provisions concerning social security and conditions of employment are applied on board flag-of-convenience ships, and to report to the Joint Maritime Commission and to the Governing Body the results of such a survey.¹²⁵

The first results of the survey were submitted to the Joint Commission at its 23rd session in 1980.¹²⁶ A questionnaire was sent to 23 countries to which all but three countries (Liberia, Somalia, Yugoslavia) replied.¹²⁷ The subject was placed again on the agenda of the 24th session of the Joint

¹²² Moreover, other Conventions of great value in this area are not listed therein; these are: the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Equality of Treatment (Social Security) Convention, 1962 (No. 118) and the Maintenance of Social Security Rights Convention, 1982 (No. 157).

¹²³ During the preparatory stages of Convention No. 147 Pakistan stated that it was impossible for it to institute social security measures at the present time, not for lack of goodwill, but because no such measures existed in any other field in Pakistan, Report V (1), 1976, p. 29.

¹²⁴ For further details concerning how Art. 4 of Convention No. 147 should be amended so that its effectiveness in the field of maritime labour would be enhanced, see *infra* Chapter 6, Section 6.1.2., pp. 452-4; Section 6.3 C), pp. 478-81.

¹²⁵ See Resolution III: Resolution Submitted to the Conference on the Proposal of the Committee on Sub-standard Vessels, Particularly Those under Flags of Convenience, 62 R.P., p. 324. For the previous forms of this Resolution and the relevant discussions, see *ibid.*, pp. 227-9, 274-5.

¹²⁶ See International Labour Organisation, Joint Maritime Commission, 23rd session, Geneva, 1980, *Social security and employment conditions of seafarers serving in ships flying flags other than those of their own country (including flags of convenience)*, JMC/23/1.

¹²⁷ It should be noted that the question of social security for seafarers was at that time linked with the question of flag-of-convenience vessels. The Seafarers admitted that there was a lack of information which would render difficult the examination of the question at the forthcoming maritime session of the ILO Conference. They thought that Convention No. 147 was a valuable instrument but could not solve all the problems. In a resolution, the Seafarers requested the Governing Body, *inter alia*, to urge certain member States to appoint "ILO inspectors" to survey physically ships whose crews were not covered by collective agreements as well as ships from countries which did not supply information concerning employment and social security conditions. On the other hand, the Shipowners were of the opinion that any new instrument should be directed not only towards FOC vessels but should apply to all vessels and,

Maritime Commission ¹²⁸ where it was decided that the question of social security for seafarers should be considered by the Preparatory Technical Maritime Conference in 1986. ¹²⁹ By this time three important issues had been decided by the Office: a) the proposed instrument would only deal with the question of social security of seafarers, excluding the question of employment conditions of foreign seamen on board ships belonging to the flag State, b) the examination of this question should not be restricted to FOC vessels but would encompass all vessels and c) social security protection for both national and non-national seafarers would be considered. ¹³⁰ Again, the views of shipowners and seafarers differed widely, as illustrated below.

5.5.2. Position of the Shipowners and the Seafarers in 1986

A) Views of the Shipowners

These were as follows:

- a) Social security instruments should be made more effective; Convention No. 70 (1946) had proved to be ineffective and had not come yet into force.
- b) Any new instrument adopted should be included in the Appendix to the Minimum Standards Convention, 1976 (No. 147).
- c) The provisions of Conventions No. 55 (concerning the Shipowner's Liability (Sick and Injured Seamen)) and No. 70 (Social Security for Seafarers) for the protection of seafarers in the event of sickness or accident during a voyage and their repatriation if they had to be put ashore for medical treatment had been widely put into practice; they could, therefore, be excluded from any revision.
- d) Seafarers serving in foreign ships should receive adequate protection against the different contingencies under the legislation of their own country.
- e) Three principles should be taken into account in the drafting of an instrument concerning the social security of seafarers:

further, suggested that it was not necessary that employment conditions on FOC vessels should be reviewed, except in the field of social security; see for the discussions and the diametrically opposite views of the Seafarers and Shipowners, International Labour Organisation, Joint Maritime Commission, 24th session, Geneva, Sep. 1984, *Social security and employment conditions of seafarers serving in ships flying flags other than those of their own country (including flags of convenience)*, JMC/24/1, pp. 1-2.

¹²⁸The Office, *inter alia*, noted the "striking" absence of bilateral or multilateral social security agreements necessary for the continuity of protection of non-national seafarers. It suggested that all Conventions previously adopted by the ILO in this area, namely Conventions Nos. 55, 56, 70 and 71, should be revised. Particularly, it pointed out that Convention No. 70 was the most advanced instrument on social security for seafarers at that date, but it had been adopted too early and was subsequently outmoded by the adoption of higher standards of social security, such as those contained in Conventions Nos. 102, 118, 121, 128, 130 and 157; see *ibid.*, pp. 40-42.

¹²⁹See International Labour Organisation, Preparatory Technical Maritime Conference, Geneva, May 1986, *Social security protection for seafarers including those serving in ships flying flags other than those of their own country*, Report II, Annex, Resolution on Social Security, pp. 41-42.

¹³⁰Moreover, the Office was of the opinion that the Convention would be more flexible if two levels of social security standards were prescribed therein, the minimum level being that to be attained by developing countries, *ibid.*, pp. 27-8. For an analysis of the instrument proposed by the Office and the 1986 Office draft, see *ibid.*, pp. 28-40.

- i) national laws should provide for national seafarers' social security benefits not less favourable than those prescribed for shore workers;
- ii) such national arrangements should be available to foreign nationals who are domiciled or resident in the country concerned;
- iii) Members should ensure that national social security arrangements should be available to their national seafarers who are employed on board vessels registered in foreign countries and that such seafarers should not be disadvantaged vis-à-vis their national arrangements as a result of their undertaking such employment.¹³¹

f) Fishermen should be excluded from the Convention.

B) *Views of the Seafarers*

These were as follows:

a) They preferred a comprehensive instrument which would also cover fishermen. The adoption of this instrument would necessitate the revision of Conventions Nos. 55, 56, 70 and 71.

b) The applicable law, as far as social security for seafarers is concerned, should be the law of the flag State, so that all the seafarers on board the same ship would fall under the same legislation. For this reason non-national seamen, including non-residents, should receive the same social security protection as national seamen.¹³²

The above views revealed the main area of discord, even among governments, at the 1987 Conference, namely whether the law of the flag or the law of the country of residence should apply to seafarers serving in foreign ships. In the absence of Convention No. 165, adopted by the 1987 Conference, no definite rule concerning the position in international law as regards the applicable law could be laid down. At present countries are almost equally divided on this point.

¹³¹Ibid., pp. 1-2.

¹³²Ibid., pp. 2-3.

5.5.3. State practice concerning social security for seafarers in 1986 ¹³³

I. *Protection of national seafarers* ¹³⁴

A) Protection of national seafarers serving on board national ships

Henceforth, when reference is made to "contingencies" nos. 1, 2 etc., this implies the contingencies listed in n. 134.

a) 21 countries (including Canada, France, the F.R.G., Greece, Italy, Japan, Netherlands, Norway, the USSR and the U.K.) out of 56 afford protection to seafarers in respect of all contingencies.

b) Contingency no. 2 is not covered in 7 countries. ¹³⁵

c) Contingency no. 3 is not available in Ghana.

d) Contingencies nos. 4 and 6 are not covered in 9 countries. ¹³⁶

e) Contingency no. 7 is excluded from coverage in 11 countries. ¹³⁷

f) Contingency no. 8 is not available in 19 countries. ¹³⁸

g) Contingency no. 9 is not covered in 26 countries. ¹³⁹

h) Contingency no. 10 is not provided for in 11 countries. ¹⁴⁰

B) Protection of national seafarers not employed on board national ships but awaiting employment ¹⁴¹

¹³³The information concerning State practice on social security is based on the replies of 56 maritime countries to the relevant ILO questionnaires from 1980 to 1984. These countries are: Algeria, Argentina, Australia, Austria, Bangladesh, Barbados, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Cuba, Cyprus, Denmark, Egypt, Ethiopia, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guyana, Hungary, India, Indonesia, Iraq, Italy, Japan, Madagascar, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, the Philippines, Portugal, Qatar, Seychelles, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, Turkey, the USSR, the U.K., the U.S., Uruguay and Venezuela, *PTMC*, Report II, 1986, pp. 5-24.

¹³⁴The ILO Office defined the term "social security protection" as follows: "benefits in cash and medical and allied benefits, which are provided by the national legislation to seafarers and to their dependants in case of the following contingencies: 1) temporary incapacity for work due to sickness or injury of an occupational origin (i.e. directly connected with work or employment), 2) temporary incapacity for work due to sickness or injury of a non-occupational origin, 3) permanent disability due to accidents or diseases of an occupational origin, 4) permanent disability due to accidents or diseases of a non-occupational origin, 5) death due to accidents or diseases of an occupational origin, 6) death due to accidents or diseases of a non-occupational origin, 7) maternity, 8) responsibility for maintaining dependants (in respect of which family benefits are usually provided), 9) involuntary unemployment and 10) repatriation, *PTMC*, Report II, 1986, pp. 23-4.

¹³⁵Australia, Barbados, Liberia, Madagascar, Morocco, Sri Lanka and Thailand.

¹³⁶Australia, Bangladesh, Barbados, Ghana, Indonesia, Madagascar, Morocco, Sri Lanka and Thailand.

¹³⁷Australia, Barbados, Ghana, Malaysia, Morocco, New Zealand, Pakistan, Qatar, Sri Lanka, Thailand and the U.S. India and Switzerland stated that no women are employed on board ships.

¹³⁸Australia, Bangladesh, Barbados, Colombia, Cyprus, Egypt, Ethiopia, Ghana, Guyana, Liberia, Madagascar, Morocco, Peru, Qatar, Sri Lanka, Sudan, Switzerland, Thailand and the U.S.

¹³⁹Algeria, Bangladesh, Barbados, Brazil, Colombia, Cuba, Ghana, Guyana, India, Indonesia, Iraq, Liberia, Madagascar, Mexico, Morocco, New Zealand, Panama, Peru, Philippines, Qatar, Sri Lanka, Sudan, Thailand, Turkey, the U.S. and Venezuela.

¹⁴⁰Australia, Austria, Chile, Cyprus, Egypt, Ghana, Guyana, Madagascar, Seychelles, Sri Lanka and Sudan.

¹⁴¹Except in 4 countries (the F.R.G., Netherlands, Sweden and Switzerland), in respect of social security no country makes a distinction between national seafarers under contract and those not under contract. Most replies did not refer to repatriation benefits.

a) In 17 countries the same protection is afforded to such seamen as when they are employed at sea. ¹⁴²

b) Reduced protection is available to these seamen in 14 countries, which mainly excluded contingencies directly connected with work or employment. ¹⁴³

c) No protection is afforded to these seamen in 14 countries. ¹⁴⁴

C) Protection of national seafarers employed on board foreign ships

a) In at least 26 countries legislation provides for the coverage of such seamen. ¹⁴⁵

b) However, conditions which have to be met in order that these seamen be entitled to protection and coverage differ widely in various countries:

i) These conditions include: temporary sending of the seaman on board a vessel registered abroad (3); charter of vessel on a bare-boat basis or ownership or operation by a national shipowner (5); protection at the request of the shipowner (2) and the foreign vessel subject to national laws and regulations relating to the prevention of occupational accidents and the supervision of safety (1); residence in the national territory (1); employment under national articles of agreement (1); that the contract of employment is entered into in the national territory and the person by whom wages are paid has a place of business therein or that the contract of employment is entered abroad and the seafarer is paid by some person other than the owner of the vessel, if that person has his principal place of business in the national territory (1).

ii) Coverage is complete in 10 countries, ¹⁴⁶ but it is incomplete in 11: the different contingencies covered in each of these countries do not permit any kind of classification. ¹⁴⁷

D) Types of schemes covering different contingencies in respect of national seafarers

a) General social security schemes covering all employed persons, or active population, or all residents apply to seafarers in the large majority of the countries (32). ¹⁴⁸

¹⁴²Canada, GDR, Italy, Japan, Mexico, Netherlands, Norway, Panama, Peru, Portugal, Spain, Switzerland, Turkey, USSR, the U.K., the U.S. and Uruguay. The same applies in the F.R.G. and Sweden in respect of employees who remain under contract.

¹⁴³Algeria, Argentina, Bangladesh, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, the F.R.G. (between periods of employment), Ghana, India, New Zealand and Sweden (between periods of employment).

¹⁴⁴Australia, Barbados, Brazil, Ethiopia, Guyana, Indonesia, Liberia, Malaysia, Morocco, Pakistan, Philippines, Qatar, Seychelles and Venezuela.

¹⁴⁵Argentina, Bangladesh, Cuba, Finland, France, the F.R.G., Greece, Guyana, India, Italy, Japan, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Philippines, Portugal, Spain, Sri Lanka, Sweden, Switzerland, Turkey, USSR and the U.K.

¹⁴⁶An observation must be made here in respect of the above data: countries which cover all contingencies usually lay down conditions governing the maintenance of protection. On the contrary, countries which only cover certain contingencies do not usually impose additional requirements. In three countries, Bangladesh, India and Pakistan, coverage is complete without any further conditions.

¹⁴⁷In USSR the question does not arise, since national seafarers are employed on board foreign vessels only under a Soviet technical assistance project and remain subject to national legislation. In Sweden the coverage is not normally complete but when a national seaman is employed on board a foreign ship chartered on a bare-boat basis all contingencies are covered.

¹⁴⁸Algeria, Argentina, Austria, Bangladesh, Barbados, Brazil, Canada, Colombia, Cuba, Cyprus, Denmark, Egypt, the F.R.G., the GDR, Ghana, Guyana, Hungary, Indonesia, Iraq, Liberia, Madagascar, Malaysia, Mexico, Morocco, Netherlands, Peru, Thailand, the USSR, the U.K., the U.S., Uruguay and Venezuela.

b) Special schemes for seafarers; 7 countries have these. ¹⁴⁹

c) A combination of a special scheme for seafarers and a general scheme; this is in operation in 9 countries, each covering certain contingencies. ¹⁵⁰

d) The general or special social security schemes for seafarers or both supplemented by shipowner's liability schemes; this is done in 22 countries. ¹⁵¹ The latter schemes usually cover sickness and accident during voyage and repatriation.

In two countries (Ethiopia and Sri Lanka) only a shipowner's liability scheme exists while in Colombia this scheme applies in regions where a social security general scheme is not yet applicable.

E) Social security benefits granted (nature, conditions, duration, rates, etc.)

a) Sickness benefits

i) In many countries the shipowner is responsible for the payment of medical care expenses in the event of sickness during the voyage. When the shipowner's liability comes to an end, the public social security schemes are applicable.

ii) In order that a seaman be entitled to social security benefits he must be ill, incapacitated for work and he must not receive wages or sick leave payments from his employer. Certain countries also provide for a minimum qualifying period of contribution but other countries have eliminated this requirement. The length of the qualifying period for cash sickness benefits differs widely in various countries while the qualifying period for cash maternity benefits is usually longer than that required for the payment of cash sickness benefits. Usually, no minimum qualifying period is required for medical benefits.

iii) The amount of cash sickness benefits payable usually varies from 50 to 75% of the seaman's earnings while in some countries it is even higher. Usually, the duration of cash benefits in case of sickness is not shorter than 26 weeks. In some countries the duration of benefits is longer. Thereafter, a seaman is entitled to invalidity pension in most countries. The amount of cash maternity benefits differs widely. In many countries, such benefit is paid for a certain period before and after childbirth and the wives of insured seamen are also covered. As regards medical care, it is provided in most countries for an unlimited period. Hospitalisation is provided for a limited period in certain countries. Medical care is also provided to seafarers' dependants but in certain countries it is more limited than that afforded to seafarers.

iv) In the majority of countries social security schemes are financed by contributions from the employers and the workers but some legislation provides for government contributions. In some cases in Eastern European countries contributions are paid mostly by state-owned enterprises.

b) Employment injury benefits

¹⁴⁹Chile, France, Greece, India, Japan, Philippines and Spain.

¹⁵⁰Australia, Belgium, Finland, Italy, Norway, Pakistan, Portugal, Sweden and Switzerland.

¹⁵¹Argentina, Austria, Bangladesh, Barbados, Belgium, Denmark, the F.R.G., Finland, France, Ghana, Greece, India, Iraq, Japan, Liberia, Morocco, New Zealand, Norway, Pakistan, Panama, Qatar and Sweden.

i) No minimum qualifying period of insurance or employment is usually required for entitlements to cash benefits in the case of unemployment injury which results in temporary disability. The amount of such cash benefits differs widely but usually is at least 50% of the seaman's average earnings during a period before the injury. The duration of such benefits varies from 26 to 52 weeks. Cash benefits in cases of permanent disability generally consist of a pension payable for life. In few countries a lump sum is given instead of a pension. The pension is usually equal to 60-75% of the seaman's earnings and there are no qualifying period requirements. In the case of permanent partial disability either a fraction of the pension or a lump sum is paid.

ii) Apart from cash benefits, a seaman is entitled to medical care in case of employment injury. If this injury results in the death of a seafarer, pensions are paid to the seafarer's dependants. No minimum qualifying period is required for the payment of these pensions. The rates of the pensions granted to seafarers vary from 30 to 60% of the seaman's average earnings immediately before his death. The rates of the pensions provided to other members of the family are lower. In some countries not a pension but a lump sum is paid.

iii) Social security benefits in case of employment injury are usually financed by employers' contributions. If, however, employment injury protection has merged with other social security schemes, contributions from all three parties are required.

c) Old age, invalidity and death benefits

i) The attainment of a specified age (usually 60 to 65) and a minimum qualifying period of employment (5 to 15 years) is usually required for the granting of the old age benefit. Retirement from the covered employment is an additional requirement. If a seaman is retired before he reaches the age specified, he is usually entitled to a reduced benefit.¹⁵² These pensions are in most countries in the form of wage-related, periodic payments while in other countries they consist of a fixed sum or of a combination of the two. The actual rates of these benefits are calculated using different criteria in various countries.

ii) Incapacity for work and a minimum qualifying period of contributions or employment (usually 3 to 5 years) are two prerequisites for the payment of invalidity pensions. Full or partial invalidity pension is calculated on the basis of the percentage of the loss of working capacity (usually 66 2/3 % for entitlement to full pension). These pensions are calculated on the basis of percentages of average earnings. In the case of partial disability a reduced pension is paid. Some countries pay lump sums instead of pensions.

iii) Survivors pensions are available to the seafarer's dependants if either the deceased seafarer had already been a pensioner at the time of his death or had completed a minimum qualifying period of employment or contribution. These pensions are in the form of periodic payments in most coun-

¹⁵²Full pension is paid in some cases even before the attainment of the age specified in the case of arduous or unhealthy work, which may include maritime employment as in Greece and the USSR.

tries expressed as a percentage of the seafarer's pension at the time of his death or of the pension to which he would have been entitled if he had reached the appropriate age (50% to 75% of the seafarer's pension). In some countries lump sums are paid. Sometimes lifetime pensions are payable to widows while other countries impose several limitations (age, children in care). Special provisions exist for orphans' pensions.

iv) The above benefits are financed by contributions from employers and workers and, in many countries, from governments. In most countries with bipartite financing, the employers pay a larger share than the workers. These contributions are either wage-related or flat-rate.

d) Unemployment benefits

i) Three conditions have to be met before a seaman is entitled to these benefits: i) he must be involuntarily unemployed, ii) he must have completed a minimum qualifying period of contribution or employment (usually six months of insurance before unemployment began) and iii) registration with an employment office.

ii) These benefits are expressed either as i) wage-related percentages of average earnings (40 to 75 % of average wages) during a certain period or ii) flat rates.¹⁵³ The duration of these benefits usually is not shorter than 26 weeks. In certain countries unemployment assistance schemes exist whereby a seafarer continues to receive unemployment benefits after he has exhausted all his rights under the regular unemployment insurance scheme.

iii) Unemployment insurance contributions usually are a fixed percentage of covered wages. In some cases, governments pay contributions. In some countries contributions are paid by both employers and workers while in other countries contributions are only paid by the employer. The assistance schemes are entirely financed by governments.

e) Family benefits

i) There are two kinds of family benefit schemes: i) those which apply to all resident seafarers and ii) those which apply to all employed persons.

ii) Most countries pay allowances with the first child. The entitlements are closely linked with the child's school leaving age but in some cases extensions are provided. Allowances for children are fixed uniform amounts of money for every eligible child regardless of the number of children (majority of countries) or they increase with each additional eligible child. Workers do not contribute to family allowances.

F) Continuity of protection of seafarers covered by special schemes

In some of the countries, which have special social security schemes for seafarers, maintenance of the rights in course of acquisition is provided for seafarers who have left sea-service to work ashore.¹⁵⁴

¹⁵³ A combination of both systems is in force in the U.K.

¹⁵⁴ Finland, France, Greece, Italy, Japan, Norway, Spain and Sweden.

II. *Protection of non-national seafarers* ¹⁵⁵

A) Protection of non-national seafarers resident in the country in which the ship is registered and employed on board national vessels

a) Full equality of treatment is assured to these seafarers in 31 countries. ¹⁵⁶

b) Restrictions on equality of treatment of such seafarers are imposed in 9 countries. ¹⁵⁷

These restrictions are based on the type of contingency, the type of scheme by which the seaman is covered, recruitment in national territory, nationality, etc). It seems that in three countries (Indonesia, Egypt and Mexico) non-national seafarers are totally excluded from coverage.

B) Protection of non-national seafarers not resident in the country in which the ship is registered but employed on board vessels registered in that country

a) Full equality of treatment is assured in 13 countries. ¹⁵⁸

b) Restrictions on equality of treatment are imposed in 15 countries. ¹⁵⁹ Again, these restrictions are based on the type of the scheme by which the seaman is covered, the type of contingency, the capacity in which the seaman is employed on board ship, the type of trade and the country of residence of the seaman.

c) No social security protection of non-national non-resident seafarers is provided for in 10 countries. ¹⁶⁰

C) Equality of treatment of national and non-national seafarers by means of bilateral or multilateral agreements or both between the flag State and other countries

a) The EEC countries are bound by Community regulations to secure equality of treatment of national and non-national workers including seafarers.

b) Equality of treatment of all nationals of the contracting Parties is compulsory for states parties to the European Convention on Social Security.

c) The Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) have concluded a multilateral agreement which ensures non-discrimination for seafarers employed on board a ship flying the flag of one of these countries, if they are resident in one of these countries. ¹⁶¹

¹⁵⁵No foreign seafarers are employed on board ships flying the flag of the following countries: Bangladesh, Ethiopia, Hungary, India, Pakistan, Turkey and the USSR. In Algeria and Sudan foreign seafarers are employed only if there is a lack of nationals. In the GDR, when, exceptionally, foreign seafarers are employed they enjoy the same benefits as national seafarers.

¹⁵⁶Argentina, Australia, Barbados, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Cyprus, Denmark, Finland, the F.R.G., Ghana, Guyana, Iraq, Italy, Japan, Liberia, Morocco, Netherlands, New Zealand, Norway, Panama, Philippines, Portugal, Qatar, Sri Lanka, Sweden, the U.K. and Venezuela.

¹⁵⁷Algeria, Cuba, France, Greece, Malaysia, Spain, Switzerland, the U.S. and Uruguay.

¹⁵⁸Argentina, Australia, Brazil, Bulgaria, Canada, Colombia, Iraq, Liberia, Morocco, the Philippines, Portugal, Qatar and Sri Lanka.

¹⁵⁹Algeria, Austria, Belgium, Denmark, the F.R.G., Greece, Ethiopia, Finland, France, Italy, Norway, Sweden, Switzerland, the U.K. and the U.S.

¹⁶⁰Barbados, Cyprus, Egypt, Ghana, Guyana, Japan, Mexico, the Netherlands, Panama and Spain.

¹⁶¹This agreement was signed by Denmark, Finland, Iceland, Norway and Sweden on 5 March 1981 and entered into force on 1 January 1982. It is mainly based on the principle of residence but in the case of seafarers the law applicable is that of the country under whose flag a seafarers sails; for an analysis see A. Trier, "The Nordic Social Security Con-

d) Bilateral agreements have been concluded by 27 countries ¹⁶² but there remain 26 countries that have not concluded such agreements. ¹⁶³

5.5.4. The Office drafts and the 1986 Preparatory Maritime Conference

The 1986 Office draft was based on three main considerations: a) that the Convention should usually be applicable i) to all foreign seafarers irrespective of nationality or ii) to foreign seafarers nationals of a Member, refugee seafarers and stateless persons resident in the territory of a Member, b) that the primary responsibility for the application of the Convention lay with the flag State with certain exceptions ¹⁶⁴ and c) that rights in course of acquisition should be maintained. ¹⁶⁵

At the Preparatory Conference the Shipowners objected to the Office draft for two reasons: they were opposed to the inclusion of fishermen in the Convention and they thought that it was the country of residence which should have the primary responsibility for the protection of foreign or migrant seafarers. The seafarers supported the flag criterion. Some governments also spoke in favour of the flag criterion while others preferred the residence criterion. Other governments were in favour of a Recommendation rather than a Convention. ¹⁶⁶ Considerable discussion ensued about the question of whether the shipowner's liability should be included in the Convention. The Shipowners and the Government of Japan were against that idea while the representative of the ILO Office thought that the proposed instrument should be as comprehensive as possible. The latter view was shared by the Seafarers and the USSR. It was decided that two alternatives should be included in the Office draft, one laying down the responsibilities of the shipowner in more detail while the other simply referring to the provisions concerning the shipowner's liability in any Member. ¹⁶⁷

Again, the Preparatory Conference could not reach an agreement over the question concerning the applicable legislation. It was decided that two alternatives should be included in the 1987 Office draft: a) the applicable law should be the law of the flag subject to exceptions (point 20 of the 1986

vention", *ILR*, Vol. 121, No. 3, May-June, 1982, pp. 259-269; Nordic Countries: "Nordic Social Security Convention", *SLB*, 4/1981, pp. 485-486.

¹⁶²Algeria, Argentina, Austria, Belgium, Brazil, Bulgaria, Chile, Cyprus, Finland, France, the F.R.G., Italy, Madagascar, Morocco, Netherlands, Norway, Panama, Peru, Philippines, Portugal, Spain, Sweden, Switzerland, Turkey, the U.K., the U.S. and Uruguay. For the countries between which bilateral agreements have been concluded, see *PTMC*, Report II, 1986, pp. 22-23.

¹⁶³Australia, Bangladesh, Barbados, Colombia, Cuba, Egypt, Ethiopia, the GDR, Ghana, Greece, Guyana, Hungary, India, Indonesia, Iraq, Japan, Liberia, Malaysia, Mexico, Pakistan, Qatar, Sri Lanka, the Sudan, Thailand, USSR and Venezuela. The Office observed that "Considerable gaps subsist in the network of bilateral or multilateral social security agreements which are necessary to solve the problems of foreign or migrant seafarers. The near total absence of such agreements among or with the Asian maritime countries is striking", *ibid.*, p. 26.

¹⁶⁴*Ibid.*, p. 31; see also Points 17-21 of the Office draft, *ibid.*, pp. 37-38.

¹⁶⁵*Ibid.*, pp. 31-32; see also Points 22-27 of the Office draft, *ibid.*, pp. 38-39.

¹⁶⁶International Labour Conference, 74th (Maritime) Session 1987, *Social security protection for seafarers including those serving in ships flying flags other than those of their own country*, Report III (1), pp. 12-14; also see for the Shipowners' and Seafarers' views, *ibid.*, pp. 35-36.

¹⁶⁷*Ibid.*, pp. 19-20.

Office draft) and b) the law applicable would be decided by mutual agreements taking into account both the flag and residence criteria, plus the criteria of the place of business and the residence of the employer.¹⁶⁸

Finally, an amendment was submitted by the Government members of France, the Federal Republic of Germany, Greece, Italy, the Netherlands, Portugal, Spain and the U.K. to allow Members to derogate from the provisions of the new instrument by special bilateral or multilateral agreements, provided these did not affect the rights and obligations of other Members and afforded social security protection to seafarers that was, in the aggregate, at least as favourable as they received under the new instrument. This proposal was finally adopted but it applied only to the maintenance of rights.¹⁶⁹

Certain controversial issues concerning social security for seafarers revisited

The Office having noted that some of the most important issues of social security for seafarers, namely the inclusion of the liability of the shipowner in the Convention, the maintenance of the rights in course of acquisition in the case of a seafarer switching to shore employment, the law applicable to foreign or migrant seafarers and equality of treatment of nationals and non-nationals, had not been resolved at the Preparatory Conference decided to send a questionnaire to Governments on these questions.¹⁷⁰

a) The shipowner's liability: Out of 48 governments 23¹⁷¹ were in favour of more detailed regulation of the shipowner's liability in the Convention (Alternative I of 1987 the Office draft) while 23 held the opposite view (Alternative II of the draft).¹⁷²

¹⁶⁸The second alternative was a result of a proposal put forward by the Government of Sweden, *ibid.*, pp. 22-23. Many countries, among them, Greece, the U.K., Netherlands were in favour of the residence criterion. The Government of Japan favoured the residence of the employer criterion.

¹⁶⁹*Ibid.*, p. 25. See also Art. 29 of the 1987 Office draft. For the text of the 1987 Office draft, see *ibid.*, pp. 37-47. It is important to note that one Government, Belgium, was of the opinion that this provision should apply to the protection of the foreign or migrant seafarers as well, International Labour Conference, 74th (Maritime) Session 1987, *Social security protection for seafarers including those serving in ships flying flags other than those of their own country*, Report III (2), pp. 19-20.

¹⁷⁰Report III (1), 1987, pp. 48-49. Information on these points is based on the replies of 50 member States (Argentina, Australia, Austria, Bahamas, Bahrain, Belgium, Canada, Chile, China, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Ecuador, El Salvador, Ethiopia, Finland, the FRG, Gabon, the GDR, Greece, Guatemala, Hungary, Indonesia, Iraq, Ivory Coast, Japan, Liberia, Madagascar, Malaysia, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Portugal, Spain, Sweden, Switzerland, Turkey, Ukrainian SSR, United Arab Emirates, the USSR, the U.K., the U.S. and Venezuela, Report III (2), 1987.

¹⁷¹Argentina, Austria, Bahrain, China, Cyprus, the GDR, the FRG, Guatemala, Indonesia, Iraq, Japan, Madagascar, New Zealand, Nigeria, Peru, Portugal, El Salvador, Spain, Turkey, Ukrainian SSR, United Arab Emirates, USSR and Venezuela.

¹⁷²Australia, Belgium, Canada, Chile, Gabon, Ivory Coast, Colombia, Cuba, Czechoslovakia, Denmark, Djibouti, Ethiopia, Greece, Hungary, Liberia, Malaysia, Netherlands, Norway, Pakistan, Sweden, Switzerland, the U.K. and the U.S. Two governments Ecuador and Finland held other views, Report III (2), 1987, pp. 5-7. The seafarers' organisations were in favour of Alternative I while the shipowners' associations favoured Alternative II, *ibid.*, pp. 7-8.

b) Law applicable to foreign or migrant seafarers: Out of 48 governments 23 ¹⁷³ were in favour of the flag criterion (Alternative I) while 20 ¹⁷⁴ favoured determination of the applicable legislation by conclusion of mutual agreements (Alternative II).

c) Equality of treatment of national and non-national seafarers: Out of 33 countries, 15 were of the opinion that equality of treatment should be guaranteed to all foreign seafarers irrespective of nationality (Alternative I), ¹⁷⁵ while 9 thought that equality of treatment should only be guaranteed to foreign seamen who are nationals of a Member, refugees or stateless persons irrespective of residence (Alternative II). ¹⁷⁶

Following the consideration of the replies of the governments the Office decided to maintain the original Office text, as far as the shipowner's liability and the equality of treatment of nationals and non-national seafarers were concerned. It inserted a paragraph ensuring continuity of protection of seafarers passing from a special to a general social security scheme. It also added a third option, based on the flag criterion, to the possibilities open to ratifying countries regarding determination of the legislation applicable to foreign or migrant seafarers. ¹⁷⁷

5.5.5. The 1987 Conference

In the Committee on Social Security the Employers' reiterated the views which they had expressed at the Preparatory Conference while the Seafarers' members maintained a reserved attitude and awaited the governments' views. All members emphasised the complexity of the question of the social security for seafarers. ¹⁷⁸ Considerable discussion arose with regard to the number of branches of social security benefits in respect of which a ratifying Member would undertake obligations. The Employers and most developing countries preferred to limit themselves to only three branches while the Workers proposed that shipowners and governments accept four or five branches. In the end, the Office text was maintained limiting the obligation to 3 branches. ¹⁷⁹

¹⁷³ Argentina, Austria, Belgium, Chile, China, Colombia, Cyprus, Denmark, Djibouti, Ecuador, Ethiopia, Finland, the GDR, Guatemala, Iraq, Ivory Coast, Madagascar, Malaysia, Nigeria, Peru, Spain, Ukrainian SSR, United Arab Emirates, USSR, the U.S and Venezuela.

¹⁷⁴ Australia, Bahamas, Bahrain, China, Cuba, Czechoslovakia, Finland, Gabon, Greece, Guatemala, Hungary, Indonesia, Japan, Liberia, Netherlands, New Zealand, Norway, Sweden, Turkey and the U.K. 5 countries (Finland, the F.R.G. Portugal, El Salvador and Switzerland) had other views. Generally, the Shipowners were in favour of Alternative II while the Seafarers preferred Alternative I; however, the representatives of the Swiss and British seafarers preferred Alternative II, Report III (2), 1987, pp. 11-16.

¹⁷⁵ Australia, Colombia, Cuba, Cyprus, Czechoslovakia, Djibouti, Ecuador, the GDR, Indonesia, Iraq, Nigeria, Portugal, El Salvador, Turkey and USSR.

¹⁷⁶ Bahrain, Ethiopia, Finland, the FRG, Greece, Japan, Liberia, Netherlands and Sweden. 9 countries, namely Austria, Belgium, Denmark, New Zealand, Norway, Switzerland, Ukrainian SSR, the U.K. and the U.S. had other views. The shipowners' associations were in favour of Alternative II while the seafarers' organisations in favour of Alternative I, Report III (2), 1987, pp. 16-19. It can be seen from the replies of the governments that most governments which favour the residence criterion with regard to the legislation applicable to foreign or migrant seafarers are opposed to equality of treatment of national and foreign seafarers regardless of residence.

¹⁷⁷ Ibid., p. 16. For the text of the 1987 Office draft, see *ibid.*, pp. 22-44 (English text).

¹⁷⁸ *R.P.*, pp. 14/2-14/4.

¹⁷⁹ Ibid., pp. 14/5-14/6.

Despite the fact that the Employers' group and many government delegates took the opposite view, the Committee decided that the Convention should contain provisions regulating the liability of the shipowner in respect of social security benefits.¹⁸⁰

The most controversial issue in the Committee on Social Security was the choice of law applicable to foreign or migrant seafarers combined with the equality of treatment of national and non-national seafarers.¹⁸¹ A compromise formula was agreed under which the flag criterion, the residence criterion and mutual agreements were accepted on an equal footing as the criteria determining the law applicable. As regards the equality of treatment of national and non-national seafarers, many governments thought that the benefits of the Convention should not extend, without any other condition, to all non-national seafarers. Furthermore, though the Employers and certain governments accepted that the benefits of the Convention should extend to non-national seafarers who were nationals of another Member they considered that in such cases the criterion of residence in the territory of the Member to whose legislation the seafarer concerned is subject should play an important role.¹⁸² Again, the Members of the Committee agreed on a compromise wording which ensured equality of treatment of national and non-national seafarers, the residence test being expressly applied to both nationals and non-nationals. The possibility of derogation from certain articles of the Convention by means of the adoption of bilateral and multilateral instruments was extended to the provisions concerning the protection of foreign or migrant seafarers.¹⁸³

At the plenary sitting of the Conference, the Chairman and the Vice-Chairmen of the Committee on Social Security pointed out that the instrument arrived at was the result of a compromise and aimed to accommodate the divergent national legislations in the area of social security for seafarers.¹⁸⁴ The Convention was adopted by 198 votes to 3, with 4 abstentions.¹⁸⁵

5.5.6. Analysis of the provisions of Convention No. 166

The intention of the Office was to produce a single, comprehensive instrument covering all aspects of social security: basic provisions, co-ordination of national legislation, obligations of the

¹⁸⁰Alternative II of the Office draft which provided that the Convention did not affect the obligations of the shipowner under national laws and regulations was rejected by 14688 votes in favour, 15552 against, with 648 abstentions. For a discussion see *ibid.*, pp. 14/8-14/9.

¹⁸¹The writer was present at that meeting of the Committee on Social Security and noted that numerous amendments were moved. Shipowners, seafarers and governments held widely differing views on this issue and it seemed that an impasse would be reached. The text arrived at represents a compromise between conflicting views. For a discussion, see *ibid.*, pp. 14/10-14/12.

¹⁸²*Ibid.*, p. 14/12.

¹⁸³*Ibid.*, p. 14/13.

¹⁸⁴*Ibid.*, pp. 18/2-18/5.

¹⁸⁵The French Government and the Employer delegate of Norway voted against the Convention. The Employer delegates of France and Greece and the Government delegate of Madagascar abstained, *ibid.*, pp. 19/8-19/9. For the text of Convention No. 165, see *ibid.*, Appendix 14A; see also *ibid.*, pp. XXXII-XLIX. The Convention has not received any ratifications so far.

shipowner. The Convention does not propose to revise Conventions Nos. 8 and 55 (Shipowners' Liability) which the Office considered useful in the specific fields they covered.

1) Convention No. 165 establishes two levels of social security protection: the first minimum level of protection is based on acceptance of certain provisions of the Social Security (Minimum Standards) Convention, 1952 (No. 102); the second more advanced level of protection is based on the acceptance of certain provisions of Convention No. 102, the Maternity Protection Convention (Revised), 1952 (No. 103), the Employment Injury Benefits Convention, 1964 (No. 121), the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128) and the Medical Care and Sickness Benefits Convention, 1969 (No. 130).¹⁸⁶ On the other hand, the Convention aspires to achieve five aims in the field of social security for seafarers: a) to ensure that seafarers are treated no less favourably than shore workers, b) to lay down a number of provisions of substantive law relating to social security at the two levels mentioned immediately above, c) to establish a simple regime governing the shipowner's liability, d) to ensure the protection of foreign or migrant seafarers and e) to provide a workable system for the maintenance of rights in course of acquisition.

2) The term "Member" in the Convention does not include non-metropolitan territories.¹⁸⁷ As a result, ratifying Members can avoid the obligations of the Convention concerning social security by registering national ships in non-metropolitan territories.

3) The 1987 Office draft applied to deep-sea fishermen.¹⁸⁸ No possibility of exclusion of this category was envisaged, unlike in Convention No. 70.¹⁸⁹ The Convention, for the first time, adopts a new formula: As a result of a common wording employed in all Conventions adopted by the 1987 Conference, the competent authority is empowered to exclude even deep fishing vessels from the scope of the Convention (Art. 2 (2)).¹⁹⁰ The new formula results in reduced protection of fishermen in the field of social security. On the other hand, the Convention applies to all seafarers: National law cannot provide for any exceptions in respect of the categories of the persons to whom the instrument applies.¹⁹¹ Moreover, for the first time in an ILO maritime instrument, the seafarer does not have to be employed on a board ship registered in the territory of a Member.¹⁹² Thus, *prima facie*, the

¹⁸⁶It is not necessary for a country wanting to ratify Convention No. 165 that it should have ratified Conventions Nos. 102, 103, 121, 128 and 130. Nor does it have to accept all the obligations imposed by these Conventions. As regards Convention No. 102 it is sufficient that the country concerned should be able to accept the obligations laid down in this Convention in respect of a minimum number of categories of benefit, which are left to its own choice but which must include at least one of the categories of benefit required for ratification of Convention No. 102, namely unemployment, old age, employment injury, invalidity or survivors' benefits, *PTMC*, Report II, 1986, p. 29, see also Art. 2 of Convention No. 102.

¹⁸⁷The opposite would be contrary to Art. 35 of the ILO Constitution, which allows ratifying Members to exclude from the application of the Conventions ratified, subject to certain conditions, non-metropolitan territories for whose international relations the former are responsible or any trust territories for which they are the administering authority.

¹⁸⁸Art. 1 (c) (i); see similar provisions in Conventions Nos. 55 and 70.

¹⁸⁹Report III (1), 1987, p. 15.

¹⁹⁰74 R.P., p. 14/4.

¹⁹¹Report III (1), 1987, p. 17.

¹⁹²74 R.P., p. 14/4.

Convention applies to all seafarers and is not based on the criterion of registration, which traditionally had been used for more than 60 years within the ILO.

4) Art. 3 lays down that Members should comply with the obligations imposed by Arts. 9 or 11 in respect of certain categories of benefits. It does not, however, specify in respect of which seafarers these obligations are undertaken. The protection of foreign or migrant seafarers is included in Part IV of the Convention. On the other hand, Art. 3 of the Office draft had included a provision (para. 2) to the effect that for any country which has ratified and has accepted the obligations of the the Social Security (Minimum Standards) Convention (applying to shore workers), "the number of branches accepted in accordance with the provisions of paragraph 1 may not be less than the number of branches in respect of which that Member has accepted the obligations of that Convention". This provision, however, was deleted in the Committee on Social Security. This deletion is without any significance, since Art. 7 of the Convention requires ratifying Members to provide for seafarers social security protection no less favourable than that enjoyed by shore workers in respect of each of the branches of social security mentioned in Art. 3 for which it has legislation in force.¹⁹³ The result is that if a Member has accepted obligations imposed by the provisions of the Conventions listed in Arts. 9 and 11 of Convention No. 165 in respect of more than three categories of social security benefits for shore workers, it is required to apply the same protection in respect of each branch to seafarers.¹⁹⁴

5) The Convention provides for the social protection of the seafarers at two levels:

- i) Social security protection in each Member should not be less favourable than that enjoyed by shore workers in respect of all nine branches mentioned in Art. 3. It follows that, if in any country the social security provisions are higher than those provided for in Convention No. 102 the Member concerned is under an obligation to provide for seafarers social security protection of the same level.
- ii) The social security protection for seafarers should be of the level afforded by a) Convention No. 102 (Art. 9) or b) by Conventions Nos. 103, 121, 128 and 130 (Art. 11) or c) the combination of a) and b).

Finally, the Convention recognises voluntary insurance schemes provided that they are supervised by public authorities or administered by shipowners and seafarers, cover a substantial number of seafarers and comply with the relevant provisions of Convention No. 102 (Arts. 10 and 12).¹⁹⁵

¹⁹³Ibid., p. 14/6.

¹⁹⁴The equality of treatment of shore workers and seafarers in the "competent" Member is one of the basic principles of Convention No. 165. This seemed to have eluded the attention of the Greek delegation when they were thinking of applying 3 branches of social security benefits to seafarers. Greece has accepted the obligations of Convention No. 102 in respect of Parts II to VI and VIII to X, that is in respect of 8 branches of social security benefits: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, maternity benefit, invalidity and survivors' benefit. If Greece ratifies Convention No. 165, it will have to apply at least the same protection to seafarers.

¹⁹⁵Report III (1), 1987, p. 19.

One observation should be made here: Art. 11 (h) requires a ratifying Member which chooses to ratify the Convention by accepting the obligations of Art. 11 rather than those of Art. 9, to ensure that seafarers receive unemployment and family benefits no less favourable than those specified "in any future Convention laying down standards superior to those specified" in Convention No. 102 in respect of these benefits.¹⁹⁶ This is the first time that an ILO maritime Convention has referred to an instrument to be adopted in the future as binding the ratifying country *a priori*.¹⁹⁷ This provision may cause difficulties in the future and its inclusion was only possible because of the existence of inferior standards in Art. 9 of the Convention. It should not constitute a precedent in areas other than social security,¹⁹⁸ since employment conditions in the maritime industry show peculiarities which are not always reconcilable with provisions of general instruments.¹⁹⁹

6) The Convention regulates in some detail the liability of the shipowner in respect of social security benefits. It should be noted that there are important differences between the provisions of Convention No. 165 and those of Convention No. 55. The main examples of these are as follows:

i) The liability of the shipowner under Convention No. 55 is restricted to cases of sickness and injury. The similar provisions of Convention No. 165 apply to "seafarers whose condition requires medical care ... or who are left behind by reason of their condition ...". It is not clear whether this condition will have been caused by sickness or injury.

ii) Convention No. 55 enables national laws to provide for exceptions in the case of (a) injury incurred otherwise than in the service of the ship, (b) injury or sickness due to the wilful act, default or misbehaviour of the seaman and (c) sickness or infirmity intentionally concealed when the engagement is entered into. None of these exceptions is provided for in Convention No. 165.

iii) Convention No. 55 limits the liability of the shipowner in respect of medical care to 16 weeks. Convention No. 165 does not contain any such limitation.

iv) In contrast to Convention No. 55 no detailed provisions concerning repatriation exist in Convention No. 165.²⁰⁰

¹⁹⁶Emphasis added.

¹⁹⁷The same provision goes on to provide that seafarers will be entitled to the superior benefits of the future Convention which "the General Conference of the International Labour Organisation has, after its coming into force, recognised as applicable for the purpose of this clause by means of a Protocol adopted in the framework of a special maritime question included in the agenda". This provision is not satisfactory for two reasons: a) if a Member specifies at the time of the ratification of the Convention that it accepts the obligations of Art. 11 in respect of unemployment and family benefits (Art. 4) and the same Member is in the dissenting minority at the General Conference which considered as applicable the provisions of the future Convention for the purpose of Art. 11 (h) of the Convention, this Member will in any case be required to apply the provisions of the future Convention to unemployment and family benefits for seafarers: Arts. 5 and 6 of the Convention do not seem to permit a Member which has accepted the "advanced" obligations of Art. 11 to replace them by the minimum obligations of Art. 9. The only solution for this Member would be to denounce the Convention under Art. 40; b) it empowers a general session of the Conference to deal with questions of a maritime nature. This method would be better avoided, for the reasons explained in Chapter 6, pp. 457-459, 484-485.

¹⁹⁸Even in the field of social security, as has been pointed out earlier, some countries maintain special social security schemes for seafarers.

¹⁹⁹For a discussion of this question, see 74 R.P., pp. 14/7-14/8.

²⁰⁰According to Art. 1 (i) repatriation means "transportation to a place to which seafarers are entitled to be returned under laws and regulations or collective agreements applicable to them". No reference is made to Convention No. 166

v) Under Convention No. 55 the shipowner is not liable for the cost of the sickness benefits, if the seaman concerned refused to be medically examined. There is no such provision in Convention No. 165.

vi) Wages under Convention No. 55 are mainly paid when the seaman remains on board whereas Convention No. 165 does not lay down such a condition.

vii) The obligation of the shipowner to pay wages is broader under Convention No. 165 than under Convention No. 55. The combination of Arts. 14 and 15 of the former instrument has the following consequences: the shipowner is required to pay the seaman full wages: a) if he is left behind in the territory of a State other than that of the competent Member,²⁰¹ from the time he is left behind until he finds suitable employment or is repatriated or until the expiry of a period which must not be less than 12 weeks, whichever event first occurs, and b) if the seaman is repatriated or landed in the territory of the competent Member, from the time when he is repatriated or landed, until his recovery or until the expiry of a period specified as above under a).²⁰²

viii) Unlike Convention No. 55, no right of the seaman to require the shipowner to defray the funeral expenses of a deceased seaman is established under Convention No. 165.

7) Art. 17 of the Convention reads as follows:

"With a view to avoiding conflicts of laws and the undesirable consequences that might ensue for those concerned either through lack of protection or as a result of undue plurality of contributions or other liabilities or of benefits, the legislation applicable in respect of seafarers shall be determined by the Members concerned in accordance with the following rules:

(a) seafarers shall be subject to the legislation of one Member only;

(b) in principle this legislation shall be

- the legislation of the Member whose flag the ship is flying, or
- the legislation of the Member in whose territory the seafarer is resident;

(c) notwithstanding the rules set forth in the preceding subparagraphs, Members concerned may determine, by mutual agreement, other rules concerning the legislation applicable to seafarers, in the interest of the persons concerned".²⁰³

on Repatriation of Seafarers which, as pointed out in Chapter 4 (Section 4.2.2. D), pp. 353-4) imposes certain restrictions on such national laws and regulations.

²⁰¹According to Art. 1 (f) competent Member means "the Member under whose legislation the person concerned can claim benefit".

²⁰²Entitlements to wages under Art. 14 and 15 are not cumulative. If wages have been paid under Article 14 the period in respect of which wages have been so paid will be deducted from the period of Art. 15 (Art. 15 second period), see also 74 R.P., p. 14/9. A problem which arises from the text of Art. 15 as it stands is that it provides that a seafarer who has been repatriated in the territory of the competent Member "shall continue to be entitled to full wages ... from the time when he is repatriated ..." (emphasis added). This Article may imply that wages continue to be paid during the repatriation travel, that is the time between the periods in respect of which wages are paid under Art. 14 and Art. 15. This was not the intention of the drafters and the Convention should be interpreted as not giving a right to sick or injured seaman to demand wages during the repatriation travel.

²⁰³Emphasis added.

It is clear from the introductory paragraph that this Article aims to eliminate positive or negative conflicts of law in the field of social security for seafarers.²⁰⁴ As a general remark, it may be said that this Article is not as flexible as the Committee intended it to be. The above provisions require clarification in many respects:

i) The phrase "shall be determined by the Members concerned in accordance with" contains two obligations: the obligation to determine the law applicable and the obligation to determine that law in accordance with certain rules. It is not clear whether this law must be determined by mutual agreement by the Members concerned or whether the words "Members concerned" permits the decision to be made unilaterally by the Member concerned.²⁰⁵ It is difficult to imagine how ratifying Members can be required by the Convention to conclude bilateral or other agreements in accordance with certain rules.²⁰⁶ It is submitted that the above words should be interpreted as enabling the Member concerned to determine the applicable law either by mutual agreement, if feasible, or by unilateral decision.

ii) According to Art. 17 in principle the legislation applicable shall be either the law of the flag or the law of the seafarer's country of residence. The meaning of the phrase "in principle" is obscure. It may be said that it implies that Members can derogate therefrom by mutual agreement under clause (c), though the text does not favour such an interpretation.²⁰⁷ Another interpretation could be that other laws could be applicable to foreign or migrant seafarers, such as the residence of the employer, the place of the conclusion of the contract, etc. This interpretation is unacceptable first because it does not evidence the intention of the Workers' Members who drafted the original amendment²⁰⁸ and, secondly, because it would render the whole Art. 17 meaningless. Accordingly, any rule other than the law of the flag or the law of the seafarer's country of residence can only be agreed by mutual agreement under clause (c).²⁰⁹

²⁰⁴The rules relating to the choice of applicable law only concern the public social security schemes in force in each country and do not deal with the shipowner's liability. As a result of a Swedish proposal, Art. 20 of the first 1987 Office draft, which applied the same rules to the shipowner's liability, was deleted. This article was rightly rejected for many reasons, see Report III (2), 1987, pp. 20, 21. Therefore, it is safe to assume that the shipowner's liability as set out in Arts. 13 to 15 of the Convention applies to all seafarers employed on board ship irrespective of nationality or residence.

²⁰⁵An earlier version of this amendment used the word "Member" instead of "Members". An amendment by the Government of Belgium, supported by the Government of Netherlands, sought to eliminate the words "by mutual agreement" in clause (c) because, in the opinion of that Government the introductory paragraph implied an agreement between Members. This amendment was rejected but this fact does not elucidate the meaning of the word "Members" in the introductory paragraph, 74 R.P., p. 14/11.

²⁰⁶The Swedish proposal adopted at the Preparatory Technical Maritime Conference used the words "taking into account" instead, see Art. 21 (Alternative II) of the PTMC draft, Report III (1), 1987, p. 31. Some countries such as Japan, Liberia, Netherlands and the U.K. and a number of shipowners' associations favoured the wording of the original Swedish proposal, Report III (2), 1987, pp. 12, 14-5.

²⁰⁷If this was the case, the words "in principle" should appear in clause (a) too.

²⁰⁸74 R.P., p. 14/11.

²⁰⁹Again, one is led to the conclusion that the introductory paragraph envisages both unilateral decisions and mutual agreements.

iii) Exceptions may be mutually agreed under clause (c) either to the applicable legislation according to clause (b) or to the principle that the seafarer concerned should be subject to one legislation only.²¹⁰ It is debatable what is the effect of an exception to clause (a). If Members can derogate therefrom the seafarer might be subject to more than one applicable law and thus the purpose of the introductory paragraph would be defeated. It is submitted that the exception to the principle of clause (a) by means of mutual agreements should be regarded as enabling the Members concerned to apply more than one law in respect of different branches of social security benefits.²¹¹ It should be noted that there is no legal vacuum in Art. 17 in this respect: the conclusion of mutual agreements under clause (c) is optional but if no agreement is reached either the law of the flag or the law of the seafarer's residence is applicable.²¹²

iv) Perhaps the most important observation concerning Art. 17 is that though legally mutual agreements are not given a prominent role therein, it is unlikely that the regime established by the Convention will work outside a network of mutual agreements. Let us take the example of a Greek seaman resident in Greece and employed on board a Spanish ship. If Greece applies the residence criterion and Spain the flag criterion this seaman will be subject to both countries' laws. In the opposite case of a Spanish seaman resident in Spain and employed on board a Greek ship, this seaman will not normally be entitled to benefits under either country's law. The principle of the introductory paragraph and clause (a), then, can only be realised by the conclusion of mutual agreements.²¹³

8) Art. 18 establishes equality of treatment irrespective of nationality. This equality of treatment must be ensured by the Member whose legislation is applicable to the seafarer and not by the Member whose nationality the seafarer has. Accordingly, Art. 18 comes into operation after the applicable law has been determined under Art. 17.²¹⁴ Equality of treatment of national and foreign seamen under Art. 18 is subject to certain conditions: a) the foreign seaman must be a national of another Member, b) the foreign seaman will enjoy equality of treatment with a national seaman without any condition of residence in the territory of the national seaman, if the latter is entitled to the same

²¹⁰As a result of an amendment by the Government of Sweden, the effect of clause (c) was extended to clause (a) as well, 74 R.P., p. 14/11.

²¹¹This interpretation is in accordance with Art. 16 of the Convention which provides that the rules of Art. 17 are applicable to foreign or migrant seafarers "in respect of any branch of social security specified in Art. 3 ...".

²¹²Clause (c) provides for possible exceptions to clauses (a) and (b) but not to the introductory paragraph.

²¹³The wording of Art. 6 of the Revised Agreement concerning the Social Security of Rhine Boatmen (13 February 1961), although it could not have been adopted by the 1987 Conference, provides much more certainty of law than the provisions of the Convention: in the absence of any agreement to the contrary (para. 5) the applicable law is defined as follows in order of compulsory application: a) the law of the country in whose territory the undertaking employing the person concerned has its principal place of business (para. 2); b) the law of the country of the legal domicile of the owner (if the latter operates the vessel himself and does not have his principal place of business in the territory of one of the contracting parties); c) the law of the country of the nationality of the owner (if he does not have its legal domicile in one of the contracting parties) (para. 3); for the text of the Agreement see *O.B.*, Vol. XLIV, pp. 371-401. It is interesting to note that, according to this agreement, the applicable legislation is centralised on the person of the owner; it is his legal status which makes the law of one or another party applicable to the boatman concerned.

²¹⁴74 R.P., p. 14/12.

social security benefits without any such condition.²¹⁵ As a result, Art. 18 can still result in cases where a non-national non-resident (or even a non-national resident) seaman is not entitled to social security benefits under any state's laws.²¹⁶ The need for conclusion of mutual agreements is, therefore, obvious.²¹⁷

²¹⁵The words "resident in the territory of a Member" in Art. 18 apply only to refugees and stateless persons, *ibid.*, p. 14/12. The old Convention No. 70 is more progressive than Convention No. 165 in certain respects: a) the foreign seaman does not need to be a national of another Member, b) if the shipowner's liability scheme in a country does not cover a seaman resident outside its territory in respect of medical care, board, lodging and repatriation, he must be covered by a public social security scheme of the same country. No such obligation is imposed on a ratifying Member under Convention No. 165. On the other hand, under both Conventions Nos. 70 and 165 unconditional equality of treatment of seafarers regardless of residence is ensured, as far as the liability of the shipowner in respect of social security is concerned (Arts. 6 (1) and 20 respectively).

²¹⁶This might happen in three cases: a) when the national seaman is not entitled to a specific benefit because he does not reside in the country of his nationality, b) when the national seaman is entitled to a specific benefit not because he is resident in the country of his nationality (this discrimination would be prohibited by the second period of Art. 18) but because he is covered by the social insurance scheme of a third country which does not apply to the non-national non-resident (or non-national resident) seaman concerned, and c) where discrimination on the basis of residence is based not on residence of the seafarer concerned in the territory whose law is applicable to him under Art. 17 but on his residence in the territory of another country. Let us take the example of a German seaman employed on board a Spanish ship and resident in Spain. Assuming that the law of the flag is applicable to that seaman under Art. 17 (in fact, this seaman could be covered by German law only at the request of the shipowner and subject to certain conditions), this seaman, although primarily subject to Spanish legislation, will not be covered thereby, since current Spanish law does not regularly apply to non-national seafarers. If a Philippino seaman resident in Spain was employed on board the same Spanish ship, he would not be entitled under current Philippinese law to repatriation benefits and his dependants would not be entitled to maintenance. But under Spanish law he or his dependants would be entitled to the above benefits because Spanish law discriminates between foreign nationals of Latin American countries, Andorra, Philippines and Portugal who are covered thereby and all other nationals who are excluded from coverage. In short, the exclusion of the German seaman from coverage does not consist in the fact that he is not a resident of Spain but in the fact that Spanish law discriminates between foreign nationals, which case is not covered by Art. 18 (case b)). If the Philippino seaman was resident in Philippines, he would not have any rights under Spanish law. In this case there would be a discrimination between Philippino seamen on the basis of residence which is prohibited by Art. 18. A second example may be given in the case of a French seaman resident in Belgium and employed on board a British vessel. Assuming that by mutual agreement under clause (b) of Art. 17 the law of the flag is applicable to that seaman (in fact, it is unlikely that he would be covered by French law), this seaman would be subject to British law and could be entitled, for example, to disablement benefit under that law, which applies to non-nationals resident in a number of specified countries, among which is Belgium, in respect of certain branches of social security benefits. The situation would be the same, if the same seaman had his residence in Australia or in the Netherlands. But if this seaman was a resident of Spain, he would not be entitled to any benefit under any state's laws (French, English or Spanish) (case c)). However, this discrimination on the basis of residence does not come within Art. 18 which forbids discrimination against a foreign seafarer on the basis of whether or not he is resident in the territory of a country to whose legislation he is subject under Art. 17. This territory, in our example, is the British territory and not Spanish, Belgian, Australian, etc. territories, residence in which actually determined the seaman's rights in our example.

²¹⁷The question of equality of treatment of national and foreign seamen outside the treaty regime has been examined indirectly in a recent case by the Court of Appeal in Sri Lanka. The Court of Appeal, in affirming the Order made by the High Court, held that deductions for NAT (the Greek Maritime Pension Fund) tax imposed under Greek law on Sri Lankan seamen under Greek articles are not to be upheld because they are repugnant to the content and spirit of Sri Lankan law. In fact, under Greek law such deductions are imposed on all foreign seamen serving on board Greek ships and are never returned to them. At the same time these seamen are not eligible for social security benefits under Greek law which applies only to seamen of Greek nationality; see M.L.S. Jayasekera, "Greek Nat Tax Illegal in Sri Lanka", *LMCLQ*, Nov. 1986, pp. 434-5. Some observations can be made here: a) the Greek policy concerning social security is inconsistent since it applies social security laws using the criterion of the flag for tax revenue purposes and the criterion of nationality and residence as regards entitlements to benefits; b) the Court did not decide the question whether the deductions concerned were illegal under Greek law (whether a clause dealing with NAT deductions should be inserted in the articles of agreement under Greek law) and whether Greece was acting in conformity with the rules of international law in imposing such obligations on foreign seamen on a discriminatory basis; c) Art. 18 of Convention No. 165 should be interpreted in the sense that equality of treatment applies equally to rights and obligations arising from the applicable social security laws under Art. 17; otherwise, ratifying countries will still be able to impose obligations on foreign seamen serving on board national vessels while at the same time avoiding to grant them social security benefits by employing as a criterion for the granting of these benefits the residence of the seaman.

9) Arts. 21 to 27 refer to the question of the maintenance of rights in the course of their acquisition and contain useful provisions concerning calculation of periods of insurance, employment or residence or of benefits in respect of different branches of social security. Three observations can be made here: a) not all benefits are treated in the same way;²¹⁸ b) the whole system of maintenance of rights in course of acquisition envisaged in the Convention is based on the conclusion of mutual agreements;²¹⁹ and c) there is no compulsory provision in the Convention regulating the maintenance of such rights in cases where the establishment of maintenance schemes proves not to be feasible.

10) Special mention of Art. 29 of the Convention should be made. This Article eliminates the last possibility of uniformity and clarity of law in the Convention. It provides ratifying Members with the option of derogating from the provisions of Articles 16 to 25 and 27, namely the provisions of the Convention relating to the protection of foreign or migrant seafarers and the maintenance of rights in course of acquisition. This Article, which is a result of an amendment submitted by the EEC countries,²²⁰ has the advantage of allowing the EEC countries or other countries to apply their own regime of social security for seafarers if the standards contained therein are not lower than those of the Convention. However, it has two major drawbacks: a) it allows the substitution of bilateral and regional instruments, which will be adopted in the future, for the Convention itself, thus eliminating clarity and certainty of law within the Convention and rendering impossible the eventual "rapprochement" of national laws in the field of social security for seafarers, and b) it aggravates the situation by providing that the provisions contained in these instruments should, "*in the aggregate*", be at least as favourable as those required under the Convention.²²¹ It is not clear what is meant by the words "in the aggregate" but they are likely to cause confusion at the international level and give rise to a wide range of interpretations.²²²

11) Art. 30 provides that "every person concerned shall have a right of appeal in case of refusal of the benefit or complaint as to its nature, level, amount or quality". This provision empowers the seaman to launch an appeal either in court or before an administrative authority.²²³

²¹⁸Compare Art. 24 to Art. 27, Art. 24 to Art. 25

²¹⁹Art. 24 is a partial exception to this rule.

²²⁰74 R.P., p. 14/13.

²²¹Compare the more precise provisions of Art. 4 of the Revised Agreement concerning the Social Security of Rhine Boatmen: "... if the provisions of such other Convention or regulations, on becoming applicable, are not in any case less favourable than the corresponding provisions of this Agreement".

²²²It may mean that countries can by bilateral or other agreements agree on another criterion for the determination of the law applicable to foreign or migrant seafarers; or that the periods of Art. 19 could be varied by agreement, if coverage is the same; or that different arrangements from those of Arts. 21 to 25 and 27 may be agreed for the establishment of maintenance schemes in respect of specific branches of social security; or even that no equality of treatment of nationals and non-nationals regardless of residence will be ensured to seafarers by public social security schemes, if this equality is provided by the laws and regulations relating to the shipowner's liability. It should be noted that Art. 17 of Maintenance of Social Security Rights Convention, No. 157, 1982, from which the provisions of Art. 29 of Convention No. 165 were copied, has a much more limited scope, since it only applies to the maintenance of social security rights and not to the acquisition of social security benefits; compare Art. 17 of Convention No. 157 to Art. 29 of Convention No. 165 in conjunction with Arts. 16, 3, 9 and 11 of the same Convention.

²²³Report III (1), 1987, p. 24. Thus, a means of rapid settlement of disputes is available under the Convention (provision for the rapid and inexpensive settlement of disputes concerning the shipowner's liability is also required

5.6. Conclusions

Convention No. 165 concerning Social Security for Seafarers (Revised) is a comprehensive instrument which aims to afford seamen social security protection in most branches of social security at the international level. It ensures equality of treatment of seafarers and shore workers and of national and non-national seafarers regardless of residence (subject to certain conditions, as pointed out earlier). It also makes provision for the maintenance of rights in course of acquisition and contains provisions concerning the shipowner's liability in the field of social security.²²⁴

On the other hand, the adoption of this Convention brought about innovations previously unheard of in the maritime standard-setting activities of the ILO:

a) The flag criterion is no longer preponderant. In fact, the application of the Convention is not entrusted to the flag State (or as better expressed, the state in the territory of which the ship is registered) but to other states, such as the country of the seafarer's residence or, as pointed out in the analysis of Art. 17 of the Convention, to virtually any other State or a combination of other States.

b) The standards aimed at are not only minimum, as has been the case with most ILO maritime instruments, but advanced as well. Also, the Convention provides ratifying Members with the option to implement minimum and advanced standards in respect of different branches of social security.²²⁵

c) The Convention indirectly burdens with indeterminate obligations any ratifying Member who chooses to accept the obligations of Art. 11 in respect of unemployment and family benefits.²²⁶

d) Existing and future international rules adopted or to be adopted by other bodies were allowed to have a substantial effect on the Convention.²²⁷

However, the ILO's regime of social security of seafarers, as pointed out earlier, has many disadvantages. The main ones will be outlined here and possible remedies will be suggested.

1) Convention No. 165 does not cover all aspects of social security for seafarers, since it does not deal with the questions of shipwreck indemnity and seafarers' pensions, which are dealt with in

from Members under the Convention (Art. 32)). What the Convention does not lay down, is whether the seaman will have the right to appeal to a court when the benefits disputed are refused by the administrative authority at first appeal. This matter is left to national law.

²²⁴Convention No. 70 affords more protection than Convention No. 165 in certain areas: a) in the cases referred to in n. 215, b) in that it provides for repatriation benefits without specifying whether it is to be granted by the shipowner or by public schemes established by the Member (no repatriation benefits are provided for in the articles of Conventions Nos. 102, 103, 121, 128 and 130 listed in Arts. 9 and 11 of Convention No. 165) and c) in providing for cash benefits in cases of incapacity for work "whether due to employment injury or not" (for an interpretation, see supra n. 86).

²²⁵Compare the substantive provisions contained in Arts. 9 and 11 of the Convention.

²²⁶See the earlier analysis of Art. 11 (h) at p. 418, n. 197.

²²⁷Art. 29.

Conventions Nos. 8 and 71.²²⁸ A revision of Conventions Nos. 8²²⁹ and 71²³⁰ should have been undertaken as regards certain points.

2) A close examination of the scope of Conventions Nos. 8, 55, 71 and 165 reveals that there are important differences both as regards the types of ships and the persons covered.²³¹ Since all these Conventions will be in force after Convention No. 165 comes into force²³² and will complement each other in the field of social security for seafarers, it is advisable that all the above Conventions have the same scope; viz. the scope of the recently adopted Convention No. 165, as amended along the lines to be suggested later.

3) As pointed out earlier, there are important differences between the provisions of Convention No. 55 concerning repatriation and those of Convention No. 166 concerning the Repatriation of Seafarers (Revised). The repatriation provisions of Convention No. 55 are now obsolete. Since neither Convention No. 165 nor Convention No. 166 revises Convention No. 55 in this respect, the situation results in the existence of double standards at the international level. It is suggested that the repatriation provisions of Convention No. 55 should be replaced by the relevant provisions of Convention No. 166. Furthermore, the social security Conventions adopted by the ILO never took account of the repatriation Conventions. Conventions Nos. 55 and 70 did not take account of Convention No. 23 and this history was repeated in the case of Convention No. 165 which neither mentions nor refers to Convention No. 166. Again, it is suggested that the repatriation provisions of social security Conventions should be aligned with other ILO instruments on repatriation. Finally, as pointed out earlier, when Convention No. 55 was examined, it would have been desirable that further consideration be given to the place to which a sick or injured seaman is to be repatriated, since he may be in a more advantageous position if he is repatriated to the country where he is entitled to sickness or accident insurance benefits.

²²⁸Furthermore, an amendment put forward by the Government member of the USSR in the Committee on Social Security to the effect that where the injury or death of a seafarer is due to a violation by the ship's administration of established safety provisions, extra compensation payable by the shipowner should be given to the seafarer or his dependants, in the case of his death, beyond the relevant social security benefit, if the latter falls short of the seafarer's lost wages, was not seconded, 74 *R.P.*, p. 14/9. This amendment raised interesting issues, as in it security questions mesh with labour rights, and its inclusion in Convention No. 165 might have indirectly enhanced safety on board ship.

²²⁹Convention No. 8 could have been revised by Convention No. 165 in order to clarify in certain respects the following points: a) the meaning of "loss or foundering" of the ship, b) the meaning of the indemnity payable for the period during which the seaman remains unemployed, and c) the position in various countries in the event of the loss or foundering of a vessel the crew of which would, had there been no loss or foundering, have had their contract of service terminated in any case, because the voyage would have been completed within a period of less than two months from the loss or foundering which in fact resulted.

²³⁰The revision of Convention No. 71 by Convention No. 165 would have been useful in certain respects: a) the reconsideration of Arts. 3 (1) and 4 (4) of the former Convention, since these have proved to be obstacles to the ratification of that Convention, b) the reconsideration of Art. 2 (2) (j) and (k) of the same Convention, which permit the exclusion of foreign and non-resident seafarers therefrom. As the situation is now, equality of treatment of non-national or non-resident seafarers is ensured under Convention No. 165 but it is not so ensured in respect of one of the most important social security benefits, namely the seafarer's pension.

²³¹Compare Art. 1 of Convention No. 8, Art. 1 of Convention No. 55, Arts. 1 and 2 of Convention No. 71 and Arts. 1 and 2 of Convention No. 165.

²³²The latter Convention revises only Conventions Nos. 56 and 70.

4) It was explained in subsection 5.5.6. 6) that the provisions of Conventions Nos. 55 and 165 relating to the shipowner's liability differ in many areas, with Convention No. 165 providing the seafarer with more comprehensive protection in almost all respects. As a result, double standards exist at the international level as regards the shipowner's liability.²³³ It is suggested that the provisions relevant to the shipowners' liability (Arts. 13, 14, 15, 20 and 32) should have been deleted, since most of the points mentioned therein are covered by Convention No. 55 in a different way and the latter Convention has not been revised; to provide for this case it would have been necessary to include a provision in the Convention to the effect that that Convention did not apply to the shipowner's liability. Nonetheless, if the Convention encounters ratification difficulties in the future and the deletion of the provisions relating to this liability is then suggested, it may be considered desirable to maintain Arts. 20 and 32 of the Convention.²³⁴

The writer considers that provisions concerning the shipowner's liability should be included in a future revised Convention, if Convention No. 55 is accordingly revised. The argument advanced by a number of countries that Convention No. 70 was not ratified because of the existence of provisions regarding the shipowner's liability is only partly justified. First, not all these provisions were of a controversial nature and, secondly, as pointed out earlier, there were other reasons which slowed down the progress of ratifications of that Convention. Even if no detailed provisions concerning the shipowner's liability, such as were contained in Arts. 13 to 15 of Convention No. 165, are included in a future revision of this instrument, it is very important that continuity of protection should be secured to the seafarer under the shipowner's liability schemes and the public social security schemes.²³⁵ Ironically, as in Convention No. 70, such a provision is absent from Convention No. 165. If a provision concerning the liability of the shipowner is finally maintained, it might be desirable to insert in a future instrument a provision laying down the time when the national insurance scheme starts to apply to seafarers in situations where a shipowner, because of bankruptcy or other reasons, cannot fulfil its obligations under the shipowners' liability scheme. There is a gap in Convention No. 165 in this respect.

²³³In fact, in many instances it was pointed out at the 1987 Conference that if Convention No. 165 were to contain provisions relating to the shipowner's liability it should provide for the revision of Convention No. 55 but this was not done. From the replies of the representative of the Secretary General, it seems that the Office decided to include these provisions in the 1987 draft because they encompassed the main ideas of Convention No. 55 which had not been the cause of any difficulty within the framework of that Convention, 74 *R.P.*, pp. 14/8-14/9. With respect, this is not the case. Arts. 13 to 15 of Convention No. 165 are substantially different from the relevant provisions of Convention No. 55 and, interestingly, are not based on knowledge of state practice today but were the result of an ill-matched transfer of the provisions of Convention No. 55 into the text of Convention No. 165. It is almost certain that Arts. 13 to 15 will cause great ratification problems in the future.

²³⁴This alternative would be aiming at countries which have not ratified Convention No. 55 but are prepared to apply the principle of "no distinction on the basis of nationality or residence" in respect of the shipowner's liability as well as to provide for a rapid and inexpensive settlement of disputes concerning such liability.

²³⁵This, of course, would apply to countries whose legislation provides for a shipowners' liability scheme, since in many countries no such schemes exist.

5) The major drawback to Convention No. 165 is that its effectiveness is based on the future conclusion of bilateral and other agreements concerning the social security of seafarers.²³⁶ The combination of Arts. 16 to 25, 27 and 29 virtually render the Convention an international generator of future bilateral and multilateral agreements. In fact, the Convention only seems to create legal obligations in respect of the social security protection of national seafarers while it gives only guidance concerning the protection of foreign and migrant seafarers and the maintenance of rights in the course of acquisition. Flexibility was given preference over clarity and certainty of law.²³⁷ The Convention provides that the applicable legislation "...shall be determined..." but it remains to be seen how a country can unilaterally or otherwise be forced to enter into an agreement. It is possible that the agreements envisaged in the Convention will never be concluded with the result that, even if it is ratified, it will be a dead letter.²³⁸ A solution could have been found, by adding a provision in the Convention to the effect that ratifying countries should report to the ILO the conclusion of such agreements or if no agreements had been concluded, the reasons for this failure. The Committee of Experts would then have the opportunity of drawing the attention of ratifying countries to the conclusion of the necessary agreements. It might even be considered desirable that the entry of the Convention into force be made dependent on conclusion of a number of agreements between a specified number of States or even between a number of specified countries after examination of their laws and regulations and of the number of foreign and migrant seafarers employed on board vessels registered in these countries. Unfortunately, no such requirements are imposed by Convention No. 165.²³⁹

Moreover, the regulation of the protection of the foreign or migrant seafarers is defective in three respects: a) no mention is made of the position of national seafarers employed on foreign registered ships (for the flag State these seafarers are non-nationals), b) no provision is made for discrimination on the basis of nationality between foreign seamen, as opposed to discrimination between na-

²³⁶It is worth noting that only one of the four paragraphs of Recommendation No. 75 (para. 1) is implemented by Convention No. 165. It has been reported that the Government of the Philippines is prepared to respect the provisions of Convention No. 165 and adopted, to this end, a decision to the effect that in the future all contracts signed in the Philippines for overseas sea-going Philippino nationals will include a clause bringing them within the country's social security system. All Philippino seafarers recruited by local licensed manning agencies on behalf of foreign owners will be covered; see *SLB*, 4/88, pp. 499-500. It remains to be seen how such a clause will be effectively inserted in articles of agreement of Philippino seafarers and to what extent these benefits could be extended to Philippino seafarers which signed contracts outside the Philippines. It is interesting to notice that the decision of the Government was a unilateral one and seems to espouse the criterion of the nationality of the seaman combined with that of the *lex loci contractus* as the criteria for the determination of the applicable social security law.

²³⁷It is interesting to note how the attitude of Conferences and parties concerned changes with time. In 1936 an amendment which proposed that the question of compulsory sickness insurance for seamen should be regulated by bipartite arrangements between the flag State and the country of residence of the seaman was rejected, 21 *R.P.*, p. 262.

²³⁸The danger of a "legal vacuum" was pointed out by some countries, such as the U.S. and Denmark, Report III (2), 1987, pp. 11, 13-4.

²³⁹This is the reason why the present writer was opposed to the inclusion of the standard final provisions in Convention No. 165 (entry into force after the registration of ratification by two countries). The combination of tonnage and ratification requirements before the Convention enters into force, which had been proposed by the Shipowners in the Committee on Social Security, may have been excessive; also, it was stressed by many government and worker delegates that it was important that a social security instrument came into force as soon as possible, see 74 *R.P.*, pp. 14/14-14/15. But the entry into force of a Convention whose effectiveness depends on a widespread conclusion of bilateral agreements after the registration of two ratifications is meaningless.

tional and foreign seamen, and c) no provision is made for discrimination on the basis of residence not related to the country whose legislation is applicable under Art. 17.²⁴⁰ It is suggested that provisions concerning the social security protection of foreign seafarers in a future instrument should deal with the above points, otherwise, there will be gaps in the international social security network established thereby.

6) It has been suggested above that if the entry into force of Convention No. 165 had been made dependent on the conclusion of a number of agreements between specified countries, the possibilities would have been clear: either the Convention would come into force and would start having its beneficial effect immediately or it would never come into force, in which case it would have to be revised. The question must be asked: could the 1987 Conference have avoided having recourse to "mutual agreements"? This would necessitate, at a first stage, an examination of whether the flag or the residence criterion should have been given the more prominent role in the Convention. Apart from the fact that countries are almost equally divided on this question, the legal arguments in favour of either criterion are equally sound:

i) Arguments in favour of the criterion of residence: a) a seafarer may be employed on board vessels flying flags of different countries; b) a seafarer may be employed on shore in his country of residence for certain periods, c) the seafarer's dependants usually remain in his country of residence;²⁴¹ d) the extension of social security benefits to non-resident foreign seafarers would cause enormous administrative problems; e) seafarers from developed countries might be obliged to receive the lower protection provided for in developing countries.²⁴²

ii) Arguments for the criterion of the flag: a) all seafarers employed on board the same ship should be entitled to the same social security benefits; b) most international instruments have adopted the flag criterion; c) the application of different legislation to members of the same crew would, especially in the Third World countries, be very difficult to administer.²⁴³

²⁴⁰See the examples given in n. 216.

