

International labour standards

A global approach

75th anniversary of the Committee of Experts on the
Application of Conventions and Recommendations



INTERNATIONAL LABOUR OFFICE

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Preliminary version

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Presentation

At the heart of the International Labour Organization, and of all the activities of the International Labour Office, lie tripartism and international labour standards. It is tripartism, self-evidently, which gives these standards their own particular legitimacy, since they are developed and administered not only by governments, but also by employers and workers. This is an opportunity to show, based on experience since 1919, the considerable extent to which these standards, both Conventions (irrespective of their ratification) and Recommendations, have had an impact, even though it is often discreet and indirect, on the law and practice of the various member States.

It is always useful to recall the extent to which the application of these standards is vital for social stability, economic progress and lasting peace. From its very origins, in its Constitution, in a very far-sighted message, the ILO upheld international labour law as an essential pillar of development and peace, both within each State and between States.

Tripartism and the universality of standards are unsubstantial. They give rise, with pertinent wisdom, to the concern to take into account the diversity of interests and accept a certain degree of flexibility reflecting differences in national situations.

No legal system can be static. Societies, like institutions, and technologies, in the same way as legal standards, are bound to evolve and have to adapt. In view of the present deep-rooted economic and social changes, it is necessary to welcome the emergence and development of new concepts, which will undoubtedly influence the future of international labour standards. It is sufficient to mention, in the context of the ILO, those of decent work and the integrated approach to standards. These are proof, if such were needed, of the constant dynamism of international labour standards.

A significant number of ILO Conventions and Recommendations have very pertinently been revised over the years. Moreover, a number of recent decisions by the Governing Body and the International Labour Conference have led to the identification of instruments which, in whole or in part, no longer respond to current needs. As a result, the relevant action has been taken and these decisions, the origins and scope of which are examined below, have made it possible to distinguish between Conventions whose ratification and implementation are to be encouraged, instruments to be revised, instruments that are withdrawn, those that are outdated for various reasons (failure to come into force, very low number of ratifications, etc.) and, finally, those which are still under examination.

The purpose of this publication by the International Labour Standards Department of the International Labour Office is both modest and ambitious. Since they are at the service of constituents, namely governments, employers and workers, it is the wish of the authors to present the ILO's standards to constituents in an accessible, but technically sound manner.

Accordingly, an analysis is provided below, firstly, of the main content of all the ILO Conventions and Recommendations which respond to current needs, in accordance with the successive decisions taken in the context of the Organization's new standards policy. Secondly, reference is made to the content of instruments which are to be revised. It should be added that instruments deemed to be outdated are not directly analysed.

A presentation of standards alone would not suffice for a proper understanding of international labour law. It therefore appeared indispensable to indicate the results of the Committee of Experts' work, which identifies essential criteria and principles for assessing

the conformity of national standards with ILO instruments. It is also important to enumerate briefly the problems in the application of Conventions which are encountered most frequently in national law.

There is a similar presentation for each chapter. It starts with a table presenting the relevant Conventions and Recommendations in the context of the Organization's new standards policy. The content of the standards is then described, together with the principles identified by the Committee of Experts (derived in the main from General Surveys). A final section indicates, where appropriate, the most frequent problems encountered in the application of these standards in the various countries.

The publication is built around the four strategic objectives of the Organization, which lie at the heart of the concept of decent work as developed by Mr. Juan Somavia, Director-General of the International Labour Office, in his first Report to the Conference in 1999: fundamental principles and rights at work, employment, social protection and social dialogue. Certain subjects clearly come under several of these objectives. This publication does not foreshadow the classification of instruments by families or groups (the terminology has not yet been determined), which will be decided upon by the Governing Body with a view to future work on the revision of standards.

This is also an excellent opportunity to emphasize the very close association between languages and law. The Standards Department wishes to show, through the present publication, that it is essential for international labour standards to be directly accessible in the broadest range of languages. In this spirit, this work, already available in English, French and Spanish, is being translated into Arabic, Chinese, German, Portuguese and Russian, and will probably be translated into other languages. Before envisaging the ratification of any Convention, it is indispensable to analyse its fundamental elements. This is also an opportunity to pay particular tribute to the contribution that is made by the regional offices and multidisciplinary advisory teams. It is through them that bibliographies and Internet references have been provided for the languages concerned.

Very warm thanks should also be given to each of the officials of the International Labour Standards Department. Without the competence and enthusiasm of each and every one of them, none of this would have been achieved. Particular tribute should be paid to Mr. Alberto Otero, who undertook the general coordination of the publication with constance and determination.

Finally, this work reflects the important contribution of the Turin Centre, as well as the financial support of the Infocus Programme on Promoting the Declaration, the Sectoral Activities Department, the Bureau for Workers' Activities, the Regional Office for the Americas, the Regional Office for the Arab States, the ILO Office in Moscow, the International Programme for the Elimination of Child Labour (IPEC), the Follow-up Programme to the Declaration concerning Freedom of Association (Turin), the Conditions of Work Branch, the International Migration Branch and several governments.

It is hoped that readers will share the staunch conviction of the authors and of all those in the International Labour Office that international labour standards are instruments without which there would be a major risk of many human rights not being given effect, and therefore of having no practical value for anyone. Furthermore, these instruments contribute to the development of decent work and to the implementation of the principles set out in the Declaration of Philadelphia, which remains highly topical. Every international labour standard, however brief or technical it may be, adds to the material well-being and spiritual development of all human beings. It is hoped that the present volume will also contribute to these objectives.

Jean-Claude Javillier,
Director of the International Labour Standards Department.

Glossary

International Labour Conference. Supreme body of the ILO. Meets once a year in the month of June and gathers together governments, employers' and workers' organizations from each of the 175 member States of the ILO (tripartism). Adopts the ILO budget and international labour Conventions and Recommendations and determines the Organization's policy and programmes.

Governing Body. Executive body of the ILO (tripartite). Elects the Director-General of the ILO, prepares the Organizations' programme and budget, sets the agenda of the Conference, determines the Organization's standards policy and its technical cooperation policy, supervises the implementation of related programmes and implements the decisions of the Conference.

International labour Conventions. Instruments intended to create international obligations upon States which ratify them.

International labour Recommendations. Instruments providing guidance for action by governments, employers' and workers' organizations; they are not intended to give rise to obligations, nor can they be ratified by member States.

Committee of Experts on the Application of Conventions and Recommendations. Established by the Governing Body in 1926 to examine government reports on the application of Conventions and other obligations contained in the ILO Constitution relating to international labour standards; assesses the conformity of national law and practice with the provisions of ILO Conventions. Composed of 20 high-level jurists (judges of supreme courts, professors, legal experts, etc.) appointed by the Governing Body. It meets once a year in November-December and its report is examined by the International Labour Conference.

Committee on the Application of Standards. Tripartite Committee of the International Labour Conference which takes as a basis for its work the report of the Committee of Experts. In its report to the Conference, the Committee on the Application of Standards makes conclusions, inviting the governments concerned to provide clarifications and take measures, where appropriate, to overcome divergencies observed between national law and practice and the provisions of ratified Conventions.

General Surveys of the Committee of Experts. Drawn up on the basis of the reports received from governments, employers' and workers' organizations following requests by the Governing Body concerning the situation of national law and practice in relation to one or more Conventions and Recommendations. Provides a comparative description of the situation of national law and practice in relation to the instruments under consideration and establishes the main lines for the application of these instruments.

Observations. Comments by the Committee of Experts published in its report. An observation is normally made in the most serious or long-lasting cases of non-compliance with obligations.

Direct requests. Comments by the Committee of Experts which are not published in its report, but are sent to governments by the Office on behalf of the Committee of Experts. Direct requests generally raise technical issues, and may also request clarifications on certain points.

ILO standards policy

M. Humblet and M. Zarka-Martres

International labour standards in the service of social justice

While the idea of developing international labour legislation goes back to the beginning of the nineteenth century, the formal origins of the ILO are to be found in the Peace Conference convened at the end of the First World War.¹ During that Conference, a Commission, for the first time in diplomatic history bringing together not only government delegates, but also representatives of the world of work, was specifically entrusted with developing proposals on matters relating to labour. Part XIII of the Treaty of Versailles, which was the outcome of its work, became the founding text of the ILO and most of its provisions are contained in the text of the ILO's Constitution.

The Preamble to Part XIII of the Treaty of Versailles begins as follows: "Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice ...". Thus, following a global conflict, social justice was seen as a prerequisite for the maintenance of the peace which had only just been restored. The ILO was entrusted with working towards this objective² and was given the competence to adopt international labour standards as its principal means of action. As emphasized by the Director-General in his Report to the Conference in 1997, without being an end in themselves, standards are the most important means that the International Labour Organization has at its disposal to attain its objectives and ensure that the values enshrined in its Constitution are put into practice.³

The Constitution lays down in this respect that "[w]hen the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention".⁴ While Conventions are international treaties with certain specific

¹ On the origins, creation and mandate of the ILO, see Nicolas Valticos, *Droit international du travail*, in *Traité de droit du travail*, Vol. 8, 2nd edition, Paris, Dalloz, 1983, Chs. 1 and 2.

² In addition to this political objective, the foundation of the ILO also responded to humanitarian concerns, since the promotion of social justice was an objective in itself. Finally, economic considerations also played an important role in this respect, with the international regulation of conditions of work being perceived as necessary to prevent distortions in competition between the various nations. As will be seen below, this objective remains entirely topical in an era of globalization.

³ *The ILO, standard setting and globalization*, Report of the Director-General, ILC, 85th Session, 1997, p. 3.

⁴ Article 19, paragraph 1, of the Constitution.

characteristics,⁵ Recommendations do not have binding force and are intended to guide the policy of member States in a specific field.⁶

The Preamble to the Constitution also enumerates priorities in carrying out this programme: the regulation of the hours of work, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of employment, the protection of children, young persons and women, provision for old age and injury, protection of workers employed abroad and recognition of the principle of freedom of association.

The characteristics of the ILO's standards-related activities

The ILO's standards policy cannot be described without first, however briefly, outlining the principal characteristics of the Organization's standards-related activities. The first of these, which goes beyond the context of standards and is in effect a characteristic of the Organization itself, is tripartism. It is not the purpose of this text to describe all the aspects of tripartism.⁷ It should however be recalled that the composition of the two decision-making bodies, the International Labour Conference (hereinafter the Conference) and the Governing Body, is itself tripartite. At the Conference, the highest body, which adopts international labour standards, each of the 175 member States of the Organization is represented by four delegates, namely two Government delegates, a delegate representing workers and a delegate representing employers, each of which, in legal terms, has complete freedom in the exercise of their right to vote. Moreover, the adoption of standards requires a majority of two-thirds of the votes cast by the delegates present, and not unanimity.⁸ These two rules combined make it possible to achieve majorities which vary according to the issues under examination.

Two characteristics of the ILO's standards-related action should be emphasized. Firstly, ILO instruments are not a disparate collection of Conventions and Recommendations, but a series of standards covering most of the fields of labour law. Secondly, the established procedure for the adoption of instruments allows a great economy of means through the precise time-limits (generally two years) envisaged for their adoption in the Standing Orders of the Conference.

Within this juridical framework, the Conference has been prolific in setting standards. By the end of its 89th Session (June 2001), it had adopted 184 Conventions and 192 Recommendations, covering almost all fields of labour law, as noted above. In parallel, the ILO has constantly endeavoured to strengthen the coherence and improve the impact of

⁵ J. Morellet, "Un type original de traité: les conventions internationales du travail", in *Revue critique de droit international privé*, 1938, pp. 1 et seq.

⁶ As indicated in the Constitution, the Conference sometimes adopts autonomous Recommendations where the subject matter does not (yet) lend itself to the adoption of a Convention. In most cases, however, Recommendations accompany a Convention by further specifying their provisions or introducing a higher standard in the field that they cover.

⁷ On tripartism, see in particular W. Jenks, "The significance for international law of the tripartite character of the International Labour Organisation", in *Transactions of the Grotius Society*, Vol. 32, 1936, pp. 1-37; and E. Vogel-Polsy, *Du tripartisme à l'Organisation internationale du Travail*, Brussels, Free University of Brussels, Etudes du Centre national de sociologie du droit social, 1966.

⁸ Article 19, paragraph 2, of the Constitution.

international labour standards and has regularly, throughout its history, engaged in in-depth reflection on the various aspects of its standards-related action. As of 30 September 2001, the number of ratifications of these Conventions was 6,947.

ILO standards themselves are characterized by two features. In the first place, they are universal, as they are intended to be applied in all the member States of the Organization. On the other hand, and as a counterpart, they possess a certain flexibility. “Indeed, the flexibility of standards is the price of their universality. If standards have to be universal, and therefore applicable to States whose level of development and legal approaches differ considerably from one another, the only realistic approach is to develop standards with sufficient flexibility so that they can be adapted to the most diverse of countries”⁹ This is a delicate balance to maintain, since it consists of not adopting standards which are too high and therefore cannot be applied in most member States, nor inadequate standards which would only enshrine the lowest common denominator among those countries.

It is not possible to describe here the whole range of the obligations of member States deriving from the adoption of standards by the Conference.¹⁰ However, two of them, which relate to both Recommendations and unratified Conventions, should be emphasized. Member States are under the obligation to submit to their competent authority (in principle, the legislative assembly), within a period of between one year and 18 months, all Conventions and Recommendations adopted by the Conference “for the enactment of legislation or other action”.¹¹ The intention is to ensure the holding of a public debate at the national level on the issues covered by these instruments, with a view to promoting their implementation. Since the adoption of an amendment to the Constitution in 1946, member States are also under the obligation to report periodically to the ILO on the position of their law and practice in regard to the matters dealt with by Conventions that they have not ratified and by Recommendations.¹² In the case of Conventions, these two obligations are particularly original. Under general international law, if a State has signed a treaty but not ratified it, it is under no other obligation than to refrain from any act which is

⁹ N. Valticos, “Conventions de l’Organisation internationale du Travail à la croisée des anniversaires”, in *Revue générale de droit international public*, 1996, p. 36. On the flexibility clauses in Conventions, see also doc. GB.244/SC/3/3.

¹⁰ For a description of these obligations and the supervisory machinery for the application of standards see, in particular, N. Valticos and G.W. von Potobsky, *International Labour Law*, 2nd edition (revised), Deventer-Boston, Kluwer, 1995, Second Part; N. Valticos, “Un système de contrôle international: La mise en oeuvre des conventions internationales du travail”, in *Recueil des cours de l’Académie de droit international de la Haye*, 1968-I, Vol. 123, pp. 311-407; E.A. Landy, *The effectiveness of international supervision: Thirty years of ILO experience*, London, Stevens & Sons, 1966. The various chapters of this latter work contain references to the comments of the supervisory bodies, and particularly the Committee of Experts on the Application of Conventions and Recommendations (hereinafter the Committee of Experts) and, in Chapters 1 and 2, the Committee on Freedom of Association. For a description of the functions of these bodies, see the glossary at the beginning of this publication.

¹¹ Article 19, paragraphs 5(b) and 6(b), of the Constitution. An amendment to the Constitution adopted in 1946 adds the obligation to transmit to the International Labour Office, with copies to the representative organizations of workers and employers, all information concerning the submission to the competent authority and its decisions.

¹² Article 19, paragraphs 5(e) and 6(d) of the Constitution. Each year the Governing Body selects a certain number of instruments on which member States are requested to provide reports. On the basis of these reports, the Committee of Experts prepares General Surveys, which are then examined by the Conference Committee on the Application of Standards.

contrary to the object of the treaty. Although the idea of conferring upon ILO Conventions the character of binding international labour law based on the sole fact of their adoption did not prevail in 1919, these two obligations which are specific to the ILO nevertheless emphasize the particular characteristics of these instruments and strengthen their impact.

It may therefore be considered that the ILO has progressively conceived and developed a real standards policy, that is a series of strategies relating to the adoption, revision, interpretation, promotion and supervision of the application of standards, with the intent of securing the greatest possible impact and coherence. In the following pages, the main developments of this process are outlined, with emphasis on matters related to the adoption and revision of standards.¹³

Adoption and revision of standards during the first years of the ILO

The First Session of the Conference, held in Washington, DC in October 1919, led to the adoption of six Conventions¹⁴ and six Recommendations.¹⁵ Between 1911 and 1921, no less than 16 Conventions and 18 Recommendations were adopted by the Conference. The choice of the subjects of these instruments was based on considerations related to the degree of urgency and maturity of the problems concerned. Faced with this precocious accumulation of texts, it was felt necessary to ensure a more in-depth preparation of standards in future. These reflections led up to the adoption in 1922 of the double-discussion procedure.¹⁶ Since then, the adoption of new standards in principle requires a discussion in a technical committee over two sessions (generally consecutive) of the Conference. However, the ILO was very rapidly faced with another need, namely that of updating the instruments that the Conference had adopted and which were no longer adapted to the current situation, or whose ratification was giving rise to problems.

The Conference had anticipated this need, since the first Conventions already contained a clause under which at least once in ten years the Governing Body of the ILO had to present to the General Conference a report on the working of these Conventions and decide whether the question of their revision or modification should be placed on the agenda of the Conference.¹⁷ However, neither the Constitution nor the Conventions

¹³ The question of supervising the application of standards is to be covered by a forthcoming publication by the ILO's International Labour Standards Department.

¹⁴ Covering, respectively, hours of work in industry, unemployment, maternity protection, night work of women, minimum age for admission to employment or work in industry and night work of young persons in industry.

¹⁵ One of these Recommendations is related to the Unemployment Convention, 1919 (No. 2). The five other Recommendations cover, respectively, equality of treatment on a reciprocal basis between foreign workers and nationals employed on the territory of each member State, the prevention of anthrax and lead poisoning, labour inspection and the prohibition of white phosphorous in the manufacture of matches.

¹⁶ For a detailed description of the double-discussion procedure, see Article 10, paragraph 4, of the Standing Orders of the Governing Body and article 39 of the Standing Orders of the Conference. However, a specific procedure is applicable for the adoption of maritime Conventions.

¹⁷ In its current wording, following the coming into force of the Final Articles Revision Convention, 1961 (No. 116), this Article provides that the Governing Body shall present to the Conference a report at such times as it may consider necessary, and no longer obligatorily every ten years. However, it was only in 1947 that the first report of this type, which led up to a revision, was

themselves contained provisions respecting the procedure for the revision of Conventions, nor the legal effects of such revision.¹⁸ The Governing Body addressed these issues towards the end of the first ten-year period for the Conventions adopted in 1919.

A specific procedure for the revision of Conventions was introduced into the Standing Orders of the Governing Body and those of the Conference in 1928 and 1929, respectively.¹⁹ This procedure was set in motion for the first time in 1931 and resulted, in the following year, in the partial revision of the Protection against Accidents (Dockers) Convention, 1929 (No. 28), as certain governments had indicated that a number of the technical provisions of the Convention were constituted an obstacle to its ratification. However, this procedure has no longer put into practice for many years. Since the 1960s, the traditional procedure of the double discussion has generally been followed.²⁰

A more difficult issue concerned of the consequences of the coexistence of several texts addressing the same subject. As emphasized by a member of the Governing Body, “the tendency and the fundamental object of international labour legislation” is “to secure legislative uniformity. Revision, if it result[s] in creating two sets of Conventions, the revised and the unrevised, would have disastrous effects on uniformity.”²¹ In certain cases, it may be considered that the earlier Convention remains an interim objective for States which are not yet in a position to apply the higher standards.²² However, successive standards may also be based on approaches which are diametrically opposed.²³

One solution would be repeal the earlier Convention deemed to be outdated. The Conference examined this possibility attentively in 1929.

It finally concluded that it did not have the necessary competence, based on the contractual view of Conventions. According to this view, Conventions constitute “actual contracts between States” which have ratified them and the Conference cannot remove the obligations deriving from such ratifications.²⁴ As will be seen, the adoption of an

requested. The result of this procedure was the adoption by the Conference of the Maternity Protection Convention (Revised), 1952 (No. 103). On this subject, see doc. GB.276/LILS/WP/PRS/2, para. 36.

¹⁸ The issue of the revision of Recommendations is not examined here.

¹⁹ Article 11 of the Standing Orders of the Governing Body and article 44 of the Standing Orders of the Conference.

²⁰ Doc. GB.276/LILS/WP/PRS/2, para. 12.

²¹ Intervention by Mr. Mahaim, Minutes of the 38th Session (February 1928) of the Governing Body, p. 30.

²² That is the case, for example, of social security Conventions, for which each generation of instruments sets higher standards in terms of the population protected and the benefits provided. See below, Ch. 11 on social security standards.

²³ For example, while the Indigenous and Tribal Populations Convention, 1957 (No. 107), places emphasis on the integration of the populations concerned, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), which revises Convention No. 107, indicates in its Preamble that it is necessary to remove “the assimilationist orientation of the earlier standards” and focus on maintaining the identities of these peoples. See below, Ch. 4.

²⁴ Record of proceedings of the 13th Session (1929) of the Conference, Vol. I, Third Part (Appendices), p. 733-734. Note by the Legal Adviser of the ILO, minutes of the 43rd Session (March 1929) of the Governing Body, pp. 90-101.

instrument of amendment of the Constitution in 1997 to empower the Conference to abrogate obsolete Conventions finally made it possible to overcome this doctrinal obstacle.

In 1929, the Conference took less radical measures, but which nevertheless made it possible to limit the consequences of adopting successive texts on the same subject. For this purpose, it adopted new model final provisions to be included in the Conventions that it adopted in future. In accordance with these provisions, the adoption of a revising Convention would result, from its coming into force, in the automatic denunciation of the earlier Convention, which would also cease to be open for ratification.²⁵ Nevertheless, the earlier Convention would still remain in force for States which had ratified it and did not ratify the new Convention. This innovation was introduced for the future and does not therefore apply to Conventions adopted before 1929, for which the problem of the successive adoption of several Conventions on the same subject still persists.²⁶ The problem is, however, attenuated by the fact that these Conventions leave open the possibility of denouncing them at any time following a period of ten years after their coming into force.²⁷

Post-war innovations

By the force of circumstances, the ILO's activities were reduced in level during the Second World War. However, at a session held in Philadelphia in 1944, the Conference adopted the Declaration concerning the Aims and Purposes of the International Labour Organisation (hereinafter, the Declaration of Philadelphia), which was incorporated two years later into the Constitution of the ILO.²⁸ The Declaration of Philadelphia sets forth the principle of the primacy of social objectives over those of economic policy. From this perspective, it broadened the mandate of the ILO by making it responsible for promoting the principle 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; (...) 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".²⁹

²⁵ For Conventions adopted as from 1933, these two clauses are subject to the condition that the new Convention does not provide otherwise.

²⁶ It should, however, be noted that the Minimum Age Convention, 1973 (No. 138), which revises ten Conventions on the minimum age, provides in Article 10, paragraph 3, that four of them, which were nevertheless adopted before 1929, shall be closed to further ratification when all the parties thereto have consented to such closing. However, this provision has not been given effect. Article 10, paragraph 5, of Convention No. 138 also provides that, when the Convention has come into force, its ratification shall involve the automatic denunciation of these four earlier Conventions. More recently, the Recruitment and Placement of Seafarers Convention, 1996 (No. 179), provides in Article 9, paragraph 4, that any ratification of the Convention constitutes an act of immediate denunciation of the Placing of Seamen Convention, 1920 (No. 9).

²⁷ With the exception of the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), which, in the same way as Conventions adopted subsequently, only provides for "windows of denunciation" of one year every ten years (or, in certain cases, every five years).

²⁸ Article 1 of the Constitution makes the ILO responsible for the promotion of the objects set forth in the Preamble and in the Declaration of Philadelphia, which is annexed to the Constitution.

²⁹ Part II, paras. (a) and (d), of the Declaration of Philadelphia. See also, N. Valticos, *Droit international du travail*, op. cit., paras. 96-102.

Although the ILO makes use of other means of action, and particularly technical cooperation, in pursuit of its new objectives, its standards-related activities have not slowed down. Indeed, several constitutional amendments were adopted in 1946 to strengthen the Organization's standards system. Reference has already been made to the introduction of the obligation for member States to report on the effect given or that they propose to give to unratified Conventions and to Recommendations. Other amendments relate to the procedure for the examination of complaints alleging non-observance of a Convention.³⁰ Finally, an amendment to the Constitution introduced the possibility of appointing a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention.³¹ However, use has not yet been made of this provision.

Over the years that followed, the principal procedural innovation related to the supervision of the application of standards.³² In parallel, the Conference maintained its standard-setting activities at a sustained pace. Between 1945 and 1960, it adopted no fewer than 48 Conventions, 11 of them revising earlier Conventions.³³ Nevertheless, the revision of standards raises the question of the ratification of the more recent Conventions (the revised Conventions). On average, the 11 revised Conventions adopted during this period have each received fewer than 25 ratifications. Four of them have received fewer than ten, while only one of them, namely the Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90), has received 50 ratifications.³⁴ The question of promoting the ratification of revised Conventions has constantly been raised for the Organization.³⁵

The Report of the Director-General to the Conference in 1964 pointed to the shortcomings in the revision procedure and the remedies that could be made.³⁶ The first problem, which has already been noted, was related to the impossibility of abrogating Conventions which had not achieved their objective or, alternatively, which had entirely fulfilled their purpose. The second shortcoming related to the absence of a simplified procedure for the modification of certain technical provisions of Conventions, without prejudice to the basic principles of these instruments. Finally, the Director-General called for the establishment of a standing revision committee to undertake "a full-blooded

³⁰ Articles 26 to 34 of the Constitution.

³¹ Article 37, paragraph 2, of the Constitution.

³² In 1950, a specific procedure was established for the protection of freedom of association. Its principal characteristic is that it can be set in motion even against States which have not ratified the relevant Conventions. On the content of these Conventions, see below, Chs. 1 and 2. For further information on the procedure relating to freedom of association, see, *ILO law on freedom of association: Standards and procedures*, ILO, Geneva, 1996; and N. Valticos, "Les méthodes de la protection internationale de la liberté syndicale", in *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 144(1), 1975.

³³ Fourteen of the 48 Conventions adopted by the Conference during this period are maritime Conventions; of these, six revise earlier Conventions.

³⁴ Denunciations were subsequently received for some of these Conventions.

³⁵ It was, for example, included in the mandate of the Working Party on Policy regarding the Revision of Standards.

³⁶ Report of the Director-General to the 48th Session (1964) of the International Labour Conference, ILO, Geneva, pp. 152-171. This report had first been submitted to the previous session of the Conference, but the Director-General considered that its discussion deserved to be continued in 1964.

programme of systematic revision of Conventions calling for reconsideration based on the continuing review of the substance of social policy which is one of the primary responsibilities of the Organisation.”³⁷

As noted above, the first shortcoming was only remedied in 1997 with the adoption of an instrument of amendment to the Constitution to permit the abrogation of obsolete Conventions. With regard to the other two points raised in the Report of the Director-General, in 1965 the Governing Body approved a procedure to allow the Conference to deal rapidly with straightforward questions of revision not giving rise to any controversy relating to specific technical provisions of Conventions. Issues of revision of limited scope would be entrusted to a technical revision committee of the Conference in a single discussion, after a preparatory discussion in the Governing Body to ensure a broad consensus on the objective and scope of each revision. However, this procedure, re-examined recently in the broader context of methods for the revision of standards,³⁸ has never been used.

In-depth review of ILO standards

Some ten years later, the Office submitted to the Governing Body an in-depth study of international labour standards covering: “the ways and means of keeping ILO standards fully relevant to the needs and realities of the contemporary world and of strengthening the effectiveness of ILO procedures and activities for the promotion and implementation of its standards”.³⁹ This report covered developments on general matters relating to the adoption, supervision and promotion of the application of standards. It also analysed, subject by subject, the pertinence of existing standards and possible needs for new standards. After examining this study, the Governing Body created a Working Party on International Labour Standards entrusted with proposing a classification of ILO Conventions and Recommendations and of identifying subjects on which further studies or new standards were considered necessary.⁴⁰

The Working Party proposed a classification of existing standards into three categories, which was approved by the Governing Body. The first category included instruments the ratification and application of which should be promoted on a priority basis, as they constituted valid targets on a universal basis. The second category was of instruments the revision of which would be appropriate. In the third category, namely “other existing instruments”, were Conventions and Recommendations which it was not appropriate to include in any other category. These could include, for example, standards still of value as an intermediary objective for States which were not yet in a position to apply more modern instruments. The Working Party indicated in this respect that “[i]nclusion in category 3 does not imply that commitments accepted under such an instrument are not of continuing value, or that supervision of its application should be

³⁷ *ibid.*, p. 159.

³⁸ Doc. GB.274/LILS/WP/PRS/2.

³⁹ Doc. GB.194/PFA/12/5, para. 1.

⁴⁰ Final report of the Working Party on International Labour Standards, *Official Bulletin*, Special issue, Vol. LXII, 1979, Series A, para. 2.

relaxed”.⁴¹ Finally, subjects concerning which the formulation of new instruments should be considered were also identified.

The Working Party also made recommendations on policies and procedures for future standards-related activities, and particularly on the use of flexibility devices and procedures for the revision of standards.⁴² For example, it mentioned the possibility of adding protocols to Conventions “in order to adapt them to changed situations or deal with practical difficulties of application which emerged after an instrument has been adopted”. In legal terms, a protocol partially revises an existing Convention and leaves the choice to member States as to whether to ratify the latter with or without the Protocol. The first Protocol was adopted by the Conference in 1982 and only revises Article 1 of the Plantations Convention, 1958 (No. 110), respecting the scope of application of the Convention. Since then, two other Protocols have been adopted by the Conference.⁴³

The Director-General once again took up certain questions relating to standards in his Report to the Conference in 1984, emphasizing that, for the ILO, “standard-setting activities remain the favoured means of achieving its objectives of economic progress and social justice and of exerting a growing influence in the international community”.⁴⁴ The objective of this Report was to give rise to a discussion in the Conference which would help to determine: the general approach to the adoption, revision, consolidation and implementation of standards; improvements in the procedures for the adoption of Conventions and Recommendations; clarification of the principles underlying supervision of compliance with standards; means of resolving situations in which the views of the supervisory bodies are contested by the State concerned; measures to assist member States to participate more actively in drawing up standards and promoting their implementation; and measures to ensure adequate coordination of the standard-setting work of international organizations.⁴⁵

The Conference held an in-depth discussion of these subjects and, to follow it up, in November 1984 the Governing Body set up a second Working Party on International Labour Standards, entrusted among other tasks with reviewing the classification of standards established in 1979, submitting a revised classification and examining future policy regarding the adoption of standards.⁴⁶ Despite certain differences of opinion concerning the procedures for standard-setting activities, the second Working Party emphasized at the outset in its final report the “importance which standard-setting activities retain as a means of promoting balanced development, in justice and freedom, and as a source of inspiration for social policies”.⁴⁷ In addition to revising the 1979

⁴¹ *ibid.*, para. 9.

⁴² *ibid.*, paras. 41-51.

⁴³ These are the Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948 (No. 89), and the Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147). However, these three instruments have received a very low number of ratifications.

⁴⁴ Report of the Director-General to the 70th Session (1984) of the Conference, ILO, Geneva, 1984, p. VII.

⁴⁵ *ibid.*, pp. 65-66.

⁴⁶ Report of the Working Party on International Labour Standards, *Official Bulletin*, Special issue, Vol. LXX, 1987, Series A, para. 1.

⁴⁷ *ibid.*, para. 6.

classification, the Working Party addressed more general questions, such as procedures for consolidating and abrogating standards.⁴⁸

Consolidation may offer interesting prospects in certain fields.⁴⁹ However, in technical terms, problems related to the coexistence of successive standards addressing the same subject also arise in this case. In this respect, a clear distinction should be made between consolidation measures and the publication of the International Labour Code.⁵⁰ Published by the Office in 1954, the latter is not an official codification, but a methodological presentation by subject matter of the provisions of Conventions and Recommendations adopted by the Conference from 1919 to 1951.⁵¹

ILO action in a globalized economy

Entrusted by its Constitution with promoting social justice, the ILO cannot remain passive before with the challenges of economic globalization. While the latter offers certain positive aspects in terms of economic growth, it is also marked by the persistence and growth of inequalities between rich countries and poor countries, and within each society. It is therefore indispensable to take into account the social dimension of globalization. Over 80 years after the creation of the ILO, the adoption of universal labour standards therefore still today finds one of its purposes in the fact that “the failure by 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 own countries”.⁵² Indeed, the *raison d’être* of the ILO “is still to guarantee social peace, without which neither the multilateral trade system, nor the financial system – and by extension the global economy – would be able to develop or even survive”.⁵³

The ILO’s response to the challenge of globalization has two basic dimensions. In the first place, the need to secure the protection of the fundamental rights of workers has been reaffirmed; and secondly, the Organization has made increased efforts to modernize its standards system. These efforts have focused, on the one hand, on existing standards, with the setting up by the Governing Body of a new Working Party to examine each of the instruments and make recommendations on them; and, on the other hand, on future standards-related activities, with the adoption of a new so-called integrated approach to the

⁴⁸ In terms of consolidation, the Minimum Age Convention, 1973 (No. 138), which is of general application and revises ten Conventions, each covering a specific sector, offers a model for the consolidation of a complex series of instruments.

⁴⁹ See, for example, the project for the framework Convention on maritime labour standards, which is examined below.

⁵⁰ *International Labour Code*, 1951, ILO, Geneva, 1954. A preliminary version of the Code had been published a few years previously only in English: *International Labour Code*, 1939, ILO, Montreal, 1941.

⁵¹ This collection of texts is supplemented by explanatory annotations and appendices containing resolutions, memoranda and relevant reports.

⁵² Preamble to the Constitution of the ILO.

⁵³ *The ILO, standard setting and globalization*, Report of the Director-General to the 85th Session (1997) of the Conference, ILO, Geneva, 1997, p. 7.

ILO's standards-related activities.⁵⁴ The following paragraphs successively describe the results of these various initiatives.

Following the Social Summit in Copenhagen in 1995, seven ILO Conventions, which constitute a minimum social platform, were qualified as fundamental⁵⁵ and have been covered by a specific promotional campaign. These Conventions cover, respectively, the prohibition of forced or compulsory labour, the abolition of child labour, freedom of association, the right to collective bargaining, equal remuneration for work of equal value and the elimination of any discrimination in employment and occupation. The Conference has gone further in considering that, in freely joining the ILO, all Members have endorsed the principles and rights set forth and developed in its Constitution and in the Declaration of Philadelphia, which are set forth and developed in the fundamental Conventions. Therefore, even if they have not ratified these Conventions, member States have an obligation, arising from the very fact of their membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles set out therein. Based on this postulate, in 1998 the Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which is described in the following section of this publication.

Working Party on Policy regarding the Revision of Standards

An important discussion on the ILO's standards system was held in the Conference in 1994, based on the Report submitted by the Director-General on the occasion of the 75th anniversary of the Organization.⁵⁶ Following the discussion, a document was submitted to the Governing Body which took up the themes and questions raised during the debate and addressed the means to be used to adapt the ILO's methods and practices in the field of standards. The document identified 14 themes which could be examined in greater detail, ranging from the place and role of standard setting, to the strengthening of the supervisory system, including the promotion of basic human rights Conventions.⁵⁷ Among these themes, the Governing Body gave priority to examining the need to revise existing standards and issues related to the denunciation and abrogation of Conventions.

The Governing Body identified a series of questions that it wished to examine: the assessment of actual revision needs, or in other words updating the classification established in 1987; studying the possibility of establishing a procedure for the regular evaluation of existing standards; reflecting on the possibility of diversifying methods of revision; strengthening the coherence of the standards system through the adoption of procedures for the abrogation of obsolete Conventions or other practical measures; analysing prospects for ratification; studying measures to improve the ratification rate of

⁵⁴ Work is also under way on possible improvements to the system for supervising the application of standards. See doc. GB.280/LILS/3.

⁵⁵ The number of fundamental Conventions rose to eight with the adoption of the Worst Forms of Child Labour Convention, 1999 (No. 182).

⁵⁶ *Defending values, promoting change: Social justice in a global economy: An ILO agenda*, Report of the Director-General to the 81st Session of the Conference, ILO, Geneva, 1994.

⁵⁷ Doc. GB.261/LILS/3/1, para. 66.

revised Conventions; and examining the issue of periods when ratified Conventions can be denounced.⁵⁸

For this purpose a Working Party on Policy regarding the Revision of Standards was set up in March 1995 by the Governing Body. Its first task consisted of evaluating current needs for the revision of standards, based on the 1987 classification, and making recommendations to the Governing Body in this respect. However, the instruments adopted since 1985, as well as fundamental and priority Conventions,⁵⁹ were not included in its mandate, as the Governing Body based itself on the principle that these standards were up-to-date. The Working Party is about to complete its work. Up to now,⁶⁰ the Governing Body has considered that 70 Conventions are up-to-date and that 24 others should be revised. In addition, 52 Conventions are out-of-date due to the fact, for example, that a more recent Convention has been adopted on the same subject, and member States have been invited to ratify the latter and denounce the earlier Convention.⁶¹ Before making a definitive decision on a number of Conventions, the Governing Body also requested additional information from member States on matters such as obstacles to ratification and the need to revise these Conventions.

In addition to this individual examination of existing standards, the Working Party has addressed more general matters relating to standards policy. In this regard, it held a first discussion on methods for the revision of standards.⁶² As noted above, for the past 40 years, the double-discussion procedure, which was originally envisaged for the adoption of new standards, has also been used for the revision of Conventions. The document prepared by the Office as a basis for the review examined, among other matters, the possibility of having recourse to alternative methods, including reactivating the simplified revision procedure adopted in 1965, as well as the adoption of Protocols or amendments to Conventions. In conclusion, the Working Party considered that the choice of a specific procedure for the revision of a Convention and the form taken by the resulting instrument should be based on an evaluation of the most appropriate methods for the specific case, taking into account the objective of the revision.

Moreover, following the examination by the Working Party of the question of the procedure to abrogate or otherwise terminate international labour Conventions,⁶³ the Conference in 1997 adopted an instrument for the amendment of the Constitution of the

⁵⁸ Doc. GB.262/LILS/3, paras. 30 and 67.

⁵⁹ In addition to the fundamental Conventions referred to above, four Conventions are classified as priority Conventions: the Labour Inspection Convention, 1947 (No. 81); Employment Policy Convention, 1964 (No. 122); the Labour Inspection (Agriculture) Convention, 1969 (No. 129); and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

⁶⁰ These figures take into account the decisions of the Governing Body up to its 280th Session (March 2001) inclusive. For more detailed information on these decisions, see the Information note on the progress of work and decisions taken concerning the revision of standards, doc. GB.280/LILS/WP/PRS/1/2.

⁶¹ Where the most recent Convention revises an earlier Convention, its ratification results (except for the earliest Conventions and under certain conditions) in the automatic denunciation of the earlier Convention.

⁶² Doc. GB.274/LILS/WP/PRS/2.

⁶³ Docs. GB.265/LILS/WP/PRS/2, GB.265/LILS/5, GB.267/LILS/WP/PRS/1 and GB.267/LILS/4/1.

ILO which, when it has come into force,⁶⁴ will enable the Conference to abrogate Conventions considered to be obsolete because they have lost their purpose or no longer make a useful contribution to attaining the objectives of the Organization.⁶⁵ The only effect of abrogation is to remove the legal effects of the Convention in relation to the Organization and the other parties. The Governing Body has considered that five Conventions are obsolete and could be abrogated when the instrument of amendment of the Constitution comes into force.⁶⁶

Moreover, an amendment to the Standing Orders of the Conference has introduced a procedure for the withdrawal of Conventions that are not in force and of obsolete Recommendations,⁶⁷ in view of the fact that they give rise to no binding obligations for States, and that, the obstacles referred to above do not arise.⁶⁸ In June 2000, the Conference withdrew five Conventions which had not entered into force and, at its session in June 2002, it will examine the question of the withdrawal of 20 Recommendations.

The introduction of the possibility of abrogating or withdrawing obsolete Conventions constitutes an important step forward in symbolic terms in view of the efforts to strengthen the coherence and relevance of the ILO's standards system. It thereby constitutes a step towards the development of a real International Labour Code, going beyond the unofficial codification carried out by the ILO half a century ago. These procedures have nevertheless been surrounded by certain guarantees to ensure their proper utilization. For example, when the Governing Body is called upon to decide on the placing on the agenda of the Conference the question of abrogating or withdrawing obsolete instruments, such a decision must as far as possible be reached by consensus.⁶⁹

Prior to the adoption of the procedures for abrogation and withdrawal, the Governing Body adopted practical measures designed to focus the efforts of the Organization on up-to-date standards, by shelving certain out-of-date Conventions. Since then, five of these Conventions have been withdrawn and others could be abrogated once the 1997 amendment to the Constitution has come into force. Currently, a total of 22 Conventions have been shelved. In practical terms, this means that their ratification is no longer encouraged and, in theory, States parties to these Conventions are no longer obliged to submit periodical reports on their application. Safeguards have nevertheless been envisaged and, for example, enable employers' and workers' organizations to submit observations, where necessary, on the application of these Conventions, which can once again set off the obligation to submit regular reports on them. Furthermore, the possibility

⁶⁴ To come into force, the instrument of amendment has to be ratified or accepted by 117 member States, including five of the ten Members of chief industrial importance. As of 30 June 2001, 65 member States, including five of chief industrial importance, had ratified or accepted it.

⁶⁵ F. Maupin, "Une révolution tranquille dans le droit des traités: l'abrogation des conventions internationales du travail obsolètes", in *Annuaire français de droit international*, 1996, pp. 629-634.

⁶⁶ Doc. GB.280/LILS/WP/PRS/1/2, paras. 37-38 and 49-50.

⁶⁷ New article 45bis of the Standing Orders of the Conference.

⁶⁸ With the exception of the obligations envisaged in article 19 of the Constitution.