²⁴¹It is worth noting that these arguments were advanced by the National Union of Marine, Aviation and Shipping Transport Officers, Report III (2), 1987, p. 5.

²⁴²Report III (1), 1987, p. 18.

²⁴³Views of the Ethiopian shipowners in Report III (2), 1987, p. 14.

A solution could have been found if the Convention had laid down that the protection of foreign or migrant seafarers should be ensured by either the country to which the seaman belongs or in which he has his ordinary residence, or the country in the territory of which the ship is registered. This protection would be ensured by mutual agreement. If, however, no agreement were reached, this protection would be ensured by the flag State.²⁴⁴ A residual obligation imposed on the flag State or, perhaps, another State, would press this State to conclude bilateral agreements and the aim of the Convention could eventually be achieved. However, this solution would not have been acceptable to all countries.

Alternatively, Art. 17 could distinguish between different categories of seafarers, i.e.:

i) Resident nationals of the flag State serving in national flag vessels could enjoy social security protection under the legislation of that State.

ii) Nationals of the flag State serving in national flag vessels but resident in the territory of another Member to whom the law of this flag State could be applicable.

iii) Non-nationals resident in the flag State serving in flag State vessels who could enjoy social security protection under the law of the flag State²⁴⁵ (for temporary residents the law of the country of ordinary residence might also be applicable, if the necessary agreements have been concluded).

iv) Non-residents non-nationals serving on foreign flag vessels could be covered by the social security schemes of their country of nationality, if this is also the country of residence; if the country of the nationality and the country of residence are different, then agreements between the flag-State and the country of residence should be entered into thus avoiding eventual plurality of contributions or lack of protection of the seafarers concerned.

The above proposal has the advantage of clarity and certainty of law and could result in uniform and comprehensive social security protection of seafarers at the international level.²⁴⁶ It renders the conclusion of mutual agreements necessary only in the case of a non-resident non-national seafarer, if the country of his nationality and the country of his residence are not the same.²⁴⁷ Moreover, the preference for the residence criterion in case iv) would ensure that no difficulties of an administrative nature would be encountered in the protection of non-national non-resident seafarers.²⁴⁸

²⁴⁴Compare para. 3 of Recommendation No. 75.

²⁴⁵This is the case in the majority of the countries, see *PTMC*, Report II, 1986, p. 20.

²⁴⁶This basic regime would not prevent the conclusion of bilateral or other agreements which would regulate the social security protection of seafarers in a different manner. However, if no bilateral or other agreements were concluded, the above arrangements would be obligatory for ratifying countries. The advantage of the writer's proposal in this connection is, it is submitted, that the Convention would then provide ratifying countries with a rather more certain framework within which the social security protection of foreign seafarers is to be developed.

²⁴⁷For the proposal of the Norwegian shipowners, which distinguished between non-national non-resident seafarers from labour-supplying countries and those which are not from labour-supplying countries, see Report III (2), 1987, p. 14. The difficulty inherent in this proposal is identifying labour-supplying countries in an everchanging shipping industry.

²⁴⁸For the advantages of the residence criterion in this respect, see the statement of the Government member of Philippines in 74 *R.P.*, p. 14/10. Case iv) would afford adequate protection to seafarers nationals of and resident in developed countries serving on board vessels registered in developing countries; see the views of the unions of British seamen in Report III (2), 1987, 4-5, 15-16.

7) In view of the analysis of Art. 29 conducted earlier, the question concerning whether a provision should have been included in Convention to the effect that other ways of implementing the provisions of the Convention should be allowed, provided protection at least equal to that afforded by the Convention is assured to seafarers, is difficult to answer. No such provision is usually included in ILO maritime instruments. Moreover, as pointed out earlier, this Article transforms the Convention into a generator of future bilateral or other agreements instead of providing an international legally compulsory instrument. Its inclusion in the Convention could be allowed if the words "in the aggregate" now laid down in it are deleted and if additional supervisory procedures are laid down, requiring those ratifying countries that have taken advantage of the derogation clause to report to the ILO on the agreements they have concluded to implement the substantial provisions of the Convention.

8) Convention No. 165 contains provisions ensuring the maintenance of seafarer's rights in course of acquisition when a seafarer, who is covered by a special scheme, has ceased to be subject thereto (for example, when, after a period of service at sea, he decides to find employment ashore, where he will be covered by a general scheme for shore workers).²⁴⁹ No provision is made in the Convention for the case where a seaman had been covered by a general scheme before he switched to sea employment, or had periods of shore-based employment between employment at sea.

9) If the extension of social security benefits extra-territorially encounters difficulties, the setting up of an international social security fund for seafarers, contributed to by interests to be agreed to, could be envisaged. The purpose of this institution would be to provide social security protection in cases where a seafarer does not enjoy such protection under any national legislation or to facilitate the provision of these benefits for certain categories of seafarers.²⁵⁰

10) No provision is included in Convention No. 165 concerning the benefit entitlements of national seafarers who are not employed on board ship but are waiting for future employment at sea. It may be provided in a future instrument that these seafarers are entitled to the same benefits as other national seafarers, if and insofar as they remain under contract.

²⁴⁹Art. 8.

²⁵⁰Report III (1), 1987, p. 14 and Report III (2), 1987, pp. 4, 20.

11) There is no specific provision concerning inter-State assistance in the administration of national social insurance schemes. ²⁵¹

12) The revision of the Appendices to Convention No. 147 and Recommendation No. 155 in respect of social security protection of seafarers should be undertaken as a result of the adoption of Convention No. 165. ²⁵²

13) There is a notable absence of provisions relating to the inspection of social security requirements laid down by Convention No. 165. Art. 4 of Convention No. 147, unless amended along the lines suggested in 5.4., does not provide a satisfactory inspection framework. In particular, there should be provisions (included either in a Convention or in a Code of practice) ensuring that contributions are actually paid and recorded; that the provisions of the Convention concerning social security of national and foreign seamen are respected, etc. ²⁵³

14) It has been pointed out earlier that double standards exist at the international level as regards the shipowner's liability in the field of social security and repatriation in cases of sickness or injury. The same can be said with regard to the choice of applicable law to foreign seafarers as regards the maintenance of rights in social security. This is the result of the adoption of Convention No. 157 concerning the Establishment of an International System for the Maintenance of Rights in Social Security. A comparison between Art. 5 (1) (c) of that Convention ²⁵⁴ and Art. 17 of Convention No. 165 shows that in the field of maintenance of social security rights the former instrument, unlike the latter, adopts the flag criterion with two exceptions allowing the use of the residence criterion and for the conclusion of mutual agreements. ²⁵⁵ The most important difference between these two provisions is that, as pointed out earlier, the satisfactory working of Art. 17 of Convention No. 165 presupposes the conclusion of mutual agreements whereas under Art. 5 of Convention No. 157,

²⁵¹Compare para. 2 of Recommendation No. 75; see also Part V of Convention No. 157 concerning the Establishment of an International System for the Maintenance of Rights in Social Security, 1982 and Title IV, Administrative Centre for the Social Security of Rhine Boatmen (Arts. 71-72) of the Agreement concerning the Social Security of Rhine Boatmen (Revised), 30 Nov. 1979; for the text of the Agreement see *O.B.*, Vol. LXIV, 1981, Series A, No. 1, pp. 38-80. A similar centre could be set up to administer social security schemes for seafarers at the international level. In particular, this centre could propose revision of Convention No. 165, if this is deemed desirable, and could facilitate the conclusion and supervise the application of bilateral or multilateral agreements concluded under the Convention.

²⁵²See JMC/24/1, p. 46. However, the application of the criterion of "substantial equivalence" to the provisions of Convention No. 165 relating to the protection of foreign or migrant seafarers may cause severe problems of interpretation and implementation of social security provisions through Convention No. 147. As to the need for revision of Convention No. 147 in other areas relating to the social security of seafarers, see *supra* Section 5.4. where Convention No. 147 is examined.

²⁵³For example, the inspector should be able to see that the employer has not debited the worker with sums larger than the latter would otherwise have to pay, see ILO, *labour inspection, purposes and practice*, Geneva, 1973, pp. 152-153.

²⁵⁴Art. 5 (1) (c) of Convention No. 157 reads as follows: "The legislation applicable in respect of persons covered by this Convention shall be determined by mutual agreement between the Members concerned, with a view to avoiding conflicts of laws and the undesirable consequences that might ensue for those concerned either through lack of protection, or as a result of undue plurality of contributions or other liabilities or of benefits, in accordance with the following rules: ... (c) employees and self-employed persons sailing on board a ship flying the flag of a Member shall be subject to the legislation of that Member even if they are resident in the territory of another Member or if the undertaking which employs them has its registered office, or their employer has his place or residence, in the territory of another Member".

²⁵⁵Art. 5, paras. 2 and 3.

if no agreements are concluded the flag criterion will be applicable. It will be unfortunate if maritime countries do not ratify Convention No. 157 because of the existence of Art. 5 (1) (c) therein. Once more, the lack of coordination between conferences of a general nature and maritime conferences is evident.

15) Finally, some observations should be made here concerning the provisions of substantive social security law contained in Arts. 9 and 11. This question did not occupy the attention of the Committee on Social Security in 1987 which was concerned with other thorny problems, such as the protection of foreign seafarers and the liability of the shipowner. The question which arises, is whether it was wise to regulate social security for seafarers by reference to instruments of a general nature such as Conventions Nos. 102, 103, 121, 128 and 130. In terms of ratification numbers this decision is partly justified. These Conventions have received a fairly large but not exceptional number of ratifications.²⁵⁶ Also, despite the fact that Members which wish to ratify Convention No. 165 do not have to ratify the above Conventions, it is worth mentioning that many important maritime countries have not ratified them.²⁵⁷

A comparison of the provisions of Convention No. 102 contained in Art. 9 of Convention No. 165 and current state practice, as set out above under 5.5.3. E) reveals a degree of irregularity in the latter Convention: while in certain areas the provisions of Convention No. 102 provide lower social security protection than state practice would indicate, Art. 18 of Convention No. 165 goes further than Art. 68 of Convention No. 102 in providing unconditional equality of treatment of non-nationals residents. Thus, non-national resident seafarers are treated more favourably than non-national resident shore-workers.²⁵⁸ It is suggested that an analysis of seafarers' social security schemes in the maritime state Members of the ILO be undertaken and that independent conclusions then be drawn which would form the basis of an international instrument clearly depicting the situation in the shipping industry.²⁵⁹ It is outside the scope of this work to undertake such an analysis, which could well be the subject of another dissertation.

²⁵⁶Convention No. 102 has been ratified by 32 countries, Convention No. 103 by 26, Convention No. 121 by 18, Convention No. 128 by 14 and Convention No. 130 by 13. Moreover, the ratifications registered by different countries reveal that there are wide divergencies as regards the parts of each Convention in respect of which each country has accepted the obligations of the Conventions. This observation is especially sound in respect of Conventions Nos. 102 and 130.

²⁵⁷The U.S., the USSR, Liberia, Panama, China and India have not ratified Convention No. 102; other countries such as Greece, Japan, Norway and the U.K. have ratified it. Convention No. 103 has not been ratified by any important maritime country apart from Greece and the USSR. Convention No. 121 has not been ratified by any important maritime country apart from Cyprus and Japan. Similar observations apply to Conventions Nos. 128 and 130. Panama, Liberia, India, Pakistan, China and the U.S. have not ratified any of the above Conventions.

²⁵⁸Here, it should be noted that Art. 9 of Convention No. 165 does not refer to Art. 69 of Convention No. 102 which provides for cases where a shore-worker's right to a specific benefit is suspended. The intention, however, was not to give seafarers unconditional rights to social security benefits. This question is left to national law under Convention No. 165.

²⁵⁹For example, state practice as set out in 5.5.3. A) indicates that many countries do not provide for maintenance of seafarer's dependants and for protection in case of involuntary unemployment. The relevant provisions of the Conventions of a general nature listed in Arts. 9 and 11 of Convention No. 165 may cause difficulties of ratification of the latter Convention. On the other hand, other questions such as the problem of crediting periods during which insured sea-

men were unemployed for reasons beyond their control, such as incapacity, unemployment, military service, training and education are not dealt with in Convention No. 165. Compare the definition of the term "periods of employment" in Art. 1 (1) of Convention No. 157. A similar attempt resulted in the revision of the 1961 Agreement concerning the Social Security of Rhine Boatmen by a Governmental Conference which produced a very comprehensive instrument covering almost every aspect of social security of these workers; see Agreement concerning the Social Security of Rhine Boatmen (Revised), Adopted by the Governmental Conference Responsible for Revising the Agreement of 13 February 1961 concerning the Social Security of Rhine Boatmen (Revised) (Geneva, 30 November 1979); *O.B.*, Vol. LXIV, 1981, Series A, No. 1, pp. 38-80. This revised agreement amounts to 98 Articles. Articles 15-70 contain detailed provisions dealing with most aspects of social security and do not refer to other social security instruments as Convention No. 165 does.

Chapter 6

SUBSTANDARD VESSELS AND MARITIME LABOUR

In this Chapter the main ILO instruments on substandard vessels will be examined, namely Convention No. 147 concerning Minimum Standards in Merchant Ships and Recommendation No. 155 concerning the Improvements of Standards in Merchant Ships. Other instruments of other international organisations will also be considered insofar as they are relevant to the question of substandard vessels from the labour point of view. It should be noted that important questions posed by the above two instruments have already been answered in previous chapters where appropriate suggestions to improve the existing standards were made.¹ After a brief account of the efforts of the ILO to regulate substandard vessels, this Chapter is confined to the examination of other problems that these instruments present, such as the scope of Convention No. 147 in relation to the scope of the instruments listed in the Appendix thereto, the meaning of substantial equivalence, its port State control provisions insofar as they have not been considered earlier, the determination of the nature of the instruments which should be included in the Appendix and the implications of such inclusion and, finally, the question of the revision of this Convention.

Since Convention No. 147 is *typically* concerned² with substandard ships from the labour point of view, the present Chapter will examine the question of flags of convenience (the question of the "genuine link" is discussed in Chapter 1) in so far they are related to maritime labour questions. Moreover, Art. 4 of Convention No. 147 deals with the inspection of labour conditions on board ship. Conclusions concerning the improvement of this brave but incomplete Article would be of limited authority if no account were taken of the status of port inspection of labour conditions on board ship in international law. To achieve this end, a brief account is given of the status of port state control of labour conditions under current international customary law. Also, the relevant provisions of the Law of the Sea Conventions are discussed. Finally, account is taken of ILO Recommendation No. 28 dealing with principles which should govern the inspections of conditions of work on board ship, the 1952 Brussels Conventions on Criminal and Civil Jurisdiction and the Memorandum of Un-

¹The provisions of Convention No. 147 and Recommendation No. 155 concerning a) seamen's engagement, b) training, c) hours of work, wages and manning and d) social security have been considered in Chapters 2, 3, 4 and 5 respectively.

²As will be seen later, it is the opinion of the present writer that the control provisions of Convention No. 147 are not labour-conscious and are limited by safety considerations.

derstanding on Port State Control. It will be seen that the general thesis of this writer is that the law which should govern labour relations on board ship should be the law of the flag State for reasons of uniformity and legal certainty of the crew unless certain specified considerations necessitate a different solution. These considerations (suspension and cancellation of certificates, peace and security of the port, matters falling outside the internal discipline of the ship), however, are not absolute or are difficult to ascertain and reversion to the law of the flag State should be the primary consideration, particularly if revision of the relevant instruments follows the lines suggested in this Chapter.

6.1. Minimum standards for substandard vessels with special reference to Convention No. 147 and Recommendation No. 155

6.1.1. The question of substandard vessels within the ILO

A) Brief history of the question

The concern of the ILO over the question of flags of convenience (hereafter FOC) dates back to 1933 when the ITF requested the ILO to study the effect of the transfer of ships from one flag to another on the seamen's conditions of employment.³ This request was repeated in 1946 and a resolution was adopted by the JMC at its 14th session drawing attention to the implications of the question of FOC vessels and requesting the ILO to keep it under continuing study.⁴ After a threat of the ITF in 1948 to boycott substandard ships in Panama and Honduras, the Panamanian Government asked the ILO to appoint an independent Committee to consider the question of the conditions of seamen on board Panamanian vessels. The Committee drew certain conclusions in a report following which some progress was noted in Panama and a number of collective agreements were concluded.⁵

³9 J.M.C. , Appendix IV, pp. 95-96, *O.B.* , Vol. XIX, p. 11. For a review of the ILO's policy with regard to the question of FOC and substandard vessels, see Enrico Argiroffo, "Flags of Convenience and Substandard Vessels, A Review of the ILO's Approach to the Problem", *I.L.R.* , Vol. 110, No. 5, Nov. 1974, pp. 437-453.

⁴For the history of the action taken by the ILO as regards substandard vessels, see International Labour Organisation, Joint Maritime Commission, 21st Session, Geneva November-December 1972, *Flags of Convenience* , Fourth Item on the Agenda, JMC/21/4, pp. 2-6, Preparatory Technical Maritime Conference, Geneva, October 1975, Report V, *Substandard Vessels, Particularly those Registered under Flags of Convenience* , pp. 3-10. At the 14th session of the JMC in December 1947 the seafarers criticised the fact that the shipping tonnage of Panama had increased to an unprecedented level but the shipowners replied that there was no evidence that this fact had an adverse impact on seamen's conditions and they argued that registration under the Panamanian flag did not, in fact, have the effect of lowering wages and social conditions of seamen, *PTMC* , 1975, Report V, p. 4.

⁵See International Labour Office, *Conditions in ships flying the Panama flag* , Report of the Committee of Enquiry of the International Labour Organisation, Studies and Reports, New Series, No. 22, Geneva 1950. The Committee of Enquiry concluded that a) the percentage of ships which were 30 years old or older under the Panamanian flag was higher than in most of the leading maritime countries, b) a number of Panamanian ships was not up to Lloyd's classification standards, c) the legislation concerning seafarers' conditions was scattered over a number of texts and it was difficult to apply; moreover, the existing texts were deficient in certain respects, d) the Panamanian legislation was in conformity with Conventions Nos. 7, 15, 58, Recommendation No. 9 (in the course of application); did not deal with matters covered by, or was not in conformity with, Conventions Nos. 9, 53, 57, 68, 69, 74, 75, 76, 92, 93 and Recommendation Nos. 10 and 28; was partially in accordance with Conventions Nos. 8, 22, 23, 54, 55, 72, 73, 91; no final verdict was given in respect of Conventions Nos. 56, 70 and 71, e) there was a need for adequately trained career consuls in foreign ports and the establishment of a system of inspection of safety standards on board Panamanian vessels, f) safety and labour standards on board these ships fell short of the requirements of the relevant international regulations, g) that the charges of the ITF against Panama were partly justified as regards the possibility of evading safety, social and labour standards, *ibid.* , pp. 8-40, specially pp. 37-40. For the provisions of the Panamanian law which used to govern the employment of seamen at that time, see *ibid.* , Appendix III, pp. 56-64. As regards the age of Panamanian vessels in recent times, it should be noted that the situation has substantially improved. It was reported that more than half of the

However, the question was not solved in a satisfactory manner and in 1954 the ITF again asked the ILO to reconsider the matter.⁶ This led to the adoption of the Seafarers' Engagement (Foreign Vessels) Recommendation, 1958 (No. 107) and the Social Conditions and Safety (Seafarers) Recommendation, 1958 (No. 108).⁷

As pointed out by the Office some years ago, the interest of the ILO in the question of substandard vessels is twofold: "Firstly, the ILO aims not only at ensuring that the terms of international competition in the shipping industry do not adversely affect the employment conditions of seafarers but also at the establishment of minimum standards for these conditions. There is a not inconsiderable body of standards in the maritime field which have been widely ratified, and the ILO is concerned that these should not be evaded by recourse to flags of convenience. Secondly, the ILO considers that countries which have become important maritime nations through the registration of merchant vessels not their own should exercise effective authority over the ships under their registry and thus ensure the observance of appropriate social and safety standards in conformity with the provisions of Recommendation No. 108 adopted in 1958".⁸

Recommendation No. 108 (1958) concerning Social Conditions and Safety (Seafarers)

The Recommendation recalled the efforts of the first U.N. Conference on the Law of the Sea to solve the question of substandard vessels and its Preamble referred to the High Seas Convention and, particularly, to a) the requirement that a genuine link should exist between the flag State and the ship, and b) the obligation that every State should take such measures for ships under its flag as are necessary to ensure safety at sea "with regard, *inter alia*, to the manning of ships and labour conditions for crews, taking into account the applicable international labour instruments".⁹

The operative part of Recommendation No. 108 referred to the need for the country of registration to accept the full obligations implied by registration and exercise effective jurisdiction and control for the purpose of the safety and welfare of seafarers in its sea-going merchant ships and it enumerated certain cases in which effective jurisdiction and control should be exercised, such as safety standards for ships, adequate inspection services, the engagement of seafarers, their conditions of employment and the freedom of association, the repatriation of seafarers and, finally, their certification.¹⁰

tonnage which was added to the Panamanian register during 1985 was less than four years old, see "Panama ships registrations increase 15%" in *Cargo Focus*, 26/7/85, p. 4.

⁶For the ITF activities in the ILO see H. Northrup and R. Rowan, *The International Transport Workers' Federation and Flags of Convenience Shipping*, 1983, pp. 31-33; Appendix C, pp. 213-229 (especially for ITF activities in the ILO concerning seafarers see *ibid.*, pp. 213-220).

⁷For details concerning Recommendation No. 107, its inadequacies and conclusions, see *supra* Chapter 2, Section 2.2.1.3, pp. 149-150; Subsection 2.2.1.4.3., pp. 164-169.

⁸JMC/21/4, p. 3.

⁹Emphasis added. For an analysis of the relevant provisions of the HSC and UNCLOS III, see *supra* Chapter 1, Section 1.6.3., pp. 85-90.

¹⁰For the preparatory meetings and discussions which led to the adoption of Recommendation No. 108 see International Labour Conference, 41st session, 1958, Report IV, *Flag Transfer in Relation to Social Conditions and Safety*, pp. 1-8.

The main characteristic and drawback of Recommendation No. 108 is that it contained provisions of a very general nature and though it referred to most aspects of maritime labour, it did not make law nor did it refer to any specific provisions of other ILO maritime instruments. Expressions such as "internationally accepted safety standards" (clause (b)), "conditions ... in accordance with the standards generally accepted by the traditional maritime countries" (clause (d)), "proper repatriation ... in accordance with the practice followed in traditional maritime countries" (clause (f)), "proper and satisfactory arrangements ... for the examination of candidates for certificates of competency ..." (clause (g)) were either too vague to be effective or relied on the ambiguous criterion of the law and practice in traditional maritime countries, particularly vague since law and practice in these countries relating to the matters dealt with in the Recommendation differed widely.¹¹

B) The preparatory discussions before the 1976 Conference

At the 55th Session (Maritime) of the ILO conference Resolution VIII was adopted concerning Flags of Convenience. It urged the Governing Body to ask the governments to report on the measures taken to implement the provisions of the Seafarers' Engagement (Foreign Vessels) Recommendation, 1958 (No. 107), and the Social conditions and Safety (Seafarers) Recommendation, 1958 (No. 108).¹² The Governing Body decided that the question should be referred to the 21st session of the Joint Maritime Commission.¹³

After the reports of the governments had been received, the Workers' members of the Conference Committee on the Application of Conventions and Recommendations at the 57th session remarked that, though 62 countries had supplied information on the action taken on the above Recommendation, important maritime countries (including Liberia, Panama, USSR, Denmark and Yugoslavia) had failed to provide any reports. Moreover, a small number of countries referred to the question of freedom of association of seafarers. This view coincided with the findings of the Committee of Experts on the Application of Conventions and Recommendations (henceforth also referred to as the Committee of Experts). Both Committees expressed the hope that more complete information would be available to assist the JMC in its work.¹⁴ It should be noted, however, that 8 countries which had not supplied information, provided the reports requested by the Office before the 21st

¹¹As regards clause (e) (obligation of the Member to ensure freedom of association for the seafarers serving on board its ships), it should be noted that it covers all seafarers employed on board a ship to which the Convention applies and not only nationals of the country of the ship's registration, 41 *R.P.*, p. 238. Recommendation No. 108 was adopted by 144 votes to 0, with 3 abstentions (U.S. Government and Greek employer delegates), *ibid.*, pp. 187-188.

¹²For the text of the Resolution, see 55 *R.P.*, p. 288. It was argued by the Workers' Group that little or no action had been taken on those Recommendations. The Workers' member of Greece pointed out that the situation in Greece was better, since Greek seafarers employed on Greek-owned FOC vessels enjoyed protection similar to that of Greek seafarers on Greek ships through appropriate collective agreements. On the other hand, the Employers' Group objected to the use of the word "flags of convenience" and preferred a general wording which would call upon all governments to implement the provisions of the relevant ILO instruments, *ibid.*, pp. 161, 199; this latter view was also shared by the Government of Liberia, *ibid.*, p. 207.

¹³185 *G.B.*, pp. 78, 154.

¹⁴JMC/21/4, p. 6. For the Report of the Conference Committee on the Application of Conventions and Recommendations, see ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4C), International Labour Conference, 57th Session, Geneva, 1972 (hereinafter cited as the Report of the Committee of Experts). This report is also reproduced in *PTMC*, Report V, 1975, Annex IV, pp. 51-57.

session of the JMC (Denmark, Haiti, Ireland, Jamaica, Liberia, Portugal, Sudan and Ukraine). Among these countries Denmark and Ireland stated that existing laws gave effect to the provisions of Recommendation No. 108; Haiti gave a general answer referring to Sections 328-344 of the Labour Code "Francois Duvalier"; Jamaica reported in general terms that the provisions of the Recommendation are complied with; Portugal referred to Decrees-Laws passed for the ratification of the relevant ILO Conventions; the Sudan gave specific information on all aspects of employment of Sudanese seamen which, generally, seemed to be in accordance with the aims and provisions of the Recommendation; the Ukraine stated that the Recommendation was not of any interest to that country at present; and Liberia indicated that it had legislative and administrative provisions covering some of the matters dealt with in the Recommendation.¹⁵

As regards the implementation of the provisions of Recommendation No. 108, the replies of forty six governments were examined by the Committee of Experts.¹⁶ As the report of the Committee reveals not all countries had taken action on all the provisions of the Recommendation.¹⁷ However, an impressive number of countries reported that they gave effect to certain of its clauses.¹⁸

In the meantime other bodies and governments became very concerned with the question of flags of convenience.¹⁹ It was pointed out that one of the reasons which contributed to the growth of FOC vessels was the substantial financial advantages that shipowners operating under flags of conve-

¹⁵International Labour Organisation, Joint Maritime Commission, 21st session, Geneva November - December 1972, Supplementary information on: 1 *Holidays with pay for seafarers*, 2. *Protection of young seafarers*, 3) *Continuity of employment of seafarers*, 4. *Flags of Convenience*, JMC/21/7, pp. 6-30. As regards Liberia, the main law relating to seamen's employment was Chapter 10 of Title 22 of the Liberian Code of Laws of 1956, effective 18 August 1964. Of particular interest were Sections 292 and 341 (c) regarding manning (the first required that a Liberian vessel must not be navigated unless it had on board such complement of officers and crew as is necessary for safe navigation; the second laid down that a sufficient number of men must be employed to promote safety of life at sea and to avoid excessive overtime); no actual number of officers and crew was prescribed), 294 which prescribed penalties for misuse of licences or certificates, 320-325 which contained provisions similar to those of Convention No. 22, 326 which laid down a 16-year minimum age limit, 332, 334, 335 and 336 (4) preserving the right of seaman to wages, 336 (1) - (3) which provided for wages, maintenance and cure for sick and injured seaman and further enumerated the cases where the said seaman was not entitled to these benefits, 341 which provided for an 8-hour day without provisions for limitation of overtime and weekly rest, 336 (3), 342 and 343 relating to repatriation whose provisions differed substantially from the ILO repatriation instruments actually limiting the seaman's right to repatriation to cases where his landing ashore is not due to his own fault, 352-357 concerning freedom of association and collective bargaining. Art. 361 empowered the Commissioner to make rules and regulations (but not contrary to the above provisions) relating to all aspects of seamen's affairs. Under the Liberian Maritime Regulations, as amended through to 11 July, 1969, all ships were required to carry a specified minimum number of certificated personnel (Chapter X, 10.292); for the above-mentioned provisions, see *ibid.*, pp. 9-28. For the philosophy of the new Liberian Register from a shipowner's point of view see *Which Register? Which Flag?* Conference, 1987, Speech of J. Smith, especially pp. 6-12.

¹⁶These included all major maritime countries except the five countries mentioned earlier. For the position in these countries with regard to Recommendations Nos. 107 and 108, see International Labour Conference, 57th session, Geneva, 1972, *Summary of reports on two Recommendations*, Report III (Part 2 B), pp. 2-51.

¹⁷Paras. 14, 16, 17 and 18 of the Report of the Committee of Experts, *op. cit.*, pp. 4-5.

¹⁸Out of 46 countries the following indicated that they gave effect to clauses (a) to (g) of Recommendation No. 108: Clause (a): 45 (98%), clause (b): 40 (87%), clause (c): 29 (63%), clause (d): 33 (72%), clause (e): 30 (65%), clause (f): 34 (74%), clause (g): 36 (78%). The percentages given are rounded off to the nearest 0.5%. For details as regards which countries reported to have given effect to Recommendation No. 108, see the Report of the Committee of Experts, *op. cit.*, pp. 5-6, *PTMC*, 1975, Report V, Annex IV, pp. 54-55.

¹⁹The UK Government made an inquiry into the conditions prevailing in the shipping industry, see Committee of Inquiry into Shipping - Report - Chairman, Lord Rochdale, London, May 1970 (HMSO, 1970; Cmnd 4337), especially p. 51, para. 184 where a definition of the flags of convenience is given; also see OECC, *Study on the Expansion of the Flags of Convenience Fleets and on various aspects thereof*, 1958; OECD: *Maritime Transport* 1971. A Study by the Maritime Transport Committee (Paris, 1972).

nience enjoyed as regards crew costs, including lower manning scales.²⁰ The Committee concluded that, though the information available did not give "a sufficiently complete picture of the manner in which the matters covered by the two Recommendations are dealt with in a large segment of the world's shipping industry at the present time", more than half of the countries who replied seemed to give effect to their provisions. Nevertheless, about half of the countries only refer to national provisions ensuring freedom of association for seafarers employed on board their ships.²¹

The 21st session of the JMC

At the 21st session of the JMC the views of the Seafarer and the Shipowner members remained unchanged. The Seafarers stated that the operation of vessels under flags of convenience meant lower labour and safety standards on board ship. This had an adverse effect on seamen's hours of work, wages, social security and repatriation benefits and accounted for the poor accident record of those vessels. On the other hand, the Shipowners argued that certain flags of convenience countries had established safety and labour standards higher than the accepted minima and these were indeed higher than those adopted in some non-FOC countries. The shipowners had recourse to flags of convenience because of the operational and financing advantages which registration under these flags entailed.²² Finally, the JMC at the same session adopted a unanimous resolution on substandard vessels, particularly those registered under flags of convenience, calling the countries who had not done so to take immediate action on Recommendations Nos. 107 and 108 and requesting the Governing Body to include the question in the Agenda of the Preparatory Technical Maritime Conference the question of substandard vessels.²³

Other developments

Apart from the case of Panama, certain progress was reported in other countries after 1960. Liberia ratified Convention No. 53 concerning the Minimum Requirements of Professional Capacity for Masters and Officers on Board Merchant Ships, 1936 and it was reported that Liberia had established an adequate system of inspection services and satisfactory arrangements for the certification of

²⁰It was asserted that American shipowners were indeed required to use flags of convenience, if they were to operate and compete in the international market without subsidies, OECD, 1971, op. cit., p. 16, para. 188. No or inefficient mechanisms for the enforcement of safety and social regulations were provided in FOC countries, *ibid.*, pp. 20-21. It is calculated that crew cost savings of up to 45% are realised by shipowners who decided to flag out because of the international competition, A. Branch, *Economics of Shipping Practice and Management*, p. 18. For the fiscal and other advantages of FOC countries, see also E. du Pontavice, "Les pavillons de complaisance", *Droit Maritime Français*, no. 345, Sept. 1977, pp. 503-512; no. 346, Oct. 1977, pp. 568-582, at pp. 506-512. It has been asserted that the registration under a FOC flag rather than under a traditional flag would be translated to a difference of 2 to 300000 DM in crew costs only; however, reduction of crew costs may prove a more difficult proposition in ships such as tankers in view of the need for the employment of qualified personnel, E. du Pontavice, *ibid.*, pp. 509, 510; labour costs is regarded as an important advantage of flags of convenience by B. A. Boczek, *Flags of Convenience, An International Legal Study*, (1962), at pp. 30-31; however, this opinion is valid when U.S. wages are compared to FOC wages. It may be that certain European wages are lower than FOC wages, *ibid.*, p. 31, n. 18. For the differences between average monthly total costs for able seamen on dry cargo vessels in the U.S. and in other countries in 1954, see J. Collins, *Never pay off*, 1964, pp. 269-270; for differences in annual operating costs of North European and FOC tanker fleets, see B.N. Metaxas, *Flags of Convenience*, 1985, pp. 76-82, 86.

²¹See paras. 20, 23 and 24 of the Report of the Committee of Experts, op. cit., pp. 6-7.

²²PTMC, 1975, Report V, pp. 9-10.

²³For the text of the resolution, see *ibid.*, Annex V, pp. 58-59, JMC/21/8, Annex V, pp. 21-22.

officers.²⁴ The Liberian Government had issued a Notice to shipowners, masters and officers of merchant ships which contained regulations regarding the duties of the masters as regards regular inspection of the ship and the facilitation of the duties of nautical inspectors. It also contained inspection reports to be completed by the nautical inspector and signed by him and the master. It is important to note that apart from annual surveys, special inspections were required when the Commissioner of Maritime Affairs or his substitute believes that the safety of the ship, its cargo, the crew or its passengers is endangered or when previous inspections disclose such deficiencies as to warrant follow-up inspections. However, cargo ships of less than 500 GRT, pleasure yachts and sailing and fishing vessels were excluded from these regulations.²⁵

The Governing Body at its 189th Session (February-March 1973) decided that the question of substandard vessels, particularly those registered under flags of convenience should be included in the Agenda of the Preparatory Technical Maritime Conference to be held 1975 as item 5.²⁶

The ILO Office decided that the new instrument should have two parts: a) a part defining the obligations of ratifying Members with regard to a comprehensive body of labour and other standards and b) a part laying down provisions for the effective application of the above standards. As will be seen later, these two parts were linked into a combined text which constitutes Convention No. 147, as it stands today.

The first Office draft and the PTMC draft

Three points can be made as regards the 1975 Office draft submitted to the Preparatory Conference:

a) each country which had not ratified the instruments contained in the Appendix should satisfy itself that laws, regulations or collective agreements lay down standards at least equivalent to the standards listed therein (Point 4 (b));

b) this instrument aspired to be a comprehensive instrument aiming to combat substandard vessels; this is the reason why the Appendix thereto contained a wide range of instruments, such as the IMO Conventions on Pollution, as amended (1954, 1962, 1973), the ILO Wages, Hours of Work and Manning Recommendation and a number of ILO Conventions of general nature, and

c) Section B (Programme for the effective attainment of standards) contained a provision to the effect that if the instruments referred to in the Appendix were not ratified by a party to the Convention, "it will be open to shipowners to advise the Director-General of the International Labour Office that the standards required in clauses (b) and (d) of point 4 (the instruments listed in the

²⁴PTMC, 1975, Report V, pp. 11-12, Fred T. Lininger, Senior Deputy Commissioner of Maritime Affairs, Republic of Liberia, *Lloyd's List Annual Review*, 1968. At the 31st session of the Maritime Safety Committee of the IMO in 1974, the U.K. proposed a form of international inspection service based on internationally accepted instruments establishing safety and labour standards, such as the SOLAS Convention, the Load Line Convention, the Training and Watchkeeping Convention and the ILO Convention on substandard vessels which would be adopted in 1976, see PTMC, 1975, Report V, pp. 14-15.

²⁵See Instructions Concerning the Annual Inspections of Liberian Ships, Bureau of Maritime Affairs, Marine Notice No. 117, Republic of Liberia, 7 August 1972 in PTMC, 1975, Report V, Annex VI, pp. 60-75.

²⁶189 G.B., pp. 59, 88.

Appendix plus the Vocational Training (Seafarers) Recommendation, 1970) of the proposed conclusions with a view to an instrument are, to the extent that they do not specifically call for government action, satisfied on their ships, and to accept that any allegations that this is not so will be examined by a procedure to be determined by the Governing Body of the International Labour Office; the Director-General would inform member States of the receipt of such statements".²⁷ This provision was deleted by the Office at a later stage.²⁸

During the discussions held in the Committee on Substandard Vessels appointed by the Preparatory Technical Maritime Conference in 1975, certain countries, such as Liberia, the Scandinavian countries, and the shipowners were against the use of the words "flags of convenience" in the Convention and argued that the latter aimed to combat substandard conditions on board ship irrespective of the register or the flag. On the other hand, the seafarers preferred a specific reference to flags of convenience, since for various reasons, such as the poor accident record and low level of labour conditions, the safety and labour standards on board these ships should be corrected.²⁹

After lengthy discussions it was decided by vote that the provisions of laws or regulations which a ratifying Member undertook to have under the Convention should be "substantially equivalent" to the Conventions listed in the Appendix thereto.³⁰ A new paragraph was adopted requiring ratifying Members to hold official enquiries into serious marine casualties and that the report of such inquiries be made public. Finally, the part of the Office draft entitled "Programme for the effective attainment of the standards" was substantially modified, the provision mentioned above relating to the responsibilities of the shipowners having been deleted. The reference to flags of convenience of convenience in the title of the instrument was maintained.³¹

The second Office draft (1976)

Before the 1976 Conference there was no unanimity among Governments as to which instruments should be included in or excluded from the Appendix to Convention No. 147: Some Governments preferred the exclusion of the Social Security (Seafarers) Convention 1946, others the exclusion of the Certification of Able Seamen Convention, 1946 and that certain instruments should be deleted from the list according to single countries. Again, some countries thought that Recommendations, resolutions and guidelines should not be included therein while other countries did not encounter any problems in this respect. Finally, many countries were of the opinion that this list should

²⁷This procedure could be modelled along the lines of Arts. 24 and 25 of the ILO Constitution. For the text of the first ILO Office draft, see *PTMC*, 1975, Report V, pp. 17-19, International Labour Conference, 62nd (Maritime) Session 1976, Report V (1), *Substandard Vessels, Particularly Those Registered under Flags of Convenience*, pp. 5-8.

²⁸International Labour Conference, 62nd (Maritime) Session 1976, Report V (2), *Substandard Vessels, Particularly Those Registered under Flags of Convenience*, pp. 26-27.

²⁹Report V (1), 1976, pp. 10-12, Report V (2), 1976, p. 4, see also the discussions held at the Committee on Substandard Vessels appointed by the 1976 Conference, 62 *R.P.*, pp. 186-187.

³⁰Report V (1), 1976, p. 17.

³¹*Ibid.*, pp. 21-22.

not be so comprehensive as to impede the ratification of the future Convention but a few countries did not object to a comprehensive list comprising all aspects of seamen's employment.

The Office decided, in view of the fact that a number of countries (including Liberia, Japan, the U.K., Canada and India) favoured the exclusion of IMO instruments from the Appendix to the Convention, to delete IMO instruments from the Appendix and to require that ratification should only be open to Members which are parties to the IMO Conventions for the Safety of Life at Sea, on Load Lines and the International Regulations for Preventing Collisions at Sea.³² Accordingly, from that time the Convention on Minimum Standards ceased to be a joint ILO/IMO Convention, since no IMO instruments were included in the Appendix to this Convention at a later stage and no reference was made to IMO control procedures as had been done in the earlier Office draft.³³

Finally, the reference to flags of convenience was deleted from the title of the instrument according to the replies of the majority of the governments.³⁴

C) The 1976 Conference

The Committee on Substandard Vessels, Particularly Those Registered under Flags of Convenience

In the Committee many countries identified areas where the Office text was not considered satisfactory. The Government of Sweden pointed out that some instruments contained in the Appendix to the Convention were obsolete and that their revision should be undertaken by the Joint Maritime Commission.³⁵ It added that important documents such as the Labour Inspection (Seamen) Recommendation, 1926 (No. 28) had not been included and that the final instrument should be supplemented by guidelines for judging a substandard ship similar to IMO control procedures. Bulgaria suggested the drafting of a Recommendation aiming to ensure the human rights of seafarers.³⁶ Once more, the views of the shipowners' and the seafarers' groups were divided. The former thought that the Convention would not be practical, if it contained a long list of instruments in its Appendix while the latter seemed to favour a comprehensive instrument applicable to FOC vessels.³⁷

The Committee adopted a very important new Article (Art. 4 of the Convention) proposed by the Workers' group, to the effect that a ratifying Member could take the necessary measures (not unreasonably detaining or delaying the ship) to rectify conditions on board ship which are clearly haz-

³²See Report V (2), 1976, pp. 10-17. The IMO Pollution Conventions and the ILO Recommendations were altogether deleted from the Appendix to Convention No. 147, *ibid.* p. 44.

³³As the Office stated, IMO Conventions would continue to be enforced through IMO control procedures while ILO instruments would be enforced through the procedures available under the ILO Constitution, *ibid.*, pp. 43-44. This dispelled the doubts expressed by certain countries in the Committee on Substandard Vessels (at the 1976 Conference) over the competence of the two organisations, 62 *R.P.*, pp. 187-188, 197.

³⁴12 countries favoured the maintenance of the words "flags of convenience" in the Convention while 19 had the opposite opinion. The latter offered many reasons for this deletion: a) the Convention aimed to fight substandard vessels which did not always coincide with FOC vessels, b) "flags of convenience" could not be accurately defined, Report V (2), 1976, pp. 27-32.

³⁵As to the competence of the JMC in this respect and the feasibility of the Swedish proposal, see *supra* Chapter 1, Sections 1.7.2. and 1.7.3., pp. 105-110.

³⁶62 *R.P.*, pp. 186-187.

³⁷*Ibid.*, pp. 186, 188.

ardous to safety or health. Although certain developing countries such as India were afraid that such a provision would inhibit the aspirations of developing countries to build up national fleets, it was made clear that it only aimed to combat safety and health standards that were inferior to the standards of Convention No. 147; "these measures would be taken in the light of the standards included in the Appendix to the proposed Convention, in other words according to internationally accepted standards and not according to the standards in force in a certain State".³⁸

It should also be noted that these measures are not subject to prior notification thereof to the competent authorities of the flag State.³⁹

Finally, the Committee departed from the common final provisions for ILO maritime Conventions and agreed that the Convention would come into force after ratification by at least ten countries had been registered representing a total share in world shipping gross tonnage of 25 per cent.

Para. 2 of Recommendation No. 155 concerning the Improvement of Standards in Merchant Ships, as adopted by the Committee, provides that the provisions of national laws, regulations and collective agreements should be "at least equivalent" to the international standards listed in the Appendix to Convention No. 147 despite the opposite views of the Shipowners' group and the Government of India.⁴⁰ An attempt by the Workers' group to include a new paragraph in the Recommendation to the effect that official enquiries into marine casualties should be held not only in the case of a marine casualty involving a ship registered in the territory of a ratifying Member but also cases involving a ship passing through waters under the jurisdiction of the same Member was defeated. In the Appendix to the Recommendation were included in their entirety the following instruments:⁴¹ Convention No. 53 (Arts. 3 and 4), Convention No. 68 (Art. 5), Convention No. 133, Convention No. 134 (Arts. 4 and 7), the Workers' Representatives Convention, 1971 (No. 135), Convention No. 91 or (optionally) Convention No. 146, Convention No. 70, Recommendation No. 137 and the IMCO/ILO Document for Guidance, 1975.⁴²

The Committee on Substandard Vessels had before it two Resolutions concerning Flags of Convenience submitted by the Workers' delegates of France and Sweden respectively. These gave rise to lengthy discussions in the Committee which led to the adoption of two trivial resolutions, the first reaffirming the need for a study of the social security and employment conditions of seamen on board FOC vessels and the second urging governments to implement the provisions of Convention

³⁸*Ibid.*, pp. 192-193. The majority of the countries were in favour of a control procedure which would permit ratifying Members to take the necessary rectifying measures against a ship which does not conform to the standards of the Convention, even if this ship is registered in a country which has not ratified it. An amendment by the USSR aiming to limit the application of this Article to vessels flying a flag of country which has ratified the Convention was rejected by 306 votes in favour, 2938 against, with 356 abstentions, *ibid.*, pp. 188, 192-193.

³⁹*Ibid.*, p. 193.

⁴⁰*Ibid.*, p. 195.

⁴¹*Ibid.*, pp. 196-197. In parentheses appear the Articles of the same Conventions which are included in the Appendix to Convention No. 147 as opposed to the entire instruments.

⁴²Recommendation No. 137 on seafarers' training is the only Recommendation which appears in the Appendix to either Minimum Standards instruments. The 1975 Document for Guidance has been revised recently following amendments proposed by the Joint ILO/IMO Committee on Training; for details see Chapter 3, Section 3.1.2., p. 200, n. 12.

No. 147 and the substantive provisions of the instruments listed in the Appendix thereto at the national level.⁴³

The 1976 Conference

At the Conference many Governments⁴⁴ and both the Employers and the Workers spoke in favour of the two proposed instruments. In particular, the Government delegate of Netherlands pointed out that the port State control provisions of Article 4 of the Convention were not something new in international law, since IMO instruments provided for similar control procedures and that there were trends at the Law of the Sea Conference towards confirming certain powers of coastal States. However, from the speeches of the Governments it is clear that the text of Art. 4 was acceptable only because it was limited to cases "clearly hazardous to safety or health". It is probable that it would not have been supported by the government delegates, had it aimed at providing for control of social standards on board ship.⁴⁵

All amendments having been lost, Convention No. 147 (or the Merchant Shipping (Minimum Standards) Convention, hereinafter cited as the MSC) was adopted by 160 votes to 0, with 67 abstentions and Recommendation No. 155 by 211 votes to 0 with 15 abstentions.⁴⁶

6.1.2. Analysis of the key features of the MSC and possible remedies for its weaknesses

Convention No. 147 has been ratified by 20 countries so far⁴⁷ and came into force on 28 November 1981. As explained earlier, not all substantive provisions of this Convention will be analysed below, since this has been done in previous chapters; this section will be confined to the examination of the key concepts pervading this Convention and of certain of its provisions such as Arts. 1, 2 (f)-(g), 4, 5, 6 and the Appendix.

1) The form and the scope of the Convention

⁴³For the texts of these Resolutions (III and IV) see 62 *R.P.*, pp. 230, 324-25. The resolutions originally submitted to the Committee pointed out the need for a genuine link between the flag State and the vessel and recommended that measures be taken against ships on board which no adequate safety, social and environmental standard exist. Despite certain matters dealt with inadvertently in the Resolutions, such as the requirement that pay of all seafarers on FOC vessels should correspond to that of seafarers of advanced countries without any further qualification, para. (d) of the operative part of the Swedish resolution contained a novelty in ILO control procedures; it read as follows: "where port States are unable to inspect such vessels in order to determine whether the required standards are met with regard to qualifications, pay, working and social conditions the International Labour Organisation shall be given the necessary power to undertake inspection", *ibid.*, p. 228. If this provision had found its way into a Convention or a Recommendation, it would have been the first time in an ILO maritime instrument that the Organisation would act as a nautical inspector, quite apart from the provisions of the ILO Constitution concerning supervision.

⁴⁴The following Governments were opposed to Art. 4 of the Convention in that form: Indonesia, Poland, Bulgaria, Cuba, G.D.R., Philippines, Hungary, Mexico, Ghana and the USSR.

⁴⁵62 *R.P.*, pp. 248-260. See particularly, the speech of the Russian Government delegate, who was against a broad interpretation of Art. 4 and stated that it did not apply to labour disputes and social problems on board ship, *ibid.*, p. 250. As shown earlier in Chapter 4, Section 4.1.5.3.4., where the conditions of seamen's employment in relation to the question of port state control were discussed, this is the only accurate and possible interpretation of Art. 4.

⁴⁶*Ibid.*, pp. 261, 283-286. The following Governments abstained: Algeria, Brazil, Bulgaria, Colombia, Ivory Coast, Cuba, Ghana, Guatemala, Honduras, Hungary, Morocco, Mexico, Panama, Peru, Poland, G.D.R., Rumania, Sierra Leone, Trinidad and Tobago, Tunisia, Ukrainian SSR, USSR, Venezuela and Yugoslavia (24). All other Governments voted for the Convention (44). Most Employers' and Workers' delegates voted for the Convention.

⁴⁷Belgium, Costa Rica, Denmark, Egypt, Finland, France, F.R.G., Greece, Iraq, Italy, Japan, Liberia, Morocco, Netherlands, Norway, Portugal, Spain, Sweden, the U.K. and the U.S (in 15 June 1988).

The ILO regime on substandard vessels consists of a Convention and a Recommendation. However, this was not an obvious choice at the 1976 Conference: Out of 40 Governments, 21 (including Canada, France, the F.R.G., Honduras, India, Norway, Philippines and the U.S.S.R.) preferred a Convention and 15 (including Denmark, Japan, Liberia, Pakistan and the U.S.) were in favour of a Recommendation, while 4 (including the U.K.) preferred a Convention supplemented by a Recommendation. Other countries proposed other forms: the instruments should be divided into "Standards" covering all requirements essential for safety and for good conditions for seafarers and "Recommended Practices" which would include all controversial items.⁴⁸ Since, however, the MSC has been ratified by major maritime countries and has come into force, the value of alternative proposals regarding the form of the instrument will be considered later, insofar as they could provide a basis for the elimination of any obscurities of the notion of "substantial equivalence".

The Convention does not apply to sailing and fishing vessels (Art. 1 (4) (a) and (b)). However, problems may arise in cases where one of the Conventions listed in the Appendix covers fishing vessels explicitly or implicitly.⁴⁹ If a country, party to Convention No. 147, has ratified the Convention concerned, then it will be bound by that Convention.⁵⁰ If, however, it has not ratified the latter Convention, the question arises as to whether the concept of "substantial equivalence" also affects the scope of the Convention concerned.⁵¹ This problem is part of a more general question relating to the scope of the concept of "substantial equivalence" and will be discussed later. However, in view of the unequivocal wording of Art. 4 (b) of Convention No. 147, a ratifying Member, in the implementation of the provisions of Conventions listed in the Appendix which it has not ratified, is not required to apply them to fishing vessels, even if the Conventions concerned apply to fishing vessels or fishermen.

It also does not apply to small vessels⁵² and oil rigs or drilling platforms that are not engaged in navigation (Art. 1 (4) (c)).⁵³

⁴⁸Ghana, Report V (2), 1976, pp. 7, 12.

⁴⁹For example, the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55) implicitly covers fishing vessels engaged in deep-sea fishing; the Sickness Insurance (Sea) Convention, 1936 (No. 56) expressly covers all vessels engaged in sea-fishing; the Minimum Age Convention, 1973 (No. 138) (apart from possible exceptions allowed under Art. 4) and Freedom of Association and Collective Bargaining Conventions (Nos. 87 and 98) apply to all workers.

⁵⁰See Art. 2 (a) of Convention No. 147, at the end "... in so far as the Member is not otherwise bound to give effect to the Conventions in question".

⁵¹The Office draft contained after the words "in similar pursuits" the following phrase: "except in so far as they are expressly covered by Conventions referred to in the Appendix to this Convention". This phrase was deleted by the Committee on Substandard Vessels, after the Legal Adviser of the ILO had pointed out certain difficulties of interpretation which might have arisen because of its existence in the text of the Convention, 62 *R.P.*, pp. 189-190.

⁵²"Small vessels" cover, for example, small submarines engaged upon exploration work but not all "specialist" vessels, 62 *R.P.*, p. 190.

⁵³The decision as to which vessels are covered under this subparagraph is taken by the competent authority. This was the first step in an ILO Convention towards the inclusion of oil rigs and platforms therein, which had not been regarded as vessels up to then. If oil rigs or platforms are engaged in navigation it seems that they are included in the Convention. However, according to Art. 1 (1) of the Convention, it applies to every sea-going ship (to be determined by the competent authority) "which is engaged in the transport of cargo or passengers for the purpose of trade or is employed for any other commercial purpose". It is not clear whether the words "not engaged in navigation" in subpara. (c) refer to commercial navigation. Even if it is assumed that an oil-rig is usually removed for commercial purposes, no attempt was made to determine how the frequency of such "movement" would constitute the essence of "navigation".

Though Convention No. 147 is aiming to combat substandard vessels, *inter alia*, for safety purposes, it follows the traditional ILO wording in defining its scope; it should be noted that the Office in drafting Art. 1 of the Convention adopted a formula similar to that used in previous ILO Conventions for defining their scope and rejected proposals which sought to bring this Article into line with similar provisions of IMO instruments, such as the Collision Regulations and the 1974 SOLAS Convention.⁵⁴

Comparing the scope of the MSC to that of the ILO Conventions included in the Appendix to the former, one comes to the conclusion that the scope of the former Convention is not identical to the scope of any of the latter. In some respects the scope of certain Conventions is broader than that of Convention No. 147 in that the former do not exclude sailing or fishing vessels. On the other hand, the latter instrument expressly applies to sea-going tugs and does not impose a tonnage limit below which vessels are excluded therefrom (as do Conventions Nos. 73, 92, 22 and 23). This is the reason why at the Preparatory Conference an amendment was accepted to the effect that the scope of each of the Conventions listed in the Appendix should remain unaffected by Article 1 of the Minimum Standards Convention.⁵⁵

2) Substantial equivalence

At the 1976 Conference, the Government of Mexico raised issues concerning the nature of obligations of countries which ratify Convention No. 147 but have not ratified the Conventions listed in the Appendix thereto. In particular, the question was whether ratification of the former Convention was tantamount to ratification of the latter for purposes of creating international legal obligations.⁵⁶ This requires interpretation of the phrase "substantially equivalent" in Art. 2 (a) of the Convention.

It is worth noting that many countries in 1976 were against the inclusion of the notion of "substantial equivalence" in the Convention and preferred the expression "at least equivalent" to the former. In fact, the ILO Office chose to apply the concept of "substantial equivalence" to the ILO instruments listed in the Appendix only.⁵⁷

Though "substantial equivalence" is the concept on which the whole edifice of the Convention rests, no definition of the notion of "substantial equivalence" exists therein. It is submitted that such definition should have been included in the text of the Convention as a guidance to ratifying Mem-

⁵⁴The Office considered it important that the scope of Convention No. 147 should be in line with the scope of an ILO Convention, Report V (2), 1976, pp. 34-35.

⁵⁵Report V (1), 1976, p. 15. Nonetheless, Art. 1 (5) of the MSC, as it stands, only wards off the possibility of extending the scope of the Conventions listed in the Appendix thereto, thus implying that the scope of these Conventions could be restricted in certain cases. The following wording would be preferable: "Nothing in this Convention shall affect the scope ...".

⁵⁶62 R.P., p. 187.

⁵⁷This was a decision based on a marginal relative majority. 10 countries stated that the expression "substantially equivalent" should apply to all instruments, 11 though that it should apply to all ILO instruments included in the Appendix and not to the IMO instruments (including the U.K., Japan and Philippines) while 9 countries (including Canada, France, Liberia and the U.S.) rejected the concept of "substantial equivalence" altogether; Report V (2), 1976, pp. 25.

bers. Only two interpretations of the meaning of this phrase have been given by ILO officials at the preparatory meetings and these are not considered to be satisfactory:

i) At the Preparatory Conference, the opinion of the Legal Adviser was requested as regards the interpretation of the words "at least equivalent" in the Office draft. He indicated that this wording was not tantamount to requiring ratification of the Conventions listed in the Appendix and gave the following three reasons for this: "a) As regards some of these Conventions, only the acceptance of certain Articles was required, b) acceptance by virtue of collective agreements, with a residual obligation to legislate, was envisaged, c) the expression "standards ... which are at least equivalent ..." meant that deviations of detail from the terms of a Convention could be admitted as long as the general level of protection remained the same".⁵⁸

ii) The opinion of the representative of the Secretary-General with regard to the nature of obligations that the instruments included in the Appendix would impose on ratifying Members was as follows: "... the expression 'substantially equivalent' contained in Article 2, subparagraph (d) - referring to laws and regulations of States which ratified the Convention - did not involve the ratification of the instruments mentioned in the Appendix but implied that the State agreed to take account of the general goal of those instruments, whose absolute conformity with national standards was not required".⁵⁹

As regards the first opinion, the phrases "deviations of detail" and "general level of protection" are so vague as to permit a wide range of interpretations by the competent authorities, and if this is the case with the words "at least equivalent", one wonders what restrictions on interpretation use of the words "substantially equivalent" might impose. As to the second opinion, the distance between the general goal of the instruments concerned and absolute conformity with national standards is so huge that this interpretation as a guide is meaningless. Moreover, no expedient procedure exists in the Convention which could resolve doubts as to the substantial equivalence of standards implemented at the national level to the standards contained in the Appendix to the Convention.⁶⁰ The lack of any criteria, either in the Convention or in any ILO Recommendation or Resolution by means of which the existence or absence of "substantial equivalence" may be ascertained, is aggravated by the fact that

⁵⁸Report V (1), 1976, p. 14.

⁵⁹62 R.P., p. 188. The United States ratified Convention No. 147 subject to 5 understandings which were regarded by the Director-General as being in conformity with the terms of the Convention. Understanding No. 3 read as follows: "It is the understanding of the United States that the term 'substantially equivalent' as it appears in Article 2 (a) requires the ratifying State to take account of the general goal of the instruments in the Appendix, but does not require it to adhere to the precise terms of these instruments. This means that national laws and regulations may be different in detail, if the ratifying State has satisfied itself that the general goals of the instruments in the Appendix are respected.", see *O.B.*, Vol. LXXI, 1988, Series A, No. 2, p. 66. It is apparent in understandings such as the above which also conforms to the official ILO interpretation of the term 'substantially equivalent' that the difficulties of application of this concept consist in identifying the general goal of the instrument concerned. There are no means in the Convention for ensuring a uniform interpretation of the term "general goal".

⁶⁰Compare the Committee envisaged in Art. 22 paras. 4-6 of Convention No. 109, see *supra* Chapter 4. According to New Zealand, such procedure would require a member State which maintains that any of its standards are substantially equivalent to describe those standards to an ILO Committee of Experts which would determine whether or not they are substantially equivalent and advise other member States accordingly; Report V (2), 1976, p. 22.

countries seem to attach different meanings to this concept, which, it seems, can sometimes hardly be justified by the intentions of the drafters.⁶¹

Many examples of the difficulties likely to be encountered in the application of this notion can be given but three would suffice:

a) Art. 2 of Convention No. 7 provides that no children under the age of 14 must be employed on board ship. If a country allows this limit to fall to 12, would this be "substantially equivalent" to Art. 2 of the Convention? If the criterion is the spirit and purpose of the Convention and the historical facts as evidenced by the discussions at the preparatory meetings, this limit may well not be regarded generally as "substantially equivalent" to the limit of Art. 2. But if the criterion is the socio-economic conditions of the country concerned and it can arguably show that, for example, the average minimum age-limit of workers employed in private establishments is 13, the answer may be different.⁶²

b) Art. 3 of Convention No. 22 provides that the articles of agreement must be signed by the shipowner and the seaman. Can oral conclusion of the contract be regarded as substantially equivalent to signing? In this case, an answer in the negative is facilitated by the text itself, since Art. 3 (3) of the same Convention lays down that the above provisions shall be deemed to have been fulfilled if the competent authority certifies that the provisions of the agreement have been laid before it in writing and have been confirmed by both parties. Thus, para. 3 itself provides a standard for testing what is considered "substantially equivalent" to the requirements of para. 1 and, given the heated discussions which led to the adoption of these provisions, it can be said that an oral conclusion of a contract, which lacks the safeguards of Art. 3 (3), cannot be regarded as substantially equivalent to the signing of the agreement under Art. 3 (1).⁶³

c) Art. 4 of Convention No. 53 prescribes three conjoined requirements for the granting of a certificate of competency to officers in the deck and engine departments: i) minimum age, ii) professional experience, iii) passing of the appropriate examinations. The question arises whether a period of training in a maritime training institution can be substituted for professional experience and vice versa. This would constitute a departure from the requirement of professional experience in Art. 4 (1) (b) of the Convention. The discussions at the 1936 Conference would point to the rejection of this interpretation. However, recently some countries have pointed out the need for revision of certain ILO Conventions concerning certificates of competency.⁶⁴ Moreover, the IMO in 1978 adopted the

⁶¹One country (Philippines) thought that the criterion of "substantial equivalence" has "a wide range of flexibility being modified by economic, political, educational and social environment" while another (Portugal) reported that the basic standards included in the Appendix to the Convention, as applied though the concept of substantial equivalence "should constitute only guidance to be taken into consideration by the national legislation, since their strict application is not required; Report V (2), 1976, p. 23.

⁶²The Legal Adviser of the ILO Office was of the opinion that taking into account the doctrine of substantial equivalence the minimum standard is, in fact, 14 years, Francis Wolf, *Convention No. 147, The First Ten Years*, extract of unknown source found in the Maritime Branch of the ILO Office in Geneva, pp. 9-12, at p. 9.

⁶³Problems may arise, if the country concerned asserts that *similar* categories of workers (cabotage, dockworkers, fishermen) are legally or in practice allowed to conclude their contract of employment orally. The answer depends entirely on the choice of criteria to define the concept of "substantial equivalence".

⁶⁴See *supra* Chapter 3, especially n. 89.

STCW Convention, which in Regulations II/4 para. 2 (c) and III/4 para. 2 (c) - (d) allows the substitution of a certain period of special training or approved education for a fraction of a required period of professional experience. The question thus arises whether these developments can be taken into account when the notion of substantial equivalence is applied.⁶⁵

As a conclusion, the application of the concept of "substantial equivalence" to a wide range of international maritime labour standards presupposes the use of strictly defined criteria for determining its scope; otherwise another formula has to be devised and Convention No. 147 will have to be revised in this respect.

On the other hand, it could be argued that if broadly interpreted substantial equivalence could also provide the necessary flexibility so that ratifying Members do not have to ratify antiquated ILO instruments, but this flexibility runs counter to the more precise safety standards adopted by the IMO and this is why many countries were of the opinion that the criterion of substantial equivalence should not be applied to IMO safety standards or, in any event, to standards of safety, competence and manning.⁶⁶ Even so, it is far from clear that in the ILO maritime Conventions it is only to social standards that the notion of "substantial equivalence" could possibly be applied. It is difficult to assert that Conventions or provisions of Conventions, such as Arts. 3 and 4 of Convention No. 53, Convention No. 73, Convention No. 134 and Art. 6 of Convention No. 92, do not deal with matters directly related to safety on board ship. If it was thought desirable or mandatory that "substantial equivalence" should not apply to IMO instruments,⁶⁷ this is the case with at least the above-mentioned instruments and provisions. Thus, apart from the fact that this notion is not defined in any instrument, its potential scope betrays the grounds on which it was allowed to enter into Convention No. 147.

The last question which may present difficulties in respect of the expression "substantially equivalent" is the definition of its scope. In particular, it is not clear whether this notion only applies to the substantive provisions of the instruments listed in the Appendix or whether it comprises their scope and final provisions too. No attention has been paid to this aspect of "substantial equivalence" either at the 1976 Conference or later. Attempts to answer this question by means of textual interpretation of Convention No. 147 is rendered difficult by the existence of two rather ambiguous provisions therein: a) Art. 2 (a) refers to national provisions "substantially equivalent to the Conventions or Articles of the Conventions referred to in the Appendix ...". The word "Conventions" comprises the scope and final provisions of the instruments listed in the Appendix⁶⁸ but the Articles of Conventions

⁶⁵The same problems arise if an Administration seeks to vary the requirements of Art. 4 of Convention No. 53 in respect of engineer officers employed on board ships engaged on near-coastal voyages; see Regulations III/2 para. 2 (d), III/3 para. 2 (d), III/4 para. 2 (at the end) of the STCW Convention.

⁶⁶Report V (2), 1976, pp. 20-25.

⁶⁷As was pointed out by several delegates, the notion of "substantial equivalence" would have had the effect of weakening IMO safety standards, had they been included in the Appendix to the Convention, Report V (1), 1976, pp. 28, 30, Report V (2), 1976, p. 5.

⁶⁸However, this is not clear. It seems that the delegates at the 1976 Conference, when they voted for this Article, had in mind the standards of the Conventions and not the "Conventions" as a whole, since the scope thereof had not been

listed therein do not refer to the scope or the final provisions of these Conventions and it would be illogical to apply the concept of "substantial equivalence" to the first group of instruments but not to the latter, since this was not the intention of the 1976 Conference. On the other hand, Art. 1 (5) of Convention No. 147 seems to allow the use of "substantial equivalence" in certain cases.⁶⁹ This provision, as pointed out earlier, was intended to leave the scope of the instruments listed in the Appendix unaffected by Art. 1 of Convention No. 147 but, as it stands, the notion of "substantial equivalence" can be used to reduce the scope of the Conventions concerned. On the whole, it seems that "substantial equivalence" applies to the scope and, perhaps, the final provisions of the Conventions listed in the Appendix, though doubts are not dispelled, if one takes into account the proceedings which led to the adoption of the Convention.⁷⁰

3) Art. 2 (c) of the MSC

Art. 2 (c) provides that each Member which ratifies the Convention must "satisfy itself that *measures for the effective control of other shipboard conditions of employment and living arrangements*, where it has no effective jurisdiction, are agreed between shipowners or their organisations and seafarers organisations *constituted in accordance with the substantive provisions* of the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949".⁷¹ This Article requires ratifying States which are unable to satisfy themselves that the shipowners' and seafarers' organisations have agreed on measures for effective control (by means of grievance procedures, arbitration, etc.) of the respective collective agreements, to take measures enabling them to exercise effective jurisdiction and control themselves, thus eliminating the need for measures to be agreed upon between shipowners' and seafarers' organisations.⁷²

4) Art. 2 (f) and (g) of the MSC

Art. 2 (f) deals with the inspection of national ships by the port authorities of the flag State and is aimed at verifying that they comply with a) ratified international labour standards and b) national labour standards. It is not clear from the Convention whether this requirement consists in peri-

discussed either at the Conference or at any preparatory meeting. As to whether the Articles of Conventions listed in the Appendix are meant to comprise the scope and the final provisions of the same Conventions, see below under 7), The Appendix to the MSC.

⁶⁹This Article reads as follows: "Nothing in this Convention shall be deemed to extend the scope of the Conventions referred to in the Appendix to this Convention or of the provisions contained therein", emphasis added.

⁷⁰An affirmative or negative answer to this question is of considerable significance, since, in the first case, a ratifying Member may be able to vary the requirements of the instruments of the Appendix with regard to certain categories of workers or vessels, or the denunciation periods.

⁷¹Italics supplied. The Government Member of Mexico declared that his Government would have serious difficulties in accepting this text, not having ratified one of the two Conventions mentioned therein (Conventions Nos. 87 and 98); 62 *R.P.*, pp. 191, 257. The words "constituted in accordance with the substantive provisions" denote probably Arts. 2, 3 and 7 of Convention No. 87 and Art. 2 of Convention No. 98; see Interpretation of Instruments Adopted by the Conference: Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), *O.B.*, Vol. LXV, 1982, Series A, No. 3, pp. 129-132.

⁷²*Ibid.*, p. 131.

odic or regular inspections and, in the latter case, how frequently they should be exercised.⁷³ It is important to note that, as Art. 2 (f) stands, it requires ratifying Members to carry out ship inspections in respect of matters pertaining both to private and to public law.⁷⁴

Inquiries, according to Art. 2 (g) of the MSC, may be held only into serious marine casualties.⁷⁵ The expression "serious" is only indirectly defined: it must certainly comprise cases involving injury or loss of life but other "serious" marine casualties could be envisaged such as stranding or loss of ship involving serious environmental damage or potentially serious environmental damage, collision, injuries to members of the crew, etc. The requirement that the final report of the enquiry must normally be made public is likely to result in legal complications in certain countries.⁷⁶ One of the disadvantages of this provision from the technical and practical point of view is that it does not aim to facilitate and regulate the conduct of official inquiries into marine casualties at the international level.⁷⁷

5) Port State Control (Art. 4 of the MSC)

Much has been written about whether the extension of the control procedures of the Article to ships registered in countries which have not ratified the Convention constitutes a violation of the rules of international law.⁷⁸ Yet, both the shipowners' and the seafarers' groups supported Art. 4 of the Convention concerning port State control. Since, as pointed out earlier, the majority of governments were also in favour of this Article, it may be confidently asserted that it constituted an acceptable formula.⁷⁹

⁷³See relevant IMO Recommendations.

⁷⁴Report V (2), 1976, pp. 38, 41.

⁷⁵It should be noted that Art. 2 (g) is in accordance with the present rules of international law under which each State has jurisdiction over vessels flying its flag on the high seas, Ebere Osieke, "The International Labour Organisation and the Control of Substandard Merchant Vessels", *ICLQ*, Vol. 30, Jul. 1981, pp. 497-512 at p. 505; *ibid.*, "Flags of Convenience Vessels: Recent Developments", *AJIL*, Vol. 73, 1979, pp. 604-627, at pp. 617-8.

⁷⁶New Zealand: No publication of the findings of preliminary inquiries should be required, Report V (2), 1976, pp. 38-39, Germany: It may not be possible to carry out an official inquiry or to require periodic inspection in respect of an act of private law, such as the recruitment procedure, *ibid.*, pp. 36, 37-38, 41, Norway: The Norwegian Maritime Act, sections 308 and 314, provide that in certain cases the findings of official inquiries into marine casualties need not be published. This is the reason why Art. 2 (g) of the Convention could not be accepted by Norway, *ibid.*, p. 40. However, Norway and Germany have ratified Convention No. 147. No information is available as to how the word "normally" in Art. 2 (g) is interpreted in these countries.

⁷⁷Compare IMO Resolution A. 173, Participation in Official Inquiries into Maritime Casualties. According to this Resolution such inquiries may be conducted by a State other than the flag State. The provisions of this Resolution concern countries "affected by or having a substantial interest in maritime casualties" and were aimed at dealing with oil pollution incidents but they could equally apply to certain of the instruments included in the Appendix to the MSC, such as the Accidents Prevention Convention (Arts. 4 and 7); see also IMO Resolution A. 440 concerning The Exchange of Information for Investigations into Marine Casualties.

⁷⁸The view that Art. 4 of Convention No. 147 is in accordance with international law at present was expressed by many writers, see Osieke 1979, *op. cit.*, p. 619; Osieke 1981, *op. cit.*, pp. 507-508. One commentator described the possibility of the examination of foreign ships as "an innovation for the ILO", Joseph P. Goldberg, "ILO tightens standards for maritime safety", *Monthly Labor Review*, July 1977, pp. 25-30, at p. 28. Another writer stated that the MSC is "a step toward international regulation of conditions aboard vessels replacing ITF boycotts as a method of obtaining improved conditions"; see Rachel Roat, "Promulgation and Enforcement of Minimum Standards for Foreign Flag Ships", *Brooklyn Journal of International Law*, Vol. VI:1, 1980, pp. 54-87, at pp. 70-71, n. 83. However, the view of the latter writer that port control under Art. 4 of the Convention may extend only to vessels registered in the territory of a ratifying Member is not acceptable and is due to a misapprehension of the proceedings of the 1976 Conference, *ibid.*, pp. 83-84.

⁷⁹62 R.P., pp. 246-248.

However, the regulation of port State control in Art. 4 of the Convention is not unequivocally successful in legal and practical terms:

a) Art. 4 clearly contradicts Art. 6 (1) of the Convention.⁸⁰

b) It was argued that this Article is contrary to the ILO Constitution and to Art. 34 of the Vienna Convention on the Law of Treaties.⁸¹

c) As pointed out in Chapter 4, Section 4.1.5.3.4., where the provisions of Convention No. 147 were examined in relation to the seamen's conditions of employment, although the "standards" of Convention No. 147 include not only safety but also social standards, port State control is confined to the former.⁸²

d) Some countries have adopted a very restrictive view of the powers of the port State under Art. 4.⁸³

e) No procedures are laid down in Art. 4 (3) for the submission and consideration of complaints by the persons or bodies enumerated therein.⁸⁴ Accordingly, such questions as the onus of proof and acceptance of complaints are left to national practice and interpretations vary.⁸⁵

f) Many times at the 1976 Conference it was argued that the powers of the port State under Art. 4 are likely to be abused.⁸⁶ This argument calls for closer consideration. In 1976 the MSC Convention was the first instrument which aspired to establish a system of international inspection of labour conditions on board ship and this may have generated fears which mounted because of the existence of the obscure insertion of the phrase "substantial equivalence" into Art. 4. At first sight, port State control is only restricted to the rectification of conditions clearly hazardous to safety or health, as defined above, and, therefore, it seems that the powers of the port State cannot exceed the limits fixed thereby. However, there is one element in Art. 4 of the Convention which complicates the matter: The port authority is empowered to rectify certain conditions on board ship, if it receives a complaint or obtains evidence that the ship does not conform to *the standards of this Convention*. It may be asked to what standards this provision refers. The proceedings of the 1976 Conference show unequivocally

⁸⁰The latter reads: "This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General".

⁸¹The following Governments at the 1976 Conference were opposed to Art. 4 of the Convention in its present form: Indonesia, Poland, Bulgaria, Cuba, G.D.R., Philippines, Hungary, Mexico, Ghana and the USSR, 62 R.P., 248-260.

⁸²According to the Reporter of the Committee on Substandard Vessels, the words "clearly hazardous to safety and health" apply to "flagrant examples implying danger to safety or health", 62 R.P., p. 245. The term "safety" in Art. 4 (1) seems to apply to the safety of both the vessel and the crew (compare Art. 4 (3)); for observations concerning this distinction see International Labour Conference, 9th session, Geneva, 1926, *Report on General principles for the inspection of the conditions of work of seamen*, Report II, pp. 83-87.

⁸³Argentina stated: "we understand that such measures should be none other than urgent measures which cannot be put off in order to deal with real emergency situations, to be undertaken only in extreme circumstances which might arise while a ship is in a port under the jurisdiction of a member State which has ratified the Convention", 62 R.P., p. 276.

⁸⁴Compare Section IV of Resolution A. 321 adopted by the IMO, Section 4 of the Annex to Resolution A. 466 (Res. A. 466 superseded Res. A. 321).

⁸⁵The need for rules for the submission of a complaint concerning social conditions on board ship was pointed out by the Philippines, 62 R.P., p. 253. Argentina interpreted Art. 4 (3) to mean that "the person who makes such a complaint should show proof that he has a legitimate interest in the situation about which he is complaining", *ibid.*, p. 276.

⁸⁶The danger of subjective interpretation of the provisions of Convention No. 147 has been regarded as a major disadvantage of this Convention, see Stewart Wade, "Anti-foc lobby marshals forces with ILO 147", *Fairplay International Shipping Weekly*, 1st May 1986, pp. 12-14.

that these standards are not only the standards of Convention No. 147 relevant to safety and health but refer to all the standards of this Convention, viz. all standards included in the Appendix thereto.⁸⁷ This observation has two important consequences: a) it makes the job of the port authorities particularly difficult, since they have to decide whether the breach of the labour standards (safety standards apart) of the Conventions listed in the Appendix could lead to conditions clearly hazardous to safety and health and if so the breach of what standards (here, the discretionary powers of the port authorities are particularly important)⁸⁸ and b) it attaches great significance to the vague criterion of "substantial equivalence": it is the latter which will ultimately decide whether given conditions on board a specific ship justify the taking of rectifying measures because the ship concerned does not conform to the labour standards of the MSC as qualified by the expression "substantially equivalent". In conclusion, port authorities, though they are not free in the exercise of their power to take rectifying measures, have a degree of discretion that could result in a non-uniform application of the provisions of the Convention at the international level.

6) Co-ordination of the activities of the ILO and the IMO with respect to Convention No. 147

Essentially, each Organisation would continue to supervise its own instruments, and governments would make reports on these instruments only once.⁸⁹ The IMO representative said that a distinction should be made between safety standards, which were the responsibility of the IMO, and social standards that were to be applied by virtue of Convention No. 147.⁹⁰

Although the IMO Conventions relating to safety standards have been widely ratified and, as pointed out, they would not constitute a substantial obstacle to ratification of Convention No. 147,⁹¹ it is submitted that the precondition that the Convention should be open to the ratification of parties to these IMO Conventions would have been better deleted. The reason is that the line between safety standards and social standards cannot be easily drawn and many ILO instruments contain safety standards. As a result, problems of interpretation may arise in certain cases concerning the applicable control procedures (ILO or IMO procedures).

7) The Appendix to the MSC

The main question with regard to the Appendix to Convention No. 147 concerns the criteria for inclusion of new instruments in, and exclusion of old instruments from this Appendix. Un-

⁸⁷62 R.P., pp. 259-260, 261, 266-267.