⁶⁹ If such a consensus cannot be reached in two successive sessions of the Governing Body, the decision has to be taken by a four-fifths majority of members of the Governing Body with a right to vote during the second of these sessions. Article 12bis of the Standing Orders of the Governing Body.

of submitting representations or complaints alleging non-compliance with a Convention by a State has been maintained for shelved Conventions.⁷⁰

The integrated approach to the ILO's standards-related activities

Shortly after taking office, in 1999, the Director-General of the ILO, Juan Somavia, submitted to the Conference a Report in which he emphasized that, in the context of economic globalization, the primary goal of the ILO is to promote opportunities for everyone to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.⁷¹ This Report, which received very broad support from the Conference, also pointed out that, for the ILO, the “best guarantee of credibility lies in the effectiveness of the ILO’s normative activities and the integrity of its supervisory and control machinery (...) Improving the visibility, effectiveness and relevance of the ILO’s standard-setting system must become a political priority”.⁷² Based on the direction provided by the Director-General and the results of the Cartier Working Party, a new wave of reflection on the ILO’s standards policy and a general examination of possible improvements to the ILO’s standards activities has been launched. This examination is still far from being completed.⁷³ It has however already produced an important outcome with the adoption by the Governing Body in November 2000 of the integrated approach to the ILO’s standards-related activities.⁷⁴

The integrated approach to standards-related activities is based on the combined use of all the Organization’s means of action and follows directly from the constant efforts of the ILO to reinforce the coherence and relevance of international labour standards and increase their impact. This may be subdivided into three stages. The first is a result of the realization that, to ensure the relevance and impact of any new or revised standards in a particular field and the coherence of the resulting set of standards, it is indispensable, before placing any new standards-related item on the agenda of the Conference, to undertake an examination of all the means of action already available to the Organization in this area.⁷⁵ The Office would therefore be called upon to undertake a thorough analysis, in the area under examination, of existing standards, other types of instruments (such as collections of practical guidelines) and the other means of action of the Organization, such as promotional action and technical cooperation. As a second stage, in a technical committee, the Conference would hold a general discussion based on the Office’s analysis. This discussion would make it possible for the Conference to identify the needs and priorities of the Organization in a specific area and accordingly to adopt an overall plan. This would identify the subjects for new standards, the form and objective of revisions decided upon by the Governing Body, the possibility of adopting more technical instruments on certain subjects, and needs in relation to promotion and technical

⁷⁰ Articles 24 and 26 of the Constitution.

⁷¹ *Decent work*, Report of the Director-General to the 87th Session (1999) of the Conference, p. 3.

⁷² *ibid.*, p. 7.

⁷³ In this context, the Governing Body has also undertaken a re-examination of the system for supervising the application of international labour standards, which it will pursue over its next sessions. On this subject, see docs. GB.280/LILS/3 and GB.280/12/1.

⁷⁴ Doc. GB.279/4.

⁷⁵ *ibid.*, para. 13.

cooperation. At a third stage, the Governing Body would be entrusted with implementing the plan of action adopted by the Conference. For example, if the Conference identifies potential subjects for new standards, it would be for the Governing Body to place these items on the agenda of subsequent sessions of the Conference.

The implementation of the integrated approach implies the grouping of Conventions and Recommendations by subject matter around the four strategic objections of the Organization, namely standards and fundamental principles and rights at work, employment, social protection and social dialogue into “families” of standards.⁷⁶ The Governing Body has decided that occupational safety and health will be the subject of the first application of the integrated approach at the session of the Conference in June 2003.⁷⁷

Conclusion

From the very first years of its existence, the ILO has endeavoured to improve its standards system. Very early on, it addressed the question of the revision of standards, both in terms of the procedure to be followed and its effects. Its constant search for new solutions has also enabled it to find ways of overcoming the obstacles with which it has been confronted in its efforts to strengthen the coherence and relevance of its standards system. Examples include the amendment of the model final provisions in 1929 and, nearly 70 years later, the adoption of the instrument of amendment of the Constitution on the abrogation of obsolete Conventions. The Governing Body’s two working parties have also made a significant contribution to this endeavour by identifying up-to-date Conventions and Recommendations and the need to revise other instruments, thereby providing a clearer vision of the body of standards.

The efforts to modernize the ILO’s standards system are still continuing, with the adoption of the integrated approach and the examination commenced by the Governing Body of the supervisory procedures for the application of standards. Other work is under way in specific fields, such as the project for the consolidation of maritime Conventions and Recommendations, which could lead up to the adoption of a framework Convention on labour standards in this sector.⁷⁸

The above developments show that the ILO has been able to establish a real standards policy as an essential instrument for the attainment of its objectives. By pursuing its efforts in this direction, it will be ever more capable of strengthening the impact of international labour standards, and accordingly of promoting social justice.

⁷⁶ *Reducing the decent work deficit: A global challenge*, Report of the Director-General to the 89th Session (2001) of the Conference, p. 60.

⁷⁷ Doc. GB.280/2.

⁷⁸ The first part of this Convention would contain general provisions, while each of the other parts would cover a specific area. Each of these parts could be supplemented by one or more appendices containing more detailed provisions, for which a simplified mechanism would be envisaged for updating them. By ratifying the framework Convention, member States would have to accept a minimum number of appendices. In legal terms, this is an innovation which would provide the ILO, in a very important economic sector, with an overall standard endowed with a certain flexibility and allowing its regular updating through its appendices. Doc. GB.280/5.

Chapter 1

Freedom of association

B. Gernigon, A. Otero and H. Guido

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and recommendations to which member States are invited to give effect.)		
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	138	Fundamental Convention
Workers' Representatives Convention, 1971 (No. 135)	70	The Governing Body has invited member States to contemplate ratifying Convention No. 135 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of the Convention.
Workers' Representatives Recommendation, 1971 (No. 143)	–	The Governing Body has invited member States to give effect to Recommendation No. 143.
Rural Workers' Organisations Convention, 1975 (No. 141)	37	The Governing Body has invited member States to contemplate ratifying Convention No. 141 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of the Convention.
Rural Workers' Organisations Recommendation, 1975 (No. 149)	–	The Governing Body has invited member States to give effect to Recommendation No. 149.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects)		
Right of Association (Agriculture) Convention, 1921 (No. 11)	120	The Governing Body has invited the States parties to Convention No. 11 which have not yet ratified Convention No. 87 to contemplate doing so. In addition, it has invited member States which have not ratified either Convention No. 11 or Convention No. 87 to ratify the latter on a priority basis.
Right of Association (Non-Metropolitan Territories) Convention, 1947 (No. 84)	4	The Governing Body has invited member States which have made a formal commitment to apply the provisions of Convention No. 84 to contemplate ratifying Convention No. 87, and/or as appropriate, Convention No. 98. The Office has to conduct consultations on this issue with States parties to this Convention and inform the Governing Body of the result of the consultations.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged).		
In the area of freedom of association, no instrument has been considered as outdated by the Governing Body		

In its Preamble, the Constitution of the ILO (1919) affirms the principle of freedom of association as being among the means of improving the conditions of workers and ensuring peace. The 1944 Declaration of Philadelphia, which forms part of the Constitution of the ILO, affirms that “freedom of expression and of association are essential to sustained progress” and emphasizes that they are among the “fundamental principles on which the Organisation is based”. In June 1998, the International Labour Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which states that “all Members, even if they have not ratified the [fundamental] Conventions (...), have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”. These principles include freedom of association and the effective recognition of the right to collective bargaining. The Declaration considers as fundamental the principles of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

Freedom of association and collective bargaining are of vital importance for the social partners, since they enable them to establish rules in such areas as working conditions, including wages, and to further more general claims.

I. Content of the standards on freedom of association

Right to organize, independence of organizations and non-interference by the authorities

The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), applies to workers and employers and their organizations and sets forth the following rights and guarantees:

- Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.
- Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.
- Workers' and employers' organizations shall not be liable to be dissolved or suspended by administrative authority.
- The acquisition of legal personality by workers' and employers' organizations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the above provisions.
- Workers' and employers' organizations shall have the right to establish and join federations and confederations. The above four provisions apply to federations and confederations of organizations of workers and employers.
- Any organization, federation or confederation shall have the right to affiliate with international organizations of workers and employers.
- In exercising the rights provided for in the Convention, workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in the Convention.
- The extent to which the guarantees provided for in the Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
- The term "organization" means any organization of workers or of employers for furthering and defending the interests of workers or of employers.
- Each Member of the International Labour Organization for which the Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.

Protection against acts of discrimination and interference

The Right to Organise and Collective Bargaining Convention, 1949 (No. 98), sets forth the following guarantees relating to the right to organize:¹

- Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

Such protection shall apply more particularly in respect of acts calculated to:

- make the employment of a worker subject to the condition that he or she shall not join a union or shall relinquish trade union membership;
 - cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours, or with the consent of the employer, within working hours.
- Workers' and employers' organizations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

In particular, acts which are designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations, or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations, shall be deemed to constitute acts of interference.

The Convention provides that "Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organize" as defined by the preceding provisions.

With regard to its scope of application, the Convention provides that the extent to which the guarantees for which it provides shall apply to the armed forces and the police shall be determined by national laws or regulations. Furthermore, the Convention does not deal with the position of public servants, nor shall it be construed as prejudicing their rights or status in any way.

Protection and facilities to be afforded to workers' representatives

The Workers' Representatives Convention, 1971 (No. 135), supplements the provisions of Convention No. 98 relating to anti-union discrimination since, although Convention No. 98 refers to the protection which shall be enjoyed by workers and trade union members, it does not specifically address the question of the protection of workers' representatives, nor the facilities necessary for them to carry out their functions.

For the purposes of Convention No. 135, these representatives may, in accordance with national law or practice, be representatives designated or elected by trade unions, or representatives who are freely elected by the workers of the enterprise (although in the latter case, their functions must not include activities which are recognized as the exclusive prerogative of trade unions). The type or types of representatives concerned may be

¹ The provisions of Convention No. 98 respecting collective bargaining are covered in the next chapter.

determined through national laws or regulations, collective agreements, arbitration awards or court decisions.

With regard to the protection of workers' representatives in the enterprise, the Convention provides that they "shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements".

The Workers' Representatives Recommendation, 1971 (No. 143), lists as examples a number of measures with a view to affording effective protection against acts deemed to be prejudicial, including: detailed and precise definition of the reasons justifying termination of employment; consultation with, or an advisory opinion from, an independent or joint body; a special recourse procedure; an effective remedy for unjustified termination of employment including, unless this is contrary to the basic principles of the law of the country concerned, reinstatement with payment of unpaid wages and with maintenance of acquired rights; the laying upon the employer of the burden of proof; recognition of a priority to be given to workers' representatives with regard to their retention in employment in the case of reduction of the workforce. According to the Recommendation, the protection set out in the Convention should also apply to workers who are candidates for election or appointment as workers' representatives.

Convention No. 135 also provides that facilities in the enterprise shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently. In this connection, account has to be taken of the characteristics of the industrial relations system of the country and the needs, size and capabilities of the enterprise concerned. The Convention emphasizes that the granting of such facilities must not impair the efficient operation of the enterprise concerned.

Recommendation No. 143 lists as number of facilities for workers' trade union representatives, including: the granting of time off from work without loss of pay or benefits; access to workplaces, to the management of the enterprise and to management representatives empowered to take decisions; authorization to collect trade union dues; authorization to post trade union notices; distribution of union documents to workers; material facilities and information necessary for the exercise of their functions. The Recommendation envisages guarantees for employers that the facilities should not impair the efficient operation of the enterprise. It also envisages that elected representatives (of workers) should be given similar facilities as trade union representatives.

Effect may be given to the provisions of Convention No. 135 through national laws or regulations or collective agreements, or in any other manner consistent with national practice.

The Convention also states that "the existence of elected representatives" must not be "used to undermine the position of the trade unions concerned or their representatives" and, at the same time, that appropriate measures have to be taken to "encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives".

Right of association of rural workers' organizations

The Right of Association (Agriculture) Convention, 1921 (No. 11), provides that each Member which ratifies the Convention undertakes to "secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged

in agriculture”. This protection is very limited in scope and it therefore appeared necessary to devote a specific instrument to rural workers.

The Rural Workers’ Organisations Convention, 1975 (No. 141), associates rural workers’ organizations with economic and social development for the permanent and effective improvement of their conditions of work and life.

Convention No. 141 applies to organizations of rural workers (including organizations not restricted to but representative of rural workers), to rural workers and wage earners and, subject to certain conditions, to tenant farmers, sharecroppers or small owner-occupiers, even if they are self-employed.

Convention No. 141 sets forth the right of rural workers to establish and join organizations of their own choosing with a view to participating in economic and social development and in the benefits resulting therefrom. These organizations must be independent, established on a voluntary basis and must remain free from all interference, coercion or repression. The Convention reaffirms the principles set out in Convention No. 87 concerning respect for law of the land and the acquisition of legal personality. In accordance with the Convention, member States are under the obligation to encourage the development of strong and independent organizations and to eliminate discrimination as an objective of national policy concerning rural development. Steps also have to be taken to promote the widest possible understanding of the need to further the development of these organizations and of the contribution that they can make.

The Rural Workers’ Organisations Recommendation, 1975 (No. 149), develops the principles set out in Convention No. 141. It indicates that these organizations should represent rural workers and defend their interests, for instance through negotiations and consultations at all levels, including in relation to programmes of rural development and in national planning. The organizations should be associated with planning procedures and the functioning of the competent authorities.

The Recommendation emphasizes the role of organizations of rural workers in promoting their access to services such as credit and transport, in the improvement of education, training and conditions of work, and in the extension of social security and basic social services. It devotes several paragraphs to the principles of freedom of association, collective bargaining and protection against anti-union discrimination (including in relation to other workers and organizations), it refers to the issue of the access of organizations to their members in a manner respecting the rights of all concerned, and recommends adequate machinery to ensure the implementation of laws and regulations.

The Recommendation advocates the adoption of appropriate measures to make possible the effective participation of such organizations in the formulation, implementation and evaluation of agrarian reform programmes.

The Recommendation also enumerates steps which should or might be taken to promote a better understanding of the contribution which can be made by rural workers’ organizations in rural matters and the means of attaining this objective (information campaigns, seminars, etc.). Part of the Recommendation covers the training of the leaders

and members of rural workers' organizations with a view to achieving the objectives which are indicated.²

Finally, Recommendation No. 149 indicates that financial and material assistance for rural workers' organizations, including that provided by the State, should be received in a manner which fully respects their independence and interests and those of their members.

² With regard to workers' education, reference should be made to other instruments. The Paid Educational Leave Convention, 1974 (No. 140), provides that each Member shall formulate and apply a policy designed to promote, by methods appropriate to national conditions and practice and by stages as necessary, the granting of paid educational leave for the purpose of (...) trade union education. The policy shall be designed to contribute, on differing terms as necessary:

- (a) to the acquisition, improvement and adaptation of occupational and functional skills, and the promotion of employment and job security in conditions of scientific and technological development and economic and structural change;
- (b) to the competent and active participation of workers and their representatives in the life of the undertaking and of the community;
- (c) to the human, social and cultural advancement of workers; and
- (d) generally, to the promotion of appropriate continuing education and training, helping workers to adjust to contemporary requirements.

Under the terms of the Convention, the financing of arrangements for paid educational leave shall be on a regular and adequate basis and in accordance with national practice.

The Paid Educational Leave Recommendation, 1974 (No. 148), indicates that the financing of arrangements for paid educational leave should be on a regular and adequate basis and in accordance with national practice. It adds that it should be recognized that employers, collectively or individually, public authorities and educational or training institutions or bodies, and employers' and workers' organizations, may be expected to contribute to the financing of arrangements for paid educational leave according to their respective responsibilities.

The Recommendation adds that the workers' organizations concerned should have the responsibility for the selection of candidates for trade union education. It also indicates that the manner in which workers who satisfy the conditions of eligibility are granted paid educational leave should be agreed upon between enterprises or the employers' organizations concerned and the workers' organizations concerned so as to ensure the efficient continuing operation of the enterprises in question.

Where trade union education programmes are carried out by the trade union organizations themselves, they should have the responsibility for planning, approval and implementation of the programmes. Where such programmes are carried out by other educational institutions or bodies, they should be established in agreement with the trade union organizations concerned.

Furthermore, the Human Resources Development Recommendation, 1975 (No. 150), provides that Members should aim in particular at establishing conditions permitting workers to supplement their vocational training by trade union education given by their representative organizations. The Recommendation advocates that representatives of employers' and workers' organizations should be included in the bodies responsible for governing publicly operated training institutions and for supervising their operations; where such bodies do not exist, representatives of employers' and workers' organizations should in other ways participate in the setting up, management and supervision of such institutions.

Trade union rights in the public administration

The Labour Relations (Public Service) Convention, 1978 (No. 151), was adopted taking into account the fact that Convention No. 98 does not cover certain categories of public servants and that the Workers' Representatives Convention, 1971 (No. 135), only applies to workers' representatives in the enterprise.

Convention No. 151 applies to all persons employed by public authorities (to the extent that more favourable provisions in other international labour Conventions are not applicable to them). However, it is for national laws or regulations to determine the extent to which the guarantees provided for in the Convention shall apply to: (1) high-level employees whose functions are normally considered as policy-making or managerial; (2) employees whose duties are of a highly confidential nature; and (3) the armed forces and the police.

Convention No. 151 contains similar provisions to those in Convention No. 98 concerning protection against anti-union discrimination and acts of interference, and to those in Convention No. 135 relating to the facilities to be afforded to representatives of organizations of public employees in order to enable them to carry out their functions promptly and efficiently (see above). With reference to these facilities, their nature and scope, the Labour Relations (Public Service) Recommendation, 1978 (No. 159), indicates that regard should be had to the Workers' Representatives Recommendation, 1971 (No. 143) (see above).

Convention No. 151 contains a provision on procedures for determining terms and conditions of employment which is analysed (alongside certain provisions of Recommendation No. 159) in the following chapter of this publication on collective bargaining.³

Finally, Convention No. 151 provides that "Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions."

Other categories of workers

The Migration for Employment Convention (Revised), 1949 (No. 97), lays down the principle of the non-discrimination of migrant workers in respect of "membership of trade unions and enjoyment of the benefits of collective bargaining". The Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100), states that the right of association and freedom for all lawful trade union activities should be granted to migrant workers and that "all practicable measures should be taken to assure to trade unions which are representative of the workers concerned the right to conclude collective agreements". The Migrant Workers Recommendation, 1975 (No. 151), reaffirms the principle of effective equality of opportunity and treatment with nationals in respect of membership of trade unions, exercise of trade union rights and eligibility for office in trade unions and in labour-management relations bodies, including bodies representing workers in enterprises.

The Indigenous and Tribal Peoples Convention, 1989 (No. 169), lays down that governments shall do everything possible to prevent any discrimination as regards "the

³ Convention No. 151 also covers the settlement of collective labour disputes. This issue is also examined in Chapter 2 on collective bargaining.

right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations".

The Plantations Convention, 1958 (No. 110), Parts IX and X, reproduces all the principles set out in Conventions Nos. 87 and 98.

The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), is designed to ensure that States which have ratified it, for ships registered in their territory, ensure that the provisions of their laws and regulations are "substantially equivalent to the Conventions or Articles of Conventions referred to in the Appendix" to the Convention, which include Conventions Nos. 87 and 98.

The Merchant Shipping (Improvement of Standards) Recommendation, 1976 (No. 155), indicates that "steps should be taken, by stages if necessary, with a view to such laws or regulations, or as appropriate collective agreements, containing provisions at least equivalent to the provisions of the instruments referred to in the Appendix" to the Recommendation, which include the Workers' Representatives Convention, 1971 (No. 135).

Standards referring to strikes

Strikes are mentioned in the Abolition of Forced Labour Convention, 1957 (No. 105), and in the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), Convention No. 105 prohibits the use of any form of forced or compulsory labour "as a punishment for having participated in strikes" (Article 1(d)). Recommendation No. 92 advocates abstaining from strikes while conciliation or arbitration procedures (Paragraphs 4 and 6) are in progress and indicates that none of its provisions may be interpreted "as limiting, in any way whatsoever, the right to strike" (Paragraph 7).

II. Summary of the principles of the Committee of Experts

The standards and principles concerning freedom of association derived from ILO Conventions and Recommendations, and the principles established by the Committee of Experts on the basis of these instruments, may be summarized as follows:

Trade union rights and civil liberties

- The guarantees set out in international labour Conventions, in particular those relating to freedom of association, can only be effective if the civil and political rights enshrined in the Universal Declaration of Human Rights and other international instruments are genuinely recognized and protected.

Right of workers and employers, without distinction whatsoever, to establish and join organizations of their own choosing

- The free exercise of this trade union right involves: the absence of any distinction (based on race, nationality, sex, marital status, age, political affiliation or activities) in law and in practice among those entitled to the right of association; the absence of the need for previous authorization to establish organizations; and freedom of choice with regard to membership of such organizations.
- The guarantees of Convention No. 87 should apply to all workers and employers without any distinction whatsoever, the only exceptions provided by the Convention

being the armed forces and the police. Provisions prohibiting the right to organize for specific categories of workers, such as public servants, managerial staff, domestic staff or agricultural workers, are incompatible with the express provisions of the Convention.

Right to establish organizations without previous authorization

- The formalities required, such as those intended to ensure publicity, must not be so complex or lengthy as to give the authorities in practice discretionary power to refuse the establishment of organizations. Provision should be made for the possibility of a judicial appeal against any administrative decision of this kind to an independent and impartial body.

Right of workers and employers to establish and join organizations of their own choosing

- The right of workers and employers to establish organizations of their own choosing implies in particular the right to take freely the following decisions: choice of the structure and composition of organizations; the establishment of one or more organizations in any one enterprise, occupation or branch of activity; and the establishment of federations and confederations. It is derived from this principle that, although the Convention does not aim to make trade union pluralism compulsory, pluralism must be possible in every case, even if trade union unity was once adopted by the trade union movement. Systems of trade union unity or monopoly must not therefore be imposed directly by the law.
- Excessive restrictions as regards the minimum number of members are also incompatible with Article 2 of Convention No. 87.

Free functioning of organizations; Right to draw up their constitutions and rules

- In order for this right to be fully guaranteed, two basic conditions must be met: firstly, national legislation should only lay down formal requirements as regards trade union constitutions; secondly, the constitutions and rules should not be subject to prior approval at the discretion of the public authorities.
- The existence of a right to appeal to the courts in connection with the approval of by-laws does not in itself constitute a sufficient guarantee. The courts should be entitled to re-examine the substance of the case, as well as the grounds on which an administrative decision is based.

Right to elect representatives in full freedom

- The autonomy of organizations can be effectively guaranteed only if their members have the right to elect their representatives in full freedom. The public authorities should therefore refrain from any interference which might restrict the exercise of this right, whether as regards the holding of trade union elections, conditions of eligibility or the re-election or removal of representatives.
- The regulation of procedures and methods for the election of trade union officials is primarily to be governed by the trade unions' rules themselves. The fundamental idea of Article 3 of Convention No. 87 is that workers and employers may decide for themselves the rules which should govern the administration of their organizations and the elections which are held therein.

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- The intervention of the authorities in the exercise of this right should not go beyond provisions to promote democratic principles within trade unions or to ensure the proper conduct of the election process, with respect for members' rights, so as to avoid any dispute on their outcome.

Right of trade unions to organize their administration

- The right of workers' and employers' organizations to organize their administration without interference by the public authorities includes in particular autonomy and financial independence and the protection of the assets and property of these organizations.
- Problems of compatibility with Convention No. 87 arise when the law establishes the minimum contribution of members, specifies the proportion of union funds that have to be paid to federations or requires that certain financial operations, such as the receipt of funds from abroad, be approved by the public authorities.
- Problems of compatibility also arise where the administrative authority has the power to examine the books and other documents of an organization, conduct an investigation and demand information at any time, or is the only body authorized to exercise control, or if such control is exercised by the single central organization expressly designated by the law.
- The freedom to organize their administration is not limited to strictly financial operations but also implies that trade unions should be able to dispose of all their fixed and movable assets unhindered and that they should enjoy inviolability of their premises, correspondence and communications.

Right of organizations to organize their activities in full freedom and to formulate their programmes

- This right includes in particular the right to hold trade union meetings, the right of trade union officers to have access to places of work and to communicate with management, certain political activities of organizations, the right to strike⁴ and, in general, any activity involved in the defence of members' rights.
- The right to peaceful strike action must be recognized in general for trade unions, federations and confederations in the public and private sectors: this right may only be prohibited or subjected to important restrictions for the following categories of workers or in the following situations: members of the armed forces and the police; public servants exercising authority in the name of the State; workers in essential services in the strict sense of the term (those the interruption of which would endanger the life, personal safety or health of the whole or part of the population); and in the event of an acute national crisis.
- The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations.

⁴ For the Committee of Experts, although the right to strike is not mentioned explicitly in Convention No. 87, it derives from Article 3, which sets forth the right of organizations to organize their activities and to formulate their programmes.

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- Appropriate protection should be afforded to trade union leaders and workers against measures which may be taken against them (dismissal or other sanctions) for organizing or participating in lawful and peaceful strikes.⁵

Right of workers' and employers' organizations to establish federations and confederations and to affiliate with international organizations of workers and employers

- Workers' and employers' organizations should have the right to form federations and confederations of their own choosing, which should themselves enjoy the various rights accorded to first-level organizations, in particular as regards their freedom of operation, activities and programmes.
- International solidarity of workers and employers also requires that their national federations and confederations be able to group together and act freely at the international level.

Dissolution and suspension of organizations

- Measures of suspension or dissolution by the administrative authority constitute serious infringements of the principles of freedom of association.
- The dissolution and suspension of trade union organizations constitute extreme forms of interference by the authorities in the activities of organizations, and should therefore be accompanied by all the necessary guarantees. This can only be ensured through a normal judicial procedure, which should also have the effect of a stay of execution.
- As regards the distribution of trade union assets in the event of dissolution, these should be used for the purposes for which they were acquired.

Protection against acts of anti-union discrimination

- The protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association, since such acts may result in practice in denial of the guarantees laid down in Convention No. 87.
- Article 1 of Convention No. 98 guarantees workers adequate protection against acts of anti-union discrimination, in taking up employment and in the course of employment, including at the time of termination, and covers all prejudicial acts related to trade union membership or participation in lawful trade union activities.⁶

⁵ For a complete overview of the principles of the supervisory bodies on the right to strike, see ILO: B. Gernigon, A. Odero and H. Guido, "ILO principles concerning the right to strike", in *International Labour Review*, Vol. 137 (1998), No. 4. This article has also been published separately.

⁶ For example, legislation which in practice allows employers to terminate employment of a worker, subject to the payment of the compensation provided for by the law in all cases of unjustified dismissal, when the real motive is the worker's trade union membership or activities, is inadequate under the terms of Article 1 of the Convention.

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- The protection provided in the Convention is particularly important in the case of trade union representatives and officers, as these must have the guarantee that they will not be prejudiced on account of the union office which they hold.
 - The existence of general legal provisions prohibiting acts of anti-union discrimination is inadequate unless they are combined with effective, expeditious, inexpensive and impartial procedures to ensure their application in practice, coupled with sufficiently dissuasive sanctions.
 - Protection against acts of anti-union discrimination may take various forms adapted to national law and practice, provided that it prevents or effectively compensates anti-union discrimination.

Adequate protection against acts of interference

- The legislation should make express provision for rapid appeal procedures, coupled with effective and dissuasive sanctions against acts of interference by employers and their organizations against workers' organizations, and vice versa.

III. Application of standards and principles in practice

Analysis of the content of the Committee of Experts' observations for 2000 and 2001 concerning the application of Convention No. 87 shows that comments were made for 88 of the 134 countries which have ratified the Convention. However, for most of these countries, the problems observed did not seriously impair the principles of freedom of association. The matters addressed include restrictions on the right of association of certain categories of workers (public servants, seafarers, workers in export processing zones, etc.) (40 countries). In a significant number of countries, the legislation contains restrictions on the categories of persons who may hold trade union office (distinction between nationals and foreigners) (15 countries), restrictions on the free election of trade union leaders (12 countries), the requirement of an excessive number of workers or employers to establish a trade union or an employers' association (11 countries), refusal to register organizations or the requirement of prior authorization (12 countries). Finally, there are a lower number of comments concerning the imposition by law of a trade union monopoly (eight countries), denial of the right to establish federations and confederations, or limitations on their functions (seven countries), dissolution of organizations by administrative authority (four countries) and the prohibition of more than one union in a single enterprise or sector (five countries). The comments also address restrictions on various aspects of the right to strike (the prohibition of this right for public servants other than those exercising authority in the name of the State, the imposition of compulsory arbitration, the prohibition of strikes in services which are not essential in the strict sense of the term, the denial of the right to strike for federations and confederations, and the imposition by the government of minimum services without consulting the parties).

In relation to the application of the provisions of Convention No. 98 respecting protection against acts of anti-union discrimination and interference, the observations of the Committee of Experts for 2000 and 2001 include critical comments concerning 34 of the 148 States which have ratified the Convention. The problems raised concern in particular legislation which does not contain provisions prohibiting anti-union discrimination (20 countries) or acts of interference (12 countries), or which provide inadequate protection, particularly in view of the absence of procedures (five countries) or of sufficiently dissuasive sanctions (12 countries). To a lesser extent, the problems raised concern the slowness of compensation procedures and the exclusion of certain categories of workers from the guarantees afforded by the Convention (five countries).

Chapter 2

Collective bargaining

B. Gernigon, A. Otero and H. Guido

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	150	Fundamental Convention
Labour Relations (Public Service) Convention, 1978 (No. 151)	39	The Governing Body has invited member States to contemplate ratifying Convention No. 151 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of the Convention.
Labour Relations (Public Service) Recommendation, 1978 (No. 159)	–	The Governing Body has invited member States to give effect to Recommendation No. 159.
Collective Bargaining Convention, 1981 (No. 154)	32	The Governing Body has invited member States to contemplate ratifying Convention No. 154 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of the Convention.
Collective Bargaining Recommendation, 1981 (No. 163)	–	The Governing Body has invited member States to give effect to Recommendation No. 163.
Collective Agreements Recommendation, 1951 (No. 91)	–	The Governing Body has invited member States to give effect to Recommendation No. 91.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
In the area of collective bargaining, no instrument has been considered as outdated by the Governing Body.		

One of the ILO's principal missions is to promote collective bargaining throughout the world. This mission was conferred upon it in 1944 by the Declaration of Philadelphia, which forms part of the Constitution of the ILO and which recognizes "the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve [...] the effective recognition of the right of collective bargaining". This principle is set forth in the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), adopted five years later in 1949, which has since achieved almost universal adhesion in terms of ratifications, bearing witness to the force of the principles that it lays down in most countries.

More recently, in June 1998, the ILO took a further step by adopting the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which indicates that "all Members, even if they have not ratified the [fundamental] Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions". These principles include the effective recognition of the right to collective bargaining, as well as freedom of association.

I. Content of the standards

Definition and purpose of collective bargaining

In the ILO's instruments, collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. For the purposes of the Collective Agreements Recommendation, 1951 (No. 91), under Paragraph 2, the term "collective agreements":

means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.

Also under the terms of Recommendation No. 91, collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Stipulations in contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. However, stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should be respected. Recommendation No. 91 therefore established in 1951 the principle of the binding nature of collective agreements and their precedence over individual contracts of employment, with the exception of clauses in such contracts which are more favourable for workers covered by the collective agreement.

Convention No. 98 does not contain a definition of collective agreements, but outlines their fundamental aspects in Article 4:

Measures appropriate to national conditions shall be taken [...] to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

In the preparatory work for the Labour Relations (Public Service) Convention, 1978 (No. 151), it was agreed that the term "negotiation" was to be interpreted as including "any form of discussion, formal or informal, that was designed to reach agreement", and that this word was preferable to "discussion", which "might not be designed to secure agreement".¹

The Collective Bargaining Convention (No. 154), adopted in 1981, further defines this concept in Article 2:

The term "collective bargaining" extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organizations and a workers' organisation or workers' organisations.

Subjects, parties and content of collective bargaining

The ILO's instruments only authorize collective bargaining with the representatives of the workers concerned in the absence of workers' organizations at the specific level (the enterprise or higher levels). This principle is set out in Paragraph 2, referred to above, of Recommendation No. 91 and is confirmed in the Workers' Representatives Convention, 1971 (No. 135), which provides in Article 5 that appropriate measures shall be taken to ensure that "the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives". Similarly, Convention No. 154

¹ ILO: *Record of Proceedings*, 64th Session of the International Labour Conference (1978), paras. 64 and 65, p. 25/9, Geneva.

provides in Article 3, paragraph 2, that “appropriate measures shall be taken, wherever necessary, to ensure that the existence of these [workers’] representatives is not used to undermine the position of the workers’ organisations concerned”.

The possibility for representatives of workers to be able to conclude collective agreements in the absence of one or various representative organisations of workers is envisaged in Recommendation No. 91, “taking into account the position of those countries in which trade union organisations have not yet reached a sufficient degree of development, and in order to enable the principles laid down in the Recommendation to be implemented in such countries”.²

For trade unions to be able to fulfil their purpose of “furthering and defending the interests of workers” by exercising the right to collective bargaining, they have to be independent and must be able to organize their activities without any interference by the public authorities which would restrict this right or impede the lawful exercise thereof (Articles 3 and 10 of Convention No. 87). Furthermore, they must not be “under the control of employers or employers’ organisations” (Article 2 of Convention No. 98). The Collective Bargaining Recommendation, 1981 (No. 163), provides that: “In so far as necessary, measures adapted to national conditions should be taken to facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers’ and workers’ organisations.”

Convention No. 151 provides in Article 5 that “Public employees’ organizations shall enjoy complete independence from public authorities”, and Recommendation No. 91 rejects any interpretation of collective bargaining “implying the recognition of any association of workers established, dominated or financed by employers or their representatives”.

Requirement of a certain level of representativeness

Another issue which should be examined is whether the right to negotiate is subject to a certain level of representativity.

In this respect, the Collective Bargaining Recommendation, 1981 (No. 163), enumerates various measures designed to promote collective bargaining, including the recognition of representative employers’ and workers’ organizations based on pre-established and objective criteria.

Preferential or exclusive bargaining rights

The Labour Relations (Public Service) Recommendation, 1978 (No. 159), indicates that in countries in which procedures for recognition of public employees’ organizations apply with a view to determining the organizations to be granted, on a preferential or exclusive basis, the rights provided for under the Convention (and particularly collective bargaining), such determination should be based on objective and pre-established criteria with regard to the organizations’ representative character.

Workers covered by collective bargaining

Convention No. 98 (Articles 4-6) associates collective bargaining with the conclusion of collective agreements for the regulation of terms and conditions of employment. It

² ILO: *Record of Proceedings*, 34th Session of the International Labour Conference (1951), Report VIII, p. 633, Geneva.

provides that “the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations”, and also states that “this Convention does not deal with the position of public servants engaged in the administration of the State”.³

Subjects covered by collective bargaining

Conventions Nos. 98, 151 and 154, and Recommendation No. 91, focus the content of collective bargaining on terms and conditions of work and employment and on the regulation of the relations between employers and workers and between organizations of employers and of workers.

The principle of free and voluntary negotiation

Article 4 of Convention No. 98 explicitly sets forth the voluntary nature of collective bargaining, which is a fundamental aspect of the principles of freedom of association. The necessity to promote collective bargaining therefore excludes recourse to measures of compulsion. When the International Labour Conference was preparing Convention No. 154, it was agreed that no compulsory measures should be taken for this purpose.⁴

Free choice of collective bargaining

In this regard, Recommendation No. 163 indicates that: “Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.”

The ILO’s standards have not established rigid criteria concerning the relationship between collective agreements at the different levels (which may address the economy in general, a sector or industry, an enterprise or group of enterprises, an establishment or factory; and which may, according to the individual case, have a different geographical scope). Paragraph 4 of Recommendation No. 163 indicates that: “In countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels.”

³ With regard to this category of public servants, the Committee of Experts has indicated that it “could not allow the exclusion from the terms of the Convention of large categories of workers employed by the State merely on the grounds that they are formally placed on the same footing as public officials engaged in the administration of the State. The distinction must therefore be drawn between, on the one hand, public servants who by their functions are directly employed in the administration of the State (for example, in some countries, civil servants employed in government ministries and other comparable bodies, as well as ancillary staff) who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention.” ILO: *Freedom of association and collective bargaining, General Survey of the Reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B), 81st Session of the International Labour Conference (1994), para. 200, Geneva.

⁴ ILO: *Record of Proceedings*, 67th Session of the International Labour Conference (1981), p. 22/6, Geneva.

The principle of good faith

In the preparatory work for Convention No. 154, it was recognized that collective bargaining could only function effectively if it was conducted in good faith by both parties. However, as good faith cannot be imposed by law, it “could only be achieved as a result of the voluntary and persistent efforts of both parties”.⁵

Voluntary procedures: Machinery to facilitate negotiations

Convention No. 154 encourages the establishment of rules of procedure agreed between employers’ and workers’ organizations. Nevertheless, the Conventions and Recommendations on collective bargaining admit conciliation and mediation that is voluntary or established by law, as well as voluntary arbitration, in accordance with the provisions of Recommendation No. 92, under which “Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority.” Convention No. 154 clearly states that its provisions “do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate”.

Interpretation and application of collective agreements

The Collective Agreements Recommendation, 1951 (No. 91), establishes that disputes arising out of the interpretation of a collective agreement should be submitted to an appropriate procedure for settlement established either by agreement between the parties or by laws or regulations as may be appropriate under national conditions. With regard to supervising the application of collective agreements, it establishes that such supervision should be ensured by the employers’ and workers’ organizations parties to such agreements or by the bodies existing or established for this purpose.

Settlement of disputes

Convention No. 151 provides that: “The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.” The Collective Bargaining Convention, 1981 (No. 154), which is general in its scope, provides that bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

On this issue, the Collective Bargaining Recommendation, 1981 (No. 163), which is applicable to all branches of economic activity and to the public service, states that: “Measures adapted to national conditions should be taken, if necessary, so that the procedures for the settlement of labour disputes assist the parties to find a solution to the dispute themselves, whether the dispute is one which arose during the negotiation of agreements, one which arose in connection with the interpretation and application of agreements or one covered by the Examination of Grievances Recommendation, 1967.”

⁵ *ibid.*, p. 22/11.

The Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), encourages the parties concerned to abstain from strikes and lockouts while these procedures are in progress.

Right of information

Recommendation No. 163 indicates that: “Measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.” The Recommendation adds that: “Public and private employers should, at the request of workers’ organisations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to be made available may be agreed upon between the parties to collective bargaining.” In addition, “The public authorities should make available such information as is necessary on the overall economic and social situation of the country and the branch of activity concerned, to the extent to which the disclosure of this information is not prejudicial to the national interest.”

The Recommendation also advocates measures so that negotiators have the opportunity to receive appropriate training.

Extension of collective agreements

Recommendation No. 91 associates the representative organizations of workers and employers, and the employers and workers concerned, with the procedure of the extension of collective agreements.

Collective bargaining in the public service

The recognition of the right of collective bargaining for organizations of public officials and employees is now a reality in industrialized countries and is increasingly so in developing countries. Convention No. 98, adopted in 1949, excludes from its scope public servants engaged in the administration of the State. However, Convention No. 151, adopted in 1978, took an important step forward in requiring States to promote machinery for negotiation or such other methods as will allow representatives of public employees to participate in the determination of their terms and conditions of employment. Article 7 of Convention No. 154 provides that: “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees’ organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.” In accordance with Article 1 of the Convention, the only categories which may be excluded (in addition to the armed forces and the police, as in previous Conventions) are “high-level employees whose functions are normally considered as policy-making or managerial, or (...) employees whose duties are of a highly confidential nature”.

Shortly afterwards, in 1981, Convention No. 154 was adopted. This Convention encourages collective bargaining in both the private sector and the public service (with the exception of the armed forces and the police), with the only reservation that national laws or regulations or national practice may fix “special modalities of application” of the Convention as regards the public service. Member States which ratify the Convention may no longer confine themselves to consultations. They are bound to promote collective bargaining for determining working conditions and terms of employment, among other objectives. The extension of the scope of Convention No. 154 to the public service was

facilitated by the fact that, in contrast with Convention No. 98, this instrument does not refer to the determination of terms and conditions of employment by means of “collective agreements” (which have force of law in many countries, whereas agreements in the public sector [*accords collectives, acuerdos colectivos*] do not have this binding force in certain countries). Such a provision would have rendered it impossible to extend the scope of the Collective Bargaining Convention, 1981 (No. 154), to the public service in view of the objections of the States which, although being prepared to recognize collective bargaining in the public service, were not ready to renounce the statutory system. Other indications of flexibility are also to be found in Convention No. 154 in its provision that “collective bargaining should be progressively extended to all matters covered” by the Convention or that its provisions shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

II. Summary of the principles of the Committee of Experts

The standards and principles concerning the right to collective bargaining emerging from the ILO’s Conventions, Recommendations and other relevant instruments, and the principles established by the Committee of Experts on the basis of these instruments may be summarized as follows:

- The right to collective bargaining is a fundamental right endorsed by the Members of the ILO by the very fact of their membership of the Organization, which they have an obligation to respect, to promote and to realize in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).
- Collective bargaining is a right of employers and their organizations, on the one hand, and organizations of workers, on the other hand (first-level trade unions, federations and confederations); only in the absence of these latter organizations may representatives of the workers concerned engage in collective bargaining.
- The right to collective bargaining should be recognized throughout the private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the State who may be excluded from the exercise thereof (Convention No. 98).⁶
- The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.
- Collective agreements are binding on the parties and are intended to determine terms and conditions of employment which are more favourable than those established by law. Preference must not be given to individual contracts over collective agreements, except where more favourable provisions are contained in individual contracts.
- To be effective, the exercise of the right to collective bargaining requires that workers’ organizations are independent and not under the control of employers or

⁶ Nevertheless, when a State ratifies the Collective Bargaining Convention, 1981 (No. 154), the right to collective bargaining is also applicable in the context of the public administration, for which special modalities of application may be fixed. In contrast, the Labour Relations (Public Service) Convention, 1978 (No. 151), permits, in the context of the public administration, the possibility of opting between collective bargaining and other methods for the determination of terms and conditions of employment.

employers' organizations, and that the process of collective bargaining can proceed without undue interference by the authorities.