⁸⁸It is recommended that a Guide should be prepared setting out the ILO maritime standards non-compliance with which may have adverse effects on safety and health on board ship. At the preparatory meetings of the EEC countries on medical care which were held in Luxembourg in 1986 (no proceedings available) the question was discussed whether the absence of a doctor or medical facilities on board ship would justify rectifying measures on the part of the port authorities. It is submitted that an unqualified negative answer to this question (which prevailed at the meeting) could hardly be given in view of the analysis made above.

⁸⁹For the cooperation between the ILO and the IMO on the subject of substandard ships, see Resolution A.353 (IX) adopted by the IMCO Assembly on 13 November 1975.

⁹⁰62 R.P., p. 191.

⁹¹Ibid., p. 193. The words "or any Convention subsequently revising these Conventions" at the end of each clause of Art. 5 (1) do not mean that a Member wishing to ratify Convention No. 147 must be a party to the IMO Conventions mentioned in the Article "with amendments at any time in force"; they only enable a country to ratify Convention No. 147, if it was not a party to these Conventions but would be a party to any revised version thereof, *ibid.*, p. 194.

fortunately, government opinions differ on this point.⁹² It seems that the existence in the Appendix of instruments not ratified by the countries concerned has slowed down ratifications only to a certain extent.⁹³

Certain observations can be made as regards the Appendix to the MSC:

a) As a formula aiming to tighten control procedures in respect of labour standards on board ship, it is incomplete. This can be seen from a) tables A and B which appear in Appendix 4⁹⁴ and b) from the comparative list of the number of ratifications of Conventions included in, and excluded from, the Appendix to Convention No. 147, which are classified by categories relating to particular fields of maritime employment, as follows:⁹⁵

- i) General: Continuity of Employment (Seafarers) Convention, 1976, No. 145 (17).
- ii) Conditions for admission to employment: Minimum Age (Trimmers and Stokers) Convention, 1921, No. 15 (67),⁹⁶ 37, 49, 51, ⁹⁷ Medical Examination of Young Persons (Sea) Convention, 1921, No. 16 (70), 30 .⁹⁸
- iii) Entry into employment: Placing of Seamen Convention, 1920, No. 9 (32), Seafarers' Identity Documents Convention, 1958, No. 108 (47), 52 .⁹⁹

⁹²Canada: only those ILO Conventions which have been ratified by nations owning the majority of the world's tonnage should be included in the list, F.R.G. and the U.K.: no Recommendations and Resolutions should appear in the list, since they would otherwise be given the force of a Convention, India: basic principles should be included in the instrument itself and not in a separate list, Spain: the list should be limited to Conventions in force, Sweden: the Appendix to Recommendation No. 155 could contain instruments adopted by the ILO as well as the IMO; in particular, Resolution A.321 (IX) (referring to control procedures) adopted by the IMO should be included in the Appendix to the Recommendation, USSR: only instruments actually acceptable and acknowledged internationally should be included therein; see Report V (2), 1976, pp. 10-16.

⁹³Out of 12 countries which argued that there would be ratification difficulties of a Convention that invoked the provisions of other Conventions not ratified by the countries concerned (U.K., Netherlands, Italy, Denmark, the United States, Libyan Arab Republic, New Zealand, Pakistan, Switzerland, Turkey, Indonesia and Mexico, see Report V (1), 1976, pp. 12, 13, Report V (2), 1976, pp. 4, 6, 7-8, 9, 13, 15-16, 62 *R.P.*, pp. 251, 257) the first five countries ratified Convention No. 147 (aided by "substantial equivalence") while the other seven did not. Therefore, it seems that developing countries encountered more difficulties in ratifying a super-Convention referring to a wide range of labour standards than did developed countries.

⁹⁴Table A includes all ILO Maritime Conventions in force; Conventions which have not come into force have also been included therein as long as they have not become obsolete; the latter category comprises Conventions which have not come into force and were subsequently revised. As a result, the following Conventions are omitted: Holidays with Pay (Sea) Convention, 1936 (No. 54), Hours of Work and Manning (Sea) Convention, 1936, Paid Vacations (Seafarers) Convention, 1946 (No. 72), Accommodation of Crews Convention, 1946 (No. 75), Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76), Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93). In Table B certain Conventions of a general nature are listed which are applicable to seafarers.

⁹⁵The numbers in parentheses denote the number of ratifications received by the respective Conventions which are either excluded from, or only partly included in the Appendix to the MSC; when a second or more numbers (printed in italics) follow, these signify the number of ratifications received by the Conventions included in the Appendix to the MSC which relate to the same field of employment at sea. The words "in part" in brackets mean that only certain articles of the Conventions concerned are included in the Appendix to the MSC.

⁹⁶Certain countries have denounced this Convention as a result of the ratification of Convention No. 138.

⁹⁷Number of ratifications received by Conventions Nos. 138, 58 and 7 (dealing with minimum age) respectively. Certain countries have denounced Convention No. 7 as a result of the ratification of Conventions Nos. 58 and 138 while certain countries have denounced Convention No. 58 as a result of the ratification of Convention No. 138.

⁹⁸Number of ratifications received by the Medical Examination (Seafarers) Convention, 1946 (No. 73).

⁹⁹Number of ratifications received by the Seamen's Articles of Agreement Convention, 1926 (No. 22).

- iv) Officers' Competency Certificates Convention, 1936, No. 53 (27) (in part), Training and certificates of competency: Certification of Ships' Cooks Convention, 1946, No. 69 (26), Certification of Able Seamen Convention, 1946, No. 74 (21).
- v) Conditions of employment: Paid Vacations (Seafarers) Convention (Revised), 1949, No. 91 (20), ¹⁰⁰ Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958, No. 109 (11, not yet in force), Seafarers' Annual Leave with Pay Convention, 1976, No. 146 (10), Repatriation of Seafarers (Revised) Convention, 1987, No. 166 (1),³⁷ . ¹⁰¹
- vi) Safety, health and welfare: Food and Catering (Ships' Crews) Convention, 1946, No. 68 (21) (in part), Accommodation of Crews (Supplementary Provisions) Convention, 1970, No. 133 (17, not yet in force), ³¹ ¹⁰², Prevention of Accidents (Seafarers) Convention, 1970, No. 134 (22) (in part), Seafarers' Welfare Convention, 1987, No. 163 (3), Health Protection and Medical Care (Seafarers) Convention, 1987, No. 164 (1).
- vii) Social security: Unemployment Indemnity (Shipwreck) Convention, 1920, No. 8 (51), Social Security (Seafarers) Convention, 1946, No. 70 (7, not yet in force), Social Security (Seafarers) Convention, 1987, No. 165 (0), Seafarers' Pensions Convention, 1946, No. 71 (12), ¹⁵ , ¹⁴ , ¹³ . ¹⁰³

A number of conclusions can be drawn from a close examination of the above information: aa) the Appendix to the Convention contains only Conventions in force. However, the number of ratifications does not seem to play a major role nor is there any rational classification of instruments based on a high or above average ratification level; the number of ratifications of the instruments, included in the Appendix, relating to certificates of competency, food and accommodation and social security is low while instruments with a good or high record of ratification, such as Conventions Nos. 8, 9, 15, 16 and 108, have not been included, bb) there are areas of maritime employment which are not covered at all by Convention No. 147 such as continuity of employment, the seafarers' engagement and general conditions of employment (repatriation apart); the certification of seamen is only partly taken into account in the Appendix and only certain aspects of seamen's social security are dealt with in instruments included therein, cc) in the cases of the conditions for admission to employment and the entry into employment, the Conventions left out are more widely ratified than those included in the Appendix.

b) The extent of application of Conventions Nos. 53, 68 and 134, of which only certain articles are listed in the Appendix is not clear. These Articles do not refer to the scope of the respective Conventions and the question arises whether the scope applicable thereto will be the scope of these Conventions as qualified by "substantial equivalence" or that of Convention No. 147. If the first inter-

¹⁰⁰Certain countries have denounced this Convention as a result of the ratification of Convention No. 146.

¹⁰¹Number of ratifications received by the Repatriation of Seamen Convention, 1926 (No. 23).

¹⁰²Number of ratifications received by the Accommodation of Crews (Revised) Convention, 1949 (No. 92).

¹⁰³Number of ratifications received by the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55, the Sickness Insurance (Sea) Convention, 1936 (No. 56) and the Medical Care and Sickness Benefits Convention, 1969 (No. 130) respectively.

pretation is accepted, the respective articles of the Conventions should have been specified. Despite this fact, it is the first solution which is more likely to have been intended by the 1976 Conference.¹⁰⁴

c) In two cases (Minimum Age and Social Security Conventions) the Appendix provides ratifying States with the option of applying the provisions of one out of three instruments. This practice acts as an escape clause and is legally confusing. As regards the Minimum Age Conventions, the age limits adopted by Conventions Nos. 7 and 58 are 14 and 15 years respectively. The 14-year limit qualified by the criterion of "substantial equivalence" could result in the application of a 13 or 12 year limit at the national level which is in sharp contrast to the obligations imposed on States which chose to respect the provisions of Conventions Nos. 58 or 138. Finally, Conventions Nos. 55 and 56 both deal with questions of sickness insurance for seamen but the conditions which have to be fulfilled before a seaman is entitled to a sickness insurance benefit are different in each Convention and in many respects they deal with different aspects of social security (for example, Convention No. 55 includes provisions concerning repatriation necessitated by sickness or injury while Convention No. 56 makes provision for maternity benefits.¹⁰⁵ Since optional application of the above Conventions could result in malpractices as regards minimum age requirements and in a partial application of social security provisions to seamen, Convention No. 7¹⁰⁶ and the word "or" between Conventions Nos. 55 and 56 should be eliminated.

Therefore, it seems that much remains to be done as regards the revision of the Appendix to Convention No. 147.¹⁰⁷

The last question with regard to the Appendix to Convention No. 147 relates to the updating of the list of instruments contained therein. The effect of an amendment moved at the Preparatory Conference would have been that the words "as updated from time to time" were inserted after the phrase "substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix to this Convention". This addition was not finally adopted at the Preparatory Conference because there was uncertainty as to what updating procedures should be adopted.¹⁰⁸

A system of automatic replacement of the instruments listed in the Appendix by the relevant revised instruments as soon as the latter come into force would be objected to on two grounds: i) it would by-pass any criteria for the selection of instruments whose inclusion in the Appendix seems

¹⁰⁴This is supported by Art. 1 (5) of Convention No. 147 which provides that this Convention cannot be used to extend the scope of the Conventions included in the Appendix "or of the provisions contained therein"; emphasis added. These provisions do not have any scope in themselves, if no implied reference is intended to the scope of the respective Conventions.

¹⁰⁵For details, see *supra* Chapter 5, Section 5.2.3., pp. 390-392.

¹⁰⁶The expression "substantial equivalence" would ensure conformity with the provisions of Conventions Nos. 58 and 138 even by governments who have not ratified them.

¹⁰⁷The Appendix to the Supplementary Recommendation (No. 155) can be regarded as more progressive in this respect: from the instruments listed above, it includes Conventions Nos. 68, 133, 91, 146 and 70. The JMC, at its 25th session, recommended that the Appendix to Convention No. 147 be revised by adding to it Conventions Nos. 108, 145, 146 and 133 (as soon as the latter comes into force); see Resolution concerning the Identification of any Possible New Conventions to Be Added by a Protocol to the Appendix of Convention No. 147, *O.B.*, Vol. LXXI, 1988, Series A, No. 3, p. 161.

¹⁰⁸Report V (1), 1976, pp. 17-18.

appropriate (see *infra* under 6.3. Conclusions) and b) it would impose on the national legislator future obligations whose significance he would be unable to assess.¹⁰⁹

On the other hand, updating of the Appendix could be effected by means of the following procedures: a) a vote by a general Conference (which would, however, lack the expertise of specialist delegates), b) a vote at a maritime session of the Conference (updating may not be effective in view of the infrequent holdings of these sessions), a vote in the Governing Body or a resolution adopted by the JMC (impractical in view of the bipartite structure of this Committee; however, a comprehensive tripartite sub-Committee thereof could be entrusted with the task of revision).¹¹⁰

Finally, it was decided that "the incorporation into the Appendix to Convention No. 147 of new Conventions which have achieved reasonably wide acceptance and are in force should be effected by means of a Protocol which contains a supplementary appendix listing such Conventions and which provides that States may accept the obligations of Convention No. 147 in respect of them by ratifying the Protocol in addition to the Convention". In addition, it was decided that the question concerning whether any specific Convention should be included in the Protocol should be examined in the first instance by the JMC and the inclusion or inclusions would be upheld by a maritime session of the ILO Conference, unless special maritime sessions are held at intervals of more than 6 years in which case the question will form an item on the Agenda of an ordinary session of the Conference to which a particular Protocol to Convention No. 147 might be submitted for adoption after a recommendation of the JMC, "based on a high level of consensus within that body;"¹¹¹

Certain other comments concerning the adopted revision mechanism must be made:

a) It prevents the JMC from considering the inclusion in the Appendix of Conventions that have not come into force, and Recommendations.¹¹²

b) The phrase "new Conventions which have achieved reasonably wide acceptance" is not clear and is thus misleading. It is submitted that it implies Conventions which at present are not included in

¹⁰⁹Certain countries raised issues of interpretation of the Convention with regard to the updating of instruments considered obsolete (Sweden) or would not accept the above-mentioned method of revision (Germany), Report V (2), 1976, pp. 5, 11.

¹¹⁰See Para. 4 of Recommendation No. 155 concerning the Improvement of Standards in Merchant Ships and Resolution II concerning the Periodic Revision of the List of Conventions Appended to the Merchant Shipping (Minimum Standards) Convention, 1976 adopted by the 1976 Conference, 62 R.P., p. 324. According to this Resolution the consideration of the need for a revision of the instruments contained in the Appendix to the MSC rests with the JMC while the final decision is to be taken by a maritime session of the ILO Conference.

¹¹¹Resolution concerning the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147) adopted by the 1986 Preparatory Technical Maritime Conference, see Joint Maritime Commission, 25th Session, Geneva, October 1987, *Identification of any possible new Conventions to be added by a protocol to the Appendix to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*, JMC/25/2, p. 5. The Conference, by adopting this position, rejected other forms of revision of the Appendix to Convention No. 147, such as a revised instrument or a revised Appendix (along the lines of Conventions Nos. 121 and 110 respectively), PTMC, Geneva, May 1986, *The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147); Mechanism for incorporating new Conventions in the appendix*, Report IV, pp. 5-6.

¹¹²No obvious reasons have been given for this, see Joint Maritime Commission, 24th session, Geneva, September 1984, Review of the application and scope of the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), JMC/24/3, p. 18.

the Appendix to the MSC.¹¹³ This means that old Conventions may be included in the Appendix, if the terms of the Resolution are satisfied.

c) According to the Resolution revision of the Appendix may be undertaken by a General Conference; this possibility is not welcomed by certain governments.¹¹⁴

d) The effectiveness of the revision of the Appendix entirely depends on the JMC. In particular, the submission of a particular Protocol to Convention No. 147 should be based on a high level of consensus within that body. It is the experience of the present writer that such consensus has been achieved only when questions of a less controversial character have been discussed in that Committee. As can be seen from the history of the questions examined in previous chapters, in many instances, shipowners would not agree proposals to submit certain questions to the Conference if they thought it undesirable for various reasons (premature, adverse effects on shipping industry, etc). The inclusion of new instruments in the Appendix to Convention No. 147 is likely to lead to passionate discussions in the JMC depending on the controversial character of the instrument which is proposed for inclusion. It is possible that, as regards certain questions, such as wages, hours of work, manning and social security, a large majority in favour of particular proposals will be very difficult to obtain. Moreover, the bipartite structure of the JMC at present means that Governments have no voice in discussions involving the inclusion or exclusion of certain instruments in the Appendix to Convention No. 147.¹¹⁵ This situation is aggravated by the fact that the revision of the Appendix is entrusted to the General Conference where the presence of non-maritime countries and unqualified delegates may

¹¹³At the Preparatory Conference the seafarers' group was of the same opinion while the shipowners' group thought that the terms of the Resolution would exclude reconsideration of the Conventions excluded at the 1976 Conference, unless "some material change had occurred in the interim", JMC/25/2, p. 3.

¹¹⁴An unofficial statement to this effect was made by the Greek delegate at the 1986 Preparatory Conference in Athens in 1987. Though it has been argued by the same delegate that a maritime question should be considered at a maritime session of the ILO Conference, it cannot be overlooked that, as a matter of fact, maritime Conventions have been adopted at two General Conferences in 1921 and 1949 (revision of the Conventions adopted by the Seattle Conference in 1946) respectively. However, it is submitted that the revision procedure adopted at the 1949 should be limited to the special circumstances of the case. The Office Report said: "... in view of the very limited number of points involved in this instance and of the desirability of avoiding delays in ratification while revision is pending, the Governing Body agreed to place the question of the partial revision of four of the Seattle Conventions on the agenda of the 32nd session of the Conference, instead of waiting till a special maritime session could convened in accordance with the procedure generally followed for the consideration of questions affecting seafarers.", International Labour Conference, 32nd session, Geneva, 1949, *Partial Revision of Four Conventions Adopted by the 28th (Maritime) Session of the Conference, Seattle, 1946*, Report XII, p. 2. It should be noted that this procedure was vigorously opposed by the Shipowners in the tripartite Subcommittee of the JMC, which was entrusted with the task of revising the 1946 Conventions, and was only adopted on the understanding that the proposed revision would involve minor points, *ibid.*, pp. 8, 21-23. For different views on the significance and interpretation of the 1921 Resolution which recommended that maritime questions should be passed as a special maritime question on the agenda after they have been examined by the JMC, see 8 *J.M.C.*, p. 17, 9 *J.M.C.*, pp. 24-25.

¹¹⁵It is the official position of the Greek Government that the Appendix to Convention No. 147 should not be overloaded with other instruments before the effectiveness of this Convention, as it stands, is assessed; 74 *R.P.*, p. 8/8. In the meetings of the EEC countries convened to examine matters which fell within the competence of the Committee on Health Protection and Medical Care at the 1987 ILO Conference (no proceedings available), one of the main issues was a resolution adopted by the EEC to the effect that the Convention on Health Protection and Medical Care which was going to be adopted at the Conference, should be included in the Appendix to Convention No. 147. It was only after heated discussions in these meetings that it was realised that none of the delegates present had strong feelings about this resolution. Had it been adopted by the 1987 Conference (its existence was and is still unknown to the shipowners and seafarers), now the JMC would be called to decide on its inclusion in the Appendix without the participation of Governments.

have disastrous consequences. In fact, nothing prevents an ILO Conference from reversing the decisions of the JMC as long as it respects the terms of the Agenda, as finalised by the Governing Body.

e) The exact procedure for the revision of the Appendix is not laid down in the Resolution; especially the question concerning whether the partial revision or the single discussion procedure should be adopted for the revision thereof remains unanswered.¹¹⁶

6.2. International customary law and other international instruments relating to inspection of labour conditions on board ship and relevant questions

6.2.1. Brief analysis of the relevant rules of customary and treaty law

In the Conclusions to this Chapter, a revision of the port State control provisions of the Minimum Standards Convention is suggested. The scope of the powers of the port authorities in this respect can be understood only after an examination of the legal position of merchant seamen in the territorial waters of a foreign State and in foreign ports under international customary and treaty law.¹¹⁷ Any pronouncement on the jurisdiction of port authorities over cases concerning maritime employment is facilitated by an examination of the powers of the flag State and the port State in respect of criminal and civil acts occurring on board ship while it is passing through the territorial waters or is in the port of a third State.¹¹⁸

A) The relevant rules of international customary law concerning criminal and civil jurisdiction over acts occurring on board ships in foreign territorial waters and foreign ports

Extensive analysis of the exercise of criminal and civil jurisdiction over ships passing through territorial waters is outside the scope of this study. Here, it should be noted as regards civil jurisdiction over ships passing through the territorial waters of a coastal State that while there is no general legal rule exempting such vessels from the application of territorial laws there is a rule of international comity (some States regard it as a rule of law) which prohibits the exercise of such jurisdiction over all issues relating to the internal discipline of the ship so long as the peace of the littoral State is not affected and the intervention of the local authorities has not been requested.¹¹⁹

¹¹⁶See *PTMC*, 1986, Report IV, pp. 3-4.

¹¹⁷As distinct from the question of the legal position of merchant seamen, the powers of the flag state on the high seas over vessels flying its flag have been analysed in Chapter 1 where the question of the applicable law in cases concerning maritime labour was considered. As pointed out in that Chapter, the relevant 1958 HSC and UNCLOS III do not provide any assistance in this context, are open to subjective interpretation and have not been followed in state practice.

¹¹⁸It should be noted that port State control in this section is discussed only from the labour point of view. Watts argues that the right to protection of alien seamen as such by the law of the flag State is doubtful under international law; he founds his assumption on US practice and theoretical considerations but the conclusions he reaches are unclear; A.D. Watts, "The Protection of Alien Seamen", *ICLQ*, Vol. VII, 1958, pp. 691-711, at pp. 698 ff. The cases cited in that article refer to diplomatic protection and to injuries incurred by seamen (not to employment relations); moreover, no distinction is made, as regards the protection of seamen under the law of the flag State, according to whether the facts out of which a legal dispute has arisen occurred on the high seas, or the territorial or internal waters of a foreign State.

¹¹⁹Colomhos, *International Law of the Sea*, 1962, p. 293. Some are of the opinion that this is a rule of international comity; others regard it as an obligatory rule of international law, H. Meyers, *The Nationality of Ships*, 1967, pp. 80-81, 90. For the differences between the French and the American doctrine as regards criminal jurisdiction over ships in

As regards civil jurisdiction over foreign vessels in port, two observations can be made: a) state practice supports the view that the authorities of the port State should not interfere with matters relating to the internal discipline of the vessel unless the acts committed on board ship compromised the peace and tranquillity of the port or assistance was invoked;¹²⁰ and b) apart from the question concerning the right of a port State to close its ports to foreign merchant ships,¹²¹ if it does choose to

the territorial sea and internal waters and the advantages of each system, their modifications over the years and the relevant practice, see A.H. Charteris, "The Legal Position of Merchantmen in Foreign Ports and National Waters", *BYIL*, 1920-21, pp. 45-96; see also D.P. O'Connell, *The International Law of the Sea*, Vol. II, pp. 941-9; M.S. McDougal and W. Burke, *The Public Order of the Oceans*, 1962, pp. 161-173. The last author states that prevailing opinion among observers would place limitation upon coastal authority to assume jurisdiction over events in internal waters according to the effects of the conduct. He concludes that "the current doctrinal formulations might be made adequately to protect both coastal value processes and to preclude undesirable interference with the internal economy of a vessel" with one exception, namely the right of the coastal State to assume jurisdiction in cases of imminent criminal behaviour likely to affect the coastal State, *ibid.*, pp. 172-173. Charteris, quoting extracts of the *Tempest* decision and stating as a rule of international law "the complete subjection of foreign vessels in port", criticises the French system on the grounds that it runs counter considerations of convenience and interest; *op. cit.*, pp. 55 ff. However, his arguments are limited to criminal jurisdiction over ships; he does not state whether such rule exists as regards, for example, labour disputes on board ships in foreign ports; moreover, it seems that in the case of the latter disputes considerations of convenience dictate the application of the law of the flag State; since no criminal offence is committed (of whatsoever nature) it is obvious that the need for legal certainty of seamen worldwide could only be satisfied by a uniform application of one law which would enable them to know their rights and obligations. Furthermore, from Charteris's analysis of the British doctrine and its followers (*op. cit.*, pp. 62 ff) it is evident that English and American courts were uncertain as to the extent of the application of the law of the flag State and that of the port State to cases involving disciplinary and civil matters on board ship and, generally, they were reluctant to maintain an action for wages involving foreign seamen on board foreign ships in national ports (see especially pp. 65, 69-70, 72). Although English courts exercised their discretion in determining the application of English law to claims for wages made by seamen serving on board foreign ships while in a UK port (see *The Leon XIII* (1883) 8 P.D. 121 (C.A.); s. 24 (2) (a) of the *Supreme Court Act* 1981; for the position under the Consular Relations Act 1968 see D.C. Jackson, *Enforcement of Maritime Claims*, 1985, pp. 127-8), two factors militate against the assertion of such jurisdiction *de lege ferenda*: a) a claim for wages may not depend on lien on the ship but on another civil right to damages as is the case with other claims concerning repatriation, employers' contributions to social security funds, medical treatment, etc; accordingly, there is no action against the ship itself which is subject to port jurisdiction (however, it should be noted that courts in some countries, such as the U.K., the U.S., Canada and France, have interpreted the term "wages" very broadly, although minor differences exist); for a comparative analysis of national legislation concerning seamen's and master's wages in these countries see, *inter alia*, W. Tetley, *Maritime Liens and Claims*, London 1985, pp. 100-129; see also Jackson, *op. cit.*, pp. 24-26; b) if the foreign seaman concerned was engaged under foreign articles, remedial action before the tribunals of the port State disregards the contractual obligations between the parties; the shipowner, like the seaman, is entitled to know his rights and obligations as finalised at the time of the conclusion of the contract (usually the *lex loci contractus* will be the law of the flag State). If the jurisdiction of the port State is extended to the above cases through the principles of the *lex fori* and the *forum conveniens*, as developed in English doctrine with all ensuing uncertainty, resort to foreign jurisdiction which results in disrespect for the terms of the contract or in a substantial alteration of the remedies available under it, should be regarded as a breach thereof. It has been argued that "It is ... hard to think what system of law, apart from English law as the *lex fori*, ought to govern liens for wages; in view of the use of flags of convenience, the law of the flag would be arbitrary ..."; A.M. Tettenborn, "Maritime securities and the conflict of laws-some problems", *LMCLQ*, 1980, pp. 404-410, at p. 406. Apart from the fact that a lien for wages with high priority has been introduced in most maritime countries, including certain FOC countries, and the treatment of maritime liens as procedural, and not substantial rights, is highly questionable (for a criticism of this view see D.C. Jackson, "Foreign maritime liens in English courts-Principle and policy", *LMCLQ*, 1981, pp. 335-340), the real issue is whether national courts, in accepting that the claimant has a maritime lien for wages, will enforce national wage rates or ITF rates, or the wage rates agreed to under the law of the flag. It is submitted that it is the law of the flag that should be applied in such cases.

¹²⁰Colombos, *op. cit.*, pp. 294-302.

¹²¹For this question see, among others, M.S. McDougal and W. Burke, *op. cit.*, pp. 99-117 where all conflicting views on this issue are cited. Lowe argues in favour of such a right; see A.V. Lowe, "The Right of Entry into Maritime Ports in International Law", *SDLR*, Vol. 14 (1977), pp. 597-622; for a different opinion see the *dictum* from the award in the *Aramco* arbitration which stated that "According to a great principle of public international law, the ports of every State must be open to foreign vessels and can only be closed when the vital interests of the State so require."; *Aramco v. Saudi Arabia* (1958), 27 *Intern. Law Rep.* 1963, 117, at p. 212; see also R.J. Dupuy and D. Vignes, *Traité du Nouveau Droit de la Mer*, Paris, Brussels, 1985, at p. 223.

open its ports to trade the Geneva Convention and Statute on the International Regime of Maritime Ports, 1923, which, in the view of some, could provide some evidence customary law,¹²² requires it to open these ports to all states on a non-discriminatory basis (Art. 2 (1)).¹²³ As far as questions relating to maritime employment are concerned, it could be argued that a similar obligation is imposed on states non-parties to Convention No. 147. The latter Convention with its port state control provisions, like the SOLAS Conventions, introduces a kind of novelty as regards the principle of prohibition of discrimination against foreign ships in open ports in so far as measures to rectify conditions on board ship may result in withdrawal of certain port facilities.

B) The 1958 Geneva Convention on the Territorial Sea (TSC) and UNCLOS III

a) Innocent passage

The TSC, *inter alia*, provides that a coastal State must not hamper passage which is innocent (Art. 15 (1)) and passage is considered to be innocent so long as it is not prejudicial to the peace, good order or security of the coastal State (Art. 14 (4) first period). It seems that this Article does not refer to economic or ideological security.¹²⁴ On the other hand, this passage shall take place in conformity with the relevant TSC provisions and other rules of international law (Art. 14 (4) second period). In this respect, Art. 16 (2) lays down in the case of a foreign vessel proceeding to the internal waters of a coastal State that the latter may take the necessary steps to prevent any breach of conditions to which admission of those ships to those waters is subject. It follows that if the coastal State makes such admission dependent upon compliance with specified maritime labour standards these must be observed. Moreover, Art. 17 provides, *inter alia*, that a vessel engaged in innocent passage

¹²²Contra MacDougal and Burke, op. cit., p. 113; O'Connell is ambiguous, op. cit., pp. 848-851. Lowe doubts whether Art. 2 of the Statute has the necessary qualities to create a rule of customary law; op. cit., pp. 605-6.

¹²³For the text of the Convention see *LNTS*, Vol. 58, pp. 285-313. This Convention was concluded on 9 December 1923 and entered into force on 26 July 1926. The Convention and the Statute have been ratified by 34 States, including most European States, but not by the United States, the Soviet Union, China and the Latin American States; this equality of treatment under this Convention covers, *inter alia*, the use of port facilities such as the allocation of berths, and loading and unloading facilities (Art. 2 (2) of the Statute); see also O'Connell, op. cit., Vol. II, pp. 848-9. This observation is not without legal consequences. If neither the port State nor the flag State are parties to Convention No. 147 and assuming that the port State does not make access to its ports dependent upon compliance with labour standards, it is unclear on what legal basis discriminatory ITF policies against certain ships can be justified when seamen's unions gain the support of dockworkers and loading or unloading of specific ships is hindered. Unfortunately, the relevant legal questions are frequently obscured by laws of the port State concerning the protection of trade unionism and "secondary" boycott activities. Deviation from the provisions of the 1923 Geneva Convention is permitted only in cases of "grave incidents" which compromise the vital interests of the port State (Art. 16). While a strike in the port of the coastal State might be regarded as a grave incident (but this may not be the case if a strike occurs on board ship), union boycotts not amounting to such incidents may involve the international responsibility of the coastal State as a consequence of the violation of the international rule of non-discrimination (especially, when the boycotts concerned are illegal under the law of the port State). While this argument may not be valid outside the 1923 Geneva Convention, it is argued that it is so under the Treaty of Rome for EEC countries; I. von Münch, "Freedom of Navigation and the Trade Unions", *GYIL*, 1976, pp. 128-142, at pp. 136-142. Here, it should be noted that, depending on the provisions of the *lex fori*, a strike may have unforeseen consequences as regards the legal liability of the strikers for damages incurred by third parties; see Israel: "Supreme Court creates precedent by ordering strikers to reimburse third party", *SLB*, 4/87, pp. 565-567.

¹²⁴O'Connell, op. cit., Vol. I, pp. 268-9; MacDougal and Burke, op. cit., pp. 215-6, 251-2. Thus, labour disputes on board ship arising from ideological and economic reasons, which is usually the case, would not appear to impair innocent passage. For the meaning of "innocent passage" at this date and the distinction between the concept of innocence of passage and that of the obligation of a vessel in passage to conform to the laws and regulations of the coastal State and the rules of international law see MacDougal and Burke, op. cit., pp. 249-263, 273, especially n. 237.

must conform to the laws and regulations enacted by the coastal State in conformity with these Articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation. As a result, as long as innocent passage is maintained, the law of the flag State applies; otherwise the law of the coastal State is operative. However, the extent of the power of the coastal State under international law to lay down laws and regulations under this provision is not clear.

Art. 19 of UNCLOS III while maintaining the definition of TSC 14 adds a list of 11 (and one "catch-all category", "I") types of conduct which would render passage non-innocent. No provision relating to non-observance of maritime labour standards is included in this list. However, clause (l) (any other activity not having a direct bearing on passage) is ambiguous. It has been argued that this clause is not made *ejusdem generis* to the others.¹²⁵ This, coupled with Art. 24 (1), would not empower the coastal State to render a passage non-innocent as labour disputes on board a vessel passing through the territorial sea do not have a direct bearing on passage.¹²⁶ While it may be argued that the effect of clause (l) is to reduce the significance of Art. 24 (1) (b), which provides for the duty of the coastal State not discriminate against the ships of any State, one conclusion can be safely drawn: in the unlikely case where unacceptable labour conditions on board ship may render the passage non-innocent (for instance, when the law of the coastal state makes fishing rights subject to certain stipulations concerning labour conditions), the coastal state is empowered under the above provision to treat ships on board which national or international labour standards are not observed (substandard vessels from the social point of view) as ships not engaged on innocent passage but is not entitled to discriminate against ships belonging to traditional maritime countries and FOC vessels. The criterion applicable must be the standards on board ship and not the flag. Similarly, if on certain FOC vessels labour standards render the passage non-innocent the same test should be applied to East European vessels; otherwise favourable treatment of the latter vessels would constitute discrimination. It is not certain how many States parties to UNCLOS III, would be prepared to adopt this attitude. This means, in effect, that the powers, if there are any, of coastal States in respect of non-innocent passage as far as maritime labour questions are concerned are unlikely to be exercised.

Finally, a gloss should be made on Art. 21 (2), which provides that the laws and regulations enacted by the coastal State relating to innocent passage do not apply, *inter alia*, to manning of foreign ships unless they are giving effect to generally accepted international rules or standards. As a consequence, even though this State may adopt regulations concerning safety of navigation and the prevention of pollution (UNCLOS III 21 (1) (a) and (f)) (in fact, successful regulation of these issues calls for the international regulation of manning and the laying down of manning scales), these expressly cannot apply to manning. The effect of the last part of para. 2 is less than clear. No generally

¹²⁵O'Connell, Vol. I, op. cit., p. 270. Similarly, it is argued that the list of regulations which the coastal State may enact under Art. 21 is not exhaustive; *ibid*.

¹²⁶The question concerning whether labour disputes on board ship are considered to be an "activity" within the meaning of Art. 19 of UNCLOS III is a matter of interpretation.

accepted international standards and rules relating to manning exist.¹²⁷ Consequently, manning on board foreign ships traversing the territorial sea is outside the regulatory competence of the coastal State. Can it be inferred that, similarly, other issues relating to maritime employment should be treated similarly, or do they fall within the competence of the coastal State under Art. 21 (1) ? No definite answer can be given to this question. On the one hand, manning is one of the most burning safety and social issues and by virtue of one interpretation Art. 21 (2) applies to manning and to *anything* less than manning in terms of social importance. On the other, the listing of manning among design, construction of ships, etc. can lead to the interpretation that only safety issues were intended to be included in Art. 21 (2). In the latter case, maritime labour questions could be within the regulatory competence of the coastal State under Art. 21 (1) (assuming that the list is not exhaustive). A third interpretation is that the inclusion of questions relating to maritime employment was not contemplated by the drafters of UNCLOS III and these questions are regulated by customary law.

b) Criminal and civil jurisdiction of the coastal State

Provisions which are relevant to maritime employment will be exclusively examined here.

Art. 19 (1) of the TSC (Art. 27 (1) of UNCLOS III) provides for the intervention of the coastal State in respect of crimes committed on board a ship passing through its territorial waters in cases where a) the consequences of the crime extend beyond the vessel; b) the crime is likely to disturb the peace of the country or the good order of the territorial sea; c) the assistance of the local authorities has been requested by the master or the consul of the flag State; and d) if it is necessary for the suppression of illicit traffic in narcotic drugs (UNCLOS III adds psychotropic substances).¹²⁸

Art. 20 of the TSC (Art. 28 of UNCLOS III) provides, *inter alia*, that the littoral State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board (para. 1) and, moreover, it cannot exercise its jurisdiction in civil matters arising on board a ship passing through its territorial waters except in the case of obligations assumed or responsibilities incurred by the ship in view or on the occasion of navigation during her passage through the waters of the coastal State (para. 2).¹²⁹

¹²⁷The relevant ILO provisions are inadequate, vague, and not "generally accepted" while IMO Resolutions Nos. 466 and 481 cannot claim to have achieved the status of "generally accepted" standards and Regulation 13 of Chapter V of the 1974 SOLAS Convention is not of great assistance; see Chapter 4, especially n. 258.

¹²⁸This provision is of an hortatory character; L.T. Lee, "Jurisdiction over Foreign Merchant Ships in the Territorial Sea", *AJIL*, Vol. 55 (1961), pp. 77-96 at pp. 83-84; contra MacDougal Burke, op. cit., pp. 300-1. Its importance in the context of maritime labour lies in the fact that, as will be seen below, a breach of obligations under the contract by the parties thereto may also result in, or constitute, a criminal offence. Clause (d) is not in accordance with customary law but gives rise to an interesting question: it will empower the territorial State to exercise criminal jurisdiction in relation to a seaman who clandestinely has carried drugs on board ship. At the same time, this seaman will probably be in breach of his contractual obligation (false declaration of personal belongings) and if the ship is delayed from the investigation the owner may be entitled to sue for damages. The applicable law in the latter case will probably be the law of the flag State but the question arises whether the *lex fori*, if it happens to be the law of the territorial State, could apply to the civil action for damages as a *forum conveniens*.

¹²⁹The first of these provisions is an exhortation and not an obligation; L.T. Lee, op. cit., p. 84; contra MacDougal and Burke, op. cit., pp. 279-80. In any case, Art. 20 discourages coastal States from exercising civil jurisdiction in relation to labour matters on board ship. In particular, if disputes arising from the maritime contract, such as claims for higher wages, are based on facts which occurred prior to the entry of the ship into *the waters of the coastal State* such

C) The 1952 Brussels Conventions

These Conventions ¹³⁰ were the result of the CMI's Naples Conference in 1951.

The 1952 Penal Jurisdiction Convention vests the flag State with exclusive jurisdiction, including arrest or detention, over incidents occurring on the high seas and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship (Arts. 1 and 2). However, Art. 3 established a concurrent criminal jurisdiction in two cases: the power to suspend or cancel certificates is also vested in the country which issued them while States are empowered to prosecute their own nationals for offences committed on board ships flying the flag of another State (Art. 3). ¹³¹ The Convention does not apply to ports and inland waters and a ratifying State may reserve its right to institute proceedings in respect of crimes committed within its territorial waters (Art. 4). ¹³²

The 1952 Arrest Convention provides in Art. 2 that: "A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim, but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any Governments or their Departments, Public Authorities, or Dock or Harbour Authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction." ¹³³ The right of the territorial State to intervene is subject to certain safeguards. However, it remains obscure whether the "jurisdiction" of a contracting party under the Convention empowers it to arrest a ship in its territorial sea or in its ports. ¹³⁴

jurisdiction may not be exercised by it. The position in customary law could have been different; see O'Connell, op. cit., vol. II, pp. 870-2; MacDougal and Burke argue that Art. 20 represents customary law; op. cit., p. 281.

¹³⁰The International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation (10 May 1952) and the International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships (hereinafter cited as the 1952 Penal Jurisdiction Convention and the 1952 Arrest Convention respectively); for the text of these conventions, see N. Singh, 4 *International Maritime Law Conventions*, 1983, at p. 3101; 439 *UNTS* 233, 193.

¹³¹H. Meyers describes the difference between this Article and HSC 11 as far as the former relates to criminal jurisdiction over incidents occurring on the high seas, in the following terms: according to the HSC "only the state which issued the certificate is competent to take such disciplinary measures. The so-called passive nationality principle ... as well as the principle of the first port put into, amongst others, have been abandoned, as involving too much legal insecurity for the crew"; op. cit., at p. 47; see also *ibid.*, pp. 48-51.

¹³²The importance of this Convention in the present context lies in the fact that, when no reservations are made under Art. 4, it applies to crimes committed within the territorial waters of the coastal State. If a certificate is suspended as a result of disciplinary proceedings against the crew the concurrent jurisdiction laid down in Art. 3 is established. This Convention together with HSC 11 poses questions of uniformity in the application of legislation to suspensions of seamen's certificates; see Sections 6.2.2. and 6.3. under C).

¹³³The term "maritime claim" is defined in Art. 1 of the Convention and includes, *inter alia*, "wages of Masters, Officers or crew" (Art. 1 (m)).

¹³⁴MacDougal and Burke, op. cit., p. 277. For a comparison of the 1952 Arrest Convention and Art. 20 of the TSC see *ibid.*, pp. 281-2. For the application of the Brussels Convention in the U.K. and France and the connection between the Convention, the *Mareva* injunction and the *saisie conservatoire* see W. Tetley, "Attachment, the *Mareva* injunction and *saisie conservatoire*", *LMCLQ*, 1985, pp. 59-80, especially pp. 64, 78-79.

6.2.2. Conclusions

Before we proceed to the examination of Recommendation No. 28 and of the Memorandum of Understanding, it is opportune to draw certain conclusions concerning jurisdiction over questions relating to maritime labour under present international law.

In the light of the above analysis the question which arises is whether labour disputes on board a ship engaged on passage through the territorial sea of another state are likely to render such passage non-innocent. It seems that labour disputes are not generally likely to compromise the peace, good order and security of the littoral State (but see below in this subsection). However, non-compliance with sanitary regulations could render the passage non-innocent. It might be that the passage will be regarded as non-innocent if the laws of the territorial State lay down special procedures to be followed in cases of epidemic diseases and further provide for the obligation of the shipowner to provide the seaman with medical treatment in certain cases (sickness occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement; compare ILO Convention No. 55) and to take the necessary precautions, and the latter fails to discharge such obligations.¹³⁵ Finally, the language of Art. 21 of UNCLOS III, as explained above, particularly clause (l), may give rise to arguably justified interventions by the coastal State in cases concerning maritime employment.

As a general rule, the regulation of questions relating to the internal discipline of the vessel is left to the flag State, whether or not the ship is on the high seas, in the territorial waters or in the ports of a third State unless, in the last two cases, a) the peace or tranquillity of the port is affected; or b) assistance has been requested by those in control of the ship or a representative of the flag State. This view poses a number of questions as regards port State control in respect of maritime labour questions, namely whether a) the intervention of the port State is justified when assistance is requested not by a representative of the owner or the flag State but by a person directly concerned, such as a national or international seafarers' union; and b) labour disputes on board ship can be regarded as matters relating to the internal discipline of the ship.

As regards the first question, there is no evidence of established state practice that the intervention of the port State at the instance of a trade union is justified. The TSC certainly does not provide legal support for such interpretation.¹³⁶ Moreover, as will be seen in the Conclusions to this Chapter, recent judicial practice in the United States and other countries shows that such interventions by trade unions have not been generally upheld by courts.

¹³⁵The shipowner is on the one hand in breach of his obligations under the contract (assuming that the law of the flag State also imposes on him such obligations) and on the other he may be engaged on non-innocent passage.

¹³⁶Apart from the fact that Art. 19 (1) (c) applies to crimes and not labour disputes, this provision is "an application of the principle of international law according to which a party can renounce by agreement certain rights it has under a treaty"; Meyers, *op. cit.*, p. 89. It is clear that the master in this provision is mentioned as a representative of the flag State and not as a party to the maritime contract in which case a request by a trade union representing seamen for the intervention of the port State could be legally sound on the basis of the principle of international labour law which generally affords "equal rights" to employers and employees.

As regards the characterisation of maritime labour questions as matters relating to the internal discipline of the ship a clear answer cannot be given. Usually, these questions will be regarded as questions relating to the internal discipline of the ship. However, in two cases national courts may find it convenient to claim jurisdiction over maritime labour disputes: a) when a disciplinary issue has arisen on board ship which has criminal aspects which might affect the good order of the port of the littoral State (for example, mutiny on the part of the crew is a breach of their obligations towards the master and the shipowner but if this results in the murder of a senior officer and the ship is likely to flee onto the high seas the port State may decide to interfere);¹³⁷ b) when labour disputes are likely to activate public opinion and cause labour disputes in the littoral State.¹³⁸ No established practice appears to exist with regard to the above-mentioned issues.¹³⁹ On the other hand, the principle of non-

¹³⁷A similar case could be envisaged when the shipowner does not discharge his obligation towards a sick seaman to provide him with medical treatment and, as a result, the seaman dies in the port of another state; the shipowner has committed a breach of his obligations under the contract but at the same time he may be accused of manslaughter. The littoral state may find it convenient to intervene; however, before deciding the criminal case, it will have to decide the civil case (whether there was a breach of contract and whether it resulted in the death of the seafarer). In the special case of desertion it is argued that, in the absence of bilateral or other treaties, there is no rule of international law requiring a port State to assist the master in bringing back the deserters; Colombos, op. cit., p. 303.

¹³⁸For example, complaints of seamen on board a ship about low wages are received by the port inspector who decides to carry out the appropriate inspection to see whether wages on board the specific ship conform to the national laws of the flag State or to collective agreements in force. On the other hand, the ITF forces the owner of the ship to sign the ITF agreement threatening delay of the ship and it gains the support of seamen's unions and stevedores' representatives in the port State. If the owner, in the absence of any treaty, questions before the court the legal right of the inspector to carry out the inspection and argues that the court of the port State cannot claim jurisdiction in respect of such a dispute, the question arises whether the port authorities present an effective counter-argument by claiming that subsequent labour disputes and movements would compromise the peace of the port concerned. If the *Avis du Conseil d'État* of November 6, 1806 is taken as representing the yardstick by which subsequent disputes concerning the internal discipline of the ship are to be measured, the above facts might not constitute instances in which the security of the port has been affected. It has been argued that under the *Avis* "by disturbance of the peace was meant the actual disturbance at the moment of the incident, not the moral disturbance created when it became known ashore"; Charteris, op. cit., p. 51 n.1. Subsequent cases, like the *Tempest* and the *Wildenhuis* cases, modified the *Avis* but these cases dealt with crimes committed on board ship and not labour disputes.

¹³⁹Complications may arise in cases where the theory of the territoriality of ships is called into question in interpreting international Conventions. The question whether the term "territory" in ILO Conventions also includes ships registered in the territory of a ratifying Member has rarely arisen within the ILO. The views of the ILO Office in this respect are as follows: "... the legal construction of the territoriality of merchant ships -which is not universally accepted- was developed as an explanation for the exclusive jurisdiction of the flag State over the ship on the high seas, and does not require, and has not normally been understood to require, that the term "territory" in an international instrument comprise ships of a State in addition to its territory in the normal geographical sense"; *O.B.*, Vol. LV, 1972, p. 150. In 1926 the Japanese Government requested the ILO Office to indicate whether Art. 1 of the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), which imposes on obligation on ratifying Members to grant equality of treatment in respect of workmen's compensation for personal injury due to industrial accidents happening in their territory, applies in respect of accidents occurring to persons other than the crew of a ship while the ship is anchored in the territorial waters of another country, for example during loading or unloading operations or the carrying out of repairs. The Office concluded, on the ground that as a general rule merchant ships which are in the territorial waters of another country are not considered part of the territory of the country whose flag they fly, that, unless national legislation were to rule otherwise, compensation for accidents which occur on board a ship in foreign waters to persons other than the crew should be governed by the legislation of the country in the territorial waters of which the ship is situated. It should be observed that the existence of the general rule invoked by the Office is questionable. Furthermore, it is not clear whether it was led to this interpretation by the fact that persons in question did not belong to the crew (injuries incurred by a person other than a member of the crew are not always a matter concerning the internal discipline of the ship). The Office had the opportunity to examine the effect of equality of treatment in relation to members of the crew in 1970 when the Norwegian and the Dutch Governments asked the ILO Office whether the words "within its territory" in Art. 3 (1) of the Equality of Treatment (Social Security) Convention, 1962 (No. 118) and in Art. 32 of the Medical Care and Sickness Benefits Convention, 1969 (No. 130) should be interpreted to exclude merchant ships in foreign trade in view of the fact that, according to the laws of these countries, national social insurance Acts do not cover non-nationals on board national ships engaged in foreign trade who are not residing in their territories. The Office, after having examined the preparatory work of these Conventions, came to the

discrimination should be kept in mind when ITF boycotts are carried out. Apart from the fact that this principle may be a rule of international customary law, for parties to the Geneva Convention on the International Regime of Maritime Ports, 1923, and to UNCLOS III the rule of non-discrimination, albeit on a different level, is obligatory. Moreover, as will be seen later, it is endorsed in the Memorandum of Understanding on Port State Control according to which the maritime authorities of the Western European States must maintain an effective system of port State control with a view to ensuring that, without discrimination as to flag, foreign merchant ships comply with certain international standards. This rule further weakens the intervention of port States in maritime labour cases.

Finally, two questions of policy arise with regard to HSC 11 and the 1952 Penal Jurisdiction Convention: a) whether as a matter of policy a single, instead of a concurrent, jurisdiction should be established in cases of suspension of certificates;¹⁴⁰ b) and whether this single jurisdiction should be made to apply to suspensions of certificates as a result of acts occurring in foreign ports. It is certainly desirable that a single jurisdiction (that of the issuing country) be established; this principle is, unlike the 1952 Convention, endorsed in HSC 11 (2) and would provide seamen with legal certainty.

With respect to the second question, it is submitted that the law of the issuing country should be substituted for the law of the flag State to the extent that the latter law is applicable to acts committed on board ship while it is on the high seas or in the port of a foreign State. This observation applies to suspensions of certificates as a result of acts which cannot be regarded as crimes, and to suspensions of certificates as result of disciplinary proceedings instituted in respect of professional behaviour of seamen which do not result in collisions or "other incidents of navigation".¹⁴¹ In short, it

conclusion that there was not sufficient basis for a conclusion that the Conference intended the term "territory" used in the above instruments to include ships registered in the territory of the Member concerned. The conclusions of the Office were mainly based on two considerations: a) that international law does not require the term "territory" as used in international conventions to comprise the ships of a State; and b) the preparatory work of Convention No. 118, while indicating that the Conference intended the personal scope of the obligation laid down in Art. 3 to extend to alien non-resident seafarers, "shows that the Conference did not address itself to the question of the territorial scope of that obligation in relation to the persons concerned"; *ibid.*, pp. 150-3. As a result, the Office said that the Convention applied a) to foreign seafarers who are resident in the territory of a Member and b) to foreign seafarers, not resident in such territory, who are employed in the geographical confines of that territory, including territorial waters. It is submitted that this interpretation is correct in the context of the Conventions interpreted but it results in administrative difficulties: two Greek seamen employed on board two Norwegian vessels and resident in Greece may be entitled under the above Conventions to social security benefits, the one under Norwegian law and the other under Greek law, if the former is employed on a ship engaged in the coastal trade of Norway and the latter on a ship engaged in foreign trade. This rather results in inequality and complications concerning the payment of such benefits, especially if the first seaman is transferred to foreign trade. As has been seen in Chapter 5, ILO Conventions concerning the social security of seafarers have dealt with the question of equality of treatment. Not all provisions of these Conventions are satisfactory in this respect and state practice is not uniform.

¹⁴⁰The term "suspension" of certificates in this context includes cancellation thereof.

¹⁴¹For example, the national law of a country could provide for suspension of certificates in cases where the holder has repeatedly disregarded safety considerations on board ship. If repeated failure to observe safety considerations causes danger of life at sea in many instances but does not result in collision or other "external" damage to pipelines, submarine cables, etc., suspension of the certificate of the seaman concerned in this case might not come under HSC 11 or the 1952 Convention. Of course, such a case would come under HSC 11 (2) if the term "disciplinary matters" in that Article is not limited by the "disciplinary proceedings" within the meaning of HSC 11 (1) and is, therefore, applicable to "disciplinary matters" arising out of circumstances other than collisions or other incidents of navigation. On the other hand, the words "disciplinary proceedings" in HSC 11 (1) do seem to apply to disciplinary measures other than the suspension of certificates; for a discussion see MacDougal and Burke, *op. cit.*, pp. 832-3, especially n. 322.

is submitted that on the high seas HSC 11 (2) should be the guiding provision. In respect of acts committed in the territorial or internal waters of a foreign coastal State the law of the issuing country should apply to the suspension of certificates unless these acts compromise the security and peace of the coastal State or assistance has been requested by the representative of the flag State.

6.2.3. ILO Recommendation No. 28 and the Memorandum of Understanding

A) ILO Recommendation No. 28

The question of inspection of maritime work was first considered in the first session of the JMC which proposed to include in the ISC an item worded as follows: "Service of inspection of maritime work charged with the control of the application of Conventions, laws and regulations relating to hours, hygiene and safety of maritime work". After a resolution had been adopted at the 5th session of the Conference in 1923, which asked the Governing Body to consider the possibility of inscribing on the Agenda of a forthcoming Session of the Conference the institution of a special inspection system for the mercantile marine...¹⁴² the JMC, at its 4th session in September 1924, requested the Governing Body to place the inspection of maritime work on the Agenda of the 1926 Maritime Conference. The Governing Body, at its 25th session, in January 1925 decided to place on the Agenda of the 1926 Conference the following item: "general principles for the inspection of the conditions of work of seamen".¹⁴³

The Office made in 1926 a very important distinction between three issues of an inspection system for the conditions of seamen: a) the aspects of maritime employment which would be subject to supervision, b) the methods of inspection and c) the organisation of such inspection.¹⁴⁴ This distinction was forgotten when more recent ILO maritime instruments were at the drafting stage, notably Convention No. 147 with the result that the regulation of inspection of seamen's conditions therein is inadequate. The 1926 Office draft was a very comprehensive instrument aiming to enunciate the general principles which should govern inspection of labour conditions on board ship.¹⁴⁵ It was divided into four parts relating to the scope of inspection (which included virtually all aspects of maritime employment), the organisation of inspection, the reports of the inspection authorities and the powers and duties of inspectors.

Though Recommendation No. 28 concerning the General Principles for the Inspection of the Conditions of Work of Seamen does not specifically refer to different aspects of maritime labour as the Office draft did, the powers of inspectors therein were meant to apply to all conditions "under

¹⁴²See 5 R.P. , pp. 275, 195, 350.

¹⁴³These principles were intended to apply to all staff on board ship. For the history of the question, see 9 R.P. , pp. 584-585; International Labour Conference, 9th Session, Geneva, 1926, *General principles for the inspection of the conditions of work of seamen* , Second item on the Agenda, Questionnaire II, pp. 3-11.

¹⁴⁴Ibid., pp. 11-12.

¹⁴⁵International Labour Conference, 9th Session, Geneva, 1926, *Report on General principles for the inspection of the conditions of work of seamen* , Second item on the Agenda, Report II, pp. 108-116, 9 R.P. , pp. 576-583.

which seamen work" (Para. 1 (1)).¹⁴⁶ The Recommendation also applies to all vessels, including fishing vessels.¹⁴⁷

The innovation of Recommendation No. 28 consists in the fact that it empowered the flag State to inspect labour conditions of seamen while the vessel was on the high seas.¹⁴⁸ On the other hand, as in Convention No. 147, detainment of the vessel in port is only allowed in "serious cases where the health or safety of the crew is endangered" (para. 12). However, Recommendation No. 28 is more progressive than Convention No. 147 in one respect: the inspector's powers in the former unquestionably encompass all aspects of maritime labour while in the latter they can affect labour conditions on board ship only as long as non-observance of labour standards endangers safety and health on board ship.¹⁴⁹

Finally, unlike Convention No. 147, which refers to measures taken by "a Member", Recommendation No. 28 provides for the setting up of joint committees of shipowners and seamen which could assist in the enforcement of the relevant laws and regulations and for the participation of seamen in inspection authorities (paras. 18 (b) and 19 (2)). Moreover, it seems that trade union members could function as inspectors.¹⁵⁰

B) The Paris Memorandum of Understanding (signed on Jan 26, 1982)

The Memorandum of Understanding on Port State Control (hereinafter cited as MOU) which succeeded the "Hague" or "North Sea" Agreement (Memorandum of Understanding on the Maintenance of Standards on Merchant Ships) is a regional instrument on port State control and has been signed by officials (not Ministers) representing 14 European countries and entered into force on 1 July 1982.¹⁵¹ The Memorandum applies to all individual foreign merchant ships entering the ports of a signatory State (Section 1.3).¹⁵²

Under Section 3 port authorities are empowered to carry out inspections following a special selection procedure (preference for ships which may present a special hazard, such as oil tankers and

¹⁴⁶This would include periods during which a seaman is not actually engaged in his occupation, such as repatriation, 9 R.P., p. 587.

¹⁴⁷Ibid., p. 588.

¹⁴⁸However, the powers of inspectors were limited to exceptional cases fixed by national law and by authorisation of the maritime authority, *ibid.*, p. 589. This provision had its origin in inspections which used to be carried out on board deep-sea fishing vessels on the high seas in Iceland and Newfoundland, Questionnaire II, 1926, p. 43.

¹⁴⁹According to Recommendation No. 28, in certain cases inspection authorities are empowered to issue orders concerning the observance of "laws and regulations governing the conditions under which seamen work" (para. 14).

¹⁵⁰9 R.P., p. 591. Nevertheless, it appears that seamen cannot alone carry out inspections at the exclusion of a governmental inspection body; they may be included in an impartial body of inspectors consisting of permanent public servants, see paras. 19 and 21.

¹⁵¹ILM, Vol. 21 (1982), p. 1. For the history of the MOU and an analysis of its main provisions, see A.V. Lowe, "A move against substandard shipping", Reports in *Mar. Pol.*, Oct. 1982, pp. 326-330; see also Françoise Moussou-Odier, "Le Memorandum de Paris et son Application", *Annuaire de droit maritime et aérien*, Vols. 7-8, 1983-85, pp. 127-131; Europe: "Maritime conference agrees to strengthen state control of the safety of merchant ships", *SLB*, 4/1982, pp. 112-114.

¹⁵²There are special provisions for ships under 500 GRT: The MOU applies to such ships insofar as the instruments listed in Section 2.1 are applicable to them; if these instruments do not apply, the inspecting authorities will take "... such action as may be necessary to ensure that those ships are not clearly hazardous to safety, health or the environment..." (Section 2.5). The standards to be expected from these ships is a matter left to the professional judgement of the surveyor (Annex 1, Section 5, paras. 5.1-5.3).

gas and chemical carriers, ships with several deficiencies, no inspection of ships having been inspected within the previous months unless there are clear ground for doing so).¹⁵³ Targets are set for the number of inspections to be carried out by each State. Surveyors are called to see that the ships inspected comply with a number of instruments listed in Section 2.1 of the Memorandum. This list mostly includes IMO safety and pollution Conventions. As far as maritime labour is concerned, three instruments in the list are of importance: ILO Convention No. 147, the 1978 STCW Convention and, to a lesser extent, the 1974 SOLAS Convention with the 1978 Protocol.

Since under Section 2.3 each signatory undertakes to apply such instruments in force as it has ratified, with such amendments in force as it has accepted, uniform application of inspections to different ships presupposes that each signatory should ratify all the instruments listed and accept all amendments thereto at the same time.¹⁵⁴ The MOU contains a "no more favourable treatment" clause whose effect would be similar to Art. 4 (1) of Convention No. 147.¹⁵⁵ An important advantage of the MOU compared to the MSC is that it lays down specific methods of inspection.¹⁵⁶ Though the rectification of the deficiencies detected includes labour questions,¹⁵⁷ detention of the ship may be justified only in the case of deficiencies clearly hazardous to safety and health.¹⁵⁸

The disadvantages of the Memorandum of Understanding

1) The main drawback of the MOU is ironically the inclusion of Convention No. 147 in Section 2.1 thereof. The MOU presupposes that the instruments listed in Section 2.1 make provision for the issue of a certificate of compliance which constitutes *prima facie* evidence of satisfactory conditions on board ship.¹⁵⁹ Accordingly, it seems that the application of Convention No. 147 to a speci-

¹⁵³Sections 3.3 and 3.4. Compare the more general wording of section 3 of the Hague Agreement which empowered inspecting authorities to carry out inspections at random or following a complaint from any source.

¹⁵⁴Lowe, op. cit., p. 327. As regards Convention No. 147, all parties to the MOU but one (Ireland) have ratified Convention No. 147. Since parties to the MOU can enforce the provisions of the instruments listed in Section 2.1 only if they are parties thereto, it follows that Ireland cannot enforce Convention No. 147 through the MOU. Also, all MOU members have ratified the 1974 SOLAS and the STCW Conventions.

¹⁵⁵Section 2.4.

¹⁵⁶Annex 1 contains detailed provisions for inspections concerning minimum age, medical examination, certificates of competence, food and catering, crew accommodation and the prevention of occupational accidents (these guidelines for surveyors extensively refer to the MSC). The surveyor will have to use his professional judgement to decide whether the ship shall receive a more detailed inspection with regard to, *inter alia*, accident prevention, health and hygiene standards covering matters such as the construction and equipment of crew accommodation, catering and working areas, etc (para. 4.1). On the other hand, certificates of competency are to be accepted as valid unless there is a reason to believe that the holder of the certificate is not the authorised bearer, or in a case of manifest fraud (para. 3.3.1) (for an analysis of the control procedures relating to maritime training, see *supra* Chapter 3). It should be noted that only the STCW Convention can be applied in the manner prescribed above. Arts. 3 and 4 of ILO Convention No. 53, which are to be applied by MOU surveyors via the MSC do not provide for uniform international certificates of competency, see *supra* Chapter 3. As a result, the surveyor will have to compare the particulars of a specific certificate to the requirements of the national law of the flag State.

¹⁵⁷Section 3.6 in conjunction with Section 2.1.

¹⁵⁸Section 3.7. It seems that low working conditions on board ship may not justify detention. Art. 7.2 of the EEC draft (quoted in Lowe, op. cit., p. 328) which gave certain examples of cases where the detention of a ship is rightful did not make any reference to general conditions of employment on board ship.

¹⁵⁹Para. 1.3 of Annex 1 provides that if the country, whose flag the ship to be inspected is entitled to fly, is not party to the instruments listed in Section 2.1 and, therefore is not "provided with certificates representing *prima facie* evidence of satisfactory conditions on board", the surveyor will carry out a detailed inspection. It goes on to add that "[t]he conditions of and on such ship and its equipment and the certification of the crew, its number and composition shall be compatible with the aims of the provisions of a relevant instrument; otherwise the ship shall be subject to such restrictions as are necessary to obtain a comparable level of safety"; emphasis added. Three observations may be made

fic ship will almost always require a "detailed inspection" from MOU surveyors, according to Section 3.1 or Annex 1, Section 1, para. 1.3 of the MOU, for which the resources and the number of inspectors available may be limited.¹⁶⁰ Moreover, the professional judgement of the surveyor who is to decide whether a detailed inspection is necessary may be different from that of other surveyors or from that of the master of the ship concerned; this is especially so when account is taken of the two following factors: a) the MSC contains the criterion of "substantial equivalence" which renders the application of ILO maritime standards uncertain; and b) the guidelines included in Section 4 of Annex 1 of the MOU are far from comprehensive and do not take account of all relevant instruments contained in the Appendix to the MSC.¹⁶¹

2) No manning scales are laid down in the MOU. Reference is made to the 1974 SOLAS Convention, the MSC (and especially to Arts. 3 and 4 of Convention No. 53), the STCW Convention and IMO Resolution A. 481 (XII). It has been pointed out earlier in Chapters 3 and 4 that the international regulation of manning scales on board ship is defective. With few exceptions mentioned earlier, no manning requirements exist at the international level. Resolution A. 481 contains only some useful guidelines without specific mention of manning requirements. Furthermore, it was shown in Chapter 3 that Convention No. 53 and the STCW Convention do not impose manning requirements at the international level. Detention of the ship for non-observance of manning requirements is justified only if the actual number and composition of the crew is not in accordance with the safe manning document issued by the flag State.¹⁶²

No guidelines for surveyors are laid down in Annex 1 of the MOU as regards the inspection of the following aspects of maritime employment: a) social security for seamen, including the

here: a) the expression "compatible with the aims" is reminiscent of the criterion of "substantial equivalence" in the MSC as analysed above; b) the "relevant" instrument is not always readily identifiable: As regards the MSC, this expression should be interpreted to apply the instruments listed in the Appendix to Convention No. 147, and not to the Convention itself. Moreover, it has been pointed out earlier in Chapter 3 that the number and the composition of the crew has not yet been adequately dealt with in any international instruments. One may speculate which is the "relevant" instrument referred to in para. 1.3 of the MOU and c) the aim of obtaining a comparable level of safety on board ships belonging to non-Parties to the instruments of Section 2.1. disregards the fact that "the conditions of and on such ships" may require the rectification of matters not directly related to safety.

¹⁶⁰Though the ITF thinks that the Appendix to the Convention provides certain guidelines for enforcement, it is reported that the surveyors entrusted with the enforcement of the Memorandum of Understanding found Convention No. 147 unenforceable, see Wade, *op. cit.*, p. 13.

¹⁶¹The last paragraph of Section 4.1 of Annex 1 which refers to the implementation of Convention No. 147 reads as follows: "When a ship receives a more detailed inspection it should be ensured that the conditions on board ship are in substantial conformity with the following principles ... " (emphasis added). The recommendatory character of this provision can be easily identified. Furthermore, one wonders what the effect of the phrase "in substantial conformity" is when the labour standards included in Section 4 are already a simplified and down-graded version of the relevant standards contained in the Appendix to the MSC. If the above phrase connotes the criterion of "substantial equivalence" the latter wording should be used for reasons of uniformity in the application of the relevant standards.

¹⁶²Annex 1, para. 3.2.2. If no safe manning document exists on board the ship concerned detention is justified when the flag State does not respond with a manning standard for the particular ship and the ship is not considered to be safe, taking into account the principles of IMO Resolution A. 481. However, it is stipulated in the latter case that the minimum standards to be applied must be no more stringent than those applied to ships flying the flag of the port State (para. 3.2.3 second period). It is important to note from the labour point of view that one of the criteria to be taken into account in proceeding to the detention of the ship for lack of manning or certification standards is "whether or not appropriate rest periods of the crew can be observed" (para. 3.4).

shipowner's liability in cases of sickness or injury; b) seamen's articles of agreement; c) repatriation; d) paid leave; e) freedom of association; f) wages and hours of work (independently of the MSC). No reference is made to ILO Recommendation No. 155 which supplements the MSC.

3) There are no selection criteria with regard to age, tonnage and proportion of MOU member flag ships which should be inspected, by which surveyors could be guided when they determine which ships should be included in the inspection. Consequently, it is possible that certain Members would select ships which are not likely to have low working and safety conditions, particularly in view of the pressure which port competition could exercise on port inspectors. ¹⁶³

4) The regional character of the instrument and the lack of computerised system of organisation of inspection reports have resulted in duplicate or, even triple, inspections. ¹⁶⁴

Nonetheless, the effectiveness of the MOU is reported to have been significant. It was reported that between July 1982 and mid 1985 35000 inspections on board 25000 vessels were carried out. 19.7% of all vessels calling at ports of the signatory parties were inspected (efforts are being made to raise the inspection percentage to 25% provided for in Section 1.3 of the MOU), which amount to about 60% of all ships plying in the region. ¹⁶⁵

On the other hand, the effectiveness of the MOU has been questioned by one writer on two grounds: a) many countries not signatories to the Memorandum possess ships which have caused pollution and present working condition problems and b) it seems that only through the collective power of an international, not a regional agreement, could minimum standards be enforced on board all ships. ¹⁶⁶

¹⁶³See anonymous comment entitled "Fits and starts in the campaign for safer ships", *Lloyd's Ship Manager*, January 1984, pp. 33- 34. If competitive pressures amongst various Community ports undermine the application of the MOU in the future a solution to the problem could be to transfer the MOU into Community law.

¹⁶⁴However, the success of such computerised system depends on the accuracy of the data entered, *ibid.*, p. 33.

¹⁶⁵"Is European control working?", Comment in *Fairplay International Shipping Weekly*, 1st May 1986, p. 14. But as will be seen later the application of the MSC through the MOU has not been as successful. For information concerning the inspections carried out under the MOU see Appendix 5.

¹⁶⁶Roat, *op. cit.*, p. 77.

6.3. Conclusions

From the above analysis it becomes clear that there has been a shift of emphasis within the ILO and other fora from the consideration of the implications of registration in FOC countries to the examination of the more comprehensive and socially effective term of "substandard vessels".¹⁶⁷ There has been no acceptable definition of FOC vessels either in international instruments or within national fora.¹⁶⁸ Moreover, the development of International Registers by traditional maritime countries and the birth of registries by countries not traditionally regarded as FOC countries has given another meaning to the concept of open registries; the definition given in the Rochdale Report may be in certain respects out of date.¹⁶⁹ On the other hand, the unprecedented expansion of Eastern Bloc merchant fleets which has threatened the survival of Western operators, has caused great concern among shipping circles.¹⁷⁰ Recently, Latin American shipowners have resorted to FOC vessels.¹⁷¹

¹⁶⁷See also Argiroffo, op. cit., pp. 439, 451-2, E. du Pontavice, op. cit., pp. 569-570. For the different terms used to describe the phenomenon of flags of convenience see R. Roat, op. cit., pp. 57-58. Countering the use of the term "flags of convenience" it has been observed that lower wages are also paid on board European vessels, such as British vessels which have been traditionally manned by Asian crews on certain routes, see R.L. Rowan, H.R. Northrup and M.J. Immediata, "International Enforcement of Union Standards in Ocean Transport", *British Journal of Industrial Relations*, Vol. XV, No. 3, pp. 338-355, at p. 339 n. 8.

¹⁶⁸As was pointed out in Chapter 1, the HSC and the UNCLOS III did not provide any answer to the question of the "genuine link" and the definition of FOC registries. Certain writers have made other distinctions: a) "pavillons de complaisance", b) "les pays de libre immatriculation (it comprises "fiscal paradises" such as Bahamas and Bermudas) and c) "pavillons de quasi-complaisance" to indicate countries which offer certain of the advantages of FOC countries but impose certain obligations on a certain part of the vessels registered under their flag, see E. du Pontavice, op. cit., p. 505, note 6; for the so-called quasi-flag of convenience registries, see B.N. Metaxas, "Some Thoughts on Flags of Convenience", *Fairplay International Shipping Weekly*, Vol. 251, 30, May 1974, p. 21; see also B.N. Metaxas, 1985, op. cit., pp. 14-5.

¹⁶⁹Smith of the LSC made the following distinction between the flags used by various countries: a) National Flag Vessels (owned by nationals of the flag State); and b) Open Registry Vessels which comprise: i) Captive Open Registries (a Dependency or "connected" off-shoot of a national flag such as the Isle of Man, Kerguelen, the NIS, Gibraltar); ii) Traditional open registries (in existence for more than 30 years such as Panama, Liberia, Cyprus and Honduras); and iii) new open registries (established since 1980 such as Bahamas, Vanuatu etc.); Which Register? Which Flag?, op. cit., p. 4. There has been a shift of emphasis towards greater implementation of international labour and safety standards. In fact, Smith confirmed that the intention of the LSC and the Liberian Government is to accept and implement international labour and safety standards which are regarded as being more favourable to shipowners than the unnecessary formalities imposed by national laws of the traditional maritime countries. Also other factors such as mortgage security, flag administration and adequate flag state inspection are regarded by the LSC as important components of the new concept of FOC countries, *ibid.*, pp. 6-10. On the other hand, new open registries, such as Vanuatu, attach significance to the following factors: a) reasonable access to the central registry; b) a bare minimum of required forms and, especially, the number thereof; c) choice of mortgage forms at the borrower's and the lender's option; d) availability of convertible currency options in the mortgage document; e) facilities for bare-boat charter registry; f) legislation ensuring that, in emergencies, the owning corporation can be moved in and out of a registry quickly; g) legal protection for parent companies of shipowning subsidiaries. It is no longer appropriate to distinguish open registries using the old criteria. It seems that the trend in open registries will in the future be towards acceptance of international safety and labour standards and towards the development of mortgage and international financing strategies which would attract the shipowner to register his vessels with them. At the same time safety and labour legal requirements will continue to be less demanding than those observed in traditional maritime countries.

¹⁷⁰For the opinion of the Economic and Social Committee of the European Communities on this issue and the measures proposed by it see *EEC's Transport Problems with East European Countries*, Brussels, 1977, especially pp. 7-10, 12-7; for the extent of the problem and the differences between Eastern Bloc shipping companies and their Western counterparts as regards their operational set-up and the commercial conditions to which they are subject see *ibid.*, pp. 19-24, 43-56; for the situation in the inland water transport see *ibid.*, 115-132. It seems that there is disagreement over the need for the elimination of FOC vessels among governments, employers and, even, trade unions and it was instead pointed out that the expansion of East-European fleets and their tactics should be considered more seriously; P. Gaurat, "Eastern-Bloc shipping policies and the European shipping industries" in G. Yannopoulos (editor), *Shipping Policies for an open world economy*, 1989, pp. 145-175, especially at pp. 153-155, du Pontavice, op. cit., pp. 581-2; see also Ademuni-Odeke, *Shipping in International Trade Relations*, 1988, pp. 74-77. However, the above commentators

Recommendation No. 108 supplied some criteria but its provisions do not provide clear-cut answers. Convention No. 147 did not adopt either the OECD's or the Rochdale Committee's method of determining specifically the flag of convenience countries; its negotiators refused to accept the notion of flags of convenience and preferred that of substandard vessels.

On the one hand, Convention No. 147 is an important instrument because, since it was adopted, the ILO Constitution is applicable thereto which imposes certain obligations on ratifying and non-ratifying members with respect to adopted Conventions.¹⁷² Moreover, it is a comprehensive instrument which can lead to wide implementation of the seafarers' standards listed therein, by employing the formula of "substantial equivalence". One of the reasons for non-ratification of ILO Conventions relates to the legal or technical difficulties impeding ratification.¹⁷³ These obstacles could be surmounted if, as is the case to some extent under Convention No. 147, ratification were not necessary in the first instance for the implementation of the standards contained in ILO instruments.

mainly concentrate on the possible economic and strategic consequences of the expansion of the Eastern fleet while, from the maritime labour point of view, it seems that the Soviet fleet cannot be accused of bad safety records due to inadequate training and certificate requirements; D. Long in his profound examination of the expansion of the Soviet Fleet and its future during the period 1920-1999, after an analysis of the maritime training system of the USSR and the safety records of the Soviet merchant fleet during the years 1962-1980 concludes that "the safety record would indicate that in a period of major expansion the selection and training of personnel has resulted in high standards of professionalism at a time when new crews might be expected to lack experience"; D.M. Long, *The Soviet Merchant Fleet*, 1986, at p. 37. As regards the question of wages, although the wages paid to Soviet seamen are higher than those paid to other categories of Soviet workers, the percentage increases in wages paid to Soviet seamen each year are less than those experienced by Western shippers; see *ibid.*, p. 42; see also tables 5 and 6 in Appendix 6. However, it should be noted that the wage figures which appear in Tables 5 and 6 do not represent the actual amount of wages that a Soviet seaman receives, since with accruing cargo, profit, fuel and other bonuses the basic pay of a maritime worker can be raised by 40%. Long estimates that the true cost to the Soviet economy for the maritime worker is 332 rubles per month. Although he admits that this cost is far below the majority of the world wages he adds that account should be taken of the purchasing power of money in the USSR and the State fringe benefits; also pension rates for Soviet seamen are very low compared to those provided to Western seamen; *ibid.*, pp. 43-5. Nonetheless, as can be seen from the above tables, payments made to Soviet seamen are far below those made to Western seamen or to seamen serving on any FOC vessel and, in fact, result in significant operational advantages in a competitive shipping industry. In fact, by 1984 wages paid to all categories of seamen on a Soviet bulk carrier, apart from the master and the chief engineer, were lower than the revised international minimum wage adopted by the JMC at its 24 and 25 sessions (in 1984 and 1987 respectively). Of course, if to these basic wages were added social payments and bonuses to Soviet seamen, the ILO minimum limits were exceeded. For an analysis of the system of remuneration, including wage bonuses and supplements, and, interestingly, payment in the event of lay-up of vessels and during reserve periods, in the Soviet Merchant Marine, see E. Korsakov, "The System of Remuneration in the Soviet Merchant Marine", *I.L.R.*, Vol. 94, Oct. 1966, No. 4, pp. 398-414. For a Soviet view of the methodology of studies in comparative labour law, see S.A. Ivanov, "Sur les Études Comparatives en Droit du Travail", *R.I.D.C.*, 2-1985, pp. 379-389. In particular, Ivanov, *inter alia*, argues that in comparing labour standards account should be taken of the socio-economic conditions in which these standards have developed, *ibid.*, p. 383.

¹⁷¹The main reasons for this attitude of Latin American shipowners towards FOC, which, it should be noted are different in various Latin American countries, are a) rising difficulties in the financing of tonnage registered under the national flag; b) easy purchase and sale of FOC tonnage as compared to that registered in Latin American countries which exercise governmental control in this area; c) lower operating costs for FOC vessels; d) national crew shortages and non-availability of trained and reliable crews which are legally required for the manning of national vessels; see S. Farrell, "The use of flags of convenience by Latin American Shipping", *Marit. Pol. Mgmt.*, 1984, Vol. 11, No. 1, pp. 15-20.

¹⁷²See Arts. 15 (5) (b) and (c), 19 (5) (d) and (e), 22, 24, 25 and 26 of the ILO Constitution.

¹⁷³For the legal and technical reasons for the non-observance of ratified Conventions, see E. Landy, *The Effectiveness of the ILO supervision*, 1966, pp. 59-118. The same reasons can postpone decision on the ratification of a particular Convention.

It can be said that single ILO maritime instruments aim at ratification while ratification of Convention No. 147 aims rather at implementation.

On the other, it is a half-way success. It requires ratifying Members to introduce national legislation to implement certain international standards; but it qualifies this obligation by the notion of substantial equivalence. Moreover, its control provisions are aimed at applying to safety standards which are not even listed in the Convention.

The two pillars on which Convention No. 147 stands, namely "substandard equivalence" and "substandard vessels", are not defined therein! The former may lead to the creation of double standards in various countries, since not all authorities are likely to interpret this term equally.

As regards the latter term, Convention No. 147 does not define substandard vessels but a ship is assumed to be a substandard vessel if the labour standards on board the same ship are not at least substantially equivalent to the standards listed in the Appendix.¹⁷⁴ This means that, unless the instruments listed in the Appendix are regularly updated to take account of recent developments, the definition of substandard vessels at a specific point of time will not be accurate.¹⁷⁵ Again, even if the term "substandard vessels" is adequately defined, this will not have any practical consequences, since necessary measures will only be taken to rectify labour or safety conditions clearly hazardous to safety and health. It suffices to say that the Minimum Standards Convention is meaningless in attempting to define and combat substandard vessels by reference to a wide range of social standards which port authorities may not be able to apply at the national level on the basis of the provisions of Art. 4; if they do so, their decisions may be open to legal disputes.¹⁷⁶

Below a number of possible remedies are listed which could fill the lacunae of the MSC:

A) Convention No. 147 should encourage and lead to an assimilation of the scope of ILO Maritime Conventions and, eventually, of national laws and regulations. The wording of Art. 1 partly achieves this object a) by eschewing mention of a specific tonnage limit and b) by aiming to be a universal maritime Convention, excluding fishermen and eliminating possible future disputes, and partly fails because a) it allows national laws to determine what ship is sea-going for the purpose of the Convention (each Member is free to prescribe a different tonnage limit beyond which only a ship is regarded as sea-going) and b) it does not prevent ratifying Members from adopting various tonnage limits in the implementation nationally of Conventions listed in the Appendix which deal with different aspects of seamen's affairs.¹⁷⁷ It is suggested that the Convention should include a provision

¹⁷⁴Compare the more efficient provisions of Section III of IMO Resolution A. 321, 12 Nov. 1975 on Procedures for the Control of Ships; particularly, under para. 7 the lack of Radiotelegraph Operator's Certificate(s) or Radiotelephone Operator's Certificate(s) constitutes a prima facie evidence that the ship is substandard and may justify detention of the ship; see also Section 3 of Resolution A. 466 (particularly under 3.2).

¹⁷⁵The need for updating certain instruments listed in the Appendix to the Convention has been pointed out more than once, see views of Sweden, Finland, Norway in Report V (1), 1976, p. 12.

¹⁷⁶Despite these drawbacks, Convention No. 147 is a unique instrument in its field and its importance has been sanctioned by its inclusion in the MOU. Moreover, this instrument is supported by strong trade unions, such as the National Union of Seamen in the U.K., see NUS, *Flags of convenience*, 1981, p. 15.

¹⁷⁷Another disadvantage of Convention No. 147 is that it does not attempt to deal with question of substandard vessels in fluvial navigation, as it applies only to "sea-going" ships. The development of FOC fleets sailing the Rhine

defining the term "sea-going" ship. Fluvial and inland navigation should gradually come into the scope of the Convention with the necessary modifications.

B) As to which criteria can be employed to define the notion of substantial equivalence, it is submitted that while flexibility should be a target, certainty of law should be another, since its unrestricted application to a wide range of ILO maritime standards would render the latter meaningless or of dubious usefulness.¹⁷⁸ The circumstances which should be taken into account to this end are the following:

a) The preparatory discussions which led to the adoption of the ILO instrument concerned; in particular, the votes, the majorities with which specific proposals were carried and the minorities which supported provisions which were finally not adopted (but resemble the national provision which a ratifying Member claims to be the "substantial equivalent" of an article of the instrument concerned).

b) An interpretation of the provision concerned according to the usual legal methods of interpretation. Particularly, the existence of another provision in the same or other instrument (especially, if adopted by the same Conference) may facilitate the rejection or acceptance of a "substantially equivalent" claim (see above example b) at pp. 448-9).

c) The provisions of instruments adopted by other organisations and relating to the same subject should only be considered, if they are backed up by requests from, or practices of, States which ratified the ILO instrument concerned or, at least, voted for it at the Conference concerned, evidencing a trend towards a changing situation similar to that envisaged by the national "claim".¹⁷⁹

would justify the inclusion of a special provision in the Convention concerning the application of certain ILO maritime standards to fluvial navigation, see E. du Pontavice, *op. cit.*, p. 506, note 8; JMM, 1977, p. 1092; for the international maritime labour agreements which apply to Rhine boatmen, see Agreement concerning the Social Security of Rhine Boatmen and Agreement concerning the Conditions of Employment of Rhine Boatmen in *O.B.*, Vol. XXXIII, pp. 98-122; for subsequent amendments to these agreements and the relevant discussions see *O.B.*, Vol. XXXVII, pp. 21-28; *O.B.*, Vol. XLIV, pp. 371-401; *O.B.*, Vol. LXIV, pp. 38-80; H. Creutz, "The new Agreement on Social Security for Rhine Boatmen", *ILR*, Vol. 120, No. 1, Jan.-Feb. 1981, pp. 83-96. At the Conferences which adopted these Agreements the following countries were represented: Austria, Belgium, France, the F.R.G., Luxembourg, the Netherlands and Switzerland. The Economic and Social Committee of the European Communities has called for the development of agreements concerning working conditions on board ships engaged in trade between the Rhine and the Danube countries on the basis of the agreements already applicable to shipping on the Rhine; see *EEC's Transport Problems with East European Countries*, *op. cit.*, pp. 126, 132.

¹⁷⁸It is the concept of "substantial equivalence" which would leave the provisions of Convention No. 147 open to subjective interpretation by inspection authorities and not the lack of uniform certification standards therein. It was argued by the former president of Liberian services that one of the major drawbacks of the MSC which should be corrected was a) the lack of uniform certification standards and b) the absence of any specific control guidelines in the Convention, S. Wade, *op. cit.*, p. 14. While the latter disadvantage is unquestionable, the lack of uniform certification standards is counterbalanced by i) the existence of a number of specific obligations imposed by the Conventions in the Appendix thereto and b) the restrictive view of the scope of Art. 4, as it emerges from the historical interpretation of this Article and the views of the Governments who voted for it or ratified the Convention. The lack of uniform certification standards in certain ILO instruments (it should be noted that not all ILO maritime standards can be subjected to certification) is a disadvantage of the single instruments included in the Appendix and not of the Convention itself. Two ways are open: a) the instruments included in the Appendix should be revised to provide for certificates of compliance or b) Convention No. 147 should be revised to include extracts of basic maritime labour standards without any reference to other instruments or to the criterion of substantial equivalence; in the latter case, the Convention could make provision for certificates of compliance with its standards.

¹⁷⁹In any other case the provisions of these instruments (for example, IMO instruments) should not be taken into account, even though the relevant ILO instruments seem to be antiquated. New developments in the field of maritime

d) National laws, regulations or practices inasmuch as they are not obviously contrary to the text of the ILO instrument concerned and are accepted by the majority of the countries who voted for, or ratified it.

The "safety" standards of ILO Conventions should be identified and excluded from the concept of "substantial equivalence". The latter, if finally retained, should only apply to labour standards. This consideration raises another issue: In view of what has been said above and of the difficulty to distinguish between labour and safety standards, the word "at least equivalent" could be used in addition to the words "substantially equivalent". Ratifying Members would have the option to adopt either criterion but the countries which opt for the criterion would apply it only to international labour standards which they have not ratified. The writer supports the retention of "substantial equivalence" in the text on two grounds: i) that it will be strictly defined, and ii) to the extent that it would allow the insertion of Recommendations or widely accepted articles of Conventions, which have not yet come into force, in the Appendix to Convention No. 147.¹⁸⁰

C) As suggested earlier, a formula enabling port State control of labour standards¹⁸¹ should be included in the Convention irrespective of a "clear" link to safety or health on board ship.¹⁸² Measures to rectify "substandard" labour conditions¹⁸³ on board ship would be taken against ratifying Members only at a first stage.¹⁸⁴ It remains to be seen how labour disputes on board a ship

employment should influence a decision for the revision of the Appendix to Convention No. 147 and not the application of the "substantial equivalence" to a given ILO text.

¹⁸⁰A number of countries had proposed alternative formulae at the 1976 Conference: the inclusion of only basic standards extracted from ILO instruments in the main body of the Convention as opposed to a separate Appendix was supported by certain countries such as Italy, India, U.S., Belgium, Mexico, Sri Lanka, Report V (2), 1976, pp. 8, 12, 17, 62 R.P., p. 187.

¹⁸¹The enforcement of the MSC through the MOU has not been successful yet: Between 1 July 1982 and 30 June 1983 8352 deficiencies under the MOU were reported of which 376 concerned the crew, 256 accommodation, 57 food and catering and 32 working space (a total of 721 which amounts to 8.63% of the total of deficiencies reported), *Lloyd's Ship Manager*, Jan. 1984, op. cit., p. 34. During the period 1984-1985 deficiencies concerning labour conditions approximated to 10% of the total. It seems that the low percentage of deficiencies concerning labour standards is not due to a high level of compliance with ILO standards but to the fact that the labour aspect of ship conditions which are inspected has almost entirely been neglected; this was the view of the Transport Commissioner at the Greenwich Forum Conference on marine transportation hazards held in June 1985; see *Lloyd's List*, Saturday June 8 1985. Another alarming development which was pointed out by the same speaker is the decrease in the number of inspectors in certain MOU members. The representative of the Commission of the European Communities, commenting on the inadequacies of the MOU at the 74th session of the ILO Conference, said: "... I am concerned that port inspectors, whose work is vital to its implementation, are usually technical specialists and not necessarily equipped to verify whether all the standards laid down in Convention No. 147 are being correctly applied in ships visiting their ports.", 74 R.P., p. 4/5; see also the view of the representative of the ITF at the same Conference; *ibid.*, p. 6/14.

¹⁸²For details, see *supra* Chapter 4, Section 4.1.5.3.4.

¹⁸³It has been the thesis of this writer that Art. 4 (1) of Convention No. 147 justifies inspection authorities to take measures to rectify labour conditions on board ship only insofar as non-compliance with them could have serious effects on safety and health matters; non-observance of safety and health regulations could affect the peace of the port of the littoral State. For a different view, according to which "Art. 4 of Convention No. 147 broke with this traditional conception (namely, that a rule of comity matters affecting the internal discipline of the ship are governed by the law of the flag) and thus represented an important new development by providing expressly for the intervention of the port State on questions relating to the conditions of the crew on board a foreign ship and this irrespective of whether or not the flag State of that ship has ratified the Convention.", see F. Wolf, op. cit., p. 10.

¹⁸⁴To avoid legal problems, the application of territorial law to labour relations on board a vessel flying a foreign flag would have to be based on a compulsory international instrument. For reasons of comity in international trade, questions involving the internal discipline of the ship are determined by the law of the flag; see the analysis of customary international law given earlier in this Chapter. This is also the judicial practice in the United States: the Supreme

which is anchored in the port of a foreign State, have disturbed the peace of that port, even indirectly by the activation of trade unions or by public outcry and demands of other categories of workers for social improvements similar to those disputed by the parties involved in the conflict on board ship, and a series of similar incidents has formed a rule of customary law that all or a number of such disputes no longer can be regarded as matters relating to the internal discipline of the ship. In any case, this

Court has refused to apply the National Labor Relations Act and the Labor Management Relations Act to foreign flag ships employing alien seamen; for the relevant cases and the rationale behind these decisions which rejected the "balancing of contacts" test, see *Northwestern University Law Review* (Unsigned Comment), May-June 1965, Vol. 60, No. 2, pp. 195-211, especially pp. 202-208; Edith A. Wittig, "Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers", *Texas International Law Journal*, Vol. 14, 1979, pp. 115-138, at pp. 128-9. This does not prevent the Jones Act from applying to any seaman who has suffered personal injury in the course of his employment provided that the test of "substantial contact" is satisfied; see *ibid.*, p. 130 and Louis R. Harolds, "Some Legal Problems Arising Out of Foreign Flag Operations", *Fordham Law Review*, Vol. 28, 1959, pp. 295-315, at pp. 305-313; the practicality and rationale of the U.S. Supreme Court has been questioned by Don F. Dagenais, "Foreign ships in American ports: The question of NLRB jurisdiction", *Cornell International Law Journal*, Vol. 9:50, 1975, pp. 50-81, at pp. 68-81 where certain rules which should govern the application of U.S. labour law to disputes involving a foreign party are suggested. Currie has criticised the relevant decisions of the US Supreme Court from a different point of view. Currie's thesis is based on the assertion that a system of choice-of-law-rules should entail "an enquiry into the purposes of law"; D. Currie, "Flags of Convenience, American Labor, and the Conflict of Laws", *The Supreme Court Review*, 1963, Vol. 34, pp. 34-100, at pp. 46-47, n. 50. This thesis is not flawless: a) each country has its own rules determining the choice of law and the teleological interpretation is not recognised as preponderant in all legal systems; b) it is not always easy to ascertain the exact purpose of certain legal provisions; and c) enquiry into the purposes of law does not encourage uniformity as regards the regulations of seamen's affairs at the international level (for a different view of uniformity see Currie, *ibid.* pp. 65-6) and is not accepted as a primary tool of interpretation in international law. The situation seems to be similar in the Netherlands and Denmark where FOC vessel boycotting has not been upheld by the courts; as regards the position under British law, after the *Camellia* case owners were likely to have difficulties in obtaining an injunction against union picketing; further support for ITF activities was provided by the *Nawala* case, see Rowan, Northrup and Immediata, *op. cit.*, pp. 342, 348-51; K. Ewing, "Union Action Against Flags of Convenience-The Legal Position in Great Britain", *JMLC*, Vol. 11, No. 4, pp. 503-508; R. Roat, *op. cit.*, p. 67 (however, after the *Marina shipping* case and the *Universe Tankships* case and amendments of the British legislation in the 1980s, British law is no longer in favour of ITF boycotts. It seems that the success of ITF boycotts in Great Britain will depend on whether or not provisions have been enacted, usually by Labour governments, concerning the granting of immunity from actions in certain torts such as conspiracy, breach of contract, etc. if these torts are committed by a person in contemplation or furtherance of a trade dispute; for an analysis of the *Universe Tankships* case and the 1982 Employment Bill and their possible effects on ITF policies, see M.J. Sterling, "Actions for Duress, Seafarers and Industrial Disputes", *The Industrial Law Journal*, Volume 11, Number 3, Sep. 1982, pp. 156-169. Such provisions mask the real issue of the applicable law: it is one thing for a court to refuse to grant an interlocutory injunction against union picketing; it is another thing for it to apply English wage law as the law of the port State. If the shipowners agree with the ITF on specific wage scales this agreement, unless provided otherwise, will again be governed by the law of the flag State). For the reasons why economic boycott of PanLibHon vessels and the attempted organisation of their crews by American unions failed to achieve substantial results, see Collins, *op. cit.*, pp. 258-260; for the ITF campaign against FOC shippers see H. Northrup and R. Rowan, *op. cit.*, pp. 31-115. It is clear from the ITF's activities against FOC vessels that i) boycotts have not been successful in the U.S. and the Netherlands (see *The Saudi Independence*, cited in *JMLC*, Vol. 16, No. 3, July, 1985, pp. 423-426); ii) they have been more successful in Scandinavian ports (especially in Sweden and Finland where the applicable labour laws favour boycott; but a Swedish court found against the ITF in a recent case; see Sweden: "Panamanian flag exempts Swedish-owned ship from agreement", *SLB*, 1/1985, pp. 80-82), in German ports (however, when German courts heard the relevant cases in 1983 they held in favour of the shipowners and found ITF demands illegal) and in Australian ports (but boycotts in this country were effected independently of the ITF) and partially successful in French ports; despite earlier success of the ITF in English courts, English law and judicial practice has not favoured ITF boycott since 1980; a Canadian court held that the law of the flag State ordinarily governs the affairs of a ship but, when that law is not proved, the *lex fori* is applicable (*The Mercury Bell v. Amosin*, cited in *LMCLQ*, 1988, at p. 88); it should be noted that in this case the ship had signed the ITF agreement; iii) however, the principle that port States had no jurisdiction over matters relating to the internal discipline of the ship, which was regarded as a rule of international law by American courts, was not challenged or disputed in the cases where boycott has been successful; iv) the foreign shippers who were threatened with boycott never recognised ITF jurisdiction over maritime labour matters; in fact, they challenged the ITF's interference.

trend, as pointed out above, is difficult to achieve through the MSC in view of its safety-conscious rather than social-conscious port State control provisions.¹⁸⁵

The inclusion of a "no favourable treatment" clause, such as the MOU clause, in the MSC is not to be recommended for two reasons: a) it has not traditionally been used in ILO instruments and its effect is not readily ascertainable, b) it may lead to a decrease in the quality of inspections carried out on board non-Party flag ships, since the inspection would consist in a comparison between the conditions on board the specific ship and the "basic aims" only of the relevant instruments.¹⁸⁶

On the other hand, Convention No. 147 does not provide any solution for cases of breaches of contract on board ship which involve criminal prosecution¹⁸⁷ and the suspension or cancellation of certificates of competency.¹⁸⁸ It is submitted that the Convention should be revised to the effect that

¹⁸⁵Little information concerning the application of Art. 4 of the MSC has been supplied so far by ratifying countries; see ILO, *Report of the Director-General*, 74 (Maritime) Session, 1987, p. 26. The Memorandum of Understanding is not a treaty in force; it is an agreement between a limited number of maritime administrations only (for the legal status of the MOU and, generally, of informal international instruments see, *inter alia*, A. Aust, "The Theory and Practice of Informal International Instruments", *ICLQ*, Vol. 35, Oct. 1986, pp. 787-812) and this fact combined with the disappointing application of the MSC through the MOU leads to the conclusion that no rule of international law in favour of the MOU regime in respect of maritime labour matters has been established. This view is given further support by Art. 9, para. 6 (b), (c) and (d) of the UNCTAD Convention on Conditions for Registration of Ships which imposes on the flag State, without any distinction as regards the waters through which it is passing, the obligation to ensure 1) that the terms and conditions of employment on board ships flying its flag are in conformity with applicable international rules and standards; 2) that adequate legal procedures exist for the settlement of civil disputes between seafarers employed on ships flying its flag and their employers; and 3) that nationals and foreign seafarers have equal access to appropriate legal processes to secure their contractual rights in their relations with their employers.

¹⁸⁶*IMO News*, Number 4: 1988, p. 8; see supra n. 159; also compare analysis of Art. X of the STCW Convention in Chapter 3, Section 3.2.5., pp. 235-7. Similar is Art. II, para. 3 of the 1978 Protocol to the 1974 SOLAS Convention.

¹⁸⁷The Appendix to Convention No. 147 includes the Seamen's Articles of Agreement Convention. Assuming that this Convention is revised to include a disciplinary code for seamen, the competent authorities of the port State will be called to adjudicate on questions involving the maintenance of discipline on board ship. Then, the question which arises is whether this kind of port State control should be extended to ships registered in a non-ratifying territory. The answer involves consideration of the old question concerning whether breaches of discipline on board ship would affect the peace and good order of the port.

¹⁸⁸The Appendix to Convention No. 147 includes the Officers' Competency Certificates Convention. In the future, other Conventions concerning certificates of competency will be included in this Appendix. This is, in fact, suggested in the analysis of the Appendix to the Convention given earlier. If an officer on board ship has obtained a certificate by fraud the question arises whether the competent authorities of the port State can suspend its certificate as one of the necessary measures to rectify conditions on board which are clearly hazardous to safety (Art. 4). This seems to be permissible as the reference to Convention No. 53 in the Appendix includes only Arts. 3 and 4 of that Convention and not Arts. 5 and 6 which confer enforcement powers upon the authorities of the flag State. However, this solution does not seem to take account of the fact that the certificate of competency is an official document issued by the authorities of the flag State or even of a third State, that of the nationality of the seafarer, etc. Furthermore, it does not provide seamen with legal certainty as to the applicable law. It should be noted that the ILO Conference, at its 41st session in 1958, urged ILO Members to apply the law of the issuing country to cases involving the suspension or cancellation of certificates of competency even if the incidents of navigation giving rise to such action had occurred in the territorial waters, ports and inland waters of a third State; in other words, the Conference opted for the exclusive jurisdiction of the issuing country irrespective of navigational areas; see Resolution concerning the Jurisdiction Competent to Suspend or Cancel Officers' Competency Certificates, 41 *R.P.*, p. 256. This principle should be abandoned in two cases: a) when the issuing State has failed to inquire into the necessity for taking action in respect of an alleged incident of navigation which would involve suspension or cancellation of certificates; and b) when special agreements have been concluded between States concerning the recognition of certificates of competency issued by one of the contracting States. For a discussion of the above Resolution see International Labour Conference, 41st session, 1958, *Jurisdiction over the Suspension of Officers' Certificates of Competency*, Report VI. It should be noted that the proposal that a port State ought not to interfere with the validity of a foreign certificate within its own jurisdiction including its inland and territorial waters was not disputed at the Plenary Conference. The proposal that ILO Members should accede to the Brussels Convention on Penal Jurisdiction without reservation was opposed by France, Poland and the USSR but was finally adopted; see 41 *R.P.*, pp. 244, 71. The purpose of the Resolution was described by the Reporter of the Committee on Competency Certificates as follows: "Suspension or cancellation of a certificate means loss of livelihood and is a professional discredit of the very highest order. ... , to qualify for a certificate an officer must

a) the port authorities should intervene in cases involving criminal prosecution only when the acts committed on board ship are crimes of common criminal law affecting the peace of the port; all other disciplinary questions (mostly involving crimes peculiar to the seafaring profession) should be left to the master, the authorities of the flag State and the competent seafarers' associations as the case may be. In this manner legal uncertainty over the rights and duties of the crew would be avoided; and b) the cancellation of the certificates should be left only to the State which issued the certificate concerned. The flag State and the port State, if they are not the issuing states, should not have jurisdiction over this question, for the sake of uniformity and legal certainty. The latter two states, however, could have authority to suspend or cancel certificates issued by other countries in two cases: i) the certificates are issued by an international issuing Authority established by an international instrument the parties to which have agreed to mutual recognition and suspension of certificates issued thereunder; or ii) an international model certificate is created along the lines suggested in Chapter 3 and the respective instrument, for instance, a revised STCW Convention, is incorporated in the MSC. In addition, the port State should have the power to suspend or cancel certificates issued by another country in cases where the acts which resulted in such suspension or cancellation affected the security or peace of the port or where assistance has been requested by the representatives of the flag State.

D) In the light of the analysis made above under 6.1.2. 2) and 4) it becomes apparent that the effectiveness of Convention No. 147 depends to a great extent on the availability of sufficiently trained and qualified labour inspectors or consular authorities.¹⁸⁹ A provision to this effect should be included in a future revision of this Convention; it could lay out the rights and duties of marine labour inspectors and contain general instructions as to the procedures to be followed by inspectors in examining labour conditions on board ship in particular cases.¹⁹⁰ It is recommended that:

a) The areas of maritime employment which would be subject to supervision should be identified (hours of work, minimum age and medical examination for employment at sea and arduous employment (greasers, engineers), social security, safety and health, etc).¹⁹¹

b) The frequency of inspection should be laid out in more detail than in Arts. 2 (f) and 4 of Convention No. 147¹⁹² (inspection of new vessels and of all vessels before putting to sea, periodical inspection, special inspection, mandatory annual inspection).¹⁹³

satisfy the issuing authorities as to his character, his experience and his knowledge. The issuing authorities are the ones who found him competent. If his competence is to be held in question, and if he is to be deprived of his certificate, it is not an unreasonable principle that those who granted him the certificate should be the only ones empowered to take it away from him"; 41 *R.P.*, pp. 70-71.

¹⁸⁹Wittig, *op. cit.*, p. 126.

¹⁹⁰The inadequacies of the regulation of the inspection of seamen's conditions in Convention No. 147 are due to the fact that the inclusion of port State control in the main text of the Convention had not been originally envisaged and it was not until the 1976 Conference that, as a result of a Workers' amendment, this possibility was examined, 62 *R.P.*, p. 192.

¹⁹¹This, as pointed out earlier, will be possible if the Appendix to Convention No. 147 is regularly revised to include more ILO instruments or articles of instruments, such as those identified above in 6.1.2. 7).

¹⁹²Compare Regulations I/6 (b), I/7-10 of the 1974 SOLAS Convention as amended by the 1978 Protocol, Annex to Resolution A. 413 adopted on 15 Nov. 1979 concerning Guidelines on Surveys and Inspections under the 1974

c) The composition (public officials, seafarers' associations, board of inspection (consisting of representatives of all parties concerned, classification societies acting as governments officials) and, generally, the organisation of marine inspectors (coordination of various national inspecting bodies, exchange of inspection local reports and periodic publication of reports prepared by central authorities) at the national level should be studied with a view to including a relevant provision in Convention No.147 or in an additional Protocol thereto.

d) The methods of inspection should be identified (time-table of hours of work drawn up by the master, entry of particulars including overtime in the log, special table for night work with special reference to young persons under a certain age, records counter-signed by inspection authorities or by a seamen's representative on board). ¹⁹⁴

e) A list of rights (inspection of ships' papers, evidence by the crew, detainment of the ship) and duties of maritime labour inspectors should be drawn up and procedures under which inspection is carried out should be included in a Guide for Marine Inspectors; ¹⁹⁵ the qualifications of inspectors dealing with maritime labour cases could be included in a Recommendation or Guide for Marine Inspectors.

If the above measures are not taken it is doubtful whether the concept of port State control will be of any use or significance in the future; flag State control will remain the primary tool for inspection of conditions on board ship. ¹⁹⁶

E) The requirement that countries wishing to ratify Convention No. 147 should be parties to certain IMO Conventions can only be detrimental, since the examination of compliance with the latter instruments, as pointed out above, rests with the IMO. Art. 5 of the MSC is meaningful, only if it is

SOLAS (1978 Protocol) and 1973 MARPOL (1978 Protocol) Conventions as amended by Resolution A. 465, Resolution A. 560 (which superseded Resolutions Nos. 413 and 465).

¹⁹³Here, it should be noted that the IMO plans a harmonisation of surveys and (ship's) certification requirements under the relevant IMO Conventions, *IMO News*, Number 3: 1988, pp. 14-15. A similar system could be devised as regards the inspection procedures relating to all maritime questions covered by ILO Conventions.

¹⁹⁴The convening by the ILO of small tripartite Meeting of Experts on Procedures for the Inspection of Labour Conditions on Board Ships from 19 to 26 October 1989 is a welcome attempt to define the methods of inspection of labour conditions on board ship; see ILO, Meeting of Experts on Procedures for the Inspection of Labour Conditions on Board Ships, Geneva, October 1989, *Draft guidelines for procedures for the inspection of labour conditions on board ships*, MEIBS/1989/1, pp. 1-59. These guidelines deal with questions of minimum age, medical examination, articles of agreement, vocational training, officers' certificates of competency, food and catering, crew accommodation, hours of work and manning, prevention of occupational accidents, sickness or injury benefits, repatriation and freedom of association and protection of the right to organise and collective bargaining. They constitute the first ILO attempt to intensify control under the MSC and apply its vague provisions.

¹⁹⁵Compare Regulation 6 (c) and (d) of the 1974 SOLAS Convention as amended by the 1978 Protocol, Regulation I/4 of the STCW Convention whose deficiencies are analysed in Chapter 3, Sections V and VI of IMO Resolution A. 321, Sections 5 and 6 of Resolution A. 466. Under 6.4 of the latter Resolution, deficiency reports made in accordance with the terms of the Resolution and relating to labour questions may be forwarded to the ILO. As an inspector's duty can be regarded the recent Resolution A. 597 urging port authorities on the conclusion of the control to give the master a document with the results thereof.

¹⁹⁶J. Smith the General Secretary of the LSC stated in this respect: "... it is my belief that rather too much reliance is being placed on Port State Control. This can only be an adjunct to flag state control and, of course, good vessel management. A port state inspector presented with a license of competency issued by a sovereign nation is unlikely to be able to determine whether it is legitimate or a forgery, nor is it likely to challenge a certificate issued by even the most obscure and inexperienced Classification Society on behalf of a flag state; Smith in *Which Register? Which Flag?*, op. cit., p. 8.

decided by means of some innovation that 3 or 4 IMO instruments could be subjected to ILO control procedures through the MSC.

F) Conventions or provisions of Conventions relating to wages, hours of work, manning, social security and seamen's engagement should be included in the Appendix to the Convention, if the latter is to be regarded as a reliable measure of "substandard" conditions. Moreover, the possible inclusion of certain Conventions with high records of ratifications should be considered.

With regard to the revision of the Appendix, I think that it should aim to confirm the meaning of substandard vessels at a specific point of time. To this end, the inclusion not only of Conventions that have come into force but also Recommendations and Articles of Conventions not yet in force could be envisaged as long as they have achieved wide acceptance.¹⁹⁷ Legal problems concerning the validity of Recommendations¹⁹⁸ or non-ratified Conventions are circumvented by the existence of the concept of "substantial equivalence" in the text of the Convention.

Finally, if the revision of the Appendix to Convention No. 147 is to be effected by General Conferences, it is suggested that a tripartite sub-Committee of the JMC should consider the matter as a first stage. In general, the revision of the Appendix to Convention No. 147 by General Conferences is undesirable for two reasons: a) such revision does not now concern minor points of adopted Conventions or the redrafting of one provision, as it was the case in 1949, but aims to add articles or entire Conventions to the Appendix to this Convention which could affect its effectiveness and, ultimately, its future. It is not clear to what extent ILO Members are prepared to include in delegations to ILO Conferences specialised maritime experts for various purposes (for example, financial or accommodation difficulties) and b) delegates of countries with no maritime interests could influence the decisions taken with regard to the revision of the Appendix.¹⁹⁹ Taking into account that Convention No. 147 contains provisions relating to port State Control, this may have far-reaching consequences.

¹⁹⁷For example, it may be thought that Arts. 14 and 19 of Convention No. 109 enjoy reasonably wide acceptance which justifies their inclusion in the Appendix to the MSC.

¹⁹⁸Absolute conformity to the provisions of a Recommendation through the Appendix to the MSC would be tantamount to giving it the force of a Convention without respecting the relevant provisions of the ILO Constitution concerning the adoption of Conventions.

¹⁹⁹An example of the difficulties encountered when maritime questions are discussed at General Conferences is provided by the preparatory meetings which led to the adoption of Convention No. 132 concerning Annual Holidays with Pay (Revised 1970) at the 54th (general) session of the ILO Conference. When the question of the application of this Convention to seafarers was first discussed in 1969 at the 53rd session of the Conference, the members of the Committee on Holidays with Pay decided to delete a phrase from the 1969 Office draft which would exclude seafarers from the application of the Convention, 53 *R.P.*, pp. 665-666. This was so even if the Office draft had been prepared without taking seafarers into account on whose position Governments had not been requested to supply information. The representative of the Secretary General had to intervene to point out the difficulties with which ratifying Members and the seafarers themselves would have been faced, if this deletion had been adopted, *ibid.*, p. 675. At the Plenary Conference, the Vice-Chairman of the Employers' Group said that the employers were against the inclusion of seafarers in the Convention in view of the special conditions which applied to them, *ibid.*, pp. 458. The answer of the Workers' adviser of the U.K. is worth mentioning: "I have not yet had an opportunity of talking to some, not many, people I know from the United Kingdom who represent seafarers. I know they are extremely touchy about anybody handling their affairs, but I am satisfied that they will all take the view that at the end of the day what we have to say in this Committee on reasonable holidays with pay for all workers shall, so far as is possible, apply to seafarers as well", *ibid.*, p. 461. The Conference adopted the proposed Conclusions as amended which covered seafarers, *ibid.*, p. 467. It was only after the intervention of the Office that seafarers were finally excluded from the proposed Convention in the light of the replies of most major maritime countries (including negative replies from a number of shipowners' and seafarers' associations, the ISF and the ITF) to the 1970 Office Questionnaire that it was not advisable to include seafarers in the

proposed instrument; Resolution VII was adopted by the 54th session of the ILO Conference which simply envisaged the initiation of the available ILO machinery for the examination of seamen's questions, see ILO Conference, 54th session, 1970, *Holidays with Pay*, Report IV (1), pp. 45-46, Report IV (2), pp. 9-15, 54 R.P. , pp. 471, 472, 482, 612, 733.

Chapter 7

CONCLUSIONS

From the analysis conducted in the previous chapters, it can be said, without doubt, that the ILO has contributed substantially to the establishment and development of international law relating to seafarers. Considerable praise should also go to the efforts of the Employer and Worker representatives, especially within the JMC, which, in many cases, effectively advanced the cause of seamen at the international level. As has been seen, the writer has adopted a detailed analytical approach in examining the ILO's work on seafarers' standards. The reasons for this are threefold: a) unlike many instruments of a general nature, ILO maritime instruments contain many words and phrases whose meaning is hidden and thus require further investigation and interpretation if the exact meaning of the relevant provisions is to be unveiled; b) an examination of the historical material reveals the exposition of the seafarers' and the shipowners' views on many maritime issues and enables the formulation of conclusions concerning which provisions attracted unanimity or widespread support and thus may be regarded as contributing to the establishment of effective ILO maritime standards, the adoption of which in many cases has been achieved only after years of struggle; and c) the detailed interpretation of these instruments, taking into account relevant state practice, when available, and observations made by delegates at preparatory meetings and ILO Conferences, reveals their shortcomings and shows that many ILO instruments which deal with important aspects of maritime employment could be substantially improved.¹

¹In March 1979 the G.B. completed its examination of existing instruments and of subjects whose regulation appears desirable. In respect of instruments concerning seamen (excluding fishermen and inland boatmen) it came to the following conclusions: a) Conventions Nos. 8, 9, 22, 23, 53, 55, 56, 68, 69, 70, 71, 73, 74 (study to be made), 92, 108, 133, 134, 145, 146, 147 (Appendix-revision to be studied from time to time) and Recommendations Nos. 10, 27, 28 (revision of which should also be considered), 48, 75, 76, 78, 105, 106, 137, 138, 139 (except Part IV), 140, 141, 142, 153, 154, 155 are valid instruments and have priority status; b) Conventions Nos. 74, 109 and Recommendations Nos. 28, 105 and 109 should be revised; c) new areas to be covered included social problems arising from new technology on board ship, adoption of a comprehensive Convention on seafarers' welfare at sea and in port, various aspects of environment on board ship, treatment of foreign seafarers in transit, and medical care on board ship, repatriation and the new forms of off-shore industrial activities; it should be noted that certain areas such as repatriation, welfare of seamen at sea and in port and medical care on board ship have already been covered by the ILO Conventions adopted at 74th session of the 1987 ILO Conference; see "Final Report of the Working Party on International Labour Standards", *O.B.*, Vol. LXII, 1979, Series A, pp. 1-30. For an account of the GB's review of ILO standards see N. Valticos, "The future prospects for international labour standards", *ILR*, Vol. 118, No. 6, Nov.-Dec. 1979, pp. 679-697. The above lists of instruments were revised in 1987 as a result of the work of the Working Party on International Labour Standards which was appointed by the G.B. to review, inter alia, the classification of existing ILO instruments and the future standard-setting policies of the ILO. Under the new recommendations of the Working Party which were approved by the G.B. at its 235th Session in March 1987, no changes have been effected in the classification of ILO standards concerning

7.1. The ILO's impact in promoting social standards for seafarers

A characteristic element in the ILO's attempt to safeguard human rights for all workers and, in particular, for seafarers has been its ability to follow economic and social developments in a constantly changing world. The principles laid down in the Treaty of Versailles and the Declaration of Philadelphia are of continued importance today and the ILO has managed, by adapting itself to the changing needs of the international community, especially through the continuous development of the International Labour Code,² to give meaning to these principles and to confirm their significance.³

The contribution of the ILO to the promotion of human rights has been very significant and has operated at various levels: first, it has given specific content and meaning to the broad concept of human rights; secondly, it has preserved the dynamic content of this concept through the continuous evolution and periodical revision of international labour standards; thirdly, it has promoted greater uniformity in labour legislation relating to human rights at the international level; fourthly, it has made possible the participation of all interests concerned in the adoption and implementation of international labour standards relating to human rights as was envisaged in the Declaration of Philadelphia; finally, it has secured the effectiveness of these standards through the establishment of an elaborate system of supervision of their application at the national level. The above considerations equally apply to the development of international standards for seafarers.

It is beyond doubt that the ILO's work has had a considerable impact on the formulation and implementation of international standards for seafarers. At various times, it has dared to lay down international standards when action at the national level was scarce and even non-existent. It has responded to the need for international action when individual countries were reluctant to lay down specific maritime labour standards or intimidated from doing so. It has promoted and influenced national legislation in many areas of maritime employment, such as repatriation of seafarers, employment indemnity in cases of shipwreck, minimum age for admission to employment, medical

seafarers except that the certain ILO instruments relating to repatriation, medical care, social security and welfare which previously were to be promoted on a priority basis were replaced by the new ILO standards adopted by the 74th (maritime) session of the ILO Conference; see "Report of the Working Party on International Labour Standards", *O.B.*, Vol. LXIX, 1987, Series A, pp. 1-57, at pp. 34-5, 37, 48. It should be noted that the Working Party reiterated the findings of the 1979 Working Party that the conditions of work in offshore industrial activities should be one of the possible subjects to be covered by future instruments. Para. 39 of Appendix III of the Report of the Working Party states that "[t]he 1979 classification had listed the Certification of Able Seamen Convention, 1946 (No. 74) among the instruments to be revised. In view of the adoption by the International Maritime Organisation in 1978 of a Convention on standards of training, certification and watchkeeping of seafarers, such revision no longer appears appropriate. The item has accordingly been omitted from the revised classification"; *ibid.*, p. 48. Ironically, as has been explained in Chapter 3, the STCW Convention explicitly excludes able seamen from its scope and its provisions do not affect those of Convention No. 74. Moreover, it is surprising that the Working Party decided to omit this Convention from the revised list in view of requests by certain Governments that this Convention be revised to take account of recent developments.

²It has been rightly said that "it is through the provisions of the International Labour Code that these rights (economic and social rights) are given a specific content and become practically enforceable", C.W. Jenks, *Social Justice in the Law of Nations* (The ILO Impact After Fifty Years), Oxford Un. Press, 1970, at p. 71.

³For a discussion see N. Valticos, "Les normes de l'Organisation Internationale du Travail en matière de protection des droits de l'homme", *Revue des droits de l'homme*, Vol. 4, 1971, pp. 763 seq; see also Jenks, 1970, *op. cit.*, pp. 73 seq.

examination of seafarers, seafarers' identity documents, etc. and has ensured that the "internationalisation" of the law of maritime employment has proceeded in a uniform manner.⁴ Finally, in certain instances, it has attempted to break new ground and has contributed to the "progressive development" of existing labour standards for seafarers, although existing State practice was not uniform at the time.⁵

The ILO's success in this respect cannot be measured only in terms of the number of ratifications obtained by the relevant Conventions⁶ but also by the fact that it has induced a large number of ILO Members nationally to establish and develop a considerable range of social standards for seafarers based on ILO standards contained in Conventions and Recommendations.⁷

⁴See, for example, Convention No. 138 on minimum age which attempted to ensure uniformity at the international level as regards the question of minimum age for admission to employment.

⁵This applies, for example, to Arts. 2 and 5 of Convention No. 166; also to Convention No. 108.

⁶It was reported that one of the categories of Conventions which have a low number of ratifications are maritime Conventions; *The impact of international labour Conventions and Recommendations*, Geneva, 1976, p. 29. On the other, it has been shown that, as far as observations concerning the application of ILO Maritime Conventions are concerned, during the period between 1920 and June 1964 the degree of compliance with the recommendations of the Committee of Experts has been clearly above average compared to that of other categories of ILO instruments; see E. Landy, *The Effectiveness of International Supervision, Thirty Years of ILO Experience*, 1966, pp. 69-70. For examples of difficulties in the implementation of certain maritime Conventions see *ibid.* pp. 91, 104-105, 114-115; see also N. Valticos in "Conventions internationales du travail et droit interne", *R.C.D.J.P.*, Vol. 44, 1955, pp. 259, 264, 269-270, 271-274.

⁷For examples where ILO maritime standards have influenced national policies otherwise than by means of ratification or even before their adoption see 21 *R.P.*, p. 132; Seventh report of the International Labour Organisation to the United Nations (Geneva, 1953), pp. 104-106. As regards the Seattle Conventions concerning the welfare of seamen, wages, hours of work and manning and accommodation, it was pointed out in the House of Lords in 1969 that "although not ratified by many seaboard countries, [they] are acknowledged to have had profound and far-reaching influence on legislation, collective agreements and administrative action alike"; Parliamentary debates, House of Lords, Vol. 298, No. 24, 22 Jan. 1969, col. 946 cited in E. Landy, "The Influence of International Labour Standards: Possibilities and Performance", *I.L.R.*, June 1970, pp. 555-604, at p. 565; for the influence of ILO maritime standards on Swiss legislation during and after the 2nd World War see A. Berenstein, "The influence of international labour Conventions on Swiss legislation", *I.L.R.*, Vol. LXXVII, No. 6, June 1958, pp. 495-518, at pp. 513-515; it was also pointed out that the Seamen's Welfare in Ports Recommendation, 1936, "greatly contributed to the well-being of Allied as well as British seamen when ashore in the ports of the United Kingdom" during and after the 2nd World War; see G.A., Johnston, "The influence of international labours standards on legislation and practice in the United Kingdom", *I.L.R.*, Vol. 97, No. 5, May 1968, pp. 465-487, at p. 482; similarly, it was argued that the effect of the ILO Conventions on wages, hours of work and manning for seafarers has been substantial in industrial negotiations in many countries such as the UK; (Proctor of the UK delegation) 41 *R.P.*, p. 101; for other countries where the provisions of ILO Conventions on wages and hours of work have proved influential see Chapter 4, n. 237. ILO standards concerning seafarers' holidays with pay have exercised considerable influence in Norway before the 2nd World War; K.N. Dahl, "The influence of ILO standards on Norwegian legislation", *I.L.R.*, Vol. XC, No. 3, Sep. 1964, pp. 226-251, at p. 238. In Venezuela some provisions of the Regulation concerning the Fund for the Professional Capacity of the Merchant Marine have taken into account the relevant provisions of Recommendation No. 77; see J.E. Flores Peralta, "La formación profesional del personal subalterno de la marine mercante", *Boletín Técnico*, Año 9, No. 23, 1975, pp. 43-50. The main provisions of Recommendation No. 137 have been implemented in Brazil; see "La formación profesional marítima en Brasil", *Cinterfor*, Boletín, 41, Julio-Agosto 1975, pp. 55-59. In Sweden Recommendation No. 107 has been effectively applied; it was reported that seamen's employment agencies would not co-operate in providing crews unless the conditions of engagement complied with those laid down by Recommendation No. 107; see S. Lagergren, "The influence of ILO standards on Swedish law and practice", *ILR*, Vol. 125, No. 3, May-June, 1986, pp. 305-328, at p. 310; moreover, Act No. 109 of 1978 concerning safety on board ship effectively applies the provisions of Convention No. 134 (not yet ratified by Sweden) as regards minimum age for employment at sea; *ibid.*, p. 322. The principles of Conventions Nos. 7, 8, 15, 16 and 22 had been applied in Indonesia by 1958; 41 *R.P.*, pp. 34-35. Maritime social legislation in Turkey the Philippines and Ghana has been influenced by ILO maritime standards; 41 *R.P.*, pp. 35-36, 55 *R.P.*, p. 50 and 62 *R.P.*, p. 82 respectively. France had applied the principles of Convention No. 92 before it ratified it; 41 *R.P.*, 39. The maritime law of 1957 in Switzerland was partly based on ILO Conventions and Recommendations; *ibid.*, p. 44. ILO standards concerning wages and hours of work have had considerable effect on national legislation in Canada; *ibid.*, p. 46. Accommodation on newly constructed ships in 1958 in India was in accordance with the provisions of Convention No. 75; *ibid.*, pp. 52, 99. By 1976 national regulations concerning accommodation on Indian ships complied with the substantial provisions of Conventions Nos. 92 and 133; 62 *R.P.*, p. 39. Many of the provisions of Conventions Nos. 70, 75 and 92 were implemented in Australia, 41 *R.P.*, p. 58. Likewise, a

On the other hand, it is true that some maritime labour standards are now obsolete and no longer correspond to present needs.⁸ Others were premature at the time they were adopted and this has been partly responsible for the slow progress in ratification.⁹ By the time they were more widely ratified, their significance in one or more respects had already faded.¹⁰ Other Conventions, such as those on hours of work, have lost their importance, as State practice has progressed since their adoption.¹¹ Finally, new ILO instruments have sometimes been less than successful in attempting to codify and progressively develop existing law in the sense that, on the one hand, their co-ordination of existing schemes and standards for seafarers and the revision of old instruments was defective in certain respects, while, on the other, in developing existing law, they have had to resort to compromise formulae which have adversely affected clarity and uniformity in the application of the proposed new legal regime.¹²

Seamen's problems towards the end of the 20th century remain as acute as ever. The economic recession, the crisis in almost all sectors of the shipping industry, excess tonnage, advances in technology on board ship and in ports, manpower problems, poor employment opportunities, the oversupply of seagoing labour from the main labour supplying developing countries whose lower pay and working standards offer effective competition to the higher standards of seafarers from traditional maritime countries, the growth in piracy and robbery are some of the factors which, nowadays more than ever, militate against the rational and progressive development of a comprehensive, advanced and widespread international legal regime for seafarers.¹³ Adverse repercussions on the employment of seafarers resulting from the above situation are inevitable. What the ILO now is called upon to do, is to establish minimum social standards for seafarers and to mitigate the unfortunate effects which a protracted crisis in the shipping industry has had on maritime labour from the legal, social, professional and psychological point of view. To achieve this end, the ILO must become more

new certificate structure, which was proposed around 1976, took into account the provisions of Convention No. 53; 62 *R.P.*, p. 109. It was reported that in Tunisia the new maritime labour legislation "was directly modelled on the international Conventions adopted by the I.L.O., although Tunisia has not yet ratified any maritime Conventions."; 41 *R.P.*, p. 65. The fundamental principles of Conventions Nos. 75 and 92 were applied in Spain, *ibid.*, p. 103. Legislation concerning holidays with pay, seamen's accommodation, hours of work and continuity of employment in Finland has been influenced by ILO standards, 62 *R.P.*, p. 95. It was reported that the principles of Recommendations Nos. 48 and 138 are being applied in the U.S.S.R.; 55 *R.P.*, p. 101, 62 *R.P.*, p. 134. It was also reported that the provisions of Convention Nos. 145, 146 and 147 are implemented in the G.D.R., 74 *R.P.*, p. 6/6. It was stated by the Government delegate of Panama at the 1987 Conference that "the Panamanian administration has been implementing the main measures contained" in Convention No. 147; 74 *R.P.*, p. 11/7. For other examples of the influence of ILO maritime instruments over national legislation see ILO, *The Impact of International Labour Conventions and Recommendations*, *op. cit.*, pp. 19-21, 38, 40, 41, 42, 43.

⁸The early ILO instruments on wages, hours of work, repatriation, seamen's engagement, training and certification constitute an example.

⁹Some of them, such as the first ILO Conventions on seafarers' annual leave, never came into force.

¹⁰For example, the Conventions on seamen's certification and the early Conventions on social security for seafarers.

¹¹See *supra* Chapter 4.1.3, n. 182.

¹²This applies to Convention No. 165; see *supra* Chapter 5.5.6.

¹³For the crisis in the shipping industry and its impact on maritime employment see ILO, *Report of the Director-General*, 74 (Maritime) Session, 1987, Part 1: Evolution in the Shipping Industry and Transition in the Employment of Seafarers, pp. 7-24, especially pp. 19-24.

efficient, more adaptable to the everchanging needs of the shipping industry. Maritime sessions of ILO Conferences are held only at long intervals with the result that the ILO is usually called to rectify *ex post facto* unfavourable situations for seafarers which emerged during the past five or ten years. However, the ILO would be much more effective, if it could foresee potential problems which the present status of the shipping industry is likely to cause to maritime labour, and regulate aspects of maritime employment before irreversible trends establish themselves as the new *status quo*. The ILO should initiate on a more regular basis comparative studies concerning maritime employment and closer cooperation with the JMC and other bodies responsible for the regular updating of ILO maritime standards.

No conclusions concerning specific ILO maritime instruments will be drawn here. The reader is referred to previous chapters. On the contrary, the purpose of this chapter is to identify the areas of concern relating to seafarers' affairs, including putting forward suggestions for future action, and the formulation of possible general remedies which might improve the current international regime governing seafarers' affairs.

7.1.1. Uniformity and flexibility: two contradictory features of ILO Conventions

The importance of uniformity as a goal of international labour legislation has been downgraded by the introduction of flexibility clauses in ILO maritime instruments.¹⁴ Furthermore, in many instances ILO maritime instruments have avoided dealing with certain matters in detail and have provided Governments only with general guidelines, leaving matters of detail, sometimes even of substance, to be determined by national legislation. This attitude, however understandable from a procedural point of view, has detracted from the effectiveness of ILO standards. Leaving matters to national legislation is an aspect of the flexibility of ILO maritime standards, which is a general feature of international labour standards. There is a difference, however: in the case of a flexible standard, ratifying States are still required to adopt the particular standard, though they have wide discretion as to the manner in which this end may be achieved. If the matter is wholly left to national legislation, however, ratifying States are free to deal with the respective issue in whatever manner they like, with the exception perhaps of certain principles which are laid down in other parts of the Convention concerned. This has been a major problem of ILO maritime Conventions¹⁵ and has been to a great

¹⁴For the concept of "flexibility" clauses and the problems posed by their introduction in ILO Conventions, see Valticos, *Droit international du travail*, 1983, pp. 226-230; Valticos, 1971, *op. cit.*, pp. 749-754.

¹⁵Examples of flexibility clauses or references to national legislation abound in ILO maritime instruments: Art. 2, para. 2 of Convention No. 58 under which ratifying countries can reduce the normal 15 years age limit for admission to employment at sea to 14 years subject to certain conditions; Art. 2, paras. 4 and 5, 4, 5 and 7 of Convention No. 138 which, in effect, detract from the universality of the 15 years rule; Art. 3 of Convention No. 9 states that all "practicable" measures must be taken to abolish fee-charging as soon as possible; Art. 7 of Convention No. 9 which leaves each country free to decide whether it would apply its provisions to deck and engineer officers; Art. 2 (d) refers to "adequate" procedures for the engagement of seafarers; the questions concerning the possession of the seaman's document (record of employment), the shipowner's right to dismiss the seaman and the seaman's right to demand his discharge are left to national law (Art. 5, 11 and 12 of Convention No. 22); Art. 3 of Convention No. 147 provides that the ratifying State must advise its nationals on the possible problems of signing on ships, which do not meet, certain standards, "in so far as practicable"; Arts. 5, 6 (b) and (d), 7 (1), 8 (1) of Convention No. 146. Further, it is usual

extent due to the, sometimes deliberate, unwillingness of ILO delegates to deal with certain issues in detail and the distorting effect that ILO Conferences and preparatory meetings have had on the formulation of maritime labour standards. The vagueness and the flexibility of many provisions in ILO maritime instruments has adversely affected the clarity of law and uniformity in the social protection of seafarers at the international level, which, as pointed out earlier in this study, are the goals, which should be aimed at, in any labour standard-setting activity on the international plane. Moreover, this vagueness or flexibility, or both, may render the implementation and supervision of the relevant standards difficult or ineffective by leaving public administrators wide discretion to determine the nature and the extent of the relevant standards.

It is hoped that in the future the ILO will pay attention to the impact of the flexibility of ILO maritime standards on their effectiveness. In earlier Chapters it has been shown that this effectiveness is likely to be compromised by the existence of numerous flexibility clauses and vague terms in the relevant ILO instruments and the gain in terms of ratification, in most instances, do not justify their inclusion in these instruments.

7.1.2. Suggestions for the adoption of labour standards concerning certain aspects of maritime employment

The significant role of the ILO in establishing an International Seamen's Code, which has promoted the protection of the seafarers at the international level, was pointed out earlier. Despite the compromises evidenced by the vagueness and flexibility encountered in ILO maritime standards, there remain aspects of maritime employment hitherto not covered by any international standard. This, as has become clear from the previous analysis, has been to some extent due to the reluctance of ILO delegates to deal with specific aspects of maritime labour and the situation has been aggravated by infrequency of ILO maritime Conferences.¹⁶ Aspects of maritime employment which call for adoption of new standards or for revision of the existing ones include wages, hours of work, manning, seamen's discipline, the position of the master on board ship, including his authority and his liability towards the shipowner and the crew or third parties, facilities for finding employment for seamen (especially so far as coverage of officers, foreign seafarers and seafarers employed on board foreign-registered ships and the control powers of the ratifying state are concerned), certificates of competency (specific provisions concerning training and certification requirements, establishment of an international system of inspection), annual leave (clarification of leave requirements, taking into

that the question of the expenses whose defrayment will be necessary as a result of the ratification of the Conventions, is referred to national laws. This is the case with Conventions Nos. 9 (facilities for finding employment for seamen), 21 and 73 (medical examination of seafarers), 23 (repatriation of seafarers). Enforcement procedures at the national level are also left to national law (Art. 15 of Convention No. 22, Art. 5 of Convention No. 53). Finally, a prime example of flexible devices is the criterion of "substantial equivalence" in Convention No. 147, for which see *supra* Chapter 6.1.2. 2), 6.3.

¹⁶On this point, see *infra* 7.3.

account questions of continuity of employment, calculation of the leave otherwise than on an annual basis, etc.), and international supervision of social requirements on board ship (revision of the MSC and its Appendix).

The need for the adoption of international standards on the above-mentioned questions has been pointed out elsewhere.¹⁷ Here, certain aspects of the International Seamen's Code, which need further development, will be set out.

Convention No. 22 on Seamen's Articles of Agreement is a prime example of an ILO maritime instrument which leaves much to be done. In particular, questions relating to the termination of the seaman's employment have been dealt with in a very general manner. Areas, which need further regulation include: the seaman's dismissal, depending on whether the seaman's contract is of a definite or an indefinite period; specification of the grounds for discharge; the seaman's compensation in cases of dismissal; the nature of the default that may deprive a seaman of the right to compensation in cases of dismissal; enumeration of the circumstances in which the seaman can claim his discharge, the nature of the contravention of the master's or the shipowner's duties that entitles the seaman to terminate the contract; discharge formalities, etc.

Seamen's accidents at work represent another aspect of maritime employment that has not received proper attention in ILO Conferences. The most important issue in this respect is the definition of an accident. This may include, apart from accidents *stricto sensu*, cases of illness or sickness. Questions which need to be answered, relate to the manner in which the accident should be connected with the seaman's duties for it to be considered as an accident at work; the nature of the illness and its relationship with the seaman's employment; whether pre-existing (before the conclusion of the contract) illness is ruled out; whether medical examination by the shipowning company or knowledge by the shipowner or the master of the pre-existing or advancing illness have the effect of enabling the seaman to reassert his right; whether exceptional circumstances and heavy work have any particular significance, etc. The preconditions of the seaman's entitlement to compensation in the case of accident at work should also be laid down (period of engagement, if any, wilful act or negligence of the seaman which caused the injury or the illness, etc.). Finally, such questions as the methods of compensating the seaman and the liability of the shipowner's representative in the seaman's engagement should also be considered.

Issues of private international law arising in the field of maritime employment have also never been addressed by the ILO. It was noted earlier¹⁸ that the ILO has opted for the criterion of registration as the criterion for identifying the State responsible for the application of ILO Conventions, following the customary rule, sanctioned in the 1958 High Seas and 1982 UN Law of the Sea Conventions that the regulation of employment matters on ships is normally a duty of the flag State. However, no attempt has been made to deal with the issues of conflict of laws that arise with

¹⁷See *supra* Chapters 2, 3, 4 and 6.

¹⁸See *supra* Chapter 1.6.

regard to all aspects of maritime employment in the various ocean regions. A ship may enter the territorial or internal waters of another State. The question then arises as to what law will be applied by the judge of the forum. It was pointed out earlier that in many jurisdictions the law of the flag State is applicable; in others, if this law is not determined by the parties concerned, then the law, which is "appropriate" to the case, taking into account all particular circumstances, is applicable;¹⁹ in some cases, the *lex fori* has been applied (for example, in a number of wage cases in the United States); finally, in certain areas, such as the social security of the seafarers, it has been argued that the law of the seaman's country of residence is applicable.²⁰

The situation is further aggravated in cases of seamen's accidents at work. The law applicable to seamen's accidents is one of the most controversial issues of private international law. Depending on the ocean region where the accident occurred, the views put forward concerning the choice of law in this respect include the law of the flag State, the "appropriate" law, taking into account the particular circumstances of the case, the *lex fori* and the law of the country in whose territorial waters the accident occurred (*lex loci delicti commissi*).

Differences of approach by national courts in the determination of the applicable law can have important consequences: first, the seaman will not be able to know in advance with some degree of certainty the nature and extent of his rights and obligations. This drawback would also apply to the shipowner. Secondly, in many cases, the methods of determining the law applicable may eventually defeat the criterion of the ship's registration adopted in the ILO Conventions. Uniformity in the social protection of the seafarers should extend to questions of the applicable law and it is submitted that this is an issue which should be studied closely by the ILO in collaboration with other competent organisations and agencies involved in the area of private international law.

7.2. ILO techniques for promoting the International Seamen's Code; future developments

The question which should be addressed by the ILO in the future concerns the type of strategy it should adopt in advancing the establishment of an International Seamen's Code. Until now, apart from certain technical assistance programmes and two Asian Regional Maritime Conferences, the main means of adopting international maritime labour standards have been through conclusion of ILO Conventions, Recommendations and Resolutions.²¹ It has been seen in previous chapters that

¹⁹See, for example, Art. 25 of the Greek Civil Code.

²⁰See *supra* discussion in Chapter 5.5.6 and 5.6.

²¹Here, it should be noted that ILO Resolutions concerning seamen's affairs differ from IMO Resolutions in that the latter are couched in terms of "substantive law" (for example, port state control, safety guidelines and regulations) while the former are usually limited merely to advising that maritime questions be examined by a future session of the JMC and, subsequently, a maritime session of the ILO Conference. Thus, the ILO Resolutions do not contribute to the law making process directly and, apart from certain exceptions, do not require specific action by ILO members in the field of maritime employment though ultimately they might be contributory to the ILO's law making process. Moreover, the

ILO maritime instruments are either of a general ²² or a specific nature. They can be divided into three categories:

- a) instruments which protect the basic human rights of the seafarers.
- b) instruments which contain detailed provisions governing certain aspects of maritime employment, such as safety, health, welfare and social security and,
- c) instruments aiming to lay down general principles relating to some aspects of maritime labour. ²³

Among the reasons why progress in ratification of certain instruments is slow, even though standards prevailing in non-ratifying countries are in certain respects higher than those laid down by these instruments, is that a different approach towards the matters covered by them has been adopted in a number of countries. ²⁴ On the other hand, developing countries sometimes are unable to meet the requirements of the instruments concerned. ILO maritime Conventions, as do all ILO Conventions, aim to lay down minimum standards which either can be further improved at the national level or do not prejudice the more advanced conditions which prevail in ratifying countries. A main disadvantage of minimum standards instruments is that they are not always capable of directly addressing the needs of countries where higher or lower labour standards are in force or of countries where the organisation of employment and the supervision of labour standards is based on different principles and systems. A solution could be arrived at by adopting different and separate instruments

adoption of such Resolutions gives the JMC a prominent status as the body of consultative character which usually has the first say before any instruments are adopted.

²²Chapter 3 pointed out the differences between ILO and IMO instruments on maritime training in this respect.

²³It is not difficult to imagine a special maritime instrument concerning the seafarers' basic rights including the freedom of association and the right to organise (collective bargaining). This instrument would also include basic rights of seamen extracted from previous and future ILO maritime Conventions and Recommendations which are generally accepted by the parties concerned and are of vital importance to the status of seamen. A first example of such instrument at the international level was the the International Seafarers' Charter which was adopted by seamen's representatives in 1945. The provisions of this Charter have been examined in previous chapters. The ISF failed to influence national and international legislative fora because it contained a great many detailed provisions which were in advance of state practice at that time. The adoption of a similar instrument, containing basic maritime labour standards, would advance the cause of the International Seamen's Code the establishment of which has been one of the major aspirations of the ILO since as early as 1920. Here, it should be noted that the JMC had urged the establishment of an International Maritime Charter since 1942, see International Labour Office, *Studies and Reports*, Series P (Seamen) No. 5, "Merchant Seamen and the War", pp. 33, 145-148.

²⁴The rigidity of the ILO instruments from the point of view of application in the national territory should not be overestimated. First, all recent ILO maritime Conventions enable Members to ratify them by means of collective agreements. Secondly, it is not only by means of laws, regulations or collective agreements that a Convention may be applied at the national level. It can also be given effect by other means, such as the general maritime practice in a particular country. In 1950 the U.S. Government asked the ILO Office about the meaning of "national laws or regulations" in Art. 2 of the Shipowners' Liability Convention (No. 55), pending the decision of the Supreme Court in the *Warren* case. The ILO in reply to this request was of the opinion that these words could be interpreted as comprising, beyond legislation in the narrowest technical sense, "other forms of legal prescription including decrees, ordinances of various types and, when applicable, principles of customary law" (the principles of general maritime law are implied here), see 114 *G.B.* This interpretation, it seems, holds its value with regard to all ILO maritime Conventions. The Supreme Court's analysis of the above expression conformed to the interpretation provided by the Office. The *Warren* case is relevant to the question of the self-executing nature of provisions of ILO Conventions; for an analysis of this issue see V.A. Leary, *International Labour Conventions and National Law*, Martinus Nijhoff, 1982; for the significance, in this context, of the *Warren* case and other cases concerning maritime employment see *ibid.*, pp. 77-82, 87-88, 98-99, 103-104, 143-144.

for countries with high maritime labour standards and those with lower standards; however, this might result in enhancing the gap between developed and developing maritime countries, which in the field of maritime employment is particularly wide. To meet these problems, flexibility clauses have been devised, which, however, have reduced the clarity, universality and effectiveness of the ILO standards. Another possible solution could be based on the desire for equalisation of labour standards for seafarers in various regions of the world and it is to this question that we shall now turn.

7.2.1. The regionalisation of ILO standards for seafarers

The question of the level at which universal ILO standards should be fixed is not easy to answer. In the Governing Body it was pointed out in 1976 that labour standards should take account of economic and social conditions, which vary from country to country, and, in particular, the special needs of the developing countries but, on the other hand, they should not be so flexible as to lose their influence as a means for social progress or to cease representing a common standard.²⁵

The above end has not always been achieved in the field of maritime labour: on the one hand, the influence of major maritime countries in the ILO preliminary discussions and Conferences has been apparent throughout the history of the ILO and predominant during certain periods; this influence, together with the sometimes negative attitude of the Employers' group, has had adverse effects on the rational regulation of seafarers' standards and on their universal character; on the other hand, the "flexibility" clauses introduced in ILO instruments have had the effect of diminishing their importance as universal instruments.

It is sometimes argued that, due to the different stages of development of various countries, the objective of the international regulation of labour is not to achieve uniformity of national laws but their equivalence.²⁶ In fact, the application of the same standards to states at a different stage of development could result in accentuating their differences. The application of "equivalent" standards to these states presupposes a certain degree of flexibility in ILO instruments, which can be achieved, *inter alia*, through the use of flexibility clauses. The goal of achieving "equivalence" instead of "uniformity" is, of course, understandable from a practical point of view and has the advantage of taking into account existing diversities at the national level. However, a question arises concerning the extent to which an "equivalent" standard achieves the purpose of the standard itself and, if so, what is the degree of "equivalence" required, and, further, whether the "equivalent" standard can achieve its aim that is widespread and representative ratification or adoption, or both, at the national level of the standard concerned as a counter-balance to offset its diminished universality and clarity.

²⁵GB 199/9/22, Annex, para. 14.

²⁶Valticos, 1983, *op. cit.*, p. 105; in fact, the Treaty of Peace recognises in Art. 427 that "differences of climate, habits and customs, of economic opportunity and industrial tradition, make strict uniformity in the conditions of labour difficult of immediate attainment" and makes the general methods principles for regulating labour conditions, listed in this Article, subject to the "special circumstances" of the states.

Unfortunately, this feature of international labour legislation has not been sufficiently analysed and there are no rules and procedures to which its operation would be subject.

Maritime employment is a global problem; however, it is not uniformly global.²⁷ Therefore, states within a particular region, where special problems are dominant, ought to be able to concentrate on negotiating solutions to these problems in greater detail within a regional forum.²⁸ Problems relating to wage policies, employment finding agencies, etc. in the Far East are much more real and significant than in other areas of the world, and attempts to solve these problems in a global manner would not only fail to achieve widespread acceptance in these areas but might also have negative effects on the acceptance and effectiveness of the global instrument itself.²⁹ Social security is another area which presents special problems for developing countries. It has been indicated earlier in Chapter 5 that the financing of social security schemes is an area of major disputes. Employers and Governments for various reasons have been sceptical about financing these schemes. The ILO's approach in this area is that attempts to establish a social security scheme in developing countries should take into account the special needs and exigencies, the state of development and the financial resources of the particular country.³⁰ An example of such an effort at the regional level is the European Convention on Social Security which, without losing sight of the principles elaborated in the relevant ILO instruments, has effectively adapted them to the social needs of European migrant workers.³¹

To achieve a better application of maritime labour standards in areas in which State practice over a substantial period of time has shown that the ratification progress or the application of these standards has been insignificant or very slow three methods appear possible: the adoption of "substantially equivalent" standards absolute conformity with which is not required; the inclusion of "flexibility" clauses in ILO maritime Conventions, excluding, temporarily or under certain conditions,

²⁷As regards marine pollution questions, compare O. Schachter and D. Serwer, "Marine Pollution Problems and Remedies", 65 *A.J.I.L.* (1971), 110.

²⁸As the ILO seminars on maritime labour standards for the West, Central and East African countries have shown, there is still much to be done as regards the modernisation and updating of maritime labour standards in these regions, the development of technical co-operation and economic assistance programmes and the enactment of new legislation; see *Report on the ILO Seminar on Maritime Labour Standards for Central and West African Countries*, Brazzaville, 26-30 November 1985, ILO 1986, pp. 24-31, 125-154; *Report on the ILO Seminar on Maritime Labour Standards for East African Countries*, Dar es Salaam, 27 January-3 February 1987, ILO 1987, pp. 21, 33-39, 101-133. For the question of the choice between universal and regional standards see C. Philip, *Normes Internationales du Travail: Universalisme ou Régionalisme?*, Bruxelles, 1978, especially pp. 125-138, 162-177, 265-274. After comparing universal and regional labour standards, such as the European Social Charter, the European Code of Social Security, the Agreements regulating the employment conditions of Rhine Boatmen, the Arab Labour Convention, etc., Philip discusses certain methods of regionalisation of international labour standards and is of the opinion that the regionalisation of "universal" international organisations, including the ILO, is desirable and possible: "Elles (organisations universelles) ne sont pas toujours parvenues à une grande efficacité et ont souvent, au nom de leur vocation universelle, refusé de prendre en considération et d'aider les particularismes régionaux. Leurs activités se situent à un niveau trop général pour donner satisfaction à des besoins qui sont, par définition, précis.", *ibid.*, p. 273.

²⁹The existence of special problems in the field of maritime labour in the Asian region is proved by the two Asian regional maritime conferences, referred to earlier in this study, which adopted a large number of resolutions pertaining to specific aspects of maritime employment. Resolutions adopted at similar Conferences could, with the appropriate technical and legal background, form the basis for the elaboration of regional labour standards.

³⁰G.A. Johnston, *The International Labour Organisation*, 1970, London, pp. 206-207 who makes a distinction between the "economically possible" and the "socially desirable" in the field of social security.

³¹C. Villars, "Social security for migrant workers in the framework of the Council of Europe", *I.L.R.*, Vol. 120, p. 302.

specific regions, such as developing countries or specified categories of workers from the application of the Conventions concerned; adoption of regional standards. The first two methods have not proved effective so far. In particular, Convention No. 147 which introduces the criterion of "substantial equivalence" has not been ratified yet by developing countries or by countries whose seafarers are required to work under low employment conditions (such as Korea, the Philippines, etc). Moreover, as has been shown,³² this criterion can give rise to a wide range of interpretations and is not likely to enhance the effectiveness nor promote uniformity in the application of the ILO standards listed in its Appendix. As regards the "flexibility" clauses, they have had beneficial effects on the ratification progress only to a limited extent.³³ This is also confirmed by the fact that, irrespective of any flexibility clauses, older ILO maritime instruments have, as a general rule, received a larger number of ratifications than newer instruments.

In support of the regionalisation of labour standards it has been pointed out that if instruments were limited to regions where similar economic and social conditions prevail, their application might be less difficult and more uniform. This view is rejected by some writers, such as Landy, who argues that: "Since international labour standards lay down minimum conditions, the crystallization of a series of regional levels would accentuate rather than reconcile differences."³⁴ This view disregards certain factors: a) ILO minimum standards are not always low,³⁵ b) the adoption of regional standards does not necessarily aim at the application of lower standards but at avoiding technical or legal difficulties which impede ratification, c) in certain cases, the aim of regional standards would be to lay down stricter rules and to ensure stricter supervision than universal standards and d) if the transition from lower regional standards to universal standards is compulsory within a specified period it is not possible to contend that crystallisation at various regional levels would accentuate competition. In fact, it is not a question of replacing universal standards by regional standards in certain areas, which for the reasons usually pointed out is not desirable,³⁶ but of ensuring the eventual effectiveness of universal standards through the preliminary adoption of regional standards and the progressive development of social standards for seafarers at the international level. In fact, however, when a maritime country for various reasons does not ratify a particular Convention or ratifies it only after a period of 50 years has elapsed, it is not readily apparent that the universal standard has achieved its aim of stimulating the adoption of labour legislation in a specific area. In this respect, it should be

³²See supra Chapter 6.1.2 and 6.3.

³³A prime example of this are the ILO's Conventions on certification which, despite their general character as "policy" instruments, have not received a large number of ratifications.

³⁴E. Landy, *The Effectiveness of ILO Supervision*, 1966, at p. 126; see, also, Valticos, 1983, *op. cit.*, p. 225.

³⁵In fact, the essence of minimum standards is that a) ratifying countries can adopt higher standards and b) no lower standards can be laid down but the second hypothesis falls when standards laying down minimum conditions are not exactly low but, in certain cases, higher than many countries can hope to be in a position to adopt. These countries either will never adopt the standards concerned or they will adopt them after a considerable period of time when the relevant standards will probably have lost their character and effectiveness as new universal standards.

³⁶Valticos, 1983, *op. cit.*, pp. 225-226.

noted that certain ILO maritime instruments contain a number of provisions which could well be regarded as laying down lower regional standards either with permanent effect or temporarily.³⁷

The regionalisation of ILO standards for seafarers, if pursued, should be subjected to certain conditions so that the purposes of the ILO standard-setting activities in the field of maritime employment are not undermined. Moreover, in order to produce positive results, machinery for the adoption and supervision of regional standards will need to be instituted if this task is not undertaken by the ILO itself.³⁸ The relevant issues which are set out and examined in more detail below, are as follows:

a) The universal implementation of ILO minimum standards for seafarers will be the rule. Regionalisation should not have the result of pushing regional standards below minimum international labour standards, especially if they are low, unless this is considered absolutely necessary after examination of the relevant standards has shown that these have been ineffective in specific regions over a long period of time and have not been able to accommodate the special needs of the specific region. Depending on the particular circumstances of the case, regional standards would either initially lay down rules at a lower level than universal standards or embody the basic aims of the instruments concerned for a particular region only, when difficulties have been encountered in the implementation of specific provisions (for example, Convention No. 145 on Continuity of Employment falls into this latter category), or, finally, provide for different methods of implementation and supervision of the universal standards at the regional level than those laid down in the universal ILO Conventions, if the methods laid down in the universal instrument have for various reasons proved impractical at that level.

b) Regional standards do not promote uniformity, which, as explained in the Introduction of this thesis, is one of the major goals of international labour law, unless a mechanism exists whereby regional standards are effectively related to universal standards. This mechanism would provide for transition from regional standards to universal standards, if the former are lower than the latter standards, within a specified period of time.

c) The regionalisation of labour standards would not affect human rights for seafarers, such as the freedom of association and collective bargaining, equality in the facilities for finding employment

³⁷See Art. of Convention No. 15, which applies the 16 years age limit to seamen employed as trimmers and stokers on vessels engaged in the coasting trade of India and Japan; Art. 2, para. 4 of Convention No. 138, which allows developing countries to specify a 14 years age limit, instead of the general 15 years limit under certain conditions; Art. 6 of Convention No. 76, which was aimed to lay down wage minima for limited categories of seamen (mainly, for those coming from developing countries); Art. 7 of Convention No. 109 which provides for wage exceptions in respect of ships where extra number of ratings are employed; Art. 5 of Convention No. 138 under which developing countries can initially limit the scope of the Convention in respect of certain branches of economic activity, including transport. Finally, Art. 29 of Convention No. 165 allows the substitution of bilateral and regional instruments, which will be adopted in the future, for the Convention itself, although "in the aggregate" no lower standards than those of the Convention can be laid down therein.

³⁸Here, attempts at establishing regional standards in the field of human rights would be of assistance; see *supra* Introduction, pp. 33-39. On the other hand, it should be noted that the systems of regional protection in the area of human rights, although useful to bear in mind, are necessarily limited to the specific nature of these rights, which are universal in character and content and do not have the diversity and the economic character of certain of the seafarers' standards.

irrespective of trade union membership, etc., which can only be universal,³⁹ but standards that accord seafarers specific labour rights and obligations which can and need to be differentiated at the regional level if they are to be effective, taking into account the special needs of the region concerned.

As a result of the analysis of maritime standards attempted in previous chapters, a number of standards could be subjected to regionalisation; these include hours of work, wages,⁴⁰ social security benefits, the regulation of employment agencies for finding employment for seamen, development of industrial relations, etc.⁴¹ Finally, the application of regional maritime labour standards to certain types of vessels and trades, which are usually excluded from the scope of ILO maritime Conventions, could be envisaged.

d) Regionalisation of standards would also aim at laying down more stringent standards or establishing stricter supervision procedures, should the special needs of a particular region so require. Certain aspects of maritime employment, such as the abolition of fee-charging employment agencies in the Asian region would fall under this category.

e) The regional protection of seafarers' rights presupposes the establishment of an effective system whereby such protection may be realised. Questions such as the determination of the regional boundaries, membership, regulatory and supervisory powers of the regional group, voting systems, inspection procedures, the settlement of disputes, and the organs of the regional organisation would have to be considered in detail.⁴²

³⁹For a view against regional standards in the field of human rights, see Valticos, 1971, *op. cit.*, pp. 742-747, who argues, *inter alia*, that the adoption of regional standards on human rights would result in an excessive relativism of the notion of human rights and, because of their unavoidable conflict, in a diminution of their significance, *ibid.*, p. 744.

⁴⁰See *supra* Chapter 4.1.5., pp. 322-324 and relevant footnote references.

⁴¹For example, in the Asian region, the regulation of the engagement of seafarers should take into account the unemployment resulting from overpopulation and from the impossibility of Asian seafarers being absorbed by their national fleets and corrupt practices by intermediaries; other special problems include the weak structure of seafarers' organisations and the state of development in vocational training facilities for the industry.

⁴²For suggestions with regard to the organisation of regional agencies in other areas, such as marine pollution, see, *inter alia*, Okidi Odidi, *Regional Control of Ocean Pollution* (Alphen aan den Rijn, 1978), pp. 219-229; The development of regional standards in environmental protection law is interesting in this respect. At the regional level there are many treaties and agreements which deal with aspects of marine pollution; see, *inter alia*, S. Boehmer-Christiansen, "Marine pollution control in Europe", *Mar. Pol.*, Vol. 8, 1984, pp. 44-55; P. Hayward, "Environmental protection: regional approaches", *ibid.*, pp. 106-119. It is interesting to note that many existing regional regimes for environmental protection are based on legally binding instruments. In particular, Hayward refers to important functions of regional pollution conventions, such as providing a specific legal framework for a particular geographical region taking into account any particular local circumstances; the formulating and developing regional policies; providing a framework for regional control; providing a forum for consultation and co-operation between States; *ibid.* pp. 118-119. As has been clear from the objectives of the development of regional labour standards set out in the Introduction of this thesis, his observations are very relevant to the possible functions of future regional labour Conventions. The importance attached by UNCLOS III to regional arrangements is evidenced by the fact that some provisions refer to regional rules; see Arts. 194, 197, 207 (3) and (4), 208 (5), 210 (4), 212 (3) of UNCLOS III; under these provisions account should be taken, in formulating international rules and standards and taking measures to prevent marine pollution from various sources, of characteristic regional features; Art. 207 (f4) adds another two factors: the economic capacity of developing States and their need for economic development. For the usefulness, the purpose and the disadvantages of regional arrangements in the field of marine pollution see, *inter alia*, GR. J. Timagenis, *International Control of Marine Pollution*, Oceana Publications, 1980, pp. 39-42, 269-273; compare also the Declaration on the Human Environment and the Action Plan adopted by the United Nations Conference on the Human Environment (UNCHE), held at Stockholm in 1972. *Principles* 10, 11, 12, 23 address the problems which the international regulation of environmental protection may cause to developing countries; moreover, several *Recommendations for action at the international level* dealt with special problems which may be encountered by developing countries in the establishment and development of environmental protection programmes; they recommended, *inter alia*, that states should take appropriate measures to prevent marine environmental pollution using the best practicable means available

f) In order that conflict between universal and regional standards is avoided, first, close co-operation between the ILO and the relevant regional fora should be established (if it is not the ILO itself which will be laying down regional standards) with a view to the harmonisation of the various standards adopted and their uniform and effective application,⁴³ and, second, final clauses should be introduced in regional instruments to the effect that either they do not affect obligations undertaken by member States by reason of ratification of other instruments, such as ILO Conventions, which may contain more advantageous provisions for the workers.⁴⁴ If at a given point of time a State, which has ratified a regional instrument, ratified a more progressive ILO Convention, the obligations of that State under the regional instrument would cease to exist to the extent that they would be incompatible with those arising from the ILO Convention or to the extent that the ratification of the relevant ILO Convention would automatically entail the denunciation of the regional instrument. It might be possible to create an international committee for co-ordination of various maritime labour standard-setting activities to rationalise legislative activities in this field in order to avoid normative conflicts between universal and regional standards.⁴⁵ Moreover, regular review of regional standards could and should be provided for. This could be undertaken by the regional agencies under the supervision and approval of the ILO (in the cases where the relevant regional standards have been adopted by regional conferences) or by the ILO itself in its capacity as the global agency.