- A trade union which represents the majority or a high percentage of the workers in a bargaining unit may enjoy preferential or exclusive bargaining rights. However, in cases where no trade union fulfils these conditions or such exclusive rights are not recognized, workers' organizations should nevertheless be able to conclude a collective agreement on behalf of their own members.
- The principle of good faith in collective bargaining implies genuine and persistent efforts by both parties.
- In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective bargaining may not be imposed upon the parties and procedures to support bargaining must, in principle, take into account its voluntary nature. Moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.
- It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: (1) in essential services in the strict sense of the term (those whose interruption would endanger the life, personal safety or health of the whole or part of the population); (2) with regard to public servants engaged in the administration of the State; (3) where, after prolonged and fruitless negotiations, it is clear that the deadlock will not be overcome without an initiative by the authorities; and (4) in the event of an acute national crisis. Arbitration which is accepted by both parties (voluntary arbitration) is always legitimate.
- Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining.
- Restrictions on the content of future collective agreements, particularly in relation to wages, which are imposed by the authorities as part of economic stabilization or structural adjustment policies for imperative reasons of economic interest, are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and fulfil the following conditions: they are applied as an exceptional measure, and only to the extent necessary; do not exceed a reasonable period; and are accompanied by adequate guarantees designed to protect effectively the standards of living of the workers concerned, and particularly those who are likely to be the most affected.

III. Application of the standards and principles in practice

The observations made by the Committee of Experts concerning the application of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), show that the great majority of States which have ratified the Convention apply it in a satisfactory manner. This demonstrates that it is a right which enjoys almost universal recognition in law and practice.

In this respect, in its reports for 2000 and 2001, the Committee of Experts made critical observations to one-third of the 148 governments which have ratified Convention No. 98. The problems which arise most frequently concern the denial of the right of collective bargaining to all public servants or to public servants who are not engaged in the administration of the State (19 countries) and the requirement for trade union organizations to represent too high a proportion of workers to be recognized or to engage in collective bargaining (11 countries). These are followed by the fact that in a significant number of countries collective bargaining is subordinated to the government's economic policy (eight countries). Finally, certain countries exclude certain subjects from collective bargaining (six countries), submit it to compulsory arbitration in certain cases (six countries), restrict the right of the parties to determine the level of bargaining (three countries), prohibit collective bargaining by specific categories of workers in the private sector (two countries) or by federations and confederations (four countries).

Chapter 3

Freedom of workers: The abolition of forced or compulsory labour

M. Kern and C. Sottas

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Forced Labour Convention, 1930 (No. 29)	159	Fundamental Convention
Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35)	–	This Recommendation is related to a fundamental Convention and is considered up to date.
Abolition of Forced Labour Convention, 1957 (No. 105)	155	Fundamental Convention
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Forced Labour (Regulation) Recommendation, 1930 (No. 36)	–	The Governing Body has noted that Recommendation No. 36 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation.

In the present-day world, forced or compulsory labour is being imposed for the purpose of production or service and as a sanction or corollary of punishment. It is exacted by the State or by private persons or entities, under national laws and regulations or illegally, openly or hidden from the public view.

In principle, forced or compulsory labour is almost universally banned. The two ILO Conventions dealing with the abolition of forced or compulsory labour are the most widely ratified of its Conventions: the Forced Labour Convention, 1930 (No. 29), has been ratified by 156 States and the Abolition of Forced Labour Convention, 1957 (No. 105), has received 153 ratifications.

Moreover, the ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session, in 1998:

Declares that all members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: ... the elimination of all forms of forced or compulsory labour ...

The fundamental requirements of the two Conventions are considered below.

I. Forced Labour Convention, 1930 (No. 29)

The main provisions of the Forced Labour Convention, 1930 (No. 29), are examined as follows: (1) measures called for under Article 1, paragraph 1, and Article 25 of the Convention; (2) definition of forced or compulsory labour (Article 2, paragraph 1); (3) exceptions from the scope of the Convention (Article 2, paragraph 2); and (4) present status of Article 1, paragraph 2, and Articles 4-24 of the Convention.

1. Measures called for under Articles 1, paragraph 1 and 25, of the Convention

The basic obligation undertaken by a State which ratifies the Forced Labour Convention, 1930 (No. 29), is “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”.¹ This obligation to suppress the use of forced or compulsory labour, as defined in the Convention,² includes for the State both an obligation to abstain and an obligation to act. The State must neither exact forced or compulsory labour nor tolerate its exaction and it must repeal any laws and statutory or administrative instruments that provide or allow for the exaction of forced or compulsory labour, so that any such exaction, be it by private persons or public servants, is found illegal in national law.

In order to effectively suppress the use of forced or compulsory labour and ensure that adequate penalties are not only provided for by law but also strictly enforced, the measures to be taken must take account of the nature of the problems which may arise in practice. Thus, with regard to the trafficking in persons for the purpose of exploitation, the Committee of Experts has sought information, *inter alia*, on measures taken to ensure that the provisions of national legislation aimed at the punishment of the exaction of forced or compulsory labour, trafficking in persons and the exploiters of the prostitution of others:

... are strictly enforced against those responsible for the forced labour of legal or illegal migrants, *inter alia*, in sweatshops, prostitution, domestic service and agriculture; in particular, measures required in practice for court proceedings to be initiated and completed, including:

- (a) measures designed to encourage the victims to turn to the authorities, such as:
 - (i) permission to stay in the country at least for the duration of court proceedings, and possibly permanently;
 - (ii) efficient protection of victims willing to testify and of their families from reprisals by the exploiters both in the country of destination and the country of origin of the victim, before, during and after any court proceedings, and beyond the duration of any prison term that might be imposed on the exploiter; and the participation of the government in any forms of intergovernmental cooperation set up for this purpose;
 - (iii) measures designed to inform victims and potential victims of trafficking of measures under (i) and (ii), with due regard to any barriers of language and circumstances of physical confinement of victims;
- (b) measures designed to strengthen the active investigation of organized crime with regard to trafficking in persons, the exploitation of the prostitution of others, and the running of sweatshops, including:
 - (i) the provision of adequate material and human resources to law enforcement agencies;
 - (ii) the specific training of law enforcement officers, including those working in immigration control, labour inspection and vice squads, to address the problems of trafficking in persons in a manner conducive to the arrest of the exploiters rather than of the victims;
 - (iii) international cooperation between law enforcement agencies with a view to preventing and combating the trafficking in persons;
- (c) cooperation with employers' and workers' organizations as well as non-governmental organizations engaged in the protection of human rights and the fight against the trafficking in persons, with regard to matters considered under ... (a) and (b)(ii) ... *

* Report of the Committee of Experts, 2001, general observation, Convention No. 29.

¹ Article 1, paragraph 1, of the Convention.

² For the definition of forced or compulsory labour given in the Convention and the exceptions from its scope, see sections 2 and 3 below.

Furthermore, the State must ensure that “the illegal exaction of forced or compulsory labour shall be punishable as a penal offence” and “that the penalties imposed by law are really adequate and are strictly enforced”.³

2. Definition of forced or compulsory labour

The Convention defines “forced or compulsory labour” as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁴ Before setting out the express exceptions retained in the Convention,⁵ three aspects of this definition need to be considered so as to ascertain the general scope of the Convention: the notion of “work or service”; the “menace of any penalty”; and the criteria for not having “offered oneself voluntarily”.⁶

Work or service

In the first place, the definition refers to “work or service”. As noted by the Committee of Experts,⁷ the exaction of work or service may be distinguished from cases in which an obligation is imposed to undergo education or training. The principle of compulsory education is recognized in various international standards as a means of securing the right to education,⁸ and it is also provided for in several ILO instruments.⁹ A similar distinction is to be found in other international labour standards between work and vocational training.¹⁰ The Committee of Experts has also pointed out that a compulsory scheme of vocational training by analogy with and considered as an extension to compulsory general education, does not constitute compulsory work or service within the

³ Article 25 of the Convention.

⁴ Article 2, paragraph 1, of the Convention.

⁵ Article 2, paragraph 2, of the Convention – see section below on exceptions from the scope of the Convention.

⁶ In the text of the Convention, the criterion of not having offered oneself voluntarily is distinct from that of “the menace of any penalty”. However, where consent to work or service already was given “under the menace of a penalty”, the two criteria overlap: there is no “voluntary offer” under threat. But the distinction between the two criteria becomes meaningful where there is a difference in time, as in the text of the Convention: a person may have volunteered for a career in the armed forces and thereby freely and knowingly accepted a position where desertion becomes punishable.

⁷ International Labour Conference, 65th Session, 1979, Report III (Part 4B), General Survey of the reports relating to the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) (hereinafter, General Survey of 1979 on the abolition of forced labour), para. 20.

⁸ Universal Declaration of Human Rights, article 26; International Covenant on Economic, Social and Cultural Rights, articles 13 and 14.

⁹ Provisions concerning the prescription of a school-leaving age appear, inter alia, in Article 15, paragraph 2, of the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117).

¹⁰ In particular, the Special Youth Schemes Recommendation, 1970 (No. 136), indicates (Paragraph 7(1) and (2)(a)) that schemes of education and training involving obligatory enrolment of unemployed young people are compatible with the Conventions on forced labour, but requires prior consent for any schemes involving an obligation to serve (Paragraph 7(1) and (2)(b)).

meaning of the Forced Labour Convention, 1930 (No. 29).¹¹ However, as vocational training usually entails a certain amount of practical work, the distinction between training and employment is not always easy to draw. It is by reference to the various elements involved in the general context of a particular scheme of training that one may determine whether it is unequivocally one of vocational training or on the contrary involves the exaction of work or service within the definition of “forced or compulsory labour”.¹²

Menace of any penalty

To fall within the definition of “forced or compulsory labour” in the 1930 Convention, work or service must be exacted “under the menace of any penalty”. It was made clear during the consideration of the draft instrument by the Conference that the penalty here in question need not be in the form of penal sanctions, but might take the form also of a loss of rights or privileges.¹³ For example, for a prisoner, it may consist of being placed at a lower level of privileges,¹⁴ or of a reduced prospect of early release.¹⁵

Voluntary offer

In considering the issue of “voluntary offer”, the ILO supervisory bodies have touched upon a certain number of different aspects: the form and subject matter of the consent; the role of external or indirect constraints for which the State or the employer may be accountable or not; the possibility for a minor (or his or her parents) to give a valid consent; and the possibility of revoking a freely given consent.

Form and subject matter of consent

The Convention does not prescribe the modalities of expressing agreement to work and the ILO supervisory bodies have sought to ascertain formal consent (whatever its modalities) merely in specific circumstances where the free will of the worker cannot be taken for granted and, in particular, where a prisoner performs work which may not be exacted from him or her under the Convention.¹⁶

As regards the subject matter of consent, seeking employment must be distinguished from accepting a concrete position: thus, where migrant workers were induced by deceit,

¹¹ General Survey of 1979 on the abolition of forced labour, para. 20, referring also to earlier sources.

¹² *ibid.*

¹³ International Labour Conference, 14th Session, Geneva, 1930, *Record of Proceedings*, p. 691; General Survey of 1979 on the abolition of forced labour, para. 21.

¹⁴ Committee of Experts, direct request, 1999, Convention No. 29, United Kingdom.

¹⁵ Report of the Committee of Experts 2001, General Report, para. 129; RCE 1995, observation, Convention No. 29, France.

¹⁶ General Survey of 1979 on the abolition of forced labour, paras. 97-101.

false promises and retention of identity documents or force to remain at the disposal of an employer, the ILO supervisory bodies noted a violation of the Convention.¹⁷

Role of external constraints or indirect coercion

In considering the freedom to “offer oneself voluntarily” for work or service, account must be taken of the legislative and practical framework guaranteeing or limiting that freedom: thus, the mere freedom to choose among any type of work or service is not sufficient to ensure observance of the Convention where national law provides for a general obligation to work, i.e. makes it a legal obligation for all able-bodied citizens who are not receiving some kind of instruction to engage in a gainful occupation. This has been found incompatible with the 1930 and 1957 Conventions.¹⁸

Similarly, where captive labour – such as persons called up for compulsory military service, or serving a prison term – are being offered a limited choice between work which can anyway be exacted under the exceptions provided for in the Convention, and some other work which is being offered to them and which does not fall under those exceptions,¹⁹ the altogether relative freedom of choice is not in itself sufficient for considering acceptance of the work offered as being freely consented to.²⁰

An external constraint or indirect coercion interfering with a worker’s freedom to “offer himself voluntarily” may result not only from an act of the authorities, such as a statutory instrument, but also from an employer’s practice, such as retention of a migrant worker’s identity documents;²¹ in the latter case, the State’s responsibility is also involved under the Convention.²² However, the employer or the State are not accountable for all external constraints or indirect coercion existing in practice; for example, the need to work in order to earn one’s living could become relevant only in conjunction with other factors for which they are answerable. Such factors might be, for example, legislation under which persons requesting asylum are normally prohibited from taking up employment, but the

¹⁷ For example, report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance of certain international labour Conventions by the Dominican Republic and Haiti with respect to the employment of Haitian workers on the sugar plantations of the Dominican Republic (ILO, *Official Bulletin*, Special Supplement, Vol. LXVI, 1983, Series B); report of the Committee set up to examine the representation made by the CLAT under article 24 of the ILO Constitution alleging non-observance by Brazil of the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105).

¹⁸ General Survey of 1979 on the abolition of forced labour, para. 45.

¹⁹ See below the sections on compulsory military service and prison labour.

²⁰ *ibid.*

²¹ See also the United Nations Convention against Transnational Organized Crime and the Protocol supplementing it to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (United Nations doc. A/55/383 and Add.1); article 3, subparagraph (b), of the Protocol specifies that “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means [of coercion, fraud, deception, abuse of power, etc.] set forth in subparagraph (a) have been used.”

²² See above the section on measures called for under Articles 1, paragraph 1, and 25 of the Convention.

very same persons may be called upon to perform “socially useful work” which they have no choice but to carry out if they are to maintain their welfare entitlements.²³

In order to establish to what extent the State is accountable for an economic constraint, the ILO supervisory bodies have resorted to the following criteria:

In a case where an objective situation of economic constraint exists but has not been created by the Government, then only if the Government exploits that situation by offering an excessively low level of remuneration could it to some extent become answerable for a situation that it did not create. Moreover, it might be held responsible for organizing or exacerbating economic constraints if the number of people hired by the Government at excessively low rates of pay and the quantity of work done by such employees had a knock-on effect on the situation of other people, causing them to lose their normal jobs and face identical economic constraints.²⁴

Possibility for a minor (or his or her parents) to give valid consent

As was noted by the ILO supervisory bodies with regard to child labour, the question arises whether, and if so, under what circumstances a minor can be considered to have offered himself or herself “voluntarily” for work or service and whether the consent of the parents is needed in this regard and whether it is sufficient, and what the sanctions for refusal are.²⁵ Most national legal orders, while fixing the coming of age as a rule somewhere between 18 and 21 years of age, have established, for the purposes of concluding a labour contract, a lower age limit, which may coincide with the age at which compulsory school attendance ends; but employment that is likely to jeopardize health, safety or morals is generally prohibited for persons below 18 years of age, in conformity with the relevant ILO Conventions,²⁶ so that neither they nor those having parental authority over them may give valid consent to their admission to such employment.²⁷ The ILO supervisory bodies have regularly raised cases of exploitation of children under the

²³ Report of the Committee of Experts 1984, observation, Convention No. 29, Federal Republic of Germany.

²⁴ ILO, Governing Body, Nov. 1997, doc. GB.270/15/3, para. 30.

²⁵ Report of the Committee of Experts 1996, observation, Convention No. 29, Pakistan, para. 5; Report of the Commission of Inquiry appointed under article 26 of the Constitution of the ILO to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29) (ILO, *Official Bulletin*, Special Supplement, Vol. LXXXI, 1998, Series B, para. 206).

²⁶ For example, the Minimum Age Convention, 1973 (No. 138), Article 3, paragraph 1, and the Worst Forms of Child Labour Convention, 1999 (No. 182), Articles 1, 2 and 3, paragraph (d).

²⁷ Also, under article 3, subparagraph (c), of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, already referred to in footnote 21 above, “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’, even if this does not involve any of the means [of coercion, etc.] set forth in subparagraph (a) of this article”; subparagraph (d) specifies that “child” shall mean any person under 18 years of age.

Forced Labour Convention, 1930 (No. 29),²⁸ but also requested – and obtained – that minors engaged in a military career could terminate their engagement.²⁹

Possibility of revoking a freely given consent

Once an adult has “offered himself – or herself – voluntarily” for a work or service, the latter does not come under the strict definition of forced or compulsory labour given in Article 2, paragraph 1, of the Convention; but does it follow from such freely given consent that any restrictions on workers’ freedom to leave their employment will remain outside the scope of the Convention? The ILO supervisory bodies have considered that, although in such cases employment is originally the result of a freely concluded agreement, the workers’ right to free choice of employment remains inalienable. Accordingly, the effect of statutory provisions preventing termination of employment of indefinite duration (or very long duration) by means of notice of reasonable length is to turn a contractual relationship based on the will of the parties into service by compulsion of law, and is thus incompatible with the Conventions relating to forced labour. This is also the case when a worker is required to serve beyond the expiry of a contract of fixed duration.³⁰

The ILO supervisory bodies have thus addressed restrictions on the freedom to leave one’s employment by giving notice of reasonable length that were imposed in different countries, in particular on professional soldiers,³¹ on all persons in government service³² or in the socialist and mixed sectors,³³ or even on all workers.³⁴

²⁸ For example, Report of the Committee of Experts 2001, observations, Convention No. 29, Haiti, India, Indonesia, Sri Lanka, Thailand.

²⁹ General Survey of 1979 on the abolition of forced labour, para. 71; Report of the Committee of Experts 1982, observation, Convention No. 29, Belgium.

³⁰ General Survey of 1979 on the abolition of forced labour, para. 68. The Committee of Experts also noted, as an illustration of this principle, that article 1(a) of the Supplementary Convention of 1956 on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery refers, *inter alia*, to the status or condition arising from a pledge by a debtor of his personal services if the length and nature of those services are not respectively limited and defined.

³¹ (In peacetime.) However, where previous acceptance to serve a number of years was given in exchange for higher education received, e.g. to become a physician or a pilot, a differentiated approach is called for, taking into account such elements as the proportionality of obligations, the possibility of reimbursing the cost of studies, the penalties that may be imposed, etc. – see General Survey of 1979 on the abolition of forced labour, paras. 72 and 60.

³² See, for example, Report of the Committee of Experts 2000, observation, Convention No. 29, Pakistan; Report of the Committee of Experts 1999, observation, Convention No. 29, Bangladesh.

³³ Report of the Committee of Experts 2001, observation, Convention No. 29, Iraq.

³⁴ Legislation repealed in 1998 – Report of the Committee of Experts 1999, observation, Convention No. 29, Netherlands.

3. Exceptions from the scope of the Convention (Article 2, paragraph 2)

By virtue of Article 2, paragraph 2, of the Convention, certain forms of compulsory service which would otherwise have fallen under the general definition of “forced or compulsory labour” are excluded from its scope “for the purposes of this Convention”:

- (a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- (b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- (d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
- (e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

The conditions laid down by these provisions which define the limits of the exceptions are considered below.

Compulsory military service

Convention No. 29 exempts from its provisions compulsory military service, provided that it is used “for work of a purely military character”.³⁵ The condition of a “purely military character”, aimed specifically at preventing the call-up of conscripts for public works,³⁶ has its corollary in Article 1(b) of the Abolition of Forced Labour Convention, 1957 (No. 105), which prohibits the use of forced or compulsory labour “as a means of mobilizing and using labour for purposes of economic development”.³⁷

³⁵ Article 2, paragraph 2(a).

³⁶ General Survey of 1979 on the abolition of forced labour, para. 24, with references to the preparatory work of Convention No. 29.

³⁷ See below Part II, the sections on substantive provisions and economic development (Article 1(b) of the Convention). The ILC reasserted this principle when discussing the draft Special Youth Schemes Recommendation, 1970 (No. 136); the Conference heeded the incompatibility with the forced labour Conventions of a proposal under which young people could have been obliged to take part in special employment schemes directed to national development, provided they were

There are, however, specific circumstances in which a non-military activity performed within the framework of compulsory military service or as an alternative to such service remains outside the scope of the forced labour Convention.³⁸ In the first place, conscripts as any other citizens may be called to work in cases of emergency, as defined in the Convention.³⁹ Also, conscripts performing their service in engineering or similar units may be made to join in the building of roads and bridges as a part of their military training.

Lastly, while the Convention does not mention the issue of conscientious objectors, the ILO supervisory bodies have considered that their exemption from compulsory military service, coupled with an obligation to perform an alternative service, is a privilege granted to individuals on request, in the name of freedom of conscience. But more generally, the existence of a choice between military service proper and non-military work does not in itself exclude the application of the Convention when the choice between different forms of service is made within the framework and on the basis of a compulsory service obligation. The number of persons concerned and the conditions in which they make their choice thus need, *inter alia*, to be taken into account in examining whether a privilege was granted to individuals on request or whether, on the contrary, national service becomes a means of pursuing economic and social development with the use of compulsory labour.⁴⁰

Normal civic obligations

“Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country” is exempted from the scope of the Convention.⁴¹

Examples are compulsory jury service and the duty to assist a person in danger.⁴² Other “normal civic obligations” are specifically mentioned in the Convention which limits their scope: compulsory military service in the conditions set out above,⁴³ as well as assistance in cases of emergency⁴⁴ and “minor communal services”.⁴⁵ The ILO supervisory bodies have noted that the general reference to “normal civic obligations” must be read in the light of the other provisions of the Convention and cannot be invoked to justify recourse to forms of compulsory service which are contrary to the specific conditions laid down in those other provisions.⁴⁶

undertaken within the framework of compulsory military service or as an alternative to such service – see General Survey of 1979 on the abolition of forced labour, para. 25, with references to the preparatory work of Recommendation No. 136.

³⁸ See General Survey of 1979 on the abolition of forced labour, paras. 26-32.

³⁹ Article 2, paragraph 2(d), of the Convention – see below the section on emergencies.

⁴⁰ General Survey of 1979 on the abolition of forced labour, para. 31.

⁴¹ Article 2, paragraph 2(b), of the Convention.

⁴² General Survey of 1979 on the abolition of forced labour, para. 34.

⁴³ See above the section on compulsory military service.

⁴⁴ Article 2, paragraph 2(d), of the Convention. See below the section on emergencies.

⁴⁵ Article 2, paragraph 2(e), of the Convention. See below the section on minor communal services.

⁴⁶ General Survey of 1979 on the abolition of forced labour, para. 34.

Prison labour

The Convention exempts from its provisions “any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations”.⁴⁷ Compulsory prison labour thus is excluded from the scope of the Convention only if a certain number of conditions are met, some of which concern the basis for the obligation to work and others the conditions in which penal labour may be used.

Basis for the obligation to work

Consequence of a conviction

The Convention provides that work can only be exacted from a prisoner as a consequence of a conviction. It follows that persons who are in detention but have not been convicted – such as prisoners awaiting trial or persons detained without trial – should not be obliged to perform labour. It also follows from the use of the term “conviction” that the person concerned must have been found guilty of an offence. In the absence of such a finding of guilt, compulsory labour may not be imposed, even as a result of a decision by a court of law.⁴⁸

Conviction in a court of law

According to the Convention, work can only be exacted from a person as a consequence of a conviction “in a court of law”. It follows that compulsory labour imposed by administrative or other non-judicial bodies or authorities is not compatible with the Convention. This provision aims at ensuring that penal labour will not be imposed unless the guarantees laid down in the general principles of law recognized by the community of nations are observed, such as the presumption of innocence, equality before the law, regularity and impartiality of proceedings, independence and impartiality of courts, guarantees necessary for defence, clear definition of the offence and non-retroactivity of penal law.⁴⁹

Conditions governing the use of compulsory prison labour

Under the terms of the Convention, compulsory prison labour must be “carried out under the supervision and control of a public authority”, and the prisoner must not be “hired to or placed at the disposal of private individuals, companies or associations”.⁵⁰ The two conditions are cumulative and apply independently; the fact that the prisoner remains at all times under the supervision and control of a public authority does not in itself

⁴⁷ Article 2, paragraph 2(c), of the Convention.

⁴⁸ General Survey of 1979 on the abolition of forced labour, para. 90.

⁴⁹ *ibid.*, para. 94.

⁵⁰ In adopting this provision, the Conference expressly rejected an amendment which would have permitted the hiring of prison labour to private undertakings engaged in the execution of public works (ILC, 14th Session, Geneva, 1930, *Record of Proceedings*, pp. 305-308).

dispense the government from fulfilling the second condition, namely that the person is not hired to or placed at the disposal of private individuals, companies or associations.⁵¹

Supervision and control of a public authority

If the supervision and control are restricted to a general authority to inspect the premises periodically, this by itself would not appear to meet the requirements of the Convention for supervision and control.⁵²

Meaning of the terms “hired to” or “placed at the disposal of”

Hired to. The normal meaning of the term “hired to” as understood at the time of the adoption of the Convention can be seen in the description of the lease system, the general contract system and the special contract system given in the Memorandum of 1931 of the International Labour Office “on such of the problems of prison administration as are within its competence, i.e. those relating to prison labour”.⁵³

Contract labour is one of the older systems of prison labour; it still exists in some countries.

The term denotes systems in which the labour of the prisoners is hired out to private contractors (private persons, companies, or associations). These systems comprise:

(a) *The lease system.* This system is based on a contract between the State and a contractor, under which the prisoners are hired out to the latter, who is often styled the lessee. His contractual obligations are the boarding, lodging, clothing, and guarding of the prisoners, and the payment of an agreed per capita rate, in return for which he acquires the right to employ the prisoners for the duration of the contract. In more recent years provision has been made in such contracts for periodic inspection by State officials.

(b) *The general contract system.* Under this system all the prisoners are hired out to a single contractor, but, in contrast to the lease system, the State supplies the buildings and the necessary equipment for housing the prisoners and guards them. For the latter purpose the State appoints and pays officials. The contractor feeds the prisoners, provides the raw material and tools, and pays the State a lump sum. In return the State hands over the prisoners’ labour to the contractor.

(c) *The special contract system.* As under the general contract system the State supplies the buildings and the necessary equipment for housing the prisoners, but in contrast to that system the State retains the whole administration of the prisons. The prisoners, individually or in groups, are allotted to the contractor, the prison authorities selecting the prisoners in each case. The contractor supplies the raw material and tools and his agents direct the work, being admitted to the prison for this purpose. He pays for the prisoners’ work at

⁵¹ Report of the Committee of Experts 2001, General Report, paras. 86 and 119.

⁵² Report of the Committee of Experts 1998, General Report, para. 124.

⁵³ The essential parts of the Memorandum were published under the title “prison labour” in the *International Labour Review*, Vol. XXV, Nos. 3 and 4 (Mar. and Apr. 1932), pp. 311-331 and 499-524.

daily or piece rates. As in the other systems, the whole output belongs to the contractor.⁵⁴

Placed at the disposal of. Arrangements where the private company is not paying the public authority as provider of the prisoner's services, but is on the contrary being subsidized by the State for the running of a private prison, indeed differ from what would normally be considered as hiring (or lease) arrangements. However, the position of a person placed by the State with the obligation to work in a prison run by a private contractor is not affected by the question of whether the contractor pays the State or the State subsidizes the contractor. For the purposes of the Convention, in the first case the prisoner is "hired to" the private contractor; in the second he or she is "placed at the disposal of" the latter.⁵⁵

Role of private profit or benefit. The question of the direction in which payments flow between the State and private contractors leads to the issue of profit or benefit. Nothing suggests that the absence of balance sheet profit would negate the applicability to particular private entities of the provisions of the Convention prohibiting that a person be "hired to or placed at the disposal of private individuals, companies or associations".⁵⁶

Conditions for private employment of prisoners

Compulsory prison labour is exempted from the scope of the Convention only where the labour is not hired to or placed at the disposal of private individuals, companies or associations.⁵⁷ In certain countries, however, certain prisoners may, particularly during the period preceding their release, voluntarily accept employment with private employers, subject to guarantees as to the payment of normal wages and social security, consent of trade unions, etc.⁵⁸ The question thus arises as to whether prisoners, notwithstanding their captive circumstances, can be in a situation of truly voluntary labour, for which they have offered themselves voluntarily and without the menace of any penalty, including the loss of a right or advantage,⁵⁹ so that their work does not come under the definition of forced or compulsory labour given in Article 2, paragraph 1, of the Convention. If that is the case, the conditions laid down in Article 2, paragraph 2(c), for compulsory prison labour do not apply, and private employment of prisoners becomes possible.

⁵⁴ Report of the Committee of Experts 2001, General Report, paras. 96 and 122. The Committee of Experts further notes in paras. 97 and 98 that in its 1931 Memorandum the Office notes that "it has not yet been possible to eradicate the lease system entirely", despite its drawbacks, because "the system offers considerable financial advantages to the State", and that the general contract system "is now practically a matter of history. The special contract system on the contrary, is still common in prison labour".

⁵⁵ *ibid.*, para. 123.

⁵⁶ *ibid.*, paras. 124-127. The Committee of Experts notes, *inter alia*, from the preparatory work that the amendment which introduced to Article 2(2)(c) the words "or placed at the disposal of", following a proposal of the Workers' group, "intended to strengthen the clause", and also added the words "companies or other entities". The words "other entities", subsequently replaced by "associations", would also cover non-profit-making associations.

⁵⁷ See above the section on conditions governing the use of compulsory prison labour.

⁵⁸ General Survey of 1979 on the abolition of forced labour, para. 97.

⁵⁹ See above the sections on menace of any penalty and voluntary offer and Report of the Committee of Experts 2001, General Report, paras. 128 *et seq.*

In the first place, private employment of prison labour must depend on the formal consent of the prisoner concerned.⁶⁰ But the requirement of such formal consent is not in itself sufficient to eliminate the possibility that consent be given under the menace of loss of a right or advantage, or even of assignment to a compulsory work that can legally be imposed.⁶¹ Prison labour is captive labour in the full sense of the term, namely, it has no access in law and in practice to employment other than under the conditions set unilaterally by the prison administration. Therefore, it seems difficult or even impossible, particularly in the prison context, to reconstitute the conditions of a free working relationship in the absence of an employment contract and outside the scope of the labour law.⁶²

Conditions approximating a free labour relationship are the most reliable indicator of the voluntariness of labour. Such conditions would not have to emulate all the conditions which are applicable to a free market but in the areas of wages, social security, safety and health and labour inspection, the circumstances in which the prison labour is performed should not be so disproportionately lower than the free market that it could be characterized as exploitative. These facts will need to be weighed together with the circumstances under which formal consent has been given in order to ascertain whether the Convention is being respected when private entities are involved with prison labour.⁶³

Emergencies

The Convention exempts from its provisions “any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population”.⁶⁴

The concept of emergency – as indicated by the enumeration of examples in the Convention – involves a sudden, unforeseen happening calling for instant counter-measures. To respect the limits of the exception provided for in the Convention, the power to call up labour should be confined to genuine cases of emergency. Moreover, the extent of compulsory service, as well as the purpose for which it is used, should be limited to what is strictly required by the exigencies of the situation. In the same manner as Article 2, paragraph (2)(a), of the Convention exempts from its scope “work exacted in virtue of compulsory military service laws” only “for work of a purely military character”.⁶⁵ Article 2, paragraph (2)(d), concerning emergencies is no blanket licence for imposing – on the occasion of war, fire or earthquake – any kind of compulsory service, but can only

⁶⁰ General Survey of 1979 on the abolition of forced labour, paras. 97 et seq.; see above the section on form and subject matter of consent.

⁶¹ Report of the Committee of Experts 2001, General Report, paras. 129-130; see above the sections on menace of any penalty and voluntary offer.

⁶² Report of the Committee of Experts 2001, General Report, para. 130.

⁶³ *ibid.*, para. 143.

⁶⁴ Article 2, paragraph 2(d), of the Convention.

⁶⁵ See above the section on compulsory military service.

be invoked for service that is strictly required to counter an imminent danger to the population.⁶⁶

Minor communal services

The Convention also exempts from its provisions “minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representative shall have the right to be consulted in regard to the need for such services”.⁶⁷ The ILO supervisory bodies⁶⁸ have drawn attention to the criteria which determine the limits of this exception and serve to distinguish it from other forms of compulsory services which, under the terms of the Convention, must be abolished (such as forced labour for general or local public works). These criteria are as follows:

- the services must be “minor services”, i.e. relate primarily to maintenance work and – in exceptional cases – to the erection of certain buildings intended to improve the social conditions of the population of the community itself (a small school, a medical consultation and treatment room, etc.);⁶⁹
- the services must be “communal services” performed “in the direct interest of the community”, and not relate to the execution of works intended to benefit a wider group;
- the “members of the community” (i.e. the community which has to perform the services) or their “direct” representative (e.g. the village council) must “have the right to be consulted in regard to the need for such services”.

4. Present status of Article 1, paragraph 2, and Articles 4 et seq. of the Convention

While States ratifying the Convention are obliged “to suppress the use of forced or compulsory labour in all its forms⁷⁰ within the shortest possible period”,⁷¹ the Convention, as adopted in 1930, provides that: “With a view to this complete suppression,

⁶⁶ General Survey of 1979 on the abolition of forced labour, para. 36; Report of the Committee of Experts 1997, observation, Convention No. 29, Japan.

⁶⁷ Article 2, paragraph 2(e), of the Convention.

⁶⁸ General Survey of 1979 on the abolition of forced labour, para. 37; Report of the Committee of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29) (ILO, *Official Bulletin*, Special Supplement, Vol. LXXXI, 1998, Series B), para. 213.

⁶⁹ Since even the public works of general interest that come under the definition of forced labour, but were tolerated during a transitional period (see section 4 below), were not only strictly regulated but also restricted to a maximum of 60 days per year (Article 12 of the Convention), the minor nature of “minor services” entirely exempted from the very definition of forced labour is to be reflected in a duration of an incomparably smaller magnitude.

⁷⁰ Other than those specifically excluded from the scope of the Convention (see section 3 above).

⁷¹ Article 1, paragraph 1, of the Convention.

recourse to forced or compulsory labour may be had during the transitional period, for public purposes only and as an exceptional measure, subject to the conditions and guarantees hereinafter provided.”⁷²

However, since the Convention, adopted in 1930, calls for the suppression of forced labour within the shortest possible period, to invoke at the current time that certain forms of forced or compulsory labour comply with one of the requirements of this set of provisions is to disregard the transitional function of these provisions and contradict the spirit of the Convention, as well as the status of the abolition of forced or compulsory labour in general international law as a peremptory norm from which no derogation is permitted.⁷³ Consequently, the ILO supervisory bodies have considered that use of a form of forced or compulsory labour falling within the scope of the Convention as defined in Article 2 may no longer be justified by invoking observance of the provisions of Article 1, paragraph 2, and Articles 4-24, although the absolute prohibitions contained in these provisions remain binding upon the States having ratified the Convention.⁷⁴

II. Abolition of Forced Labour Convention, 1957 (No. 105)

1. Substantive provisions

Under Article 2 of the Convention:

Each Member of the International Labour Organisation which ratifies this Convention undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in Article 1 of this Convention.

According to Article 1:

Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a means of mobilising and using labour for purposes of economic development;
- (c) as a means of labour discipline;

⁷² Article 2, paragraph 2, of the Convention.

⁷³ Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29) (ILO, *Official Bulletin*, Special Supplement, Vol. LXXXI, 1998, Series B), para. 218; Report of the Committee of Experts 1998, observation, Convention No. 29, Bangladesh; Report of the Committee of the Experts 2000, observation, Convention No. 29, Myanmar.

⁷⁴ *ibid.*

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- (d) as a punishment for having participated in strikes;
 - (e) as a means of racial, social, national or religious discrimination.

Before addressing the specific circumstances referred to in the five cases enumerated in Article 1 (a) to (e) of the Convention,⁷⁵ it is necessary to examine more generally the scope of Convention No. 105 against the background of Convention No. 29 and, in this connection, the definition of forced or compulsory labour and the role of the exceptions made from Convention No. 29, in particular as regards compulsory prison labour.

2. Scope of Convention No. 105 in relation to Convention No. 29 and compulsory prison labour

Convention No. 105 does not constitute a revision of Convention No. 29, but was designed to supplement the earlier instrument.⁷⁶ In the absence of a definition of “forced or compulsory labour” in Convention No. 105, the definition contained in the earlier Convention has been considered generally valid,⁷⁷ namely “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁷⁸

However, while Convention No. 29 calls for the general abolition of forced or compulsory labour in all its forms – subject to the exceptions set out in Article 2, paragraph 2⁷⁹ – Convention No. 105 requires the abolition of any form of forced or compulsory labour only in the five cases listed in Article 1 of that Convention.⁸⁰ Thus limited in scope by comparison with the general purview of the earlier instrument, Convention No. 105 accordingly covers new ground only because the exceptions from Convention No. 29 made in its Article 2, paragraph 2 “for the purposes of this Convention”, and in particular the exemption concerning prison labour,⁸¹ do not automatically apply to the later instrument, which was designed to supplement the 1930 Convention.⁸²

⁷⁵ See section 3 below.

⁷⁶ General Survey of 1979 on the abolition of forced labour, paras. 9 and 104.

⁷⁷ *ibid.*, para. 39.

⁷⁸ Convention No. 29, Article 2, paragraph 1, see above the section on definition of forced or compulsory labour.

⁷⁹ See above the sections on measures called for under Articles 1, paragraph 1, and 25 of Convention No. 29 and exceptions from the scope of Convention No. 29.

⁸⁰ See above the section on substantive provisions above.

⁸¹ See above the section on prison labour.

⁸² General Survey of 1979 on the abolition of forced labour, para. 104. The Committee of Experts recalls in this connection that the Convention was adopted following a survey by the UN-ILO Ad Hoc Committee on Forced Labour, which found that one of the most common forms of forced labour in the world was forced labour as a means of political coercion. Many of the specific cases from which the Ad Hoc Committee drew this conclusion related to labour resulting from penal legislation, involving conviction by a court of law. The Governing Body of the ILO accordingly

Convention No. 105 does not prohibit the exaction of forced or compulsory labour from common offenders convicted, for example, of robbery, kidnapping, bombing or other acts of violence or acts or omissions that have endangered the life or health of others. Although a prisoner may be directed to work under the menace of a punishment and against his will, the labour in this instance is not imposed on him for one of the reasons cited in the Convention. Consequently, in most cases, labour imposed on persons as a consequence of a conviction in a court of law will have no relevance to the application of the Abolition of Forced Labour Convention. On the other hand, if a person is in any way forced to work because she or he holds or has expressed particular political views, has committed a breach of labour discipline or has participated in a strike,⁸³ the situation is covered by the Convention, which prohibits the use “of any form” of forced or compulsory labour as a sanction, as a means of coercion, education or discipline, or as a punishment in respect of the persons within the ambit of Article 1(a), (c) and (d).⁸⁴

In this connection, the supervisory bodies have noted that, while prison labour exacted from common offenders is intended to reform or rehabilitate them, the same need does not arise in the case of persons convicted for their opinions or for having taken part in a strike. Furthermore, in the case of persons convicted for expressing certain political views, an intention to reform or educate them through labour would in itself be covered by the express terms of the Convention, which applies *inter alia* to any form of compulsory labour as a means of political education.⁸⁵ For all these reasons, the ILO supervisory bodies have considered that compulsory labour in any form, including compulsory prison labour, is covered by Convention No. 105 when it is exacted in one of the five cases specified by that Convention.

Compliance of penal laws with the Convention can accordingly be ensured at different levels: at the level of civil and social rights and liberties when, in particular, political activities and the expression of political views, the manifestation of ideological opposition, breaches of labour discipline and the participation in strikes are beyond the purview of criminal punishment; at the level of the penalties that may be imposed, when these are limited to fines or other sanctions that do not involve an obligation to work; and, finally, at the level of the prison system: in a certain number of countries, the law has traditionally conferred a special status on prisoners convicted of certain political offences, comparable to that conferred on persons in detention while awaiting trial, under which they

decided to include an item on forced labour in the agenda of the Conference and expressed the view that any subsequent instrument adopted by the Conference should deal with the practices which are specifically excluded from the scope of the 1930 Convention (*ibid.*, footnote, with references to the preparatory work).

⁸³ The scope of the Convention as regards certain restrictions relating specifically to freedom of opinion and the right to strike is examined below in the sections on political coercion and participation in strikes.

⁸⁴ General Survey of 1979 on the abolition of forced labour, paras. 105 and 106.

⁸⁵ *ibid.*, para. 108. The point had already been made in the course of the preparatory work on the Convention that, in most countries, it is regarded as normal that persons convicted of certain categories of crime should be required to work during the period of their sentence, that such work serves an educational purpose and helps keep up the morale of prisoners and that it may be felt that it is reasonable to permit this type of forced labour and undesirable to attempt to forbid it in any way. However, it was pointed out in the preparatory report submitted to the Conference that this same form of forced labour can lead to abuses, particularly if persons may be sentenced to penal labour on account of their political or other beliefs. The proposed instrument should guard against this (General Survey of 1979 on the abolition of forced labour, para. 107, with references to the preparatory work).

are free from prison labour imposed on common offenders – although they may pursue an activity at their request.