This co-ordination should not exist only in the area of standard-setting activities but should aim at avoiding conflicts between regional and global supervisory systems.⁴⁶ It is particularly important that the drafters of various international labour standards, whether universal or regional, try

to minimise discharges of hazardous substances and they should co-operate on an international and regional level to create appropriate rules concerning marine pollution. Certain observations must be made here concerning the application of the above principles to maritime employment: a) in many cases, it is the shipowner and not the State that bears the financial burden imposed by maritime labour standards; as a result, arguments concerning the financial position of developing countries may not be valid; b) regional standards do not promote uniformity, which, as explained in the Introduction of this thesis, is one of the major goals of international labour law, unless a mechanism exists whereby regional standards are effectively related to universal standards.

⁴³Such co-operation could be envisaged in many areas: participation of ILO organs in the deliberations of the relevant Committees of the regional organisations (compare the co-operation between the ILO and the UN envisaged in the International Covenant of Economic, Social and Cultural Rights (1966), the participation of an ILO official in the deliberations of the Committee of Experts provided for in the European Social Charter, consultation of the ILO before the Council of Europe makes any decision concerning compliance of Member States with the European Code of Social Security, etc); common interpretative approaches; and similar control techniques.

⁴⁴Compare Art. 32 of the European Social Charter which preserves any more favourable treatment that may already be provided for under domestic law or other international treaties and Art. 120 of the Arab Convention on labour standards according to which the Convention does not affect treaties or international conventions which contain more advantageous provisions than those laid down therein. For legislative techniques for the avoidance of normative conflicts in the field of human rights, see T. Meron, *Human Rights Law-Making in the United Nations, A Critique of Instruments and Process*, pp. 202-213.

⁴⁵Compare in the field of human rights, Meron, *op. cit.*, pp. 211-212. Organs similar to the European Commission of Human Rights and the European Court of Human Rights or their American counterparts (Inter-American Commission and the Inter-American Court of Human Rights) could be established in various regions, such as Asia, South America, etc. whose role would be to give advisory opinions on the interpretation of a particular regional instrument in cooperation with the ILO Office, to assess its relation to other regional or universal instruments, to identify possible conflicts between regional and universal standards as well as between regional standards and domestic laws as interpreted and applied in practice, and to work out possible solutions for their gradual elimination.

⁴⁶For this question in the field of human rights, see Meron, *op. cit.*, pp. 229 seq.

to prevent future overlapping of or conflict of jurisdiction. This is not a difficult task in the field of labour since the supervision of future regional labour or maritime labour standards could be entrusted either to the ILO itself or to regional agencies directly dependent on or accountable to the ILO. Alternatively, the ILO could consider means of organising co-operation between it and other regional fora with a view to adopting a unified international and regional system of supervision. In this respect, the highly developed reporting system established by the ILO, which has been well tested over a long period and proved efficient, will be of great assistance.⁴⁷

It was pointed out above that the special economic and social conditions of certain regions, such as the Asian and the African region, which do not always permit the countries in these regions to adopt the measures required by universal standards concerned for various reasons, including their economic cost, the rigid requirements laid down thereby, etc., have resulted in slow progress in the ratification of a number of ILO maritime Conventions. In the field of maritime employment, a means of overcoming these obstacles to the widespread ratification and implementation of the relevant Conventions could be the adoption of regional standards. It is hoped that the regionalisation of certain maritime labour standards would, on the one hand, raise employment standards at the regional level while, on the other, assisting these countries, through "escalation" provisions, to approach in a more confident way, and eventually to adopt, the standards laid down in these Conventions. At the same time, this method would not compromise the effectiveness and universality of the standards contained in the "universal" Conventions by introducing flexibility clauses into them or by down-grading their social significance by relegating important provisions only to ILO Recommendations, as sometimes occurs.

In certain cases, the normative content of universal and regional instruments will in principle be the same. There may be variations in formulation, due to differences in drafting or legal traditions, but the basic rights and fundamental freedoms will be the same for all. In these cases, the value of the regional system would be in the method of implementation and enforcement of maritime labour standards. A system of regional enforcement would take account of the cultural diversities and social traditions in various regions of the world.⁴⁸ Regional control of employment conditions could envisage more effective methods of supervision than flag State control. Regional systems of control could, for example, be based, where appropriate, on the criterion of the seaman's nationality, when common characteristics and problems appertaining to particular groups of seafarers could and perhaps should be dealt with in a uniform and effective manner within a region irrespective of the flag under

⁴⁷The ILO has, in contrast to other UN agencies, developed a very elaborate system for the adoption of labour standards and the protection of labour rights, which could serve as a model in the elaboration of such a system at the regional level. Regional standards could be adopted either by the ILO itself in ILO Conferences in which all the parties interested in the region participate or in regional Conferences, organised through the ILO regional offices, which would be empowered to adopt, apart from resolutions and guidelines, ILO standards. The application of such standards would then be examined either by the Committee of Experts on the Application of Conventions and Recommendations or by a similar group established for regional purposes.

⁴⁸In some areas of maritime employment, such as the seamen's engagement and seamen's wages, effective supervision at the regional level could have beneficial effects on universal ILO standards and could eventually contribute to the latter's promotion and effectiveness.

which these seafarers are employed. Finally, the establishment of regional standards and supervisory procedures would permit the holding of formal investigations and the publication of official reports on violations of seafarers' rights in a specific region.

This writer believes that in the field of seafarers' affairs regional developments are an important step to universal law and the adoption of regional instruments would be a viable means of ensuring effective enforcement of certain basic rules of law concerning maritime employment. Adoption of regional standards would prevent low ILO standards from becoming, in many instances, the lowest common denominator while, on the other hand, enabling higher ILO standards eventually to be adopted by developing countries, within a relatively short period of time and in accordance with carefully established procedures, bearing in mind the experience which these States have accumulated after the adoption and implementation of the relevant regional standards.

7.2.2. The development of codes of practice or conduct and collective agreements

Another area in which the ILO's activities in the field of maritime employment could be developed is the adoption of codes of practice. The ILO has adopted such codes ⁴⁹ but they are very few and have not achieved a significant status in the ILO's maritime activities. ⁵⁰ However, it must be admitted that the great majority of the questions relating to seamen's affairs cannot be dealt with in Codes of practices because of their nature. The Codes of practices adopted by the ILO, as in the case of those adopted by the IMO, relate only to safety and, in particular, in the case of the former, to safety at work. ⁵¹ In fact, this seems to be one of the few areas where codes of practices could be useful.

⁴⁹ILO Codes of Practices, *Safety and health in dock work*, Revised edition, ILO, Geneva, 3rd impression 1984, pp. 221; *Guide to safety and health in dock work*, ILO, Geneva, 1976, pp. 287; ILO Codes of Practice, *Accident prevention on board ship at sea and in port*, ILO, Geneva, 1978, pp. 188. Other codes deal with safety in sectors related to the maritime industry: *Code of safety for fishermen and fishing vessels*, Part A, Safety and health practice for skippers and crews, published on behalf of the ILO, FAO and the IMO, ILO, Geneva, 1970, pp. 78; *Safety and Health in Shipbuilding and Ship Repairing*, Geneva, 1974, pp. 260; *Safety and health in the construction of fixed offshore installations in the petroleum industry*, Geneva, 1981, pp. 135.

⁵⁰Compare the success of the IMO in this field, which has elaborated many codes and guidelines aiming to maintain safety at sea, such as the International Maritime Dangerous Goods Code, the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk, the Code of Safety for Nuclear Merchant Ships, the Medical First Aid Guide (in collaboration with the ILO and the WHO), Guidelines on Surveys under the SOLAS Conventions, Guidelines on port State control, watchkeeping, etc.; for these codes see the relevant IMO publications; see also S. Mankabady, *The International Maritime Organisation*, 1986, Vol. I, pp. 13-14, 84-95, 103-130.

⁵¹*Prevention of Accidents Due to Electricity Underground in Coal Mines*, Geneva, 1959, pp. 54; *Prevention of Accidents Due to Fires Underground in Coal Mines*, Geneva, 1959, pp. 48; *Guide to the prevention and suppression of dust in mining, tunneling and quarrying*, Geneva, 1965, pp. 421; *Code of practice for the safe construction and installation of electric passenger, goods and service lifts*, Geneva, 1972, pp. 108; *Prevention of accidents due to explosions underground in coal mines*, Geneva, 1974, pp. 37; *Protection of workers against noise and vibration in the working environment*, Geneva, 1977, pp. 74; *Occupational exposure to airborne substances harmful to health*, Geneva, 1980, pp. 44; *Safety in the use of asbestos*, Geneva, 1984, pp. 116; *Safety and health in building and civil engineering work*, Geneva, 3rd impression 1985, pp. 386; *Safety and health in coal mines*, Geneva, 1986, pp. 176; *Safety, health and working conditions in the transfer of technology to developing countries*, Geneva, 1988, pp. 81. Other guides and codes have also been published in respect of other sectors such as agriculture, forestry and industrial radiation. It has been reported that the *Model Code of Safety Regulations for Industrial Establishments for the Guidance of Governments and Industry*, published in 1949 and subsequently revised on three occasions has exercised considerable influence on national standards; see ILO, *The Impact of International Labour Conventions and Recommendations*, Geneva, 1976, p. 79, n. 1.

Other areas could be maritime training,⁵² medical care, health, inspection and discipline and the ILO has drafted a number of instruments in these fields.⁵³ From the conclusions drawn earlier in Chapter 6, it is clear that the drafting of an ILO code concerning the duties, rights and inspection techniques of inspectors dealing with maritime labour cases is also advisable.⁵⁴ On the other hand, hours of work, minimum age, social security and other questions which constitute the main bulk of the ILO's work on labour standards, and maritime standards, are not translatable into codes of practice.

Moreover, the use of, and, even more so, the substitution of Codes of Practices for, international legal obligations should be viewed cautiously. It is advisable that experience should be gained of the working of such Codes over a trial period.⁵⁵ Another problem posed by the widespread use of Codes of Conduct or Practices is the relationship between these and the training requirements for seafarers, including their certificates of competency. Is the specific conduct laid down by the code of safe practice within the actual competence of the seafarer concerned and what sanctions can be imposed on him if he disregards or defies the recommendations of such Codes? This leads to another question, concerning the legal nature of such Codes. At the national level, it has been suggested that any revised Code on Safe Working Practices has to retain the essential character of a recommendation rather than regulation.⁵⁶ While Codes of Practices relating to safety of the ship and the construction and design of machinery could be accorded a regulatory status, this might not be the case with Codes relating to the safe working practices of seamen⁵⁷ because various circumstances, connected with different types of ships, trades, departments on board ship, may mean that practices have to be flexible and adjustable. It follows that, in Codes of the latter type, details concerning safe working practices, disciplinary procedures, inspection procedures, etc. could be included, which, because of their variety, detail and circumstantial character, cannot be included in an ILO Convention. However, the establishment of such Codes relating to seamen's affairs at the international level would not permit the ILO to dispense with binding international rules, laying down basic seamen's rights.⁵⁸

⁵²At the present the 1978 IMO Convention on this subject is as comprehensive as a code of practice and has been widely ratified.

⁵³See *supra* notes 49 and 51.

⁵⁴This code could be based on the excellent manual on labour inspection published by the ILO: ILO, *Labour Inspection, Purposes and Practice*, Geneva, 1973, pp. 234. Though ILO maritime instruments are mentioned in this guide, it is not specifically directed to inspection problems in the maritime industry. However, in view of the opinion of the MOU inspectors that Convention No. 147 is unenforceable (see Chapter 6, notes 160, 178, 181 and 185), it would be advisable that marine inspectors should consult the above guide, especially Sections 6 (legal power and status of inspectors), 11 (methods of inspection), 12 (health and safety inspection) and 13 (inspection of working conditions). Here, it should be noted that methods of inspection of working conditions are quite different from those of safety and health and require special knowledge of certain techniques on the part of the inspector; as regards medical inspection, see ILO, *The Role of Medical Inspection of Labour*, Geneva, 1968, pp. 111.

⁵⁵It was found by the Steering Committee on the Safety of Merchant Seamen at Work that in the U.K. the 1970 Code of Safe Working Practices had not been as effective as was thought in reducing the number of accidents. Although copies of the Code were carried on board ship, a high proportion of seafarers made little use of it. It was the view of the Committee that a suitable revised Code should be prepared, *Safety of seamen at work*, Report of the Steering Committee on the Safety of Merchant Seamen at Work, London, 1978, p. 5.

⁵⁶*ibid.*, p. 7.

⁵⁷Unless their recommendations are incorporated in laws or regulations having the force of law at the national level.

⁵⁸The ILO publication *The Impact of International Labour Conventions and Recommendations* states that during the discussions in the Governing Body there has been general agreement that codes of practices "should supplement, and not take the place of, Conventions and Recommendations, and that they should be regarded merely as guidance and not

In conclusion, despite some criticisms which were directed at the usefulness of international maritime conventions in furthering shipping policies and the limitations of the inherent powers of international maritime organisations,⁵⁹ it is submitted that the case for a gradual disengagement from conclusion of further ILO maritime Conventions has not been established. In contrast to most IMO instruments, ILO maritime Conventions reflect political disagreements over shipping policies. The participation of governments, shipowners and seafarers ensures this. Moreover, as pointed out earlier,⁶⁰ the ILO has arguably prompted the initiation of maritime social legislation in a large number of countries, not only through ratification but also through encouraging adoption of national policies which are based on standards included in ILO Conventions and Recommendations. The standard-setting activities of the ILO in the field of maritime employment have established themselves as an approved means of the development of international legal standards and the codes of practice, given the legal and constitutional problems which their implementation at the national level might entail, should be regarded only as complementary maritime standard-generator.⁶¹ As a complement to established ILO standard-setting procedures, the drawing up of codes concerning maritime employment is of great value. Such codes serve many purposes: a) they deal with cases of procedural detail such as inspection procedures, sometimes illuminating obscure provisions such as those of Convention No. 147; b) they gradually form an independent body of maritime labour standards which would be more flexible and could be easily updated through JMC procedures;⁶² c) they may eventually be incorporated in ILO instruments.⁶³

The ILO, in recent years, has recognised the value of collective agreements by including in the ILO maritime instruments specific provisions concerning the implementation of maritime labour standards by means of collective agreements. In the writer's opinion, the ILO could in the future examine the possibility of itself drafting, especially in developing countries, national collective agreements which would be based on similar concepts in all countries. The second stage in this direction would

as creating obligations"; op. cit., p. 79. In any case, such codes are not recognised in the ILO Constitution and, as a result, the ILO's supervisory machinery does not apply to them.

⁵⁹A. Cafruny in his book on the politics of international shipping, referring to IMO Conventions on pollution, states: "Since the late 1960s the ratification record has improved somewhat. However, many states accede to conventions for public-relations reasons; the conventions are cosmetic measures that help to conceal the indifference of shipowners and governments, *Ruling the Waves*, 1987, at p. 267; "... much of the work of IMO dealing with technical questions can be described as non-political. Nevertheless, as a rule, if international maritime organisations do not conform to the structure of interests, but, rather, seek to steer a course against the prevailing powers, they are either destroyed or ignored", *ibid.*, p. 283.

⁶⁰See *supra* p. 486, n. 7

⁶¹This, of course, does not mean that current ILO maritime instruments are faultless or adequate. Their defects in respect of specific maritime issues have been shown in previous chapters. Later in this Chapter, possible improvements of ILO drafting techniques will be suggested.

⁶²This would require a reconsideration of the JMC's powers and, possibly, a restructure of the JMC on a tripartite basis; for more details see *supra* Chapter 1, Section 1.7.2.

⁶³This occurred for the first time in 1987 when, as result of amendments submitted in the Committee on Medical Care, Convention No. 164 concerning Health Protection and Medical Care (Seafarers), 1987 was made to include almost verbatim provisions concerning training in medical care which were contained in the joint IMO/ILO international maritime training guide, adopted by the ILO/IMO Committee on Training in 1985.

involve the drafting of an international collective agreement for seafarers, which unlike the ITF agreement,⁶⁴ would be generally acceptable to seafarers and shipowners alike.⁶⁵ The impartiality of the ILO staff and the tripartite structure of the ILO would contribute to the success of this experimental initiative.

7.2.3. Need for better preparation of final documents

Finally, one lesson which has to be learnt from the history of the ILO's involvement in maritime affairs is that, to a great extent, the success of the instruments adopted has been dependent on adequate preparation of the drafts at the preliminary stages. Insufficient preparation has resulted either in a low number of ratifications⁶⁶ or in a missed opportunity to regulate substantial aspects of the seamen's conditions of employment.⁶⁷

7.2.4. The drafting of ILO instruments concerning seafarers

a) The scope of ILO Maritime Conventions - the vagueness of ILO definitions

While no special problems have arisen as regards the definition of the term "shipowner" in ILO Conventions,⁶⁸ the possibility of a uniform definition of the terms "ship"⁶⁹ and "seaman" has

⁶⁴For the inability of the ITF to mount an effective boycott campaign, see *supra* Chapter 6. However, in the last decade a clause stipulating that all FOC vessels must have signed crew employment agreements approved by the ITF has been gradually introduced in charter parties; B.N. Metaxas, *Flags of Convenience*, 1985, p. 59.

⁶⁵This can be done through the JMC. Thus, this body would turn from an international forum for "pre-collective bargaining to a *sui generis* forum for international collective bargaining: the new element would be the participation of governments in the proceedings, especially as regards the submission of draft documents for consideration by the final Conference; for this point see *supra* Chapter 1, Sections 1.7.2.3. and 1.7.3.

⁶⁶Holidays with Pay (Sea) Convention, 1936 (No. 54).

⁶⁷Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76), Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93). Of course, this does not imply that this was the only reason why the above Conventions have not come into force. For details, see the relevant chapters.

⁶⁸The term "shipowner" in ILO Conventions has to be construed as denoting not only the registered owner, but also "any other person who operates the ship with his own master and crew" or, in other words, any "persons on whose account the ship is fitted out"; *O.B.*, Vol. XL, p. 478.

⁶⁹The question of the application of ILO Conventions to mobile offshore units or other offshore installations has never been fully examined within the ILO although seafarers' representatives have from time to time argued that they should be regarded as ships for ILO purposes. However, it seems that these installations cannot be assimilated to ships for certain legal purposes; see J. Kitchen, "Lessons from the 'Sea Gem': Legal Aspects of Safety and Discipline on Offshore Oil Rigs", *Marit. Stud. Mgmt.*, 1974, 1, pp. 232-242. Kitchen argues that the extension of the disciplinary provisions applying to merchant seamen to employees on oil rigs is not warranted due to the dissimilarities between the shipping and oil rig industries; see especially *ibid.*, pp. 233-4, 238-240; for the legal problems arising out of the applicability of ILO Conventions to offshore installations see Ian Chambers, "The applicability of international labour Conventions offshore: an approach", *I.L.R.*, Vol. 120, No. 4, Jul.-Aug. 1981, pp. 395-409. Answer to this question will depend on the nature of the coastal State's rights to the continental shelf; the extension of labour legislation to offshore installations; the nature of these installations (fixed, mobile, semi-fixed); the designation of workers employed on them as seafarers; and the scope of the particular ILO Conventions. As a result of accidents on mobile drilling units requests have been made for the adoption of international standards on manning levels and qualifications for persons in positions of responsibility; see also ILO, *Report of the Director-General*, 1987, pp. 63-64. Another category of workers whose labour questions could be regulated in the future at the international level is that of the crews employed on board offshore supply vessels. During the period 1973-1984 the fleet of offshore supply vessels (crew boats, supply boats, tugs, tug-supply and special purpose vessels) has nearly doubled in size and is expected to continue to rise as subsea oil and gas resources become more important in the world market; see R.H. Burroughs, "Offshore supply vessels: An emerging maritime industry", *Marit. Pol. Mgmt.*, 1984, Vol. 11, No. 4, pp. 269-276. It is argued that this emerging industry will present further employment opportunities to the maritime workforce at least in the United States. At the same time it is thought that the special characteristics of workboat employment such as the level of unionisation, pay scales and the nature of shipboard tasks will limit mobility; *ibid.*, p. 272. The IMO is currently preparing a document

not been examined in detail within the ILO.⁷⁰ These questions are thus frequently left to be settled in national laws and regulations.⁷¹ Some ILO maritime standards apply to pleasure yachts whereas others do not. Also, there is no uniformity in ILO Conventions as to whether, in order for seamen to be covered, they must be entered on the ship's articles or in the crew list as members of the crew.⁷² Certain types of ships and categories of seafarers are usually excluded from the application of ILO Conventions but this has not taken place in a uniform manner⁷³ and, in many instances, ratifying Governments are provided with too much discretion in this respect.⁷⁴ Sometimes the ILO deliberations have the effect of restricting unjustifiably the scope of certain instruments, thus undermining their effectiveness.⁷⁵ Also, the scope of the Convention is frequently restricted by reference to legal terms, whose meaning is not easily ascertainable.⁷⁶ Unfortunately, the MSC has been partially successful in bringing uniformity to the scope of the ILO Conventions listed in its Appendix.⁷⁷

A major loophole in the implementation of ILO Maritime Conventions at the national level is the existence of a provision in most Conventions that "national laws or regulations"⁷⁸ determine when vessels are to be regarded as seagoing vessels". As interpreted by competent national authorities it seems to be assumed that the exclusion of vessels of small tonnage from the application of the Convention is justified in addition to the exclusion of certain other categories of vessels specifically permitted by subsequent articles of these Conventions.⁷⁹ This is a matter of interpretation of each

which covers the question of "Additional training and qualifications of officers and crews of MODUs and other mobile offshore units"; see IMO, Sub-Committee on Standards of Training and Watchkeeping, 19th session, 9-13 September 1986, STW 19/2; STW 19/7; STW 19/7/1; STW 19/12, Annex 1; STW 19/WP. 4.

⁷⁰However, it is unquestionable that women are included in the term "seafarer", see 32 *R.P.*, pp. 645-655. The position of the master is less clear. According to an early ILO dictum, "in principle, a provision does not apply to masters, unless this is expressly stated", 9 *R.P.*, p. 516. However, the ILO Office was of the opinion that the parts of the ISC dealing with age of admission to employment, social security for seafarers, shipowners' liability, seafarers' pensions and unemployment indemnities and insurance "do not define the position of masters and must be regarded as including them", ILO, *The International Labour Code*, 1951, Vol. I: Code, p. 770.

⁷¹See, for example, Art. 1 (2) of Convention No. 108.

⁷²Such a condition exists in Conventions Nos. 22 and 23 but is not necessary in Conventions Nos. 55 and 166.

⁷³This is particularly the case as regards the social security instruments, see *supra* Chapter 5.3.3., n. 112; 5.6. 2).

⁷⁴Compare Art. 2 of Convention No. 73; see also Art. 2 (7) of Convention No. 146 which empowers ratifying Members to exclude from the application of the Convention "limited categories of persons employed on board sea-going ships".

⁷⁵For example, Convention No. 15 does not apply to vessels 'mainly propelled' by means other than steam

⁷⁶Art. 8 of Convention No. 9 provides that the same facilities for finding employment should be available for seafarers of countries, where "industrial conditions are generally the same" (compare also para. 1 of Recommendation No. 107 where reference to conditions of engagement is made "generally equivalent to those applicable under collective agreements and social standards accepted by bone fide organisations of shipowners and seafarers of maritime countries where such agreements are traditionally observed"). This vague legal term has the effect of restricting the scope of the Convention vis-a-vis non-national seafarers.

⁷⁷See *supra* Chapter 6, pp. 445-446, 449-450.

⁷⁸It should be noted that, according to the ILO Office, the term "national laws and regulations" widely interpreted includes general principles of maritime law. No enactment of legislation is necessary as long as the effective application of the provisions of the Convention is guaranteed by some other means; *O.B.*, Vol. XXXIII, 1950, Interpretation of Decisions of the International Labour Conference: *Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)*, pp. 305-6.

⁷⁹The Greek delegation went to the 1987 ILO Conference convinced that the 1987 Office drafts which contained the same provision would facilitate the future ratification of these Conventions by Greece as far as vessels of small tonnage

Convention. It is without question that the list of exclusions contained in ILO Conventions concerning seamen's affairs was meant to be restrictive. On the other hand, the meaning of the above mentioned provisions has never been clarified by an ILO Conference. It could be said that the provision aims to limit the discretion of competent authorities as regards those areas of navigation that are to be excluded from the application of the Convention. This reasoning, however, would not be valid for countries such as Greece where a "sea-going" vessel is, *inter alia*, defined by reference to tonnage criteria.⁸⁰ It is submitted that the criteria which should be applied to the interpretation of this provision is whether its extensive use would defeat the objects and the purpose of the Convention concerned, taking into account the exclusions expressly allowed therein.⁸¹

Likewise, the meaning of the words "commercial maritime navigation" or "maritime navigation", which appear in most ILO maritime instruments, should be clarified. On the one hand, this provision has created problems of interpretation in ratifying countries;⁸² on the other, it permits ratifying countries to avoid application of provisions of ILO maritime instruments to vessels of small tonnage, even if this tonnage is higher than that allowed under the Convention, by enacting laws and regulations which define ships of a "desirable" tonnage as vessels not engaged in maritime navigation. It is submitted that the scope of ILO Conventions and Recommendations should be fixed on the basis of tonnage and strictly defined navigational limits.

As a result, there is no uniform application of ILO maritime standards at the international level. Efforts should be made, in this respect, to secure a generally acceptable definition of these terms,

were concerned. Mr. Gruénais, the Workers' delegate of France, commenting on Art. 1 (2) of Convention No. 147 in which the above-mentioned phrase appears, said: "The proposed Convention before us, if adopted as such, would be virtually ineffective, because it is national legislation which has to define which are seagoing vessels and which are not, because only Members which ratify the Convention will be undertaking to exercise their jurisdiction and control over ships registered in their territory"; 62 *R.P.*, p. 42.

⁸⁰The implications of this question were briefly addressed at the 28th session of the ILO Conference in 1946 but no positive conclusions were reached. The discussion centred on the question whether the addition of the words "for the purpose of this Convention" after the above mentioned phrase (which formed Art. 1 (2) of the 1946 Office draft on Holidays with Pay for Seafarers) meant that governments were free to decide what ships were to be regarded as falling within the scope of the Convention, 28 *R.P.*, pp. 86-87. The words "for the purpose of this Convention" were deleted but the problem was not resolved and to generalise in respect of all ILO Maritime Conventions would be stretching the argument.

⁸¹The interpretation given by the Committee on Wages, Hours of Work and Manning in 1946 in respect of the term "sea-going" in the 1946 Convention on Wages, Hours of work and Manning should be regarded as applicable to all ILO maritime instruments if the purpose of these instruments is not to be defeated. This interpretation stated that it "was felt necessary to ensure that the definition of sea-going vessels adopted in each country should be that country's normal definition and not one adopted specially for the purpose of excluding certain vessels from the application of the Convention"; 28 *R.P.*, p. 300. The need for the ILO's concern in the regulation of safety and working conditions on board ships under 500 tons and special ships has been emphasised in the past; see 41 *R.P.*, p. 129; 62 *R.P.*, pp. 114-115. The ILO considered this problem in 1956 but no measures were taken at that time; for a discussion see JMC, 18th Session, Oct. 1955, *Conditions of seafarers in smaller ships, 2nd Report*, JMC/18/3/3; Preparatory Technical Maritime Conference, London, Autumn 1956, Report I/2, (a) *Conditions of Seafarers in Small Ships*, Geneva, 1956.

⁸²In ratifying Conventions Nos. 53, 55 and 58 the United States stated that "the United States Government understands and construes the words "maritime navigation" appearing in this Convention to mean navigation on the high seas only."; *O.B.*, Vol. XXXIII, pp. 129, 132-6. This interpretation, however, is not correct. Conventions Nos. 53, 55 and 58, unlike other ILO Conventions, do not exclude coastal navigation from their application. Maritime navigation within the meaning of Art. 1 of these Conventions seems to exclude river or inland navigation but not coastal navigation.

since, as is well known, their interpretation has given rise to disputes in national courts. Moreover, uniformity in the application of seafarers' standards at the international level would be endangered if ILO standards, which are intended to serve as models for the implementation of social standards at the national level, provide, because of their inconsistency, little guidance to ratifying Governments as regards the scope of national laws and regulations. In this respect, it is submitted that, so far as vague terms have the effect of limiting the scope of ILO maritime instruments, they should be restrictively interpreted with a view to ensuring the widest possible application of seafarers' standards at the international level.⁸³

Use of vague terms not only affects the scope of ILO maritime Conventions but also their application. The problems presented by the criterion of "substantial equivalence" have been discussed elsewhere.⁸⁴ Other examples of "vague" legal terms are words such as "default", "wilful act" or similar expressions, which can have the effect of depriving seafarers of their rights under ILO Conventions, since, as these do not define these terms, the implementation of certain labour standards becomes a matter of interpretation by the ratifying Governments.⁸⁵ Since the clarification of vague legal terms is indispensable for the effective application of the instruments concerned, the inclusion of these terms in ILO maritime instruments, unless they are defined therein, would be better avoided.

b) The importance of international certificates of maritime labour standards

A general comment may be made as regards the contents of ILO maritime Conventions. Unlike IMO Conventions, the former do not contain provisions concerning the issue of international certificates. There are no international certificates certifying wages, hours of work manning, social security and crew accommodation standards, etc. It was pointed out earlier, in Chapter 3, that the inclusion of provisions in ILO Conventions concerning the issue of international certificates of proficiency is necessary; especially since the relevant provisions of the STCW Convention are not entirely successful in this respect. Furthermore, as was pointed out in Chapter 6, MOU inspectors have experienced difficulties in applying Convention No. 147 under the MOU. Thus, enforcement of social standards for seafarers at the international level lags behind enforcement of safety standards because of the lack of uniform certificates certifying the adherence to international social standards on board ship. There are two possible solutions to the problem: a) the ILO Conventions could be revised to provide for the carrying on board of uniform international certificates of labour standards; or b) a universal certificate could be created which would facilitate the enforcement of the labour standards included in Convention No. 147, provided that the Appendix of the latter is enriched with up-to-date maritime labour standards, as suggested in Chapter 6. In either case, these certificates would form

⁸³For example, in Art. 2 of Convention No. 7 the word "family" should be interpreted as denoting family in the strictest sense, viz., parents and children belonging to one family. In this respect, it has been argued elsewhere that provisions in ILO maritime Conventions, excluding from their scope members of the shipowner's family, should be deleted (see *supra* Chapter 4.3.2., n. 109).

⁸⁴See *supra* Chapter 6.1.2. and 6.3.

⁸⁵Art. 4 (d) of Convention No. 23; Art. 4 (3) of Convention No. 166; Art. 2 (2) of Convention No. 55; Art. 2 (5) of Convention No. 56.

part of the ship's papers and would be inspected normally by classification societies and other bodies in the same way as all other certificates concerning the safety and construction of the ship, etc.

Finally, consideration should be given to the possible adoption of international standards concerning "flexible" certificates of competency which would allow seafarers employed on home-trade to be engaged on foreign-going ships in a certificated capacity and vice-versa. The introduction of this type of certificates might have beneficial effects on unemployment among seafarers and on the diminishing availability of qualified seafarers in certain countries.

c) The need for the inclusion of provisions concerning sanctions

As pointed out in previous chapters, some maritime instruments do not have adequate provisions concerning the sanctions to be imposed if their substantive provisions are not respected. Particularly, so long as the Appendix to Convention No. 147 is not regularly updated, the development of standard provisions relating to supervision on an international plane should be considered for inclusion in the relevant instruments. Especially, international co-ordination in the supervision of labour standards on board ship is urgently needed and if standard provisions on international supervision are developed, this would facilitate the uniform application of standards for seafarers at the international level.⁸⁶

7.2.5. The position of fishermen

Another critical issue, which has been a subject of discussion in almost all Maritime Conferences, is the position of fishermen under ILO maritime instruments.⁸⁷ This question has two aspects: a) which ILO instruments relating to seamen also cover fishermen and b) the possibility and practicality of including fishermen in future ILO instruments covering seafarers. As regards the first question, the position of fishermen in ILO maritime instruments is not uniformly treated.⁸⁸

With regard to the second question, it must be said that the unconditional inclusion of fishermen in instruments dealing with seamen was rejected at the last maritime session of the ILO Confer-

⁸⁶The provisions concerning supervision could be modelled on a modified version of Art. 4 of Convention No. 147 as suggested earlier in Chapters 4 and 6. These would provide for legal sanctions against specific ships as opposed to general measures of an economic nature; measures of the second type have been suggested by a workers' member of the G.B. who argued that "if a country failed to apply Conventions ... to which it was a party, it might be threatened with a refusal to supply the necessary coal or oil for its ships, or with higher charges in port, or with a refusal to load or unload the ships"; 94 *G.B.*, p. 44. Of course, ideas such as the one expressed above should not find a place in international legal instruments dealing with shipping as they are likely to have only a partial effect and, on the other hand, they would exacerbate competition in the shipping industry.

⁸⁷For the latest ILO developments concerning working conditions in the fishing industry, see *Committee on Conditions of Work in the Fishing Industry* (Geneva, 4-13 May 1988), *O.B.*, Vol. LXXI, 1988, Series A, No. 1, pp. 33-41.

⁸⁸Conventions Nos. 22, 23, 54, 57, 72, 73, 75, 76, 91, 92, 93, 109, 133, 145, 146 and 147 explicitly exclude fishermen; it is also clear that Conventions Nos. 7, 8, 9, 15 and 16 do not apply to fishermen; see for the Office's interpretation of the Minimum Age Convention with regard to the inclusion of fishermen therein, *The International Labour Code*, op. cit., pp. 841-2, XIII *O.B.*, pp. 69-73; Conventions Nos. 55 and 70 permit national laws and regulations to make an exception for coastwise fishing boats; Convention No. 71 allows national schemes for the payment of pensions to exclude fishing vessels from the application of the Convention; Convention No. 53 does not contain a provision on this point but, in the opinion of the writer, applies to fishermen; see Chapter 3, 3.2.3; Convention No. 56 applies to vessels engaged in "sea-fishing"; Convention No. 108 provides ratifying Members with wide discretion as regards the inclusion of fishermen in the definition of "seafarer" and, as a result, they are free to exclude them after consultation with the organisations of seafarers and shipowners; see Chapter 2, 2.3.2.

ence in 1987.⁸⁹ It is beyond doubt that the position of fishermen has not been comprehensively dealt with in ILO instruments. A solution could be found to this problem if delegates having experience in fishing were included in shipping delegations to ILO maritime Conferences. As has been pointed out in Chapter 4, the PTMC in 1986 expressed its desire that such delegates be invited to participate in the 1987 Conference. However, no action on this point was taken. On the other hand, it is frequently suggested that maritime conferences be integrated within conferences of a "general" nature at which delegates with experience in shipping would be present. While this view has been found by the present writer in many instances in this study to be unacceptable, it is one that could be applied to maritime conferences in respect of the inclusion of delegates with experience in the fishing industry. IMO, interestingly, is also beginning to take more interest in the safety of fishing vessels, following recent disasters.

The Office, after a brief examination of the provisions concerning fishermen in ILO maritime instruments, stated that "... it would seem proper to conclude that, in the absence of express provisions or decisions providing for or allowing the exclusion of fishing vessels, Conventions whose scope is defined as covering vessels engaged in maritime navigation must be considered applicable to fishing vessels, particularly when the problems dealt with are equally relevant to this sector of maritime employment".⁹⁰ While this interpretation is correct historically, in the light of the position of fishermen in ILO maritime instruments, it hardly provides a conclusive means for resolution of future disputes and it does not encourage uniformity in this respect. It is suggested that fishermen in future ILO maritime instruments should either be expressly excluded or expressly included for the sake of uniformity. If they are expressly excluded this would not prevent ratifying countries from applying the provisions of the relevant instruments to them. The practice followed in ILO instruments of including or excluding fishermen according to whether or not they fall within the definition of "seafarer" under national law and leaving the question, "in the event of any doubt" to the competent authorities of the ratifying countries, is not doctrinally desirable, is likely to transfer international disputes over the status of fishermen to the national level and, as has been seen in previous chapters, has given rise to difficulties of interpretation.⁹¹ It should, therefore, be avoided.

⁸⁹The standard provision adopted by the 1987 Conference reads as follows: "To the extent it deems practicable, after consultation with the representative organisations of fishing vessel owners and fishermen, the competent authority shall apply the provisions of this Convention to commercial maritime fishing"; In this respect the 1988 Committee on Conditions of Work in the Fishing Industry adopted a resolution which requested the GB to urge "the governments and employers' and workers' organisations concerned to establish appropriate machinery at the national level to study the provisions of the aforesaid Conventions with a view to applying them where possible to the fishing industry"; see Resolution on working and living conditions in the fishing industry, *Committee on Conditions of Work in the Fishing Industry*, op. cit., p. 40. It remains to be seen whether this Resolution will be put into effect.

⁹⁰*O.B.*, Vol. LVII, Nos. 2, 3 and 4, p. 210.

⁹¹These provisions usually reads as follows: "In the event of any doubt whether any categories of persons are to be regarded as seafarers for the purpose of this Convention, the question shall be determined by the competent authority in each country after consultation with the shipowners' and seafarers' organisations concerned". It follows that analysis of this provision in different ILO Conventions can lead to different or quite opposite interpretations since it could reveal that fishermen are or are not included in the definition of "seafarer" "for the purpose of each Convention". The ILO Office itself has given different interpretations of the same provision in Conventions Nos. 108 and 134; see *O.B.*, Vol. LVII, Nos. 2, 3 and 4, pp. 208-213. The Office, in giving the interpretation that Convention No. 134 applied to fishermen, employed unusual methods of interpretation, namely whether "having regard to the subject matter and purposes

7.2.6. The interrelationship between labour, safety and environmental issues

As can be seen from pollution disasters in the last decades, the relationship between labour, safety and pollution is established but this is not the place to embark on an extensive analysis of this question. It suffices to say that inadequate manning scales and insufficiently trained crew may have disastrous consequences. The valuable role that the ILO can play in this respect resides in the fact that it can establish, together with the IMO, maritime training standards which would follow recent developments in ship construction. On the other hand, social standards should not be assimilated to safety standards. If the idea behind ILO standards is the establishment of social justice, maritime social standards should not be content with laying down safety requirements. As an example, it may be said that adequate standards of social manning may require a larger number of crew on board ship than safety manning.

However, it seems that in modern vessels manning scales will be reduced substantially (see the later discussion on automation), with the result that manning eventually will be regarded only as a safety requirement. In this event, to strike a balance between social and safety manning will be a matter of agreement between trade unions and shipowners but shipowners and seafarers have not easily agreed on such questions.⁹² One solution to this problem could be provided by the ILO which, as suggested in Chapter 4, could lay down guidelines for manning. Furthermore, the ILO could draw a distinction between safe and social manning, if current methods of construction and disagreement between seafarers and shipowners render this necessary, and also between manning scales on board normal ships and those on board automated or nuclear-powered vessels (although the importance of the latter type of vessels has diminished in view of the practical problems posed by use of nuclear power and of, decommissioning of such vessels). It might be that the social element is not so evident in the case of ships belonging to the second category.⁹³ The establishment of the International Sea-

of each Convention, the protection for which it provides can be considered sufficiently marginal for a given occupational group, because of the special characteristics of its employment, to raise a *bona fide* doubt whether the persons concerned should or should not be covered by the Convention"; *ibid.*, p. 212. In the opinion of the writer such a construction is inadmissible: a) it introduces so many subjective criteria as to render impossible any identification of common threads for any interpretative approach through which certainty of law could be achieved; b) it disregards the "ordinary meaning" of the words "doubt" and "purpose" in the context of the above provision; and c) it nullifies the purpose for which this provision was inserted in certain ILO Conventions, namely to leave it to the competent authorities in each country to determine, in cases of doubt, the categories of persons entitled to the benefits of the instruments concerned.

⁹²L. Pressman, "Case Study in Labor-Management Relations: Maritime Industry-1965", *Boston College Industrial and Commercial Law Review*, 1965, pp. 805-820; I. Chrzanowski, *An Introduction to Shipping Economics*, 1985, pp. 76-78.

⁹³In other areas the impact of the operation of nuclear-powered vessels on maritime employment is considerable; the JMC, at its 19th session, adopted two resolutions concerning Nuclear Tests in Ocean Areas and Nuclear-Powered Merchant Ships in which, on the one hand, the hazards that the conduct of nuclear tests at sea could entail for seafarers was stressed and, on the other, the need for the protection of merchant seamen employed on board nuclear-powered vessels with respect to the safety of seamen, liability in respect of accidents and sickness, specially trained manpower and special conditions of service was emphasised; for the text of the Resolutions see *O.B.*, Vol. XLV, p. 70. For the emphasis placed on the effects of nuclear-power propulsion on maritime labour during ILO Conferences see 41 *R.P.*, pp. 3, 24-25, 26-27.

Bed Authority by UNCLOS III is likely to give rise to the question of the adoption of appropriate labour and safety standards for personnel employed on board ships operated by the Authority or the Enterprise.⁹⁴ The ILO will ultimately be called upon to play an active role in this area.

Finally, the interrelationship between different aspects of maritime labour itself should always be kept in mind when new instruments are discussed.⁹⁵ In particular, it is suggested that the relationship between trade union membership and certain maritime social questions be examined (e.g. the effects of changes in trade union membership, as a result of a seaman being transferred to a newly established post, on social security benefits; trade union membership compared to company service contracts, etc.).

7.3. The ILO's established machinery for the adoption of seafarers' standards

An issue akin to the need for sufficient preparation of the ILO instruments is that concerning the nature of the special machinery used by the ILO for seamen's affairs. It has been a tradition within the ILO that seamen's questions are examined first by the JMC, subsequently by the PTMC and, finally, the relevant instruments are adopted at a special (maritime) session of the ILO Conference. This tradition is based on a Resolution adopted by the 1919 Peace Conference and the system then established has yielded good results in the field of maritime employment and, especially, has produced important international regulations contributing towards achieving the goal of the establishment of an International Seamen's Code. This system is in danger because of the Resolution adopted by the 1986 Preparatory Technical Maritime Conference to the effect that the Protocol to Convention No. 147 may be revised at a general session of the ILO Conference.⁹⁶ In Chapter 6 some reasons were given why this system is an undesirable development. Here, it suffices to say that the ILO Office itself did not agree that seafarers' questions should be considered at General Conferences.⁹⁷

7.3.1. Recorded votes at maritime conferences

Another interesting feature of ILO Maritime Conferences is that the great majority of the delegates vote for the Convention but the subsequent ratifications do not reflect the votes taken. There are

⁹⁴The Report of the Director-General to the 74th session of the Conference stated that "... the ILO is interested in ensuring that the labour and social conditions and the safety standards applicable to workers in the Area administered by the Authority are formally fixed at appropriate levels and effectively enforced in the particular context of the Authority and its Enterprise"; *op. cit.*, p. 28.

⁹⁵As an example, it may be cited that at the 55th session of the ILO Conference, the Workers' members of Israel and France referred to "the difficulty of recruitment of young seafarers, which they believed was due in part to the inferior conditions in this industry as regards holidays with pay, 55 *R.P.*, p. 157.

⁹⁶For an analysis of this Resolution see *supra* Chapter 6, Section 6.1.2., pp. 456-459.

⁹⁷The representative of the Secretary General said when appearing before the Committee on Holidays with Pay appointed by the 54th session of the ILO Conference: "The Office continued to hold the view that the inclusion of ... seafarers within the scope of a general Convention would create serious difficulties, ... it had suggested ... for seafarers recourse to the special ILO machinery that customarily dealt with maritime questions", 54 *R.P.*, p. 471.

many reasons for this, for example: a) the government concerned, after further examination of the adopted instrument, considers that it raises questions which cannot readily be resolved in the immediate future; b) the government voted for the instrument, despite its intention not to ratify it, in order to express its agreement with its basic principles;⁹⁸ c) the government intends to ratify the Convention but not in the immediate future.⁹⁹ It is submitted that these attitudes of delegates towards ILO Conventions should be gradually changed. It is the opinion of this writer that *known* technical and legal difficulties concerning specific Conventions should be solved before, and not after, the adoption of final instruments. This, of course, depends on the knowledge and alertness of the delegates present at the Conference which provides a good reason why the ILO General Conferences are not an appropriate forum for such issues. However, many delegates vote for a Convention with the intention of examining the adopted instruments in more detail when they return to their countries after the Conference. Close scrutiny of ILO maritime instruments *before* their final adoption would have certain beneficial effects: a) it would reduce the workload of the Committee of Experts; b) it would enhance the progress of ratification of the Conventions concerned; and c) it would make these instruments more effective and reduce the need for their revision at a future date, thus saving time and money. Money is an important consideration here because savings could be used for convening maritime conferences at more frequent intervals. If this can be achieved requests for restructuring the JMC will have less significance.

7.3.2. Standard final provisions of ILO maritime Conventions

At the last maritime session of the ILO Conference, the standard final provisions for ILO Conventions were adopted; these provide that two ratifications are sufficient for a Convention to come into force; all alternative proposals suggesting a combination of a larger number of ratifications and tonnage were rejected. One wonders whether this policy will serve the purpose of establishing international standards at which these Conventions aim and, particularly, whether the entry of a Convention into force after the registration of two ratifications will have any practical effect. To answer this question it is necessary to make certain distinctions based on the nature of the Conventions adopted.

First, it should be noted that the old argument that a combination of a large number of ratifications and tonnage should be inserted in the final articles of the Convention concerned when its provisions are likely to exacerbate competition at the international level, should be rejected. To take the example of the ILO Conventions concerning wages, hours of work and manning, this strategy, as

⁹⁸Sometimes, the opposite may be the case. Some governments, especially in the early ILO years, have ratified Conventions which admittedly were of little practical application in the countries concerned, being of the opinion that "the standard set will be kept in view for the future."; thus, Ghana in respect of Conventions Nos. 15, 16 and 58, see 41 *R.P.*, p. 29.

⁹⁹It is important to note that at the last maritime session of the ILO Conference in 1987, Convention No. 163 was adopted by 214 votes to 0, with 3 abstentions, Convention No. 164 by 214 votes to 0, Convention No. 165 by 198 votes to 3, with 4 abstentions and Convention No. 166 by 209 votes to 0, with 2 abstentions. It remains to be seen whether this vast majority of votes will be translated into a large number of ratifications.

pointed out earlier in Chapter 4, has not induced ILO Members to ratify the Conventions concerned and has prevented the collection and assessment of valuable information concerning these aspects of maritime employment. If the few countries which have ratified the Convention concerned think that, in view of the fact that no other ILO Member has ratified it, it places an excessive burden on them, special procedures for denunciation or other action could be introduced in the final articles of those Conventions, as suggested earlier in Chapter 4.

Secondly, it seems that the requirement that a Convention be ratified by two countries before it comes into force is reasonable and facilitates the evaluation of the working of the Convention concerned, thus pointing out the way for possible revision. However, this solution is not ideal when the provisions of a Convention contain an international element of a *substantial* nature, as is the case in the following examples: a) the Convention requires joint action at the international level without which it cannot practically operate;¹⁰⁰ b) the working of the Convention presupposes the development of a network of agreements whether multilateral or bilateral;¹⁰¹ and c) "escalator" clauses are included in ILO instruments which require ratifying Members to take necessary action if the persons or States primarily responsible fail to take the prescribed action.¹⁰² In all above cases, the inclusion of a combination of a sufficient number of ratifications and tonnage in the final provisions of the Convention concerned or, alternatively, as a final clause, in that part of the Convention which contains the above elements, should be considered if the effect of the Convention is not to be compromised.

7.3.3. The importance of Resolutions adopted at Maritime Conferences

Resolutions adopted by ILO Maritime Conferences have played an important role in the evolution of the International Seamen's Code. In fact, the adoption of many ILO instruments concerning various aspects of maritime employment has been the result of the adoption of relevant resolutions by previous ILO Conferences and subsequent discussion of the proposals concerned in the JMC. However, it should not be presumed that the adoption of ILO maritime resolutions has invariably led to practical results. From 1920 to 1989 80 ILO Resolutions, calling for the adoption of specific international measures, have been adopted by Maritime Conferences. Leaving aside the 8 Resolutions which were adopted at the 74th session of the ILO Conference (1987) and the evaluation of which would be premature at the present stage, it can be observed¹⁰³ that, out of a total of 72 Resolutions, positive ac-

¹⁰⁰For example, the success of Convention No. 147 on minimum standards on board ship is based on co-ordinated port state control at the international level.

¹⁰¹As explained in Chapter 5, Part IV of Convention No. 165 concerning Social Security for Seafarers (Revised), in fact, assumes co-operation of contracting States at the international level, namely the conclusion of bilateral or multilateral agreements. In contrast, the non-observance of, or partial compliance with the provisions of Art. 13 of Convention No. 164 concerning Health Protection and Medical Care for Seafarers, which expressly provides for international co-operation towards achieving certain goals laid down therein, is not considered so critical as to compromise the effect of that Convention.

¹⁰²For example, this would be the case if Art. 5 (a) second period of Convention No. 166 concerning the Repatriation of Seafarers (Revised) imposed an obligation on parties to the Convention as regards the defrayment of repatriation expenses, failing the taking of any action by those primarily responsible.

¹⁰³See Appendix 7, Table A.

tion has been taken in respect 56 Resolutions. Of these, 38 have been fully and 18 partially implemented. Action on 16 Resolutions has yet to be taken. Finally, 32 Resolutions which have been proposed at ILO maritime Conferences during the period 1920-1989 have not been approved by the majority of delegates.

It is interesting to note that the level of total or partial implementation of ILO maritime Resolutions is high, amounting to 77.7%. However, the number of non-adopted Resolutions has increased in recent years, especially since 1970. Moreover, leaving aside the 1987 Resolutions, no action has been taken on certain Resolutions, adopted in 1958 and 1976, which represent 1/2 and 1/3 respectively of the total number of Resolutions adopted in those years.

Important Resolutions, on which no positive action has been taken yet, deal with various aspects of maritime employment, such as questions of seamen's discipline; the limitation of hours of work in inland navigation; seamen's wages; the composition of the JMC; the manning of ships; the application of the principle of a 40-hour working week on board ship; the convening of regional maritime conferences; the employment of women on board ship; the environment on board ships; and the treatment of foreign seafarers in transit.

Some Resolutions, which were proposed at maritime conferences but did not obtain the approval of the majority of delegates, are concerned with important issues, such as the standardisation of wages; the right of association of foreign seamen; the fixing of minimum manning scales; the establishment of an international supervisory authority; the composition of the JMC; the applicability of ILO instruments to fishermen; occupational safety and working conditions on board maritime mobile offshore units and supply vessels; regional maritime conferences; the establishment of an international relief fund for seafarers; discriminatory conditions of employment; the promotion of the employment of women in maritime activities; inspection of seafarers' conditions of employment. The Resolutions relating to the employment of women on board ship, the transformation of the JMC into a tripartite body, the convening of regional maritime conferences and the conditions of employment on board mobile units have been rejected more than once in recent times. The question of manning also has not been dealt with successfully in ILO Resolutions.¹⁰⁴ There are many reasons why ILO Resolutions are not adopted: a) lack of time; which means priorities have to be established if a large number of Resolutions are put forward for consideration by the Resolutions Committee; b) the resolution involves political issues which are usually considered to be outside the competence of the Conference; c) the resolutions concerned relate to controversial issues, such as manning or the composition of the JMC and, therefore, fail to obtain high priority; and d) they considered to be too technical and are forwarded to other more competent bodies (this was the case with the 1976 Resolution concerning Medical Care aboard Ship).

¹⁰⁴For a list of the Resolutions adopted at maritime ILO Conferences and their implementation see Appendix 7, Table B.

As a conclusion, although the maritime Resolutions adopted by ILO Conferences have been implemented to a remarkable degree, the unwillingness of the delegates to discuss critical issues for seafarers has postponed considerably their consideration. Resolutions concerning the revision of out-of-date instruments are not proposed very often and this is one of the reasons why considerable time elapses before these instruments are revised. Finally, attention should be drawn to the fact that, as is evident from Appendix 7, action on many ILO Resolutions is taken only a considerable time after their adoption.

7.3.4. Number of ratifications, percentage of the world tonnage and the criterion of registration

Usually, the success or failure of ILO maritime instruments is expressed in terms of the number of ratifications which the instruments concerned have received. While the number of ratifications is an objective and easily verifiable criterion for assessing the impact of ILO Conventions, it is not alone sufficient to offer a complete picture of the effectiveness of ILO instruments. Three other factors can be identified for this purpose: a) the impact of unratified Conventions and Recommendations on ILO Members;¹⁰⁵ b) the number of workers (in our case, maritime workers) covered by ratified Conventions;¹⁰⁶ and c) the percentage of the world tonnage that is represented by the number of ratifications received. In this respect, it should be noted that, although the number of ratifications of ILO maritime Conventions is constantly increasing, this is not reflected in the percentage of the world's tonnage covered by these instruments; in fact, this percentage, as regards the most important maritime Conventions, is decreasing. For reasons of space, only the record of ratifications of the important ILO maritime Conventions (all Conventions in force, plus Conventions Nos. 70, 109 and 133) during the period 1976 (adoption of the MSC) -1989 will be analysed here. A closer look at Table A in Appendix 6 leads to the following conclusions:

a) Between 1976 and 1989 the number of ratifications received by all ILO maritime Conventions (except Convention No. 70 which is not in force) has increased. In particular, in 1976 the average number of ratifications for ILO maritime Conventions in force was 27.76 (the Conventions adopted in 1976 are not taken into account); if Conventions Nos. 70 and 109, which have not come into force yet are included in the calculation, the average number of ratifications falls to 26. The respective numbers for 1989 are 31.5 and 29.77 (the Conventions adopted in 1987 are not taken into account). This is not a particularly good ratification record, since over 90 ILO member States have an interest in shipping and the principal maritime countries number about 50.

b) In contrast to this increase, the average percentage of the world tonnage represented by the number of ratifications received by ILO maritime Conventions (excluding Conventions Nos. 70 and

¹⁰⁵This question has been briefly examined earlier in this chapter; see *supra* n. 7.

¹⁰⁶Unfortunately, no statistics showing the number of maritime workers per flag State exist at the international level. The ILO Annual Yearbook of Statistics does not refer to maritime workers as a special category of transport workers.

109) has fallen to 38.81% in 1989 (the Conventions adopted in 1987 are not taken into account) from about 43% in 1976 (the Conventions adopted in 1976 are not taken into account). This observation applies to most important Conventions in force. However, the percentage of the world tonnage covered by certain Conventions has increased during the period under consideration. These are: Conventions Nos. 22, 23, 71, 92, 108, 133 and 134. Nonetheless, the last two Conventions were adopted very close to 1976 and thus cannot properly be taken into account for the purposes of the present comparison. It is interesting to note that the increase in the percentage of world tonnage covered by the above-mentioned Conventions is mainly due to their ratification by Liberia and Greece after 1976.

c) The most widely ratified Conventions (40 ratifications or more) are those concerning minimum age, medical examination of young persons, seamen's articles of agreement and seafarers' identity documents; all of them, except the Convention on seafarers' identity documents, were adopted in the early years of the ILO. The Conventions which have received a low number of ratifications (less than 20 ratifications) deal with the questions of social security and related matters, wages, hours of work and manning, accommodation (supplementary provisions), continuity of employment and annual leave. All other instruments which are concerned with such issues as the placing of seamen, repatriation, certificates of competency, food and catering, paid vacations, accommodation, medical examination, prevention of accidents and minimum standards are in the middle range of ratifications (20-40 ratifications).

d) The average period of time elapsing between the adoption of ILO maritime Conventions and their entry into force is 5.22 years. The following Conventions exceed this average by a substantial margin (over 5 years): Nos. 56, 68, 71 and 91. Of these Conventions, Conventions Nos. 68, 71 and 91 require ratification by more than two members before they enter into force. It follows that burdensome final provisions represent one of the main reasons for the delayed entry into force of certain ILO maritime Conventions.

e) Finally, it is obvious that registration of ships in countries which have not ratified the relevant ILO instruments can undermine their effectiveness. In this respect, it is suggested that registration as the criterion for determining the scope of ILO maritime Conventions should be replaced by a modified criterion of registration as proposed in Chapter 1.¹⁰⁷

7.4. International custom and maritime labour law

It was noted in the Introduction that the demands of international customary law have never played an important role in ILO Conferences, except in certain cases, such as port state control. Moreover, it was pointed out that the identification of the trends in customary maritime labour law could prove a difficult task, since the constant evolution of this law by means of the adoption of legislation, regulations, decrees, or by the conclusion of collective agreements, renders the

¹⁰⁷See *supra* Chapter 1, Section 1.6.5., pp. 95-103, especially pp. 101-102.

crystallisation of custom at any given moment difficult. However, sometimes the ILO has been called upon to eliminate widespread malpractices (for example, the abolition of fee-charging employment agencies), and to adopt "new law" for certain cases in respect of which the position in customary law was unclear before the adoption of the relevant ILO standards.¹⁰⁸

It was explained in the Introduction why the relationship between maritime labour standards, in particular, ILO standards, and customary law was not going to be examined in detail. The practical importance of the above considerations should not be underestimated. It is a reality and this has become clear from the examination of the relevant maritime labour standards, that some of them have not been ratified nor been adopted by a large number of states, including, in particular, certain of the so-called F.O.C countries and countries whose seafarers are usually employed on board ships registered in traditional maritime countries (South Korea, the Philippines, Russia, etc.). If the preconditions for the formation of a customary rule of law were met, that is identification of consistent and uniform State practice (usage) and *opinio juris sive necessitatis*,¹⁰⁹ then the relevant rules laid down in the particular ILO instrument would have a binding force *erga omnes*, that is even for States which are not parties to the instrument concerned. Of course, this may not apply to States which have manifested consistent opposition to such rules.¹¹⁰

In this respect, it would be useful to ascertain the extent of the interaction between ILO Conventions, *qua* treaties, and customary rules of maritime employment emerging either outside the ILO Conventions or arising out of the conventional rules laid down therein. In particular, it should be ascertained to what extent ILO maritime Conventions have codified customary rules of law in this area and to what extent customary law has modified or rendered obsolete the provisions of certain, sometimes old, Conventions, especially those which have not entered into force or have been accepted by relatively few states. Although the question of the interaction of the sources of law (in particular, between treaties and customary law) still remains to be explored, increased awareness of these issues, apart from facilitating the identification of treaty and customary rules in this field, will have a beneficial effect on the evaluation and effectiveness of ILO standards established to date and will provide a measure of the role and potential of customary law in the area of maritime employment.

¹⁰⁸An example can be cited here: the Placing of Seamen Convention (No. 9) was adopted in 1920 and its principles have been observed by a large majority of maritime countries. In the light of the appearance in recent years of "manning" agencies which supply crews and charge fees for their services, production of evidence that this practice is against customary law, as it has evolved since the adoption of the Convention, would add to the legal arguments for their abolition. However, the wording of Resolution V concerning the recruitment of seafarers and the regulation of fee-charging employment agencies, which was adopted by the 1987 Conference, seems to imply that the principles of this Convention have not become part of customary law; for the text of the Resolution see 74 *R.P.*, p. LXXVII.

¹⁰⁹The generally held view of customary law, which has been endorsed by the ICJ is that the formation of a rule of customary international law postulates two constitutive elements: (1) a general practice of States and (2) the acceptance by States of the general practice as law, see Schwarzenberger, *A Manual of International Law*, 1967, p. 32; Continental Shelf cases, *I.C.J. Reports* 1969, p. 3, at p. 44; for a summary and critique of the various views on the subject see, *inter alia*, H.W.A. Thirlway, *International Customary Law and Codification*, A.W. Sijthoff-Leiden, 1972, pp. 46-61; M. Villiger, *Customary International Law and Treaties*, 1985, pp. 12 seq.

¹¹⁰What Sir Gerald Fitzmaurice has called "recalcitrant States", in 92 *Recueil des Cours*, 1957 II, p. 99; also, see the contentions of Norway in the Fisheries case, *I.C.J. Reports* 1951, p. 116.

ILO preparatory meetings are usually well organised and exchange of views between Government officials frequently takes place within the ILO forum before the adoption of the final draft. Moreover, in many instances States feel obliged to state their practice on a specific subject and to formulate their opinion on specific proposals; at other times, they are actually engaged in practice (through voting procedures, declarations, statements, etc.), thus providing valuable elements which could be taken into account in the examination of whether a particular standard has become or has generated customary law.

An extensive study of the practice of the ILO negotiations leading to the adoption of maritime labour instruments should be undertaken. The discussions during the preliminary ILO meetings and the statements made on behalf of member States in the discussions, the reasons given by specific States for adopting this or that stance, the practice of a large number of States as evidenced by the ILO Reports and the declarations concerning State practice made by government officials during the preparatory stages, the adoption (unanimous or not) of ILO Conventions, Recommendations or Resolutions on a specific subject ¹¹¹ and the position of member States during the voting procedures (the size and composition of the majority and the proportionate size of the minority), the "widespread and representative participation" of States in a particular ILO Convention, including those States "whose interests were specially affected", ¹¹² provide extensive evidence of the elements required to be taken into account in identifying the formation of customary law. Although the notion of the "specially affected" States is criticised nowadays, ¹¹³ in the ILO domain this notion is of practical importance, as it would point to States which either are engaged in the shipping trade or have nationals employed on board ships belonging to other nations. It is submitted that the process of the formation of customary law in the ILO framework is not so difficult to ascertain as it would be if State practice were to be ascertained independently of ILO procedures. ¹¹⁴

Further, following the ICJ's examination of the conditions which must be satisfied for the process of the "generation" of a customary rule by a treaty, an analysis of the relevant ILO instruments should be attempted with a view to identifying whether a number of maritime labour

¹¹¹The fact that at ILO Conferences, instruments are usually adopted unanimously, especially in recent years, does not in the present writer's view amount to State practice which could lead to the formation of customary law (see on this point, M. Villiger, *op. cit.*, p. 9). The experience of the present writer from ILO Conferences is that Government delegates many times, especially recently, vote in favour of a particular proposal, as a matter of courtesy, just in order not to spoil the "unanimity" of the proceedings and intend to examine the matter more closely when they go back home. From an examination of the voting procedures since 1919 until today it is very difficult to say that the votes in favour of a particular proposal, the abstentions and dissenting votes expressed the opinion of member States as to their will or intention to regard the relevant rules as binding or to extract any conclusions as to the existence of an *opinio juris*. Moreover, the value of the votes in ILO Conferences as evidence of State practice is even more equivocal. It is common practice among ILO Members voting in favour of a particular rule to refuse to ratify it at a later stage, although the reasons for non-ratification are not always identifiable and do not always mean that the State concerned has rejected that rule. More important in this respect are opinions expressed by member States during the preparatory meetings with concomitant statements, explanations of votes and reservations which could reflect the position of the particular State with regard to a particular standard and, sometimes, give some indication of the existence or not of an *opinio juris*.

¹¹²*I.C.J. Reports*, 1969, p. 42, para. 73; but see also M. Villiger who does not consider ratification of a treaty as an important aspect of State practice leading to the formation of customary law, *op. cit.*, pp. 11 seq.

¹¹³See, *inter alia*, M. Villiger, *op. cit.*, pp. 13-35.

¹¹⁴Compare on this point, Villiger, *op. cit.*, pp. 295-297.

standards are of a "fundamentally norm-creating character", ¹¹⁵ that is to say, of such a kind that they can operate as a general rule. It is true that reservations to ILO instruments are not permitted under the ILO Constitution and, therefore, this aspect of the norm-creating character of a particular ILO standard (i.e. lack of reservations) should not be overemphasised. ¹¹⁶ On the other hand, in many cases, it cannot be said that all ILO Conventions contain maritime labour standards which evidence, declare or embody legal rules or legal régimes which are recognised as being of universal validity and application so as to create rules binding on non-parties to these Conventions. It should be noted that usually maritime labour standards are specialised, sometimes embody individual and concrete rules, ¹¹⁷ are expressly made subject to national laws, regulations, and collective agreements and refer to specific maritime activities which are susceptible to change in various areas of the world and their scope and effectiveness is conditioned to a considerable extent by changes in the shipping business and in governmental policies, so that the question whether these standards have an intrinsic norm-creating character should be carefully examined. In other words, it should be considered whether rules of customary law can be created through the operation of ILO maritime Conventions, as law-making or norm-enunciating treaties. Certain ILO maritime standards, such as the age for admission to employment, the right of a seaman to repatriation, the right of a seaman to leave, etc. may have this character; other standards, such as those concerning wages and social security benefits may not. ¹¹⁸

Despite the continuous development of ever-changing regulations, it is possible to identify certain standards which, bearing in mind the consistent and widespread State practice either outside or within ILO Conventions, may be said to have become customary rules of maritime employment law if an *opinio juris* were present, or which can be said to be in the process of becoming such rules. These include: the 15-year minimum age limit; the 18-year minimum age for trimmers and stokers; the medical examination of seafarers before admission to employment at sea (but perhaps not the periods of the validity of the medical certificates laid down in Convention No. 73); the issue to seafarers of documents (identity or other documents) that facilitate their movement across national boundaries; Art. 3 and the basic provisions of Art. 4 of Convention No. 53 concerning the certification of officers; the 8-hour working day and, perhaps, the 48-hour working week for all departments (excluding, of course, overtime); the repatriation of masters and apprentices; a right of the seaman to repatriation in cases of illness or injury incurred while in service; that the expenses of repatriation include at least the

¹¹⁵*I.C.J. Reports*, 1969, p. 42, para. 72.

¹¹⁶On this point see Thirlway, *op. cit.*, pp. 117-124.

¹¹⁷For an analysis of the notion of the "norm-creating" character of a conventional rule and the "general" and "abstract" nature of this rule, and the negative effect that its being subject to special agreements or being qualified by "special circumstances" can have on its potential to become a customary rule of law, see *I.C.J. Reports*, 1969, p. 42, para. 72; see also Villiger, *op. cit.*, Chapter 5, D and E, who questions the Court's reasoning as regards the latter two preconditions laid down by it for the generation of a customary rule of law out of a conventional rule of law.

¹¹⁸Another problem encountered with ILO instruments in this respect is that, in many instances, for example, as regarding questions of social security, there has been some inconsistency in the succession of standards, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in various cases, that it is not possible to discern any constant and uniform usage, accepted as law, with regard to a particular standard (see Johnston, *op. cit.*, p. 241).

cost of reconveyance and subsistence from the time the seaman was discharged to his arrival in the port to which he had to be brought back; that a seaman entitled to repatriation is provided with accommodation and food during the repatriation travel; that travel time and/or any waiting time are not deducted from paid annual leave accruing to the seafarer; that the shipowner is ultimately financially responsible for the repatriation of the seaman; and that payment in lieu of leave earned is prohibited or is allowed only in exceptional circumstances.

The complete disregard of customary law and its implications for development of treaty law, which is apparent from the discussions held at ILO Conferences, is, of course, due to the absence of international legal experts in national delegations to these conferences. However, this practice has had negative effects on the effectiveness of ILO instruments and has deprived the ILO meetings from discussing ILO maritime standards from a different perspective, namely the uniform codification and progressive development of existing standards for seafarers, taking into account such principles as the clarity and certainty of law. It is in this context that issues, such as hours of work, manning, discipline, the placing of seamen, etc., should be discussed in the future.

7.5. The Law of the Sea Conventions and international standards for seafarers

Certain views were expressed in the Introduction and in Chapter 1 of the present study concerning the role of the UN Law of the Sea Conventions in effectively regulating social matters on board ship and it was argued there that Art. 10 of the HSC and Art. 94 of the LOSC are defective in this respect.

The first point, which was made, was that if these provisions are interpreted literally, according to their ordinary meaning, their scope is obviously limited. The flag State's obligation to regulate labour matters on board ship does not extend beyond strict safety requirements. In other words, there is an obligation to take measures in respect of employment matters only to the extent that this is necessary for the maintenance of safety at sea.¹¹⁹

The significance of safety considerations in the 1982 UNCLOS is further evidenced by the inclusion of para. 4 in Art. 94 (about crew qualifications) which clearly indicates a concern for ensuring safety at sea. Moreover, it will be remembered that Art. 10 of the HSC required flag States to take measures to ensure safety at sea with regard to manning and labour conditions for the crews, taking into account "the applicable international labour instruments". Another novelty of Art. 94 in this respect is that the word "labour" was deleted. Thus, the flag State is now obliged to take into account only the "applicable international instruments". This may evidence a further preference of the LOSC for safety at sea in disregard of social considerations. On the other hand, such deletion may have seemed necessary because, as the analysis undertaken in earlier Chapters has made clear, no international labour instruments on manning exist; furthermore, very few international labour

¹¹⁹See *supra* Chapter 1.6.3. and note 163.

instruments contain provisions relating to safety at sea; finally, the insertion of "training" in Art. 94 (3) (b) may have been aimed at including the IMO's STCW Convention in the applicable international instruments to be taken into account. It is certainly arguable that this Convention is a safety instrument rather than a labour instrument ¹²⁰ and the retention of the word "labour" might have rendered its applicability problematic. It may be possible to clarify this point when the commentary on the UNCLOS currently being produced under the auspices of the University of Virginia, USA, finally covers these relevant articles of the UNCLOS.

In any case, the deletion of the word "labour" in Art. 94 (3) (b) cannot mean that no labour instruments can be taken into account. It rather denotes the intention of the drafters to include any applicable international instrument whether this is of a safety or of a labour nature. In the writer's opinion, if the purpose of taking into consideration the applicable international instruments is to enhance safety at sea, this latter term should be given the widest possible meaning. Very few would argue that the well being of seafarers does not have a beneficial effect on safety at sea. If, in addition, the term "labour conditions" were interpreted to cover questions such as social security, health, medical care and safety of the seafarers, then the obligation of the flag State's duty to take measures to ensure safety at sea as regards ships flying its flag would acquire real social content. As is clear from the previous Chapters, the ILO has adopted instruments on all the above matters which could be taken into account in the application of the above provisions.

It was concluded above that in order to enhance the effectiveness of the above provisions of the Law of the Sea Conventions, an expansive rather than a restrictive interpretation should be applied to the terms "safety at sea" and "labour conditions". The next question arising concerns the nature of the obligation of the flag State in respect of the "applicable international instruments" and "generally accepted international instruments".

In the first place, it should be noted that neither provision imposes on the flag State a clear duty to regulate, that is to adopt laws and regulations. The obligations of the flag State towards the above international standards acquire meaning only if they are connected with its primary duty to ensure safety at sea. To this end it is required to take the necessary measures. Thus, the above provisions are concerned to ensure that the flag State takes enforcement measures to ensure safety of life at sea. Prescriptive duties are significant to the extent that they are necessary to give effect to the flag State's enforcement duties. As long as the necessary *measures* taken conform to the relevant "generally accepted international standards", the adoption of relevant laws and regulations does not appear necessary.

Second, there is a clear difference between HSC 10, para. 1 (LOSC 94, para. 3) and HSC 10, para. 2 (LOSC 94, para. 5). The former does not impose on the flag State a duty to apply the relevant international standards on board ships flying its flag nor to ratify the instruments in which these standards are laid down. Although the flag State is required to take account of the relevant instruments,

¹²⁰In the writer's opinion, it has both safety and labour aspects, see *supra* Chapter 3.

¹²¹ the effect is that the flag State is free to adopt its own national rules and regulations with a view to regulating labour conditions on board ships flying its flag which are virtually uncontrolled by internationally agreed standards. In other words, Governments are left with wide discretion with regard to the content of the labour standards to be taken into account and their enforcement, especially if the Governments concerned have not ratified the relevant ILO Conventions. As a result, these provisions are of an hortatory character and subject the relevant national laws and regulations to a negligible level of international control. ¹²² On the contrary, the latter provisions oblige flag States, in taking the necessary measures to ensure safety at sea, to conform to "generally accepted international standards". There is a clear obligation imposed on the flag State to make sure that the measures taken are in conformity with internationally accepted standards. However, the relationship between the "applicable international instruments" and the "generally accepted international standards" is less than clear. The former probably refers to the international labour instruments applicable to a particular case without any requirement that these standards be "generally accepted". ¹²³ If, however, the standards contained therein are "generally accepted", then the flag State is obliged to take measures in conformity therewith. ¹²⁴

This brings us to the next question, that is the meaning of the term "generally accepted international standards" to which the flag State is required to conform in discharging its obligations under the Conventions. It has been argued that reference to them has been dictated by reasons of practical necessity. ¹²⁵ The writer suggests that these terms should be viewed in the light of a two goals, namely, the uniform regulation of employment matters on board ship and the effective enforcement of the relevant laws and regulations on the basis of internationally agreed criteria.

The adoption of international labour standards is today one of the main tasks of the ILO and since 1919 this has been the organisation which has usually been looked to, whenever the need for the adoption of international labour standards on a new topic has become apparent. Therefore, to answer

¹²¹ See supra Chapter 1.6.3., n. 169.

¹²² Compare the analysis of the HSC reference to standards on marine pollution by A. Boyle, "Marine Pollution under the Law of the Sea Convention", 79 *AJIL* (1985), 347, at pp. 351-2.

¹²³ This is, it seems, the reason why the flag State is only required to take them into account. Thus, the flag State is urged to take into account the applicable international instruments irrespective of whether the standards contained therein are "generally accepted" or not. This has the advantage that flag States in taking measures to prevent safety at sea with regard to labour conditions will take into consideration certain principles or standards contained in instruments which have been adopted in one or another way by the international community (for example, Conventions, Recommendations, Resolutions) regardless of whether or not they have been widely applied in practice; thus, national action, in this respect, would be guided by certain international principles or standards. Furthermore, if State action upon this provision became consistent and general, the above principles and standards could at a later stage achieve some degree of general acceptance, in which case flag States would eventually be required to conform to them (HSC 10, para. 2, LOSC 94, para. 5).

¹²⁴ For a different view according to which no real significance should be attached to the term "applicable international instruments" in Art. 94 (3) (b), as its apparent conflict with Art. 94 (5) can be explained on historical grounds, see T. Treves in R.J. Dupuy, D. Vignes (ed.), *Traité du Nouveau Droit de la Mer*, 1985, pp. 723-724.

¹²⁵ Thus, wide divergencies and incompatibility between various standards will be avoided and promotion of the safety of shipping through the uniformity of international standards will be achieved, R. Churchill, A. Lowe, *The Law of the Sea*, 1983, p. 185.

the above question, it would be useful first to examine briefly the meaning attributed to the term "ILO standards", according to the traditional ILO philosophy.

It is beyond doubt that when reference is made to international labour standards (*normes internationales du travail*), this term encompasses the provisions contained in international labour Conventions and Recommendations adopted by the ILO.¹²⁶ However, it is pointed out that there are other ILO standards which have a less formal character, such as resolutions adopted by the ILO Conferences, resolutions adopted by regional conferences or by technical or specialised committees, etc.¹²⁷ Thus, international labour standards are contained in ILO Conventions, Recommendations and Resolutions and these may be said to possess the international character required by the Law of the Sea Conventions. Are they, however, "generally accepted"?

It is generally considered that this term refers to standards adopted by the ILO and, as far as "appropriate qualifications" of seafarers are concerned, reference is usually made to the STCW Convention adopted by the IMO.¹²⁸ However, little attention has been paid to the question concerning the meaning of the words "generally accepted international standards" and whether the labour standards adopted by the ILO meet this requirement.¹²⁹

The phrase "generally accepted" in this context could mean either standards or rules which have received widespread ratification or incorporation in national law¹³⁰ or have acquired the status of customary law;¹³¹ or have been ratified by a sufficient number of countries to enable them to come into force.¹³²

With regard to the meaning of the above term, it seems that the drafters of the 1982 UNCLOS primarily intended to refer to International Labour Conventions and Recommendations adopted by the ILO, without any further qualification. A proposed amendment to Art. 138 (General Conduct of States in relation to the Area) of the United Nations Convention on the Law of the Sea is indicative of this. This amendment would have created a second paragraph reading as follows:

¹²⁶See Valticos, 1983, op. cit., pp. 131-132.