3. Circumstances referred to in the Convention

Political coercion (Article 1(a) of the Convention)

The Convention prohibits the use of forced or compulsory labour as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system. The range of activities which must be protected from punishment involving forced or compulsory labour thus comprises the freedom to express political or ideological views orally and through the press and other communications media, as well as various other generally recognized rights, such as the right of association and of assembly through which citizens seek to secure the dissemination and acceptance of their views and the adoption of policies and laws reflecting them, and which may be affected by measures of political coercion. Sanctions involving compulsory labour fall within the scope of the Convention where they enforce a prohibition of the expression of views or of opposition to the established political, social or economic system, whether such prohibition is imposed by law or by a discretionary administrative decision.⁸⁶

However, certain limitations may be imposed by law on the rights and freedoms at stake “for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.⁸⁷ Thus, the Convention prohibits neither punishment by penalties involving compulsory labour of persons who use violence, incite to violence or engage in preparatory acts aimed at violence, nor judicial imposition of certain restrictions on persons convicted of crimes of this kind.⁸⁸

In addition to the proper limits within which particular rights are to be exercised under normal circumstances, freedom of expression and other fundamental rights relevant to the Convention may during certain exceptional periods be subjected to temporary restrictions. The need for exceptional recourse to such measures is recognized in the International Covenant on Civil and Political Rights “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed”; in such cases derogations from the provisions of the Covenant may be made “to the extent strictly required by the exigencies of the situation”.⁸⁹ The ILO supervisory bodies have adopted a similar approach in regard to emergency measures, such as the suppression of fundamental rights and freedoms, which may have a bearing on the application of Article 1(a) of the Convention where the measures are enforced by sanctions involving compulsory labour. Recourse to such exceptional powers must be limited to what is necessary to meet

⁸⁶ General Survey of 1979 on the abolition of forced labour, para. 133.

⁸⁷ Universal Declaration of Human Rights, article 29; see also articles 5, 21 and 22 of the International Covenant on Civil and Political Rights.

⁸⁸ General Survey of 1979 on the abolition of forced labour, para. 133.

⁸⁹ Article 4 of the International Covenant.

circumstances that would endanger the life, personal safety or health of the whole or part of the population.⁹⁰

Economic Development (Article 1(b) of the Convention)

Article 1(b) of the Convention prohibits the use of forced or compulsory labour “as a method of mobilising and using labour for purposes of economic development”. It follows from the terms “mobilising” and “economic development” used here that Article 1(b) is aimed at circumstances where recourse to forced or compulsory labour has a certain quantitative significance and is used for economic ends.⁹¹ The prohibition applies even where recourse to forced labour as a method of mobilizing and using labour for purposes of economic development is of temporary or exceptional nature.⁹²

Labour discipline (Article 1(c) of the Convention)

Forced or compulsory labour as a means of labour discipline may be of two kinds. It may consist of measures to ensure the due performance by a worker of his service under compulsion of law (in the form of physical constraint or the menace of a penalty), or of a sanction for breaches of labour discipline with penalties involving an obligation to perform work. In the latter case, the ILO supervisory bodies have however distinguished between penalties imposed to enforce labour discipline as such (and therefore falling within the scope of the Convention) and penalties which punish breaches of labour discipline that impair or are liable to endanger the operation of essential services,⁹³ or which are committed either in the exercise of functions that are essential to safety or in circumstances where life or health are in danger. Such actions or omissions do not come under the protection of the Convention. However, in such cases there must exist an effective danger, not mere inconvenience. Furthermore, the workers concerned must remain free to terminate their employment by reasonable notice.⁹⁴ The supervisory bodies have identified means of labour discipline falling under the Convention, particularly in certain laws governing the public sector or merchant shipping.⁹⁵

⁹⁰ General Survey of 1979 on the abolition of forced labour, para. 134. The criteria for an emergency and the requirement of proportionality of the measures taken correspond to what has been stated in the section on emergencies with regard to Article 2, paragraph 2(d), of Convention No. 29, concerning work or service exacted in cases of emergency. See also the section below on participation in strikes regarding exceptional prohibitions of strikes.

⁹¹ General Survey of 1979 on the abolition of forced labour, para. 40.

⁹² The Conference declined to limit the prohibition in Article 1(b) to the use of forced labour as a “normal” method of mobilizing and using labour for purposes of economic development – *Record of Proceedings*, International Labour Conference, 39th Session, Geneva, 1956, p. 723, para. 11; *ibid.*, 40th Session, Geneva 1957, p. 709, para. 11.

⁹³ That is services, the interruption of which may endanger the life, personal safety or health of the whole or part of the population; this criterion corresponds to what has been stated above on emergency situations in footnote 90.

⁹⁴ General Survey of 1979 on the abolition of forced labour, para. 110.

⁹⁵ See, *inter alia*, *ibid.*, paras. 111 to 119; and Committee of Experts, various more recent comments on the observance of the Convention in a number of countries.

Participation in strikes (Article 1(d) of the Convention)

The Convention prohibits recourse to sanctions involving any form of forced or compulsory labour “as a punishment for having participated in strikes”. However, the ILO supervisory bodies have noted⁹⁶ that the Conference Committee which considered the draft Convention agreed that “in certain circumstances penalties could be imposed for participation in illegal strikes and that these penalties might include normal prison labour”,⁹⁷ and that in particular such penalties might be imposed where there were “national laws prohibiting strikes in certain sectors or during conciliation proceedings” or “where trade unions voluntarily agreed to renounce the right to strike in certain circumstances”.⁹⁸ In examining the compatibility of national laws on strikes with the Convention – in so far as they are enforceable with sanctions that may involve compulsory labour – the ILO supervisory bodies have followed the principles developed in the field of freedom of association⁹⁹ in ascertaining the specific limits to the right to strike, and in particular the restrictions concerning essential services and persons representing public authority, as well as those concerning emergency situations, political strikes and the conditions under which a strike may be called, so as to clarify the scope of the protection afforded by Article 1(d) of the Convention.¹⁰⁰

Discrimination (Article 1(e) of the Convention)

Article 1(e) of the Convention prohibits the use of any form of compulsory labour “as a means of racial, social, national or religious discrimination”. This provision requires the abolition of any discriminatory distinctions made on racial, social, national or religious grounds in exacting labour for the purpose of production or service, even where the labour is not otherwise covered by the Conventions on forced labour¹⁰¹ (for example, in the context of minor communal services¹⁰²). Similarly, where punishment involving compulsory labour is meted out more severely to certain groups defined in racial, social, national or religious terms, this falls within the scope of the Convention¹⁰³ (even where the offence giving rise to the punishment is a common offence which does not otherwise come under the protection of (Article 1(a), (c) or (d) of the Convention).

⁹⁶ General Survey of 1979 on the abolition of forced labour, para. 120.

⁹⁷ ILO: *Record of Proceedings*, International Labour Conference, 40th Session, Geneva, 1957, p. 709, para. 14 (Geneva, 1958).

⁹⁸ *idem*, 39th Session, Geneva, 1956, p. 723, para. 12.

⁹⁹ See Chapter 1.

¹⁰⁰ See also General Survey of 1979 on the abolition of forced labour, paras. 122-132.

¹⁰¹ General Survey of 1979 on the abolition of forced labour, para. 42.

¹⁰² See above the section on minor communal services (and the section on economic development as regards the quantitative significance of what comes under Article 1(b) of Convention No. 105).

¹⁰³ General Survey of 1979 on the abolition of forced labour, para. 141.

Chapter 4

Equality of opportunity and treatment

4.1. Non-discrimination and equality of opportunity and treatment in employment and occupation

C. Thomas and Y. Horii

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Equal Remuneration Convention, 1951 (No. 100)	153	Fundamental Convention
Equal Remuneration Recommendation, 1951 (No. 90)	–	This Recommendation is related to a fundamental Convention and is considered up to date.
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	152	Fundamental Convention
Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111)	–	This Recommendation is related to a fundamental Convention and is considered up to date.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
In the area of equality in employment and occupation and equal remuneration, no instrument has been considered as outdated by the Governing Body.		

Since its foundation in 1919, the question of the observance of equality of opportunity and treatment has been one of the fundamental objectives of the ILO. The original Constitution of the ILO indicated that this principle is among those that are “of special interest and urgent importance” and that the “standards set by law in each country with respect to the economic conditions should have due regard to the equitable economic treatment of all workers lawfully resident therein”. The original Constitution further recognized “the principle of equal work for work of equal value”.¹ In a resolution adopted in 1938, the International Labour Conference invited all Members “to apply the principle of equality of treatment to all workers resident in their territory, and to renounce all measures of exception which might in particular establish discrimination against workers belonging to certain races or confessions with regard to their admission to public or private posts”.²

The Declaration of Philadelphia affirms 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. It further proclaims that the attainment of the conditions making it possible to achieve equality of opportunity and treatment shall be the central aim of national and

¹ Section II, article 41, points 7 and 8, of the Constitution (Article 427 of the Treaty of the Versailles). Emphasis was also placed on the protection of women, young persons and children.

² International Labour Conference (ILC), *Record of Proceedings*, 24th Session, Geneva, 1938, p. 679.

international policy, and that “all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective”.³

The first binding international instruments to be adopted with the specific objective of promoting equality and eliminating discrimination were the Equal Remuneration Convention, 1951 (No. 100), and its accompanying Recommendation No. 90. These instruments were limited to the promotion of equality between men and women and the issue of pay. Upon their adoption, it was recognized that equal pay could not be achieved without the elimination of discrimination in all areas of employment and that other grounds of discrimination also should be the subjects of prohibition. Thus, these instruments were shortly followed, in 1958, with the adoption by the International Labour Conference of the Discrimination (Employment and Occupation) Convention (No. 111), and Recommendation (No. 111), which address all forms of discrimination concerning employment and occupation. They cover all workers and prohibit discrimination on seven grounds of discrimination (race, colour, sex, religion, national extraction, political opinion and social origin).

Prior to the adoption of these instruments on equality, international labour standards directed specifically at women had been aimed at providing protection through prohibition, restriction or special measures. A marked shift in emphasis from special protection to the promotion of equality in the standard-setting activities of the ILO regarding women occurred during 1975, when the International Labour Conference adopted a Declaration on Equality of Opportunity and Treatment for Women Workers.⁴ The Declaration recalls that the protection of women at work should be an integral part of the efforts aimed at continuous promotion and improvement of living and working conditions of all employees. It provides that women should be protected “on the same basis and with the same standards of protection as men”; that studies and research should be undertaken and measures should be taken to protect against processes which might have a harmful effect on women and men from the standpoint of their social function of reproduction. In 1985 the International Labour Conference adopted a resolution on equal opportunities and equal treatment for men and women in employment.⁵ With respect to the issue of protective measures, the

³ Part II of the Declaration of Philadelphia which, according to article 1, para. 1, of the Constitution, sets forth the objects of the ILO.

⁴ ILC, 60th Session, 1975, Declaration on Equality of Opportunity and Treatment for Women Workers; ILO: *Official Bulletin*, Vol. LVIII, 1975, Series A, pp. 96-100. The Declaration emphasizes that “all forms of discrimination on grounds of sex which deny or restrict [equality of opportunity and treatment for all workers] are unacceptable and must be eliminated”. Convinced that the persistence of discrimination against women workers is incompatible with the interests of the economy and social justice, it states that the protection of women at work shall be an integral part of the efforts aimed at improving living and working conditions of all employees, and that women shall be protected from risks inherent in their employment and occupation on the same basis and with the same standards of protection as men. It also emphasizes that positive special treatment during a transitional period aimed at effective equality between the sexes shall not be regarded as discriminatory.

⁵ ILC, 71st Session, 1985, resolution and conclusions on equal opportunities and equal treatment for men and women in employment; ILO: *Official Bulletin*, Vol. LXVIII, 1985, Series A, pp. 85-95: the conclusions review the policy and measures adopted by the ILO for women workers over the previous ten years, emphasizing the need to intensify the measures taken with a view to ensuring better conditions of employment, work and life for women, and to achieve their participation in all the aspects of the development process. The conclusions outline a series of measures to guide national action and that of the ILO in various fields and emphasize the specific problems

resolution recommends that all protective legislation applying to women should be reviewed in light of up-to-date scientific knowledge and technical changes and that it should be revised, supplemented, extended, retained or repealed, according to national circumstances. The Committee of Experts, in its General Survey on night work of women in industry, 2001,⁶ recently affirmed this approach and confirmed that protection and equality have and should guide standard-setting action in matters of women's employment.

In 1975, the International Labour Conference, based on the new approach that equality can only be achieved by improving the general conditions of work of all workers, both women and men, invited the Governing Body to include the issue of workers with family responsibilities on the agenda of the earliest possible session of the International Labour Conference with a view to the adoption of a new instrument. During the general discussion at the Conference, it was pointed out that any change in the traditional role of women would have to be accompanied by a change in that of men, greater sharing in family life and household tasks and equal access for men and women to all services and arrangements made in these fields.

Recommendation No. 123, which had been adopted in 1965 to provide measures that should be taken to allow women to harmonize their various responsibilities without being exposed to discrimination, was considered to be out of date as it did not question placing the burden of responsibility for such matters solely on women, but sought to alleviate some of the hardship these dual and seemingly competing responsibilities caused.

In this context the Governing Body decided to include in the 66th Session (1980) of the International Labour Conference the question of equality of opportunity and treatment for workers of both sexes having family responsibilities. In 1981, the International Labour Conference adopted the Workers with Family Responsibilities Convention, 1981 (No. 156), and its accompanying Recommendation No. 165.

In addition to the general standards on non-discrimination and equality, other international labour standards address the issue of non-discrimination or promotion of equality as either their main objective or as a specific provision. These instruments serve to emphasize that in certain domains particular attention needs to be drawn to the promotion of equality among members of particular groups. For example, the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), provides that the aim of any social policy shall be to eliminate all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation. The Employment Policy Convention, 1964, (No. 122), states that employment policy shall aim at ensuring that there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use skills and endowments in, a job for which the worker is well suited,

encountered by rural women workers, the difficulties of reintegration into working life after a period of absence, and the difficulties of women belonging to underprivileged categories, such as migrant workers, refugees, the disabled, minorities, single-parent families and the long-term unemployed. The resolution concerning ILO action for women workers, adopted by the ILC in 1991, reaffirms the ILO's constant concern for women workers and recalls its resolution of 1985. It emphasizes that a concerted effort by governments and organizations of employers and workers remains necessary to give effect to the principle of equality. It therefore calls upon governments, as well as employers' and workers' organizations, to adopt comprehensive strategies to eliminate the continuing barriers to the equal participation of women in employment through the ratification of the relevant Conventions, the adoption of policies and positive and concrete measures with a view to increasing the participation of women in all fields of employment, including decision-making.

⁶ ILO, *Night work of women in industry*, General Survey by the Committee of Experts on the Application of International Labour Conventions and Recommendations, Report III (Part IB), ILC, 89th Session, 2001.

irrespective of race, colour, sex, religion, political opinion, national extraction or social origin. More specifically, Article 8 of the Paid Educational Leave Convention, 1974 (No. 140), prohibits the denial of such leave on the ground of race, colour, sex, religion, political opinion, national extraction or social origin. Article 5 of the Termination of Employment Convention, 1982 (No. 158), includes race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, social origin, maternity leave and union membership or participation as invalid reasons for termination. In some instances, Convention No. 111 is specially referenced in other conventions. For example, the Rural Workers' Organisations Convention, 1975 (No. 141), provides in Article 4 for the development of strong and independent organisations of rural workers "as an effective means of ensuring the participation of rural workers, without discrimination, as defined in the Discrimination (Employment and Occupation) Convention, 1958 ...".

Other standards that address specific groups of workers who are often the subject of discriminatory treatment and which promote equality, among other measures, for such groups include the international labour standards concerning migrant workers, indigenous and tribal peoples, disabled and older workers.⁷

The elimination of discrimination was reaffirmed as a principle inherent in any ILO policy by the adoption in 1998 of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Declaration states that the fundamental rights of workers, which are clearly set out in four principles, including the elimination of discrimination in respect of employment and occupation, are so essential to the mandate of the ILO that membership of the Organization by a State in itself creates an obligation to promote these rights, even if the State has not ratified the fundamental Conventions which set forth these four principles. The Declaration refers to the principles contained in Conventions Nos. 100 and 111, which are the two fundamental Conventions in relation to non-discrimination.

In 1995, the Director-General of the ILO launched a campaign for the ratification of the fundamental Conventions. The above Conventions are among the most widely ratified of the international labour Conventions.

⁷ See the relevant sections of this chapter for the instruments on migrant workers and indigenous and tribal peoples, and Chapter 6 for the instruments on workers with disabilities and older workers.

I. Content of the standards on non-discrimination

1. ***Discrimination in employment and occupation: The Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958***

Scope of the instruments as regards individuals, definition and grounds of discrimination ⁸

Scope of the instruments as regards individuals

No provision of the Convention or the Recommendations limits their scope as regards individuals and occupations. The elimination of discrimination in employment and occupation therefore applies to all workers, both nationals and non-nationals.⁹ They therefore apply to workers in the public and the private sectors.

Definition of discrimination ¹⁰

Article 1, paragraph 1(a), of the Convention defines discrimination as “any distinction, exclusion or preference [made on certain grounds] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.

This definition contains three elements: a factual element (the existence of a distinction, exclusion or preference which constitutes a difference in treatment); a criterion on which the difference in treatment is based; and the objective result of this difference in treatment, namely the nullification or impairment of equality of opportunity or treatment.

Through this broad definition, the Convention covers all discrimination that may affect equality of opportunity and treatment. The distinctions, exclusions or preferences covered under the Convention may have their origin in law or in practice.

In referring to the “effect” of a distinction, exclusion or preference on equality of opportunity and treatment, the definition uses the objective consequences of these measures as a criterion. Thus the Convention covers direct discrimination, such as expressly stated exclusions of persons who need not apply for jobs; and indirect forms of discrimination such as occupational segregation based on sex.

Indirect discrimination refers to apparently neutral situations, regulations, or practices, which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results

⁸ ILO, *Equality in employment and occupation*, Special Survey on equality in employment and occupation in respect of Convention No. 111, ILC, 83rd Session, 1996, Report III (Part 4B), paras. 18-22.

⁹ Under the terms of Paragraph 8 of Recommendation No. 111, with respect to immigrant workers, regard should be had to the provisions of Convention No. 97, which was later supplemented by Convention No. 143. See Chapter 4.4 on migrant workers.

¹⁰ ILO, *Equality in employment and occupation*, General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958, ILC, 75th Session, 1988, Report III (Part 4B), paras. 22-29; Special Survey, 1996, op. cit., paras. 23-26.

in a disproportionately harsh impact on some persons on the basis of certain characteristics or who belong to certain classes with specific characteristics such as race, sex or religion, and is not closely related to the inherent requirement of the job.

Intent is not an element of the definition under the Convention. The Convention covers all discrimination without referring to the intention of the author of a discriminatory act or even without there needing to be an identifiable author, such as in the case of indirect discrimination or occupational segregation based on sex.

*Grounds of discrimination*¹¹

Grounds of discrimination referred to in Article 1, paragraph 1(a), of the Convention

These consist of a restrictive list of seven grounds of discrimination:

Race and colour. These grounds are generally examined together since difference of colour is only one, albeit the most apparent, of the ethnic characteristics that differentiate human beings. However they are not considered to be identical as colour differences may exist between people of the same race. Under the Convention, the term “race” is often considered in a wide sense to refer to linguistic communities or minorities whose identity is based on religious or cultural characteristics, or even national extraction. Generally speaking, any discrimination against an ethnic group, including indigenous and tribal peoples, is considered to be racial discrimination within the terms of the Convention.

National extraction. The term “national extraction” in the Convention is not aimed at the distinctions that may be made between the citizens of the country concerned and those of another country, but covers distinctions made on the basis of a person’s place of birth, ancestry or foreign origin. Distinctions made between citizens of the same country on the basis of the foreign birth or origins of some of them are one of the most evident examples. Thus it may be understood that discrimination based on national extraction means that action which may be directed against persons who are nationals of the country in question, but who have acquired their citizenship by naturalization or who are descendants of foreign immigrants, or persons belonging to groups of different national extraction or origin living in the same State.¹²

Sex. These are distinctions which are made explicitly or implicitly to the detriment of one sex or the other. While in the great majority of cases, and particularly in cases of indirect discrimination, they are detrimental to women, protection against discrimination applies equally to either sex. Discrimination on grounds of sex also includes discrimination based on: civil status; marital status, or more specifically family situation (particularly as regards responsibilities for dependent persons); pregnancy and confinement. These distinctions are not discriminatory *in themselves*, and only become so when they have the effect of imposing a requirement or condition on an individual of a particular sex that would not be imposed on an individual of the other sex. Distinctions based on pregnancy and confinement are discriminatory due to the fact that they can only, by definition, affect women. “Sexual harassment” or “unsolicited sexual attention” are particular forms of discrimination on the basis of sex which have received increased attention.¹³

¹¹ General Survey, 1988, op. cit., paras. 30-74.

¹² *ibid.*, para. 36; and Special Survey, 1996, op. cit., paras. 33-34.

¹³ Special Survey, 1996, *ibid.*, paras. 35-40.

Religion. The Convention protects against discrimination based on denomination or faith, whether it is because of not being of a particular faith, or because of having a belief in a particular faith, or having no belief. It protects not only against discrimination based on belief in a religion, but also expression and manifestation of the religion.

Social origin. This criterion refers to situations in which an individual's membership in a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied certain jobs or activities, or because he or she is only assigned certain jobs. Even in societies with considerable social mobility, a number of obstacles continue to prevent perfect equality of opportunity for the various social categories.¹⁴

Political opinion. This protection against discrimination on the basis of political opinion implies protection in respect of the activities of expressing or demonstrating opposition to established political principles and opinions.

Other grounds of discrimination in Article 1, paragraph 1(b), of the Convention

These consist of “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment [...] as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies”. The machinery for the implementation of this Article is not specified and no government has explicitly made use of it up to now. However, in a large number of countries, criteria of discrimination other than those set forth in Article 1, paragraph 1(a), of the Convention have been incorporated in the constitution, or in laws or regulations for the elimination of discrimination in employment and occupation. Two Conventions adopted after Convention No. 111 cover two of the criteria most frequently encountered at the national level. These are the Workers with Family Responsibilities Convention, 1981 (No. 156), and the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159). Other criteria frequently encountered are state of health (including HIV-positive status), age, sexual orientation and membership or non-membership of a trade union.

Substantive field of application of the Convention: Access to training, to occupation and employment, and terms and conditions of employment¹⁵

Article 1, paragraph 3, provides that the terms “employment” and “occupation” include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. The protection afforded by the Convention is not limited to individuals who have already gained access to employment or to an occupation, but also covers opportunities of gaining access to employment or to an occupation. It also covers access to training, without which there would be no real opportunity of access to employment or occupation. The Recommendation contains provisions illustrating these concepts more specifically (Paragraph 2(b)):

- (b) all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of –
 - (i) access to vocational guidance and placement services;

¹⁴ General Survey, 1998, op. cit., para. 54; Special Survey, 1996, op. cit., para. 43.

¹⁵ General Survey, 1988, op. cit., paras. 76-123.

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- (ii) access to training and employment of their own choice on the basis of individual suitability for such training or employment;
 - (iii) advancement in accordance with their individual character, experience, ability and diligence;
 - (iv) security of tenure of employment;
 - (v) remuneration for work of equal value;
 - (vi) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment.

Under Paragraph 2(d) of the Recommendation, employers should not practice or countenance discrimination “in engaging or training any person for employment, in advancing or retaining such person in employment, or in fixing terms and conditions of employment”.

*Access to training and vocational guidance*¹⁶

Training is of paramount importance in determining the actual opportunities for gaining access to employment and occupation, since discrimination at this stage will subsequently be perpetuated and aggravated in employment and in occupation. This term should not be interpreted in a narrow sense and should cover both apprenticeship and technical education, as well as general education.

Vocational guidance is intended to offer young persons or persons who may need special assistance in choosing an occupation. A number of methods are used, such as the dissemination of information on occupations, the preparation of recommendations in the light of personal aptitudes and interests and social needs, and the joint participation of teachers and parents in fostering the choice of an occupation by children. It plays an important role in opening up a broad range of occupations, free of considerations based on stereotypes or archaic conceptions that specific trades or occupations are supposedly reserved for persons of a particular sex.

*Access to employment and to the various occupations*¹⁷

The protection afforded by the Convention covers access to *wage-earning employment* as well as self-employment. The term “occupation” means the trade, profession or type of work performed by an individual, irrespective of the branch of economic activity to which he or she belongs or his or her professional status. The two terms therefore have a very broad meaning.

Access to self-employed occupation. This category covers the majority of the active population in certain developing countries, and principally in the rural sector. It therefore includes various occupations and is of a heterogeneous nature. Access to the various material goods and services required to carry on the occupation therefore constitutes one of

¹⁶ *ibid.*, paras. 77-85.

¹⁷ *ibid.*, paras. 86-106.

the objectives of the national policy to promote equality of opportunity and treatment in employment and occupation.

Placement. The existence of a public employment service may be an essential element of a policy to promote equality of opportunity and treatment in employment. Public and private employment agencies should be covered under the Convention in relation to their consideration and placement of candidates.

Access to wage-earning or salaried employment. This means that every individual has the right to have their application for appointment to the post of their choice considered equitably, without discrimination based on any of the grounds referred to in the Convention. The recruitment procedure and the statement of reasons in the event of an adverse decision on the application for appointment are of great importance for the respect of this right.

Access to the public service. The State, as an employer, is subject directly to the principles which it must promote and, in view of the volume of employment by the State, the public sector plays a key role in the general implementation of government policy to promote equality of opportunity and treatment in employment and occupation.

Access to employers' and workers' organizations. Paragraph 2(f) of Recommendation No. 111 provides that "employers' and workers' organisations should not practice or countenance discrimination in respect of admission, retention of membership or participation in their affairs". This provision concerns both the practices of employers' and workers' organizations as influenced by the provisions of national legislation or as determined by their own regulations.

*Terms and conditions of employment*¹⁸

The concept of "terms and conditions of employment" is further specified by the Recommendation (Paragraph 2(b)), which enumerates the following areas: advancement in accordance with individual character, experience, ability and diligence of the person concerned; security of tenure of employment; remuneration for work of equal value; and conditions of work "including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment". The concept of terms and conditions of employment is therefore broader than that of general conditions of work which it encompasses.

Promotion consists of the right of every individual not to be subject to any discrimination based on any of the grounds set out in the Convention as regards promotion earned in the course of employment.

Security of tenure denotes the guarantee that dismissal must not take place on discriminatory grounds, but must be justified by reasons connected with the worker's conduct, his or her ability or fitness to perform the functions or the strict necessities of the operation of the enterprise.

Equal remuneration. This principle, which is covered in relation to men and women, by the Equal Remuneration Convention, 1951 (No. 100), supplemented by Recommendation No. 90, presupposes a general context which is free from inequality, and the relation between the principle set forth in Convention No. 100 and that of Convention

¹⁸ *ibid.*, paras. 107-123.

No. 111 is therefore paramount in this respect. Convention No. 111 extends this principle to other grounds upon which discrimination is prohibited.

Social security. Bearing in mind Article 5 of the Convention, any distinction made on the basis of sex which is not justified by special measures of protection or assistance either provided for in other international labour Conventions, or generally recognized as necessary, should be eliminated. Any discriminatory treatment in respect of benefits or conditions of entitlement to social security, the application of compulsory or voluntary statutory or occupational schemes, contributions and the calculation of benefits should be eliminated.

Other conditions of employment. These may include measures for the protection of workers' privacy, occupational safety and health measures and the working environment.

Measures not deemed to be discrimination

There are three categories of measures, which are not considered to be discrimination under the Convention:

- (1) those based on inherent requirements of a particular job;
- (2) those warranted by the protection of the security of the State; and
- (3) measures of protection and assistance.

*Inherent requirements of the job*¹⁹

Under Article 1, paragraph 2, "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination". This exception must be interpreted restrictively. The Convention requires that access to training, employment and occupation be based on objective criteria defined in light of academic and occupational qualifications required for the activity in question. When qualifications are required for a particular job, it may not be simple to distinguish between what does and what does not constitute discrimination. It is often difficult to draw the line between bona fide requirements for a job and the use of certain criteria to exclude certain categories of workers.

It appears from the preparatory work for the Convention that the concept of "a particular job" refers to a specific and definable job, function or task. The necessary qualifications may be defined as those required by the characteristics of the particular job in proportion to its inherent requirements. A genuine qualification, even if based on one of the criteria in the Convention, may not come into conflict with the principle of equality of opportunity and treatment. In no circumstances, however, may the same qualification be required for an entire sector of activity. Systematic application of requirements involving one or more of the grounds of discrimination set out in the Convention is inadmissible. Careful examination of each individual case is required. Similarly, the exclusion of certain jobs or occupations based on one of the grounds listed is contrary to the Convention.

There are few instances where the grounds listed in the Convention may actually constitute inherent requirements of the job. As regards men and women, distinctions on the basis of sex may be required for certain jobs, such as those in the performing arts, or those involving particular physical intimacy. With respect to religion, restrictions for some jobs

¹⁹ *ibid.*, paras. 125-133; Special Survey, 1996, *op. cit.*, paras. 118-122.

associated with a particular religious institution may be acceptable. Political opinion may in certain limited circumstances constitute a bona fide qualification for certain senior policy-making positions.

Measures affecting an individual suspected of activities prejudicial to the security of the State (Article 4 of the Convention)²⁰

In order to avoid undue limitations on the protection which the Convention seeks to guarantee, the exception set out in Article 4 must be applied strictly.

In the first place, Article 4 covers measures taken in respect of activities of which an individual is justifiably suspected or convicted with the exclusion of mere membership of a particular group or community.

Secondly, it covers activities which may be qualified as prejudicial to the security of the State, whether such activities are proven or whether consistent and precise elements justify suspicion of such activities.

Thirdly, measures intended to safeguard the security of the State must be sufficiently well defined and delimited to ensure that they do not become discrimination based on political opinion or religion.

With respect to the requirement of a procedural safeguard of appeal, there should be a “body to which appeals can be made, which should therefore be independent from administrative or governmental authorities, and a mere right of appeal to the administrative or governmental authority hierarchically above the authority that took the measure is not enough; this body should offer guarantees of independence and impartiality; it must be ‘competent’ to assess fully the substance of the matter: that is, it should be in a position to ascertain the reasons underlying the measures taken, and give the appellant facilities for fully presenting his case”.²¹

Special measures of protection or assistance (Article 5 of the Convention)²²

Measures provided for in international labour standards. The ratification of Convention No. 111 must not come into conflict with the ratification or implementation of other instruments adopted by the ILO which provide for special measures of protection or assistance. This is the case, for example, of special measures taken on behalf of indigenous peoples, persons with disabilities or older persons, as well as measures to protect maternity or the health of women.

Measures designed to meet the particular requirements of certain categories of persons. These are measures that may be determined by any member State, after consultation with representative employers’ and workers’ organizations, and which are generally recognized to be necessary for reasons such as age, disablement, family responsibilities or social or cultural status. This provision is designed, on the one hand, to avoid conflicts between these special measures and the general policy to eliminate

²⁰ *ibid.*, paras. 134-138.

²¹ ILO, *Discrimination in respect of employment and occupation: Summary of Reports on Unratified Conventions and on Recommendations*, Report III (Part II), ILC, 47th Session, 1963.

²² *ibid.*, paras. 139-156.

discrimination and, on the other hand, to allow special measures to secure equality of opportunity and treatment in practice, taking into account the diversity of situations of certain categories of persons.

Implementation of the principles:

The obligations of States ²³

The implementation of the principles of the Convention consists primarily of declaring and pursuing a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, both directly, by ensuring its observance in services and employment under the control of a national authority and, indirectly, by taking measures to secure its acceptance in other sectors.

Formulation and content of the national policy designed to promote equality of opportunity and treatment (Article 2 of the Convention) ²⁴

Article 2 provides that this national policy must promote equality “by methods appropriate to national conditions and practice”, thereby allowing States considerable flexibility in the manner in which it is declared and pursued, which is not subject to any predetermined form.

The policy must however be stated clearly, which implies that programmes for this purpose should be developed and implemented, and appropriate measures adopted according to the principles outlined in Article 3 of the Convention and Paragraph 2 of the Recommendation. While the mere affirmation of the principle of equality before the law may be an element of such a policy, it cannot in itself constitute a policy within the meaning of Article 2 of the Convention.

There are also certain immediate obligations, such as repealing discriminatory legal provisions and putting an end to discriminatory administrative practices, as well as the obligation to supply reports on the results achieved.

The realization of the policy is recognized to be progress and in all likelihood requests continuous implementation and monitoring.

Obligations for the implementation of a national policy of equality of opportunity and treatment (Article 3 of the Convention) ²⁵

Article 3 of the Convention specifies some of the areas and means of action which must be covered by the national policy to promote equality in employment and occupation. It sets out obligations of various types, either immediate, or to which effect may be given more progressively.

The immediate obligations include:

- repealing any statutory provisions and modifying any administrative instructions or practices which are inconsistent with the policy of equality (Article 3(c));

²³ *ibid.*, paras. 157-236.

²⁴ General Survey, 1988, *op. cit.*, paras. 158-169.

²⁵ *ibid.*, paras. 170-236.

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- pursuing the policy in respect of employment under the direct control of a national authority (Article 3(d)); and
 - ensuring observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority (Article 3(e)).

The medium-term obligations are as follows:

- to enact legislation and promote educational programmes as may be calculated to secure the acceptance and observance of the policy (Article 3(b)); and
- to cooperate with employers' and workers' organizations in promoting the acceptance and observance of the policy (Article 3(a)).

2. *Equal remuneration: The Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951*

Persons covered and definitions

Workers

The Convention covers “all workers” and “men and women workers” without limitation. The Convention therefore applies in general to all sectors, both public and private.²⁶

*Remuneration*²⁷

According to Article 1(a) of the Convention “the term ‘remuneration’ includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker’s employment”. This definition is couched in the broadest possible terms with a view to ensuring that equality is not limited to the basic or ordinary wage, nor in any other way restricted according to semantic distinctions.

Additional emoluments. The term “any additional emoluments whatsoever” is also all-embracing and includes increments based on seniority or marital status, cost-of-living allowances, housing or residential allowances, family allowances and benefits in kind, such as the provision and laundering of working clothes provided by the employer. It is important to emphasize, however, that the principle set forth in the Convention covers both the minimum wage and remuneration determined in any other way.

Indirect elements of remuneration. The term “directly or indirectly” covers certain indirect elements of remuneration which are not payable directly by the employer, but which arise out of the employment relationship. They may include allowances paid out of a common fund managed by employers or workers.

²⁶ Article 2 of Convention No. 100.

²⁷ ILO, *Equal remuneration: General Survey of the Reports on the Equal Remuneration Convention (No. 100) and Recommendation No. 90, 1951*, ILC, 72nd Session, 1986, Report III (Part 4B), paras. 14-17.

Arising out of the worker's employment. A link between the workers employment and the payments must be established. Allowances paid under social security systems financed by the undertaking or industries concerned are considered an element of remuneration. Allowances paid under a social security system financed by only public funds are not considered to be remuneration and thus are outside the scope of the Convention.

Work of equal value²⁸

Article 1(b) of the Convention provides that the expression refers to rates of remuneration established without discrimination based on sex. By situating the comparison at the level of the “value” of work, Convention No. 100 and Recommendation No. 90 go beyond a reference to “the same” or “similar” work and cover different jobs to which the same value may be attributed. Value, while not defined specifically in the Convention, refers to the worth of the job for purposes of computing remuneration. The Convention does not limit application of the concept of equal value to implementation through the methodology of comparable worth, but it certainly indicates that something other than market forces should be used to ensure application of the principle. It suggests that objective job appraisals should be used to determine valuation where deemed useful, on the basis of the work to be performed and not on the basis of the sex of the jobholder. While job appraisal systems are still a common feature of wage setting, other bases for the calculation of wages – including minimum wages, productivity pay and new competency-based wage systems – are covered by the Convention.

Role of governments in the application of the principle of equal remuneration²⁹

The obligation of a State which has ratified the Convention is a function of the wage determination machinery in force in the country. The State's obligation to *ensure* the implementation of the principle of equal remuneration is limited to those areas where such action is consistent with the methods in operation for determining rates of remuneration, in other words where the State is directly or indirectly involved in wage fixing. In areas where the government does not intervene either directly or indirectly in the negotiation of wages, its obligation is to *promote* the application of the principle.

Means of giving effect to the Convention

Article 2, paragraph 2, of the Convention provides that the principle of equal remuneration for men and women workers for work of equal value may be applied by means of:

- (a) ***National laws or regulations.*** While there is no general obligation to enact legislation under the Convention, any existing legislative provision which violates the principle of equal remuneration must be amended or repealed; or
- (b) ***Any legally established or recognized machinery for wage determination.*** In many countries there are bodies at the national level responsible for determining the applicable wage levels and they should do so in accordance with the Convention. The composition of these bodies and the criteria used are often determining factors in the

²⁸ *ibid.*, paras. 19-21; ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 89th Session, 2001, Report III (Part 1A), para. 42.

²⁹ General Survey, 1986, *op. cit.*, paras. 24-30.

application of the principle. The minimum wage is also an important means of applying the principle of equal remuneration; or

- (c) ***Collective agreements concluded between employers and workers.*** Remuneration rates are often covered by collective agreements concluded between employers and workers and should be established in conformity with the Convention. These can make an effective contribution to the application of the principle; or
- (d) ***A combination of these various means.***

Objective evaluation of jobs³⁰

Article 3, paragraph 1, of the Convention calls for measures to be taken to promote objective appraisal of jobs on the basis of the work to be performed “where such action will assist in giving effect to the provisions of this Convention”. Job evaluation provides a way of systematically classifying jobs according to their content and the skills required, without regard to the sex or personal characteristics of the worker.

The role of employers’ and workers’ organizations³¹

Under the terms of Article 4 of the Convention, “Each Member shall cooperate as appropriate with the employers’ and workers’ organisations concerned for the purpose of giving effect to the provisions of this Convention”. Paragraph 5 of Recommendation No. 90 provides that employers’ and workers’ organizations should participate in the establishment of methods of job evaluation where appropriate. These provisions also indicate the share in the responsibility incumbent upon employers’ and workers’ organizations for the effective application of the principle of equal remuneration.

II. Summary of the principles of the Committee of Experts

Certain principles relating to the application of the Conventions, which are not explicitly set out in the instruments, have also been developed in the comments of the Committee of Experts.

1. ***Discrimination in employment and occupation: Convention No. 111 and Recommendation No. 111***

Discrimination

The Convention covers any discrimination, whether it is in law, resulting from the legislation, or in practice, including the practice of private individuals.

Race and colour. In the protection against discrimination based on race and colour, the main problem is not so much to define the terms employed, as to eradicate the negative values that the perpetrators of discrimination attribute to the person discriminated against.

³⁰ *ibid.*, paras. 138-152; Report of the Committee of Experts, 2001, *op. cit.*, paras. 43 and 44.

³¹ General Survey, 1986, *op. cit.*, para. 31.

In such cases, and especially through the use of positive measures, state policies should be aimed at making equality of opportunity a reality for every population group.³²

Religion. The Convention aims to provide protection against discrimination in employment and occupation on the basis of religion, which is often the consequence of a lack of freedom or intolerance. Situations that may lead to religious discrimination derive more from an attitude of intolerance towards persons who profess a particular religion, or no religion, and may be linked to multi-ethnic communities. The risk of discrimination often arises from the absence of religious belief or from belief in different ethical principles, from lack of religious freedom to in particular where one religion has been established as the religion of the State, where the State is officially anti-religious, or where the dominant political doctrine is hostile to all religions. In a great majority of cases, discrimination on grounds of religion is not institutionalized. The freedom to practice a religion can be hindered by the constraints of a trade or occupation, particularly in regard to the manifestation of discrimination, including practices, affiliation, membership, clothing and attendance at ceremonies. This may happen when a religion prohibits work on a different day of rest established by law or custom, or in requirements of particular clothing. In these cases, the workers' right to practice his or her faith or belief needs to be weighed against the need to meet the requirements inherent in the job or the operational requirements. The rights may be restricted within the limits imposed by the principle of proportionality.³³

Social origin. Prejudices and preferences based on social origin may persist when a rigid division of society into classes determines an individual's opportunities in employment and occupation, or when certain "castes" are considered to be inferior and therefore confined to the most menial jobs.

Sex. The criterion of sex covers distinctions based on biological characteristics and functions that differentiate men and women, as well as distinctions based on social differences between men and women that are learned, changeable over time and have wide variations within and between cultures. Use of the concept of gender as a socio-economic variable to analyse roles, responsibilities, constraints, opportunities and needs of men and women is essential to promote equal opportunity and treatment under the Convention.

The Committee of Experts has noted that discrimination against women may take many forms which at first appear to be sex neutral but which actually constitute discrimination because they have a detrimental impact on women. For example, in matters of access to and retention of employment, criteria related to marital status, family situation and family responsibilities typically only affect women to their detriment in employment.

Political opinion. The Committee of Experts has indicated that, in protecting workers against discrimination with regard to employment and occupation on the basis of political opinion, the Convention implies that this protection shall be afforded to them in respect of activities expressing or demonstrating opposition to the established political principles – since the protection of opinions which are neither expressed nor demonstrated would be pointless. Regarding the nature of the opinions expressed, the Committee has noted that "the protection afforded by the Convention is not limited to differences of opinion within the framework of established principles. Therefore, even if certain doctrines are aimed at fundamental changes in the institutions of the State, this does not constitute a reason for considering their propagation beyond the protection of the Convention, in the absence of the use or advocacy of violent methods to bring about that result". The

³² Special Survey, 1996, op. cit., para. 32.

³³ General Survey, 1988, op. cit., paras. 47 and 51; Special Survey, 1996, op. cit., paras. 41 and 42.

Committee of Experts recalls the opinion expressed by a Commission of Inquiry appointed under article 26 of the Constitution of the ILO that:

... the protection of freedom of expression is aimed not merely at the individual's intellectual satisfaction at being able to speak his [or her] mind, but rather – and especially as regards the expression of political opinions – at giving him [or her] an opportunity to seek to influence decisions in the political, economic and social life of his society. For his [or her] political views to have an impact, the individual generally acts in conjunction with others. Political organizations and parties constitute a framework within which the members seek to secure wider acceptance of their opinions. To be meaningful, the protection of political opinions must therefore extend to their collective advocacy within such entities. Measures taken against a person by reference to the aims of an organization or party to which he [or she] belong imply that he [or she] must no associate himself [or herself] with those aims, and accordingly restrict his [or her] freedom to manifest his [or her] opinions.