¹²⁷Ibid., pp. 132-133. There are other standards which are elaborated by special intergovernmental Conferences under the auspices of the ILO and other international organisations, such as the two Conventions on social security and on conditions of employment for the Rhine boatmen, the European Convention on social security for workers in the international transport (1956), the European Social Charter, the European Convention on Human Rights, the European Code on Social Security and the European Convention on Social Security. The standards contained in the latter instruments, however, may not possess the international character which seems to be required by the provisions of the Law of the Sea Conventions. The examination of the question as to whether the UN Covenants on Civil and Political Rights and on Economic and Social Rights contain standards of the nature envisaged in the Law of the Sea Conventions is beyond the scope of this study.

¹²⁸D.P. O'Connell, *The International Law of the Sea*, 1985, Vol. II, p. 831; Churchill and Lowe, op. cit., pp. 188-9.

¹²⁹In fact, the ILO instruments mentioned by Churchill and Lowe as most important in this respect (Conventions Nos. 92, 109, 133, 145 and 147) have not been widely ratified and two of them, namely Conventions Nos. 109 and 133, have not yet entered into force, *ibid.*

¹³⁰As regards marine pollution, see Timagenis, op. cit., at p. 606.

¹³¹Van Reenen, "Rules of Reference in the New Convention on the Law of the Sea", 12 *N.Y.I.L.* (1981), at p. 3.

¹³²Boyle, op. cit., at p. 356; the question as to whether compliance with "generally accepted" satisfies the criterion of due diligence to be exhibited by the flag State when a flag vessel performs an act prohibited by international law is beyond the scope of this work as it touches upon questions of State responsibility; see on this point Meyers, *The Nationality of Ships*, The Hague, 1967, at p. 110; B. Smith, *State Responsibility and the Marine Environment*, Oxford, 1988, at pp. 160-161.

2. Signatories to this treaty agree to enforce internationally recognized labor standards regarding working conditions and maritime safety. Internationally recognized labor standards are defined as those standards specified in the conventions and the recommendations of the International Labour Organisation, with special reference to the Minimum Standards in the Merchant Ships Convention, No. 147.¹³³

This amendment was not adopted because it became part a compromise deal enabling the Conference to complete its work at the 1982 session but it provides an indication of the meaning which the Members of the Conference attributed to the international labour standards.

This writer believes that the reference to "generally accepted international standards" should be given the widest possible interpretation. The intention behind these Articles was to provide for the regulation of labour on board ships on the high seas an international criterion which would endow this regulation with some degree of uniformity based on a wide range of internationally accepted standards while at the same time providing the necessary flexibility as regards their application. Having in mind the above object of the Articles, the conclusion is that not only standards contained in ILO Conventions but also standards contained in ILO Recommendations should be included in the above term. Further, there is no reason why other standards contained in ILO Resolutions or in other instruments relating to employment matters should not be regarded as included in this term provided that in all the above cases these standards have achieved a certain degree of acceptance in the international community. Actually, if the aim is to guide flag States concerning to what standards they are required to conform in the regulation of maritime employment on the high seas without obliging them to adopt or to ratify these standards, thus achieving uniformity in the regulation of crew conditions and promoting safety at sea and, at a secondary level, the social protection of seafarers, such standards do not have to be binding on a large number States; they may have already passed into customary law so that the Law of the Sea Conventions would merely be codifying obligations which already exist;¹³⁴ or they may have acquired the status of law but may not have been ratified by a substantial number of states;¹³⁵ or, finally, they may not yet have the force of law because the relevant instruments have not obtained the number of ratifications required for their entry into force or they are

¹³³UN Doc. A/CONF.62/L.121, at 2 (1982).

¹³⁴The difficulty here is that in the shipping industry certain practices, often of a technical nature, may be widely applied and accepted in practice but *opinio juris*, which is necessary for the formation of customary law according to the prevailing opinion, may be lacking or its existence may not be readily ascertainable. This is particularly the case with maritime labour questions; it was seen that the role and effect of customary law in ILO deliberations has been very limited (see Introduction and Chapter 7.4.).

¹³⁵Customary rules of law apart, a high degree of acceptance, probably based on wide ratification, seems to be required by T. Treves who argues that "Il s'ensuit que la disposition veut se référer à un ensemble de règles qui (tout en comprenant aussi les règles coutumières existant en la matière) peuvent avoir aussi un degré d'acceptation moins généralisé que celui des règles coutumières. Ce degré d'acceptation doit cependant être très haut. Il est difficile de dire a priori combien de ratifications doit avoir recueilli une convention pour que l'on puisse la qualifier de "généralement acceptée"; in R.J. Dupuy, D. Vignes, op. cit., p. 723.

not by their nature legally binding.¹³⁶ However, in the last two cases, a certain degree of wide application at the international level will be required. In the case of ILO Conventions, it cannot be said that entry into force is tantamount to wide acceptance; since most ILO Conventions enter into force after the ratification of two ILO Members has been registered with the Secretariat, the entry into force cannot be an indication of wide acceptance.¹³⁷

It was concluded above that "generally accepted" international standards, regulations, etc., may include standards contained in rules of customary law; ratified ILO and IMO Conventions; ILO and IMO Recommendations and Codes of Practices; and, finally, instruments that have not yet come into force. However, in all cases but the first, wide application of the relevant standards at the international level is a prerequisite for the above provisions of the Law of the Sea Conventions, to come into operation. The degree of application of these standards will be a matter of interpretation in each particular case; factors such as the nature of the standard, State practice, the number of ratifications and the percentage of the world fleet represented thereby, the number of countries and of seafarers specially affected, etc. will be taken into account.¹³⁸

The interpretation attempted above is supported by the meaning which was attributed to the term "generally accepted international standards" by the delegates at the Law of the Sea Conference referred to above, and would certainly enhance the effectiveness of these provisions and confirm their purpose and aim without encroaching unjustifiably upon the sovereignty of States. The issue can only be resolved over time by State practice in relation to the UNCLOS once it comes into force; it will be particularly interesting to see whether States make claims against other States concerning alleged breaches of "generally accepted standards" and, if so, which. It should be noted in this context that the UNCLOS provides for dispute settlement machinery (Part XV).

¹³⁶This is easier to argue under the 1982 UNCLOS than under the HSC regime. Art. 94, para. 5 of the former, in contrast to HSC 10, para. 2 which is concerned with "standards", refers to generally accepted international "regulations, procedures and practices". Although the reference to procedures and practices underlines the legal form and the often technical nature of the standards applying in the shipping industry, especially in areas such as the construction of the ship, safety equipment, the avoidance of collisions, etc., it has the actual effect of widening the scope of these standards by implying that recommended procedures or codes of practice are among the standards to which the flag State is required to conform irrespective of whether these procedures or codes are contained in legally binding instruments. In the field of maritime employment, the above reference is wide enough to include ILO Recommendations, Resolutions and Codes of Practice, to which the flag State would be required to conform provided, of course, they are widely applied. If ILO Recommendations and Codes of Practices are to be included, there is no reason why international labour standards contained in instruments, which have not entered into force (for example, certain articles of ILO Convention No. 109 concerning wages, hours of work and manning) or are not legally binding, but which are widely applied, should not be regarded as included too. For a different view see T. Treves who argues that the instruments concerned must be of a binding nature although they do not need to have been ratified by the ratifying Members, in R.J. Dupuy, D. Vignes, op. cit., p. 724.

¹³⁷Compare the opinion of Group B in the UNCTAD Conference on Conditions for Registration of Ships, according to which the entry into force of ILO Conventions can only be an indication of general acceptance, TD/RS/CONF/10, Appendix VIII, p. 49.

¹³⁸Taking into consideration the above factors and the information contained in Appendix 4 and Chapters 2, 3, 4, 5 and 7.4, certain specific standards, such as those contained in the Medical Examination of Young Persons (Sea) 1921 Convention, the Minimum Age Conventions, the Seamen's Articles of Agreement Convention, the Wages, Hours of Work and Manning 1958 Convention and Recommendation (the 8-hour working day and the 48-hour working week for all departments, excluding overtime) and the STCW Convention, the Recommendations and the 1987 Convention on Health Protection and Medical Care could be identified as being "generally accepted" for the purpose of the application of HSC 10 and LOSC 94.

7.6. Seafarers' standards and international competition: the role of the ILO

7.6.1. The impact of competition on labour standards and their regulation

Of all trades, shipping is the most international. In no other industry is international commercial competition so severe. The special significance of economic considerations in the ILO's standard-setting activities in the field of maritime employment is underlined by the appearance and establishment of the FOC regime which, *inter alia*, was meant to reduce labour costs on board ship. This situation had allegedly an adverse impact on the nature and content of labour rights, especially in the area of conditions of employment (wages, hours of work, manning), and prompted the ILO to address the FOC problem several times.¹³⁹ The efforts of the ILO to combat flags of convenience and, in general, substandard vessels led to the adoption of Recommendation No. 108 (1958) and the 1976 Minimum Standards Convention (No. 147).¹⁴⁰ Recently, other phenomena, such as the engagement of crews from Third World countries for employment on board ships under traditional flags by virtue of collective or individual company agreements with crewing agencies operating in the Middle East and other "cheap labour" areas and the development of offshore registers, permitting the employment of less costly labour on board ship and aiming to circumvent obligations adhering to the State of the ship's registration, are likely to affect adversely labour standards at the international level.

141

In the shipping industry the question of international competition has played an important role in the negotiations between workers and employers within the ILO. The employers have in many instances argued that the international regulation of certain issues concerning seamen's affairs¹⁴² was not desirable because the operating costs of ships registered in ratifying countries would be higher than that of ships registered in non-ratifying countries. On the other hand, the workers have consistently been of the opinion that the adoption of international maritime labour standards would have the effect of reducing the detrimental effects of international competition on seafarers.¹⁴³ The ITF, for example, has frequently insisted that wages on all ships should not be less than the ILO recommended minimum as periodically revised.¹⁴⁴ In fact, as pointed out in Chapter 4, fear of international competition has proved a deterrent for the adoption by most countries of certain maritime labour standards, such as those concerning wages, hours of work and manning.

Other aspects of seafarers' employment can also be relevant to the question of competition, a good example being social security. It has been contended that social security costs, viewed as part of

¹³⁹See supra Chapter 6.1.1. and relevant footnote references.

¹⁴⁰For an analysis of these instruments, see supra Chapter 6.1. and 6.3.

¹⁴¹For the possible effects of the emergence of offshore registers on labour standards, see infra Chapter 7.11.2, notes 191 and 192.

¹⁴²See supra discussion of the question of wages and hours of work in Chapter 4.

¹⁴³This was a reiteration of the Workers' view that an increase in wages in countries where low wages prevail, would eliminate one factor of unfair competition and would increase the consumptive capacity of these areas, 15 R.P. II, p. 12.

¹⁴⁴H. Northrup, R. Rowan, *The International Transport Workers' Federation and Flag of Convenience Shipping*, 1983, pp. 97 seq.

the crew costs, represent a parameter which places FOC vessels in a considerably more advantageous financial position vis-a-vis vessels from traditional maritime countries, especially in periods of economic depression.¹⁴⁵ If ILO instruments on social security achieved widespread acceptance, social security differentiations, as a source of competition, would be reduced and, therefore, their impact on labour costs would gradually decrease.¹⁴⁶

The possibility of utilising a large market of labour from developing countries where unemployment is increasing and minimum wages and, especially, social charges are low, calls for a closer examination of the interrelationship between economic and social factors in the field of maritime employment and the role which the ILO is to assume in this area. In this respect, the impact of crew costs on the regulation of labour matters on board ship at the international level is a relevant issue.

7.6.2. Modernisation of shipping and crew costs

On the other hand, it is possible that automation on board ship will bring about situations that are favourable for seamen, as a result of the associated savings in capital and operating costs.¹⁴⁷ In fact, as a result of the modernisation of ships, it seems that of the three principal economic inputs to maritime transport, namely the ship, the fuel and the crew, the last will have the least significance.¹⁴⁸ It is undeniable that, at present, crew costs may represent a significant percentage of the operating costs of the ship¹⁴⁹ and their international regulation is likely to give rise to difficulties. However, the

¹⁴⁵See below 7.6.2, n. 151.

¹⁴⁶The impact of social issues on the competitiveness of certain industries within the EEC still preoccupies experts and Governments on the brink of the intended European economic integration by the end of 1992; in particular, it is feared that the existing national diversities in systems of social protection within the EEC will bring about a kind of "social dumping", that is a type of unfair competition based on substandard employment practices; see Hugh G. Mosley, "The social dimension of European integration", 129 *I.L.R.*, pp. 147-164, at pp. 160-1. Measures to avoid the consequences of "social dumping" included the adoption of the European Social Charter. It is reported that the FRG supported the Charter on this ground; however, the U.K. has opposed the Charter as it favours deregulatory policies in this area, see *ibid.*, pp. 157, 162.

¹⁴⁷For the possibility of savings in these areas see R. Goss, *Studies in Maritime Economics*, 1968, Chapter 5, The economics of automation in British shipping, pp. 100-102. For the effects of a faster turn-round of ships on their earning capacity, see *ibid.*, pp. 132-151. It should be noted that the Sub-Committee on Safety and Navigation (IMO), at its 35th session, 23-27 Jan. 1989, prepared draft guidelines for conducting trials and experiments in which the officer of the navigational watch acts as sole look-out at night under appropriate conditions. Such trials are being carried out in several countries; see *IMO News*, No. 2: 1989, p. 13. The introduction of single-man watchkeeping at night on certain ships is likely to have an effect on manning scales and their operating costs.

¹⁴⁸"Since larger ships do not require larger crews, the ratio of capital to labour shifts rapidly towards more capital-intensive systems", E. Schrier, E. Nadel, B. Rifas, *Outlook for the Liberalisation of Maritime Transport*, 1985, p. 6; however, an important characteristic of salaries and other crew expenses is that they tend to increase substantially over the years; see A. Boyer, *Les transports maritimes*, 1973, pp. 108-110; see also D. Moreby, "Crew costs", *Marit. Pol. Mgmt.*, 1985, Vol. 12, No. 1, pp. 55-60, at p. 60, Table 7.

¹⁴⁹For the difficulties encountered in assessing and comparing ships' operating costs see T. Heaver, "The treatment of ships' operating costs", *Marit. Pol. Mgmt.*, 1985, Vol. 12, No. 1, pp. 35-46. Accurate comparison of ships' operating costs is rendered difficult because factors such as accounting practices, the identification of cost causal factors (i.e. vessel age), route patterns, differences in vessel output and crew productivity (including repair and maintenance work) are often not taken into account. Heaver suggests that a better system of information producing comparable data should be introduced. Crew costs may account for up to 50% of the ship's operating costs; see M. Stopford, *Maritime Economics*, 1988, pp. 101-3. However, operating costs do not include voyage costs, capital costs and cargo handling costs which form part of the ship's total costs. The figures given by shipowners based on EEC statistics are 54% (of the fixed operating costs) and 21% (of the total running costs of a Dutch 1500 TEU container ship); see *Which Register? Which Flag?* Conference, 1987, speech of J. Whitworth, p. 2, slides 1 and 2. For the substantial savings effected by

solution to the international regulation of wages will not be as controversial as it has been in the past, owing to a number of factors, such as the reductions in manning scales as a result of the introduction of automation on board ship and the larger size of modern ships. It has been calculated that the savings realised by a shipowner who employs a Third World crew (it should be noted that crew costs in FOC vessels are generally higher than those required for a vessel manned exclusively by a Third World crew), namely about 17% on total operating costs, are roughly the same savings as those he would make if he cut the crew from 28 to 17.¹⁵⁰

On the other hand, the obligations imposed on a shipowner by a traditional maritime country in respect of non-wage crew costs, such as social security benefits, are always likely to place shipowners operating under flags of convenience in an advantageous position.¹⁵¹ But as pointed out earlier, if an international network of social security law for seafarers is established, based on ILO standards, the advantages of operating vessels under flags of convenience will be reduced in this respect; Convention No. 165 goes some way in this direction.

It is not contended here that FOC vessels should be eliminated. It is argued that if, apart from safety standards, labour standards on board FOC vessels are respected, the outcry against the opera-

the use of dual capability personnel in Soviet ships since 1977, see D.M. Long, *The Soviet Merchant Fleet*, 1986, p. 48.

¹⁵⁰M. Stopford, op. cit., p. 105. It remains to be seen how the widespread expansion of automation in the shipping industry will eliminate future disputes concerning non-observance of social standards on board FOC vessels. Nonetheless, the fact should not be overlooked that while shipping is a capital-intensive rather than a labour-intensive activity, in a time of recession it could be that lower labour costs will ultimately determine the profit or loss of the shipowner, see R. Goss, *Sense and Shipping Policies* in Yannopoulos (editor), *Shipping Policies for an open world economy*, p. 71. In the writer's opinion, however, an international minimum wage, laid down along the lines suggested earlier in Chapter 4, is unlikely to have, and should not have, an impact on the shipowner's decision to operate a ship under flags of convenience. First, this wage is a minimum wage; and, secondly, wages on board FOC vessels are sometimes substantially higher than the international minimum wage fixed according to the relevant ILO procedures. Moreover, it is not only the actual level of wages that determines the crew costs but the manning scale in a specific ship. It has been pointed out that a ship of the USA is manned by nearly twice as many seamen as a similar ship flying the French flag. Also, in some countries trade unions strongly oppose any reduction in the number of the crew, which was technically possible without any adverse effects on the ship's security; see I. Chrzanowski, op. cit., pp. 76-78. It is hoped that automation on board ship will contribute to the reduction of crew costs not by reducing the actual level of wages but by reducing the actual number of the crew. On the other hand, the development of an effective manpower policy in developing countries would render recruitment and employment of nationals of these countries under nominal wages more difficult. Finally, the construction of larger ships will reduce the significance of crew costs in relation to the total operating costs of the vessel: "As the number of the crew increases less than proportionately with the ship's size, the share of crew costs in total ship's expenses will decrease. One estimate states that crew costs represent 18% of fixed costs for a tanker of 19,000 dwt, 10.7% in case of a tanker of 50,000 dwt and only 2.8% of a VLCC of 400,000 dwt.", I. Chrzanowski, op. cit. However, the same writer observes that "crew costs are today one of the most important, if not the sole, factors influencing the efficiency of shipping operations under various flags." This is regarded by shipowner representatives as the main reason for the proliferation of open registries, *Which Register? Which Flag?*, (Whitworth), op. cit. pp. 4, 7. On the other hand, it has been said that arguments in favour of "flagging out" based on crew cost differentials between various countries and FOC give a false picture of crew costs in proportion to the total operating costs unless capital and fuel costs are included in the calculation; see D. Moreby, op. cit., p. 57. Moreby argues that savings due to differentials in operating costs due to crew costs are realistically more achievable in the case of larger, more capital intensive ships and foresees some means whereby operating advantages deriving from lower crew costs can be met by savings in other areas (for example, better fuel management, raising of effective days of operation); *ibid.* pp. 57-9. For a comparison of crew costs in relation to total operating costs of ships under West European and FOC flags see Appendix 6, Table 7.

¹⁵¹"The existence of international competition in shipping, and particularly that of the FOC fleets, effectively shifts on to the employer the burden of the deductions from the seaman's pay for similar purposes and for income tax", Goss in Yannopoulos, op. cit., p. 72. For the substantial differences between the net pay received per seafarer and the gross cost to the employer in various EEC countries, see Appendix 6, Table 3.

tion of these vessels will no longer have valid legal grounds of existence. Other economic reasons for the attraction of shipowners to FOC countries, such as the avoidance of taxation, the lack of an obligation to present audited accounts, the availability of credit facilities, etc. are matters of national governmental policy and cannot produce the international impact and justified rejection which the disregard of environmental, safety and labour standards on board ship may entail. ¹⁵²

7.6.3. The role of the ILO in striking a balance between social objectives and the forces of international competition

It was pointed out above that the ILO Worker delegates believed that the establishment of minimum seafarers' standards at the international level would have the effect of reducing the adverse consequences of international competition on labour standards on board ship. This can only result from the international regulation of employment at sea and does not imply that the principal aim of the ILO is to reduce competition in the shipping industry. ¹⁵³ The aim of the ILO is rather to promote social standards for seafarers at the international level and, at the same time, to ensure "that the terms of international competition in the shipping industry do not adversely affect the employment conditions of seafarers ... ". ¹⁵⁴ To this end, ILO standards should be widely ratified and should not be evaded by resort to flags of convenience, offshore registers, conclusion of agreements with foreign seafarers, etc. Moreover, flag States should exercise effective authority over the ships under their registry and ensure the observance of appropriate social and safety standards. ¹⁵⁵

As the previous analysis has made clear, most ILO Conventions lack satisfactory provisions on enforcement of social standards. Moreover, the main instrument on international supervision of social standards, viz., the Minimum Standards Convention, is seriously flawed as regards the effective supervision and enforcement of social standards at the international level. This is due both to the defective wording of the main text of the Convention and to the incomplete Appendix thereto, from which instruments concerning important aspects of maritime employment are missing. ¹⁵⁶

Although the ILO has unquestionably, through its various activities, contributed to the amelioration of the employment standards of seamen, it has failed to reduce malpractices in the shipping industry and to ensure that working standards are not avoided by use of techniques, such as

¹⁵²Metaxas argues that "the number of crew on vessels under flags of convenience is, as a rule, smaller than the number of crew on vessels of the same size and type that are registered under flags of traditional maritime nations. Furthermore, as a rule, officers and crew serving on FOC vessels are not as properly certificated and/or competent as those that are serving on vessels under traditional maritime flags.", B.N. Metaxas, op. cit., p. 28. However, the table on which he relies for his assertions (ibid.) is incomplete. Only two FOC countries, Liberia and Panama, are represented, of which only Panama justifies Metaxas's hypothesis of lower manning scales on board FOC vessels. Moreover, no account is taken of the connection between manning scales, safety manning scales for the particular ship, wages and hours of work.

¹⁵³Some States, like the U.S., have seen the ILO as means for reducing competition in the shipping industry; the U.S. Department of Commerce was of the opinion that the Government should support "international efforts to improve the working conditions of foreign maritime workers, thus helping the American merchant marine"; W. Galenson, *The International Labour Organisation: An American View*, 1981, at p. 124; see also ibid., p. 250.

¹⁵⁴JMC/21/4, p. 3.

¹⁵⁵This was the justifying reason for the adoption of Recommendation No. 108 and, later, of Convention No. 147; see supra Chapter 6.1.

¹⁵⁶See supra Chapter 6.1. and 6.3.

the change of flag, the establishment of offshore registers, and the provision by agencies set up in shipping centers, especially in the Far East and Russia, of Russian, Third World and Asian crews for employment on board ships controlled by traditional maritime interests.¹⁵⁷ The employment conditions of these crews are usually regulated by contracts specifying a law other than that of the flag State.¹⁵⁸

In such cases, although the flag-State may have ratified the relevant Convention, in case of a dispute, the judge of the forum (which may be different from the flag State) will apply in the first place the law expressly provided for by the parties concerned. Only in special cases will this law not be applied. This means that whether the flag State has ratified the relevant ILO instrument will be ultimately irrelevant and this is one area on which the efforts of the ILO should be concentrated. Criteria other than the flag or the registration should be considered with regard to individual branches of maritime employment. Other criteria have been used in Convention No. 165 on the social security of seafarers. However, the convening of ILO Maritime Conferences at more frequent intervals would help in assessing the effect of the various criteria employed in each particular instrument. Alternatively, this question could be discussed within the JMC.

It is submitted that the role of the ILO in combatting substandard vessels should be a) to devise acceptable minimum safety and social manning scales at the international level; b) to fix an international minimum wage for different categories of seafaring personnel; and c) to establish an adequate system of inspection of manning and other labour standards.¹⁵⁹ To this end, the relevant ILO instruments and, in particular Convention No. 147, should be revised along the lines suggested in Chapters 2, 3, 4, 5 and 6. Finally, particular attention should be paid to the question of avoiding the obligations assumed by the flag State under the ILO Conventions by employing the above-mentioned devices. In this respect, certain thoughts expressed earlier in Chapter 1.6.5. could be of assistance.

7.6.4. The need to take account of economic policies in the regulation of maritime labour

Finally, it is unquestionable that economic considerations should be taken into account in drafting ILO instruments in areas such as wages,¹⁶⁰ unemployment¹⁶¹ and manpower policies. It

¹⁵⁷For the problems posed by the employment of seamen from the Far East, see H. Northrup, R. Rowan, *op. cit.*, pp. 106-109.

¹⁵⁸For example, it is common nowadays that vessels registered in Liberia or Panama employ Philippino or Korean seamen under contracts expressly stipulating that Philippino or Korean law is applicable. In such a case, the question whether Liberia or Panama has ratified the relevant Convention is beyond the point.

¹⁵⁹Co-ordination and planning of the various activities at the regional level could also be envisaged; see *supra* 7.2.1.

¹⁶⁰For example, adequate and effective wage-fixing procedures may be of vital importance in the success of development policies. A wage policy which attracts better skilled workers to sectors where they are least needed and away from areas where their skills are most needed can be the cause for social and economic instability and frustrate any attempts for the development of a particular region. In the field of maritime employment, higher wages for seafarers would attract skilled workers to shipping, which is not so developed in certain regions, to the detriment of the general economic development. Account, thus, should be taken of the above factors in fixing such policies.

¹⁶¹See W. Jenks, *Social Policy in a Changing World: The ILO Response*, Geneva, 1976, at pp. 169-175, where it is argued that questions of unemployment (underemployment, misemployment), manpower policies, economic wealth and social welfare are interrelated and should be viewed and acted upon as such. The ILO's contribution in this respect is, through the employment of various means and methods, such as the World Employment Programme, to achieve the

should always be kept in mind that social and economic rights are likely to have meaning and to be enforced in a society with economic stability; only then, can labour rights acquire significance. For example, there can be no actual right to employment when no manpower policies are in existence and the effectiveness of such policies presupposes the existence and effectiveness of international and national programmes for economic expansion.¹⁶² Seafarers' conditions of employment are inevitably affected by the stability and prosperity of the shipping market: if the market is good, generally there will be more and better jobs than would otherwise be the case; when the market is shrinking, malpractices are more likely to occur and labour rights, as well as the application of labour standards, are adversely affected.

It is desirable that the interrelationship between international competition and the evolution of maritime labour standards is studied more closely. Questions such as the effect of the adoption of higher labour standards for seamen on the competitiveness of the national fleet, on job availability and on shore employment (which could lead to conflicts among various layers of wage-earners within the same country),¹⁶³ the relationship between productivity and full employment, wage policies,¹⁶⁴ social goals and economic stability, etc. should be addressed, taking into account that a proper balance should be struck between employment conditions, national development and economic growth.

It is not inconceivable that the adoption of ILO standards for seafarers can have welcome effects in reducing competition and malpractices in the shipping industry from the labour point of view. This, however, would require close examination of the issues referred to above. Moreover, this aim can only be achieved by the widespread application and enforcement of ILO standards. This may entail, to some extent, departure from the criterion of registration or flag in determining the scope of ILO Conventions. Moreover, if the standards are universal, these must be neither so high as to make their implementation in developing countries impossible nor so low as to be devoid of any economic significance. In this respect, it is submitted that, if the fundamental seafarers' rights are preserved, the evolution of regional standards, under the conditions discussed earlier in this Chapter, would assist in advancing social standards for seafarers, taking into account economic diversities at the regional level, thus reducing the gap between developed and developing countries and making choice for low paid crews less obvious.

proper balance between policies of economic development and expansion and social values and to further the latter through the rational use of the former. On the other hand, the establishment and development of adequate manpower policies, training programmes, placement facilities in a society, in which civil liberties are respected, would have a beneficial effect on economic growth, *ibid.*, p. 174.

¹⁶²Compare the Employment Policy Convention, 1964; see also for an analysis on this point, Johnston, *op. cit.*, pp. 136 seq., 173-177.

¹⁶³The eight principle of Art. 427 of the Treaty of Peace should be mentioned here which declares that "The standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident therein".

¹⁶⁴As to the role and function of minimum wage fixing policies and their effectiveness in practice in developed and developing economies see, *inter alia*, G. Starr, "Minimum wage fixing: international experience with alternative roles", *I.L.R.* Vol. 120, pp. 545-562; see also *supra* Chapter 4, pp. 322-325.

7.7. Politics and group strategies within the ILO

The ILO has been the forum where all kinds of political concepts and aspirations of professional bodies have found their most acute expression. From 1920 until the 1950s the main source of discord was the unrelenting opposition between the shipowners and seafarers on issues of crucial concern.¹⁶⁵ From 1950 to the middle 1970s, this opposition continued to exist, though latterly to a lesser extent, but one of the main areas of disagreement was the appearance of East-European countries within the ILO and the distrust of Western countries and, often, of seafarers' delegates from Western countries, of the propositions put forward by Eastern European delegates. Fortunately, the latter conflicts did not affect adversely the maritime work of the ILO.¹⁶⁶

However, it seems that recently a new-fangled strategy has developed within the ILO forum which could constitute a dangerous precedent: use of voting tactics in which shipowners' and seafarers' representatives enter into alliance with the aim of opposing Government proposals. These joint actions on the part of the employers and the workers have succeeded in defeating Government proposals which were intended to resist undue financial burdens falling on the governmental sector. In fact, some national laws impose financial obligations on shipowners while other national laws impose the same obligation on Governments. In certain cases, the shipowners, by accepting certain proposals of the seafarers, secured their support in order to defeat Government amendments that would have had the effect of leaving to national law the question as to who should bear financial responsibility for the implementation of the obligations imposed by ILO Conventions. Apart from the fact that certain delegates expressed their dismay at these tactics, resort to similar actions in the future may affect the effectiveness of ILO instruments and the credibility of ILO's maritime work in the long run.¹⁶⁷

7.8. Shipboard management/labour relations and collective bargaining

As the examples of the United States and Sweden have shown, collective bargaining will play a major role in determining seafarers' standards in an automated shipping industry. Unfortunately, in these two countries management and labour could not agree on relevant basic issues directly affecting

¹⁶⁵Especially in the early years the shipowners were opposed to the international regulation of most maritime labour issues.

¹⁶⁶For the political dimension of the ILO see, *inter alia*, W. Galenson, op., cit.; E. Osieke, *Constitutional Law and Practice in the International Labour Organisation*, Martinus Nijhoff, 1985, pp. 9-13. For an example of the conflict between representatives of the Western European countries and those of the socialist countries see the proceedings of the 41st session of the Conference, 41 R.P., especially, pp. 88-98, 180-185.

¹⁶⁷These problems touch on the more general question of the tripartite structure of the ILO which is outside the scope of the present study; for the examination of this issue see, *inter alia*, E. Vogel-Polsky, *Du Tripartisme à L'Organisation Internationale du Travail*, Bruxelles, 1966; W.C. Jenks, "The Significance for International Law of the Tripartite Character of the International Labour Organisation", in 32 *Transactions of the Grotius Society*, 1936, pp. 45-81.

seafarers and only after strikes and governmental intervention were they able to reach some kind of agreement. If to these problems are added the inevitable effects that competition and other social factors have on the social organisation of the workplace,¹⁶⁸ a question arises concerning the possible methods of improving management-labour relations in the shipping industry. This question has not been dealt with in an ILO instrument.¹⁶⁹

Collective bargaining

It is very important that the collective bargaining power of seamen, especially in developing countries, should be enhanced. As was pointed out in earlier chapters, ILO maritime instruments in many instances accord a right to a seaman which is subject to previous agreement between the parties concerned. In order that the seamen's rights under ILO Conventions are not disregarded, the establishment of strong and influential seamen's unions in these countries is recommended.¹⁷⁰ Supervision of conditions on board ship could also be entrusted to a so-called "ship's delegate" who would be a member of the crew and who, apart from his normal duties, would be able to intervene in disputes between the shipowner and the seaman and to record any contraventions of law that have occurred on board ship.¹⁷¹ Bargaining power will also be a weapon that can be used by seamen in the present era of automation. Negotiating new contracts of employment on board modern ships will require a sufficient degree of bargaining power.¹⁷² On the other hand, certain issues call for further research as they have given rise to conflicts between shipowners' and seafarers' organisations in recent times. These include questions of manning scales and accommodation in connection with the three-watch system and the introduction of technology on board ship; the possibility of joint administration

¹⁶⁸R. Walton, *Innovating to Compete*, 1987, pp. 17-20. For the circumstances under which collective bargaining has evolved in the British shipping industry see, *inter alia*, J. Mc Conville, "Collective Bargaining in the Shipping Industry", *Marit. Stud. Mgmt.*, 1973, 1, pp. 74-97; the author argues that a more flexible structure of traditional collective bargaining positions will enhance the shipping industry's ability to meet technological, economic and social changes.

¹⁶⁹Following a Resolution concerning Industrial Relations in the Shipping Industry, adopted by the ILO Conference at its 55th session (see 55 R.P., pp. 156-157, 286), the JMC at its 21st session in 1972, after some discussion, unanimously adopted a Resolution on Industrial Relations in the Shipping Industry which, *inter alia*, urged the adoption of a comprehensive instrument on this subject, taking into account relevant ILO instruments of a "general" nature (for example, Recommendations Nos. 91, 92, 94, 113, 129, 130, 143 and Convention No. 135); see *O.B.*, Vol. LVI, 1973, Nos. 2, 3 and 4, pp. 131-2, 142-3. However, no instrument covering this area of maritime employment has been adopted so far.

¹⁷⁰The need for strong seafarers' organisations was recognised in a Resolution concerning Industrial Relations in the Shipping Industry, adopted by the 1975 Preparatory Conference; see *O.B.*, Vol. LIX, Series A, No. 1, p. 61. No instrument relating to this issue has been adopted by the ILO so far. For the limited participation of Hong Kong seafarers' unions in key bargaining areas such as wage determination, job regulation and supply of labour see R. Morris, "Labour relations in the Hong Kong merchant navy", *Marit. Pol. Mgmt.*, 1978, 5, pp. 107-115. Problems concerning seamen's unions also exist in developed maritime countries but in other forms such as "inter-union" rivalry; an extended bibliography is concerned with trade union conflicts in the U.S. maritime industry; for the revival of these conflicts recently and the apparition of "top to bottom" unions see C. Forsyth, "Expansionism: new forms of old conflicts for US maritime labour unions", *Marit. Pol. Mgmt.*, 1988, Vol. 15, No. 4, pp. 279-282. Concentration of various existing maritime unions to a number of well-defined unions representative of the seafarers' interests would help to solve these problems.

¹⁷¹For the usefulness of strong seamen's unions and of ship's delegates, especially in difficult times, see Jim Green, *Against the Tide*, 1986, at pp. 80-82. For more information concerning the ship's delegate and his role on board ship, see N.U.S., *Shipboard representative's handbook*.

¹⁷²Reduction in the number of vessels, which is a form of automation, could be effected almost "painlessly ..., as long as it could be coupled with additional leave (which created jobs) and an early retirement plan...", Collins, *op. cit.*, pp. 307-8; for more information on bargaining problems in an automated shipping industry, see *ibid.*, Chapter 14, *Bargaining in the Shadow of Automation*, pp. 305-334.

of hiring halls; wages based on a 40-hour work week; liberalisation of codes of discipline; job security (company contracts, employment of foreign seafarers non-members of national unions, termination of employment due to technological change); training and retraining; high turnover in the shipping industry. These questions have led to a number of collective bargaining disputes and their solution, as will be seen later in this Chapter, involves consideration of multiple factors whose effect is not always ascertainable.¹⁷³

7.9. Special problems of the seafaring profession

The seafaring profession presents complex problems. Despite the progress that has been made, obviously on board ships registered in developed countries, such as the introduction of numerous social amenities on board ship (swimming pools, individual sleeping rooms, video players)¹⁷⁴, seamen are faced with other types of problems, partly arising from the modernisation of the shipping industry: the fast turn-around in port of modern ships, the continuing decline of the shipping industry, competition from foreign flags-of-convenience, difficulties in finding a suitable job after retirement. However, unemployed or retired seamen can always be put to good use e.g. they can be employed in shoreside standby-type work or as relief crews in port.¹⁷⁵ Training and retraining of these seamen then acquires great significance. Moreover, the appearance of dual purpose crews renders necessary training and retraining of old seamen. Apart from the emergence of GP crews, automation is likely to lead, and has led to social integration on board ship. The gradual shift of emphasis from the traditional distinction between officers and ratings to a more socially integrated crew¹⁷⁶ is facilitated, *inter alia*, by the upgrading of ratings' quarters and equalisation of privileges for officers and ratings and by providing them with common mess and leisure-time facilities for ratings and officers. This

¹⁷³For examples of problems encountered in industrial relations in the shipping industry see J. Fuchs, "Industrial relations in shipping: the Canadian experience", *Labour and Society*, Vol. 2, Jan. 1977, No. 1, pp. 3-22, at pp. 4, 13-14; Van Voorden, "Industrial relations in the shipping industry of the Netherlands", *Labour and Society*, Vol. 2, Jan. 1977, No. 1, pp. 23-36, at pp. 30-36; A. Critto, "Strategic factors in industrial relations in Argentine maritime transport", *Labour and Society*, Vol. 2, Jan. 1977, No. 1, pp. 37-52, at pp. 48-50.

¹⁷⁴For a discussion of the social welfare of seamen, the need for a better organisation of welfare activities on board ship and the effects of the availability of social facilities on board ship on the seafarers' life see R. Hope, *Spare Time at Sea*, 1974; see also R. Hope, "Social Amenities for Seafarers", *Fairplay International Shipping Journal*, 4th July 1967, pp. 151-155. The author argues that naval architects, in designing ships, should take into account desirable social amenities for seafarers and think in terms of a recreation block rather than a recreation room; *ibid.*, p. 155. However, it has been reported that the existence of all facilities imaginable on board a ultra-modern Norwegian freighter did not prevent seamen from working overtime and get overtime payments; they did not have the time to enjoy the facilities available, Schrank, *Industrial Democracy at Sea*, 1983, pp. 20-21.

¹⁷⁵Paul Dempster, "Labor/Management Scrutinizes Far Eastern Methods," *Transport 2000* (San Francisco), Sep. 1985, cited in Stephen Schwartz, *Brotherhood of the Sea*, 1986, pp. 145-146.

¹⁷⁶"Under conventional staffing systems, with crew sizes of thirty or more, the ratio of officers to ratings is about 1 to 2. As crewing is reduced to between twenty and twenty-five, the officer-to-ratings ratio becomes about 1 to 1.5; and when the total crew size is eighteen or less, it becomes about 1 to 1. In this situation, the traditional distinctions between officers and ratings make little sense.", Michael Gaffney, *The Potential for Organizational Development in the U.S. Merchant Marine*, Proceedings of the Conference on the Management of Change Aboard Ship, 1981 cited in R. Walton, *op. cit.*, p. 59.

means that traditional concepts of crew accommodation and social welfare on board ship will gradually disappear.¹⁷⁷

7.9.1. Reorganisation of work on board ship and automation

The existence of GP crews implies the reorganisation of work on board ship. The reorganisation of work at sea is a special problem. As was pointed out earlier in Chapter 4, a number of seamen have opposed the idea of joining newly formed seamen's unions which would mean that they would lose pension and other rights under old schemes. Even among developed maritime countries the reorganisation of work on board ship is regarded in different ways.¹⁷⁸ The expansion of technology on board ship may produce adverse side-effects, such as boredom, with its impact on job satisfaction and the availability of seamen; difficulties in selecting personnel among those of different origin (mates, electricians, deck hands) for the execution of the same task; the possible need for the engagement of specialist engineers in cases of emergencies (repair of automated controls), etc.¹⁷⁹ However, the amount of innovative change in the shipping industry varies from country to country and

¹⁷⁷For the introduction of GP crews in certain British lines and its effects on ship efficiency, effective use of men, flexibility of labour, training requirements, personnel responsibilities, etc. see J. Jackson and R. Wilkie, "General Purpose Manning: A Case Study of Organizational Innovation", Part I, *Marit. Stud. Mgmt.*, 1975, Vol. 2, pp. 132-137; for the problems that the introduction of GP crews has caused such as unexpected alterations in job functions, apparent collapse of earnings differentials between officers and ratings, difficulties in the implementation of the management team idea, changes in the seafaring life, inadequate company management to deal with problems posed by GP manning, etc. see *ibid.*, Part II, 215-220; Part III, Vol. 3, pp. 21-26.

¹⁷⁸Organisational differences existed on board ship before the introduction of automation. It was observed that differences existed in the training, social control, and stratification on board British and American vessels; see S. Richardson, "Organizational Contrasts on British and American Ships", *Administrative Science Quarterly*, Vol. 1, 1956-57, pp. 189-207. After the introduction of automation, it was pointed out in respect of American seamen employed on board a Norwegian freighter as a result of an agreed worker exchange program that "there is little or no flexibility in work assignments on American ships... Work roles were frozen by contract between management and the maritime unions", Schrank, *op. cit.*, pp. 4-5; see also pp. 105-109. For the elimination of certain grades of seafarers, the drastic reduction in manning scales, the philosophy underlying this, and, generally, the changes effected as a result of, the reorganisation of work on board an automated ship, see *ibid.*, pp. 6-11, 93-104, 123-125, 128-131. The main anticipated outcomes from the reorganisation of work as a result of the modernisation of the merchant fleet have been reported to be as follows: "a) from a monorole system -where everyone fills one, and only one role- to a multirole system, where most members fill at least one secondary role besides the primary one; b) from a segmented departmental system to a partly integrated system where members can alternate to some degree when needed; c) from unstable, high-turnover employment to permanent employment with limited turnover; d) from closed careers with linear promotion to relatively open careers at sea and between sea and land; e) from hierarchical information and control to shifting patterns according to needs; f) from an office-based control system to a decentralised, partly ship-based control; g) from segmented and status-based living quarters to integrated twenty-four-hour society with private areas; g) from segmentation of workplaces, schools, and research to combined work, education, and development activity; h) from a uniform organizational mode (the same for all ships) to multiform organization (alternative forms in different ships and different companies; i) from a low degree of participation in decision making to a high degree of participation and control over one's own work situation"; Einar Thorsrud in Schrank, *op. cit.*, pp. 124-5. For an ingenious critical approach of the problems caused by the reorganisation of work on board ship, see *ibid.*, pp. 203-220; see also M.H. Smith and J. Roggema, "Emerging organisational values in shipping: Part 1. Crew stability, Part 2. Towards a redistribution of responsibility on board ship", *Marit. Pol. Mgmt.*, 1979, Vol. 6, No. 2, pp. 129-143, 145-156.

¹⁷⁹Schrank, *op. cit.*, pp. 91-92.

is introduced only very slowly.¹⁸⁰ Clearly, however, training of seamen in identification of errors occurring in automated equipment will become crucial in the years to come.¹⁸¹

7.9.2. Manpower planning; updating of old ILO maritime standards

Although the question of manpower planning has been dealt with in certain ILO instruments,¹⁸² special studies need to be undertaken by the ILO concerning the organisation of manpower planning policies and their effect on unemployment, mobility in the seafaring profession and the social standing of the seafarer. The introduction of relief crews will increase the frequency of the seafarers' stay ashore so that they are likely to spend more time with their families.

The ILO should also undertake, alongside the periodic revision of the list of instruments in the Appendix to the MSC, the updating of certain maritime standards which were adopted over half a century ago. In previous Chapters the writer has singled out certain aspects of maritime labour standards which need to be revised. It should be noted that many speakers at the 62nd session of the Conference in 1976 drew the attention of the delegates to the need for such revision.¹⁸³

7.10. The relationship between the ILO, the IMO and the UNCTAD

As has been pointed out in Chapters 1 and 3, the ILO has been concerned with areas of maritime labour, such as maritime training and the concept of "the genuine link" in relation to maritime employment, which fall within scope of the IMO and the UNCTAD.

It is worth noting that, although the co-operation between these organisations at the preparatory meetings has been significant (especially the participation of ILO and IMO representatives in the Joint ILO/IMO Committee on Training), this is not reflected in formal international instruments adopted by these organisations. In particular, none of the ILO instruments concerning maritime training has taken account of the relevant IMO instruments,¹⁸⁴ while the UNCTAD's discussions of "the genuine link" have hardly had any influence on ILO and IMO policies.

¹⁸⁰"By 1983 the innovations had been widely adopted in three countries (Norway, Holland, and Japan), moderately adopted in three countries (the United Kingdom, Sweden, and West Germany) and hardly adopted at all in two countries (Denmark and the United States)", R. Walton, *op. cit.*, p. 13.

¹⁸¹"In the headlong rush to automate in the interest of reducing labour costs, it is easy to overlook some people problems that are attendant to automation. In the same manner in which we believe Masters should encourage communication among the crew (including himself), companies must encourage their Masters to embolden their crews to question the accuracy of automated systems. In psychological terms, an automated system can be seen as omnipotent as a Master in the sense that a watch officer would tend to question his own judgment before questioning the accuracy of a particular device."; see R. Hershey, "The Primacy of the Master and its consequences", *Marit. Pol. Mgmt.*, 1988, Vol. 15, No. 2, pp. 141-146, at p. 145.

¹⁸²See Sections I and II of the Employment of Seafarers (Technical Developments) Recommendation, 1970 (No. 139); Arts. 2 and 3 of the Continuity of Employment (Seafarers) Convention, 1976 (No. 145).

¹⁸³For example, it was suggested by the Government delegate of Ghana that the lower age limit for seafaring should be raised to 18 years, thus eliminating a considerable amount of the existing redundancy and improving the educational opportunities of seafarers; 62 *R.P.*, p. 83.

¹⁸⁴Exception to this general observation constitutes the incorporation of provisions of the 1985 IMO/ILO maritime training guide into Convention No. 164 concerning Health Protection and Medical Care for Seafarers, 1987.

The distinction drawn between the functions of the ILO, the IMO and UNCTAD on the basis of allocating to them labour, safety and economic questions respectively is illusory and expensive. The main reason for the division of function between the IMO and the UNCTAD is of an historical nature, i.e. evidencing the attempts of certain interests of the shipping industry to avoid state regulation,¹⁸⁵ while certain aspects of maritime labour, such as maritime training and certificates of competency are inextricably related to safety and environmental issues. The STCW Convention, which is now regarded by IMO as outdated, would have been more successful had the ILO instruments on certificates of competency been taken into account. These instruments, one of which is admittedly obsolete (Convention No. 74), could have been revised by the 1978 STCW Conference; in this manner the efforts of the two organisations would have been harmonised while unnecessary expenses concerning the revision of Conventions Nos. 53, 69 and 74 would have been avoided.¹⁸⁶ Finally, the question of the applicable law in international maritime conventions is primarily of concern to the ILO and the IMO, not to the UNCTAD. The UNCTAD Convention concerning conditions for registration of ships would have been more successful, practical and homogeneous if it had also studied the question of "the genuine link" apart from consideration of its "economic aspects", i.e. in relation to safety and labour and, especially, international safety and labour standards. The UNCTAD Convention with all its inadequacies is useless as a starting point for the application of ILO standards to foreign seafarers. It would be better in the future if these three organisations cooperated more closely instead of defending the special nature of their interest in the regulation of maritime affairs.

7.11. Miscellaneous issues

7.11.1. The ship: A "closed" environment

Another question that springs to mind in relation to the laying down of legal rules regulating seamen's affairs, is the social environment of the seafarer and its psychological impact.¹⁸⁷ One

¹⁸⁵Metaxas, *op. cit.*, p. 67; see also for the compromise and the agreement reached between the IMO and the UNCTAD and the difficulties in separating the technical from the non-technical aspects of certain maritime questions, Mankabady, *op. cit.*, Vol. I, pp. 27-29.

¹⁸⁶In contrast to the thesis of the writer is the traditional position of the IMO in claiming primary responsibility as regards safety aspects of maritime labour questions. It is normal routine in international conferences to hear the representatives of international organisations, especially of the IMO, assert the exclusive competence of their organisation in respect of certain maritime issues; see the statement of the Secretary-General of the IMO at the STCW Conference, quoted in Chapter 3, Section 3.1.2.; see also Resolution A. 353 (IX) adopted by the IMCO Assembly on 13 November 1975 concerning Co-operation between IMCO and the ILO on the Subject of Sub-standard Ships and the statement of the representative of the IMO in the UNCTAD Conference on the Conditions for Registration of Ships, TD/RS/CONF/10, pp. 19-20, para. 90; TD/RS/CONF/L.11.

¹⁸⁷For a brief but informative account of the sociological aspects of seafaring life, see Mariam Sherar, *Shipping out*, 1973. For the characterisation of the ship as a totalitarian institution see E. Goffman, *Asylums*, Penguin Books, 1968; B. Nolan, "A Possible Perspective on Deprivation" in P. Fricke (editor), *Seafarer and Community*, pp. 85-96; for a different approach see N. Perry and R. Wilkie, "Social Theory and Shipboard Structure", *Marit. Stud. Mgmt.*, 1973, 1, pp. 31-39 who dispute the usefulness of the total institution as a classificatory type to define the shipboard environment. Social conflicts may be found on board specialised vessels such as research vessels; one of the main conflicts is that between scientists who try to maximise collection of data at sea and seamen who seek to obtain maximum rest and recreation at sea and in port. This is an area where cooperation between scientists, crew and land-based ship management is needed; see H. Russell Bernard and P. Killworth, "Scientists and Crew", *Marit. Stud. Mgmt.*, 1974, 2, pp. 112-125.

phenomenon frequently encountered in the seafaring profession is alcoholism. The ILO has not produced any substantial instrument on this problem. It is the view of most behavioural scientists that alcohol represents a problem for seamen.¹⁸⁸ Drinking has had twofold effects on life on board ship. On the one hand, it has resulted in indiscipline, in a high rate of alcoholism in the shipping industry and high suicide and accident rates. On the other, it has facilitated certain forms of social structural cohesion (ratings drink with ratings, officers with officers) and of individual adaptation.¹⁸⁹ It is suggested by the above experts that the use of alcohol should be subject to open social control.

7.11.2. Maritime Labour and the development of offshore registers

An interesting trend, whose effect on employment at sea is at the moment unpredictable,¹⁹⁰ is the development of so-called second registers, e.g. international ship registers such as the NIS (Norwegian International Ship Register) which is a second Norwegian Register (other examples of offshore registers are Kerguelen, the Isle of Man, the Danish International Ship Register; also Germany and Luxembourg and others have announced the establishment of such registers). This, following first the FOC vessels, and then the introduction of a number of "semi-detached" registers, such as those that exist in the Isle of Man, Gibraltar, the Netherlands Antilles, etc., represents a third generation of "flagging out". The main characteristics of the NIS are as follows: a) there are no nationality requirements in respect of crew or equity capital; b) there is freedom to negotiate wages and other conditions of employment with any representative union regardless of nationality;¹⁹¹ c) the shipowning company seeking to register a ship may be incorporated outside Norway provided there is an owners' representative in Norway and part of the operating functions are located there; d) there is no local taxation of foreign owners and no income taxation of foreign seamen; e) registration fees are kept to a minimum and f) liberalisation of currency requirements and regulations is to accord fully

¹⁸⁸Thorsrud in Schrank, op. cit., pp. 132-133. For possible causes of alcoholism in the merchant marine, see Sherar, op. cit., pp. 35-37. She argues that drinking is primarily a port-problem and not a sea-problem. However, the situation may be different in a modern ship with bars aboard. Allocation of space for bars on board ship should be made the subject for special study. For the relationship between drinking and discipline on board ship, see Department of Trade, *Report of the Working Group on Discipline in the Merchant Navy*, November 1975, p. 16.

¹⁸⁹B. Nolan, "Seamen, drink and social structure", *Marit. Pol. Mgmt.*, 1976, 4, pp. 77-88. In dealing with seamen's alcoholism a very important distinction should be drawn between *sea-drinking* and *port-drinking*; *ibid.* Although drinking at sea may be moderate this is not usually the case with drinking in port. Therefore, methods of reducing alcoholism in port should be devised. This end would be more easily achieved as regards drinking in port where drinking is not supported by irresistible social pressures.

¹⁹⁰It was stated, however, by the State Secretary of Norway that "the vessels will be operated fully in line with our international obligations, particularly those under the IMO and ILO"; *Which Register? Which Flag?*, op. cit., Intervention by State Secretary Karin Stoltenberg, p. 2; see also Norwegian International Ships' Registry (NIS), Statement by Andreas K.L. Ugland at the ICS Annual General Meeting held on 30th April 1987. Manning rules for both Norwegian and NIS vessels are said to be laid down with regard to safety requirements only; *Which Register? Which Flag?*, Intervention by State Secretary Karin Stoltenberg; *ibid.*, p. 3. It is clear that the concept of "social" manning has been abandoned.

¹⁹¹This means that it would be possible to employ foreign crews on board NIS vessels with wages reflecting the living conditions and income levels prevailing in their countries of residence. Also regulations concerning hours of work are simpler and more flexible. For information concerning the NIS see Norwegian International Register of Ships and Det Norske Veritas, A Note to Owners, July 1987, Norway; Act Relating to a Norwegian International Ship Register; Regulations of 19 June 1987 concerning the Registration of Ships in the Norwegian International Register of Ships (NIS); The Norwegian International Ship Register, Rules and Requirements, Revised and Amended 10 August 1987.

with OECD standards. The aim is to attract back to the flags of the older maritime states some of the vessels that have registered under FOC but it remains to be seen how the new International Ship Registers will work in practice. There is a danger that though under the cloak of a traditional maritime flag, these registers will become a second generation of flags of convenience with possible adverse effects on labour standards.¹⁹² The first blow against legislation establishing an International Ship's Register was struck recently in an opinion of the Committee on Freedom of Association, delivered in its 262nd Report.¹⁹³

¹⁹²In the context of the present discussion the following observations can be made concerning the relationship of the NIS and ILO maritime Conventions: a) the NIS Act (Act of 1987 Relating to a Norwegian International Ship Register hereinafter cited as the Act and the Regulations of 19 June 1987 concerning the Registration of Ships in the Norwegian International Register of Ships hereinafter cited as the Regulations) apply, *inter alia*, to hovercraft, drilling platforms and other movable installations which are normally excluded from the scope of ILO Conventions (Section 1, para. 1 of the Act; §§ 3 and 4 of the Regulations); b) Norwegian law applies to every ship in the Norwegian International Ship Register unless explicitly otherwise provided in or pursuant to the a statute and exceptions may be allowed to the Maritime Act for ships in the NIS (Section 3); c) collective wage agreements may be concluded with Norwegian or foreign trade unions (Section 6, para. 2). According to para. 1 this collective wage agreement includes the "terms of pay and employment and other working conditions on ships" in the NIS; d) foreign law may be expressly chosen by the parties for referring disputes arising from the agreement (Section 6, para. 3); e) individual contracts of employment are permitted but are subject to Norwegian law or, sometimes, to the law of the country of the seaman's residence (Section 6, para. 4). It is interesting to note that if paras. 3 and 4 of Section 6 are contravened, no enforcement measures are imposed apart from the administrative penalty of deleting the ship concerned from the NIS (Section 12, para. 2 (b) of the Act; see also Chapter 6 of the Regulations); f) certain provisions of Norwegian law concerning hours of work, the seamen's engagement, the promotion of employment and seamen's welfare do not apply to ships in the NIS (Sections 7 and 8); g) registration of a ship with the NIS is a reasonable ground for the dismissal of a seaman if no other suitable employment is available for him (Section 14, para. 1 which amends Section 19, subsection 1 of Act no. 18 of 30 May 1975 relating to seamen). From the above it can be seen that the law of the flag is mainly the criterion for the determination of the applicable law. In general, certain labour standards on board NIS vessels seem to be in accordance with ILO standards in force (for example, crew accommodation, certificates and qualification requirements; the latter are based on the STCW Convention and ILO Convention No. 69). However, the option given to the parties of fixing another law for the referral of disputes, combined with the freedom of concluding contracts of employment with any union, may result in the application to NIS ships of labour standards which can be very different from those which are required by Norwegian labour law (which, in any case, does not apply in its entirety to NIS ships). Moreover, even if Norwegian law is applicable, contravention of the relevant provisions relating to the applicable law entails only deletion from the NIS. Finally, neither guidance is given nor minimum requirements are laid down concerning the conditions of employment which will be fixed in the collective or individual wage agreements.

¹⁹³In 1988 several Danish trade unions presented a complaint before the Committee on Freedom of Association and claimed that the Bill on the Danish International Ship's Register which became law on 23 June 1988 violated Arts. 2 and 3 of Convention No. 87 (Freedom of Association) and Art. 4 of Convention No. 98 (Right to Organise and Collective Bargaining) which Denmark had ratified. The purpose of the controversial section 10 of the Bill had been described by the competent minister as follows: "The other crucial element in the Bill is that the existing collective agreements on wage and working conditions will not be applicable to ships in the Danish International Ship's Register. New collective agreements must be concluded, explicitly stating that they shall apply only to employment in ships registered in the Danish International Ship's Register. Such collective agreements, concluded with Danish trade unions, will only comprise persons who are residents in Denmark, or who by virtue of international obligations are put on an equal footing with Danish citizens. Similarly, a collective agreement concluded with a foreign organisation, will only comprise persons who are citizens in the country where the organisation is domiciled, but Danish labour law will also be applicable to such collective agreements. I am aware that these rules represent a new idea in Danish labour law, but I consider it a necessity, if the Act is to work at all, that shipowners have the possibility of concluding special agreements for employees on ships in the Danish International Ship's Register"; see Case No. 1470: Complaints against the Government of Denmark presented by the Danish federation of Trade Unions, the Danish Seamen's Union and several other Danish trade union federations, *O.B.*, Vol. LXXI, 1988, Series B, No. 1, pp. 10-23, at pp. 10-11 (for the text of Section 10 see *ibid.*, pp. 19-20). It appeared that within one week of the coming into force of the Act 82% of Danish registered tonnage had moved to the Danish International Ship's Register. The employers had concluded agreements with organisations from Philippines and Singapore and the wages paid to ABs amounted to less than half as those paid to Danish seamen. On the other hand, Danish labour law including social security law seemed to apply to all seamen employed on ships entered in the newly established register; *ibid.*, pp. 14-15. The Government denied that the Act interfered with the collective bargaining process and with terms of existing collective agreements. It added that "new agreements have already been concluded between the relevant shipping organisations on exactly the same terms as earlier with the only change that wages have been reduced by amounts corresponding to the tax relief" (tax exemption applying to seamen employed on ships registered in the new register); *ibid.* pp. 15-19. The Committee found that

On the other hand, special efforts should be made to improve the legislation of certain international ship registers from the labour point of view. The information contained in the Guide to International Ship Registers which is regularly published by the ISF ¹⁹⁴ shows that much remains to be done in this direction. In particular, it seems that in most international ship registers there are no certification and manning requirements for ratings. Certification requirements for officers are more often prescribed but sometimes waiver clauses exist. Manning scales, especially for ratings, are rarely laid down by legislation (except in some countries, for example, in Cyprus and Hong Kong) while conditions of employment are sometimes defined in general terms and the existing regulations are far from comprehensive and not always in accordance with the relevant ILO instruments. Finally, a number of common characteristics, which are of importance to the question of labour and safety standards on board ship, are discernible in international ship registers: a) the countries that maintain these registers have on average ratified few ILO Conventions or, if these countries are non-metropolitan territories, the relevant ILO Conventions have not been made applicable to them (except for Hong Kong, the Isle of Man, Liberia, Panama); b) Most countries which have established international registers have not ratified ILO Convention No. 147 and the STCW Convention or, if these are non-metropolitan territories, these Conventions have not been made applicable to them; ¹⁹⁵ c) in many cases they possess small and not very experienced maritime administrations.

Final remarks

It is very important that future ILO instruments be based on extensive examination of state practice, laws and regulations. Laudable attempts in this direction were noted in 1926 and in 1929 when a collection was made of laws and regulations of a considerable number of countries with regard to seamen's articles of agreement and hours of work on board ship. The results of these reviews were

while no violation of Art. 2 of Convention No. 87 had been proved, the Act in question was not in conformity with the spirit of Conventions Nos. 87 and 98. The Committee concluded that the above Act constituted interference in the seafarers' right to voluntary collective bargaining and amounted to government interference in the free functioning of organisations in the defence of their members' interests which is not in conformity with the spirit of Conventions Nos. 87 and 98; it asked the Government to amend the Act "so as to ensure that full and voluntary collective bargaining open to all seafarers employed on Danish-flag ships is once again a reality"; and it referred the case to the Committee of Experts on the Application of Conventions and Recommendations. A comment made by the Committee on Freedom of Association is particularly interesting as it reveals that the possibility of abuses under the Danish Act was not precluded: "... the Act ... appears to preserve Danish resident seafarers' standard of living ... However, the possibility remains that future agreements will not respect the above-mentioned understanding and that, on one ship, several agreements may be concluded - applying different wage rates, work timetables, etc., depending on the citizenship of the seafarers on that ship - which do not preserve the standard of living of all the workers concerned by the measure"; *ibid.*, p. 22.

¹⁹⁴ISF, *Guide to International Ship Registers*, London, 1987. The Guide is based on data received by the following international ship registers: Antigua and Barbuda, Bahamas, Bermuda, Cayman Islands, Cyprus, Gibraltar, Hong Kong, Isle of Man, Kerguelen, Liberia, Luxembourg, Malta, Netherlands Antilles, Norwegian International Register, Panama, St. Vincent and the Grenadines, Singapore, Sri Lanka, Turks & Caicos Islands and Vanuatu. The following observations are based on the information contained in the ISF Guide.

¹⁹⁵Convention No. 147 has been ratified by Liberia and has been extended to Bermuda, Hong Kong and the Isle of Man and recently to Gibraltar. The STCW Convention has been ratified by/extended to Bahamas, Cyprus, the Isle of Man, Liberia and Sri Lanka.

published.¹⁹⁶ However, similar attempts at comparison have not been made recently. It is probable that the idea of the International Seamen's Code would be advanced if national maritime laws were periodically published, assuming that finance can be found for this research. Moreover, manpower plans, employment policies and recent trends affecting seafaring life (GP ratings, employment continuity, vessel assignment, social integration of seafarers) should be kept under constant review so that adequate and up-to-date standards can be formulated at the international level.

ILO maritime standards should not be based only on replies from governmental bodies but on actual practice as evidenced in independent studies. Such independent studies could be initiated by the ILO itself. It is expected that the ILO Office will exercise in future a more direct influence in international conferences. It is the thesis of this writer that the inclusion in ILO Conventions of provisions based on state practice was rejected by ILO Conferences in favour of provisions proposed by shipowners and seafarers mainly to protect certain interests of these groups. Active participation of ILO officials in the proceedings is, with few exceptions, minimal and, in any case, does not relate to questions of substance but usually to questions of legal procedure. It is submitted that the ILO's staff involvement in the development of ILO maritime standards should not be limited only to the drafting of instruments but should extend to the exposition, in preparatory meetings, of the reasons which prompted such drafting. In this connection, it should be recalled that co-operation between governmental interests would be improved if their views were to be considered along those of the shipowners and the seafarers on an equal basis. It is remarkable that shipowners and seafarers now vote as a group, though this is almost never the case with government delegates. Closer attention to the possible effects of ILO maritime instruments on national shipping policies should render the participation of government delegates more effective in "negotiating" the inclusion of relevant provisions.

¹⁹⁶See ILO, *Studies and Reports*, Series P, Nos. 1 and 3. For an excellent, although dated, review of the classification of sea-going tonnage, the number of seafarers and the salaries and wages of seafaring personnel in various countries, see ILO, *Studies and Reports*, Series N (Statistics) No. 21, Geneva, 1936. No similar research has been undertaken since.

Appendix I

State practice concerning maritime training and analysis of data (as at 1980)

I. Training facilities for seafarers: State practice *

A) Language of the course

Non English: Argentina, Belgium, Brazil, Denmark, France, FRG (in one institute the courses are in English if only foreign students participate in such courses), Greece (but English is also taught), Italy, Japan, Madagascar, Norway, Panama (but English is mandatory), Republic of Korea, Spain, Sweden, Switzerland, Thailand, U.S.S.R.

English: Australia, Bangladesh, Canada (also French), India, Ireland, Israel, Pakistan, Singapore, U.K., United States, Hong Kong.

* The source used for the preparation of this comparative study is the *Compendium of Maritime Training Facilities*, IMO, 1980. Possible developments since 1980 have not been taken into account. The language of the courses in each country has been classified as English or non-English to demonstrate the importance of the English language. Only basic distinctions have been attempted here. The above tables have been limited to the enumeration of the principal departments on board ship (deck, engineer, catering, radio) with the addition of a number of categories (fisheries, electrician, radar) when special training courses are available for such categories. As to the duration of the courses the author followed the classification of the STWC Convention and the ILO Conventions. Minor or special categories of seamen (fisheries certificates, skipper's courses, first aid courses, basic seamanship courses, courses for electricians, firefighting or technician courses etc) are not represented in the above tables. The reason why the table showing the duration of maritime training courses is presented is that, as explained earlier in the sections dealing with the questions of minimum age and training, school leaving age, minimum age for admission to employment and training are interrelated issues. It is clear that if national standards concerning school leaving age and the duration of the training courses were harmonised, the application of the international standards relating to the minimum age for admission to employment and the certification of seafarers at the international level would be facilitated. The numbers in parentheses indicate a certain period of sea-service which, apart from the duration of the relevant training courses, is required by the national Administration for the qualification of a trainee for examination or for the performance of certain duties on board ship. The data relating to these periods are analysed later under II B). When numbers are not followed by letters they refer to years. The keys to the letters are as follows: w=weeks, m=months, d=days, a= approximately, C.E.=chief engineer. The information in the paragraphs following the tables is mostly divided under the headings yes, no or no information available. It will be seen that in some cases the differences between information classified under yes or no is rather formal, since exceptions to yes are to be found in parentheses. However, it seemed to the author that certain exceptions were not sufficient to nullify the effect of the facilities available. In a number of cases a country appears under both yes and no. Finally, under II C) a collection of training facilities not covered or not sufficiently developed in international instruments concerning maritime training is presented. Information as to the duration and the training syllabi of these courses is given. Suggestions as to the way in which the data analysed could have an effect to the drafting of revised instruments concerning the training and the certification of the seafarers appear in the Conclusions to Chapter 3.

B) Courses

Table 1

	Deck	Engine	Radio	Fishing	Catering	Electrician	Radar
Argentina	Y	Y					
Australia	Y	Y	Y	Y			Y
Bangladesh	Y	Y					
Belgium	Y	Y					
Brazil	Y	Y	Y			Y	Y
Canada	Y	Y	Y	Y	Y	Y	Y
Denmark	Y	Y	Y		Y		
France	Y	Y	Y	Y			
FRG	Y	Y	Y	Y		Y	
Greece	Y	Y	Y (by 1980 only pre-sea training courses for cadets were available)				
India	Y	Y					
Ireland	Y	Y	Y				Y
Israel	Y (only pre-sea training course leading to an A. B. post)						Y
Italy							Y
Japan	Y	Y	Y				
Madagascar	Y	Y		Y			
Norway	-	-	-	-	-	-	-
Pakistan	Y	Y					
Panama	Y	Y					
Rep. of Korea	Y	Y	Y				
Singapore	Y	Y	Y		Y		Y
Spain	Y	Y	Y	Y			Y
Sweden	Y	Y	Y				Y
Switzerland			Y				
Thailand	Y	Y					
U.S.S.R.	Y	Y				Y	
U.K. [†]	Y	Y	Y		Y	Y	Y
United States	Y	Y			Y	Y	Y
Hong Kong	Y	Y	Y		Y		Y

C) Duration

Table 2

	D.Ca.	E.Ca.	D.O	E.O.	C. cad.	S. cad.	Cater.	Mast.(I)	Exec.	Rad.	R.d.	R.c.
Argentina	3.10	3.10	4w		2.10	2						
Australia	4	4	(24w)	(18w)				4(6-8w)	1	16w	2	5w
Bangladesh	2	2										
Belgium	2x2	3					4					
Brazil	80w	80w	(9w)	(9w)			(26w)(C.E.)		2w	80w		
Canada	3	3										
Denmark [†]		(20w)					(20w)	(1)				
France ^{**}	(1)	(1)					4(60m s.tr.)				1	
FRG	(1-2)	(36-80w)					(1-2)			5d	(2)	
Greece	60w	94w									60w	
India ^{***}	1	1-4	(4-6m)	(4-6m)			(4-6m)		2w			
Ireland ^Δ		1-2		(2x12w)			(19w)		1-19w	2a		
Israel ^{ΔΔ}									2w			
Italy										12w.days		

† The U.K. Government did not provide any detailed information concerning the organisation of maritime training in that country. According to the source used, in 1981 a system of maritime training would be introduced which fully conforms to the STCW requirements. Special shorter courses are available relating to subjects such as accident prevention, survival training, fire fighting and medical care. Radar simulators are used in the training of the deck department crew.

[†] The Cook's and Steward's courses of 20 weeks are pre-sea training courses to be followed by 23 months of sea service in the galley. The 20-week courses of motormen require 12 months of sea service in the engine-room as an entrance qualification. Finally, in order to qualify the one-year training course leading to the certification of masters, the candidate masters must have passed examinations of competency as mates which means that they should have had sea-going service as prescribed by the Administration and undergone a two-year training course for mates.

^{**} All years of training courses in France signify academic years (9 months). As an entrance qualification for the one-year training courses leading to the certification of Officers responsible for the watch and for marine engineers, third class shown in columns 1 and 2 respectively 36 months sea-service and 30 months sea training in engineering is required respectively. As to the First-class captain in sea-going vessels, he is given a *postgraduate* training lasting four academic years interrupted by periods of sea training to a total duration of 60 months.

^{***} The courses instituted in India are pre-sea training courses. Apart from the courses the duration of which has been given in table 1 India has established pre-sea training courses for deck and engine-room ratings on board three training ships. These courses last 26 weeks. Finally, holders of Bachelor's degree in Mechanical/Electrical Engineering are required to undergo an one-year pre-sea training course. All other cadets eligible for the course should follow a four-year course.

^Δ As to the deck department there are in Ireland training course for mates. These last 19 weeks plus the qualifying sea service for each class of mates (1st and 2nd mate). As for radar certificates the following distinctions as to the duration of the courses should be made: Radar Simulator Certificate: 1w, Radar Observer Certificate: 3w, Marine Radar Maintenance Certificate: 16-19w, As to the radio department the following durations have been prescribed: Maritime Radio-communication Certificate: 2 to 2 and half years, Restricted Radio Telephone Certificate: 1w.

^{ΔΔ} The radar observer courses last two weeks; the radar simulator courses last 10-12 days.

Japan ^{△△△}	2	2	4-5 1/2	4-5 1/2			4-5
Madagascar [*]	(96w)	64-96w			(32w)		
Norway	-	-	-	-	-	-	-
Pakistan	104w	104w					
Panama	160w	160w					
Rep. of Korea	4	130w-4					3
Singapore ^{**}	16w	208w	(12w)		3m (20w)	5d-(3w)	2
Spain	(27m)	(27m)	(18m)	(18m)	(18m)	2w	(18-27m)
Sweden ^{***}	(2x40w)	(2x40w)	-	40w	40w	2w	3x20w
Switzerland							2
Thailand	5	5					
U.S.S.R.	5 1/2	5 1/2	(see par. I. a single type of engineer-navigator has developed)				
Un. States [*]	4	4	(12w)	(12w)	15w (12w)	8d	
Hong Kong ^{**}		4	4	(12-16w)	11-12w (16w)	3w	2

△△△ The 4-year courses are available in universities. All other courses are held in training colleges. An advanced course (6 months to 2 years) exists preparing deck and engineer officers who have 2-3 years sea service or hold appropriate licences for higher certificates of competency.

* The durations given as regards training courses for the deck department apply to captains and deck officers of coasters. As to the training courses for engineer officers, the courses for 3rd class engineers last 64w and for 2nd class engineers 96w.

** A three week course is required for the training of candidates for certificates of competency (foreign going) in the proper use of radar at sea while a 5 days course has been organised for advanced and refresher training in the use of radar at sea for senior officers. As far as the deck department is concerned, there is an intensive training course to prepare trainees for work as Deck Officers on board ship. No other information is given as regards the qualifications that the master or the deck officers must have in order to be eligible for examination for certificates of competency. However, information is available as to Mates and Second Mates Foreign Going and Mates Home and Local Trade. Again, no entrance qualifications are mentioned; a 2 year training course by correspondence is available for the preparation of deck cadets for examinations for Second Mates Foreign Going and Mates Home Trade.

*** The duration of the course appearing in the first column refers to training courses preparing deck cadets for work as mates on board ship. The training systems existing in Sweden were under revision in 1980.

* The four years courses in the first two columns prepare trainees for Third Mate or Third Assistant Engineer licence. The duration of the radar observer's courses varies as follows: Radar Observer - (Any Waters) - 8 days, (Inland Waters) - 5 days, Refresher course - 3 days, Recertification exercise course - 1 day, LORAN A and C - 5 days and Gyrocompass - 5 days.

** No training courses for engineer officers are reported. There is a radar simulator course which lasts 1 week. As to the deck department the durations indicated refer to mates. Three classes of mates exist (1st, 2nd and 3rd). Preparatory training courses for first and second mates for the certificates of competency of master and first mate respectively last 16 weeks. The rest (3rd mate to 2nd mate and Class 4 to 3rd mate) last 12 weeks. As far as the radio department is concerned, an advanced course to train holders of the Maritime Radiocommunication Certificate of Competence as electronic officers of the merchant navy exists; this course lasts one year.

D) Tuition fees

- Free: Argentina, Australia (21), Belgium (nationals only), Brazil, Denmark, France, FRG (but DM 300-800 are required in certain courses for the means of instruction), Greece (nationals only), Japan (deck and engine ratings), Republic of Korea (deck, engine officers, pre-sea training for deck, engine officers and radio operators and a general purpose course for deck and engine in three institutes), Sweden, Thailand, United States (only in the U.S. Merchant Marine Academy for the training of merchant marine officers and in the Calhoun Engineering School).

- To be determined: Australia (4),

- Charges: Australia (3, short-term), Bangladesh, Canada (no information), India, Ireland, Israel, Italy, Japan (deck, engine and radio officers), Madagascar, Norway, Pakistan, Panama, Republic of Korea (deck, engine officers and radio operators in two institutions), Singapore, Spain, Sweden (short courses established for officers' certificates, radar observer course, dangerous goods course), Switzerland, U.S.S.R. (fixed on the basis of intergovernmental agreements), United States (students pay tuition fees for almost all other courses available in the U.S.), Hong Kong (however, cadetship training, lifeboat courses and courses for boys from under-privileged Hong Kong families are available free of charge).

E) Cost of board and lodging per month

Argentina: \$100, Australia: mostly to be determined, also \$A250-400, Bangladesh: \$1400 (p.a.), Belgium: \$670-800 p.a., Brazil: free of charge (in the cases of the special courses in dead-reckoning and for radar operators, expenses to be born by trainees), Canada: Coast Guard College: free, training institutes: \$30-60 p.w., \$21 per day, Denmark: \$400, 1500-1800 Danish kroner, France: FFrs 3600 p.a., FRG: DM 600, \$300-600, Greece: \$1780-2300 for the whole duration of the course, India: Rs. 95-280 per month or included in tuition fees, Ireland: £100, Israel: US\$45 per day, Italy (fire-fighting courses normally at the expense of the shipowners), Japan: free of charge (ratings), charges for officers: 3600 yen, Madagascar: US\$ 900 for 32w, Norway: US\$ 300-400 (one-week courses), Pakistan: US\$ 1500 for the period of residence (under revision due to rise in cost), Panama: \$75, Republic of Korea: free of charge (only in one training institution \$80 per month), Singapore: S\$ 16 per day; for some other training courses S\$ 500 per month, Spain: No information; for training courses in fisheries no charges are paid since all students are scholarship holders, Sweden: students make their own arrangements; US\$ 1000 for the radar observer's course (2w) and US\$ 500 for the dangerous goods course (1w), Switzerland: to be born by trainees, Thailand: cadets to make their own arrangements, U.S.S.R.: fixed on the basis of intergovernmental agreements, United States: varies from school to school; for merchant marine officers the cost starts from \$6600 up to \$8400 for four years; no charges in two training institutions, see par. D above, Hong Kong: no information.

F) Foreign students accepted

- Yes: Argentina (scholars), Australia (sometimes numbers may depend on demand), Belgium (limited number), Brazil (number determined by the Administration), Canada (only by special arrangements), Denmark (very limited number, good knowledge of Danish, at skipper schools no limitations in number, for mates and masters training courses in English may be arranged, if a sufficient number apply), France (to the limit of 20%), Greece (to the limit of 15%), India (very limited number; sometimes sanction by the Ministry of Shipping and Transport is required), Ireland [for masters, mates, engineer officer and radar (in two cases no limit exists) certificates to the limit of 50%; engineer cadet courses to the limit of 25%; for radio certificates the limit varies from 10% to 50%], Madagascar (to the limit of 50% or special courses), Norway, Pakistan (12 foreign trainees out of 20 to 40 students in each course), Panama (15 foreign students out of 75 new young cadets), Singapore (as to the preparation by correspondence for examinations for Second Mate Foreign Going or mate Home Trade foreigners are accepted if employed on Singapore Flag Vessels; engineer cadet training is available for students of any nationality on a country to country basis; preparation courses for 1st and 2nd class engineer certificates and all other engine room certificates are open to any national), Spain, Sweden, Switzerland (examination on request), U.S.S.R. (according to quota fixed by the Government on the basis of intergovernmental agreements), Hong Kong.

- No: Bangladesh, Brazil (higher competency courses for deck and engineer officers), Canada (Coast Guard College and in the Transport Canada Training Institute), India (pre-sea training on board training ships), Israel (the particulars given are for special courses planned for English speaking students), Italy (foreigners only by special agreement), Japan, Republic of Korea, Singapore (almost all courses except those relating to the engine department are normally open either to British Commonwealth citizens or to Singaporean and Malaysian nationals only; in one only training course (second mate, foreign going) foreign students can participate after approval of Singapore Government; on board training ships only nationals accepted), Thailand, United States (deck and engineer officers: normally only U.S. citizens and students from other American Republics; sometimes accepted but they will not be subsidized by the Federal Government; radar observer's courses: no foreign students admitted; in other cases (NMU U & R Plan) accepted upon approval of trustees; however, in about seven training institutions providing training for lower officers, for lifeboatman's certificate and other short courses foreign students are accepted sometimes with restrictions as to the number), Hong Kong (all but one pre-sea training courses for any department are not open to foreigners).

G) Examination and certification of foreigners

- Yes: Argentina, Australia (not all diplomas, sometimes college certificates only, no certification facilities after complementary courses), Belgium, Brazil: (as for engineer officers, certification

up to the 3rd engineer available), Denmark (for masters and mates only examination is available not certification), France (they are examined as nationals but they receive a certificate showing the level of their training), FRG (participants must fulfil the requirements of the Administration; sometimes sufficient knowledge of German is required; in one institute restrictions may exist because of the number of national applicants), Greece (foreign certificate equivalent to the Greek Lyceum and Greek language examinations at the University of Athens), India (for certificates of competency as Master, Mate, 1st and 2nd class engineers, Radar Observers courses and Life Boatman's certificate the same as for Indian nationals; for pre-sea training courses in navigation and marine engineering a lower certificate is issued), Ireland [2nd mates, radar observer certificate, survival certificate, first aid certificates, 2nd class engineer certificates, engineer cadet courses up to a certain level and all radar and radio certificates (sometimes to the technician engineer level)], Israel, Madagascar (certificate must be endorsed by the Administration of the seafarer), Norway, Pakistan (this may be done on Government to Government basis), Panama, Singapore (see par. F above), Spain, Sweden, Switzerland (see par. F above), U.S.S.R. (cadets take examinations in all subjects of the syllabus and get Higher School Graduation Diplomas), United States (deck and engineer officers: in so far they are admitted to the course (see par. F above) they receive a certification of completion of the course but no U.S. Coast Guard licence; in other cases where foreign students are accepted, either it will depend on the approval of the Coast Guard (NMU) or the same facilities are given to those students), Hong Kong (examination only).

- No: Bangladesh, Brazil (see par. F above), Canada (only Canadian Citizens, Landed Immigrants and British subjects are eligible for examination; see also par. F above), India (see par. F above), Ireland [only British subjects or British protected persons are admitted for examination for the following courses or certificates of competency: masters (foreign going and home trade), first mates (foreign going and home trade), radar simulator, Ships Captain Medical Course, 1st class engineers], Italy (see par. F above), Japan, Republic of Korea, Singapore (see par. F above), Thailand, Hong Kong (see par. F above).

H) Standard STCW

- Yes: Argentina (equal or in excess of the minimal requirements of the STWC), Australia (in some cases higher), Bangladesh, Belgium (even higher), Brazil, Denmark (at least equal), France, FRG (conforms to, sometimes exceeds STWC standards; elsewhere the expression "all courses are held at a high standard is met"), Greece (corresponds to the appropriate minimum standards of the STWC Convention; all courses are under revision), India (the pre-sea training courses in navigation and marine engineering meet the theoretical aspects of the STWC Convention; trainees are expected to reach the STWC standards by further practical training or sea service. As to the other courses (see par. G) the existing courses meet the STWC requirements; however, more courses have

to be introduced), Israel (corresponds), Italy (conforms), Madagascar (conforms), Panama (conforms), Singapore (in accordance with the STWC regulations and resolutions), Spain (exceeds the STWC standards), Sweden (considerably higher than the STWC standards), U.S.S.R. (corresponds), United States (corresponds to the STWC standards; however, no information concerning the standards for deck and engineer officers is reported except that the relevant courses are approved by the U.S. Coast Guard).

- No information available: Canada, Ireland, Japan, Norway (not applicable), Pakistan, Republic of Korea, Switzerland, Thailand (not applicable), Hong Kong.

II. Analysis of data concerning training and certification of seafarers and suggestions

A) Data based on information contained in the above tables and paragraphs

a) Language. The English language is used in training institutions in 11 out of the 29 countries which replied to the questionnaire. In other 3 out of the 18 countries remaining trainees are taught the English language. The significance of English as a means of communication between seafarers who are in fact international workers and may be employed on board various foreign flag vessels (and vice-versa, seafarers of different nationalities may be employed on board the same vessel) is manifest. The understanding of technical terms internationally would also be facilitated, if English were introduced as a mandatory subject in the training syllabi of all countries where training courses for seafarers have been established.

b) Existing training courses. From the information available it appears that all (29) countries except three (Italy, Norway and Switzerland) have established training courses for the deck department. Four countries (the above-mentioned plus Israel) do not appear to have established training courses for the engineer department. In 16 out of 29 countries training courses for radio officers exist. Only six countries offer elaborate training courses for fishermen. Six countries are reported to have instituted special training courses for seafarers employed in the catering department. However, the lack of information might be attributed to the absence of any provisions concerning training for the catering department in the STWC Convention to which the questionnaire refers. Six countries have established special training courses for electricians. Finally, in 12 countries special training courses for radar operators exist.

c) Duration of the courses.

There are great divergencies in the various national laws as to the duration of the training courses available in each country. Some countries supplied information concerning the duration of the training courses available in that country and the duration of the preparatory courses for the certification of seamen to be undergone at the end of the training courses mentioned above. Other countries reported only the duration of the preparatory courses for the certification of seamen but required as an entrance qualification a minimum period of service at sea. Finally, other countries referred to a period of pre-sea training. It should be noted that from the countries having replied to the IMO questionnaire it appears that only Germany has legislation, training courses and examination syllabi whose structure are very similar to that of the STWC Convention.

As regards courses preparing trainees with high school education for work in the deck and the engine departments their duration varies from 2 to 5 1/2 years. In some cases the required period of sea-service is included in the duration of the courses. Only two developing countries (Bangladesh and Pakistan) have established two-year courses. The duration of the courses preparing ratings for

work as officers in the deck and engine departments varies from 4 weeks to 18 months. In most countries these courses last from 12 to 24 weeks. Sometimes additional sea-service is required. The duration of courses for the catering department last between 12 and 20 weeks. The durations of the courses leading to examinations for the master's certificate differ widely. However, the general observation can be made that masters should combine sea-training and sea experience of at least 4-5 years. The duration of courses for radar operators varies from 1 to 19 weeks. However, training courses for the radar observer's certificate last 2-3 weeks in most countries. In two countries where training courses for the maintenance and operation of radar have been established, these courses last 16 and 19 weeks. Finally, the duration of courses for radio officers varies from 1 to 5 years. In the majority of the countries these courses last 2 years. Only in two countries additional sea experience as an entrance qualification is required.

d) Tuition fees. About 10 countries do not charge trainees in maritime training institutions. In about 15 countries (no information available from Canada) trainees have to pay tuition fees. The rest of the countries have adopted a mixed system by making charges for certain courses while making available others free of charge. No classification of the charges made appears possible. Differences are observed even between various training institutions in the same country. Moreover, in some countries tuition fees have to be paid for certain courses but no generalisations are possible. Discrimination between nationals and foreigners is met only in two countries.

e) Cost of board and lodging. In the large majority of the countries the established practice has been to charge trainees for the cost of board and lodging during the training courses. The training institutions of two countries (Brazil, Republic of Korea) do not make any charges and in another two (Canada, Japan) board and lodging is provided free of charge in certain cases (in one college, for ratings only respectively).

f) Admission of foreign trainees. National Administrations are divided upon the question whether foreign trainees are accepted to national institutions. In 6 countries foreign students are accepted. In another 6 either they are not or the exceptions to the rule are negligible. Nevertheless, in the majority of the countries foreign participants are admitted subject to certain limitations (basically restrictions in number, special arrangements between governments, certain courses, for example, courses for officers or the deck department are limited to nationals). On board training vessels only nationals are accepted.

g) Examination and certification of foreign trainees. In 6 countries no examination and certification facilities for foreigners exist. In about 7 countries the same facilities as for nationals are available. In about 12 countries either only examination is available for foreign participants or certification is possible up to a lower level than for nationals or, finally, certification is restricted to certain courses upon completion of which foreign trainees obtain a certificate equivalent to that awarded to

nationals. Most of the countries provide for examination of foreign seafarers but certification as pointed out above is subjected to certain restrictions.

h) STWC standards. In 18 countries national standards conform to or exceed the standards established by the STWC Convention. In one case (India), though generally the STWC standards are respected, improvements have to be made. In the case of another 9 countries no information is available. However, in two cases the comparison test is not applicable since no courses relating to the STWC requirements have been reported.

B) Data not shown in the above tables or paragraphs

a) Deck Officers: In some countries the qualifying sea-service is included in the duration of the training courses established for deck officers (see above section A). In other countries where a certain period of sea-service is required as an entrance qualification, in most cases this period is not specified. In some cases the specified period is 3 years. Again, the durations of the training courses in the cases where a qualifying sea-service has been prescribed differ widely because the duration of the training courses and the required sea-service are interrelated. The duration of the training courses varies from 9 weeks to 6 months. In one case the training course lasts one year (with 36 months sea-service) but this applies to an officer responsible for the navigational watch.

b) Engineer Officers: In some countries apart from the qualifying sea-service a certain period of training or experience in workshops is required. The period of experience in workshops varies from 2 to 4 years. The qualifying sea-service generally varies from 2 to 3 years. For senior engineer officers sometimes a longer period of sea-service and/or training is required. No conclusions can be drawn as to the duration of the training courses since it depends on the required period of sea-service and workshop experience.

c) Masters: In most cases the qualifying sea-service for masters is 4-5 years. Chief engineer (so-called) exists only in one country requiring a 7 year sea-service as engineer officers from candidates in order that they are eligible for examination.

d) Fire-fighting courses: Only in six countries (Brazil, Canada, Italy, Norway, Singapore and the United States) special fire-fighting courses have been established (nonetheless, in many other countries fire-fighting forms part of the training syllabi). In the above countries the duration of the courses varies from 3 days to one week but there are differences as to which seafarers are accepted to these courses. For example, in Italy only officers are eligible; in Singapore this course is for safety officers; in Norway, Brazil and the United States this course is open to all seafarers. In one country (Brazil) the course lasts 80 weeks. However, this might be a printing mistake since in the part of the report dealing with the scope of the studies 34 hours of attendance are reported.

e) Only 3 countries provided information on the minimum requirements for able seamen (Denmark, Singapore and the United States). No conclusions can be made as to the required period

of sea-service except that the minimum qualifying period of sea-service appears to be 18 months. The duration of the training courses varies from 2 to 15 weeks.

f) In 11 countries pre-sea training schemes (Denmark, India, Israel, Madagascar, Greece, Pakistan, Korea, Ireland, Singapore, Thailand and Hong Kong) are available. The duration of the courses varies from 2 to 26 weeks. In some countries pre-sea training lasts even more but it should be remembered that in these countries the completion of the pre-sea training courses makes trainees eligible for examination as officers without any further entrance qualification.

g) About seven countries (among them, Denmark, FRG, Ireland, the U.S.) recognise the category of mates (1st, 2nd and 3rd; no chief mates are reported). The duration of the training courses and the required period of sea-service differ widely.

h) Fishing vessels: Not all countries supplied information as to the required period of sea-service. In two countries it seems that the period of sea-service required for masters of fishing vessels is about 4 years. As to skippers in one country 36 months (of which 24 as an Officer) navigation is required. The duration of the training courses varies from 6 to 9 months. In one case the course lasts 64 weeks (this figure applies to officers responsible for the watch). Finally 12-week training courses are available for engineer officers in the FRG and for radio-telephony operators in Spain.

C) Main courses not envisaged or not sufficiently developed in the STWC Convention

Australia: radar maintenance (16w), courses in hydrographic surveying (30w, Survey, Cartography, Photogrammetry, Oceanography, Meteorology, Civil Engineering, Mathematics), diplomas and certificates in fisheries science and fisheries operations (the first applies to the master of a large fishing vessel, 4 years each), complementary courses [inter alia, radar simulator, radar observer, ship captain's Medical, {damage control (emergencies) and automatic control systems in ships}: second class engineer certificate required, marine refrigeration], Denmark: Cook's and Steward's courses (20w), courses for mates (2 years), Brazil: Electrician courses (24w, human relations, seamanship, occupational safety, health and first aid, survival at sea, damage control, fundamentals of engines and electricity etc), France: training courses and certificate of Technical Officer (two academic years sandwiching 18 months sea training), FRG: certificates for masters and officers of fishing vessels, 6 months, radar observer certificate (5 days, 20 hours), marine electrician courses (60w, 45% basic natural and engineering sciences, 20% non-technical knowledge and 35% related technical disciplines notably control and automation techniques), radar simulator courses (1w), shiphandling simulator course (1w, either VLCC, containership 3rd generation or freighter), 2 shipping management courses (1w each, voyage specific, operational and capital costs of ships. Influence on cost factors on board ship; ship, cargo, port, shipping company and their inter-dependencies; on board and port organisation. Prices and freight rates in general cargo and bulk cargo trade; rationalisation of cargo handling. This training is also available for shore-base staff of shipping companies), Greece:

subjects such as refrigeration and air conditioning and remote control automation of modern vessels are included in the training syllabi of engineer officers, India: pre-sea training courses in marine engineering include subjects such as marine refrigeration and automatic control and marine automation; radar observer course, 2w), Ireland: radar simulator certificate, 1w, Radar Observer Certificate, 2w, Ships Captain Medical Course, 16 hours, Marine Radar Maintenance Certificate, 16-19w, a special course enabling the trainee to qualify for the Marine Radio and Radar Technician's Certificate of the City and Guilds of London Institute, 3 years (105w), Israel: radar simulator course, 10-12 days, radar observer courses, 2w, Italy: courses in radar operation, 12 working days, Madagascar: Officers and Skippers, Fisheries, 64 and 32 weeks respectively, Norway: a 5 day training course for Regulations concerning the Protection Supervisors and Protection and Environment Committee in Ships (including First Aid, Dangerous Cargo, Accidents and Health Hazards, Noise Nuisance, Loading-discharging gear, the entire ship environment), damage control management (1w, contingency planning, tactical aspects of damage control, case studies), Singapore: Ship inspection (1w, including hazards of petroleum and petroleum products, legislation governing gas-free inspection vessels), oil spill control (1w, environmental and ecological effects of oil spills, legislation, methods of containment, removal and treatment, shoreline protection and contingency planning, practical handling of various oil pollution control equipment), advanced and refresher training courses in the use of Radar at Sea for Senior Officers (5 days), training of Officers in Personal Survival Techniques (2 days), on board training ship: course aimed at assisting registrants to decide whether they should make a career at sea and to ensure that seamen registered are those determined to make a career at sea, Steward's and Cook's courses for school leavers (Steward's course: 312 hours, serving techniques, techniques of preparation for service, cleaning and using machines and equipment, preparation of bread rolls, butter, basic food care, preparation of vegetable and cooking methods, social and technical skills, personal hygiene and safety, cleaning and preparation of cabins, saloon and lounge; Cook's course: 340 hours, responsibilities of a Cook, organisation and duties of Catering Personnel on a ship, kitchen equipment, methods of cooking, elementary nutrition, food storage methods and importance of planning, hygiene and sanitation, safety in storage, preparation of food, fire safety etc), Spain: course on automation, 4w, course on control of maritime traffic, 2w, course on maritime safety, 4 days, Radar Observer's course, 2w, course on shipboard refrigeration techniques, 4w, Sweden: Radar Observer's Certificate, 2w, course for dangerous goods, 1w, U.S.S.R.: 1) new type of engineer-navigator (5½ years, performs certain duties of navigation, cargo loading and other works connected with the fulfilment of production plan; maintains on board ship observation of the valid laws, rules and regulations relating to navigation and production activities of a ship; engaged in educational work with the crew of a ship and perfection of all the ship damage control measures, ensures observation of labour and fire protection rules; ensures navigating watchkeeping on board a ship, 2) Universal ship engineers responsible for the operation of Marine Power Plants (5½ years, direct organi-

ser of watchkeeping service and technical supervisor of the power plant operation; ensures observation and rational fulfilment of the given and established parameters and conditions of its work; contributes to the introduction of progressive methods of marine power plant operation, 3) Electrical engineer (5 1/2 years, provides the technical operation and servicing of ship electric equipment; direct organiser of production process; normal economical work of ship electric power plant and ship electric facilities; contributes to the introduction of progressive methods of ship electric equipment operation, United States: 15w, training courses in safe transport of LNG (fundamental principles of tanker operation including transfer of oil, tanker regulation, pump operation; special training in the operation of machinery and control systems on automated tankers etc); 15w, training courses aiming at the effective service and maintenance of electrical equipment on conventional and automated vessels (prepare for Electrician's certificate); 15w, comprehensive training in Steward Department Management, Food Service and Preparation, Storage and Refrigeration of Subsistence Stores, Control and Personnel Administration; 15w, training courses aiming at the effective operation of machinery and control systems on automated ships (take the U.S. Coast Guard Refrigeration and Junior Engineer examinations; 15w, intensive training in the Culinary Specialities required on a cargo ship through on the job training (emphasise by demonstration and application the skills required of a Chief Cook; training in hygiene, sanitation, working safety and introduction to baking and cooking techniques); 72w, training courses preparing students to obtain employment on board towing, off-shore minerals and oil support vessels, Hong Kong: 3w, Radar Observer's Courses.

Appendix 2

Reasons for the non-ratification of Conventions Nos. 76, 93 and 109

1) Some countries had not particular interest in the Convention, since they did not possess a significant merchant marine ¹

Scope of the Convention

2) Certain countries thought that the Convention should be restricted to international navigation (Sweden) or that coastal vessels (Greece, Norway) and whaling vessels (Japan, Norway) should be excluded from the Convention. ² Other countries feared international competition if they ratified the Convention. ³ Instead of a three-watch a two-watch system was applied in certain cases. ⁴ The distinction between near and distant-trade ships was not generally accepted. ⁵

Wages

3) Many countries were against an international minimum wage fixed in terms of foreign currency and one country (the F.R.G.) stated further that it abstains from public wage regulation. Implementation of Art. 5 would restrict the rights of parties to conclude collective agreements. ⁶ In most countries wages were dealt with in collective agreements and the relevant provisions could not be enforced by means of laws and/or regulations. ⁷ One country was of the opinion that it was very difficult to compare crew costs from one country to another; wages were only one of the factors in such costs and there were also indirect charges which did not affect the shipowners of other countries. ⁸

Collective agreements

4) One country (New Zealand) thought that collective agreements provided greater flexibility than the provisions of the Convention while others reported that the position as regards ratification on the basis of collective agreements should be clarified. ⁹

¹PTMC, 1956, Report I, I/1, Haiti, Iran, pp. 11, 12.

²ibid., Sweden, p. 15, Greece, Norway, p. 33, Japan, Norway, p. 35.

³ibid., Sweden specially from North European countries, p. 16, Pakistan from India, pp. 25, 54.

⁴ibid., the U.K. (on ships of less than 2500 GRT), p. 74, F.R.G. (on ships of less than 1000 tons navigating in certain areas), p. 76, Netherlands (on ships engaged in short-sea trades), p. 81.

⁵ibid., pp. 89-92, 94-101.

⁶ibid., Portugal, p. 13, Sweden, p. 15, U.K., p. 18, Italy p. 25, Japan pp. 25-26, Pakistan, p. 26, pp. 47-59, Brazil, 41 R.P., p. 139, Mexico, ibid., 141, Argentina, 142, F.R.G, PTMC, 1956, Report I/1, p. 52.

⁷ibid., pp. 47-60.

⁸ibid., Italy, pp. 24-25.

⁹ibid., New Zealand, p. 12, Canada, India, Denmark, Norway, Japan, pp. 142-4, 147, 149.

Able seaman

5) In at least two countries the rating of able seaman had not been introduced. ¹⁰

Hours of work

6) The 1946 and 1949 Conventions seemed to apply the same hours of work to apprentices and cadets while in certain countries different provisions concerning hours of work applied to apprentices and cadets. ¹¹ No weekly or fortnightly "spread-over" was envisaged in one country, unlike what was laid down in these Conventions. ¹² Hours of work in the catering department in some countries were different from those laid down in Convention No. 93. ¹³

Manning

7) In some countries shipowners and seafarers did not participate in the control of manning scales; furthermore no provisions concerning manning scales existed and in one country (Germany) legislation did not link manning to hours of work. ¹⁴

Exemption of existing ships

8) The Scandinavian countries had difficulties in accepting a Convention which did not contain a provision concerning the exemption of existing ships. ¹⁵

9) One country (Japan) enacted laws which were in substantial conformity with the provisions of Convention No. 57 (1936). These provisions had become established social practice and it would be difficult to attempt a drastic revision of them. ¹⁶

10) The 16-year age-limit for work of young persons at night was not acceptable to one country. ¹⁷

¹⁰ibid., Japan, p. 55, JMC/24/4, p. 11.

¹¹PTMC, 1956, Report I/1, U.K., p. 40, Israel, p. 41, Netherlands, p. 43.

¹²ibid., Germany, p. 77. This country had also encountered other difficulties in ratifying the relevant ILO instruments, such as the determination of compensatory time off in port in terms of hours of work performed at sea as provided in Art. 12 (4), the 48-hour week on distant-trade ships, the 2-hour limit for work on Sundays in port, the prevailing different overtime rates and the definitive manner in which types of work performed in the interests of safety were laid out in Art. 18, ibid., pp. 95, 105-108, 126, 131.

¹³ibid., pp. 118-119.

¹⁴ibid., pp. 135-136, 139, 140.

¹⁵ibid., pp. 21, 73-74, 83-84, 110.

¹⁶ibid., p. 25.

¹⁷ibid., Germany, p. 77.

Appendix 3

State practice regarding repatriation in 1926 ¹ and 1985 ²

When the specific year does not appear under a heading, this means that no replies from Governments were received on the specific question for that year.

a) Repatriation of masters, officers, apprentices, fishermen etc

1985

In 44 out of 50 countries masters and apprentices are covered by national laws, regulations and/or collective agreements concerning repatriation. In 21 countries fishermen and persons employed on Government-owned or operated ships are entitled to repatriation benefits.

b) Types of ships covered by repatriation legislation and/or agreements

1985

In 29 out of 43 countries no distinction is made as regards the application of repatriation provisions to smaller ships, yachts, fishing vessels or ships engaged in coastal trade. In 14 countries certain kinds of vessels are excluded from these provisions (mainly, ships below a certain tonnage, ships sailing in national waters or engaged in home trade, pleasure yachts, fishing vessels, Government vessels and non-commercial ships).

c) Degree of application of repatriation provisions to articles of agreements containing an international element

1985

Out of 49 countries:

i) 24 countries apply repatriation provisions to nationals and sometimes to foreigners employed on board national ships with certain restrictions according to whether the seamen concerned have been engaged in a home or foreign port.

ii) 13 countries apply the relevant provisions only to nationals serving in national ships while in certain cases nationals employed on foreign ships are entitled to repatriation.

¹The information available concerning state practice in 1926 is based on the replies of 27 Governments to the 1926 ILO Questionnaire, see Report I, 1926, pp. 127-137, Supplementary Report I, 1926, pp. 48-51, 66, 71.

²The exposition of state practice in 1985 is based on the replies of 55 Governments to the ILO Questionnaire, see Joint Maritime Commission, 24th Session, Geneva, September 1984, Revision of the Repatriation of Seamen Convention, 1926 (No. 23); and of the Repatriation (Ships Masters and Apprentices) Recommendation, 1926 (No. 27), pp. 2-20, Preparatory Technical Maritime Conference, Geneva, May 1986, Revision of the Repatriation of Seamen Convention, 1926 (No. 23); and of the Repatriation (Ships Masters and Apprentices) Recommendation, 1926 (No. 27), Report V, pp. 5-25.

iii) In 12 countries national seamen employed under the national or a foreign flag and foreign seamen working under the national flag are entitled to repatriation regardless of the port of engagement.

d) Right to repatriation and Port of destination

1926

With regard to the question whether a seaman who is discharged at a foreign port during the continuance or on the expiry of his agreement should be re-conveyed either to the port of engagement or, if the voyage is not prolonged thereby, to a port of his own country, the majority of the governments (14) were replied in the affirmative.³ Four countries (Denmark, Norway, Spain and Greece) stated that the question should be left to national law. Two countries (Germany and Netherlands) replied in the negative. Six countries (Germany, Netherlands, Italy, Australia, Yugoslavia) stated that the seaman was entitled to repatriation only if he had been discharged for lawful reasons or for reasons which cannot be ascribed to him (Japan).⁴ One country (Sweden) thought that no obligation should be imposed on a country to repatriate a seaman. For two countries (Czechoslovakia, Japan) the destination port should be only the port of engagement.

1985

I) Right to repatriation

Out of 47 countries nine countries, including Liberia, reported that the seaman is entitled to repatriation in all circumstances mentioned below and in one country in all circumstances except in the case of illness or injury incurred out of service. Another seven countries provided no specific information. The replies of the other 30 countries can be classified as follows:

Repatriation entitlements:

aa) At the end of the voyage (7 countries).

bb) At the expiration of an agreement for a specific period (11 countries).

cc) At the end of an uninterrupted period of service (13 countries, uninterrupted period ranging from three weeks to twenty-four months, six months being the period more commonly found).

dd) In cases of

i) illness or injury incurred while in service (19 countries),

³ Argentina, Belgium, Cuba, Estonia, Finland, France, U.K. and Canada (in principle, but governments should be allowed to provide for exceptions), Ireland, Latvia, Poland, Austria, Hungary and Rumania.

⁴ It should be noted that a distinction should be drawn between the right of a seaman to repatriation and the expenses incurred during repatriation. If the right of seaman to repatriation is unqualified, then in the case of his dismissal by the master for lawful reasons he will still be entitled to repatriation but he will have to defray its costs. If, on the other hand, the right to repatriation is dependent upon his non-dismissal for lawful reasons, he will have no right to repatriation, if he has been discharged for such reasons. In this context, the words "lawful reasons" imply cases in which the breaking of the articles of agreement by the seaman, entitles the master to dismiss the former, Questionnaire I, 1926, p. 65. However, the relationship between the breaking of the agreement and discharge for lawful reasons had not been established in a cogent manner at that time.

ii) illness or injury incurred while out of service (13 countries), ⁵

iii) emergency (5 countries), compassion (9 countries), shipwreck (13 countries), sale or chartering of ship (8 countries).

iv) Other cases in which a seafarer is entitled to repatriation: Termination of the agreement not due to a fault on the part of the seaman (3 countries), repatriation dependent on the availability of a replacement in the port of signing off (1 country), involuntary discharge abroad (2 countries), illness or injury not being due to the seaman's fault (2 countries), upon completion of the employment contract (4 countries), ⁶ in case the voyage is revoked or the ship proceeds to a different destination (1 country), seaman left behind abroad unless he refused to comply with reasonable repatriation arrangements made for him or was a deserter (1 country).

II) Port of destination

46 countries gave specific indications as regards the port to which a seaman is entitled to repatriation.

aa) Port of engagement: 29 countries reported that the port of engagement was normally the port to which a seaman is re-conveyed. In addition, certain of these countries provided for other repatriation ports:

i) a neighbouring port (1 countries).

ii) port of the nationality of the seafarer or the seafarer's home (10 countries). ⁷

iii) port of the ship's registry (3 countries).

iv) port at which the voyage commenced (6 countries).

v) ports re-conveyance to which incurs no additional expense (2 countries).

bb) In 4 countries the port of the ship's registry was normally used as the repatriation port.

cc) In 13 countries the seafarer's home was considered to be the destination port.

e) Definition of the repatriation expenses

1926

The overwhelming majority of governments was in agreement that the expenses of repatriation were to include at least the cost of reconveyance and subsistence from the time the seaman was discharged to his arrival in the port to which he had to be brought back. ⁸ Three countries (Denmark, France, Spain) thought that the question should be left to national law.

⁵It is assumed that the governments, who made no distinction between repatriation in the case of a service-incurred illness or injury and repatriation in the case of a non-service-incurred illness or injury, provide for repatriation in both cases.

⁶These countries did not specify whether the contract is terminated at the end of the voyage or at the expiration of an agreement for a specific period.

⁷In many countries the seafarer's home was utilised as a repatriation port only in the case of foreign seafarers. In one country the seafarer's home was chosen only in cases of illness or injury while in another at the shipowner's option.

⁸Argentina, Belgium, Estonia, Finland, Germany, U.K., Ireland, Japan, Latvia, Netherlands, Norway, Poland, Yugoslavia, Austria, Canada, Greece, Hungary, Italy, Rumania and Sweden.

1985

42 out of 49 countries indicated that a seaman entitled to repatriation is provided with accommodation and food during the repatriation travel. In a number of countries accommodation, food and, sometimes, medical expenses were provided up to the time fixed for his departure.

In 23 out of 45 countries (including India, Italy, Japan, Panama and Philippines) wages and allowances are paid to the seaman during the repatriation travel while in 22 countries the opposite is the case. In the U.K. the seaman discharged abroad because of illness or injury is entitled to his basic wage. In France payment of leave salary or leave commences on the same day when the payment of wages ceases.

f) Repatriation travel and annual leave1985

In 39 out of 46 repatriation travel time and/or any waiting time are not deducted from paid annual leave accruing to the seafarer.

g) Financial responsibility for repatriation and supervision1926

The majority of the governments (19) considered that the expense of repatriation should not be borne by the seaman unless he had been dismissed for lawful reasons.⁹ Three countries (Hungary, Australia, Brazil) were of the opinion that the costs should be born by the shipowner and 5 countries (Denmark, France, Netherlands, Norway, Spain) preferred that the question should be left to national law.

As regards the responsibility for the enforcement of the repatriation procedures, the majority of the governments (18) thought that it should rest with the public authority of the country in which the ship is registered, whatever the nationality of the seaman.¹⁰ According to 5 countries (Denmark, France, Netherlands, Norway, Spain) the question should be left to national law. Two countries (Japan, Italy) reported that national seamen should not assimilated to foreign seamen.

1985

Governments were divided on the issue of the primary responsibility for repatriation: In a number of countries the shipowner or his agents abroad are responsible for repatriation. In certain countries the responsibility rests with shipping masters, Marine Superintendents or port authorities. Finally, in some countries governmental bodies are charged with such supervision.

In 46 out of 49 countries the shipowner is ultimately financially responsible for the repatriation of the seaman. In certain cases consular authorities may arrange for the repatriation of seamen and recover the expenses incurred from the shipowner. Only in 3 countries the final responsibility

⁹Argentina, Belgium, Cuba, Estonia, Finland, Germany, U.K., Ireland, Japan, Latvia, Czechoslovakia, Poland, Yugoslavia, Austria, Canada, Greece, Italy, Rumania and Sweden.

¹⁰Argentina, Belgium, Estonia, Finland, Germany, U.K., Ireland, Latvia, Poland, Yugoslavia, Austria, Canada, Greece, Hungary, Italy, Rumania, Sweden and Cuba.

lies with the Government. In seven countries governments may pay or participate in the payment of the repatriation expenses in certain cases (illness or injury, shipwreck, desertion, long service, pregnancy, war risks). In another seven countries (including Greece and India) the seafarer has to pay his repatriation expenses or the shipowner is not held liable for them in cases of termination of the employment through misconduct or before serving the necessary time or when he fails to request repatriation within a specified time.

Appendix 4

A. ILO Maritime Conventions: Ratifications and percentage of total world gross tonnage represented by ratifying countries ¹

Convention No.	Title	Date of entry into force	No. of ra- tifications at 1/1/76	Percentage of world fleet at 1/1/76	No. of ra- tifications at 1/1/90	Percentage of world fleet at 1/1/90
7*	Minimum Age (Sea), 1920	27.09.21	43	56	51	40.86
8	Unemployment Indemnity (Shipwreck), 1920	16.03.23	42	60	51	44.55
9	Placing of Seamen, 1920	23.11.21	30	49	32	39.62
15	Minimum Age, Trimmers and Stokers, 1921	20.11.22	62		67	62.23
16	Medical Examination of Young Persons (Sea) 1921	20.11.22	63	71	70	63.66
22*	Seamen's Articles of Agreement, 1926	4.04.28	46	54	52	58.83
23*	Repatriation of Seamen, 1926	16.04.28	29	42	37	54.03
53*	Officers' Competency Certificates, 1936 ²	29.03.39	24	48	27	43.77
55*	Shipowners' Liability (Sick and Injured Seamen), 1936	29.10.39	14	42	15	39.66
56*	Sickness Insurance (Sea), 1936	09.12.49	12	30	14	20.99
58*	Minimum Age (Sea) (Revised), 1936	11.04.39	45	76	49	62.95

* The Conventions, which are marked with an asterisk, are included in the Appendix to Convention No. 147. Conventions which have not come into force have also been included in Table A as long as they have not become obsolete; the latter category comprises Conventions which have not come into force and were subsequently revised. As a result, the following Conventions are omitted: Holidays with Pay (Sea) Convention, 1936 (No. 54), Hours of Work and Manning (Sea) Convention, 1936, Paid Vacations (Seafarers) Convention, 1946 (No. 72), Accommodation of Crews Convention, 1946 (No. 75), Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76), Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93).

¹ Tonnage of non-metropolitan territories not included. Percentage of world fleet based on gross tonnage as given in Lloyd's Register of Shipping (Statistical tables, 1975 and 1988).

² Articles 3 and 4 only are included in the Appendix to Convention No. 147

Convention No.	Title	Date of entry into force	No. of ra- tifications at 1/1/76	Percentage of world fleet at 1/1/76	No. of ra- tifications at 1/1/90	Percentage of world fleet at 1/1/90
68*	Food and Catering (Ships' Crews), 1946 ³	24.03.57	16	33	21	29.14
69	Certification of Ships' Cooks, 1946	22.04.53	21	57	26	43.88
70	Social Security (Seafarers), 1946	-	7		7	6.04
71	Seafarers' Pensions, 1946	10.10.62	9	20	12	23.90
73*	Medical Examination (Seafarers), 1946	17.08.55	22	45	30	44.90
74	Certification of Able Seamen, 1946	14.07.51	19	30	21	26.59
91	Paid Vacations (Seafarers) (Revised), 1949	14.09.67	17	20	20	11.14
92*	Accommodation of Crews (Revised), 1949	29.01.53	22	43	31	51.33
108	Seafarers' Identity Documents, 1958	19.02.61	32	48	47	51.30
109	Wages, Hours of Work and Manning (Sea), 1958	-	8		11	9.77
133	Accommodation of Crews (Supplementary Provisions) 1970	-	8		17	28.47
134*	Prevention of Accidents (Seafarers), 1970 ⁴	17.02.73	7	7	22	31.26
145	Continuity of Employment (Seafarers), 1976	03.05.79	-	-	17	9.42
146	Seafarers' Annual Leave with Pay, 1976	13.06.79	-	-	10	5.58
147	Merchant Shipping Minimum Standards, 1976	28.11.81	-	-	20	43.75
163	Seafarers' Welfare, 1987	03.10.90	-	-	3	1.09
164	Health Protection and Medical Care (Sea), 1987	-	-	-	1	-
165	Social Security (Seafarers) (Revised), 1987	-	-	-	-	-
166	Repatriation of Seafarers (Revised), 1987	-	-	-	1	-

³Article 5 only is included in the Appendix to Convention no. 147.

⁴Articles 4 and 7 only are included in the Appendix to Convention No. 147.

B. Selected Conventions of general application: Ratifications and percentage of total world gross tonnage represented by ratifying countries ¹

Convention No.	Title	Date of entry into force	No. of ra- tifications at 1/1/76	Percentage of world fleet at 1/1/76	No. of ra- tifications at 1/1/90	Percentage of world fleet at 1/1/90
87*	Freedom of Association and Protection of the Right to Organise, 1948	04.07.50	82	86	99	69.01
98*	Right to Organise and Collective Bargaining, 1949	18.07.51	95	86	115	74.28
111	Discrimination (Employment and Occupation), 1958	15.06.60	86	59	111	64.23
130*	Medical Care and Sickness Benefits, 1969	27.05.72	8	13	13	4.93
135	Workers' Representatives, 1971	30.06.73	19	21	44	21.78
138*	Minimum Age, 1973	19.06.76	3	-	37	23.56
144	Tripartite Consultation (International Labour Standards), 1976	16.05.78	-	-	47	33.19

Appendix 5

MOU - Inspections and detentions

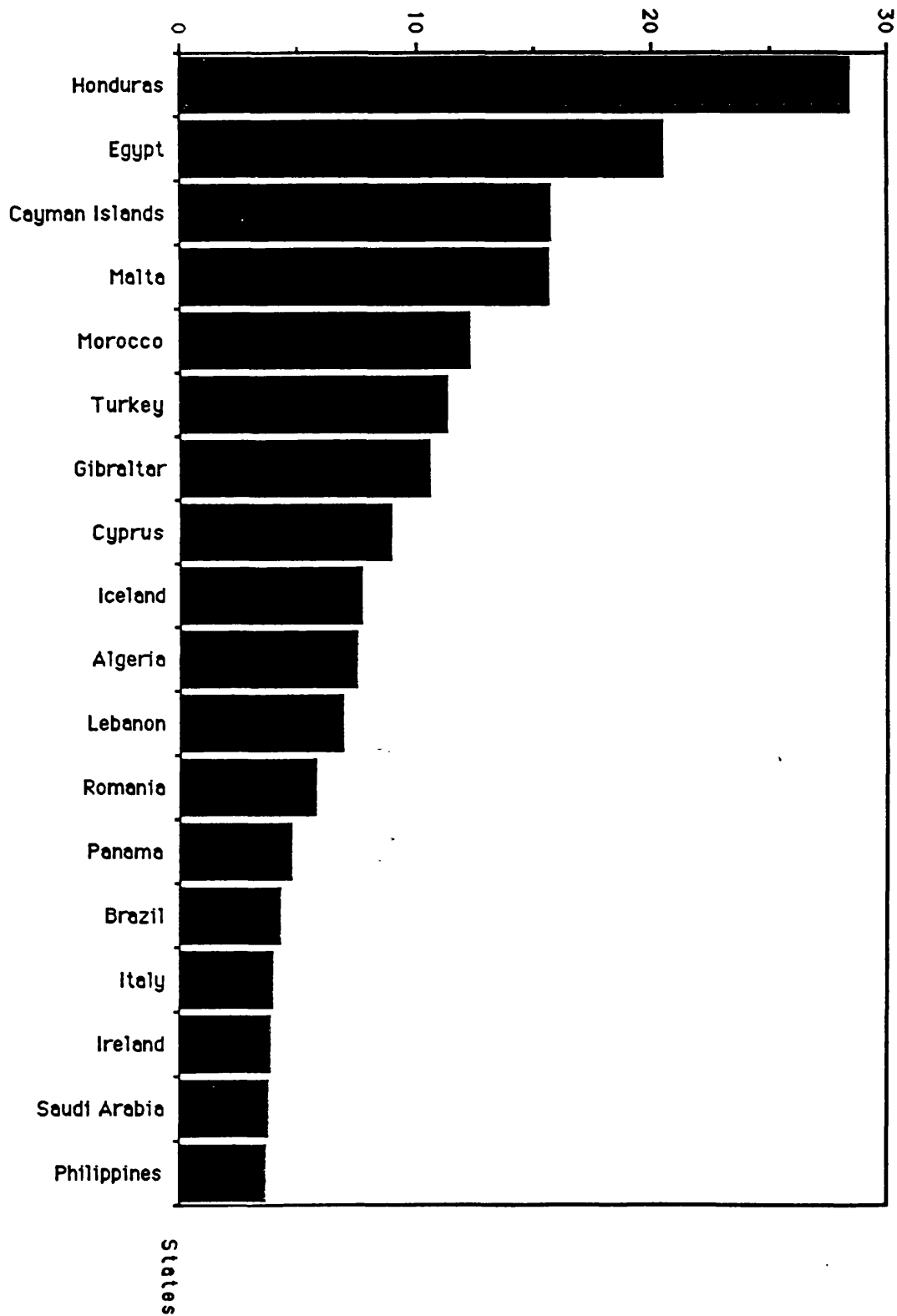
	1984	1985	1986
Number of Inspections	10,227	10,417	11,740
Number of Delays/Detentions	476	356	307
Delays/Detentions as percentage of Inspections	6.19 %	4.52 %	3.52 %

Source: Annual Report on the implementation of the Memorandum of Understanding on Port State Control, July 1985-June 1986.

MOU 2

	States (1986)	No. of insp.	No. of del./det	Percent. level
1	Honduras	88	25	28.41
2	Egypt	49	10	20.41
3	Cayman Islands	32	5	15.63
4	Malta	109	17	15.60
5	Morocco	41	5	12.20
6	Turkey	160	18	11.25
7	Gibraltar	38	4	10.53
8	Cyprus	509	45	8.84
9	Iceland	26	2	7.69
10	Algeria	40	3	7.50
11	Lebanon	29	2	6.90
12	Romania	52	3	5.77
13	Panama	852	40	4.69
14	Brazil	47	2	4.25
15	Italy	128	5	3.90
16	Ireland	52	2	3.85
17	Saudi Arabia	27	1	3.70
18	Philippines	110	4	3.64

Percentage of delays and detentions
per flag state as a percentage of
inspections



DELAYS AND DETENTIONS PER FLAG STATE (1986)

Appendix 6

Crew costs: an international comparison

Table 1
MONTHLY CREW COSTS ACCORDING TO SELECTED FLAGS

Average compensation including pay and fringe benefits in US dollars

Flag	Master	USA=100	Second engineer	USA=100	Seaman	USA=100
USA	17,387	100	8,212	100	3,301	100
Japan	9,705	56	4,820	59	3,643	110
Sweden	8,695	50	4,813	28	2,605	79
West Germany	7,401	43	4,174	51	2,200	67
Denmark	5,945	34	2,899	35	2,428	73
Korea	2,800	16	905	11	644	19
Hong-Kong	2,708	16	1,293	16	721	22
(Liberian Flag)						
Taiwan	2,505	14	1,295	16	770	23
(Panamanian Flag)						
Ghana	2,062	12	1,610	20	442	13

Source: Lloyd's Anverso, 18th November 1982, after: Shipping Statistics, Jan. 1983, p. 23 reproduced in I. Chrzanowski, An Introduction to Shipping Economics, 1985, p. 77.

Table 2
COMPARISON CREW COSTS (WAGES)

Year	Crew (fringe benefits, special allowances and overtime excluded) US\$ per month					
	Greece	Japan	Liberia	Norway	UK	USA
1978	381	534	579	829	360	865
1979	425	590	621	900	400	1022
1980	436	693	674	947	567	1060
1981	428	758	684	889	545	1081
1982	476	756	769	899	565	1255
1983	445	784	821	888	516	1323
1984	337	762	821	738	427	1448

Source: Lloyd's Shipping Economist, December 1981, January 1985, reproduced in D.M. Long, The Soviet Merchant Fleet, 1986, at p. 42.

Table 3
COMPARATIVE MANNING COSTS

Flag	Officers	Ratings	Cost (US\$ p.a.)
UK	UK	UK	908,000
Liberian	Korean	Korean	490,000
Bermuda	Filipino *	Filipino	481,000
Hong Kong	Hong Kong	Hong Kong	396,000

* British Master and Chief Engineer

Source: GCBS, November 1986.

NET EARNINGS/GROSS WAGE COSTS IN EEC COUNTRIES

Flag	AB's net income as a % of gross income	Amount paid by employer as % of AB's gross income	On-cost as % of AB's net earnings
Belgium	64.4	121.9	89.3
Finland	69.3	117.0	67.8
France	77.0	140.0	81.8
FRG	71.4	116.6	63.3
Ireland	63.6	112.3	76.6
Italy	71.0	133.9	88.6
Netherlands	60.8	122.7	101.8
Portugal	70.5	124.5	76.6
Spain	77.4	137.1	77.1
UK	71.0	106.8	50.4

Adapted from Which Register? Which Flag? Conference, 1987, LLP, Slide 6.

Table 4**TOTAL BERTH COSTS FOR CREWS OF VARIOUS NATIONALITIES**

(Typical manning complement for bulk carriers from handy size upwards
and tankers from 30,000 tons upwards comprising 24 Officers and Ratings)

Crews	TBC US\$/Month	
A. 10 North European Officers 15 North European Ratings	65,000	*
B. 5 North European Officers 5 Filipino Officers (TCC) 15 Filipino Ratings (TCC)	39,000	*
C. 5 North European Officers 5 Indian Officers (TCC) 15 Indian Ratings (TCC)	38,000	*
D. 3 North European Officers 7 Indian Officers (TCC) 15 Indian Ratings (TCC)	36,500	*
E. 5 North European Officers 5 Filipino Officers 15 Filipino Ratings (ILO)	35,700	
F. 3 North European Officers 7 East European Officers 15 East European Ratings	35,000	
G. 10 Indian Officers (TCC) 15 Indian Ratings (TCC)	34,000	*
H. 3 North European Officers 7 Indian Officers 15 Indian Ratings (NMB)	33,500	

I.	10 Indian Officers	
	15 Indian Ratings (NMB)	30,500
J.	10 East European Officers	
	15 East European Ratings	30,000
K.	10 Filipino Officers	
	15 Filipino Ratings (National Flag/Dual Registry)	23,500

Observations: No Korean manning options are shown

* Eligible for a blue certificate (excluding ITF fees)

ITF fees amount to 6000-7000 US dollars in the first year

Adapted from Which Register? Which Flag? Conference, 1987, LLP, speech of J. Dorey, pp. 10-11.

Table 5
AVERAGE MONTHLY WAGES AND SALARIES OF WORKERS AND EMPLOYEES
IN THE NATIONAL ECONOMY (rubles)

Year	Average monthly wages & salaries including allowances and benefits from the social consumption funds	Average monthly money wages & salaries excl. allowances & benefits from social consumption funds	Marine transport	Marine wages as % of national
1940	40.6	33.1	41.2	+24.47
1960	107.7	80.6	-	-
1965	129.2	96.5	135.1	+40
1970	164.5	122.0	169.5	+38.9
1975	198.9	145.8	212.8	+45.95
1980	232.7	168.9	232.0	+37.5
1984	260.0	185.0	257.5	+39.0

Source: USSR in figures 1984, reproduced in D.M. Long, The Soviet Merchant Fleet, 1986, at p. 42.

Table 6

COMPARISON OF CREW COSTS IN USSR AND IN OTHER MARITIME COUNTRIES

1. Comparison of average pay rates in sterling per month (UK seamen and Soviet seamen)

U.K.+ Allowances - £829.42	U.K. Basic - £500
Soviet + maximum allowances - £195.80	Soviet Basic - £88
% difference = 325%	470%

2. Comparison by country (US\$ per month at R. 748 exch. rate)

Year	GR	JAP	LIB	NOR	UK	USA	USSR
1983	445	784	821	888	516	1323	118

3. Comparison of the total crew cost per annum in a Soviet bulk carrier and a similar Western carrier with British officers and Chinese ratings

	Basic salary	Including social cost	Total (incl. bonus)
Soviet	\$ 78,600	\$ 108,468	\$ 139,908
Western	-	-	\$ 800, 000

4. Crew costs per day

Country	Rate in US \$ per day
South Korea	1500
United Kingdom	2540
Sweden	2850
Soviet (basic salary)	218
Soviet (inc. social cost)	301
Soviet (inc. bonus)	388

Adapted from D.M. Long, *The Soviet Merchant Fleet*, 1986, pp. 46-47.

Table 7
COMPARISON CREW COSTS
(As a proportion of total costs)

Handy-sized bulk carrier, 1982-annual costs in US\$'000.†

	US	Japan	F.R.G.	UK	Greece	FOC
Crew	2768	2705	1460	980	920	547
M&R	510	252	252	252	252	277
Insurance	733	216	216	216	227	227
Overhead	45	100	100	100	100	100
	4056	3273	2028	1548	1499	1151
(Crew %)	(68%)	(82%)	(72%)	(63%)	(61%)	(47%)
Cap.	11458	3958	3958	3958	3958	3958
	15514	7231	5986	5506	5457	5109
(Crew %)	(18%)	(37%)	(25%)	(18%)	(18%)	(11%)
Fuel	1930	1930	1930	1930	1930	1930
TOTAL	17444	9161	7916	7436	7387	7039
(Crew %)	(15%)	(29%)	(18%)	(13%)	(13%)	(8%)

† Value-new: \$19 000 000 (US built-\$55 000 000); second hand: \$7 800 000. Financing new: 100%, 8 yrs., 13% = \$3 958 000 (US = \$11 548 000); Second hand: 80%, 8 yrs., 13% = \$1 500 000. Fuel - 300 days/year x 33 tons/day x \$ 195 per ton = \$1 930 000.

2400 TEU container ship (46 000 dwt), 1982-annual costs in US\$'000.††

	Japan	F.R.G.	UK	Greece	FOC
Crew	2800	1595	1100	965	623
M&R	656	656	656	656	722
Insurance	825	825	825	867	867
Overhead	150	150	150	150	150
	4431	3226	2731	2638	2362
(Crew %)	(63%)	(49%)	(40%)	(36%)	(27%)
Cap.	9375	9375	9375	9375	9375
	13806	12601	12106	12013	11737
(Crew %)	(20%)	(13%)	(9%)	(8%)	(5%)
Fuel	8720	8720	8720	8720	8720
TOTAL	22526	21321	20826	20733	20457
(Crew %)	(12%)	(8%)	(5%)	(5%)	(3%)

†† Value-new: \$45 000 000 (US built-\$126 m); second hand: \$7 800 000. Financing new: 100%, 8 yrs., 13% = \$9 375 000; Second hand: 80%, 8 yrs., 13% = \$5 000 000. Fuel - 260 d/y x 172 t.p.d. x \$195 per ton = \$8 720 000.

Reproduced from Moreby, David, Crew costs, Marit. Pol. Mgmt., 1985, Vol. 12, No. 1, pp. 55-60, p. 57.

Appendix 7

A. Table concerning the status of Resolutions adopted by ILO Maritime Conferences

	No. of ILO Maritime Resolutions following the adoption of which action should be taken	No. of ILO Maritime Resolutions on which some action has been taken	No. of ILO Maritime Resolutions on which action has yet to be taken	No. of ILO Maritime Resolutions not adopted by ILO Marit. Conferences
Year				
1920	7	5 (1)	1	2
1921	1	1	-	-
1926	6	3 (1)	2	-
1929	6	3 (2)	1	2
1936	5	2 (2)	1	-
1946	7	3 (3)	1	2
1958	9	5	4	3
1970	15	10 (4)	1	3
1976	16	6 (5)	5	5
1987 *	8	-	-	15

* Some of the Resolutions adopted by the 1987 maritime Conference are in the process of implementation. No conclusions with regard to these resolutions can be drawn before a certain amount of time elapses.

**B. Table of Resolutions Adopted by ILO Maritime Conferences
(1920-1987) ***

A) ILO Maritime Resolutions following the adoption of which specific action should be taken

2nd Session, 1920

Resolution proposed by the Commission on unemployment, (insurance against unemployment for seamen).

Resolution proposed by the Commission on the minimum age for the employment of children at sea (18-year minimum age limit for trimmers or stokers).

Resolution proposed by the Commission on the minimum age for the employment of children at sea (compulsory medical examination of children at sea).

Resolution proposed by the Commission on the minimum age for the employment of children at sea (establishment of technical and complementary schools for seamen in harbours or principal maritime towns).

Resolution proposed by the Commission on the International Seamen's Code (international codification of seamen's law).

Resolution proposed by the Drafting Committee as a substitute for Norwegian Resolution contained in the Minority Report of the Commission on the International Seamen's Code (distinction between clauses of a public character and those of a private character in a seaman's contract).

Resolution concerning venereal diseases (prevention and treatment of venereal diseases, provision of adequate facilities for recreation at all large ports).

3rd Session, 1921

Resolution proposed by the Maritime Commission (procedure for the adoption of ILO maritime Conventions and Recommendations).

* The following review examines whether ILO Resolutions, adopted by maritime conferences, which urged the adoption of international measures in the field of maritime labour, led to any practical results, namely the adoption of ILO Conventions and Recommendations or resulted in any specific action taken in other international fora (resolutions recommending action in areas outside maritime labour are not taken into account). Accordingly, resolutions which did not ultimately result in the adoption of any measures at the international level are classified under the "ILO Maritime Resolutions on which action has yet to be taken", although a study of their implications or impact had initially been undertaken by the ILO Office, the Governing Body, the JMC or any other body. The years in brackets signify the year(s) in which the resolution concerned led to the adoption of specific international measures. When no specific year is mentioned, this means that the practice followed at maritime conferences, meetings or other regional fora, and ILO activities, subsequent to the resolution concerned, were in accordance with its object. If partial action has been taken following the adoption of a resolution this is stated; if, despite the adoption of certain measures, the aims of a specific resolution have not been achieved, the measures taken are classified as partial action. The number in brackets in the third column of the table found in Table A. denote the number of resolutions on which partial action has been taken.

9th Session, 1926

- Resolution concerning the question of articles of agreement for the deep-sea fishing industry.
- Resolution concerning the repatriation of fishermen.
- Resolution concerning the study of the question of penalties inflicted in respect of the violation of seamen's articles of agreement.
- Resolution concerning the question of the regulation of hours of work on board ship.
- Resolution concerning an enquiry into the conditions of work in fishing for sponges, pearls of all kinds, coral and submarine products in general.
- Resolution concerning seamen's welfare.

13th Session, 1929

- Resolution concerning the difficulties which have arisen at maritime Sessions of the Conference.
- Resolution concerning the application of Draft Conventions and Recommendations adopted by previous maritime Sessions of the Conference.
- Resolution concerning the exemption of seamen from the requirement of presenting passports on disembarking in foreign countries.
- Resolution concerning the equitable treatment of seamen.
- Resolution concerning the conditions of life and labour of seamen in Asiatic countries.
- Resolution concerning the limitation of hours of work in inland navigation.

21st Session, 1936

- Resolution concerning compensation for accidents and unemployment insurance.
- Resolution concerning equality of treatment for national and foreign seamen.
- Resolution concerning the "Contractor System".
- Resolution concerning accommodation of crews on board cargo vessels.
- Resolution concerning seamen's wages (periodic collection and compilation of information concerning seamen's wages and other matters relating to competitive conditions).

28th Session, 1946

- Resolution concerning incomplete delegations.
- Resolution concerning continuous employment for seafarers.
- Resolution concerning seafarers' organisations.
- Resolution concerning the composition of the Joint Maritime Commission.
- Resolution on ratification of Conventions.
- Resolution concerning the future of the Maritime Department of the ILO Office.

Resolution concerning seamen's welfare in ports.

41st Session, 1958

Resolution concerning refugee seafarers.

Resolution concerning welfare in port.

Resolution concerning health and hygiene on board ship.

Resolution concerning crew accommodation.

Resolution concerning the manning of ships.

Resolution concerning atomic power and shipping.

Resolution concerning fishermen's questions.

Resolution concerning the application of the principle of a 40-hour working week on board ship, 1958.

Resolution concerning the jurisdiction competent to suspend or cancel officers' competency certificates.

55th Session, 1970

Resolution concerning Industrial Relations in the Shipping Industry.

Resolution concerning Holidays with Pay.

Resolution concerning the Health of Seafarers.

Resolution concerning Revision of Conventions.

Resolution concerning the Convocation of the Joint Maritime Commission.

Resolution concerning Compensatory Leave.

Resolution concerning the Protection of Young Seafarers.

Resolution concerning Flags of Convenience.

Resolution concerning Technical Co-operation.

Resolution concerning Regional Maritime Conferences.

Resolution concerning Seamen's Welfare on Board Vessels (Sewage Disposal).

Resolution concerning the Minimum Basic Wage for Able Seamen.

Resolution concerning Continuity of Employment of Seafarers.

Resolution concerning Sports Activities for Seafarers.

Resolution concerning International Co-operation in the Field of Seafarers' Welfare.

62nd Session, 1976

Resolution concerning the Convocation of a Committee on Conditions of Work in the Fishing Industry.

Resolution concerning the Periodic Revision of the List of Conventions Appended to the Merchant Shipping (Minimum Standards) Convention.

Resolution submitted to the Conference on the Proposal of the Committee on Substandard Vessels, Particularly Those Registered under Flags of Convenience.

Resolution concerning Standards on Merchant Ships.

Resolution concerning Seafarers' Welfare at Sea and in Port.

Resolution concerning Discriminatory Employment Conditions for Seafarers Serving in Vessels of Other Countries.

Resolution concerning the Revision of Conventions and Promotion of Maritime Social Legislation.

Resolution concerning Standards relating to Seafarers.

Resolution concerning the Convocation of the Joint Maritime Commission.

Resolution concerning Regional Maritime Conferences.

Resolution concerning the Minimum Basic Wage for Able Seamen.

Resolution concerning International Maritime Labour Standards on Medical Care aboard Ship.

Resolution concerning the Employment of Women on Board Ship.

Resolution concerning the Environment on Board Ships.

Resolution concerning Workers' Education for Seafarers.

Resolution concerning the Treatment of Foreign Seafarers in Transit.

74th Session, 1987.

Resolution concerning the expediting of legal proceedings in cases of abandonment of seafarers and in the sale of arrested vessels.

Resolution concerning social and welfare services for seafarers' families.

Resolution concerning the health of seafarers with particular reference to AIDS.

Resolution concerning the co-ordination of welfare activities for seafarers.

Resolution concerning the recruitment of seafarers and the regulation of fee-charging employment agencies.

Resolution concerning conditions of employment for seafarers.

Resolution concerning attacks on merchant shipping.

Resolution concerning the application of international Conventions and Recommendations and the more widespread ratification of the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147).

B) ILO Maritime Resolutions on which action has been taken

2nd Session, 1920

Resolution proposed by the Commission on unemployment (insurance against unemployment for seamen) (1946, 1987).

Resolution proposed by the Commission on the minimum age for the employment of children at sea (18-year minimum age limit for trimmers or stokers) (1921).

Resolution proposed by the Commission on the minimum age for the employment of children at sea (compulsory medical examination of children at sea) (1921).

Resolution proposed by the Commission on the minimum age for the employment of children at sea (establishment of technical and complementary schools for seamen in harbours or principal maritime towns) (1936, 1970).

Resolution proposed by the Commission on the International Seamen's Code (international codification of seamen's law) (partial action).

Resolution concerning venereal diseases (prevention and treatment of venereal diseases, provision of adequate facilities for recreation at all large ports) (1924, 1936).

3rd Session, 1921

Resolution proposed by the Maritime Commission (procedure for the adoption of ILO maritime Conventions and Recommendations).

9th Session, 1926

Resolution concerning the question of articles of agreement for the deep-sea fishing industry (1959).

Resolution concerning the repatriation of fishermen (partial, 1987).

Resolution concerning the question of the regulation of hours of work on board ship (1936, 1946, 1949, 1958).

Resolution concerning seamen's welfare (1936, 1970, 1987).

13th Session, 1929

Resolution concerning the difficulties which have arisen at maritime Sessions of the Conference.

Resolution concerning the application of Draft Conventions and Recommendations adopted by previous maritime Sessions of the Conference (partial).

Resolution concerning the equitable treatment of seamen (partial).

Resolution concerning the conditions of life and labour of seamen in Asiatic countries (1953, 1965).

21st Session, 1936

Resolution concerning compensation for accidents and unemployment insurance (1946, 1987).

Resolution concerning equality of treatment for national and foreign seamen (1946, 1987).

Resolution concerning the "Contractor System" (partial, 1984).

Resolution concerning accommodation of crews on board cargo vessels (1946, 1949, 1970).

28th Session, 1946

Resolution concerning incomplete delegations.

Resolution concerning continuous employment for seafarers (1976).

Resolution concerning seafarers' organisations (partial).

Resolution on ratification of Conventions (partial).

Resolution concerning the future of the Maritime Department of the ILO Office (partial).

Resolution concerning seamen's welfare in ports (1970, 1987).

41st Session, 1958

Resolution concerning refugee seafarers.

Resolution concerning welfare in port (1970, 1987).

Resolution concerning health and hygiene on board ship.

Resolution concerning crew accommodation (1970).

Resolution concerning fishermen's questions (1978).

55th Session, 1970

Resolution concerning Industrial Relations in the Shipping Industry (1975).

Resolution concerning Holidays with Pay (1976).

Resolution concerning the Health of Seafarers (1973).

Resolution concerning Revision of Conventions (partial, 1987).

Resolution concerning the Convocation of the Joint Maritime Commission (1972).

Resolution concerning Compensatory Leave (partial, 1972-5).

Resolution concerning the Protection of Young Seafarers (1976).

Resolution concerning Flags of Convenience (1972).

Resolution concerning Technical Co-operation.

Resolution concerning Seamen's Welfare on Board Vessels (Sewage Disposal) (partial, 1970 onwards).

Resolution concerning the Minimum Basic Wage for Able Seamen (1972 onwards).

Resolution concerning Continuity of Employment of Seafarers (1972, 1976).

Resolution concerning Sports Activities for Seafarers (partial, 1970 onwards).

Resolution concerning International Co-operation in the Field of Seafarers' Welfare (1970 onwards, 1987).

62nd Session, 1976

Resolution concerning the Convocation of a Committee on Conditions of Work in the Fishing Industry (1978).

Resolution concerning the Periodic Revision of the List of Conventions Appended to the Merchant Shipping (Minimum Standards) Convention (partial, 1987).

Resolution submitted to the Conference on the Proposal of the Committee on Substandard Vessels, Particularly Those Registered under Flags of Convenience (partial, 1980, 1987).

Resolution concerning Standards on Merchant Ships (partial, 1976 onwards).

Resolution concerning Seafarers' Welfare at Sea and in Port (1976 onwards: 1980, 1981, 1987).

Resolution concerning the Revision of Conventions and Promotion of Maritime Social Legislation (partial, 1987).

Resolution concerning Standards relating to Seafarers (1980, 1983).

Resolution concerning the Convocation of the Joint Maritime Commission (1980).

Resolution concerning the Minimum Basic Wage for Able Seamen (1980 onwards).

Resolution concerning International Maritime Labour Standards on Medical Care aboard Ship (1987).

Resolution concerning Workers' Education for Seafarers (partial, 1977 onwards).

C) ILO Maritime Resolutions on which action has yet to be taken*2nd Session, 1920*

Resolution proposed by the Drafting Committee as a substitute for Norwegian Resolution contained in the Minority Report of the Commission on the International Seamen's Code (distinction between clauses of a public character and those of a private character in a seaman's contract).

9th Session, 1926

Resolution concerning the study of the question of penalties inflicted in respect of the violation of seamen's articles of agreement.

Resolution concerning an enquiry into the conditions of work in fishing for sponges, pearls of all kinds, coral and submarine products in general.

13th Session, 1929

Resolution concerning the limitation of hours of work in inland navigation.

21th Session, 1936

Resolution concerning seamen's wages.

28th Session, 1946

Resolution concerning the composition of the Joint Maritime Commission.

41st Session, 1958

Resolution concerning the manning of ships.

Resolution concerning atomic power and shipping.

Resolution concerning the application of the principle of a 40-hour working week on board ship.

Resolution concerning the jurisdiction competent to suspend or cancel officers' competency certificates.

55th Session, 1970

Resolution concerning Regional Maritime Conferences.

62nd Session, 1976

Resolution concerning Discriminatory Employment Conditions for Seafarers Serving in Vessels of Other Countries.

Resolution concerning Regional Maritime Conferences.

Resolution concerning the Employment of Women on Board Ship.

Resolution concerning the Environment on Board Ships.

Resolution concerning the Treatment of Foreign Seafarers in Transit.

74th Session, 1987

The suggestions contained in the resolutions adopted at this session are in the process of implementation.

D) ILO Resolutions not adopted at ILO Maritime Conferences*2nd Session, 1920*

Resolution presented by Mr. Burke, Seamen's Delegate Australia (accommodation of seamen).

Resolution presented by Mr. Burke, Seamen's Delegate Australia (standardisation of wages "irrespective of country and colour").

13th Session, 1929

Resolution concerning the right of association of foreign seamen.

Resolution concerning the fixing of minimum manning scales in the mercantile marine.

28th Session, 1946

Resolution concerning international shipping policy (relating to the establishment of an international supervisory authority).

Resolution concerning conditions of entry to sea service (relating to evidence of age, minimum education, character and ability to row and swim as conditions for entry to sea service).

41st Session, 1958

Resolution concerning Welfare Services for Seafarers on Board Ship.

Resolution concerning the Joint Maritime Commission (relating to the transformation of the JMC into a committee of a tripartite structure).

Resolution concerning the Discontinuance of Tests of Atomic and Thermonuclear Weapons Endangering the Safety of Shipping and Constituting a Threat to the Lives of Seafarers.

55th Session, 1970

Resolution submitted by Mr. Gruenais, Workers' Delegate, France (relating to the development of ILO standards with a view to curbing competition in the shipping industry; supervision of safety standards; abolition of out-of-date disciplinary codes; elimination of all forms of discrimination on board ship; and revision of ILO standards with a view to adopting higher minimum standards).

Resolution concerning the Replacement of the Joint Maritime Commission by a Tripartite Maritime Commission.

62nd Session, 1976

Resolution concerning Medical Care aboard Ship, Submitted by Mr. Hall, U.S. Workers' Delegate.

Resolution concerning the Applicability of ILO Instruments for Seafarers to Fishermen.

Resolution concerning Occupational Safety and Working Conditions on Board Maritime Mobile Offshore Units and Supply Vessels.

Resolution concerning income tax relief for seafarers.

Resolution concerning seafarers' leave and remuneration.

Resolution concerning replacement of the Joint Maritime Commission by a Tripartite Maritime Commission.

74th Session, 1987

Resolution concerning technical-co-operation.

Resolution concerning the design of roll-on roll-off ships.

Resolution concerning regional maritime conferences.

Resolution concerning an international relief fund for seafarers.

Resolution concerning the establishment of order in maritime transport.

Resolution concerning discriminatory conditions of employment for seafarers on vessels of other countries or on vessels that do not belong to nationals of the country whose flag they fly.

Resolution concerning the transformation of the Joint Maritime Commission of the ILO into a tripartite maritime committee.

Resolution concerning the inclusion of maritime questions in the agenda of the International Labour Conference.

Resolution concerning the promotion of the employment of women in maritime activities.

Resolution concerning the convening of a Third Asian Maritime Conference.

Resolution concerning conditions of personnel employed on maritime mobile offshore units.

Resolution concerning inspection of seafarers' conditions of employment.

Resolution concerning workers' education for seafarers.

Resolution concerning violations of seafarers' rights to life and security with particular reference to the war at present being imposed on the Islamic Republic of Iran by the Iraqi regime.

Resolution concerning the continuation of the Iraq-Iran war and its serious social and economic effects.

SELECTED BIBLIOGRAPHY

The bibliographical references listed below include general works and specialised monographs to which reference is made in this study. Works which are relevant to this study but are not used herein are not referred to below. The bibliography is divided into three parts. The first part comprises all publications of the ILO which are relevant to the subject-matter of this thesis. All ILO publications are listed in chronological order. In the second part are included all other international documents, including documents of the European Communities, in alphabetical order. The third part contains works of various authors, national organisations and boards listed in alphabetical order.

1. Publications of the International Labour Organisation

A) OFFICIAL DOCUMENTS OF INTERNATIONAL LABOUR CONFERENCES

International Labour Conference, First session, 1919

League of Nations, Washington, 1919, Report of the Organising Committee on the Eight-Hours Day or Forty-Eight Hours Week.

International Labour Conference, 1st session, Records of Proceedings, Washington, 1919.

International Labour Conference, Second session, 1920

League of Nations, ILO Office, Report I, *Hours of Labour and their Effect on Manning and Accommodation*, London, Harrison and Sons, 1920.

League of Nations, ILO Office, Report II, *Unemployment and the Provisions of Facilities for Finding Employment for Seamen, and the Application to Seamen of the Convention and Recommendation adopted at Washington in regard to Unemployment*, London, Harrison and Sons, 1920.

League of Nations, ILO Office, Report III, *Employment of Children at Sea*, London, Harrison and Sons, 1920.

League of Nations, ILO Office, Report IV, *Seamen's Code*, London, Harrison and Sons, 1920.

Conférence Internationale du Travail (2ème session, Gênes, 1920), *Commission de l'âge minimum d'emploi des enfants à bord*, Procès-verbaux.

Conférence Internationale du Travail (2ème session, Gênes, 1920), *Commission du chômage*, Procès-verbaux.

International Labour Conference, 2nd session, Genoa, Record of proceedings, Geneva, 1920.

International Labour Conference, 3rd session, 1921

International Labour Conference, 3rd session, 1921, Questionnaire V, *A. Age of Employment as Trimmers and Stokers, B. Compulsory Medical Examination of All Children Employed on Board Ship*, Geneva, 1921.

International Labour Conference, 3rd session, 1921, Report VIII, *A. Age of Employment as Trimmers and Stokers; B. Compulsory Medical Examination of All Children Employed on Board Ship*, Geneva, 1921.

International Labour Conference, 1921 Conference Committees, *Committee on Maritime Questions*, Records of proceedings.

Records of Proceedings, Geneva, 1921, Volume I, pp. 251-264; Volume II, pp. 759-767, 856-862, 868.

International Labour Conference, Ninth session, 1926

International Labour Conference, 9th session, 1926, Questionnaire I, *International Codification of the Rules Relating to Seamen's Articles of Agreement* (with 3 Appendices), Geneva, 1925.

International Labour Conference, 9th session, 1926, Report I and Supplementary Report I, *International Codification of the Rules Relating to Seamen's Articles of Agreement*, Geneva, 1926.

International Labour Conference, 9th session, 1926, Questionnaire II, *General principles for the inspection of the conditions of work of seamen*, Geneva, 1925.

International Labour Conference, 9th Session, 1926, Report II and Supplementary Report II, *Report on General principles for the inspection of the conditions of work of seamen*, Geneva, 1926.

ILO, *Seamen's Discipline*, Geneva, 1926.

ILO, *Conditions of Work of Seamen*, Geneva, 1926.

International Labour Conference, 9th session, 1926, *Committee on the Inspection of the Conditions of Work of Seamen* (C.I.T.G.M./P.V.), Records of Proceedings, 1926.

International Labour Conference, 9th session, 1926, *Committee on the Repatriation of Seamen* (CR/P.V.), Records of Proceedings, 1926.

International Labour Conference, 9th session, 1926, *Committee on Discipline* (Commission des sanctions) (C.S./P.V.), Procès verbaux.

Conférence Internationale du Travail, IX^E Session, Genève 1926, *Commission du contrat d'engagement des marins* (C.S.A.A./P.V.), Procès Verbaux.

International Labour Conference, 3rd session, Records of Proceedings, Geneva, 1926.

International Labour Conference, Thirteenth session, 1929

International Labour Conference, 13th session, 1929, Questionnaire II, *The Protection of Seamen in Case of Sickness, including the treatment of seamen injured on board ship*, Geneva, 1929.

International Labour Conference, 13th session, 1929, Report I, *The Regulation of Hours of Work on Board Ship*, First discussion and Supplementary Report, Geneva, 1929.

International Labour Conference, 13th session, 1929, Report II, *The Protection of Seamen in Case of Sickness, including the treatment of seamen injured on board ship*, First discussion, Geneva, 1929.

International Labour Conference, 13th session, 1929, Report IV, *The Minimum Requirement of Professional Capacity in the case of Captains, Navigating and Engineer Officers in charge of Watches on Board Merchant Ships*, First discussion, Geneva, 1929.

International Labour Conference, 13th session, 1929, Conference Committees, *Committee on Hours of Work on Board Ship* (C.H.T.), Records of Proceedings.

International Labour Conference, 13th session, 1929, Conference Committees, *Committee on the Protection of Seamen in case of Sickness* (C.P.M.), Records of proceedings.

International Labour Conference, 13th session, 1929, Conference Committees, *Committee on Minimum Requirements of Professional Capacity* (C.M.C.P.), Records of proceedings.

International Labour Conference, 13th session, Records of proceedings, Geneva, 1929.

International Labour Conference, 21st and 22 second sessions, 1936

Preparatory Maritime Conference, Report I and Supplement, *The Regulation of Hours of Work on Board Ship*, Geneva, 1935.

Preparatory Maritime Meeting, Geneva, Nov - Dec 1935, Report and Record of the Meeting, Part I, Report of the Preparatory Maritime Meeting, Part II, Record of the Proceedings of the Meeting, *Committee on Hours of Work and Manning, Committee on Holidays with Pay for Seamen*, Geneva, 1936.

International Labour Conference, 21st session, 1936, Questionnaire I, *The Regulation of Hours of Work on Board Ship*, Geneva, 1931.

International Labour Conference, 21st session, Questionnaire IV, *The Minimum Requirement of professional Capacity in the case of captains, navigating and engineer officers in charge of watches on board merchant ships*, Geneva, 1936.

International Labour Conference, 21st session, 1936, Second Discussion, Report I, *The Regulation of Hours of Work on Board Ship*, Geneva, 1931.

International Labour Conference, 21st (maritime) session, 1936, Report I (A and B), *The Regulation of Hours of Work on Board Ship*, Geneva, 1936.

International Labour Conference, 21st session, 1936, Report II, *The Protection of Seamen in Case of Sickness, Including the Treatment of Seamen Injured on Board Ship*, Geneva, 1931.

International Labour Conference, 21st (maritime) session, Second Discussion, Report IV, *The Minimum Requirement of professional Capacity in the case of captains, navigating and engineer officers in charge of watches on board merchant ships*, Geneva, 1931.

International Labour Conference, 21st (maritime) session, Geneva, Oct 1936, Report V and Supplementary Report V, *Holidays with Pay for Seamen*, Geneva, 1936.

International Labour Conference, 21st session, 1936, *Committee on Holidays with Pay for Seamen* (C.C.P.M./P.V.), ten sittings.

International Labour Conference, 21st session, 1936, *Commission on the Protection of Seamen from Sickness or Injury* (C.G.M.M./PV).

International Labour Conference, 21st session, 1936, *Committee on Minimum Requirements of Professional Capacity* (C.M.C.).

International Labour Conference, 22nd session, 1936, *Report on the Partial Revision of the Minimum Age (Sea) Convention (1920)*, Geneva, 1936.

International Labour Conference, 21st and 22nd sessions, Records of proceedings, Geneva, 1937.

International Labour Conference, 28th session, 1946

Maritime Preparatory Technical Conference, Copenhagen, Nov. 1945, Report I, *Wages; Hours of Work; Manning*, Montreal, 1945.

Maritime Preparatory Technical Conference, Copenhagen, Nov. 1945, Report II, *Leave*, Montreal, 1945.

Preparatory Technical Maritime Conference, Copenhagen, Nov. 1945, Report IV, *Food and Catering*, Montreal, 1945.

Preparatory Technical Maritime Conference, Copenhagen, Nov. 1945, Report V, *Recognition of Seafarers' Organisations*, Montreal, 1945.

Maritime Preparatory Technical Conference, Copenhagen, 1945, Report VI, *Social Insurance*, Montreal, 1945.

Maritime Preparatory Technical Conference, Copenhagen, Nov. 1945, Report VIII, *Entry, Training and Promotion of Seafarers*, Montreal, 1945.

International Labour Conference, 28th session, Seattle, 1946, Report II, *Social Security for Seafarers*, Montreal, 1946.

International Labour Conference, 28st session, Seattle, 1946, Report IV, *Food and Catering on Board Ship*, Montreal, 1946.

International Labour Conference, 28th session, Seattle, 1946, Report V, *Entry, Training and Promotion of Seafarers*, Montreal, 1946.

International Labour Conference, 28th session, Seattle, 1946, Report VI, *Holidays with Pay for Seafarers*, Montreal, 1946.

International Labour Conference, 28th session, Seattle, 1946, Report VII, *Continuous Employment for Seafarers*, Montreal, 1946.

International Labour Conference, 28th session, Seattle, 1946, Report VIII, *Recognition of Seafarers' Organisations*, Montreal, 1946.

International Labour Conference, 28th session, Seattle, 1946, Report IX, *Wages; Hours; Manning*, Montreal, 1946.

International Labour Conference, 28th session, Seattle, Records of proceedings, Montreal, 1946.

International Labour Conference, 32nd session, 1949

International Labour Conference, 32nd session, 1949, Report XII, *Partial Revision of Four Conventions adopted by the 28th (Maritime) Session of the Conference, Seattle, 1946*, Geneva, 1949.

International Labour Conference, 32nd session, Records of proceedings, Geneva, 1951, pp. 86-92, 654-678, 690-744.

International Labour Conference, 41st session, 1958

Preparatory Technical Maritime Conference, London, Autumn 1956, Report I/1, *General Revision of the Wages, Hours of Work and Manning (Sea) Convention (Revised) No. 93*, Geneva, 1956.

Preparatory Technical Maritime Conference, London, Autumn 1956, Report I/2, (a) *Conditions of Seafarers in Small Ships*, (b) *Changes in Hours of Work on Board Ship since 1946*, Geneva, 1956.

Preparatory Technical Maritime Conference, London, Autumn 1956, Report I/3, *Reports of the Committee on Wages, Hours of Work and Manning*, Geneva, 1956.