The Committee of Experts has also noted that:

... one of the essential traits of this type of discrimination is that it is most likely to be due to measures taken by the State or the public authorities. Its effects may be felt in the public services, but are not confined thereto; moreover, in many modern economies the distinction between the public and private sector has become blurred or has disappeared completely.³⁴

In its Special Survey of 1996,³⁵ the Committee of Experts recommended that consideration be given to the adoption of an additional Protocol to the annex to the Convention, the objective of which would be to include additional criteria on the basis of which discrimination would be prohibited. The Committee of Experts considered that the following criteria are broadly accepted and merit consideration for inclusion in the additional Protocol (listed in alphabetical order): age, disability, family responsibilities, language, matrimonial status, nationality, property, sexual orientation, state of health³⁶, and trade union affiliation.

Elimination of discrimination, legislation and practical application³⁷

There are several regulatory levels at which the Convention can be implemented nationally: the national constitution, legislation, case law and collective labour agreements. Where provisions are adopted to give effect to the Convention, they should include all seven grounds of discrimination specified in article 1, paragraph 1(a).

³⁴ General Survey, 1988, op. cit., paras. 53-60.

³⁵ Special Survey, 1996, op. cit., para. 297.

³⁶ Particularly seropositivity and HIV status.

³⁷ Special Survey, 1996, op. cit., paras. 206-222.

Obligation of the State to apply a national policy
to promote equality in employment under the
direct control of a national authority³⁸

With respect to the establishment and promotion of a national policy, the Committee has recalled that the inclusion in a Constitution of the principle of equality of opportunity and treatment and the judicial protection of victims of discrimination represents an important stage in the implementation of the above principle, they cannot on their own constitute a national policy within the meaning of Article 2 of the Convention. The implementation of a policy of equality of opportunity and treatment also presupposes the adoption of specific measures designed to correct inequalities observed in practice. Indeed, the promotion of equality of opportunity and treatment in employment and occupation as advocated by the Convention is not aimed at a stable situation which can be definitively attained, but at a permanent process in the course of which the national equality policy must continually be adjusted to the changes that it brings about in society. While the Convention leaves it to each country to intervene according to the methods which appear to be the most adequate, taking into account national circumstances and customs, the effective application of the national policy of equality of opportunity and treatment required the implementation by the State concerned of appropriate measures, the underlying principles of which are enumerated in Article 3 of the Convention. It is therefore important to emphasize the interdependence of these two means of action, consisting of the adoption of legal provisions and the preparation and implementation of programmes to promote equality and correct *de facto* inequalities which may exist in training, employment and conditions of work.³⁹

The use of the methods of direct application of the policy available to the States is one of the obligations laid down by the Convention. Governments are encouraged to adopt programmes of affirmative actions, thereby responding to the concern to increase the overall number of members of disadvantaged groups in the public service, as a means of ensuring their participation at all levels of the public service, including the higher levels. Affirmative action programmes focus not only on recruitment policy, but also on issues related to training in employment which, to a great extent, determine promotion policy. The execution of public contracts is also an area in which the public authorities may have means of directly influencing employment practices. The Committee of Experts recommends examining the possibility of including clauses providing for equality of opportunity and treatment in public contracts.

Cooperation with employers' and workers' organizations⁴⁰

The requirement in this respect is for active collaboration with the above organizations. It is generally sought for the preparation and supervising the application of the measures adopted within the context of the national policy envisaged in Article 2 of the Convention, as well as subsequently at the sectoral, enterprise or establishment level for the direct application of the principles set out in the Convention. It is therefore a collaboration which goes beyond mere consultation with employers' and workers' organizations and which must therefore allow real consideration of the positions of the various parties.

³⁸ General Survey, 1988, op. cit., paras. 172-184.

³⁹ Report of the Committee of Experts, 2001, op. cit., pp. 495-496.

⁴⁰ General Survey, 1988, op. cit., paras. 185-192.

Special measures of protection or assistance

There are two kinds of special measures of protection and assistance envisaged in Article 5 of the Convention: measures of protection and assistance provided for in international labour Conventions and Recommendations, and measures taken after consultation with employers' and workers' organizations and designed to meet the particular requirements of persons who require special protection or assistance.

*Measures provided for in international labour standards*⁴¹

Article 5, paragraph 1, of the Convention provides that the "special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination. This concerns, for instance, special measures which may be taken on behalf of indigenous or tribal peoples or disabled or older persons. As well as those designed to protect maternity or the health of women, and which are expressly recognized as non-discriminatory. Thus, the Conference's standard-setting activity cannot be considered as establishing or permitting discrimination within the meaning of the 1958 instruments. Consequently, the ratification and application of Convention No. 111 are not to come into conflict with the ratification or implementation of other instruments providing for special measures of protection or assistance.

For example, maternity protection, in the form of leave before and after confinement and protection from dismissal, is always necessary. In practice, however, maternity remains subject to discrimination when it is directly or indirectly taken into account in considering applications for employment or as grounds for termination. Maternity is a condition which requires differential treatment to achieve genuine equality and, in this sense, it is more of a premise of the principle of equality than a dispensation. Special maternity protection measures should be taken to enable women to fulfil their maternal role without being marginalized in the labour market.

In line with the approach of full equality between male and female workers, it should be recalled that certain provisions currently applicable to women to allow them to raise children or to care for them should increasingly be granted to men as well, in accordance with the spirit of the Workers with Family Responsibilities Convention, 1981 (No. 156). The fact that these advantages are no longer exclusively granted to women may tend gradually to make women more competitive on the labour market, as they would cease to be seen by employers as more costly than men.

Measures designed to meet the particular requirements of certain persons

Article 5, paragraph 2, of the Convention states that:

... any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

Paragraph 6 of the Recommendation provides that the application of the policy of non-discrimination should not adversely affect the special measures concerned.

⁴¹ Special Survey, 1996, op. cit., paras. 130-137.

In applying the 1958 instruments, it is important to ensure that the special measures concerned do in fact pursue the objective of offering protection or assistance. These special measures tend to ensure equality of opportunity and treatment in practice, taking into account the diversity of situations of certain persons, so as to halt discriminatory practices against them. These types of preferential treatment are thus designed to restore a balance and are or should be part of a broader effort to eliminate all inequalities.

Because of the aim of protection and assistance which they are to pursue, these special measures must be proportional to the nature and scope of the protection needed or of the existing discrimination. A careful re-examination of certain measures may reveal that they are conducive to establishing or permitting actual distinctions, exclusions or preferences falling under Article 1 of the Convention. For this reason, consultation with employers' and workers' organizations, where they exist, constitutes a significant guarantee when such measures are being formulated. Such consultation must ensure that a careful examination of the measures concerned has been undertaken before they are defined as non-discriminatory and that the representative employers' and workers' organizations have had an opportunity to express their opinions on the matter. Once adopted, the special measures should be re-examined periodically, in order to ascertain whether they are still needed and remain effective. It should be borne in mind that such measures are clearly of a temporary nature in as much as their objective is to compensate for imbalances resulting from discrimination against certain workers or certain sectors.

The following grounds may call for the adoption of special measures of protection or assistance: sex, age, disablement, or membership of an ethnic minority, or of indigenous and tribal peoples; this list is not exhaustive and must be adapted to national circumstances.

2. Recent developments in light of equality⁴²

Under Convention No. 111, the Committee has reiterated that maternity protection measures are not in violation of the Convention and that other "protective" measures should be reviewed in accordance with the *resolution on equal opportunities and equal treatment for men and women in employment*, adopted by the Conference in 1985, which recommended that all protective legislation applying to women should be reviewed in the light of up-to-date scientific knowledge and technical changes and that it should be revised, supplemented, extended, retained or repealed, according to national circumstances. As for ILO standards, it requested that protective instruments, such as Convention No. 89, be reviewed periodically to determine whether their provisions were still adequate and appropriate in the light of experience acquired since their adoption and of scientific and technical information and social progress.

The Committee considers that recognition of the principle of equality between men and women is intended not only to eliminate legal provisions and practices which create advantages and disadvantages on the basis of gender, but also to achieve now and in the future effective equality of rights for both sexes by equalizing their conditions of employment and their roles in society so that women can enjoy the same employment opportunities as men. For this reason, differences in treatment between men and women can only be permitted on an exceptional basis, that is when they promote effective equality

⁴² *Night work of women in industry*, General Survey of the Reports concerning the Night Work (Women) Convention, 1919 (No. 4), the Night Work (Women) Convention (Revised), 1934 (No. 41), the Night Work (Women) Convention (Revised), 1948 (No. 89), and the Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948, ILC, 89th Session, 2001, Report III (Part 1B), paras. 60 and 161.

in society between the sexes, thereby correcting previous discriminatory practices, or where they are justified by the existence, and therefore the persistence, of overriding biological or physiological reasons, as in the case in particular of pregnancy and maternity. This requires a critical re-examination of provisions which are assumed to be “protective” towards women, but which in fact have the effect of hindering the achievement of effective equality by perpetuating or consolidating their disadvantaged employment situation.

Methods of job evaluation ⁴³

The adoption of the concept of equal remuneration for work of equal value necessarily implies some comparison between jobs. The Committee has stated, in this regard, that the scope of comparison should be as wide as is allowed for by the wage system in existence. As men and women tend to perform different jobs, in order to eliminate wage discrimination on the basis of sex, it is essential to establish appropriate techniques and procedures to measure the relative value of jobs with varying content. The Convention does not favour any particular method of evaluation. However, many countries use the analytical job evaluation methodology and there is a growing consensus that it is the most practicable method of ensuring the application of the principle of equal remuneration in practice. What the Committee is most concerned about and does advocate, is that the utmost care be taken in including factors to take sufficiently into account jobs commonly regarded as being carried out by women, so that the degree of subjectivity and gender bias is minimized.

The Committee has therefore stressed that care should be taken to prevent sex stereotyping from entering the job evaluation process, as this may result in an under-evaluation of tasks performed primarily by women or those perceived as intrinsically “feminine”. It is therefore essential to take measures to ensure that job evaluations are done on the basis of objective criteria. These criteria should not undervalue skills normally required for jobs that are in practice performed by women, such as providing care, manual dexterity and human relations skills, nor should they overvalue those attributes, such as physical strength, typically associated with jobs traditionally performed by men. The qualities most often attributed to women tend to be undervalued by society in comparison with those qualities which men are said to possess. Not surprisingly, societal values are also reflected in wage systems. Many traditional job evaluation systems also show an obvious gender bias by undervaluing or ignoring the support and non-managerial work often performed by women.

Implementation of job evaluation

The participation of all the social partners is essential for the implementation of the comparison of jobs. The involvement of occupational organizations must therefore be secured with the common objective of achieving wage equality in full knowledge of the situation, that is following appropriate training on the concept of wage discrimination and in awareness that it has to be eliminated.

Statistics ⁴⁴

In a general observation in 1999, the Committee of Experts noted that more complete information is required in order to permit an adequate evaluation of the nature, extent and

⁴³ General Survey, 1986, op. cit., paras. 139-142; Report of the Committee of Experts, 2001, op. cit., paras. 43-44.

⁴⁴ Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 87th Session, 1999, Report III (Part 1A), pp. 354-355.

causes of the pay differential between men and women and the progress achieved in implementing the principle of the Convention. Accordingly, in order to assist the Committee in evaluating the application of the principle of equal remuneration, and in accordance with the provisions of the Labour Statistics Convention, 1985 (No. 160), the Committee asks the governments to provide the fullest possible statistical information, disaggregated by sex, in their reports, with regard to the following:

- the distribution of men and women in the public sector, the federal and/or state civil service, and in the private sector by earning levels and hours of work (defined as hours actually worked or hours paid for), classified by: (1) branch of economic activity; (2) occupation or occupational group or level of education/qualification; (3) seniority; (4) age group; (5) number of hours actually worked or paid for, and where relevant, by (6) size of enterprise and (7) geographical area; and
- statistical data on the composition of earnings (indicating the nature of earnings, such as basic, ordinary or minimum wage or salary, premium pay for overtime and shift differentials, allowances, bonuses and gratuities, and remuneration for time not worked) and hours of work (defined as hours actually worked or paid for), classified according to the same variables as the distribution of employees (subparagraphs (1) to (7) of paragraph (i) above).

Where feasible, statistics on average earnings should be compiled according to hours actually worked or paid for, with an indication of the concept of hours of work used. Where earnings data are compiled on a different basis (e.g. earnings per week or per month), the statistics on the average number of hours of work should refer to the same time period (that is, by week or by month).

With respect to the fact that some governments are not yet in a position to provide full statistical information, the Committee of Experts asked them to supply all the information that is currently available to them and to continue to work towards the compilation of the statistical information set out above.

A comprehensive approach ⁴⁵

The Committee of Experts has long taken the view that wage discrimination cannot be tackled effectively unless action is also taken simultaneously to deal with all of its sources. As is evident from the preceding discussion, it is important to discuss equal remuneration and job evaluation in the context of a more general protection against discrimination, such as that offered in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Workers with Family Responsibilities Convention, 1981 (No. 156). The Committee continues to emphasize that a comprehensive approach to the reduction and elimination of pay disparity between men and women involving societal, political, cultural and labour market interventions is required. The Committee believes that the application of the principle of equal pay for work of equal value should be an explicit and necessary part of such a strategy as it has advantages that non-labour market strategies appear unable to achieve on their own. The Committee has noted that the adoption of adequate legislation requiring equal pay for work of equal value is important, but is insufficient to achieve the goals of the Convention. Policies that only deal with labour market discrimination are inadequate, since factors arising outside the labour market (relating to traditional ideas about the role of women and the conflict between work and family responsibilities) appear to be a more significant source of pay inequality than factors which originate within the labour market. The continued persistence of the wage

⁴⁵ Report of the Committee of Experts, 2001, op. cit., para. 49.

gap requires that governments, along with social partners, take more proactive measures to raise awareness, make assessments, and promote and enforce application of the principle of equal pay for work of equal value.

III. Practical difficulties and principal obstacles in the application of the Conventions

1. *Discrimination in employment and occupation: Convention No. 111 and Recommendation No. 111*

In many States which have adopted appropriate legislation in respect of promoting equality of opportunity and treatment in employment and eliminating discrimination, the Committee of Experts has noted that the practical implementation of the legislation and the national policy still give rise to many and varied difficulties. Even in States in which the Constitution and other legal provisions explicitly prohibit discrimination, particularly on the basis of sex, in practice concrete and affirmative measures are required, without which the achievement of equality is impossible. Cultural and economic factors are also at the basis of discriminatory practices based on race and religion which are still very common in relation to access to employment and which occur in States where strict regulations have been adopted in this respect, combined with penal sanctions.

Covering of all the criteria set out in the Convention and of all workers

The Committee of Experts has noted that in certain countries the legislation does not prohibit discrimination in employment base on all the criteria set forth in the Convention, or that the protection does not extend to all workers. The Committee of Experts has indicated that it is essential, when reviewing the position and deciding on the measures to be taken, that governments should give their attention on all the grounds of discrimination envisaged in the 1958 instruments.⁴⁶ In cases where certain categories of workers (such as public servants, certain agricultural workers, domestic workers) are excluded from the scope of the general legislation applicable to workers, and particularly the protection afforded by the Labour Code, it is important to ensure that the protection afforded to these workers under the terms of the Convention is secured through provisions that are applicable to them.

Implementation of a national policy to promote equality of opportunity and treatment

The Committee of Experts has noted that a number of governments indicate that the Convention does not give rise to difficulties or is fully applied, without providing other information on the content or means by which the national policy is applied. Such a statement is difficult to accept⁴⁷, since the quality of opportunity and treatment cannot be achieve in a stable and definitive manner but requires a permanent and progressive process during which the national policy has to adjust it to changes in society and evolve on the basis of the progress achieved in the implementation of the principle in law and practice.

⁴⁶ General Survey, 1988, para. 32.

⁴⁷ *ibid*, paras. 158, 159, 240 and 241.

Indeed, there remains a broad range of discrimination in most States, not only based on sex but also and in particular on race, religion and political opinion.

Other difficulties in the full application of the Convention include the fear of reprisals, the burden of proof, ineffective sanctions and remedies, the non-availability of legal assistance and inadequate institutions to safeguard equality rights.

2. *Equal remuneration: Convention No. 100 and Recommendation No. 90*

Individual scope of the instruments

As provided for in Article 2, paragraph 1, of Convention No. 100, the principle set out in the Convention applies to all workers. Nevertheless, as in the case of application of Convention No. 111, significant categories of workers, and generally those earning wages near to or lower than the minimum wage, are often excluded from the legal protection afforded against wage discrimination. The question therefore arises as to the protection of these categories of workers who are excluded from legal protection.

Meaning of the concept of “work of equal value”

Although the concept of work of “equal value”, which goes beyond references to identical work performed by persons with the same skills, the same experience and working under the same conditions, has been adopted in a significant number of countries, its interpretation, and therefore its application, give rise to many difficulties. The narrow concept of equal pay for equal work has been outdated since the end of the Second World War, in spite of the fact that it found its way into the Universal Declaration of Human Rights. If the equal pay principle were defined in such a way, its application would be extremely limited, since few people perform the same work and men and women perform, to a considerable extent, very different jobs. In fact, the drafters of the Convention, while noting the difficulty associated with the application of equal value, never shied away from insisting on its use as the guiding principle.

Job evaluation

The Committee of Experts has recognized that several difficulties exist, which hinder the use of job evaluation in the promotion of the Convention. In some countries, wages are fixed in an ad hoc manner or through bargaining without the use of any job evaluation methodology. Secondly, carrying out job evaluation exercises, as well as undertaking studies, and taking steps to equalize wages costs time and money. Finally, everywhere job evaluation exercises are carried out, they may not incorporate necessary measures to reduce gender bias in the evaluation so as to ensure an objective appraisal of jobs in accordance with the Convention.

Statistics ⁴⁸

Statistical information is of great importance in the evaluation of inequalities which exist in the labour market between men and women. It is therefore necessary to have available the most complete statistics possible, on the one hand, to make it possible to undertake an adequate evaluation of the nature, extent and cause of wage differentials between men and women, and on the other hand, to be able to evaluate the progress achieved in the application of the Convention. Moreover, the Committee of Experts has

⁴⁸ Report of the Committee of Experts, 2001, op. cit., General Report, paras. 45-46.

emphasized that an analysis of the position and pay of men and women in all jobs categories and between the various sectors is required to address fully the continuing remuneration gap between men and women which is based on sex. The Committee of Experts, noting the lack of adequate data, has recommended the manner in which statistics would have to be collected in order to undertake such an assessment. Governments have therefore been urged to analyse the national situation in order to determine the extent and the nature of the pay gap, by sector is possible, as a starting point in addressing the equal pay issue.

The causes of wage differentials ⁴⁹

It is now recognized that the causes of pay differentials between men and women are found both within and outside the labour market. Many difficulties encountered in achieving equal remuneration are closely linked to the general status of women and men in employment and society. The male/female wage gap has been traced mainly to the following factors: lower, less appropriate and less career-oriented education, training and skills levels; horizontal and vertical occupational segregation of women into lower paying jobs or occupations and lower level positions without promotion opportunities; household and family responsibilities; perceived costs of employing women, and pay structures. In some countries, particularly in the agriculture sector, collective agreements may still reflect male and female pay rates and, in some countries, differential productivity rates are set for men and women. The establishment of centralized minimum standards, narrow pay dispersion and transparency of pay structures have been identified as factors which could address the pay structure differences and help reduce the gender pay gap.

⁴⁹ *ibid.*, para. 40.

4.2. Workers with family responsibilities

A. L. Torriente

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Workers with Family Responsibilities Convention, 1981 (No. 156)	33	The Governing Body has invited member States to contemplate ratifying Convention No. 156.
Workers with Family Responsibilities Recommendation, 1981 (No. 165)	–	The Governing Body has invited member States to give effect to Recommendation No. 165.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications	Status
Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123)	–	The Governing Body has noted the replacement of Recommendation No. 123 by the Workers with Family Responsibilities Recommendation, 1981 (No. 165).

I. Workers with Family Responsibilities Convention (No. 156) and Recommendation (No. 165), 1981

Dual objective of the Convention and the Recommendation

Convention No. 156 and Recommendation No. 165 have a dual purpose:

- to create equality of opportunity and treatment in employment and occupation between men and women workers with family responsibilities; and
- to create equality of opportunity and treatment in employment and occupation between men and women workers with family responsibilities and those without such responsibilities.

In the discussions concerning the adoption of the Convention and Recommendation, it was agreed that full equality of opportunity and treatment for men and women could not be achieved without implementing broader social changes, including a more equitable sharing of family responsibilities. The first ILO instrument adopted in the area of family responsibilities, the Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123), recognized the concern that “all measures to promote equal rights may prove meaningless for a vast majority of women if – as a result of their family responsibilities – they must either give up their jobs entirely, or lose any chance of advancement because they can give only a smaller part of their attention and energy to

their professional work”.⁵⁰ The Recommendation assumed, however, that women had a greater share of family responsibilities and therefore required special measures to assist them in meeting both their work and family commitments. The reports submitted by governments concerning the application of Recommendation No. 123 approximately one decade after its adoption made clear that the instrument did not adequately reflect the changing roles of men and women in society and economic life. It was considered that special measures developed for women with family responsibilities should be extended to men. This would benefit male workers, encouraging them to take a more active role in the family and particularly assisting those male workers who bear family responsibilities alone. It would also benefit women workers by eliminating a possible source of discrimination by employers who might otherwise be disinclined to hire women with family responsibilities due to their perception that hiring such workers would entail higher costs.

At its 66th (1980) Session, the Conference initiated discussions with a view to the adoption of an instrument intended to address equal opportunities and equal treatment for men and women workers with family responsibilities. The Conference recognized that the disproportionately greater burden of responsibility borne by women for carrying out family and household tasks constituted one of the more significant reasons for the persistent inequality between men and women in the workplace.⁵¹ The Preambles to the Convention and Recommendation reflects this concern, “Recognising the need to create effective equality of opportunity and treatment as between men and women workers with family responsibilities and between such workers and other workers, ...”. The Preamble to the Convention also echoes the concern expressed in the Preamble of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, 1979, that States parties are “aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women”. The objective of the instruments is therefore to address the problems faced by workers with family responsibilities in so far as the burden of such responsibilities can create or maintain inequalities between men and women in the labour market.

Another significant concern raised during the preparatory discussions was that measures taken to ameliorate the situation of workers with family responsibilities should not result in discriminatory consequences for workers without such responsibilities.⁵² It was therefore considered beneficial to formulate a broad definition of workers with family responsibilities in order to cover all workers, since any worker might at some stage of his or her life, be required to assume family responsibilities as defined under the Convention.⁵³ Further, in order to prevent workers with family responsibilities from becoming a privileged group in relation to other workers and to prevent discrimination against workers without family responsibilities, the focus of the instruments is limited to workers with family responsibilities “where such responsibilities restrict their possibilities of preparing for, entering, participating in or advancing in economic activity” (Article 1, paragraph 1, of the Convention).

⁵⁰ ILO, General Survey of the Committee of Experts on Conventions and Recommendations relating to the Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123); ILC, 64th Session, Geneva, 1978, Report III (Part 4B), p. 1.

⁵¹ *ibid.*, para. 25.

⁵² See ILO, Report VI(2), ILC, 66th Session, 1980, pp. 18 and 20; comments by Austria and Kuwait.

⁵³ See comments by the Federal Republic of Germany, *ibid.*, p. 20.

Scope of the Convention

Article 2 of the Convention provides that the Convention applies to all branches of economic activity and to all categories of workers. The term “economic activity” is intended to cover all forms of occupational activity, both in the public and private sectors and regardless of whether the activity is for profit.⁵⁴ It was considered that the Convention should cover all forms of employment and sectors of activity, but was agreed that Article 2 could be applied by stages where necessary, and in keeping with national conditions.⁵⁵

The Convention is intended to apply to all workers, whether in part-time or full-time, temporary or other forms of employment, and regardless of whether they are in waged or non-waged employment. It is also intended to cover workers whether or not they are nationals of the ratifying country, in order to extend the Convention’s protection to migrant workers.⁵⁶

As one of the goals of the Convention is to protect workers seeking to re-enter the labour market after an absence due to family responsibilities, the language of the Convention (Article 1(1)) is phrased to provide coverage not only to those workers with family responsibilities who are already employed, but also to those seeking to enter or re-enter the work force or to acquire training for purposes of employment.⁵⁷

Definitions

The Convention applies to men and women workers with responsibilities in relation to:

- their dependent children; and
- other members of their immediate family who clearly need their care or support, where such responsibilities restrict possibilities of preparing for, entering, participating in or advancing in economic activity (Article, paragraphs 1 and 2).

The terms “dependent child” and “other member of the immediate family who clearly needs care or support” are to be defined by individual governments. Article 1, paragraph 3, of the Convention states that these terms are to be defined by one of the means referred to in Article 9 of the Convention, that is “bylaws or regulations, collective agreements [...] or in any other manner consistent with national practice which may be appropriate, account being taken of national conditions”.

It was noted during the preparatory work that the definition of “dependent child” may turn on numerous factors that may be taken into account in the national legislation, including the child’s age, legal relationship to the worker, residence and other characteristics, bearing in mind that the concept of dependence should signify reliance on

⁵⁴ See the reply to the comment of the Government of Belgium, ILO, Report V(2), ILC, 67th Session, 1981, pp. 15-17; and *Record of Proceedings*, ILC, 67th Session, 1981, p. 28/10, para. 93.

⁵⁵ See ILO, General Survey on workers with family responsibilities, ILC, 80th Session, 1993, paras. 46-51.

⁵⁶ *ibid.*, paras. 46 and 47.

⁵⁷ *ibid.*, para. 46.

the worker for support and sustenance, and physical and mental well-being.⁵⁸ It was considered that dependence should not be limited solely to economic dependence, but should take into account other forms of dependence, such as the special needs of the disabled child (regardless of whether the child is a minor or an adult).

In accordance with this concept of dependence, most ratifying States have used the definition of minority contained in their national legislation for purposes of defining the term “dependent child” under the Convention. These definitions are generally contained in national legislation on the family, social security or education, and generally cover children from birth up to a maximum age ranging from 15 to 21. This ceiling is generally extended in the case of children who are continuing their education, apprenticeship or other vocational training, or who are carrying out their military service. Many governments extend the age limit for dependent children in the case of severe illness or disability.⁵⁹

Governments have taken varying approaches to the question of the legal relationship between the child and the worker. Most governments consider that the term “dependent child” includes children born to a husband and wife or children born out of wedlock, adopted children and stepchildren from a previous marriage. Many countries also include grandchildren or the children of other family members, if the natural parents are unable to care for them. A number of countries also cover children who do not fall into any of the above categories but who reside with the worker.⁶⁰

On the question of other family members in need of care or support, a number of Governments have taken measures to cover members of the immediate family, such as elderly, ill or disabled parents. A small number of countries (e.g. the Netherlands) have defined family responsibilities to include other individuals who, while not related to the worker, have a close, quasi-family relationship with the worker, such as an elderly friend or neighbour. Many countries have, however, not yet taken steps to implement Article 1, paragraph 2, of the Convention.

Application of the Convention in stages

Article 10 provides for the provisions of the Convention to be applied in stages, with the exception of Article 1, paragraph 1. It was agreed during the preparatory work that the Convention should apply from the outset to men and women workers with family responsibilities in relation to their dependent children. The substantive provisions of the Convention were drafted in terms that permit limitations in national resources to be taken into account, in order to enable the ratification and application of the Convention by all member States, whatever their stage of economic development.

Article 10, paragraph 1, provides that:

The provisions of this Convention may be applied by stages if necessary, account being taken of national conditions: Provided that such measures of implementation as are taken shall apply in any case to all the workers covered by Article 1, paragraph 1.

Article 10, paragraph 2, requires a ratifying State to indicate in their first report on the application of the Convention under article 22 of the ILO Constitution in what respect it

⁵⁸ See *Record of Proceedings*, 1981, op. cit., p. 28/9, paras. 83-84.

⁵⁹ See General Survey, 1993, op. cit., para. 39.

⁶⁰ *ibid.*, para. 40.

intends to make use of the flexibility provided by Article 10, paragraph 1, to apply the provisions of the Convention in stages, and to indicate in subsequent reports the extent to which it has given or intends to give effect to the particular provisions identified in its first report.

Requirements of the Convention

Article 3, paragraph 1, of the Convention provides that, with a view to creating effective equality of opportunity and treatment for men and women workers, member States must make it an aim of national policy to enable persons with family responsibilities who are engaged or who wish to engage in employment to be able to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities. The introductory language regarding equality of opportunity and treatment for men and women workers was added to indicate that the measures contemplated in Article 3 should be placed in the broader framework of gender equality.⁶¹

In keeping with this broader context, Article 3, paragraph 2, makes it clear that the term “discrimination” in Article 3, paragraph 1, means discrimination in employment and occupation as defined by Articles 1 and 5 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).⁶² Therefore, national policies adopted by member States pursuant to Convention No. 156 should seek to eliminate any distinction, exclusion or preference made on the basis of family responsibilities, which has the effect of nullifying or impairing equality of opportunity and treatment in employment and occupation and which is not based on the inherent requirements of a particular job (Article 1, paragraphs 1 and 2, of Convention No. 111). Such national policies should seek to establish equality of opportunity and treatment for men and women workers with family responsibilities with regard to access to vocational training, access to employment and to particular occupations and terms and conditions of employment (Article 1, paragraph 3, of Convention No. 111).⁶³

Given that the Convention and Recommendation place the issue of equality of opportunity and treatment for workers with family responsibilities within the broader context of measures to promote equality between men and women in the workplace, it would be appropriate for the principles of these instruments be included in the national policy declared and pursued under Article 2 of Convention No. 111 for member States bound by that instrument.

Recognizing that discrimination on the basis of marital status or family responsibilities is frequently considered to be a form of discrimination on the basis of sex,⁶⁴ Paragraph 7 of the Recommendation suggests that measures should be adopted and applied to prevent direct or indirect discrimination on the basis of marital status or family responsibilities.

⁶¹ See *Record of Proceedings*, 1981, op. cit., p. 28/10, para. 97.

⁶² The reference to Article 5 of Convention No. 111 means that special measures of protection or assistance which are designed to meet the particular requirements of persons with family responsibilities will not be considered to be discriminatory.

⁶³ See Chapter 4.1 on Convention No. 111.

⁶⁴ See General Survey, 1993, op. cit., para. 26.

Training and employment

Equality of opportunity and treatment in employment for men and women workers with family responsibilities necessarily implies non-discrimination in access to vocational training, access to employment and to particular occupations, and terms and conditions of employment (Article 1, paragraph 3, of Convention No. 111). In placing emphasis on enabling persons with family responsibilities to exercise their right to free choice of employment, Convention No. 156 aims to improve employment and advancement prospects for workers with family responsibilities through strengthening their occupational qualifications. Article 7 of the Convention and Paragraphs 12, 13 and 14 of the Recommendation address the obstacles that these workers face in “preparing for, entering, participating in or advancing in economic activity” (Article 1, paragraph 1, of the Convention) because of their family responsibilities by calling for governments to adopt programmes, facilities and services, including measures in the field of vocational guidance and training, “to enable workers with family responsibilities to become and remain integrated in the labour force, as well as to re-enter the labour force after absence due to those responsibilities” (Article 7 of the Convention; Paragraph 12 of the Recommendation).

Paragraph 13 of the Recommendation suggests that, in accordance with national policy and practice, vocational training facilities and, where possible, paid educational leave arrangements should be made available to workers with family responsibilities. The inclusion of this Paragraph was not intended to advocate the introduction of paid educational leave in countries where such arrangements do not exist, but rather to recommend the adoption of measures to allow workers with family responsibilities to benefit from such arrangements on an equal footing with other workers in countries where paid educational leave is available.⁶⁵

Paragraph 14 of the Recommendation indicates that vocational guidance, counselling, information and placement services to assist workers with family responsibilities to enter or re-enter employment should be made available to such workers within the framework of existing services for all workers. The Recommendation indicates that such services should be free of charge and should be provided by staff with adequate training to enable them to meet the special needs of workers with family responsibilities.

Terms and conditions of employment and social security

The Convention states that all measures compatible with national conditions and possibilities should be adopted to take account of the needs of workers with family responsibilities:

- in terms and conditions of employment; and
- in social security.

Terms and conditions of employment

The organization of working time is an issue of paramount importance to workers with family responsibilities in their efforts to balance professional and family life. As indicated earlier, Convention No. 156 and Recommendation No. 165 seek to assist workers with family responsibilities in balancing work and family responsibilities in order to

⁶⁵ *Record of Proceedings*, 1981, op. cit., p. 28/21, para. 256.

promote equality of opportunity and treatment in employment between men and women and between workers with family responsibilities and other workers. It is in this context that Paragraph 17 of the Recommendation calls for all measures compatible with national conditions and possibilities and with the legitimate interests of other workers be taken to ensure that terms and conditions of employment are such as to enable workers with family responsibilities to reconcile their employment and family obligations.

Traditional working time patterns, generally characterized by full-time employment, fixed working hours and an uninterrupted period of service, are based on the stereotypical division of roles between men and women, according to which the male breadwinner pursued his occupation or career while his female partner raised the children and tended to the needs of the household. When women began entering the workforce in ever-increasing numbers, the constraints imposed by this traditional societal model and the pressures entailed in accommodating commitments at work and in the home had a detrimental effect on women's prospects for employment and advancement. Article 4(b) therefore calls for special measures to be taken for the benefit of workers with family responsibilities. Measures enabling workers to better reconcile work and family life have the dual effect of encouraging women to enter and remain in the work force and of encouraging men to participate more fully in family life, thereby promoting equality between men and women in the workplace and in the home.⁶⁶

Paragraph 18 of the Recommendation suggests that general measures to improve working conditions for all workers can be beneficial for workers with family responsibilities and calls for the "progressive reduction of daily hours of work and the reduction of overtime", as well as for flexible working schedules, rest periods and holidays. The special needs of workers, including those with family responsibilities, should also be taken into account in shift-work arrangements and assignments to night work (Paragraph 19). Paragraph 20 provides that family responsibilities and considerations such as the place of employment of the spouse and the possibilities of educating children should be taken into account when transferring workers from one location to another.

Workers with family responsibilities, particularly women, often move into atypical employment, such as part-time, temporary or home work, in order to better balance their work and family life.⁶⁷ These jobs are often precarious, poorly remunerated, entail few if any social protections and have limited prospects for advancement. Paragraph 21 of the Recommendation calls for adequate regulation and supervision of the terms and conditions of employment of such workers, providing that those terms and conditions, such as social security coverage, should be equivalent to those of full-time and permanent workers.

The Recommendation also contemplates the adoption of special leave entitlements. Paragraph 22 of the Recommendation provides that either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with rights resulting from employment being safeguarded. The length of the period following maternity leave, as well as the duration and conditions of the leave, are to be determined by individual States, according to Paragraph 22(2) of the Recommendation. Such leave may be introduced gradually, or be restricted to enterprises employing a certain number of workers (Paragraph 22(3)). In keeping with the objectives of the Convention, paragraph 22(1) of the

⁶⁶ See General Survey, 1993, *op. cit.*, para. 131.

⁶⁷ In many countries, women are concentrated in part-time employment. See General Survey, 1993, *op. cit.*, para. 144.

Recommendation provides that such leave should not be restricted to one parent only.⁶⁸ The Recommendation also contemplates the provision of care leave, and suggests that men and women with family responsibilities should be permitted to take leave in the event of the illness of a child (Paragraph 23(1)) or of another family member (Paragraph 23(2)).

Social security and fiscal measures

The treatment of women under the social security systems in many countries is often predicated upon the assumption that the family is composed of a male breadwinner and a female homemaker who relies upon the protection deriving from her husband's entitlement to social security benefits arising from his employment. This traditional model of social security generally penalizes women workers who move into part-time employment after maternity or who take leave or a break from their career due to their family responsibilities. The Committee of Experts has noted that social security systems should take into account the many different situations faced by men and women workers in order to guarantee men and women equal protection and equal rights.⁶⁹

The Convention provides that, with a view to creating effective equality of opportunity and treatment, governments should take all measures compatible with national conditions and possibilities to take account of the needs of workers with family responsibilities in the area of social security (Article 4(b)). This provision should be interpreted in light of the dual objective of the Convention and Recommendation: to help workers with family responsibilities balance work and family in order to achieve equality of opportunity and treatment in employment between men and women workers with family responsibilities and between workers with family responsibilities and other workers. The Recommendation also suggests that fiscal measures should ensure that parents are not penalized financially for entering or remaining in employment, particularly where both parents work.

Paragraph 27 of the Recommendation states that social security benefits, tax relief, or other appropriate measures consistent with national policy should, when necessary, be available to workers with family responsibilities. This provision refers essentially to fiscal measures, which can, depending upon the manner in which they are structured, affect the decision of parents to enter the work force or remain unemployed. Taxation systems should avoid discriminating against couples in which both the man and woman are employed.

Countries that have addressed this issue have taken varying approaches. Some countries have provided for separate taxation or a system whereby the family's total income is divided by the number of family members, to reduce the family's tax liability. Other countries have taken specific tax relief measures permitting workers with family responsibilities to take deductions for the costs involved in obtaining adequate childcare or care for another member of the family.⁷⁰

The Convention and Recommendation also call for governments to take measures to protect workers with family responsibilities during the leaves of absence referred to in Paragraphs 22 and 23 of the Recommendation (including maternity leave, paternity leave,

⁶⁸ Where the possibility of taking childcare leave, particularly extended leave, is extended only to the mother, this not only constitutes discrimination against men, but may also have a detrimental effect on women's employment prospects. See General Survey, 1993, op. cit., para. 169.

⁶⁹ *ibid.*, para. 129.

⁷⁰ *ibid.*, paras. 173-174.

parental leave and care leave). Paragraph 28 of the Recommendation provides that, during the relevant period, workers with family responsibilities may be protected by social security through any of the means contemplated in Paragraph 3 (laws or regulations, collective agreements, works rules, arbitration awards, court decisions or a combination of these methods). Where legislation or collective agreements provide for paid family leave, such leave periods are generally equated to periods of paid employment, thereby safeguarding the worker's social security rights. Where family leave, such as parental leave, is unpaid, some countries have taken steps to finance benefits out of tax revenues or through a social insurance fund. A number of countries have taken measures to credit childcare leave for purposes of calculating workers' pensions.⁷¹

Where workers cannot re-enter employment after the expiration of the paternal leave period, access to unemployment benefits is a significant consideration. In this regard, Article 26(d) of the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), calls for unemployment coverage of those workers seeking employment after a period devoted to bringing up a child or caring for someone who is sick, disabled or elderly.

Paragraph 29 of the Recommendation provides that a worker should not be excluded from social security coverage with reference to the occupational activity of his or her spouse and entitlement to benefits arising from that activity.

Childcare and family services and facilities

Article 5 of the Convention and Paragraphs 24-26 of the Recommendation call for measures compatible with national conditions to be taken:

- to take account of the needs of workers with family responsibilities in community planning; and
- to develop or promote community services, public or private, such as childcare and family services and facilities.

The competent authorities should, in cooperation with the public and private organizations concerned, take measures to assess the needs and preferences of the community for childcare and family services and facilities and ensure that such services and facilities meet the needs and preferences identified (Paragraphs 24 and 25 of the Recommendation). The competent authorities should encourage and facilitate the establishment, particularly in local communities, of plans for the systematic development of childcare and family services and facilities, and should facilitate the provision of such services and facilities either free of charge or at a reasonable charge in accordance with the workers' ability to pay. The services and facilities provided should comply with the relevant standards established by the competent authorities (Paragraph 26 of the Recommendation).

Section VII of the Recommendation also contemplates the promotion of public and private action to lighten the burden deriving from workers' family responsibilities (Paragraph 32). Paragraph 33 of the Recommendation suggests that measures be taken to develop home-help and home-care services which are adequately regulated and supervised and which can provide workers with family responsibilities with qualified assistance at a reasonable charge in accordance with the worker's ability to pay.

⁷¹ *ibid.*, paras. 176-182.

Adoption of measures to increase awareness and understanding of the problems faced by workers with family responsibilities

In order to achieve equality of opportunity and treatment for workers with family responsibilities, it is necessary to promote understanding and acceptance of the underlying principles of Convention No. 156, namely that the family is the concern of both men and women and that society must enable those with dependants to meet their family obligations and to participate fully in the labour force. To this end, Article 6 of the Convention requires governments to take appropriate measures to promote information and education which engender a broader public understanding of the principle of equality of opportunity and treatment for men and women workers and of the problems of workers with family responsibilities, as well as a climate of opinion conducive to overcoming these problems. Paragraph 11 of the Recommendation suggests that the competent authorities and bodies undertake or promote research into the various aspects of the employment of workers with family responsibilities with a view to providing objective information upon which sound policies and measures may be based, and that they promote such education as will encourage the sharing of family responsibilities between men and women and enable workers with such responsibilities better to meet their employment and family commitments.

Denial of employment or termination due to family responsibilities

Article 8 of the Convention provides that “family responsibilities shall not, as such, constitute a valid reason for termination of employment”. Paragraph 16 of the recommendation goes further, suggesting that marital status, family situation or family responsibilities should not, as such, constitute valid reasons for refusal or termination of employment.

Means of application

Article 9 of the Convention establishes that the provisions of the Convention may be applied by laws or regulations, collective agreements, works rules, arbitration awards, court decisions or by a combination of these methods, or in any other manner consistent with national practice which may be appropriate, account being taken of national conditions. Paragraph 3 of the Recommendation provides for the same means of application with regard to its provisions.

Role of employers' and workers' organizations

Article 11 provides that employers' and workers' organizations shall have the right to participate, in a manner appropriate to national conditions and practice, in devising and applying measures designed to give effect to the provisions of the Convention.

Principles established by the Committee of Experts

The Committee of Experts has emphasized that the application of Convention No. 156 should be viewed in a broad perspective. The terms of the Convention imply that its implementation requires measures to be taken in a number of distinct and discrete areas, responsibility for which is normally vested in more than one government agency or non-governmental organization or institution. In addition to action taken by the Labour Ministry or Department, other measures might lie within the responsibility of national agencies concerned with, inter alia, promoting equality of opportunity and treatment among men and women, and agencies responsible for establishing policies and

programmes in the areas of community services, education and vocational training and social security.⁷²

The Committee of Experts has also noted that if the measures taken to implement a national policy of equality of opportunity and treatment between men and women are to be effective, they should be accompanied by “a major campaign of sensitization in order to promote the widespread acceptance of the notion that the family is the concern of each individual, man and woman, and that society must enable all persons with dependants both to exercise their responsibilities and to participate fully in the labour force”.⁷³

The Committee of Experts has noted the different measures taken by countries to encourage the establishment of plans for the systematic development of childcare and family services and facilities. The responsibility of supervising the planning, development, day-to-day operation and expansion of community-based services to care for children and older persons frequently rests with local government.⁷⁴ In Canada, for example, the provincial governments administer day care programmes and coordinate policy development and programme planning for childcare services and community. In a number of countries, employers are statutorily required to set up childcare facilities, particularly where they employ a certain number of women workers.⁷⁵ The Committee of Experts has also noted that increasing numbers of employers have taken voluntary action to help their employees meet their childcare needs. These services can include childcare information and referral services, childcare subsidies paid by the employer to assist with childcare costs, the provision of on-site or off-site childcare centres or childcare through private home day-care agencies.⁷⁶

Article 8 does not require a reason to be given in all cases where the employment of workers with family responsibilities is terminated. Where employment may be terminated only for valid reasons, Article 8 establishes that family responsibilities, as such, cannot constitute a valid reason for termination. In keeping with Article 9, which permits the application of the Convention by a variety of means, Article 8 of the Convention does not require application by legislation, but allows member States flexibility in determining the manner of implementation. In general terms, provisions prohibiting the dismissal of either a pregnant women or a woman who is absent on maternity leave may also be regarded as measures to guard against discrimination in respect of a worker’s potential family responsibilities. While questions concerning maternity leave are outside the scope of application of Convention No. 156 and Recommendation No. 165, these issues should be addressed as part of any national policy in the area of equality of opportunity and treatment.⁷⁷

In the view of the Committee of Experts, measures to allow men and women workers to balance their work and family commitments are a natural extension of well-established principles of equality. Therefore, Convention No. 156 and Recommendation No. 165 must be viewed as a necessary part of the overall goal of ensuring that every man and woman

⁷² *ibid.*, para. 62.

⁷³ *ibid.*, para. 90.

⁷⁴ *ibid.*, paras. 203-204.

⁷⁵ *ibid.*, para. 206.

⁷⁶ *ibid.*, para. 207.

⁷⁷ *ibid.*, paras. 122 and 124.

should have the opportunity to play a full role in social, economic and public life, as well as in the family.

4.3. Indigenous and tribal peoples

L. Swepston and A.L. Torriente

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Indigenous and Tribal Peoples Convention, 1989 (No. 169)	14	This Convention was adopted after 1985 and is considered up to date.
Indigenous and Tribal Populations Recommendation, 1957 (No. 104)	–	The Governing Body has invited member States to give effect to Recommendation No. 104.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Recruiting of Indigenous Workers Convention, 1936 (No. 50)	30	The Governing Body has shelved Convention No. 50 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and/or the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), the Migration for Employment Convention (Revised), 1949 (No. 97), and/or the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and, as appropriate, denouncing Convention No. 50 at the same time.
Elimination of Recruiting Recommendation, 1936 (No. 46)	–	The Governing Body has noted that Recommendation No. 46 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.
Contracts of Employment (Indigenous Workers) Convention, 1939 (No. 64)	28	The Governing Body has shelved Convention No. 64 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and/or the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), the Migration for Employment Convention (Revised), 1949 (No. 97), and/or the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and, as appropriate, denouncing Convention No. 64 at the same time.
Contracts of Employment (Indigenous Workers) Recommendation, 1939 (No. 58)	–	The Governing Body has noted that Recommendation No. 58 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.
Penal Sanctions (Indigenous Workers) Convention, 1939 (No. 65)	32	The Governing Body has shelved Convention No. 65 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and, as appropriate, denouncing Convention No. 65 at the same time.

Contracts of Employment (Indigenous Workers) Convention, 1947 (No. 86)	23	The Governing Body has shelved Convention No. 86 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and/or the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), the Migration for Employment Convention (Revised), 1949 (No. 97), and/or the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and, as appropriate, denouncing Convention No. 86 at the same time.
Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955 (No. 104)	26	The Governing Body has shelved Convention No. 104 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Indigenous and Tribal Peoples Convention, 1989 (No. 169), and, as appropriate, denouncing Convention No. 104 at the same time.
Indigenous and Tribal Populations Convention, 1957 (No. 107)	19	The Governing Body has invited the States parties to Convention No. 107 to contemplate ratifying the Indigenous and Tribal Peoples Convention, 1989 (No. 169), the ratification of which would ipso jure involve the immediate denunciation of Convention No. 107.
Social Policy in Dependent Territories Recommendation, 1944 (No. 70)	–	The Governing Body has noted that Recommendation No. 70 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.
Social Policy in Dependent Territories (Supplementary Provisions) Recommendation, 1945 (No. 74)	–	The Governing Body has noted that Recommendation No. 74 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.

Historical background

The ILO has been concerned with the situation of indigenous and tribal peoples since shortly after its inception in 1919. It began working in this area in 1921 when it addressed the issue of what were then referred to as “native workers”.⁷⁸ After the establishment of the United Nations system following the end of the Second World War, the ILO was the lead agency in the Andean Indian Programme, a multi-disciplinary development programme for the Andean Latin American countries. It worked in this area from the early 1950s to the early 1970s, in collaboration with a number of other United Nations agencies. As a result of this work, the ILO decided to adopt an international legal instrument on this question, with the active collaboration of other agencies in the United Nations system.⁷⁹ In 1957, the ILO adopted the Indigenous and Tribal Populations Convention, 1957 (No. 107), and its accompanying Recommendation (No. 104).⁸⁰ Thirty-two years later, the ILO

⁷⁸ See ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*; ILC, 75th Session, Geneva, 1988, Report VI(1), p. 3.

⁷⁹ See Convention No. 107 concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, ILC, 40th Session, Geneva, 1957, Preamble.

⁸⁰ See ILC, *Record of Proceedings*, 39th Session, Geneva, 1956; and ILC, *Record of Proceedings*, 40th Session, Geneva, 1957. Convention No. 107 was the first international legal instrument to attempt to establish the rights of indigenous and tribal populations and the duties of states toward these populations. This landmark instrument covers basic policy and administration, establishes the obligation of States to seek the collaboration of the populations concerned and of their representatives, calls for the improvement of living and working conditions and level of education of indigenous and tribal populations and respect for their customary laws, provides protections in the area of land rights, and calls for these populations to enjoy equal opportunities and receive equal treatment in various areas, including employment, vocational training, social security, education and

revised Convention No. 107 through the adoption of the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Conventions Nos. 107 and 169 remain the only two international instruments relating exclusively to indigenous and tribal peoples and setting forth in a comprehensive manner the basic rights of these peoples and the obligations of States toward them.

Indigenous and tribal peoples are among the most vulnerable groups, often subjected to discrimination and oppressive working conditions, including instances of forced or bonded labour and wage discrimination. A number of other ILO instruments applicable to workers generally, are also relevant to the situation of these peoples, including the Forced Labour Convention, 1930 (No. 29); the Equal Remuneration Convention, 1951 (No. 100); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and the Convention on the Elimination of the Worst Forms of Child Labour, 1999 (No. 182). In addition, indigenous and tribal peoples often migrate to find work, so the two ILO Conventions on this subject, the Migration for Employment Convention (Revised), 1947 (No. 97), and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), are also relevant.

In the decades following the adoption of the first international instrument addressing indigenous and tribal peoples, Convention No. 107, these peoples began increasingly to make their voices heard, forming their own organizations to enable them to express their interests and concerns at the national and international levels.⁸¹ As a result, indigenous and tribal peoples have become more visible in the international arena and international organizations have attempted to respond to their stated needs and concerns.

In 1982, the United Nations Economic and Social Council established the Working Group on Indigenous Populations, which examined the situation of indigenous and tribal populations and prepared a draft text of a Universal Declaration of Indigenous Rights. By resolution 1995/32 of 3 March 1995, the United Nations Commission on Human Rights established an open-ended inter-sessional Working Group to prepare a draft United Nations Declaration on the Rights of Indigenous Peoples⁸² for consideration and adoption by the United Nations General Assembly within the International Decade of the World's Indigenous People (E/CN.4/1999/82, 20 January 1999). The draft declaration is intended to set forth minimum standards for the promotion and protection of the rights of indigenous peoples. As of May 2001, however, only two articles of the text have been adopted by the Working Group and it is uncertain when a final text of the declaration will be adopted.

health. The Convention requires that indigenous and tribal children be taught to read and write in their mother tongue where possible, and for measures to be taken to preserve the mother tongue (Article 23). Article 27 of the Convention requires governments to adopt appropriate measures to make the populations concerned aware of their rights and duties, particularly with regard to labour and social welfare. Convention No. 107 is now closed for ratification, but remains valid for those countries which have ratified it but have not ratified Convention No. 169. As of 1 October 2001, Convention No. 107 was in force for 19 countries: Angola, Bangladesh, Belgium, Brazil, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic and Tunisia.

⁸¹ J. Burger, *Report from the frontier: The state of the world's indigenous peoples*, 1987, p. 44.

⁸² The draft declaration was to be based on the text contained in the annex to resolution 1994/45 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled "Draft United Nations Declaration on the rights of indigenous peoples".

The Working Group proposed the concept of an International Year of the World's Indigenous People (1993), which was launched by the United Nations General Assembly⁸³ and led to the declaration of the International Decade of the World's Indigenous People (1995-2004).⁸⁴ The objective of the Decade is to strengthen international cooperation for the solution of problems faced by these peoples in such areas as human rights, the environment, development, education and health.⁸⁵ The United Nations has undertaken a number of activities related to indigenous and tribal peoples in recent years. The Convention on the Rights of the Child, adopted by the General Assembly in 1989, recognizes the rights of indigenous children.⁸⁶ Article 8(j) of the Convention on Biological Diversity, adopted in 1992, includes a provision relating to indigenous peoples.⁸⁷ The United Nations Committee for the Elimination of Racial Discrimination has also, on 18 August 1997, through its General Recommendation XXIII, reaffirmed that the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to indigenous peoples.

At its meeting on 25 March 1999, the Committee on Juridical and Political Affairs of the Organization of American States adopted a resolution establishing a working group under the Permanent Council to continue consideration of the Proposed American Declaration on the Rights of Indigenous Populations. The Declaration remains under consideration.

On 28 July 2000, the Economic and Social Council of the United Nations adopted a resolution to establish a Permanent Forum for Indigenous Issues. The Forum's mandate is broad and includes the discussion of "indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights". The Forum is scheduled to meet for the first time in 2002.

The revision of Convention No. 107

While Convention No. 107 was a seminal instrument and the first of its kind, it contained a fundamental flaw which became apparent in the years following its adoption. First, it took a view of the indigenous and tribal populations it sought to protect which can now be seen to be patronizing, referring to them as "less advanced" by definition.⁸⁸ Second, the Convention assumed that integration into the dominant population was the inevitable solution to the problems faced by indigenous and tribal populations.⁸⁹ The Preamble to the Convention states that the adoption of general international standards on the subject would facilitate action to assure the protection of the populations concerned, their progressive integration into their respective national communities, and the

⁸³ See A/RES/45/164 of 18 Dec. 1990.

⁸⁴ See A/RES/48/163 of 18 Feb. 1994.

⁸⁵ *ibid.*, para. 4.

⁸⁶ See UN Doc. A/44 736 (1989), arts. 17, 29 and 30.

⁸⁷ United Nations Convention on Biological Diversity, 5 Jun. 1992, 31 I.L.M. 818 (1992).

⁸⁸ See ILO Convention No. 107. Article 1, para. 1(a), of the Convention provides that the Convention applies to "members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community ...".

⁸⁹ See also Convention No. 107, Article 2, para. 1.

improvement of their living and working conditions. Article 2, paragraph 1, of the Convention requires governments to develop coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

During the process of revision of Convention No. 107, which took place from 1986 to 1989, non-governmental organizations (NGOs) representing indigenous and tribal peoples were invited to participate in the preparatory work for the adoption of a new Convention. While the ILO has historically involved those parties affected by Conventions in their adoption, its unique tripartite structure has limited direct participation in this process to governments, employers' organizations and workers' organizations.⁹⁰ Nevertheless, the ILO considered it important to introduce a fourth facet to the discussions with the inclusion of NGOs representing indigenous and tribal peoples, as well as other NGOs. Accordingly, these NGOs were invited to attend the meetings of the Conference to express their views and to address both the Meeting of Experts charged with examining the possibility of revising Convention No. 107 and the Conference sessions where it was discussed. The draft text took account of the interventions made by the NGOs, in order to improve the promotion and protection of their expressed concerns and interests.⁹¹

I. Contents of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)

By early 2001, Convention No. 169 had received 14 ratifications (Argentina, Bolivia, Costa Rica, Ecuador, Colombia, Denmark, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay and Peru) and a number of other States were actively considering ratification. Convention No. 169 has also influenced a number of countries in terms of policy development.

Convention No. 169 is divided into three main sections. Part I (Articles 1 to 12) contains provisions establishing general policy regarding indigenous and tribal peoples. Part II (Articles 13 to 32) addresses substantive issues, including land, employment, vocational training, handicrafts and rural industries, social security and health, education and communication and contacts and cross-border communication. Part III (article 33) addresses administration. Finally, Articles 34 to 44 contain administrative provisions which set out the procedures for the registration, ratification and adoption of the Convention by member States.

Convention No. 169 does not define indigenous and tribal peoples. Instead, it sets forth both objective and subjective criteria for determining whether the Convention could be deemed to apply to a particular group.

Objective criteria

A particular group may meet the objective criteria established by Article 1, paragraph 1(a) and (b), of the Convention and be recognized and accepted as indigenous or

⁹⁰ As a consequence of the tripartite structure of the ILO, its decision-making bodies are composed of government representatives and representatives of employers' and workers' organizations. See ILO Constitution, art. 3.

⁹¹ See, generally, Swepston: *A new step in the international law on indigenous and tribal peoples: ILO Convention No. 169*, 1989, 3, Okl. City U.L., Rev. 677, pp. 684-687 (1990).

tribal. The characteristics of tribal peoples as described in the Convention include peoples living in independent countries:

- whose social, cultural and economic conditions distinguish them from other sections of the national community; and
- whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

Accordingly, tribal peoples are those whose culture, social organization and way of life set them apart from other groups in the country and who have their own customs or traditions or are governed by special laws and regulations.

The characteristics of indigenous peoples as described in the Convention include peoples living in independent countries:

- who are descended from the populations that inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries; and
- who retain some or all of their own social, economic, cultural and political institutions.

Indigenous peoples are therefore generally those who were present in an area before other groups settled there, such as the Native Americans in the United States or the Aborigines in Australia and the Maoris in New Zealand, and who have retained at least some of their traditional culture, social organization and political institutions. The Convention is applicable to indigenous and tribal peoples in all regions of the world, including Africa, the Americas, Asia and the Pacific, and Europe.

Subjective criteria

Article 1, paragraph 2, of the Convention provides that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining those groups to which the Convention applies. The Convention is the first international instrument that recognizes self-identification as indigenous or tribal as a fundamental criterion.

Convention No. 169 refers to indigenous and tribal peoples, not populations. The proposed replacement of the term “populations” used in Convention No. 107 with the term “peoples” in the new Convention was so controversial that the use of the term “peoples” was discussed for three years during the meetings on the revision of Convention No. 107.⁹² In fact, during the first Conference discussion in 1988, the conclusions adopted that year referred to “peoples/populations” because it was unable to reach a decision on the use of one term or the other.⁹³

The concerns expressed during the Conference discussions with regard to the use of the term “peoples” were essentially that the term “peoples” carried with it implications linked with self-determination as that term is understood in international law. Some

⁹² Swebston, op. cit., p. 692 (Autumn, 1990).

⁹³ *ibid.* See also, generally, ILO, *Partial Revision of the Indigenous and Tribal Peoples Convention, 1957 (No. 107)*, ILC, 75th Session, Geneva, 1988, ILO, Report VI(2).

governments expressed concerns that the term “peoples” thereby implied a separation from the State.⁹⁴

The Office proposed the term “peoples” in the new Convention because of the strong preferences expressed by the indigenous and tribal representatives themselves. In the discussions, these groups indicated that “indigenous and tribal peoples are distinct societies that must be referred to in a precise and acceptable manner. Continued use of the term ‘populations’ would unfairly deny them their true status and identity as indigenous peoples”.⁹⁵ In the discussions, the Office noted that the reasons for favouring the use of the word “peoples” consisted essentially “in the idea that its use is necessary to reinforce the recognition of the right of these groups to their identity and as an essential aspect of the change of orientation toward increased respect for their cultures and ways of life”.⁹⁶

During the discussions leading to the adoption of Convention No. 169, it was determined that the term “peoples” was the appropriate term to describe those groups to which the Convention would apply. The Meeting of Experts on the Revision of Convention No. 107 indicated that “... there appears to be a general agreement that the term ‘peoples’ better reflects the distinctive identity that a revised Convention should aim to recognize for these population groups ...”.⁹⁷

Consensus on the use of the term “peoples” was finally achieved by the addition of a third paragraph to Article 1 of the Convention, which establishes that :

The use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

The new language accepted by the Conference and incorporated into the Convention signals a change in orientation, from the protection of the rights of a minority population to be assimilated into the national population, to the recognition in international law that indigenous and tribal peoples are discrete societal groups that are entitled to choose a separate and continued existence within the territory of the nation state, as well as to determine the path that they wish their own development to take.

General policy provisions

Convention No. 169 recognizes the right of indigenous and tribal peoples to be consulted and their right to exert influence in matters that concern them, as well as to exercise control over their own institutions, ways of life and economic development, and to maintain and develop their identities, languages, religions, within the framework of the States in which they live.

⁹⁴ Report VI(2), 1988, op. cit., pp. 8-11.

⁹⁵ *ibid.*, p. 9.

⁹⁶ *ibid.*, p. 12.

⁹⁷ *ibid.*, pp. 12-14.

Consultation and participation: The fundamental principles (Articles 6 and 7)

During the revision of the Convention, a conceptual decision was taken to recognize explicitly in a number of provisions that indigenous and tribal peoples should play an active role in the decision-making process concerning measures affecting them, as well as in the planning, development and administration of policies and programmes affecting them. Article 6 requires governments to:

... consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly (Article 6, paragraph 1(a)).

Article 6 also requires governments to establish means enabling these peoples to participate at all levels of decision-making in elective and administrative bodies as well as in the development of policies and programmes which concern them (Article 6, paragraph 1(b)).

The formulation of the provisions on consultation was extensively debated. Several of the non-governmental organizations representing indigenous and tribal peoples taking part in this process maintained that, in consulting with indigenous and tribal peoples, governments should be required to obtain their consent to proposed measures, whereas the governments voiced their concerns that the obligation to consult with these peoples not include their right to veto proposed measures.

During the discussions, it was clarified that Article 6 was intended to establish that governments should make a serious attempt to obtain the agreement of indigenous and tribal peoples in specified fields. Further, it was made clear that governments would retain the residual power to take the action they deemed necessary if agreement could not be reached after a sincere effort was made.⁹⁸

The Convention requires governments to consult the peoples concerned:

- whenever consideration is being given to legislative or administrative measures which may affect them directly (Article 6, paragraph 1(a));
- where the government retains the ownership of mineral or subsurface resources, or rights to other resources pertaining to lands, it must consult the peoples concerned before undertaking or permitting any programmes for the exploration or exploitation of any resources pertaining to their lands (Article 15, paragraph 2);
- where the relocation of indigenous and tribal peoples from the lands which they occupy is being considered (Article 16, paragraph 2);
- whenever consideration is being given to the capacity of indigenous and tribal peoples to alienate their lands or otherwise transmit their rights outside their own community (Article 17, paragraph 2); and
- prior to the development and implementation of special vocational training programmes for the benefit of indigenous or tribal peoples (Article 23, paragraph 3).

⁹⁸ ILO, *Partial Revision of the Indigenous and Tribal Peoples Convention, 1957 (No. 107)*, ILC, 76th Session, Geneva, 1989, Report VI(2A), p. 5.

The required consultations must be conducted with those persons or organizations that are truly representative of the communities or groups concerned and that are empowered to speak or make decisions on their behalf. This necessarily implies that governments have a duty, prior to initiating the consultation process, to identify and verify that the persons or organizations with whom they will be dealing are in fact representative of the communities or groups concerned.

The Convention requires governments to consult the indigenous and tribal peoples concerned prior to adopting measures or engaging in activities that may affect these peoples. While governments are not required to obtain the consent of the peoples concerned to the measures being proposed, Article 6 is clear that the government must make a genuine good-faith effort to conduct a meaningful dialogue with the peoples affected. Article 6, paragraph 2, provides that “The consultations carried out in application of this Convention shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”

The requirement that governments undertake consultations with indigenous and tribal peoples in good faith implies that governments must provide these peoples with full and relevant information on the subject of the consultation, in a manner that can be fully understood by them.

Participation and development (Article 7)

Participation is another fundamental principle of the Convention:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly (Article 7, paragraph 1).

Article 7 particularly contemplates the active, informed participation of indigenous and tribal peoples in:

- the development and implementation of plans for the improvement of living and working conditions and levels of health and education of the peoples concerned (Article 7, paragraph 2);
- the development and implementation of special projects to develop the areas inhabited by these peoples (Article 7, paragraph 2);
- carrying out studies to assess the social, spiritual, cultural and environmental impact of planned development activities on the communities or peoples concerned (Article 7, paragraph 3); and
- taking measures to protect and preserve the territories inhabited by the indigenous or tribal peoples concerned (Article 7, paragraph 4).

Article 7 reflects the Convention’s aim of establishing the conditions for self-management, providing the means to allow indigenous and tribal peoples to take control of their own lives and determine their future, as well as the extent and direction of their economic, social and cultural development. Articles 6 and 7 of the Convention contemplate that indigenous and tribal peoples shall have the right to participate in every step of the planning, development and implementation of projects, policies, programmes or

any other measures that may affect them directly. The participation must be achieved through the traditional or representative bodies recognized and accepted by them, and not through structures imposed externally, unless they have accepted these different structures or institutions.

Responsibility for developing coordinated and systematic action to protect the peoples concerned (Article 2)

The Convention provides that governments have the duty to protect and promote the rights of the indigenous and tribal peoples within their countries. Ratifying States are responsible for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity (Article 2, paragraph 1). In this context, governments have the obligation to take measures to:

- ensure that indigenous and tribal peoples enjoy rights and protections under national legislation equal to those enjoyed by the rest of the national population (Article 2, paragraph 2(a));
- promote the full realization of the social, cultural and economic rights of indigenous and tribal peoples while respecting their identity, traditions and institutions (Article 2, paragraph 2(b)); and
- assist the peoples concerned to eliminate the socio-economic gaps that may exist between them and the national community, in a manner compatible with their goals and ways of life (Article 2, paragraph 2(c)).

A number of States that have ratified Convention No. 169 have established specific agencies to assist them in identifying and addressing issues relevant to indigenous and tribal peoples. It is important that the necessary resources be allocated to such agencies to allow them to carry out their work effectively and that these agencies coordinate with each other and exchange information to the extent possible, to avoid inconsistencies and duplication of effort. A number of governments have established a government agency or institution responsible for coordinating policies relevant to indigenous and tribal peoples and monitoring projects and programmes being carried out by other government institutions. For example, the National Indian Foundation (FUNAI) has been established in Brazil, the National Indian Institute in Mexico and the Directorate General for Indigenous Affairs in Colombia.

Fundamental rights (Article 3)

Men and women who are members of indigenous and tribal communities are entitled to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination (Article 3, paragraph 1). This panoply of rights includes fundamental rights such as the right to equality of opportunity and treatment between men and women and relative to the rest of the national community, access to justice, the right to social security benefits, and access to education and health care.

Special measures (Article 4)

Governments are required to adopt special measures as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the indigenous and tribal peoples in the country (Article 4, paragraph 1). Such measures may not be contrary to the wishes of the peoples concerned, nor may they prejudice the general rights of citizenship that they enjoy (Article 4, paragraphs 2 and 3).

Customs and traditions (Article 5)

In applying the provisions of the Convention, governments should recognize and protect the social, cultural, religious and spiritual values and practices of indigenous and tribal peoples, taking into consideration the problems that they face as groups and as individuals (Article 5(a)). The Convention establishes that measures aimed at mitigating the difficulties faced by indigenous and tribal peoples in facing new conditions of life and work must be adopted with the participation and cooperation of the peoples affected (Article 5(c)).

Respect for the customary laws of indigenous and tribal peoples

The Convention recognizes the “distinctive contributions of indigenous and tribal peoples to the cultural diversity ... of humankind”⁹⁹ and calls for governments to respect “their social and cultural identity, their customs and traditions and their institutions”¹⁰⁰ and to adopt special measures to safeguard “the persons, institutions, property, labour, cultures and environment of the peoples concerned” (Article 4, paragraph 1).

The Convention recognizes that many indigenous and tribal peoples have developed their own customary laws and their own institutional structures, equivalent to judicial and administrative bodies or councils, which administer the application of these customary laws, in accordance with their own societal constructs and traditions. The Convention establishes that indigenous and tribal peoples have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights (Article 8, paragraph 2).

Article 8 of the Convention requires governments to:

- take into account the customs or customary laws of indigenous and tribal peoples in applying national laws and regulations to them (Article 8, paragraph 1); and
- establish procedures for the resolution of conflicts which may arise in the application of the principle that these peoples should retain their own customs and traditions (Article 8, paragraph 2).

Punishment for offences

The Convention recognizes the special problems faced by indigenous and tribal peoples in the criminal justice systems of many countries, where imprisonment is a routine punishment. Imprisonment is often traumatic for members of indigenous and tribal communities, who have no tradition of incarceration and do not cope well with confinement and removal from their familiar surroundings. The Convention contemplates the imposition of alternative forms of punishment when dealing with indigenous or tribal offenders.

In this context, Article 9 calls for governments to respect the methods customarily practised by the peoples concerned for dealing with offences committed by their members, to the extent compatible with the national legal system and with internationally recognized

⁹⁹ Preamble, Convention No. 169.

¹⁰⁰ Convention No. 169, Art. 2, para. 2(b).

human rights (Article 9, paragraph 1). It also calls for the authorities and courts to take into account the customs of the peoples concerned in regard to penal matters (Article 9, paragraph 2). In imposing penalties provided for in national legislation on indigenous and tribal peoples, account must be taken of their economic, social and cultural characteristics (Article 10, paragraph 1). The national justice system is thus called upon to seek alternative forms of punishment when dealing with indigenous or tribal offenders. Article 10, paragraph 2, provides that preference shall be given to methods of punishment other than incarceration.

Access to justice (Article 12)

Often, indigenous and tribal peoples are not familiar with the national laws or with the functioning of the national legal/judicial system. They may not speak or understand the national language used in legal proceedings, a factor which compounds the problem and impedes their fundamental right of access to justice. In order to address this issue, Article 12 of the Convention establishes that:

- indigenous and tribal peoples must be able to initiate legal proceedings individually or through their representatives, for the effective protection of their rights, and
- measures must be taken to ensure that members of these peoples can understand and be understood in legal proceedings, through the provision of interpretation where necessary.

Prohibition against compulsory labour (Article 11)

Article 11 establishes that it is prohibited to exact the performance of compulsory personal services from members of the peoples concerned and that the exaction of such services shall be a punishable offence, except where prescribed by law for all citizens.

Indigenous and tribal peoples and land rights

The Convention recognizes that many indigenous and tribal peoples have a special relationship to the lands they occupy or use, and that this relationship is often tied to spiritual and cultural practices that have evolved over time, as well as to their livelihood, as many indigenous and tribal communities depend heavily on hunting, trapping and fishing and on other natural resources for food, medicine and housing. Article 13, paragraph 1, of the Convention therefore calls for governments to respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories (or both, as applicable) which they occupy or use, particularly the collective aspects of the relationship.

Lands or territories traditionally used or occupied (Article 13, paragraph 2)

The Convention recognizes that many indigenous and tribal groups are nomadic or are shifting cultivators moving within a particular region following their traditional methods of land cultivation and resource management. Further, recognizing that many indigenous and tribal groups do not have title to the lands they occupy, the Conference adopted a broad definition of lands. Article 13, paragraph 1, refers to lands or territories (or both as applicable) which the peoples concerned occupy or otherwise use. Article 13, paragraph 2, specifies that, for purposes of Articles 15 and 16, the term “lands” includes “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.

Land rights (Articles 13-19)

The Convention provides that the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized (Article 14, paragraph 1). In order to implement this principle, governments are required to:

- take measures, in appropriate case, to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities (Article 14, paragraph 1);
- take steps as necessary to identify the lands which these peoples traditionally occupy and to guarantee effective protection of their rights of ownership and possession (Article 14, paragraph 2); and
- establish adequate procedures within the national legal system for the resolution of land claims brought by the peoples concerned (Article 14, paragraph 3).

Natural resources (Article 15)

Recognizing the special relationship of many indigenous and tribal peoples to their traditional lands and their particular dependency on the natural resources found on those lands, the Convention requires governments to specially safeguard the rights of these peoples to the natural resources pertaining to their lands, including their right to participate in the use, management and conservation of these resources (Article 15, paragraph 1).

Resources belonging to the State (Article 15, paragraph 2)

Where, as in many countries, the State retains ownership of all mineral or subsurface resources, such as oil, water or natural gas, the Convention calls for additional safeguards for the protection of indigenous and tribal peoples who occupy or use the lands where the resources are located.

Where the State owns mineral or subsurface resources or rights to other resources pertaining to lands, Article 15, paragraph 2, of the Convention requires the government to:

- establish or maintain procedures for consulting indigenous and tribal peoples;
- consult them to determine whether and to what extent their interests would be prejudiced;
- prior to undertaking or permitting any exploration or exploitation of the resources pertaining to the lands occupied or otherwise used by the peoples concerned.

Right to participate in benefits and to receive compensation

Article 15, paragraph 2, also establishes that, where exploration or exploitation of resources pertaining to their lands is permitted, indigenous and tribal peoples have the right to:

- wherever possible, participate in the benefits of the activities; and
- receive fair compensation for any damages which the peoples concerned may sustain as a result of the exploration or exploitation activities.

This right does not contravene or supersede the State's right of ownership over these resources.

Displacement and relocation (Article 16)

Article 16, paragraph 1, of the Convention establishes the principle that indigenous and tribal peoples may not be removed from their lands. This prohibition against relocation is, however, not absolute. Relocation may take place under the following conditions:

- where the relocation is considered necessary as an exceptional measure and where the free and informed consent of the peoples concerned has been obtained through prior consultation (Article 16, paragraph 2); or
- where the consent of the peoples affected cannot be obtained, the relocation may take place only after appropriate procedures established by national law have been followed and which provide the opportunity for effective representation of the peoples concerned.

Article 16, paragraph 3, provides that, wherever possible, the peoples affected have the right to return to their traditional lands as soon as the grounds for the relocation cease to exist. If return is impossible, as determined by agreement or through appropriate procedures, the peoples concerned are entitled to compensation. The indigenous and tribal peoples affected are entitled to receive:

- lands at least equal in quality and legal status to those previously occupied by them and which are sufficient to provide for their present needs and permit their future development (Article 16, paragraph 4);
- compensation in money or in kind, if they express a preference for such compensation in lieu of lands (Article 16, paragraph 4); and
- full compensation for any loss or injury resulting from the relocation (Article 16, paragraph 5).

Other land rights provisions (Articles 17-19)

Respect for traditional landholding systems

Many indigenous and tribal peoples have developed their particular system of transmission of land rights. Some peoples do not recognize individual land rights and provide only for collective rights to the land or to rights pertaining to the land, such as hunting, trapping and fishing rights. Article 17, paragraph 1, provides that the procedures established by these peoples for transmitting land rights among their members shall be respected. Article 17, paragraph 3, establishes that governments should take measures to prevent non-indigenous or non-tribal persons from taking advantage of the customs of the peoples concerned, or of their lack of understanding of national laws in order to acquire ownership, possession or use of indigenous or tribal lands.

Duty to consult

The government is required to consult the peoples concerned whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their land rights outside their own community (Article 17, paragraph 2).

Duty to prevent or punish intrusion upon indigenous lands

In a number of countries, indigenous and tribal peoples have been displaced from their traditional lands by non-indigenous settlers, ranchers or prospectors, at times through the use of violence and threats. Article 18 requires governments to establish adequate penalties under national law for unauthorized intrusion into or use of indigenous or tribal lands. Governments are also under a duty to take steps to prevent such intrusions.

Equal treatment with regard to lands

Article 19 provides that national agrarian programmes must give indigenous and tribal peoples treatment equivalent with the rest of the national population with regard to:

- granting additional lands to enable them to meet their subsistence needs; and
- providing the means necessary to promote the development of the lands that these peoples already possess.

Recruitment and conditions of employment

To the extent that these peoples are not protected by laws applicable to workers generally, governments are required to enact special measures to provide them with effective protection in regard to recruitment and conditions of employment (Article 20, paragraph 1).

Non-discrimination (Article 20, paragraph 2)

The Convention calls for governments to do everything possible to prevent discrimination between indigenous and non-indigenous workers, including in regard to:

- admission to employment, promotion and advancement;
- equal remuneration for work of equal value;
- medical and social assistance, occupational safety and health, social security and other work-related benefits, and housing; and
- the right of association and freedom for all lawful trade union activities and the right to collectively bargain.

The measures to be taken by governments include measures to ensure that indigenous and tribal workers enjoy the same protection afforded by national law and practice to other workers in the same sectors, as well as to ensure that such workers are fully informed of their rights and remedies under the labour legislation. Governments must also take measures to ensure that indigenous and tribal workers are not subjected to hazardous working conditions or to coercive recruitment systems, including forms of debt servitude. The Convention also explicitly provides that governments must take measures to ensure that such workers enjoy equal opportunities and treatment in employment for men and women and specifically calls for workers belonging to these peoples to be protected from sexual harassment (Article 20, paragraphs 2 and 3).

The Convention requires that particular attention be paid to the establishment of adequate labour inspection services in areas where the peoples concerned are employed, in order to ensure compliance with the provisions of Article 20.

Vocational training (Articles 21 and 22)

The Convention establishes that indigenous and tribal peoples shall enjoy equal opportunities with regard to vocational training (Article 21). Governments should therefore:

- promote the voluntary participation of indigenous and tribal peoples in general vocational training programmes; and
- ensure the provision of special training programmes and facilities whenever existing general vocational training programmes do not meet the special needs of the peoples concerned (Article 22, paragraphs 1 and 2).

Special training programmes should be developed with the participation of the peoples concerned, who should be consulted on the organization and operation of such programmes. They must also be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Where feasible and where they so decide, indigenous and tribal peoples shall progressively assume responsibility for the organization and operation of such programmes (Article 22(3)).

Handicrafts, rural and community-based industries (Article 23)

The Convention recognizes that handicrafts, rural and community-based industries and the traditional activities of the peoples concerned, such as hunting, trapping, fishing and gathering, are essential to the maintenance of their cultures and to their economic independence and development. Article 23 therefore calls for governments to:

- ensure (with the participation of the peoples concerned) that these activities are strengthened and promoted; and
- provide appropriate technical and financial assistance wherever possible, and at the request of the peoples concerned.

Social security and health

Access to social security (Article 24)

The Convention calls for social security schemes to be extended progressively to cover indigenous and tribal peoples without discrimination and in the same manner as the rest of the national population.

Access to health care (Article 25)

Governments must ensure that adequate health services are made available to the peoples concerned or must provide them with resources to permit them to design and deliver health services under their own responsibility and control. Health services should be community-based, wherever possible, and should be planned and administered in cooperation with the peoples concerned, taking their economic, social and cultural conditions into account. Preference should also be given to the training and employment of local community health care workers.

Education

Access to education (Article 26)

Measures should be taken to ensure that indigenous and tribal peoples have the opportunity to obtain education at all levels on at least an equal footing with the rest of the national community. The Convention requires governments to develop and implement educational programmes and services for indigenous and tribal peoples in cooperation with them. Further, governments must ensure the training of indigenous and tribal teachers and their involvement in the development of educational programmes, in order to transfer responsibility for the conduct of these programmes in a progressive manner to the peoples concerned (Article 27).

The Convention promotes access to bilingual education, calling for indigenous and tribal children to be taught in their own language wherever possible, and requiring that adequate measures be taken to ensure that these peoples also have the opportunity to attain fluency in the national language or in one of the official languages of the country (Article 28).

Education for indigenous and tribal peoples should impart general knowledge and skills that will help such children participate fully and on an equal footing with members of their own community and in the national community (Article 29).

Governments' duty to disseminate information on the Convention (Article 30)

Governments undertake to make their rights and duties known to the peoples concerned, particularly with regard to labour, economic opportunities, education and health, social welfare and their rights under the Convention. If necessary, this information should be disseminated in the languages of the peoples concerned.

Governments' duty to take educational measures designed to eliminate prejudice against indigenous and tribal peoples (Article 31)

The Convention calls for educational measures to be taken to eliminate prejudices that members of the national community may harbour against indigenous and tribal peoples. Measures should be taken to ensure that educational materials, including history textbooks, provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

Contacts and cooperation across borders (Article 32)

Some indigenous and tribal peoples are separated by national borders and live in different countries although they belong to the same people and share the same culture, traditions and values.¹⁰¹ In order to address this situation, the Convention calls for governments to take appropriate measures, including by international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders,

¹⁰¹ See the *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual*, project to promote ILO policy on indigenous and tribal peoples, ILO, 2000, p. 69.

particularly with regard to activities in the economic, social, cultural, spiritual and environmental fields.¹⁰²

Administration (Article 33) and procedural provisions (Articles 34-44)

Article 32 requires the governmental authority responsible for the matters covered under Convention No. 169 to ensure that agencies or appropriate mechanisms are created or established to administer the programmes affecting indigenous and tribal peoples as well as to ensure that such agencies or mechanisms have the means necessary to achieve the functions assigned to them. The programmes referred to include the planning, coordination, execution and evaluation of the measures called for under the Convention, as well as the proposing of legislative and other measures to the appropriate authorities and supervision of the application of the measures taken, in cooperation with the peoples concerned.

Articles 34-44 address the procedure for the registration, ratification and adoption of Convention No. 169.

II. Synthesis of principles established by the Committee of Experts

In its 1999 annual report, the Committee of Experts observed that “Convention No. 169 is the most comprehensive instrument of international law for the protection in law and in practice of the right of indigenous and tribal peoples to preserve their own laws and customs within the national societies in which they live”.¹⁰³ The Committee indicated that indigenous and tribal peoples have the right under the Convention “to decide on the orientation and conduct of their economic development, and the right to the ownership and possession of their lands; to strengthen their social organization and their educational and health programmes as well as communication with the national society; and to guarantee adequate political participation taking into account their own legal personality”.¹⁰⁴ The Committee further stated that Convention No. 169 establishes minimum rights that must be respected and put into practice by States which have ratified the Convention, with a view to the protection of the estimated 300 million members of indigenous and tribal peoples around the world.

The Committee noted that one of the fundamental precepts of Convention No. 169 is that “a relationship of respect should be established between indigenous and tribal peoples and the States in which they live, a concept which should not be confused with autonomy, or political and territorial independence from the nation State”.¹⁰⁵ It noted that Convention No. 169 has guided a number of Supreme Court decisions in the Americas, illustrating the

¹⁰² Many indigenous peoples who are separated by national boundaries have formed their own cross-border organizations. Examples of such indigenous and tribal organizations include: the Inuit Circumpolar Conference (ICC); the Saami Council; the Inter-Mountain Peoples Education and Culture in Thailand Association (IMPECT); and Coordinadora de las Organizaciones Indígenas de la Cuenca Amazonica (COICA).

¹⁰³ See ILO Committee of Experts on the Application of Conventions and Recommendations, ILC, 87th Session, 1999, Report III (Part 1A), para. 99.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*, para. 100.

potential of the Convention to influence the positive law of these countries and ameliorate the relationship of power in the dialogues between national governments and indigenous and tribal peoples.

Two interrelated themes have arisen repeatedly, both in the comments of the Committee of Experts on the application of the provisions of the Convention and in the comments of tripartite committees established to examine representations brought against States under article 24 of the ILO Constitution for alleged non-observance of Convention No. 169: the duty of States to consult the peoples concerned prior to permitting the exploration or exploitation of natural resources on the lands they occupy or use, and the issue of indigenous and tribal peoples' land rights per se. The comments of the Committee of Experts and the tripartite committees established under article 24 of the Constitution have also placed great emphasis on the duty of governments to respect the cultures, values, ways of life, traditions and customary laws of indigenous and tribal peoples and their right to participate at all levels in the decision-making process as it may affect them.

Governments' duty to consult the peoples concerned (Articles 6, 7, 15, 16, 17 and 23)

The Committee of Experts and the tripartite committees designated by the Governing Body to examine article 24 representations concerning Convention No. 169 have commented on various aspects of the duty of consultation. These comments make clear that the requisite elements of consultation include:

- genuine dialogue;
- good faith consultations;
- the peoples concerned must be provided with full information;
- the aim of the consultation should be to reach agreement or consent; and
- the consultations should be held prior to taking the action or measure contemplated.