Preparatory Technical Maritime Conference, London, Autumn 1956, Report II/1, *Engagement of Seafarers through Regularly Established Offices*, Geneva, 1956.

Preparatory Technical Maritime Conference, London, Autumn 1956, Report III/1, *Flag Transfer in Relation to Social Conditions and Safety*, Geneva, 1956.

Preparatory Technical Maritime Conference, London, Autumn 1956, Report V/1, *Jurisdiction over the Suspension of Officers' Certificates of Competency*, Geneva, 1956.

Preparatory Technical Maritime Conference, London, Autumn 1956, Report VI/1, *Reciprocal or International Recognition of Seafarers' National Identity Cards*, Geneva, 1956.

International Labour Conference, 41st session, 1958, Report II, *General Revision of the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93)*, Geneva, 1957.

International Labour Conference, 41st session, 1958, Report III, *Engagement of Seafarers through Regularly Established Offices*, Geneva, 1957.

International Labour Conference, 41st session, 1958, Report IV, *Flag Transfer in Relation to Social Conditions and Safety*, Geneva, 1957.

International Labour Conference, 41st session, 1958, Report VI, *Jurisdiction over the Suspension of Officers' Certificates of Competency*, Geneva, 1957.

International Labour Conference, 41st session, 1958, Report VII, *Reciprocal or International Recognition of Seafarers' National Identity Cards*, Geneva, 1958.

International Labour Conference, 41st session, Records of proceedings, Geneva, 1959.

International Labour Conference, 54th session, 1970

International Labour Conference, 54th session, 1970, Report IV (1), *Holidays with Pay*, Geneva, 1969, pp. 45-46.

ILO Conference, 54th session, 1970, Report IV (2), *Holidays with Pay*, Geneva, 1970, pp. 9-15.

International Labour Conference, 54th session, Records of proceedings, Geneva, 1970, pp. 471-482, 611-614, 625-633, 733.

International Labour Conference, 55th session, 1970

Preparatory Technical Maritime Conference, Genoa, September 1969, Report II, *Recommendation 109 concerning Wages, Hours of Work on Board Ship and Manning, Paragraph 2: Revision of the Minimum Basic Wage for Able Seamen*, Geneva, 1969.

Preparatory Technical Maritime Conference, Genoa, September 1969, Report III, *Employment Problems Arising from Technical Developments and Modernisation on Board Ship*, Geneva, 1969.

Preparatory Technical Maritime Conference, Genoa, September 1969, Report IV, *Accident Prevention on Board Ship at Sea and in Port*, Geneva, 1969.

Preparatory Technical Maritime Conference, Genoa, September 1969, Report V, *Vocational training of Seafarers*, Geneva, 1969.

Preparatory Technical Maritime Conference, Genoa, September 1969, Report VI, *Seafarers' Welfare at Sea and in Port*, Geneva, 1969.

International Labour Conference, 55th session, 1970, Report III, *Recommendation No. 109, para. 2, Revision of the 1958 Wage Figures of £25 or US \$70 to Their Present Equivalent, Having Regard Solely to the Fall in the Value of Money since 1958*, Geneva, 1970.

International Labour Conference, 55th session, 1970, Report IV (1), *Employment problems arising from technical developments and modernisation on board ship*, Geneva, 1969.

International Labour Conference, 55th session, 1970, Report IV (2), *Employment problems arising from technical developments and modernisation on board ship*, Geneva, 1970.

International Labour Conference, 55th session, 1970, Report VI, *Vocational Training of Seafarers*, Geneva, 1970.

International Labour Conference, 55th session, Records of proceedings, Geneva, 1971.

International Labour Conference, 57th session, 1972

International Labour Conference, 57th session, Geneva, 1972, Summary of reports on two Recommendations, Report III (Part 2 B).

International Labour Conference, 57th Session, Geneva, 1972, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4C).

International Labour Conference, 62nd session, 1976

Preparatory Technical Maritime Conference, Report II, *Holidays with Pay for Seafarers*, Geneva, October 1975.

Preparatory Technical Maritime Conference, Geneva, October 1975, Report V, *Substandard Vessels, Particularly those Registered under Flags of Convenience*, Geneva, October 1975.

International Labour Conference, 62nd (Maritime) Session, Report II, *Holidays with Pay for Seafarers*, Geneva, 1976.

International Labour Conference, 62nd (Maritime) Session, Report III, *The Protection of Young Seafarers*, Geneva, 1976.

International Labour Conference, 62nd (Maritime) Session, Report IV, *Continuity of Employment of Seafarers*, Geneva, 1976.

International Labour Conference, 62nd (Maritime) session, 1976, Report V (1), *Substandard Vessels, Particularly Those Registered under Flags of Convenience*, Geneva, 1976.

International Labour Conference, 62nd (Maritime) session, 1976, Report V (2), *Substandard Vessels, Particularly Those Registered under Flags of Convenience*, Geneva, 1976.

International Labour Conference, 62nd session, Records of proceedings, Geneva, 1977.

International Labour Conference, Seventy Fourth Session, 1987

Preparatory Technical Maritime Conference, Report II, *Social security protection for seafarers including those serving in ships flying flags other than those of their own country*, Geneva, May 1986.

Preparatory Technical Maritime Conference, Report IV, *The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147); Mechanism for incorporating new Conventions in the appendix*, Geneva, May 1986.

Preparatory Technical Maritime Conference, Report V, *Revision of the Repatriation of Seamen Convention, 1926 (No. 23), and of the Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27)*, Geneva, May 1986.

International Labour Conference, 74th (Maritime) Session, 1987, Report III (1), *Social security protection for seafarers including those serving in ships flying flags other than those of their own country*, Geneva, 1987.

International Labour Conference, 74th (Maritime) Session, 1987, Report III (2), *Social security protection for seafarers including those serving in ships flying flags other than those of their own country*, Geneva, 1987.

International Labour Conference, Report V, *Revision of the Repatriation of Seamen Convention, 1926 (No. 23), and of the Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27)*, Geneva, 1987.

International Labour Conference, 74th session, Records of proceedings, Geneva, 1988.

Asian Maritime Conferences (see also *Official Bulletin*)

International Labour Organisation, Asian Maritime Conference, Nuwara Eliya, Ceylon, Report I, *Report of the Director-General*, Geneva 1953.

International Labour Organisation, Asian Maritime Conference, Nuwara Eliya, Ceylon, Second Item on the Agenda, Report II, *Methods of recruitment and engagement of Asian Seafarers*, Geneva 1953.

International Labour Organisation, Second Asian Maritime Conference, First item on the agenda, Report I, *Report of the Director General*, Tokyo, April 1965.

International Labour Organisation, Second Asian Maritime Conference, Second Item on the Agenda, Report II, *Vocational Training of Asian Seafarers*, Tokyo, April 1965.

International Labour Organisation, Second Asian Maritime Conference, Third item on the Agenda, Report III, *Wages, Hours of Work on Board Ship and Manning in Relation to Asian Seafarers*, Tokyo, April 1965.

B) JOINT MARITIME COMMISSION: REPORTS AND RECORDS OF PROCEEDINGS

1st Session, Geneva, 8-10 November 1920, Minutes.

2nd Session, Paris, 7-8 March 1922, Minutes.

3rd Session, London, December 1923, Minutes.

3rd Session, London, December 1923, *International Seamen's Code*, Report to the Commission.

4th Session, San Sebastian, September 1924, Minutes.

4th Session, San Sebastian, September 1924, Report to the Commission.

5th Session, Paris, 27-29 April 1925, Minutes.

5th Session, Paris, April 1925, Report to the Commission.

6th Session, Paris, 5-7 May 1926, Minutes.

6th Session, Paris, May 1926, Report to the Commission.

7th Session, Geneva, 20-22 January 1927, Minutes.

8th Session, Geneva, 23-26 March 1928, Minutes.

9th Session, Paris, 18-20 April 1929, in *O.B.*, Vol. XIV, pp. 46-57.

10th Session, Geneva, 4-6 December 1933, Minutes.

11th Session, Paris, March 1935, Minutes.

12nd Session, London, 26-30 June 1942, Minutes, in ILO *Studies and Reports*, Series P, No. 5.

13th Session, London, 8-12 January 1945; the minutes of the proceedings of the 17th session of the J.M.C. have not been published; for a summary of the proceedings, see *O.B.*, Vol. XXVII, pp. 79-81.

14th Session, Geneva, 2-5 December 1947, in *O.B.*, Vol. XXX, pp. 306-312, 323.

15th Session, Geneva, 8-11 December 1948, in *O.B.*, Vol. XXXI, pp. 194-200.

16th Session, Geneva, 22-24 May 1951, in *O.B.*, Vol. XXXIV, pp. 138-140, 145-6.

17th Session, Geneva, 13-15 May 1952; the minutes of the proceedings of the 17th session of the J.M.C. have not been published; for a summary of the proceedings, see 119 *G.B.*, pp. 79-82.

18th Session, 24-28 Oct. 1955; for a summary of the proceedings, see 130 *G.B.*, Appendix X, pp. 123-128.

18th Session, Oct. 1955, *Report of the Director General*, JMC/18/1/1.

18th Session, Oct. 1955, *Proposed maritime session of the International Labour Conference and proposed Preparatory Technical Maritime Conference*, JMC/18/2/1.

- 18th Session, Oct. 1955, *Possible revision of the wages, hours of work and manning (sea) Convention (revised) no. 93*, JMC/18/3/1.
- 18th Session, Oct. 1955, *Conditions of seafarers in smaller ships, 2nd Report*, JMC/18/3/3.
- 18th Session, Oct. 1955, *Flag Transfer*, JMC/18/4/1.
- 18th Session, Oct. 1955, *Possible revision of Convention No. 9 concerning facilities for finding employment for seamen, 1920*, JMC/18/6/1.
- 18th Session, Oct. 1955, Seventh Item on the Agenda, *Refugee Seafarers*, JMC/18/7/1.
- 19th Session, Geneva, 25 Sep.- 5 Oct. 1961, in *O.B.*, Vol. XLV, pp. 39-41, 69-74.
- 19th Session, Geneva, 25 Sep.- 5 Oct. 1961, *Report of the Director-General*, JMC/19/1.
- 19th Session, Geneva, 25 Sep.- 5 Oct. 1961, *Manning of ships*, JMC/19/2.
- 19th Session, Geneva, 25 Sep.- 5 Oct. 1961, *Report on the proceedings*, JMC/19/4.
- 20th Session, Geneva, 25 Sep.- 6 Oct. 1967, *Labour Problems Arising from Technological Developments and Changes in the Organisation of Work on Board Ship*, JMC/20/2.
- 20th Session, Geneva, 25 Sep.- 6 Oct. 1967, *Conditions of Asian Seafarers*, JMC/20/4.
- 20th Session, Geneva, 25 Sep.- 6 Oct. 1967, *Vocational Training of Seafarers - Analysis of National Training Programmes*, JMC/20/3/1.
- 20th Session, Geneva, 25 Sep.- 6 Oct. 1967, *Monographs of Seafarers' Vocational Training Programmes in Various Countries*, JMC/20/3/2, Geneva, 1967.
- 20th Session, Geneva, 25 Sep.- 6 Oct. 1967, in *O.B.*, Vol. LI, 1968, No. 1, pp. 86-109.
- 21st Session, Geneva, 20 November-1 December 1972, in *O.B.*, Vol. LVI, 1973, Nos. 2, 3 and 4, pp. 129-147.
- 21st Session, Geneva, Nov-Dec 1972, *Holidays with Pay for Seafarers*, JMC/21/2.
- 21st Session, Geneva, Nov-Dec 1972, *Flags of Convenience*, JMC/21/4.
- 21st Session, Geneva, Nov.-Dec. 1972, *The Minimum Basic Wage of Able Seamen*, JMC/21/5.
- 21st Session, Geneva, Nov.-Dec. 1972, *Supplementary information on: 1 Holidays with pay for seafarers, 2. Protection of young seafarers, 3) Continuity of employment of seafarers, 4. Flags of Convenience*, JMC/21/7.
- 21st Session, Geneva, Nov-Dec 1972, *Joint Maritime Commission Report*, JMC/21/8.
- 22nd Session, Geneva, Oct. 1976, *The Minimum Basic Wage of Able Seamen*, JMC/22/1.
- 23rd session, Geneva, 16-24 Oct. 1980, *Joint Maritime Commission Report*, JMC/23/D. 20.
- 23rd session, Geneva, Oct. 1980, *Social security and employment conditions of seafarers serving in flag-of-convenience vessels*, JMC/23/1.
- 23rd session, Geneva, Oct. 1980, *Employment conditions of seafarers serving in ships flying flags other than those of their own country*, JMC/23/2.
- 23rd Session, Geneva, Oct. 1980, *The Consideration of an International Seafarers' Code and of Model Legislation Concerning Seafarers*, JMC/23/3 (a) and (b).

- 23rd Session, Geneva, Oct. 1980, *The Minimum Basic Wage of Able Seamen*, JMC/23/4.
- 24th Session, Geneva, Sep. 1984, *Social security and employment conditions of seafarers serving in ships flying flags other than those of their own country (including flags of convenience)*, JMC/24/1.
- 24th Session, Geneva, Sep. 1984, *Medical care on board ships*, JMC/24/2.
- 24th Session, Geneva, Sep. 1984, *Review of the application and scope of the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*, JMC/24/3.
- 24th Session, Geneva, Sep. 1984, *Wages, Hours of Work and Manning (Sea) Recommendation, 1958 (No. 109), Updating of Minimum Basic Wage of Able Seamen, Review and Possible Revision*, JMC/24/4.
- 24th Session, Geneva, Sep. 1984, *Revision of the Placing of Seamen Convention, 1920 (No. 9)*, JMC/24/5.
- 24th Session, Geneva, Sep. 1984, *Revision of the Repatriation of Seamen Convention, 1926 (No. 23); and of the Repatriation (Ships Masters and Apprentices) Recommendation, 1926 (No. 27)*, JMC/24/6.
- 25th Session, Geneva, 6 Oct. 1987, *Resolutions Adopted, O.B.*, Vol. LXXI, 1988, Series A, No. 3, pp. 160-161.
- Joint Maritime Commission, 25th Session, Geneva, October 1987, *Wages, Hours of Work and Manning (Sea) Recommendation, 1958 (No. 109), Paragraph 2: Minimum basic wage of able seamen: (a) updating of wage figure; (b) preliminary discussion on possible alternative formula for revising wage figure*, JMC/25/1.
- Joint Maritime Commission, 25th Session, Geneva, October 1987, *Identification of any possible new Conventions to be added by a protocol to the Appendix to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*, JMC/25/2.
- 25th Session, Geneva, Oct. 1987, JMC/25/3.

C) ILO PERIODICALS

Industrial and Labour Information

- Vol. 1, 17 Mar. 1922, *Joint Maritime Commission*, 2nd session, pp. 590-592.
- Vol. 12, 13 Oct. 1924, *Meeting of the Joint Maritime Commission*, 4th session, pp. 590-592.
- Vol. 14, 4 May 1925, *Joint Maritime Commission meeting*, 5th session, p. 138.
- Vol. 18, 17 May 1926, *Joint Maritime Commission*, 6th session, pp. 232-233.
- Vol. 18, 17 May 1926, *Maritime affairs. The 9th session of the Conference*, pp. 258-266.
- Vol. 18, 14-28 June 1926, *The International Labour Conference, 9th session*, pp. 453-461, 471-484, 505-536.
- Vol. 21, 31 Jan. 1927, *Joint Maritime Commission meeting*, 7th session, pp. 139-141.
- Vol. 25, 9 April 1928, *Joint Maritime Commission*, 8th session, pp. 26, 35-37, 412-413.

Vol. 30, May 1929, *Joint Maritime Commission*, 9th session, pp. 136-139, 159-160.

Vol. 49, 22 Jan. 1934, *Joint Maritime Commission*, 10th session, pp. 98-102.

Vol. 54, 1 April 1935, *Joint Maritime Commission*, 11th session, pp. 5-6.

International Labour Review

Vol. I, no. 1, Jan. 1921, *The First Year of the International Labour Organisation*, pp. 23-40.

Vol. V, no. 1, Feb. 1922, *Hours of Labour in the Mercantile Marine*, pp. 321-328.

Vol. XIV, no. 4, Oct. 1926, *The Ninth Session of the International Labour Conference*, pp. 508-551.

Vol. XXI, no. 1, Jan. 1930, *The Thirteenth Session of the International Labour Conference*, pp. 1-44.

Vol. XXXV, nos. 1 and 2, Jan. and Feb. 1937, *The Twenty-first and Twenty-second (Maritime) Sessions of the International Labour Conference*, pp. 3-30, 141-176.

Vol. XLVI, no. 2, Aug. 1942, Twelfth Session of the Joint Maritime Commission, pp. 166-173.

Vol. LI, no. 2, June 1945, Thirteenth Session of the Joint Maritime Commission, pp. 754-758.

Vol. LIV, nos. 1 and 2, Jul.-Aug. 1946, *The Twenty-Eighth (Maritime) Session of the International Labour Conference*, p. 1-28.

Vol. LXII, no. 5, Nov. 1950, *The Joint Maritime Commission and the Maritime Work of the ILO*, pp. 337-363.

Vol. LXXVIII, no. 5, Nov. 1958, *Seven Maritime Sessions of the International Labour Conference*, pp. 429-460.

Vol. 103, no. 3, March 1971, The 55th (Maritime) Session of the International Labour Conference, October 1970, pp. 211-226.

Vol. 115, no. 2, March-April 1977, *The 62nd (Maritime) Session of the International Labour Conference, October 1976*, pp. 145-156.

Vol. 127, no. 2, 1988/2, *The 74th (Maritime) Session of the International Labour Conference, September-October 1987*, pp. 173-189.

Official Bulletin, 1920-1989

O.B., Vol. I, April 1919-August 1920, The Commission on International Labour Legislation, pp. 1-259; Report presented to the Preliminary Peace Conference by the Commission on International Labour Legislation, pp. 260-283; The Proceedings at the Preliminary Peace Conference, pp. 284-308; The Organising Committee of the First Session of the International Labour Conference (Washington, 1919), pp. 349-407; Preparation of the Second Session of the International Labour Conference (Genoa, 1920), pp. 516-546; The Second Session of the International Labour Conference (Genoa, 1920), pp. 547-567.

O.B., Vol. II, Sep.-Dec. 1920, No. 11, First Session of the Joint Maritime Commission, pp. 1-7.

O.B., Vol. II, Jan.-Jun. 1921, Genoa decisions, Czechoslovakia: No action at present, p. 83; Genoa Conventions, Canada: Considered to fall within Federal Authority, p. 698; Genoa Conventions, Switzerland: Proposed non-adhesion, p. 725; Interpretation of the Decisions of the International Labour Conference, Recommendation concerning the Limitation of Hours of in the Fishing Industry, pp. 529-532, Draft Convention for establishing facilities for finding employment for seamen, pp. 624-627.

O.B., Vol. IV, Jul.-Dec. 1921, Compulsory Medical Examination of Children and Young Persons Employed at Sea, pp. 295-6, 325-7, 510-512; Minimum Age for Admission of Yound Persons to Employment as Trimmers and Stokers, pp. 295-6, 423-4, 507-509.

O.B., Vol. V, Jan.-June. 1922, Second Session of the Joint Maritime Commission, pp. 186-192; India: Genoa Decisions, pp. 5-20, 125, 208-214, 351-2.

O.B., Vol. VI, Jul.-Dec. 1922, Canada: Conventions Nos. 15 and 16: Transmitted to Provincial Governments; respective competence of Dominion and Provincial Legislatures, p. 289; Norway: Convention No. 8, Consideration by Judicial Committee, p. 209.

O.B., Vol. VII, Jan.-Jul. 1923, South Africa: Attitude to Genoa and Geneva decisions, pp. 50-52, 104-5; Austria: Attitude to Draft Conventions and Recommendations (Genoa), pp. 183-187; Meeting of the Sub-Committee on Deck Cargoes (JMC), pp. 211-2; Norway: Geneva decisions, pp. 279-80.

O.B., Vol. VIII, Jul.-Dec. 1923, Spain: Attitude to Genoa decisions, pp. 53-55.

O.B., Vol. IX, Jan.-Dec. 1924, Spain: Record of the Third Session of the Joint Maritime Commission, pp. 14-18, 40-42; Fourth Session of the Joint Maritime Commission, pp. 240-8.

O.B., Vol. X, Jan.-Dec. 1925, Second Meeting of the Sub-Committee on Deck Cargoes, pp. 7-8; Fifth Session of the Joint Maritime Commission, pp. 68-70; Ninth Session of the International Labour Conference: Questionnaires on the First and Second Items on the Agenda, pp. 126-134; Letter from the Shipowners' Group of the JMC to the Director of the International Labour Office, pp. 135-141.

O.B., Vol. XI, Jan.-Dec. 1926, Ninth Session of the International Labour Conference, pp. 68-77; Sixth Session of the Joint Maritime Commission, pp. 85-88; Draft Conventions and Recommendations adopted by the Ninth Session of the International Labour Conference, pp. 144-161.

O.B., Vol. XII, Jan.-Dec. 1927, Seventh Session of the Joint Maritime Commission, pp. 17-22, 83-86.

O.B., Vol. XIII, Jan.-Dec. 1928, Interpretation of the Decisions of the International Labour Conference, IV. Draft Convention concerning seamen's articles of agreement, pp. 26-28; Canada: Conventions and Recommendations adopted by the 8th and 9th (1926) Sessions, pp. 34-38; Eighth Session of the Joint Maritime Commission, pp. 61-2, 63-68; Interpretation of the Decisions of the

International Labour Conference, I. Convention fixing the minimum age for admission of children to employment at sea, pp. 69-73.

O.B., Vol. XIV, Jan.-Dec. 1929, Ninth Session of the Joint Maritime Commission, pp. 46-57.

O.B., Vol. XV, Jan.-Dec. 1930, 50th Session of the Governing Body, Preparatory Technical Maritime Conference, pp. 143-4.

O.B., Vol. XVI, Jan.-Dec. 1931, Maritime Questions on the Agenda of the International Labour Conference, pp. 5-20.

O.B., Vol. XIX, Jan.-Dec. 1934, Tenth Session of the Joint Maritime Commission, pp. 9-12.

O.B., Vol. XX, Jan.-Dec. 1935, Report of the Joint Maritime Commission, p. 32.

O.B., Vol. XXI, Jan.-Dec. 1936, 21st and 22nd Sessions of the International Labour Conference, pp. 72-76; Draft Conventions and Recommendations adopted by the 21st and 22nd Sessions of the ILO Conference, pp. 179-214, 219-221.

O.B., Vol. XXII, Jan.-Dec. 1937, Recommendations (No. 48) concerning the promotion of seamen's welfare in ports and (No. 49) concerning hours of work on board ship and manning, pp. 197-9.

O.B., Vol. XXIII, Jan.-Dec. 1938, Interpretation of the Decisions of the International Labour Conference, Hours of Work and Manning (Sea) Convention, 1936, pp. 30-3; Official Action on the Decisions of the International Labour Conference, United States of America, pp. 128-136.

O.B., Vol. XXV, 1940-1944, 12th session of the Joint Maritime Commission, pp. 168-172, 186-190; 26th session of the ILO Conference: Extract from the Report of the Director of the ILO Office to the Conference, pp. 219-220; Interpretation of the Decisions of the International Labour Conference: I. Convention (No. 16) concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea (1921), pp. 268-9.

O.B., Vol. XXIX, 1946, 99th Session of the Governing Body of the ILO Office, pp. 419-20; Conventions and Recommendations adopted by the International Labour Conference at its 28th Session, pp. 115-194; Resolutions adopted by the International Labour Conference at its 28th session, pp. 195-202, 444-454; Maritime Preparatory Technical Conference, pp. 439-441; Interpretation of the Decisions of the International Labour Conference: Convention (No. 72) concerning Vacation Holidays with Pay for Seafarers (1946), pp. 493-8.

O.B., Vol. XXX, 1947, 14th Session of the Joint Maritime Commission, pp. 306-312, 323.

O.B., Vol. XXXI, 1948, 15th Session of the Joint Maritime Commission and Meeting of Its Tripartite Subcommittee, pp. 194-200.

O.B., Vol. XXXII, 1949, Conventions and Recommendations adopted by the International Labour Conference at its 32nd Session (Geneva, 1949), pp. 85-121.

O.B., Vol. XXXIII, 1950, Conferences concerning Rhine Boatmen, pp. 91-124; Interpretation of Decisions of the International Labour Conference: Shipowners' Liability (Sick and Injured Seamen)

Convention, 1936 (No. 55), Sickness Insurance (Sea) Convention, 1936 (No. 56), Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91), pp. 305-309.

O.B., Vol. XXXIV, 1951, Sixteenth Session of the Joint Maritime Commission, pp. 138-140, 145-6; International Court of Justice: Information Furnished by the International Labour Office in Pursuance of Art. 34 of the Statute of the Court; Memorandum by the International Labour Office on the Practice of Reservations to Multilateral Conventions, pp. 274-312.

O.B., Vol. XXXV, 1952, Seventeenth Session of the Joint Maritime Commission, pp. 276-7, 291-2; Ratification of the Agreements concerning Rhine Boatmen, pp. 355-7.

O.B., Vol. XXXVI, 1953, Asian Maritime Conference of the International Labour Organisation (Nuwara Eliya, Ceylon, October 1953), pp. 100-105.

O.B., Vol. XXXVII, 1954, Special Tripartite Conference concerning Rhine Boatmen, Second Session, Geneva, 18-22 January 1954, pp. 21-28.

O.B., Vol. XXXVIII, 1955, Eighteenth Session of the Joint Maritime Commission, pp. 322-323; Interpretation of the Decisions of the International Labour Conference: Seamen's Articles of Agreement, 1926 (No. 22) and Medical Examination (Seafarers) Convention, 1946 (No. 73), pp. 374-377.

O.B., Vol., XL, 1957, Interpretation of the Decisions of the International Labour Conference: Social Security (Seafarers) Convention, 1946 (No. 70), pp. 477-480.

O.B., Vol., XLI, 1958, Conventions, Recommendations and Resolutions Adopted by the International Labour Conference at Its 41st Session and Composition of the Joint Maritime Commission, pp. 1-38; Reports of the Governing Body Committee on Freedom of Associations, Case No. 166: Complaint Presented by the Federation of Greek Maritime Unions (Cardiff) against the Government of Greece, pp. 113-116; Agreement concerning Liaison between the ILO and the EEC, pp. 565-7; Interpretation of the Decisions of the International Labour Conference: Seamen's Articles of Agreement Convention, 1926 (No. 22), pp. 596-598.

O.B., Vol., XLIII, 1960, Case No. 173: Complaint Presented by the Federation of Greek Maritime Unions (Cardiff) against the Governments of the United States and Greece, pp. 89-93; Interpretation of the Decisions of the International Labour Conference: Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109) (Articles 13, 14 and 15), pp. 569-574.

O.B., Vol., XLIV, 1961, Final Act and Agreement Adopted by the Governmental Conference on the Revision of the Agreement of 27 July 1950 concerning the Social Security of Rhine Boatmen (Geneva, 13 February 1961), pp. 371-401.

O.B., Vol., XLV, 1962, No. 1, Report on the 19th Session of the Joint Maritime Commission, pp. 14-17; 19th Session of the Joint Maritime Commission, pp. 39-41; Resolutions Adopted by the 19th Session of the Joint Maritime Commission, pp. 69-74.

O.B., Vol., XLVI, 1963, No. 1, Supplement, Case No. 194: Complaint Presented by the World Federation of Trade Unions and the Malayan National Seamen's Union against the Government of the United Kingdom in Respect of Singapore, pp. 67-70; No. 2, Supplement II, Special Tripartite Conference concerning Rhine Boatmen, pp. 341-4; Instrument for the Amendment of the Agreement concerning the Conditions of Employment of Rhine Boatmen, pp. 462-5; Interpretation of Decisions of the International Labour Conference: Seafarers' Identity Documents Convention, 1958 (No. 108), pp. 466-7; No. 3, Supplement II, Case No. 194: Complaint Presented by the World Federation of Trade Unions and the Malayan National Seamen's Union against the Government of the United Kingdom in Respect of Singapore, pp. 39-44.

O.B., Vol., XLVIII, 1965, No. 3, Second Asian Maritime Conference (Tokyo, 21-30 April 1965), pp. 264-291.

O.B., Vol., XLIX, 1966, No. 3, Case No. 194: Complaint Presented by the World Federation of Trade Unions and Malayan National Seamen's Union against the Government of Singapore, pp. 43-48; No. 4, Conditional Ratification of the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109), p. 409.

O.B., Vol., L, 1967, No. 2, Supplement Case No. 194: Complaint Presented by the World Federation of Trade Unions and Malayan National Seamen's Union against the Government of Singapore, pp. 38-40.

O.B., Vol., LI, 1968, No. 1, Joint Maritime Commission (20th Session, Geneva, 25 September-6 October 1967, pp. 86-109; No. 1, Supplement, Case No. 194: Complaint Presented by the World Federation of Trade Unions and Malayan National Seamen's Union against the Government of Singapore, pp. 33-34.

O.B., Vol., LII, 1969, No. 2, Comparative Analysis of the International Covenants on Human Rights and International Labour Conventions and Recommendations, pp. 181-216.

O.B., Vol., LIII, 1970, No. 1, Preparatory Technical Maritime Conference (Genoa, 15-26 September 1969), pp. 32-33, 58-59.

O.B., Vol., LIV, 1971, No. 1, 55th (Maritime) Session of the International Labour Conference (Geneva, 14-30 October 1970); Conventions and Recommendations, Resolutions and Additional Texts adopted by the ILO Conference at Its 55th (Maritime) Session, pp. 1-47.

O.B., Vol., LV, 1972, Nos. 2, 3 and 4, Interpretation of Decisions of the International Labour Conference: Equality of Treatment (Social Security) Convention, 1962 (No. 118), Medical Care and Sickness Benefits Convention, 1969 (No. 130), pp. 150-153.

O.B., Vol., LVI, 1973, Nos. 2, 3 and 4, Joint Maritime Commission (21st Session, Geneva, 20 November-1 December 1972): Report and Resolutions Adopted, pp. 129-147.

O.B., Vol., LVII, 1974, Nos. 2, 3 and 4, Interpretation of Decisions of the International Labour Conference: Prevention of Accidents (Seafarers) Convention, 1970 (No. 134), pp. 208-214.

- O.B., Vol., LVIII*, 1975, Series A, No. 3, Understanding between the Director-General of the International Labour Office and the Secretary-General of the Inter-Governmental Maritime Consultative Organisation concerning the Terms of Reference, Responsibilities and Working Arrangements of the Joint IMCO-ILO Committee on Training (London, 22 May 1974), pp. 254-5.
- O.B., Vol., LIX*, 1976, Series A, No. 1, Understanding between the Director-General of the International Labour Office and the Secretary-General of the Inter-Governmental Maritime Consultative Organisation concerning the Convening of a Conference(s) on Maritime Training, Qualifications or Certification of Mariners, p. 31; Resolutions Adopted by the Preparatory Technical Maritime Conference (Geneva, 13-24 October 1975), pp. 61-62.
- O.B., Vol., LX*, 1977, Series A, No. 1, 62nd (Maritime) Session of the International Labour Conference (Geneva, 13-29 October 1976); Conventions and Recommendations and Resolutions adopted by the ILO Conference at Its 62nd (Maritime) Session, pp. 1-37.
- O.B., Vol., LXI*, 1978, Series B, No. 1, Case No. 877: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 16-20.
- O.B., Vol. LXII*, 1979, Series A, Final Report of the Working Party on International Labour Standards, pp. 1-30.
- O.B., Vol. LXIII*, 1980, Series B, No. 2, Case No. 947: Complaint presented by the Pan-Hellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 56-58.
- O.B., Vol. LXIV*, 1981, Series A, No. 1, Final Act of the Government Conference for the Revision of the Agreement of 13 February 1961 concerning the Social Security of Rhine Boatmen and Agreement concerning the Social Security of Rhine Boatmen (Revised), Adopted by the Governmental Conference Responsible for Revising the Agreement of 13 February 1961 concerning the Social Security of Rhine Boatmen (Revised) (Geneva, 30 November 1979), pp. 38-80; Series A, No. 3, Joint Maritime Commission (23rd Session, Geneva, 16-24 October 1980): Resolutions Adopted, pp. 205-9; Series B, No. 2, Case No. 998: Complaint presented by the Greek Pursers' Union - Piraeus against the Government of Greece, pp. 11-12; Case No. 1008: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 32-35; Series B, No. 3, Case No. 1057: Complaint submitted by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 41-43.
- O.B., Vol. LXV*, 1982, Series A, No. 3, Interpretation of Instruments Adopted by the Conference: Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), pp. 129-132; Series B, No. 1, Case No. 1068: Complaints presented by the World Federation of Trade Unions, the Trade Unions International of Transport Workers and the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 84-87.
- O.B., Vol. LXVI*, 1983, Series A, No. 3, Interpretation of Instruments Adopted by the Conference: Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), pp. 144-145; Series B, No.

2, Case No. 1167: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 16-18.

O.B., Vol. LXVII, 1984, Series B, No. 1, Case No. 1213: Complaint presented by the Panhellenic Union of Merchant Marine Engineers against the Government of Greece, pp. 187-192; Case No. 1213, Series B, No. 3, pp. 11-14.

O.B., Vol. LXVIII, 1985, Series A, No. 1, Joint Maritime Commission (24th Session, Geneva, 20-28 September 1984): Resolutions Adopted, pp. 31-38.

O.B., Vol. LXIX, 1986, Series B, No. 3, Case No. 1357: Complaint presented by the Panhellenic Union of Merchant Marine Engineers, the Panhellenic Union of Merchant Seamen and the Panhellenic Union of Certified Third-Degree Engineers and Stefenson Pumpmen against the Government of Greece, pp. 10-14.

O.B., Vol. LXX, 1987, Series A, Report of the Working Party on International Labour Standards, pp. 1-57; Series A, No. 3, Conventions, Recommendations and Resolutions Adopted by the International Labour Conference at Its 74th (Maritime) Session (Geneva, September-October 1987), pp. 99-140.

O.B., Vol. LXXI, 1988, Series A, No. 3, Joint Maritime Commission (25th Session, Geneva, 6 October 1987): Resolutions Adopted, pp. 160-161; Series B, No. 1, Case No. 1418: Complaint against the Government of Denmark presented by the Danish Seamen's Union, pp. 47-55; Series B, No. 3, Case No. 1410: Complaint against the Government of Liberia presented by the National Seamen, Ports and General Workers' Union of Liberia, pp. 34-39; Case No. 1432: Complaints against the Government of Peru presented by the Trade Union of Seamen Employed by the Peruvian Steamship Company (CPV) and the Trade Union of Shoreworkers Employed by the CPV, pp. 299-304.

O.B., Vol. LXXI, 1988, Series A, No. 1, Committee on Conditions of Work in the Fishing Industry (Geneva, 4-13 May 1988), pp. 33-41; Series B, No. 1, Case No. 1470: Complaints against the Government of Denmark presented by the Danish federation of Trade Unions, the Danish Seamen's Union and several other Danish trade union federations, pp. 10-23.

Social and Labour Bulletin

4/1975, Spain: *Amendments to the Ordinance respecting employment in the merchant marine*, pp. 397-398.

3/1977, France: *Increased protection for dismissed seamen*, pp. 253-254.

1/1980, Poland: *New regulations concerning sailors' safety and health*, pp. 91-92.

2/1981, Greece: *Shipowners authorised to recruit more foreign seamen*, p. 198.

4/1981, Chile: *Deregulating the employment system of seafarers and port workers*, pp. 401-402.

4/1981, Nordic Countries: *Nordic Social Security Convention*, pp. 485-486.

4/1982, Europe: *Maritime conference agrees to strengthen state control of the safety of merchant ships*, pp. 112-114.

1/1985, Sweden: *Panamanian flag exempts Swedish-owned ship from agreement*, pp. 80-82.

4/87, Israel: *Supreme Court creates precedent by ordering strikers to reimburse third party*, pp. 565-567; *ITU decision seen by ITF as major victory for maritime safety*, p. 649; *Improved social security measures for Rhine Boatmen*, pp. 660-661.

4/88, Philippines: *Breakthrough in social security cover for emigrants and seafarers*, pp. 499-500.

Studies and Reports

International Labour Office, Studies and Reports, Series P (Seamen), No. 1, *Collection of laws and regulations on the engagement, dismissal, repatriation and discipline of seamen*, Geneva, 1926.

International Labour Office, Studies and Reports, Series P (Seamen) No. 3, *Hours of Work on Board Ship, Collection of Laws, Regulations and Collective Agreements*, Geneva, 1929.

International Labour Office, Studies and Reports, Series N (Statistics) No. 21, *Maritime Statistical Handbook*, Geneva, 1936.

International Labour Office, Studies and Reports, Series P (Seamen) No. 5, *Merchant Seamen and the War*, Montreal, 1943.

International Labour Office, Studies and Reports, M 19, *Social Security for Seafarers*, 1945.

International Labour Office, *Conditions in ships flying the Panama flag, Report of the Committee of Enquiry of the International Labour Organisation*, Studies and Reports, New Series, No. 22, Geneva 1950.

International Labour Office, *Minimum wage fixing and economic development*, Studies and Reports, New Series, No. 72, Geneva 1968.

D) OTHER ILO PUBLICATIONS

The Treaty of Peace, HMSO, London 1919.

The International Seamen's Code, ILO, Geneva, 1921.

Enquiry concerning the Application of the Eight-Hour Act in the French Mercantile Marine, ILO, Geneva, 1921.

The International Labour Organisation, The First Decade, ILO, Geneva, 1931.

Third Report of the International Labour Organisation to the United Nations, ILO, Geneva, 1949,
Proposed Agreement Between the International Labour Organisation and the Intergovernmental Maritime Consultative Organisation, pp. 188-192.

The International Labour Code 1951, Vol. I: Code, Vol. II: Appendices, ILO, Geneva, 1952.

Seventh report of the International Labour Organisation to the United Nations, ILO, Geneva, 1953.

The role of medical inspection of labour, ILO, Geneva, 1968.

ILO, United Nations Development Programme, *ILO Inter-regional Seminar on Maritime Training*, Singapore, 23 April to 6 May 1970, UNDP/TA 01-3-C-8-2.

Labour inspection ; purposes and practice, ILO, Geneva, 1973.

The Impact of International Labour Conventions and Recommendations, ILO, Geneva, 1976.

International Labour Conventions and Recommendations, 1919-1981, ILO, Geneva, 1982.

Wages, A Workers' Education Manual, Third edition, ILO, Geneva, 1982.

Maritime Labour Conventions and Recommendations, ILO, Geneva, 1983.

Report on the ILO Seminar for senior government officials from Asian countries on maritime labour standards, Geneva, ILO, 1983.

Report on the ILO Seminar on Maritime Labour Standards for Central and West African Countries, Brazzaville, 26-30 November 1985, ILO, Geneva, 1986.

Report on the ILO Seminar on Maritime Labour Standards for East African Countries, Dar es Salaam, 27 January-3 February 1987, ILO, Geneva, 1987.

Report of the Director-General, 74 (Maritime) Session, ILO, Geneva, 1987.

The Constitution of the International Labour Organisation, ILO, Geneva, January 1988.

ILO, Meeting of Experts on Procedures for the Inspection of Labour Conditions on Board Ships, Geneva, October 1989, *Draft guidelines for procedures for the inspection of labour conditions on board ships*, MEIBS/1989/1.

2. Other international documents and reports

Accident Prevention on board ship at sea and in port, 1978 (ILO's Code of practice following an ILO/IMO meeting of experts in 1977).

"THE DOCUMENT FOR GUIDANCE - 1970", An International Maritime Training Guide, Prepared Jointly by the ILO and IMCO, Geneva, 1971.

Document for guidance, An international maritime training guide, 1975, Geneva, 1976.

Document for guidance, An international maritime training guide, 1985, IMO, London, 1987.

European Communities, Economic and Social Committee of the European Communities, *EEC's Transport Problems with East European Countries*, Opinion, Brussels, 1977.

European Communities, Economic and Social Committee of the European Communities, *EEC Shipping Policy - Flags of Convenience*, Opinion, Brussels, 1979.

European Communities, *Bulletin of the European Communities*, Commission of the European Communities, "Progress towards a common transport policy", Maritime transport, Supplement 5/85.

FAO/ILO/IMO Code of Safety for Fishermen and Fishing Vessels, 1970.

ILO/IMO Guidelines for training in the packing of cargo in freight containers, London: IMCO, 1978.

ILO/IMO/WHO: Medical First-Aid Guide for Use in Accidents involving Dangerous Goods, 1975.

IMCO, International Conference on Safety of Life at Sea, 1960, Final Act of the Conference, IMCO, London, 1973 Reprinted.

IMCO, International Conference on Standards on Training, Certification and Watchkeeping for Seafarers, IMCO, 1978, Records of Proceedings, STW/CONF, STW/CONF/SR, 1978.

IMO, Supplement Relating to the Annex to the Convention on Facilitation of International Maritime Traffic, 1965, London, 1979 Edition.

IMO, Compendium of Maritime Training Facilities, London, 1980.

IMO, SOLAS Convention, 1974 as amended by the 1978 Protocol and the 1981 and 1983 Amendments, IMO, London.

IMO, Sub-Committee on Standards of Training and Watchkeeping, 19th session, 9-13 September 1985, Report to the Maritime Safety Committee, STW 18/11.

IMO, Sub-Committee on Standards of Training and Watchkeeping, 19th session, 9-13 September 1986, Report to the Maritime Safety Committee, STW 19/13.

IMO, Sub-Committee on Standards of Training and Watchkeeping, 19th session, 9-13 September 1986, Report to the Maritime Safety Committee, STW 19/13/Add. 1.

IMO, Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions, as at 31 December 1988.

- International Law Commission, Yearbook, 1955, 2 Vols.
- International Law Commission, Yearbook, 1956, 2 Vols.
- ISF, Guide to International Ship Registers, London, 1987.
- ITF, Conditions for Registration of Ships - The ITF Perspective.
- Joint ILO/IMO Committee, 1st session, 14-19 December 1964, Geneva, JCST/1/1964/1.
- Joint ILO/IMO Committee, 2nd session, 4-8 May 1970, Geneva, JSCT/2/1970/2.
- Joint ILO/IMO Committee, 3rd session, 2-6 July 1973, London.
- Joint ILO/IMO Committee, 4th session, 27-31 January 1975, Geneva, JSCT/4/1975/1,
- Joint ILO/IMO Committee, 5th session, 14 June-7 July 1978, London.
- Joint ILO/IMO Committee, 6th session, 16-20 March 1981, Geneva, JCT/6/1981/D. 8
- Joint ILO/IMO Committee, 7th session, 16-20 December 1985, London, JCT 7/5.
- OECC, Study on the Expansion of the Flags of Convenience Fleets and on various aspects thereof, 1958.
- OECD, Maritime Transport 1971, Paris 1972.
- Permanent Court of International Justice, Collection of Advisory Opinions, Series B, Nos. 2-3, August 12th, 1922, "Competence of the ILO with respect to agricultural labour", pp. 4-43.
- Permanent Court of International Justice, Advisory opinion of the PCIJ , Series B, No. 13, 1926, "Competence of the ILO to regulate, incidentally, the personal work of the employer".
- United Nations Conference on the Law of Treaties, 1968, Summary Records and Documents.
- United Nations Conference on Conditions for Registration of Ships, Report on the first part of its session held in Geneva from 16 July to 3 August 1984, TD/RS/CONF/10, 12 Oct. 1984.
- United Nations Conference on Conditions for Registration of Ships, Report on the third part of its session held in Geneva from 8-19 July 1985, TD/RS/CONF/19, 18 Oct. 1985.
- United Nations Conference on Conditions for Registration of Ships, Fourth Part, Geneva, 20 January 1986.
- United Nations Conference on Conditions for Registration of Ships, Report on the fourth part of its session held in Geneva from 20 January to 7 February 1986, TD/RS/CONF/24, 4 Nov. 1986.

3. Authors

- Ademuni-Odeke, *Shipping in International Trade Relations*, Aldershot: Gower, 1988.
- Agapitidis, S., *Contemporary trends in the protection of maritime employment*, Athens, 1940 (in Greek).
- Anonymous Comment, *Northwestern University Law Review*, May-June 1965, Vol. 60, No. 2, pp. 195-211.
- Anonymous comment entitled "Recommendation for Maritime Labor Relations Policies", *Monthly Labor Review*, Jan. 1966, pp. 19-21.
- Anonymous comment entitled "La formación profesional maritime en Brasil", *Cinterfor*, Boletín, 41, Julio-Agosto 1975, pp. 55-59.
- Anonymous comment entitled "Fits and starts in the campaign for safer ships", *Lloyd's Ship Manager*, January 1984, pp. 33- 34.
- Argiroffo, Enrico, "Recruitment of Seamen in Asia", *I.L.R.*, Vol. 95, No. 3, pp. 145-165.
- Argiroffo, Enrico, "Flags of Convenience and Substandard Vessels, A Review of the ILO's Approach to the Problem", *I.L.R.*, Vol. 110, No. 5, Nov. 1974, pp. 437-453.
- Ashburner, Walter, *The Rhodian Sea Law*, Oxford, 1909.
- Ayusawa, Iwao Frederick, *International Labor Legislation*, Columbia University, 1920.
- Bakr, M.A., "Maritime language: quest for simplicity", *Marit. Pol. Mgmt.*, 1978, 5, pp. 133-140.
- Berenstein, A., "The influence of international labour Conventions on Swiss legislation", *I.L.R.*, Vol. LXXVII, No. 6, June 1958, pp. 495-518.
- Bernard, Jacques, *Navires et gens de mer a Bordeaux (vers 1400-vers1550)*, Trois livres, Paris, 1968.
- Boczek, B.A., *Flags of Convenience*, An International Legal Study, 1962.
- Bonwick, G., *Automation on Shipboard*, London: Macmillan, 1967.
- Booth, Richard F. and Newman Katherine, "Social Status and Minority Recruit Performance in the Navy: Some Implications for Affirmative Action Programs", *Sociological Quarterly*: 18 (Autumn 1977), pp. 564-573.
- Boyer, A., *Les transports maritimes*, Paris, Presses Universitaires de France, 1973.
- Boyle, A., "Marine Pollution under the Law of the Sea Convention", 79 *AJIL* (1985), pp. 347-372.
- Branch, Alan E., *Elements of Shipping*, 5th edition, London, 1981.
- Branch, Alan E., *Economics of Shipping Practice and Management*, 2nd ed., London: Chapman and Hall, 1988.
- Brownlie I. (ed.), *Basic Documents in International Law* (3rd edition), Oxford, 1983.
- Brownlie, I., *Principles of Public International Law*, 4th edition, Clarendon Press, Oxford, 1990.

- Buck, P.B., "Technological Change and the Merchant Seaman", *I.L.R.*, Vol. 92, No. 4, Oct. 1965, pp. 298-313.
- Burke, William T., "Changes made in the rules of navigation and maritime trade by the 1982 Convention on the Law of the Sea", *The Developing Order of the Oceans*, 1985, pp. 662-677.
- Burroughs, R.H., "Offshore supply vessels: An emerging maritime industry", *Marit. Pol. Mgmt.*, 1984, Vol. 11, No. 4, pp. 269-276.
- Burwash, Dorothy, *English Merchant Shipping 1460-1540*, 1947.
- Cadwallader, F.J.J., "The U.K. Mariner's Contract", 9 *West. Aust. Law Rev.* (1969-70), pp. 269-283.
- Cafruny, Alan W., *Ruling the Waves*, The Political Economy of International Shipping, Berkeley: University of California Press, 1987.
- Carlisle, Rodney, *Sovereignty for Sale*, The Origins and Evolution of the Panamanian and Liberian Flags of Convenience, Annapolis, Md.: Naval Institute Press, 1981.
- Caron, D., "Ships, Nationality and Status", *Encyclopaedia of Public International Law*, Vol. 11, *Law of the Sea; Air and Space*, 1989, pp. 289-297.
- Chambers, Ian, "The applicability of international labour Conventions offshore: an approach", *I.L.R.*, Vol. 120, No. 4, Jul.-Aug. 1981, pp. 395-409.
- Charteris, A.H., "The Legal Position of Merchantmen in Foreign Ports and National Waters", *BYIL*, 1920-21, pp. 45-96.
- Chrzanowski, Ignacy, *An Introduction to Shipping Economics*, London: Fairplay, 1985.
- Clee, Charles R., "Desertion and the Freedom of the Seaman", *I.L.R.*, Vol. XIII, No. 5, May 1926, pp. 649-672; Vol. XIII, No. 6, June 1926, pp. 808-849.
- Collins, John J., *Never pay off*, The story of the independent tanker union, 1937-1962, Fordham University Press, 1964.
- Colombos, John C., *The International Law of the Sea*, 5th ed., Longmans, 1962.
- Creutz, Helmut, "The new Agreement on Social Security for Rhine Boatmen", *I.L.R.*, Vol. 120, No. 1, Jan.-Feb. 1981, pp. 83-96.
- Critto Adolfo, "Strategic factors in industrial relations in Argentine maritime transport", *Labour and Society*, Vol. 2, Jan. 1977, No. 1, pp. 37-52.
- Currie, David P., "Flags of Convenience, American Labor, and the Conflict of Laws", *The Supreme Court Review*, 1963, Vol. 34, pp. 34-100.
- Dagenais, Don F., "Foreign ships in American ports: The question of NLRB jurisdiction", *Cornell International Law Journal*, Vol. 9:50, 1975, pp. 50-81.
- Dahl, Karl Nandrup, "The influence of ILO standards on Norwegian legislation", *I.L.R.*, Vol. XC, No. 3, Sep. 1964, pp. 226-251.
- Dasgupta, C., *Selection and Training of Indian Crews in the British Merchant Navy: A Feasibility Study*, 1973 (Report based on M.Sc. thesis for the University of Wales).

- Dillon, Conley Hall, *International Labor Conventions: Their Interpretation and Revision*, The University of North Carolina Press, 1942.
- Dupuy, René-Jean and Vignes, Daniel (eds.), *Traité du Nouveau Droit de la Mer*, Paris, Brussels, 1985.
- Egiyan, G.S., "The principle of genuine link and the 1986 UN Convention on the Registration of Ships", *Mar. Pol.*, Vol. 12, Jul. 1988, pp. 314-321.
- Erez, Miriam, "Retraining of ratings for officer rank: biographical characteristics and motivational determinants of willingness to be retrained", *Marit. Pol. Mgmt.*, 1978, Vol. 5, pp. 307-313.
- Ewing Keith, "Union Action Against Flags of Convenience - The Legal Position in Great Britain", *JMLC*, Vol. 11, No. 4, pp. 503-508.
- Farrell, Sheila, "The use of flags of convenience by Latin American Shipping", *Marit. Pol. Mgmt.*, 1984, Vol. 11, No. 1, pp. 15-20.
- Farthing, Bruce, *International Shipping*, Lloyd's of London Press LTD, 1987.
- Flores Peralta, José Elpidio, "La formación profesional del personal subalterno de la marine mercante", *Boletin Tecnico*, Año 9, No. 23, 1975, pp. 43-50.
- Follows, John W., *Antecedents of the International Labour Organisation*, Oxford, 1951.
- Forsyth, Craig J., "Expansionism: new forms of old conflicts for US maritime labour unions", *Marit. Pol. Mgmt.*, 1988, Vol. 15, No. 4, pp. 279-282.
- Franklin, N.N., "The concept and measurement of 'minimum living standards'", *I.L.R.*, Vol. 95, No. 4, April 1967, pp. 271-298.
- Fricke, Peter H. (editor), *Seafarer and Community ; Towards a Social Understanding of Seafaring*, Cardiff, 1973.
- Fried, Egbert, *Rechtsvereinheitlichung im Internationalen Arbeitsrecht*, Frankfurt, 1965.
- Fuchs, John J.J., "Industrial relations in shipping: the Canadian experience", *Labour and Society*, Vol. 2, Jan. 1977, No. 1, pp. 3-22.
- Galenson, Walter, *The International Labour Organisation: An American View*, Madison: University of Wisconsin Press, 1981.
- Gamillscheg, Franz, *Internationales Arbeitsrecht*, Tübingen, 1959.
- Godwin Richard P., Hepburn William A., Carrico Paul E., "Safeguards for Crew Members of the Nuclear Ship "Savannah"", *I.L.R.*, Vol. LXXX, No. 3, Sept. 1959, pp. 236-250.
- Gold, Edgar, "International maritime law in transition, New challenges for education and training", *Mar. Pol.*, Vol. 13, Jul. 1989, pp. 178-192.
- Goldberg, Joseph P., "Seamen and modernisation of merchant shipping", *Monthly Labor Review*, Feb. 1971, pp. 49-54.
- Goldberg, Joseph P., "ILO tightens standards for maritime safety", *Monthly Labor Review*, July 1977, pp. 25-30.

- Goldie, L.F.E., "Recognition and Dual Nationality-A Problem of Flags of Convenience", *BYIL*, Vol. XXXIX, 1963, pp. 220-283.
- Goss, R.O., *Studies in Maritime Economics*, Cambridge University Press, 1968.
- Grahl-Madsen, Atle, *The Status of Refugees in International Law*, Leyden, Vol. I (1966), Vol. II, (1972).
- Green, Jim, *Against the tide*, The story of the Canadian Seamen's Union, Toronto, 1986.
- Grosjean, L., *La protection internationale des Marins*, Paris, 1933.
- Guerreau, M., "L' Organisation permanente du Travail; sa Competence en matière agricole", *Revue generale du droit international public*, 1922, pp. 223-255.
- Haas, Ernst B., *Beyond the Nation-State*, Functionalism and International Organization, Stanford University Press, Stanford California, 1964.
- Harolds, Louis R., "Some Legal Problems Arising Out of Foreign Flag Operations", *Fordham Law Review*, Vol. 28, 1959, pp. 295-315.
- Heaver, Trevor, "The treatment of ships' operating costs", *Marit. Pol. Mgmt.*, 1985, Vol. 12, No. 1, pp. 35-46.
- Hershey, Robert, "The Primacy of the Master and its consequences", *Marit. Pol. Mgmt.*, 1988, Vol. 15, No. 2, pp. 141-146.
- Heuven Goedhart, G.J. van, "Refugee Seamen", *I.L.R.*, Vol. LXXII, 1955, pp. 138-150.
- Hiitonen, E., *La competence de l' Organisation internationale du Travail*, Vol. I: Compétence de Fond, Paris, 1929.
- Hill, J.M.M., *The seafaring career*, A Study of the Forces Affecting Joining, Serving and Leaving the Merchant Navy, Centre for Applied Social Research, Tavistock Institute of Human Relations, London, 1972.
- Hope, Ronald, "Social Amenities for Seafarers", *Fairplay International Shipping Journal*, 4th July 1967, pp. 151-155.
- Hope, Ronald, *Spare Time at Sea*, 2nd edition, The Seafarers Education Service, London, 1974.
- Hugget, Frank E., *The Past, Present and Future of Life and Work at Sea*, London, 1975.
- Ivanov, Semion A., "Sur les Études Comparatives en Droit du Travail", *Revue internationale de droit comparé*, 2-1985, pp. 379-389.
- Jackson, D.C., "Foreign maritime liens in English courts-Principle and policy", *LMCLQ*, 1981, pp. 335-340.
- Jackson, D.C., *Enforcement of Maritime Claims*, Lloyd's of London Press, 1985.
- Jackson, John and Wilkie, Roy, "General Purpose Manning: A Case Study of Organizational Innovation", 3 Parts, *Marit. Stud. Mgmt.*, 1975, Vol. 2, pp. 132-137; 215-220; Vol. 3, pp. 21-26.
- Jenks, Wilfred, "The Revision of International Labour Conventions", *BYIL*, Vol. XIV, 1933, pp. 43-64.

- Jenks, Wilfred, "Some characteristics of international labour Conventions", *Canadian Bar Review*, Vol. XIII, 1935, pp. 448-462.
- Jenks Wilfred, "Are International Labour Conventions Agreements between Governments?", *Canadian Bar Review*, Vol. XV, 1937, pp. 574-578.
- Jenks, Wilfred, "La compétence de l' Organisation internationale du Travail", *Revue de droit international et de législation comparée*, 1937, pp. 156-183 and 586-623.
- Jenks, Wifred, "Contribution de l' Organisation Internationale du Travail à l' élaboration d' un droit uniforme du travail", in *Introduction à l' étude du droit comparé (Recueil d' études en l' honneur d' Edouart Lambert)*, vol. II, Paris, 1938, pp. 870-883.
- Jenks, Wilfred, "The Interpretation of International Labour Conventions by the International Labour Office", *BYIL*, Vol. XX, 1939, pp. 132-141.
- Jenks, Wilfred, "Nationality, the Flag and Registration as Criteria for Demarcating the Scope of Maritime Conventions", *Journal of Comparative Legislation and International Law*, Vol. XIX, Third Series, pp. 245-252.
- Jenks, Wilfred, "The Application of Conventions by means of Collective Agreements", *Zeitschrift für Ausländisches, Öffentliches Recht und Völkerrecht*, Aug. 1958, pp. 197-224.
- Jenks, W., "The International Protection of Trade Union Rights" in E. Luard (ed.) *The International Protection of Human Rights*, London, 1967.
- Jenks, Wilfred, *Social Justice in the Law of Nations (The ILO Impact After Fifty Years)*, Oxford Un. Press, 1970.
- Jenks, Wilfred, *Social Policy in a Changing World: The ILO Response*, Geneva, 1976.
- Johnson, D.H.N., "The Nationality of Ships", *The Indian Year Book of International Affairs*, Vol. 8, 1959, pp. 3-15.
- Johnston, G.A., *The International Labour Organisation, Its Work for Social and Economic Progress*, Europa Publications, London, 1970.
- Johnston, G.A., "The influence of international labours standards on legislation and practice in the United Kingdom", *I.L.R.*, Vol. 97, No. 5, May 1968, pp. 465-487.
- Juda, Lawrence, "World shipping, UNCTAD, and the New International Economic Order", *International Organisation*, Vol. 35, No. 3, Summer 1981, pp. 493-516.
- Kahler, Joseph, *Philosophy of Law*, New York, 1921.
- Kaplan, William, *Everything that floats, Pat Sullivan, Hal Banks, and the Seamen's Unions of Canada*, University of Toronto Press, 1987.
- Kitchen, Jonathan, "Lessons from the "Sea Gem": Legal Aspects of Safety and Discipline on Offshore Oil Rigs", *Marit. Stud. Mgmt.*, 1974, 1, pp. 232-242.
- Korsakov, E., "The System of Remuneration in the Soviet Merchant Marine", *I.L.R.*, Vol. 94, Oct. 1966, No. 4, pp. 398-414.

- Lagergren, Stina, "The influence of ILO standards on Swedish law and practice", *I.L.R.*, Vol. 125, No. 3, May-June, 1986, pp. 305-328.
- Landy, Ernest A., *The Effectiveness of International Supervision*, Thirty Years of ILO Experience, London and New York, 1966.
- Landy, Ernest A., "The Influence of International Labour Standards: Possibilities and Performance", *I.L.R.*, Vol. 101, No. 6, June 1970, pp. 555-604.
- Landy, Ernest A., "The Implementation procedures of the International Labour Organisation", *SCLR*, Vol. 20, 1980, pp. 633-663.
- Leary, Virginia A., *International Labour Conventions and National Law*, Martinus Nijhoff, 1982.
- Lee, L.T., "Consular Role in the Desertion of Seamen", *Revue Hellénique de Droit International*, Vol. 13, 1960, pp. 51-59.
- Lee, L.T., "Jurisdiction over Foreign Merchant Ships in the Territorial Sea", *AJIL*, Vol. 55 (1961), pp. 77-96.
- Lewis, Norman, "Statutes: The Merchant Shipping Act 1970", *MLR*, Vol. 34, Jan. 1971, pp. 55-61.
- Lindsay, W.S., *History of Merchant Shipping and Ancient Commerce*, 4 Vol. London 1874.
- Long, M.D., *The Soviet Merchant Fleet : Its Growth, Strategy, Strength and Weaknesses, 1920-1999*, London: Lloyd's of London Press, 1986.
- Lowe, A.V., "The Right of Entry into Maritime Ports in International Law", *SDLR*, Vol. 14 (1977), pp. 597-622.
- Lowe, A.V., "A move against substandard shipping", Reports in *Mar. Pol.*, Oct. 1982, pp. 326-330.
- Lowe, B.E., *The International Protection of Labour*, New York, 1921.
- McConnell, Moira L., "'Darkening Confusion Mounted Upon Darkening Confusion': The Search for the Elusive Genuine Link", *JMLC*, vol. 16, 1985, pp. 365-396.
- McConnell, Moira L., "'Business as usual': An Evaluation of the 1986 United Nations Convention on Conditions for Registration of Ships", *JMLC*, Vol. 18, No. 3, July 1987, pp. 435-449.
- Mc Conville, James, "Collective Bargaining in the Shipping Industry", *Marit. Stud. Mgmt.*, 1973, Vol. 1, pp. 74-97.
- McDougal, M.S., and Burke, W., *The Public Order of the Oceans*, Yale University Press, 1962.
- McDougal, M.S., and Burke, W., *The Public Order of the Oceans*, New Haven Press, 1985, 1987.
- McFarlane, J., "Shipboard Union Representation in the British Merchant Navy", *International Review of Social History*, 15 (1), 1970, pp. 1-18.
- M' Gonigle, R. Michael, and Sacher, Mark W., *Pollution, Politics, and International Law: Tankers at Sea*, 1979.
- McLeod, Walton J., "The Flags-of-Convenience Problem", *S.Car.L.R.*, Vol. 16, 1964, pp. 409-418.
- McMahon, J.F., "The Legislative Techniques of the International Labour Organisation", *BYIL*, Vol. 41, 1965-66, pp. 1-102.

- McNair, Lord, *The Law of Treaties*, Oxford, 1961.
- Mahaim, Ernest, *Droit international ouvrier*, Paris, 1913.
- Mahaim, Ernest, "L'organisation permanente du Travail", *R.C.A.D.I.*, 1924 III, pp. 104-115.
- Mahaim, Ernest, "Les avis de la Cour permanente de justice internationale au sujet de l'interprétation de certains articles de la Partie XIII du Traité de Versailles", *Revue de droit international et de législation comparée*, 1922, pp. 503-524.
- Mankabady, Samir, *The International Maritime Organisation*, Vol. 1: International shipping rules; Vol. 2: Accidents at sea, London: Croom Helm, 1986, 1987.
- Meron, Theodor, *Human Rights Law-Making in the United Nations*, A Critique of Instruments and Process, Clarendon Press, Oxford, 1986.
- Metaxas, B.N., "Some Thoughts on Flags of Convenience", *Fairplay International Shipping Weekly*, Vol. 251, 30, May 1974, p. 21.
- Metaxas, B.N., *Flags of Convenience*, A Study of Internationalisation, Aldershot: Gower, 1985.
- Meyers, H., *The Nationality of Ships*, The Hague, 1967.
- Millar, I.C., "The need for a structured policy towards reducing human-factor errors in marine accidents", *Marit. Pol. Mgmt.*, 1980, Vol. 7, No. 1, pp. 9-15.
- Moreby, David, "Crew costs", *Marit. Pol. Mgmt.*, 1985, Vol. 12, No. 1, pp. 55-60.
- Morellet, Jean, "Legal Competence of the International Labour Organisation", *The Annals of the American Academy of Political and Social Science*, vol. 166, Mar. 1933, pp. 46-52.
- Morgenstern, Felice, *International conflicts of labour law*, ILO, Geneva, 1984.
- Morris, R., "Labour relations in the Hong Kong merchant navy", *Marit. Pol. Mgmt.*, 1978, Vol. 5, pp. 107-115.
- Mosley, Hugh G., "The social dimension of European integration", 129 *I.L.R.*, pp. 147-164.
- Moussou-Odier, Françoise, "Le Memorandum de Paris et son Application", *Annuaire de droit maritime et aérien*, Vols. 7-8, 1983-85, pp. 127-131.
- Muller, M, Case Note, "Strikes: Strike of crew members supported by ITF held unlawful by Dutch Court applying Philippine law", *The Saudi Independence*, *JMLC*, Vol. 16, No. 3, July, 1985, pp. 423-426.
- Münch, Ingo von, "Freedom of Navigation and the Trade Unions", *GYIL*, 1976, pp. 128-142.
- Nolan, Brian, "Seamen, drink and social structure", *Marit. Pol. Mgmt.*, 1976, 4, pp. 77-88.
- Nolan, Brian, "Triple doses: a view of seamen's health", *Marit. Pol. Mgmt.*, 1979, Vol. 6, No. 2, pp. 119-127.
- Northrup Herbert and Rowan Richard, *The International Transport Workers' Federation and Flags of Convenience Shipping*, Industrial Research Unit, Wharton School, University of Pennsylvania, 1983.

Norway, *NIS*, Norwegian International Register of Ships and Det Norske Veritas, A Note to Owners, July 1987, Norway; Act Relating to a Norwegian International Ship Register; Regulations of 19 June 1987 concerning the Registration of Ships in the Norwegian International Register of Ships (NIS); The Norwegian International Ship Register, Rules and Requirements, Revised and Amended 10 August 1987.

O' Connell, D.P., *The International Law of the Sea*, Oxford Vol. I (1982), Vol. II (1984).

Osieke, Ebere, "The Exercise of the Judicial Function with Respect to the International Labour Organisation", *BYIL*, Vol. XLVII, 1974-75, pp. 315-340.

Osieke, Ebere, "Flags of Convenience Vessels: Recent Developments", *AJIL*, Vol. 73, 1979, pp. 604-627.

Osieke, Ebere, "The International Labour Organisation and the Control of Substandard Merchant Vessels", *ICLQ*, Vol. 30, Jul. 1981, pp. 497-512.

Osieke, Ebere, *Constitutional Law and Practice in the International Labour Organisation*, Martinus Nijhoff, 1985.

Perry Nick and Wilkie Roy, "Social Theory and Shipboard Structure: Some Reservations on an Emerging Orthodoxy", *Marit. Stud. Mgmt.*, 1973, 1, pp. 31-39.

Pesic, Ratko, "International labour standards and Yugoslav legislation", *I.L.R.*, Vol. 96, Nov. 1967, No. 5, pp. 443-467.

Philip, Christian, *Normes Internationales du Travail: Universalisme ou Régionalisme?*, Bruxelles, 1978.

Pinto, Roger, "Les pavillons de complaisance", *Journal du Droit International*, Clunet, Vol. 87, 1960, pp. 344-369.

Pleionis, R., "The influence of the Rhodian Sea Law to other maritime Codes", *Revue Hellénique de Droit International*, 1979, pp. 171-191.

Pontavice, Emmanuel du, "Les pavillons de complaisance", *Droit Maritime Français*, no. 345, Sept. 1977, pp. 503-512; no. 346, Oct. 1977, pp. 568-582.

Potobsky, G. von, "On-the-spot visits: an important cog in the ILO's supervisory machinery", *I.L.R.*, Vol. 120, No. 5, September-October 1981, pp. 581-596.

Pressman, Lee, "Case Study in Labor - Management Relations: Maritime Industry - 1965", *Boston College Industrial and Commercial Law Review*, 1965, pp. 805-820.

Pugash, James Z., "The Dilemma of the Sea Refugee: Rescue Without Refuge", *Harvard International Law Journal*, Vol. 18, No. 3, Summer 1977, pp. 577-604.

Reitcrskjold, C.A. de, "La compétence de l' Organisation internationale du Travail en matière agricole", *Revue de droit international et de législation comparée*, 1930, pp. 261-375.

Richardson, Stephen A., "Organizational Contrasts on British and American Ships", *Administrative Science Quarterly*, Vol. 1, 1956-57, pp. 189-207.

- Rienow, Robert, *The Test of the Nationality of a Merchant Vessel*, New York: Columbia University Press, 1937.
- Roat, Rachel, "Promulgation and Enforcement of Minimum Standards for Foreign Flag Ships", *Brooklyn Journal of International Law*, Vol. VI:1, 1980, pp. 54-87.
- Robertson, A.H., Merrills, J.G., *Human Rights in the World*, 1989.
- Rowan, R.L., Northrup H.R., and Immediata, M.J., "International Enforcement of Union Standards in Ocean Transport", *British Journal of Industrial Relations*, Vol. XV, No. 3, pp. 338-355.
- Rowlinson, Mervyn, "Flags of convenience: The UNCTAD case", *Marit. Pol. Mgmt.*, 1985, Vol. 12, No. 3, pp. 241-4.
- Roxburgh, Ronald F., *International Conventions and Third States*, London, 1917.
- Russell Bernard H., and Killworth, Peter, "Scientists and Crew", *Marit. Stud. Mgmt.*, 1974, Vol. 2, pp. 112-125.
- Sadler, Jack, *Discipline at Sea* (and industrial relations in the shipping industry), Glasgow: Brown Son & Ferguson, 1983.
- Samson, K.T., "The changing pattern of ILO supervision", *I.L.R.*, Vol. 118, No. 4, 1979, pp. 569-587.
- Scelle, G., *L'organisation internationale du travail et le BIT*, Paris 1930.
- Schrank, Robert (Editor), *Industrial Democracy at Sea*, The MIT press, 1983.
- Schrier Elliot, Nadel Ernest and Rifas Bertram, *Outlook for the Liberalisation of Maritime Transport*, Trade Policy Research Centre, London, 1985.
- Schulte, Heinrich, *Die "billigen Flaggen" im Völkerrecht: Zur Frage des "genuine link"*, Frankfurt am Main, Berlin, 1962.
- Schwartz, Stephen, *Brotherhood of the Sea*, A History of the Sailors' Union of the Pacific, 1885-1985, San Francisco, CA: Sailors' Union of the Pacific, AFL-CIO, 1986.
- Sherar, Mariam G., *Shipping out, A Sociological Study of American Merchant Seamen*, Cornell Maritime Press, 1973.
- Shotwell, James T., *The Origins of the International Labour Organisation*, 2 Vol., Columbia University Press, 1934.
- Sinclair, Ian, *The Vienna Convention on the Law of Treaties*, 2nd edition, Manchester University Press, 1984.
- Singh, Nagendra, "International Law Problems of Merchant Shipping", *R.C.A.D.I.*, 1962, III, Vol. 107, pp. 7-167.
- Singh, Nagendra, *International Maritime Law Conventions*, 1983.
- Singh, Nagendra, "Maritime flag and State responsibility", in J. Makarczyk, *Essays in International Law in Honour of Judge Manfred Lachs*, the Hague, 1984, pp. 657-671.

- Smith, M.H. and Roggema J., "Emerging organisational values in shipping: Part 1. Crew stability, Part 2. Towards a redistribution of responsibility on board ship", *Marit. Pol. Mgmt.*, 1979, Vol. 6, No. 2, pp. 129-143, 145-156.
- Srivastava, C.P., "IMO and the Law of the Sea", *The UN Convention on the Law of the Sea: Impact and Implementation*, Law of the Sea Institute. Conference (19th: 1985: Cardiff)/edited by E.D. Brown, R.R. Churchill, Honolulu, 1987, pp. 419-25.
- Starr, Gerald, "Minimum wage fixing: international experience with alternative roles", *I.L.R.* Vol. 120, pp. 545-562.
- Starr, Gerald, *Minimum Wage Fixing*, An international review of practices and problems, ILO Geneva, 1981.
- Sterling, M.J., "Actions for Duress, Seafarers and Industrial Disputes", *The Industrial Law Journal*, Volume 11, Number 3, Sep. 1982, pp. 156-169.
- Stopford, Martin, *Maritime Economics*, London: Allen & Unwin, 1988.
- Sturmey, S.G., "The United Nations Convention on Conditions for Registration of Ships", *LMCLQ*, Feb. 1987, pp. 97-117.
- Taylor, Silas W., "The criminal liability of ships' masters: Provisions and changes", *LMCLQ*, 1984, pp. 446-458.
- Tetley, William, *Maritime Liens and Claims*, Business Law Communications Ltd., London 1985.
- Tetley, William, "Attachment, the *Mareva* injunction and *saisie conservatoire*", *LMCLQ*, 1985, pp. 59-80.
- Tettenborn, A.M., "Maritime securities and the conflict of laws-some problems", *LMCLQ*, 1980, pp. 404-410.
- Thirlway, H.W.A., *International Customary Law and Codification*, A.W. Sijthoff-Leiden, 1972.
- Timagenis, GR. J., *International Control of Marine Pollution*, Oceana Publications, 1980.
- Trier, Adam, "The Nordic Social Security Convention", *I.L.R.*, Vol. 121, No. 3, May-June 1982, pp. 259-269.
- Troclet, L., *Legislation sociale internationale*, 1952.
- Twiss, T., *The Black Book of Admiralty*, London, 4 vol. 1871, 1873, 1874, 1876.
- U.K., *Final Report of the Court of Inquiry into certain matters concerning the Shipping Industry* (Chairman: Lord Pearson), Feb. 1967, London, HMSO, Cmnd. 3211.
- U.K., *Committee of Inquiry into Shipping* (1970), Report presented to Parliament by the President of the Board of Trade, London, May 1970, H.M.S.O., London, Cmnd. 4337.
- U.K., Department of Trade, *Report of the Working Group on Discipline in the Merchant Navy*, November 1975, London, HMSO.
- U.K., Department of Trade, *Safety of seamen at work*, Report of the Steering Committee on the Safety of Merchant Seamen at Work, 1978, London, HMSO.

- U.K., National Union of Seamen, *Flags of Convenience*, The unacceptable face of shipping, 1981.
- U.K., National Union of Seamen, *Shipboard Representative's Handbook*.
- U.K., National Union of Seamen, *Shipping and Shipbuilding, Partners in Crisis*, 1984.
- Valticos N., "Conventions internationales du travail et droit interne", *R.C.D.I.P.*, Vol. 44, 1955, pp. 251-288.
- Valticos, N., "The International Labour Organisation and National Parliaments", *Inter-Parliamentary Bulletin*, 1969, no. I, pp. 16-31.
- Valticos, N., "Les normes de l' Organisation Internationale du Travail en matière de protection des droits de l' homme", *Revue des droits de l' homme*, Vol. 4, 1971, pp. 691-771.
- Valticos, N., *International Labour Law*, Deventer, 1979, Suppl. 1984.
- Valticos, N., "The future prospects for international labour standards", *I.L.R.*, Vol. 118, No. 6, Nov.-Dec. 1979, pp. 679-697.
- Valticos, N., *Droit international du travail*, Deuxième édition, Dalloz, Paris 1983.
- Van Reenen, "Rules of Reference in the New Convention on the Law of the Sea, in Particular Connection with the Pollution of the Sea by Oil from Tankers", 12 *N.Y.I.L.*, 1981, pp. 3-39.
- Villars, C., "Social security for migrant workers in the framework of the Council of Europe", *I.L.R.*, Vol. 120, No. 3, May-June 1981, pp. 291-302.
- Villiger, Mark E., *Customary International Law and Treaties*, Dordrecht: Nijhoff, 1985.
- Voorden W. van, "Industrial relations in the shipping industry of the Netherlands", *Labour and Society*, Vol. 2, Jan. 1977, No. 1, pp. 23-36.
- Wade, Stewart, "Anti-foc lobby marshals forces with ILO 147", *Fairplay International Shipping Weekly*, 1st May 1986, pp. 12-14.
- Walton, E. Richard, *Innovating to Compete*, Lessons for Diffusing and Managing Change in the Workplace, San Francisco: Jossey-Bass, 1987.
- Warner, Aaron W., "Future of Maritime Manpower", *Monthly Labor Review*, March 1966, pp. 268-271.
- Watts, A.D., "The Protection of Merchant Ships", *BYIL*, vol. XXXIII, 1957, pp. 52-84.
- Watts, A.D., "The Protection of Alien Seamen", *ICLQ*, vol. VII, 1958, pp. 691-711.
- Watts, A.D., Comment in *Revue Egyptienne de Droit International*, 1960, Vol. 16, pp. 135-141.
- Wefers Bettink, H.W., "Open Registry, The Genuine Link and the 1986 Convention on Registration Conditions for Ships", *NYIL*, Vol. 18, 1987, pp. 69-119.
- Which Register? Which Flag?* Speakers' Papers from the Two-Day Conference 2nd/3rd September 1987, Gloucester Hotel, London, LLP, 1987.
- Widdows, Kelvin, "The Denunciation of ILO Conventions", *ICLQ*, Vol. 33, Oct. 1984, pp. 1052-1063.

Wiebringhaus, H., "L' État d' Application de la Charte Sociale Européenne", *Ann.*, 1973, Vol. XIX, pp. 928-940.

Wilson, Francis G., *Labor in the League System*, Stanford University Press, 1934.

Wittig, Edith A., "Tanker Fleets and Flags of Convenience: Advantages, Problems, and Dangers", *Texas International Law Journal*, Vol. 14, 1979, pp. 115-138.

Wolf, Francis, "L' application des conventions par voie de conventions collectives", *Ann.*, Vol. XX, 1974, pp. 103-114.

Wolf, Francis, "Convention No. 147, The First Ten Years", extract of unknown source found in the Maritime Branch of the ILO Office in Geneva.

Yannopoulos, N. G., (editor), *Shipping policies for an open world economy*, London: Routledge, 1989.

Jayasekera, M.L.S., "Greek Nat Tax Illegal in Sri Lanka," *LMCLQ*, Nov. 1986, pp. 434-5.

Zoete, Robert, *Du Recruitment des Gens de Mer*, Etude historique et critique, Bordeaux, 1919.