In a representation involving the continuing lack of resolution of indigenous land claims arising out of the displacement of certain indigenous communities due to the construction of a dam, a tripartite committee noted that the consultative spirit of the Convention calls for governments to establish a real dialogue with the indigenous communities to discuss their situation and to find answers to their problems.¹⁰⁶

Article 6, paragraph 2, of the Convention establishes that consultations must be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

In a representation involving a government's granting of logging concessions in areas which overlapped on indigenous lands, the tripartite committee stated that, in order to apply fully the provisions of Article 15 of the Convention concerning the exploitation of natural resources located on lands traditionally occupied by indigenous or tribal peoples, governments should engage in consultations in each particular case, particularly when large tracts of land are affected, and conduct environmental, cultural, social and spiritual impact studies jointly with the peoples concerned. These consultations and impact studies

¹⁰⁶ See report adopted by the Governing Body at its 276th Session, Geneva, Nov. 1999, concluding the representation brought by the Radical Trade Union of Metal and Associated Workers alleging that Mexico had failed to secure the effective observance of the Convention.

should be carried out prior to authorizing the exploitation of natural resources located in areas traditionally occupied by indigenous peoples.¹⁰⁷

Governments are required to consult the peoples concerned prior to changing their system of landownership

In the context of a representation, the tripartite committee stated that, in view of the importance of collective ownership of the land for certain indigenous peoples, decisions involving legislative or administrative measures which may affect the land ownership of these peoples must be taken in consultation with the representative institutions of the peoples concerned, as provided in Article 6 of the Convention. Further, under Article 17, paragraph 2, of the Convention, the peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.¹⁰⁸

Governments must respect the special relationship of indigenous and tribal peoples with the land

The Committee of Experts has noted that Article 13 of the Convention provides that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands ... which they occupy or otherwise use, and in particular the collective aspects of this relationship”.

Indigenous lands: Collective versus individual ownership

In a representation involving indigenous lands, the tripartite committee recalled the special importance of the relationship of indigenous peoples with the lands or territories, and in particular the collective aspects of this relationship. The tripartite committee noted that the experience acquired in the application of Convention No. 169 and its predecessor had shown that the loss of communal land often damages the cohesion and viability of the people concerned. Given the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories which they occupy or otherwise use, and in particular the collective aspects of this relationship, when communally owned indigenous lands are divided and assigned to individuals or third parties, this often weakens the exercise of their rights by the community or the indigenous peoples. As a consequence, they may end up losing all or most of the land, resulting in a general reduction of the resources that are available to indigenous peoples when they own their land communally. For this reason, in the preparatory work for the Convention, many delegates took the position that lands owned by indigenous persons, and especially communal lands, should be inalienable. In a close decision, the Conference Committee decided that Article 17 should continue the line of reasoning pursued in other parts of the Convention, according to which indigenous and tribal peoples shall decide their own priorities for the process of development (Article 7) and that they should be consulted through their representative institutions whenever consideration is being given to legislative or administrative measures which may affect them directly, i.e. that they should

¹⁰⁷ See report adopted by the Governing Body at its 271st Session, Geneva, Mar. 1999, regarding the representation made by the Bolivian Central of Workers (COB) alleging non-observance of Convention No. 169 by Bolivia.

¹⁰⁸ See report adopted by the Governing Body at its 273rd Session, Geneva, Nov. 1998, regarding the representation alleging non-observance by Peru of Convention No. 169 made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP).

be involved in any decision to change the manner in which land rights are transmitted (Article 6).¹⁰⁹

The land rights contemplated in the Convention do not necessarily require ownership

The Committee has stated that it does not consider that the Convention requires title to be recognized in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them. However, the Committee has also noted that the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention.

Governments are required to adopt adequate procedures to resolve land claims by the peoples concerned

Articles 13 and 14 of the Convention must be understood in the context of the general policy set forth in Article 2, paragraph 1, of the Convention, namely that governments have the responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. In this context, the Committee has also referred to Article 6 of the Convention, which provides that consultations shall be carried out in good faith with the peoples concerned and in a form appropriate to the circumstances, and means should be established by which these peoples can freely participate in decision-making on matters which concern them.¹¹⁰

Governments have an obligation to ensure that exploration and exploitation of natural resources do not unnecessarily disrupt indigenous and tribal communities

The Committee has noted that the retention of ownership of natural resources by the State is no obstacle to ensuring that exploration and exploitation cause a minimum of disruption to indigenous peoples, that these peoples participate in the use, management and conservation of these resources, and that they share in the benefits of these activities. This is especially so when Article 15 is read together with Articles 13 and 16 of the Convention, and in the light of the requirement in Article 7 that they shall participate in the formulation, implementation and evaluation of plans and programmes for development which may affect them directly.

Relocation of indigenous and tribal peoples

Pursuant to Article 16, paragraph 4, of the Convention, when a return to their lands is not possible, indigenous and tribal peoples shall be provided in all possible cases with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development.

The Committee of Experts has noted that, under Article 15 of the Convention, the rights of indigenous and tribal peoples to the natural resources pertaining to their lands shall be especially safeguarded, and these peoples should have the right to participate in

¹⁰⁹ *ibid.*

¹¹⁰ See report of the Committee set up to examine the representation alleging non-observance by Mexico of Convention No. 169 made under article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education (REF) (1998).

the use, management and conservation of these resources. Governments are also required to establish and maintain procedures for consulting the peoples concerned with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of resources pertaining to their lands. In the particular instance cited, the Committee requested the government concerned to make full use of appropriate procedures for consulting the communities who might be affected by any development projects on their lands or by the award of any concessions for the exploitation of natural resources on lands belonging to or traditionally occupied by those peoples. The Committee requested the government to provide detailed information in its next report on measures taken for this purpose.

Indigenous and tribal peoples are entitled to the same human rights and fundamental freedoms as other members of the national community (Article 3)

The Committee has noted in its comments that indigenous and tribal peoples must be afforded the same rights as other citizens in the country and must, in turn, accept the corresponding obligations.

Forced labour

The Committee of Experts has noted the existence of forced labour practices (slavery, debt bondage or actual bondage) affecting indigenous and tribal peoples in a number of countries. The Committee has noted forced labour practices involving these peoples in activities such as agriculture, cattle raising and logging. The most common form of forced labour to which these peoples are subjected is debt bondage, for example, through the “*enganche*” system in Latin America, pursuant to which indigenous workers are provided with a means of subsistence and work, creating a debt which the worker must pay off by producing goods or services. The debt incurred by the worker is often permanent, forcing workers to live on the employers’ premises as serfs, without having the means to pay off the debts and return to their place of origin. The Committee has noted that existing forced labour practices involve not only debt bondage, but also certain forms of deceitful or violent recruitment of labour, subhuman conditions of work and the exploitation of indigenous and tribal children.

The Committee of Experts has also noted instances where indigenous and tribal workers’ wages are not paid or are paid only at the end of the contract. Accordingly, in order to survive, these workers become indebted to their employers, contracting debts in shops run by the employers or on the employers’ premises, where they must purchase basic foodstuffs and other staples at inflated prices. They are then obliged to work to repay their debts. (This practice is addressed more specifically in the context of the Protection of Wages Convention, 1949 (No. 95).)

Duty to take special measures to safeguard the rights of the peoples concerned in legal proceedings

The Committee has noted instances where the fundamental rights of indigenous and tribal peoples were violated because they were given no chance to mount an adequate defence in legal proceedings against them and were kept in ignorance of the offences of which they were accused by being denied access to an interpreter or public defender. The Committee has stressed that the objective of Article 12 of the Convention, in providing for special protection for these peoples, is to compensate for the disadvantages they may be under in that they may not possess the linguistic or legal knowledge required to assert or protect their rights. In such cases it has requested the government concerned to continue to take the necessary measures to provide effective protection of and respect for the rights of

indigenous and tribal peoples both in legislation and in practice, in accordance with the Convention.

Non-discrimination in employment

The Committee has noted instances of salary discrimination, where the minimum wage for indigenous and tribal workers was far lower than the level established by the law, and where workers not belonging to those groups earned more for the same type of work.

Given the discriminatory labour practices to which indigenous and tribal workers are often subjected, governments should consider establishing adequate labour inspection services in areas with a high concentration of indigenous workers.¹¹¹

The Committee has noted that the socio-economic and cultural situation of many indigenous and tribal peoples has forced them to migrate to areas where they suffer discrimination and violations of their labour rights.

The Committee has noted the widespread use of the so-called “*enganche*” system whereby intermediaries deceive the indigenous and tribal workers recruited and take a percentage of their wages.

The Committee has noted that Article 20 of the Convention requires governments to adopt special measures to ensure effective protection for indigenous and tribal peoples in the area of recruitment and conditions of work. Further, governments must do everything possible to prevent any discrimination between workers that are members of these peoples and other workers, in particular with regard to equal pay for work of equal value, medical care and health at work, and to ensure that workers belonging to the peoples in question are not required to work in conditions that are hazardous to health, in particular as a result of their exposure to pesticides or other toxic substances.

The Committee has pointed out that one of the most important means of ensuring effective protection of fundamental labour rights for indigenous and tribal workers is frequent and effective inspections of workplaces where these workers are employed.

¹¹¹ In its 1999 comments on Peru in the context of Convention No. 29, the Committee of Experts requested information on the sanctions imposed and the number of infractions reported in the area, noting the Government’s statement that monitoring the situation had become easier due to the presence of the labour authorities in the area.

4.4. Migrant workers

C. Vittin-Balima

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Migration for Employment Convention (Revised), 1949 (No. 97)	41	Pursuant to a recommendation by the Working Party on Policy regarding the Revision of Standards, the Committee of Experts on the Application of Conventions and Recommendations carried out a general survey on Convention No. 97, Recommendation No. 86, Convention No. 143 and Recommendation No. 151. This survey was examined by the Committee on the Application of Standards at the June 1999 Session of the Conference. The Conference Committee concluded that this issue should be the subject of a general discussion in order to examine the existing instruments, including their possible revision. This question is the subject of a proposal for the agenda of a forthcoming session of the Conference.
Migration for Employment Recommendation (Revised), 1949 (No. 86)	–	
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)	18	
Migrant Workers Recommendation, 1975 (No. 151)	–	
Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 100.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Inspection of Emigrants Convention, 1926 (No. 21)	28	The Governing Body has shelved Convention No. 21 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Migration for Employment Convention (Revised), 1949 (No. 97), if appropriate, and denouncing Convention No. 21 at the same time.
Migration (Protection of Females at Sea) Recommendation, 1926 (No. 26)	–	The Governing Body has noted that Recommendation No. 26 is obsolete and has decided to propose to the Conference its withdrawal in due course.
Migration for Employment Convention, 1939 (No. 66)	–	Convention No. 66 was withdrawn by the Conference at its 88th Session (June 2000).
Migration for Employment Recommendation, 1939 (No. 61)	–	The Governing Body has noted the replacement of Recommendations Nos. 61 and 62 by the Migration for Employment Recommendation (Revised), 1949 (No. 86).
Migration for Employment (Co-operation between States) Recommendation, 1939 (No. 62)	–	
Reciprocity of Treatment Recommendation, 1919 (No. 2)	–	The Governing Body has noted that Recommendation No. 2 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.

The protection of workers employed in a country other than their country of origin has always had an important place among the activities of the ILO, since more than any other workers they are liable to exploitation, particularly if they are in an irregular situation and are victims of the trafficking of persons.

Introduction

The situation of workers employed abroad was addressed as soon as the ILO was founded in 1919.¹¹² This concern of the ILO with the situation of migrant workers was reflected in the adoption, at the First Session of the International Labour Conference in 1919, of a Recommendation which already sketched out the two aims of the ILO in this field, namely: *equality* of treatment between nationals and migrant workers; and *coordination* on migration policies between States, on the one hand, and between governments and employers' and workers' organizations, on the other hand.¹¹³ The Declaration concerning the aims and purposes of the International Labour Organization, or the Declaration of Philadelphia, adopted in 1944, also makes specific reference to the problems of migrant workers.¹¹⁴ It should be added that this concern remains highly topical, since the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference on 18 June 1998, in the fourth paragraph of the Preamble, reaffirms the need for the Organization to give special attention to this category of workers.¹¹⁵

Specific standards relating to migrant workers

The International Labour Conference had a dual objective in adopting instruments on migrant workers: in the first place, the intention was to *regulate* the conditions of migration and, secondly, to provide specific *protection* for a very vulnerable category of workers. In this regard, the ILO's standards have focused on two main directions:

- first, the Conference has endeavoured to establish the right to equality of treatment between nationals and non-nationals in the field of social security, and at the same time to institute an international system for the maintenance of acquired rights and rights in the course of acquisition for workers who transfer their residence from one country to another;¹¹⁶

¹¹² For example, Article 427 of the Treaty of Versailles, which lay the basis for the ILO in 1919, provides 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". Similarly, the Preamble to the Constitution of the ILO lays down the obligation for the ILO to improve "protection of the interests of workers when employed in countries other than their own".

¹¹³ The Reciprocity of Treatment Recommendation, 1919 (No. 2).

¹¹⁴ Paragraph III(c): "The Conference recognizes the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve [...] the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement."

¹¹⁵ "Whereas the ILO should give special attention to the problems of persons with special social needs, particularly [...] migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation."

¹¹⁶ Four Conventions and two Recommendations have been adopted for this purpose: the Equality of Treatment (Accident Compensation) Convention (No. 19) and Recommendation No. 25, 1925; the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48); the Equality of Treatment (Social Security) Convention, 1962 (No. 118); and the Maintenance of Social Security Rights Convention (No. 157) and Recommendation No. 167, adopted respectively in 1982 and 1983.

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- secondly, the Conference has endeavoured to find comprehensive solutions to the problems facing migrant workers and has adopted a number of instruments for this purpose (including those containing only a few provisions relating to migrant workers).¹¹⁷

Relations with other ILO standards

It should first be recalled that, with the exception of the instruments relating to migrant workers and other special categories, the Conventions and Recommendations adopted by the International Labour Conference are of general application, that is they cover *all* workers, irrespective of nationality, even though since the Organization's inception there has been an awareness of the need to adopt instruments providing specific protection for migrant workers.

Therefore, although they do not specifically cover migrant workers, the following instruments either contain provisions relating to them, or the Committee of Experts has on occasion referred to the specific situation of migrant workers in supervising their application:

the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); the Forced Labour Convention, 1930 (No. 29); the Labour Inspection Convention, 1947 (No. 81); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Employment Service Convention, 1948 (No. 88); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Maternity Protection Convention (Revised), 1952 (No. 103); the Abolition of Forced Labour Convention, 1957 (No. 105); the Indigenous and Tribal Populations Convention, 1957 (No. 107); the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958; the Workers' Housing Recommendation, 1961 (No. 115); the Employment Policy Convention, 1964 (No. 122); the Minimum Age Convention, 1973 (No. 138); the Human Resources Development Recommendation, 1975 (No. 150); the Occupational Safety and Health Recommendation, 1981 (No. 164); the Termination of Employment Convention, 1982 (No. 158); the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169); the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); the Indigenous and Tribal Peoples Convention, 1989 (No. 169); and the Private Employment Agencies Convention (No. 181) and Recommendation (No. 188), 1977.

¹¹⁷ In addition to the two principal Conventions and Recommendations which are covered by this section, namely: on the one hand, the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949 and, on the other hand, the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151). For the sake of completeness, it should be noted that in 1926 the Conference adopted the Inspection of Emigrants Convention (No. 21) and the Migration (Protection of Females at Sea) Recommendation (No. 26); in 1939, the Migration for Employment Convention (No. 66) and Recommendation (No. 61), and the Migration for Employment (Co-operation between States) Recommendation (No. 62); and in 1947, the Social Policy (Non-Metropolitan Territories) Convention (No. 82). Convention No. 66 never entered into force due to lack of ratifications and it was accordingly decided to revise it in 1949, when the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86) were adopted. In 1955, the Conference adopted the Protection of Migrant Workers (Underdeveloped Countries) Recommendation (No. 100); in 1958, the Plantations Convention (No. 110), and Recommendation (No. 110) and in 1962, the Social Policy (Basic Aims and Standards) Convention (No. 117). Finally, in 1975, the Conference supplemented the 1949 instruments by adopting the Migrant Workers (Supplementary Provisions) Convention (No. 143) and the Migrant Workers Recommendation (No. 151).

This list is by no means exhaustive. Mention should also be made of the numerous observations formulated by the Committee of Experts during its supervision of the application of the maritime Conventions.

The specific case of Convention (and Recommendation) No. 111: Under the terms of Paragraph 8 of Recommendation No. 111, regard should be had to the provisions of Convention No. 97 and Recommendation No. 86, relating to equality of treatment and the lifting of restrictions on access to employment in relation to immigrant workers of foreign nationality and the members of their families.¹¹⁸ It should be recalled that Convention No. 111 protects *all* workers, therefore including migrant workers. Although nationality is not one of the grounds of discrimination formally prohibited by Convention No. 111, migrant workers are protected by this instrument in so far as they are victims of discrimination in employment or occupation on the basis of one or other of the grounds of discrimination formally prohibited by Convention No. 111, namely race, colour, sex, religion, political opinion, national extraction or social origin.¹¹⁹

Other standards in the field of migration

Although this section is limited to United Nations instruments, it should, however, be emphasized that the management of international migratory flows features highly on the agenda of a number of regional and subregional bodies and that instruments and institutions designed to regulate the entry, stay, treatment and departure of non-national workers have been established in most regions of the world. It should also be pointed out that many States have concluded bilateral agreements to regulate the most significant emigration and immigration flows.¹²⁰

The Universal Declaration of Human Rights, adopted by the United Nations in 1948, naturally applies to migrants.

Other United Nations instruments are more pertinent in relation to the protection of migrant workers, such as the International Convention on the Elimination of All Forms of Racial Discrimination (1965). Other instruments are relevant, but to a lesser extent, such as

¹¹⁸ In this respect, it should be noted that, in its Special Survey of 1996 on Convention No. 111, the Committee of Experts recommended that the possibility should be examined of adopting an *additional protocol* to the Convention which could include, among other matters, the possibility of adopting additional grounds, including nationality, on which discrimination would be prohibited under Convention No. 111. See the section of this chapter on equality of opportunity and treatment for more details on this additional protocol to Convention No. 111.

¹¹⁹ The concept of *national extraction* contained in Convention No. 111 does not refer to the distinctions that may be made between the citizens of one country and those of another, but to distinctions between citizens of the same country.

¹²⁰ Such agreements have the advantage that they can be adapted to the specific characteristics of particular groups of migrants and that both sending and receiving countries can share the burden of ensuring adequate living and working conditions for these migrant workers, as well as monitoring and more actively managing pre- and post-migration processes. The use of bilateral instruments as a means of regulating migration was first developed in the 1960s when the countries of Western Europe concluded a series of bilateral agreements with countries which were keen to provide a source of temporary labour. Since then, bilateral agreements regulating migration have developed throughout the world, although Asia appears to be the region which has had the least success in using this method. The ILO has always considered that bilateral agreements are a good means of managing migration flows. The annex to Recommendation No. 86 contains an elaborate model of a bilateral agreement, and several provisions of Conventions Nos. 97 and 143 emphasize the role of bilateral cooperation in the field of migration.

the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989).

After a very long drafting process, to which the ILO contributed actively, on 18 December 1990, the General Assembly of the United Nations adopted the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.¹²¹ However, the new Convention has only attained a lukewarm welcome from States. While 20 ratifications are required for the Convention to come into force, only 16 States had ratified or acceded to it as of 1 June 2001.¹²² For this reason, the United Nations launched a global campaign in 1998 to promote the rights of migrants, of which the principal objective is to promote the ratification of this Convention by the largest possible number of Member States of the United Nations.

Finally, reference should be made to the adoption on 15 November 2000 of the United Nations Convention against Transnational Organized Crime and its two additional protocols, the first which is intended to prevent, suppress and punish trafficking in persons, especially women and children, and the second to prevent the smuggling of migrants by land, sea and air.

Contemporary trends in international migration

Since the adoption in 1949 and 1975 of the four instruments which form the basis of this section, the extent, direction and nature of international labour migration has undergone significant changes, which are not without consequences for the application of the instruments.

Extent of international migration

International labour migration is currently a global phenomenon and few countries remain completely unaffected by it. However, it is difficult to establish with accuracy the number of migrant workers in the world today.¹²³ However, it is clear that international

¹²¹ This Convention recognizes the provisions contained in existing ILO Conventions and built upon them and in many ways went beyond them. It extends to migrant workers who enter or reside in the host country illegally (and members of their families) rights which were previously limited to individuals involved in regular migration for employment. While the long-term objective of the Convention is to discourage and finally eliminate irregular migration, it also aims to protect the fundamental rights of migrants caught up in such migratory flows, taking account of their particularly vulnerable position. Other significant aspects of the Convention include the fact that ratifying States are not permitted to exclude any category of migrant workers from its application, the “indivisibility” of the instrument and the fact that it includes every type of migrant worker, including those which are excluded from existing ILO instruments.

¹²² Furthermore, as is the case with the ILO’s instruments, the majority of States parties to the Convention are countries which “export” migrant labour and which only exercise very little influence over the everyday life and working conditions of most migrant workers, even if they play an extremely important role in terms of the protection of migrant workers before their departure and after their return.

¹²³ In many countries, and particularly transition countries, incomplete or non-existent data make it difficult to establish with accuracy the number of migrant workers in the world today. Furthermore, methods of collecting data often differ significantly, thereby reducing the relevance of statistical comparisons between countries. Finally, data on irregular migration and illegal employment are

labour migration has grown considerably since the adoption of the four instruments under consideration.¹²⁴ The ILO recently estimated that over 96 million people (migrant workers and their families) are currently residing, legally or illegally, in a country other than their own and are remitting each year some 73 billion dollars to their country of origin;¹²⁵ while the United Nations reports 130 million migrants, of whom 40 per cent are irregular, with the number increasing for all categories taken together by between 4 and 8 per cent a year.

As the total number of persons involved in migration processes has increased, the number of sending and receiving countries has also risen.

Direction of international migration

The following few examples illustrate the directions taken by the phenomenon of migration in recent years:

- The *first example* is the economic, social and political transformation of the countries of Central and Eastern Europe which, combined with ethnic and social tensions throughout the region, has had the effect that countries which were previously merely affected by migration as countries of transit, have become migrant-receiving countries in their own right.
- The *second significant development* consists of the current trend in many migrant-receiving countries of developing preferential immigration policies, as a consequence of the rise in domestic unemployment rates and the establishment of regional groupings of countries.¹²⁶
- *Globalization*, combined with the development of communication networks and in international transport, has had a profound effect on international labour migration, in the sense that it has increased the number of people who are envisaging international migration as a means of escaping poverty, unemployment and other social, economic and political pressures in their home countries.

Nature of international migration

While at the time of the adoption of 1949 instruments, the traditional distinction between immigration for purposes of *permanent settlement* and *temporary* immigration was clear, the crisis which affected the main (European) receiving countries at the beginning of the 1970s blurred this initial distinction.

sparse even in countries with sophisticated data collection systems. Moreover, even where such data exist, there is no general consensus on the definition of such key terms as “economic migrant”, “permanent migrant” and “irregular migrant”.

¹²⁴ The number of immigrants (non-national residents who have been in the country for more than one year) has increased regularly over recent years, from 84 million in 1974, to 105 million in 1975 and 120 million in 1990.

¹²⁵ According to this estimate, the number of migrant workers is 20 million in Africa, 18 million in North America, 12 million in Latin America, 7 million in South-East Asia, 22 million (made up of 9 million economically active persons accompanied by 13 million dependants) in Western Europe, 9 million in Central and Eastern Europe and 9 million in the Middle East.

¹²⁶ A preferential immigration policy means a migration policy favouring immigration by nationals of countries from the region or from countries with which the region has particular ties, while making it more difficult for nationals of countries outside the region to immigrate.

After tightening their border controls and freezing immigration, these countries found that many migrants initially recruited for temporary employment, in fact, settled permanently in the host country and took the opportunity to bring their families.

As the ban on immigration for permanent settlement has, with few exceptions, remained in force for many major migrant-receiving countries, the only remaining means of migrating for many people is to resort to time-bound migration.

The profile of migrant workers recruited under temporary migration systems has also changed. While in the past most temporary migration flows consisted of semi-skilled workers, current immigration policies tend to focus on highly skilled migrants. However, seasonal workers, primarily recruited for agricultural work, continue to constitute an exception to this rule.

Another aspect which should be taken into consideration is the flexibility which characterizes today's labour market and which affects all workers, including migrant workers. Temporary migrant workers who, by definition, occupy precarious positions, frequently change from one job to another and from one category to another, such as self-employment, contract work and salaried work.

Recruitment practices have also changed significantly since the adoption of the four instruments under consideration. The decline in group recruitment systems, under government control, and the general decline in state leadership in the world of work, have left a vacuum which has been rapidly and effectively filled by private agencies specializing in the recruitment of workers for employment abroad.¹²⁷ As will be seen below, this development is not wholly positive.

Irregular migration

In recent years, illegal immigration has emerged as a matter of concern. The irregular entry, employment and residence of foreign workers has emerged as a disturbing trend, against which governments and the international community have endeavoured to take action.¹²⁸ This type of migration is by its nature difficult to quantify and estimates are imprecise, with fairly disparate figures being put forward. The most commonly cited figure is of 30 million irregular migrants worldwide.

Convention No. 143 and Recommendation No. 151 were adopted in 1975 partly with the objective of protecting irregular migrant workers against abuses of all types.

An examination of the current immigration policies of most major migrant-receiving countries might lead to the belief that migration has become essentially temporary in nature and only concerns highly qualified foreign workers. However, this does not necessarily reflect the real situation. In practice, it is found that the majority of migrant workers occupy unskilled or semi-skilled positions, often under illegal conditions.

Individuals who migrate or reside in a country in violation of immigration and employment regulations are very likely to find themselves in a situation in which they are

¹²⁷ By way of illustration, with regard to migration for employment between Asian countries and the Gulf States, the ILO estimates that as many as 80 per cent of all foreign job placements are handled by private agents.

¹²⁸ However, it is impossible to fail to notice the coincidence between extremely restrictive migration policies, on the one hand, and the explosion in the number of irregular migrants, on the other hand.

vulnerable to abuse and exploitation of all types, particularly in the case of women and children.

Women migrants

In general, the extent to which women engage in international migration is not known. The use of gender-specific language in the 1949 and 1975 instruments shows that at that time the typical migrant was male and the stereotyped view was that he was young and engaging in migration for economic reasons.¹²⁹

Women have long been perceived merely as accompanying their spouse in the context of family reunification. However, it is reported that as many women as men are currently migrating for employment and that they account for almost 48 per cent of migrants worldwide.¹³⁰

Due to the nature of the work which they undertake, women migrant workers can be particularly vulnerable when employed abroad. In recent years, the abuses to which *women domestic workers* are subjected have attracted much attention. Another cause of concern is the vulnerability of women recruited to work outside their countries as *sex workers*.¹³¹ While some migrate specifically for this purpose, the vast majority are forced into prostitution networks upon their arrival in the host country. In many cases, the confiscation of their travel documents and identity papers, large debts which may be owed to the recruiter and the fear of being reported to the police place these women in an extremely vulnerable position.

Fundamental human rights of migrant workers and state sovereignty

Many of those who are involved in the debate on migration draw attention to the difficulties which exist, on the one hand, in reconciling the sovereign right of States to protect their labour market (in response to concerns, whether or not they are legitimate, of public opinion preoccupied by the presence of migrants) and, on the other hand, the fundamental human rights of individuals who, out of choice or necessity, leave to seek work abroad. There is a resulting tension between internal and external forces, which tends to accentuate even further the prejudices, xenophobia and racism of which migrants are often the victims. Since its creation, the ILO has participated actively in this debate and has endeavoured to find a balance between these apparently conflicting interests through, among other measures, the adoption of international labour standards.

¹²⁹ By way of illustration, Article 6 of Convention No. 97 refers to “*women’s work*” and Paragraph 15(3) of Recommendation No. 86 indicates that the family of a migrant worker is defined as his “*wife and minor children*”.

¹³⁰ In certain countries, such as Indonesia, women account for as many as 78 per cent of workers migrating for employment abroad through official channels.

¹³¹ According to an ILO report (Lin Leam Lim (ed.): *The sex sector: The economic and social bases of prostitution in South-East Asia*, ILO, Geneva, 1998), prostitution and other “sex work” in South-East Asia has grown so rapidly in recent decades that the sex business has assumed the dimensions of a commercial sector, one that contributes substantially to employment and national income in the region. Yet, there is no clear legal stance nor effective public policies or programmes to deal with this phenomenon in any of the countries examined by the study. Governments are constrained not only because of the sensitivity and complexity of the issues involved, but also because the circumstances of “sex workers” can range widely from freely chosen and remunerative employment, to debt bondage and conditions which are similar to slavery.

The problems raised by international migration for employment are becoming ever more complex and varied. In the framework of the process of the revision of international labour standards in which the ILO is currently engaged, the 1998 General Survey of the Committee of Experts on the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151), showed that:

- there are serious discrepancies between national practice and the key provisions of Conventions Nos. 97 and 143; and
- the impact of changes from the context in which the ILO's standards on migrant workers were adopted.¹³²

For this reason, in March 2001, the ILO proposed to the Governing Body that a general discussion on the question of migrant workers should be held at a future International Labour Conference.

I. Content of standards relating to migrant workers

The two Conventions and two Recommendations on which this section focuses are all intended to protect workers against discrimination and exploitation when they are employed in countries other than their own.

A. Summary of the instruments

Content of the 1949 instruments

Migration for Employment Convention (Revised), 1949 (No. 97)

This Convention was borne out of the upheavals that occurred in Europe in the aftermath of the Second World War and prompted by a concern to facilitate the movement of surplus labour on this continent. The Convention consists of 12 operative Articles and three annexes.

Under Article 11, paragraph 1, of the Convention, the term “migrant for employment” means a person who migrates from one country to another with a view to being employed otherwise than on his own account.

(a) Measures aimed at regulating the conditions in which migration for employment occurs

- Under Article 1, each Member that ratifies Convention No. 97 undertakes to make available on request to the ILO and to other Members information on: national

¹³² These include, for example, the declining leadership of the State in the world of work, the emergence of profit-making private recruitment agencies, the rise in the number of women in the migrant worker population, the development of temporary migration instead of permanent immigration systems, the rise in the phenomenon of illegal migration, the modernization of means of transport, etc.

policies, laws and regulations relating to emigration and immigration; special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment; and general agreements and special arrangements concluded on these questions.

- This exchange of information must be supplemented by cooperation between the employment service and other services connected with migration (Article 7) and, where appropriate, cooperation in acting against misleading propaganda (Article 3, paragraph 2).
- Article 10 calls on the member States concerned to enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the Convention.

(b) General protection provisions

- Each Member which has ratified the Convention undertakes to: ensure the maintenance of a free service to assist and provide information to migrants (Article 2); take steps against misleading propaganda relating to emigration and immigration (Article 3, paragraph 1); take measures to facilitate the departure, journey and reception of migrants for employment (Article 4); maintain appropriate medical services (Article 5); and permit migrant workers to remit their earnings and savings (Article 9). The Convention also prohibits the expulsion of migrant workers admitted on a permanent basis in the event of incapacity for work (Article 8).

(c) Measures aimed at ensuring equality of treatment in a number of areas for regular migrant workers

- Article 6 prohibits inequality of treatment between migrant workers and nationals arising out of laws and regulations or the practices of the administrative authorities in four areas: living and working conditions, social security, employment taxes and access to justice.

(d) Annexes

- Under the terms of Article 14, each Member which ratifies the Convention may, by an explicit declaration, exclude from its ratification any or all of the three annexes. In the absence of such a declaration, the provisions of the annexes have the same force as those of the Convention. The first two annexes deal with organized migration for employment, while the third, which is more general in scope, applies to migration for employment, whether organized or spontaneous.

*Migration for Employment Recommendation
(Revised), 1949 (No. 86)*

- This Recommendation, which is divided into eight Parts (comprising 21 Paragraphs), advocates a series of measures intended to supplement the provisions of Convention No. 97, particularly as regards information and assistance to migrants (Part III); recruitment and selection (Part IV); and equality of treatment in access to employment and supervision of conditions of employment (Part V). It also contains provisions intended to protect migrant workers against expulsion on account of lack of means or the state of the employment market (Part VI). In annex to the Recommendation, there is a model agreement specifying methods of application of the principles laid down in Convention No. 97 and Recommendation No. 86 which is designed to serve as a model for States for the conclusion of bilateral agreements.

Content of the 1975 instruments

Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

When the Conference adopted this Convention in 1975, the international economic and social context had undergone radical changes since the adoption of the 1949 instruments. It was no longer a question of facilitating the movement of surplus labour, but of bringing migration flows under control, and therefore of focusing on the elimination of illegal migration and suppressing the activities of organizers of clandestine movements of migrants and their accomplices.¹³³ Convention No. 143 consists of three Parts:

(a) *Part I*

- Part I (Articles 1-9) is the first attempt by the international community to address the problems arising out of clandestine migration and the illegal employment of migrants, which had become particularly acute in the early 1970s.
- Article 1 sets forth the general obligation to respect the basic human rights of all migrant workers. The attention is to affirm, without challenging the right of States to regulate migratory flows, the right of migrant workers to be protected, whether or not they entered the country on a regular basis, with or without official documents.
- The struggle against clandestine immigration calls for the member States concerned to take a number of measures to determine whether there are illegally employed migrant workers on their territory and whether there depart from, pass through or arrive in their territory any movements of migrants for employment in the course of which the migrants are subjected, during their journey, on arrival or during their period of residence and employment, to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations (Article 2).
- At the same time, Members shall, where necessary in collaboration with other member States concerned, take measures to suppress clandestine movements of migrants and the illegal employment of migrants and to punish the organizers of clandestine movements of migrants and those who employ workers who have immigrated in illegal conditions (Article 3):
 - *at the national level*, the Convention provides for the adoption and application of sanctions against persons knowingly assisting clandestine or illegal movements of migrants, persons illegally employing migrant workers and organizers of clandestine or illegal movements of migrants (Article 6);
 - *at the international level*, systematic contact and exchanges of information on these matters must take place between the member States concerned (Article 4). One of the purposes of this cooperation is to make it possible to prosecute those responsible for trafficking in workers, irrespective of the country from which they exercise their activities (Article 5).
- The representative organizations of employers and workers must be consulted with regard to the laws and regulations and other measures envisaged to prevent and

¹³³ The change in status from temporary resident to permanent resident is not without difficulties and has given rise to many social problems which host countries have had to address, particularly with the birth on their territories of second and third-generation foreign nationals.

eliminate migration in abusive conditions, and the possibility of their taking initiatives for this purpose must be recognized (Article 7).

- Part I of the Convention also envisages certain protective measures for migrant workers who have lost their employment (Article 8) and for those in an irregular situation (Article 9).

(b) *Part II*

The provisions of Part II (Articles 10-14) considerably extend the scope of equality between legally resident migrant workers and national workers.

- While the provisions of the 1949 instruments are intended to prohibit inequalities of treatment mainly resulting from the action of the public authorities, Part II of Convention No. 143 goes further than simple equality of treatment and also covers equality of opportunity, or in other words the elimination of any discrimination *in practice*. Part II of Convention No. 143 draws upon the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). However, it differs from that instrument on two points:
 - *first*, national policy must not only promote, but also guarantee equality of opportunity and treatment in employment and occupation for migrant workers and members of their families who are lawfully within the territory of the country of employment; and
 - *secondly*, this equality of opportunity and treatment also extends to social security, trade union and cultural rights and individual and collective freedoms (Article 10).
- While leaving it to States to use methods appropriate to national conditions and practice, the Convention sets out a whole series of measures for this purpose (Article 12). However, Article 14 permits limited restrictions in respect of equality of access to employment. Finally, Article 13 calls upon States to facilitate the reunification of the families of migrant workers legally residing in their territory.
- For the purposes of the application of Part II of Convention No. 143, the definition of the term “migrant worker” excludes from its scope, in addition to the categories set out in the 1949 instruments, two further categories of workers, namely: persons coming specifically for purposes of training or education; and persons who have been admitted temporarily to the country at the request of their employer to undertake specific duties or assignments for a limited and defined period of time, and who are required to leave the country on the completion of their duties or assignments (Article 11).

(c) *Part III*

- Finally, Part III (Articles 15-24) includes the standard final provisions, and particularly Article 16, under which any Member which ratifies the Convention may, at the time of ratification, exclude one or other of the two first Parts from its acceptance of the Convention.

Migrant Workers Recommendation, 1975 (No. 151)

Part I of the Recommendation specifies the measures to be taken to ensure respect for the principle of equality of opportunity and treatment between migrant workers lawfully within the territory of a Member and its nationals.

Part II sets out principles of social policy intended to enable migrant workers and their families to share in the advantages enjoyed by nationals, while taking into account the special needs that they might have until they are adapted to the society of the country of employment.

Part III advocates the adoption of a number of minimum protection measures, particularly in the event of loss of employment, expulsion and departure from the country.

B. *Persons covered by the instruments*

Definitions

Employment

The scope of the ILO's instruments relating to migration is principally delineated by the Organization's mandate to protect the rights and freedoms of workers. In other words, these instruments are primarily concerned with migrants for employment, as opposed to migrants in general.¹³⁴

Families of migrant workers

During the drafting of the Conventions and Recommendations covered by this section, account was also taken of the fact that migration is not merely an economic phenomenon, but also a social issue and that migration for employment often has consequences for both the person involved in the employment relationship and the members of their families.

For this reason, the protection of many of the rights which are not directly related to the employment relationship is explicitly extended in these instruments to the families of migrant workers.

These provisions apply only to family members who are entitled by law to accompany the migrant worker. In Convention No. 97, these provisions principally address the migration process itself, that is, the departure of migrant workers from their country and their entry into another country. Convention No. 143 extends the obligations of member States to facilitating "the reunification of the families of all migrant workers legally residing" in their territory.

In Convention No. 143, the term "members of the family" of migrant workers is defined as "the spouse and dependent children, father and mother".

International migration

In Conventions Nos. 97 and 143, the term "migrant worker" means a person who migrates "from one country to another with a view to being employed otherwise than on his own account". This definition includes any person regularly admitted as a migrant for employment and covers only migration between countries, or in other words, under the terms of these two Conventions, migrants only include persons who cross international boundaries for the purposes of employment. The term does not therefore include workers who move within a country for the purposes of employment.

¹³⁴ During the discussion leading to the adoption of the 1949 instruments, it was however indicated that the provisions of the instruments covered by this section are intended to protect refugees and displaced persons, in so far as they are workers employed outside their country of origin.

Clandestine migration and illegal employment

Only Convention No. 143 (in Part I) and Recommendation No. 151 deal explicitly with the suppression of clandestine migration and the protection of migrants in an irregular situation. Article 1 of Convention No. 143 provides that each Member for which the Convention is in force undertakes to respect the basic human rights of all migrant workers, while Article 3 calls for the suppression of clandestine movements of migrants for employment and the illegal employment of migrants.

Length of stay

The four instruments covered by this section in general make no distinction between workers who have migrated for permanent settlement in a country and those who have migrated for short-term and even seasonal work. States are not therefore permitted to exempt any category of migrant workers who have been regularly admitted to the country from their provisions, except for those explicitly mentioned in the instruments.¹³⁵

However, certain provisions relate only to migrant workers and their families who settle permanently in the host country, and particularly Article 8 of Convention No. 97, the objective of which is to prevent migrant workers who have been admitted on a permanent basis (and the members of their families) from being expelled from the host country on the mere grounds of incapacity to work.

Reciprocity

The rule of reciprocity does not apply to the provisions of either the 1949 or the 1975 instruments.¹³⁶ In other words, for the provisions of these instruments to apply to a migrant worker, it is not necessary for the worker to be a national of a State which has ratified them or which guarantees equality of treatment to nationals of States which have ratified them.

Exceptions

Convention No. 97 lays down that it does not apply to:

- frontier workers;
- short-term entry of members of the liberal professions and artistes;¹³⁷ and
- seafarers.¹³⁸

¹³⁵ With regard to the specific case of seasonal workers, the preparatory work for the adoption of Convention No. 143 shows that the definition of the concept of migrant workers makes no distinction between seasonal workers and other categories of migrant workers (although the former cannot always benefit in practice from all the measures envisaged).

¹³⁶ Unlike the Migration for Employment Convention, 1939 (No. 66), which never entered into force due to lack of ratifications.

¹³⁷ The exclusion of “liberal professions and artistes”, the migration of whom did not raise major problems at the time of the drafting of the 1949 and 1975 instruments, has now taken on particular importance, particularly for women migrants in view of the relatively recent phenomenon whereby women are recruited for employment abroad and issued with permits to work as dancers in nightclubs or as hostesses in bars, when in reality they are forced to work in the sex industry. This problem, which was not an important issue in migration 50 years ago, is currently taking on worrying dimensions.

These three categories are also excluded from the scope of Convention No. 143, which in addition does not apply to:

- persons coming specifically for purposes of training or education; and
- employees of organizations or enterprises operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on completion of their duties or assignments.¹³⁹

These exclusions from Convention No. 143 only apply to Part II of the instrument. Indeed, Part I does not allow the specific exclusion of any category of migrant workers.

In addition to the above categories, it should be added that migrant workers who are self-employed are by definition excluded from the provisions of the four instruments.¹⁴⁰

Spontaneous and organized migration

The provisions of the instruments apply to both spontaneous and organized migration. They therefore cover migrant workers recruited under both private arrangements and under government control, as well as workers who migrate outside such arrangements with a view to finding work. Nevertheless, certain provisions (and particularly Annexes I and II of Convention No. 97) only cover workers who have received a firm offer of employment prior to entering the host country.

C. Scope of the measures to be taken

Flexibility of the instruments

The novel aspects of the two Conventions relate to both the experimental nature of their structure and the flexibility with which certain obligations are worded.

- The 1949 instruments constitute an innovation that they contain provisions which are flexibly worded and which only mention the basic rights of migrant workers admitted regularly to the country. Moreover, the three annexes to Convention No. 97 may be excluded from ratification.

¹³⁸ The exclusion of seafarers from the scope of Conventions Nos. 97 and 143 can be explained by the fact that a body of national and international rules, including a significant number of ILO Conventions, had already been developed for this category of workers, who were considered to require specific protection.

¹³⁹ The preparatory work for Convention No. 143 shows that this provision is essentially intended to cover the situation of workers who have special skills and who go to a country to carry out specific short technical assignments. This provision does not imply that all migrant workers recruited for a job or economic activity that is limited in time can be excluded from the provisions of Part II of Convention No. 143.

¹⁴⁰ While the exclusion of self-employed migrant workers from the instruments was justified when the instruments were adopted, it is no longer so appropriate. Indeed, many migrant workers, whether or not they are admitted regularly to the country, are self-employed or semi-self-employed and even work in the informal or marginal sector. These migrant workers are offered no protection under the terms of the Conventions examined in this section.

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- It was also with the object of permitting the maximum number of States to ratify it that Convention No. 143 was given its structure, that is its division into two Parts (the first being devoted to combating migrations in abusive conditions and the second to equality of opportunity and treatment for migrant workers lawfully within its territory and nationals), with the possibility of only ratifying one of the two Parts.

Sending and receiving countries

The 1949 and 1975 instruments are intended to have as wide a coverage as possible so that as many countries as possible can ratify and implement them.

In practice, nevertheless, the majority of States which have ratified one or other of these Conventions are countries which “export” migrant workers, that is countries which have very little influence over the everyday life and working conditions of migrant workers, even though they have an essential role to play in terms of the protection of migrant workers before their departure and following their return.

It should, however, be emphasized that Conventions Nos. 97 and 143 are applicable not only to receiving countries, but also to sending countries (as well as to third countries or transit countries), even though certain of their provisions clearly address more specifically the obligations of host countries to protect foreign workers,¹⁴¹ while others address the obligations of sending countries.¹⁴²

Conventions Nos. 97 and 143 also envisage the development of cooperation between sending countries and host countries in such areas as migration policy and coordination between the employment services of sending and receiving countries. This cooperation may take the form of multilateral or bilateral agreements.

Hierarchy of legal provisions relating to migrant workers

In the context of national laws and regulations, migrant workers are covered by several types of provisions, which are not necessarily coherent:

- first, they are considered to be *foreigners* subject to immigration legislation;
- secondly, as *migrant workers*, they may also be subject to special regulations, such as the right to a residence permit being dependent upon obtaining a work permit;
- thirdly, migrant workers are often categorized alongside nationals as *workers* and as such are subject to labour legislation;
- fourthly, *social security* legislation also generally tends to be drafted in terms that cover both nationals and non-nationals, even if it often contains provisions specifically covering the situation of migrant workers; and

¹⁴¹ Particularly the provisions respecting the reception of migrant workers in the host country, the provision of adequate housing and equality of treatment for migrant workers with nationals in relation to working conditions and social security benefits.

¹⁴² Particularly those governing the remittance of earnings and savings, the provision of information before departure, measures to ensure equality of treatment with regard to the content of the employment contract and measures related to the suppression of clandestine migration.

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- fifthly, as *residents* in the host country, they may be subject to certain rules respecting access to social services and housing.

* * *

The problems raised by international migration for employment are becoming increasingly complex and varied. As part of the process of reviewing international labour standards, the Committee of Experts has undertaken a recent survey of the relevance of the ILO's standards relating to migrant workers in the current context and in view of the practices of member States in this respect.¹⁴³ This General Survey revealed the existence of a clear divergence between national practices, the key provisions of the instruments¹⁴⁴ and the impact of the changing the context.¹⁴⁵ For this reason, in March 2001, the ILO proposed to the Governing Body that a general discussion on the issue of migrant workers should be held at a future International Labour Conference.

II. Summary of the principles developed by the Committee of Experts

A. *The migration process*¹⁴⁶

The four instruments provide for various guarantees and facilities to assist migrant workers and their families in four stages of the migration process:

- during the recruitment process;
- prior to departure from the sending country;
- during the journey to the host country; and
- upon arrival in the host country.

Recruitment

The provisions of Convention No. 97 and Annexes I and II to the Convention concerning the recruitment, introduction and placement of migrants for employment have a triple objective: to *protect* migrant workers; to *facilitate* the control of recruitment; and to *suppress* clandestine employment.

¹⁴³ General Survey of the Committee of Experts on the Application of Conventions and Recommendations on the reports on the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and Recommendation (No. 151), 1975, ILC, 87th Session, 1999.

¹⁴⁴ Recruitment procedures for migrant workers, rights afforded to migrant workers in an irregular situation and policy to promote equality of opportunity and treatment.

¹⁴⁵ Such as the declining leadership role of the State in the world of work, the emergence of private profit-making recruitment agencies, the increasing proportion of women among migrant workers, the development of temporary migration instead of systems of permanent immigration, the rise in the phenomenon of illegal migration, the modernization of means of transport, etc.

¹⁴⁶ The following indications should not, unless otherwise indicated, be interpreted as applying exclusively to either sending or receiving countries.

Definition

According to the Committee of Experts, the concept of the “recruitment of a migrant worker” is very broad since it refers not only to direct engagement by the employer or his or her representative, but also operations conducted by an intermediary, including public and private recruitment bodies, as well as all operations involved in the recruitment procedure, and particularly selection.

Documents issued to migrants

The documents which have to be provided to migrant workers before their departure are intended to provide them with adequate information on the living and working conditions in the country of employment. In this respect, the Committee of Experts considers that, in the light of the existence of fraudulent practices in certain receiving countries, such as the substitution of contracts, immigration countries should play a more active role in supervising the issuance and effective implementation of contracts of employment.¹⁴⁷

The Committee of Experts considers that, in order to ensure that migrants are protected to the greatest possible extent from abuse and exploitation in relation to conditions and terms of employment, contracts of employment should be as complete as possible. In particular, it considers it desirable that contracts should regulate such essential matters as hours of work, weekly rest periods and annual leave, without which the indication of the wage, as required by the annexes to Convention No. 97, may become meaningless.¹⁴⁸

The Committee of Experts also emphasizes that particular attention should be paid to migrant workers’ contracts which may be contrary to the ILO’s fundamental principles, such as the right to organize, the right to engage in collective bargaining and the right to strike.

Methods of recruitment

The Committee of Experts has noted the increasing role in recent years of private recruitment agencies, to the detriment of collective migration through government channels. This “commercialization” of recruitment procedures for work abroad is not without consequences, particularly on the effective observance of the *principle of the free provision of services* to migrant workers in such areas as information, recruitment, introduction and placement by public employment services. Indeed, private agencies are not explicitly covered by the same obligations.

As private recruitment for employment abroad has become a very lucrative activity, abuses by intermediaries in relation to applicants for emigration during the recruitment procedure have increased and the Committee of Experts has noted with interest that most countries are endeavouring to regulate in one way or another the activities of these agencies (the need for a license, financial guarantees, regulation of the fees charged, self-

¹⁴⁷ The substitution of contracts is the practice whereby, despite having signed an authorized contract prior to departure, the worker is issued upon arrival in the country of employment with a new contract setting out lower conditions of work, pay and so on.

¹⁴⁸ In this respect, the Committee of Experts considers that certain aspects of wage protection (payment intervals, means of payment, deductions from wages for payment of services rendered by private employment agencies, etc.) could be included in the contract or in any other written document issued to the migrant worker.

regulation, labour inspection, etc.) in order to prevent the exploitation of applicants for migration who are ready to do anything to find a job abroad through unscrupulous agents.

In this respect, the Committee of Experts has remarked that, when private bodies, and particularly employment agencies, conduct their activities at the national and international levels, it appears to be important that the authorization granted to private recruitment agencies operating exclusively within the country be distinct from that granted to those intending to recruit either non-national workers for employment inside the country, or national workers for employment abroad. According to the Committee of Experts, the difficulties facing migrant workers appear to be sufficiently distinct to merit separate attention.

Prior to departure

So that prospective migrants are able to make a well-founded decision on whether or not to leave their home countries, they should have access to reliable and unbiased information on the formalities which must be completed, as well as the conditions of life and work which await them.

Migration information and assistance services

According to the Committee of Experts, governments have great freedom of choice concerning the channels used to provide such information. However, they are under an obligation either to fund the provision of information or other assistance to migrant workers, or to provide it themselves. In the former case, they must ensure the existence of such services and monitor them and, where necessary, intervene to supplement them.

In view of the increasing “feminization” of international migration, and the particularly vulnerable position in which many women migrants can find themselves, the Committee of Experts considers that information campaigns specifically directed towards women workers may be appropriate in many cases.

Free services

Under the terms of Convention No. 97, assistance and information services for migrant workers should be provided free of charge. In its 1998 General Survey, the Committee of Experts noted that the provision of free *information* by official or state-authorized information services prior to migration does not appear to pose a problem for most countries, in contrast with the provision of free employment *services* by public employment services.

Measures to combat misleading propaganda

According to the Committee of Experts, the existence of official information services (or authorized by the State) does not suffice to guarantee that migrant workers are sufficiently and objectively informed before emigrating. Workers must also be protected against misleading information from intermediaries who may have an interest in encouraging migration in any form, regardless of the consequences for the workers involved.

The Committee of Experts has recalled that States have an obligation to take measures to combat misleading propaganda relating to emigration and immigration. Governments therefore have an obligation, on the one hand, to prevent false information from being disseminated to nationals leaving the country and, on the other, to combat false information intended for non-nationals wishing to enter the country.

Although the Convention does not make explicit reference to it, the Committee of Experts considers that combating misleading propaganda should also cover propaganda targeting the national population (such as the propagation of stereotypes of migrants as being more susceptible to crime, violence, drug abuse and certain diseases).

The Committee of Experts considers that, even in countries where misleading propaganda is not currently a problem, preventive measures may still be appropriate to ensure that this remains the case.

Misleading propaganda can emanate from within the sending State, the receiving State or from an intermediary State. In view of the devastating consequences which it can have for migrants who are subjected to it, the Committee of Experts considers that cooperation is essential between sending States and receiving States with a view to guaranteeing the recruitment of migrant workers in conditions which are not abusive and under which they are not subjected to exploitation.

During the journey

The Committee of Experts considers that certain provisions of the instruments respecting the welfare of migrant workers during the journey no longer appear to be relevant, due to the increase in air transport and the fact that the special “mass” transport of migrant workers is practically no longer organized.

Upon arrival

Content of the medical examination

The issue of the content of the medical examination to which migrant workers are subjected upon their arrival was addressed by the Committee of Experts in its last General Survey on migrant workers. It noted that the legislation in some countries prohibits entry on medical grounds to any person suffering from illness (such as blindness, alcoholism, dementia or other physical or mental conditions) which could constitute a danger to the national population, or whose state of health would require care which could become a heavy burden on public funds. It therefore drew attention to the fact that the exclusion of individuals on certain medical or personal grounds (such as homosexuality) which do not pose a danger to public health or a burden to public funds may be outdated or anachronistic due to scientific developments¹⁴⁹ or changing social attitudes, and may in certain cases constitute unacceptable discrimination.

The Committee of Experts has noted the growth of compulsory testing for the human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) among candidates for emigration. The Committee of Experts considers that refusal of entry or repatriation on the sole ground that the worker concerned is suffering from an infection or illness of any kind which has no effect on the task for which the worker has been recruited constitutes an unacceptable form of discrimination.

¹⁴⁹ In this regard, the Committee of Experts draws the attention of member States to the International Health Regulations adopted by the World Health Organization (WHO), which sets out measures that are deemed reasonable to prevent migration from posing a threat to public health, and which are regularly updated.

B. Migrant workers who are in an irregular situation and/or are illegally employed

While the phenomenon of illegal migration for employment is not new, what is striking about it today is its scale and the fact that it affects both sending countries and receiving countries. But what gives even more cause for concern than the increase in numbers is the nature of the phenomenon. Not only is illegal migration becoming a highly organized international activity, but it is now closely linked to other lucrative criminal activities such as drug trafficking, falsification of identity papers, arms trafficking, human trafficking and forced prostitution.¹⁵⁰

The growth of illegal migration and labour trafficking in particular is due to a combination of factors which may be summed up as follows: (a) on the one hand, the pressures to emigrate are strong (natural disasters, famine, demographic growth, economic disparities between countries, violations of human rights, civil war and other armed conflicts, etc.), at a time when whole sectors of the economy of receiving countries are being pushed into instability and flexibility by increasing production constraints and international competition; and (b) on the other hand, faced with economic restructuring and growing social tensions, many countries (and not only traditional countries of immigration) are officially closing their borders to migration for employment and increasingly adopting restrictive laws and regulations.

It is this interplay between rejection by the law, on the one hand, and strong economic pull factors encouraging clandestine immigration, on the other, which explains the persistence, and even growth, of illegal migration. Moreover, with the increasing build-up in many countries of legal restrictions on the entry and residence of foreigners, would-be immigrants are compelled to rely on more or less clandestine networks to slip through the net, and these in turn demand increasingly exorbitant fees for their services. The ensuing financial and moral debt (clandestine employment often being presented as a "service rendered") thus traps migrants in a position of dependence, exposing them to unbridled exploitation of their labour in conditions that are close to slavery.

Lastly, the Committee draws the attention of governments to the particular vulnerability to exploitation and abuse of women migrant workers, who according to some estimates account for half the entire migrant population worldwide today. No longer only to be found among accompanying family members, women now make up an increasing proportion of migrant workers [...]

Source: General Survey, 1999, op. cit., paras. 290-292

Minimum standards of protection

Convention No. 143 contains a number of provisions intended to ensure that migrant workers enjoy a basic level of protection, even when they have immigrated or are employed illegally and their situation cannot be regularized.

Basic human rights

Article 1 of Convention No. 143 provides that: "Each Member for which this Convention is in force undertakes to respect the basic human rights of *all* migrant workers."

¹⁵⁰ Labour trafficking, which formerly accounted for only a small percentage of clandestine migration, has been particularly affected by this change and, unless it is brought under better control, could become one of the dominant forms of abusive migration in the years to come.

According to the Committee of Experts, this Article refers to the fundamental human rights contained in the international instruments adopted by the United Nations in the field of human rights, which include some of the fundamental rights of workers.¹⁵¹

Some of these fundamental rights have recently been given special consideration in the ILO's Declaration on Fundamental Principles and Rights at Work, adopted on 18 June 1998, which in its Preamble refers to migrant workers as being especially in need of protection.

Article 1 of Convention No. 143 refers to all migrant workers, irrespective of their legal status in the country of immigration. According to the Committee of Experts, the exercise of this basic human right is not linked to any requirement as to citizenship or legal residence in the country of employment. A distinction may, however, be drawn between the rights thus protected generally, and those which are laid down in greater detail for regularly admitted migrant workers in Part II of the Convention, which can be accepted separately.

Rights relating to social security and other benefits arising out of past employment

Convention No. 143 provides that, without prejudice to measures designed to control movements of migrants for employment, migrant workers who are employed illegally cannot be denied the rights arising out of past employment as regards remuneration, social security and other benefits.

According to the Committee of Experts, an illegally employed migrant worker would only be entitled to such benefits as are accorded to a legally employed migrant worker whose employment may also be terminated without notice. This provision only covers the rights that the worker has acquired by virtue of the period of employment and by fulfilling the other qualifying conditions required in the case of migrants in a regular situation.

According to the Committee of Experts, this Article must be understood as also covering any period of legal employment in the country concerned which may have preceded the illegal employment, as well as past employment in another country which would normally be taken into consideration on the basis of bilateral or multilateral international agreements when calculating entitlement to benefits.

In the event of dispute, the worker must have the possibility of presenting his or her case to a competent body. The Committee of Experts emphasizes the importance of this point, since information available to it shows that once a migrant worker in an irregular situation has been seized by the law enforcement bodies, he or she is often immediately taken to the border without having the possibility of recovering personal belongings, requesting the payment of wages or lodging an appeal with the judicial bodies in the country of employment.

Cost of expulsion

Under the terms of Convention No. 143, in case of expulsion of the worker or his family, the cost shall not be borne by them.

¹⁵¹ Such as the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990).

In the view of the Committee of Experts, the cost referred to is not the return travel cost, but only the cost of expulsion, that is the cost incurred by the State in ensuring that the clandestine worker leaves the country, for example, the cost of the administrative and judiciary procedures involved in issuing an expulsion order or in implementing the order, that is the cost involved in escorting the migrant worker to the border must be borne by the State which wishes to ensure that the worker and his family have in fact left the country following the expulsion decision.

The Committee of Experts makes a distinction between two cases: the case where migrant workers are in an irregular situation for reasons which can be attributed to them, in which event they have to bear the *transport costs*, but not the *cost of expulsion*; and the case where migrant workers are in an irregular situation for reasons which cannot be attributed to them (such as redundancy before the expected end of a contract, or where the employer has failed to fulfil the necessary formalities to engage a foreign worker, etc.), in which case none of the costs, including the transport costs, arising out of the return of workers and their families, should fall upon them.

Regularization of the situation

The Committee of Experts notes that States regularly proceed to regularization campaigns in order to make a fresh start and eradicate clandestine migration and illegal employment once and for all, as well as for humanitarian reasons. In some cases the intention is to cut through the legal Gordian knot, which makes it impossible to either expel or regularize some clandestine workers.

In this regard, in its latest General Survey on migrant workers, the Committee of Experts notes that they are often allowed to be employed illegally for a number of years with no decision being taken relating to their status. This leaves them in a situation of permanent uncertainty, in which they are far more vulnerable to abusive conditions. To avoid such situations, the Committee of Experts emphasizes the importance of rapid detection of migrant workers in an irregular situation and a rapid decision as to whether to regularize them.

Amnesties

The Committee of Experts has noted that certain countries undertake what are termed as “amnesties”. These annul the legal consequences of the offences that migrants have committed by entering or working illegally in the country. Often, an amnesty is the first step towards regularization.

Migrations in abusive conditions

Only Part I of Convention No. 143, entitled “Migrations in abusive conditions”, specifically addresses clandestine or the illegal migration or illegal employment of migrant workers. Under the terms of the provisions contained in this first part of Convention No. 143, States for which this Part of the Convention is in force must take measures to *detect, suppress and apply sanctions* to clandestine movements of migrants in abusive conditions and the illegal employment of migrant workers, and to provide *a minimum level of protection* to workers in an irregular situation.

Definition

In the view of the Committee of Experts, the distinction between workers who have immigrated in illegal conditions and illegally employed migrants is not very relevant since, in both cases, the migrant worker runs the risk of being expelled.

Abusive conditions

According to the Committee of Experts, abusive conditions are those which are prohibited by the relevant international instruments or by national laws or regulations. While the Convention is aimed primarily against the organized movement of migrant workers of labour traffickers, it also applies to illegal or clandestine migration by individuals acting on their own or in small groups.

For a more detailed picture of the abusive conditions prohibited by the Convention, reference may be made to the following (non exhaustive) list of malpractices in the field of migration identified by the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, held in April 1997.

Abusive practices in the field of migration

Malpractices exist where the treatment of migrant workers and members of their family is not in accordance with national laws and regulations or ratified international standards, and where such treatment is recurrent and deliberate. Exploitation exists where, for example, such treatment incurs very serious pecuniary or other consequences; migrants are specifically subjected to unacceptably harsh working and living conditions or are faced with dangers to their personal security or life; workers have transfers of earnings imposed on them without their voluntary consent; candidates for migration are enticed into employment under false pretences; workers suffer degrading treatment or women are abused or forced into prostitution; workers are made to sign employment contracts by go-betweens who know that the contracts will generally not be honoured upon commencement of employment; migrants have their passports or other identity documents confiscated; workers are dismissed or blacklisted when they join or establish workers' organizations; they suffer deductions from wages without their voluntary consent, which they can recuperate only if they return to their country of origin; migrants are summarily expelled as a means to deprive them of their rights arising out of past employment, stay or status.

Source: *Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration*, April 1997, Annex III, para. 1.2.

Detection and elimination of migration in abusive conditions

In its 1999 General Survey on migrant workers, the Committee of Experts identified two common tendencies shared by the large majority of States in the detection of clandestine movements of migrants: the stepping up of police checks at borders and spot-checks within the country; and the fact that transport companies (air, land or sea) are increasingly being made responsible for verifying the travel documents and residence permits of passengers. Furthermore, the systems for authorizing employment are considered by most member States as the basic means of combating abusive practices.

In view of the growing market share of private employment agencies in the recruitment, introduction and placement of migrant workers, and the fraudulent and abusive practices which are often imputed to them, the Committee of Experts considers that any policy to prevent and eliminate clandestine migration in abusive conditions (pursued by both sending and receiving countries) must take these developments into account and accordingly focus on the supervision of these agencies and the definition of appropriate sanctions.

Collaboration between States

In the view of the Committee of Experts, the fact that fraud and malpractices in the recruitment of migrant workers still persist shows how difficult it is to mitigate the impact of market forces on migration processes by relying *entirely* on the adoption of laws or regulations.

To combat clandestine migration in abusive conditions effectively, measures need to be adopted at the national level; however, since illicit labour trafficking is often a criminal activity organized on an international scale, it also calls for international cooperation and the involvement of all the countries concerned, whether sending States, transit States or States of arrival. One of the objectives of this international collaboration is that the authors of this labour trafficking can be prosecuted irrespective of the country from which they exercise their activities.

Sanctions

The measures advocated in Part I of Convention No. 143 to combat clandestine movements of migrants are primarily targeted at the demand for clandestine labour, rather than the supply. The ILO's instruments do not accordingly address the questions of sanctions against migrant workers in an irregular situation. However, the Committee of Experts notes that an examination of national laws and regulations shows that, contrary to the spirit of the instruments, sanctions against migrants in an irregular situation are very widespread, both in sending and in receiving countries.¹⁵²

Measures directed at the organizers of clandestine movements of migrants and those who knowingly assist such movements, whether for profit or otherwise

The Committee of Experts notes that, since each country is potentially a country of emigration and a country of immigration, the fight against labour trafficking is generally seen by each country in terms of combating illegal emigration of its own nationals and in terms of combating illegal immigration of foreign nationals into its territory. However, it observes that the sanctions applied to organizers of clandestine movements of migrants and persons who knowingly assist such movements do not normally draw any distinction between traffickers engaged in "exporting" or those involved in "importing" labour.¹⁵³

Consultation of employers' and workers' organizations

Convention No. 143 requires that employers' and workers' organizations be consulted in three respects:

- in relation to measures *seeking to determine* whether there are any movements of migrants for employment in which migrants are subjected during their journey, on arrival or during their period of residence and employment to abusive conditions;

¹⁵² In this respect, the Committee of Experts noted in its 1999 General Survey that certain countries practice corporal punishment (caning) as a sanction in cases of clandestine immigration and recalled that, not only are such sanctions contrary to Article 1 of Convention No. 143, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of all Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, etc. but also to the general principles of law.

¹⁵³ Examples of sanctions envisaged to combat clandestine migration include: administrative fines, withdrawal or suspension of the license to act as an emigration agent, temporary or permanent closure of the offices or enterprise of the offenders, prohibition of residence in the country, suspension of the offender's driving license, temporary or permanent withdrawal of the authorization to carry on international transport operations, confiscation of the vehicle or of any other object used in committing the offence, or sequestration until the immigrant in an irregular situation is removed from the country, blacklisting of traffickers and employers, etc.

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- with regard to the measures necessary to establish systematic contact and exchange of *information* with other member States; and finally
 - with a view to *preventing and eliminating the abuses* against which the Convention is directed.

Illegal employment

Definitions

According to the Committee of Experts, although it is not defined, the term “illegal employment” may be considered any employment that is not in conformity with national laws and regulations. Article 6 of Convention No. 143 therefore applies to *all* forms of illegal employment, and not just those in abusive conditions.

Detection and suppression of illegal employment

In the view of the Committee of Experts, it is particularly important that receiving States are vigilant in ensuring that the conditions of employment of migrant workers correspond in law and in practice to those laid down by legislation or bilateral or multilateral agreements, in particular as regards the most vulnerable categories of migrants (domestic workers and temporary migrants), not only when they check contracts of employment for conformity with the legislation, but also when supervising how they are carried out in practice.

The Committee of Experts recalls that, in addition to the obligations on employers, public administrations also have a role to play in detecting illegal employment. In most cases, the *labour inspectorate* and *labour administration*, or specific bodies, are responsible for ensuring that no migrant workers are employed illegally, by carrying out periodic unscheduled inspections, particularly in establishments and sectors known to hire or harbour workers illegally (hotels, construction, restaurants, food processing plants, etc.).¹⁵⁴ In addition to their respective mandates, officials of public administrations and relevant services have the duty to respect the basic human rights of all migrant workers.

Sanctions

According to the Committee of Experts, it is left to national laws or regulations to define the nature of the offence of illegal employment of migrant workers in accordance with the legal system. Experience shows that, in most countries, the general rules of criminal law require the prosecution to prove a guilty intent that the employer has acted “knowingly” or “negligently”.

In its 1999 General Survey, the Committee of Experts noted that certain receiving countries tend to use sanctions against employers as a means of controlling clandestine migration, rather than supervising the application of employment standards.

¹⁵⁴ The labour inspectorate may also be called upon to assist *employment offices* in ensuring that migrant workers are employed only in accordance with the law. The checks carried out by *social insurance funds* are sometimes used as an additional opportunity for detecting the illegal employment of migrant workers. The role of the *police* in detecting illegally employed migrant workers, as well as clandestine movements of migrants, is also fundamental. The detection of illegal employment can also be a result of received written complaints against employers or private recruitment agencies.

C. **Equality of opportunity and treatment**

Although the underlying principles of combating discrimination in employment are moral and social, economic considerations also come into play, as illustrated by the following extract from the manual drafted by the ILO as the final output of the project entitled “Combating discrimination against (im)migrant workers and ethnic minorities in the world of work”.

Why is discrimination a problem?

As shown in the first phase of the ILO project, labour market discrimination does exist and migrants and ethnic minorities are particularly adversely affected by it. But why should policy-makers, legislators, employers, consumers, NGOs, trade unions and service providers care enough to change the state of affairs? Several reasons can be given, which are outlined below [...]

Economic reasons

Economically, it is not only society but also the individual employer who pays the costs of discrimination. By discriminating, employers are not using the full potential of the human resources available to them, and therefore they are neither maximizing production nor minimizing costs, contrary to all economic sense. By changing strategy and acting in a non-discriminatory manner, it is suggested that employers could avoid this unnecessary competitive disadvantage. A number of economically based arguments against discrimination and in favour of equal treatment can be given as follows:

1. Firstly, by discriminating in recruitment, employers are potentially passing over some of the best qualified candidates for the job, on irrelevant grounds, such as nationality or race. If they recruited only on the basis of aptitude, where there is no place for discrimination, the best qualified workforce would be achieved.
2. Similarly, it has also been shown that by allowing discrimination to occur in the workplace, the employer is in fact, encouraging disruption of teamwork, higher absenteeism, and reduced morale and commitment [...].
3. Further, on the national level, migrants and ethnic minorities are members of increasingly large communities who wield considerable market influence as consumers [...]. What is more, the migrant/ethnic minority population in the countries under study is predicted to expand considerably in the future and will constitute a highly significant proportion of the buying public – and of the workforce.
4. The employer of a multi-ethnic workforce, being more representative of the multi-ethnicity which prevails in all the countries studied under the ILO project, is more likely to attract custom, talented job applicants and investors than the employer who discriminates [...]. Consumers, employees and investors are beginning to value fair-mindedness and are rewarding this behaviour when they see it within companies.
5. A company consisting of diverse groups, with a wide range of skills and experiences, is more likely to be creative, open for new ideas and alternatives than one made up of a more homogeneous group in terms of background and experience. Thus, diverse workforces add value to business activities through increased creativity and better problem-solving capacities.

Source: *A manual on achieving equality for migrant and ethnic minority workers* [draft] Geneva, ILO, 1998, pp. 10-13.

Migrant workers have to face many forms of discrimination in employment and occupation. The discrimination to which they are subjected begins at the recruitment stage. Once they have found a job, migrant workers often come up against other forms of discrimination (wages, working conditions, career development). Finally, not only do they find it difficult to obtain a job, but they also have trouble keeping it. They are often used as a buffer stock of reserve labour, hired at times of shortage and dismissed when the employment situation deteriorates.

For the ILO, the implementation of a policy of equality of treatment between nationals and migrant workers, and even more so of equality of opportunity, represents a protective measure:

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- in that it aims to secure respect for the dignity of this category of workers, who are particularly vulnerable to all kinds of abuse; and
 - it also acts as a deterrent in that it enables the cost of migrant labour to be maintained at or raised to a level which is equal to that of national labour, thereby preventing the phenomenon of “social dumping”.

The Committee of Experts recalls that the provisions of the four instruments concerning equality of treatment only apply to migrant workers (and the members of their families) who are legally within the territory of the country of employment. They therefore clearly cover the period *after* the migrant worker has been lawfully admitted to the territory of the host country.

Scope of the principles set forth in the 1949 and 1975 instruments

The main objective of the four instruments that are the subject of this section is the elimination of the discrimination in employment and living conditions to which migrant workers are exposed. However, the instruments differ in their approach.

(a) *The 1949 instruments*

Convention No. 97 and Recommendation No. 86 prohibit inequalities of treatment arising principally out of the action by the public authorities (law and practice of the administrative authorities). The Convention does not oblige States to take legislative or other measures to redress inequalities in practice. Nevertheless, States are under the general obligation to ensure that the legislation is applied, particularly by means of labour inspection services or other supervisory authorities.

The Committee of Experts draws attention to the fact that, under the terms of Article 6 of Convention No. 97, the policy of equality of treatment between nationals and migrant workers that each Member for which the Convention is in force undertakes to apply must be without discrimination in respect of a number of grounds which clearly include nationality, as well as *race, religion* and *sex*.

In this respect, the Committee of Experts draws attention to the fact that women migrant workers suffer from a dual discrimination in employment: first, because they are *foreigners* and hence subject to the same discrimination as male migrant workers; and second because they are *women*, and as such often victims of deeply rooted traditional attitudes in their country of origin or of employment concerning the place of women in society in general, and in working life in particular.

Treatment that is no less favourable than that which it applies to its own nationals

According to the Committee of Experts, this wording allows the application of treatment which, although not absolutely identical, would be equivalent in its effects to that enjoyed by nationals.

(b) *The 1975 instruments*

Part II of Convention No. 143 and Recommendation No. 151 are *also* intended to promote equality of opportunity and eliminate discrimination in practice. For this reason, Part II of Convention No. 143 and Recommendation No. 151 also call for *positive* action by the public authorities to promote equality of opportunity actively in practice.

In the view of the Committee of Experts, it is not necessary to achieve equality of opportunity and treatment immediately upon ratification of the Convention. This is the objective of a national policy which may be implemented progressively through a coordinated programme of positive measures.

Seasonal workers

According to the Committee of Experts, although seasonal workers, like other migrant workers, are not excluded from the benefits of Conventions Nos. 97 and 143, particularly as regards issues which have an immediate impact on their situation, such as remuneration, working hours, etc., the possibility of enabling them to benefit from measures which demand a certain time, such as vocational training, is in practice much more limited.

Methods appropriate to national conditions and practice

The Committee of Experts recalls that the Convention does not oblige States to intervene in matters which in some countries are left to collective bargaining or the independence of the social partners.

Subjects covered by the instruments

Employment and occupation

Access to employment

Article 6 of Convention No. 97 covers most conditions of work, but not *access* to employment. However, the policy of equality envisaged in Article 10 of Convention No. 143 includes access to employment and occupation. According to the Committee of Experts, as these terms are similar to those used in Convention No. 111, it would appear to be logical to assign them the same meaning (including access to vocational training, access to employment and to particular occupations, and terms and conditions of employment), especially since the provisions of Recommendation No. 111 detailing the content of these various subjects were included in similar terms in Recommendation No. 151.

The Convention authorizes certain restrictions on the principle of equality of treatment as regards access to employment. Some of these, which are general in scope, allow States to make the free choice of employment subject to temporary restrictions during a prescribed period, which may not exceed two years. Others, which are of a specific nature, allow permanent restrictions to be imposed on access to limited categories of employment or functions where this is in the interests of the State. The Committee of Experts regularly reminds governments of the length of time for which such restrictions are admitted under the Convention. It also examines carefully the lists of jobs which are prohibited to foreign workers with a view to ensuring that they only cover limited categories of employment or public functions.

Indirect restrictions

In the view of the Committee of Experts, the fact that employment services give preference to nationals, or to certain privileged categories of foreigners (such as foreign spouses or workers belonging to the same regional or subregional community), is contrary to the principle of equality of treatment between national and foreign workers who are legally in the country when this situation extends beyond two years.

In its 1998 General Survey, the Committee of Experts noted that administrative discrimination against migrant workers is most likely to occur with regard to security of

employment and vocational training. As regards equality of treatment in respect of the provision of alternative employment, relief work and retraining, everything depends on the situation of the migrant worker: if the worker is a permanent resident, he or she will enjoy the same advantages as nationals after a certain period of time has elapsed, while it would be impossible for a *temporary* resident to meet the residency requirement, and hence they will have little chance of gaining access to these benefits.

Positive action measures

The recent *Manual on achieving equality for migrant and ethnic minority workers*, which is the final output of the ILO project "Combating discrimination against [im]migrant workers and ethnic minorities in the world of work", deals extensively with different kinds of positive action measures which are intended not only to prohibit discrimination, but to encourage the advancement of members of designated groups and to convince employers and other labour market gatekeepers to adopt and implement schemes that ensure equal opportunities for all members of society by eliminating existing disadvantages. The measures outlined include:

Measures to encourage job applications by members of ethnic minority or migrant groups

Such measures seek to encourage members of designated groups to apply for jobs in general or for specific vacancies in order to increase the pool of candidates from which a company can choose. They include company presentations in schools and universities with a large number of minority students, vacancy advertisements in newspapers read especially by migrant or ethnic minority groups – possibly translated into the most relevant migrant and ethnic minority languages (this measure can aim at potential applicants and/or their parents), and "networking" efforts targeted particularly at migrant and ethnic minority groups.

Measures to improve the qualifications of minority applicants

Rather than relying on the existing pool of applicants, these measures attempt to increase the number of potential job candidates by ensuring the availability of more qualified migrant and ethnic minority workers. Possible measures include pre-employment training or scholarships for training targeted primarily at designated group members who lack such skills, offering language courses in the host country's language, and management and leadership training for designated group members.

Measures to eliminate arbitrary barriers

This category of measures is closely related to the prohibition of indirect discrimination in particular, but further enhances this prohibition by adopting positive measures to bring about change more quickly and thoroughly. Measures which focus on the recruitment process include the elimination of tests and requirements which are not necessary to carry out the job or which are culturally biased, anti-discrimination training for labour market gatekeepers, the review of recruitment procedures and interviewing practices to ensure non-discriminatory treatment, and the inclusion of minority group members on selection boards. These measures also apply to promotions.

Job accommodation measures

These measures are also closely related to the prohibition of indirect discrimination in employment and focus on ensuring a non-discriminatory work environment. They include flexible working hours to allow, for example, the observance of religious traditions by designated groups, dress codes which accommodate cultural and religious imperatives and wishes of minority groups, procedures to deal with cases of discriminatory harassment in the workplace, and the provision of anti-discrimination training for co-workers.

This very useful Manual can be obtained from the International Labour Office in Geneva.

Source: *A manual on achieving equality for migrant and ethnic minority workers* [draft], op. cit., Ch. VII, section 2.

National policy designed to promote and to guarantee equality of opportunity and treatment

In its 1998 General Survey, the Committee of Experts noted a revival of positive action programmes or corrective measures (see box below) targeting categories of workers who face disadvantages, including migrant workers, in view of the realization that the

prohibition of discrimination is not enough in itself to eliminate discrimination in practice, even if adequate legislative measures have been adopted.¹⁵⁵

Convention No. 143 sets forth three types of measures to be taken, by methods appropriate to national conditions and practice, to promote the effective observance of the policy of equality of opportunity and treatment:

- cooperation with employers' and workers' organizations and other appropriate bodies;
- public information and education; and
- educational programmes and other measures for migrant workers and their families.

Burden of proof

The burden of proof may represent an insurmountable obstacle to achieving a fair and equitable outcome in a case of alleged discrimination, especially if indirect discrimination is involved. The Committee of Experts notes with interest that, without reversing the burden of proof, the legislation in some countries provides that the victims of discrimination may introduce statistical data in support of their allegation of discrimination, or that in view of empirical evidence the courts may call on the defendant to justify the difference of treatment. The Committee of Experts encourages governments in this direction.

Social security

The application of the principle of equality of treatment in respect of social security raises complex technical problems.¹⁵⁶

Convention No. 97

Social security is to be understood as "legal provisions in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security system".

However, the Committee of Experts notes that this clause also provides for certain arrangements relating to the principle of equality of treatment in respect of social security with regard to, on the one hand, "the maintenance of acquired rights and rights in course of acquisition" and, on the other, "benefits or portions of benefits which are payable wholly out of public funds, and [...] allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension".

Nevertheless, in the view of the Committee of Experts, these arrangements relating to the principle of equality of treatment in terms of social security cannot be interpreted as providing a legal basis permitting the automatic exclusion of a category of migrant workers from qualifying for social security benefits (and particularly temporary migrant workers).

¹⁵⁵ In addition to their foreign nationality, migrant workers are also liable to encounter prejudice by reason of their race, colour, religion, national extraction or social origin.

¹⁵⁶ See in this respect, Chapter 11 on social security, and more specifically the sections concerning the Equality of Treatment (Social Security) Convention, 1962 (No. 118).

Convention No. 143

According to the Committee of Experts, the equality of opportunity and treatment provided for under Article 10 of Convention No. 143 must be considered in the light of the provisions of Article 6 of Convention No. 97, which Convention No. 143 is designed to supplement. Account should also be taken of the provisions of the Equality of Treatment (Social Security) Convention, 1962 (No. 118), even though there is one major difference between this instrument and Conventions Nos. 97 and 143 since, based as it is on the principle of reciprocity, in contrast with Conventions Nos. 97 and 143, equality of treatment is only prescribed by Convention No. 118 for nationals of the countries which have ratified the Convention.

Trade union rights

Affiliation

The Committee of Experts considers that restrictions relating to nationality with regard to freedom of association may prevent migrant workers from playing an active role in the defence of their interests, particularly in sectors in which they represent a significant proportion of the workforce.

Eligibility

The Committee of Experts has noted that much legislation provides that only nationals of the country can be elected to official trade union positions. The Committee of Experts considers that national legislation should allow foreign workers to take up trade union office, at least after a reasonable period of residence in the host country.

Residence

The Committee of Experts recalls that the principle set forth in Article 10 of Convention No. 143 remains that of equality of treatment *without* conditions. With regard to Convention No. 143, the Committee of Experts therefore considers that the legislation of every member State which has ratified the instrument must permit foreign workers to be elected as trade union officials, at least after a reasonable period of residence, with the aim however of removing the suppression of all conditions of residence.

Exercise of trade union rights

The Committee of Experts is of the view that, particularly with regard to work-related disputes, it should be borne in mind that discretionary powers are often at the disposition of the administrative authorities to decide upon the expulsion of foreigners. The manner in which these powers are exercised may constitute a real barrier to the exercise of trade union rights by foreign workers.

Cultural rights

As regards the extent to which cultural rights also include the right to *education*, the Committee of Experts considers that the question of education does not in principle lie within the ILO's field of competence (but in that of UNESCO). Account is taken of educational matters by the ILO only in so far as the completion of certain studies constitutes a condition for access to some occupations or professions, or to a specific course of vocational training.

Individual and collective freedoms

These refer to freedoms such as freedom of assembly, information, opinion and expression, on which the full exercise of trade union rights depends. This expression does not cover political rights, even if such rights are to some extent recognized for migrant workers in certain countries.

General conditions of life

Housing

Equality of treatment in respect of accommodation, as provided for by Convention No. 97, covers the occupation of a dwelling, to which migrant workers must have access under the same conditions as nationals. On the other hand, according to the Committee of Experts, it cannot be taken to refer to access to home ownership or, consequently, to the various forms of public assistance which may be granted with a view to facilitating property ownership.

Legal proceedings

The Committee of Experts considers that access to justice is a basic human right (without which no other rights can be ensured) which must be guaranteed to all, including migrant workers.

Employment taxes, dues or contributions

In the view of the Committee of Experts, equality of treatment in respect of remuneration may be threatened if the employment of a migrant worker is subjected to a special tax. However, difference in treatment in relation to taxation is possible provided that it is not based on the nationality of the worker (but, for example, on residence).

D. Migrants in society

While Conventions Nos. 97 and 143 deal principally with migration for employment, a number provisions take into account the social consequences of migration. The basic principle of the provisions relating to social policy is to guarantee equality of opportunity and treatment for migrant workers in relation to nationals. It should be noted in this respect that most of the relevant provisions are contained in Recommendations Nos. 86 and 151 and do not therefore have binding force.

These provisions are characterized by their dualistic nature:

- one the one hand, migrants and the members of their families should be encouraged to integrate into the country of employment and to participate in society on an equal footing with nationals; and
- one the other hand, specific measures should be taken to ensure that they are encouraged to preserve their national and cultural identity.

The Committee of Experts notes that approaches to social policy in relation to migrant workers vary from one country to another, reflecting various historical experiences with migration and expectations as to the length of stay of migrants. To generalize the vast variety of social policies, it appears that:

- countries which accept migrants for permanent settlement upon entry appear more likely to favour policies aiming at both social integration and *multiculturalism*;

-
- while those which issue permanent resident status after a number of years in the country are more likely to focus on *assimilationist* policies; and
 - those which view migrants as primarily temporary workers are likely to favour voluntary repatriation and assistance for their *reintegration in their country of origin*.

Many provisions refer to the rights of the family members who are authorized to accompany or join the migrant worker. However, the Committee of Experts emphasizes that member States are not bound by any provision of international law to guarantee family reunification.

Family reunification

With the tightening of borders, family reunification remains almost the only legal means of immigration for many prospective migrants. The Committee of Experts considers that in some cases of temporary, seasonal or project-tied work, family reunification may be inappropriate (raising practical problems of housing, schooling, adaptation, etc.).

Scope of family reunification

Convention No. 143 and Recommendation No. 151 define the members of the family of the migrant worker as the spouse and dependent children, father and mother. Recommendation No. 86 goes beyond this and states that “favourable consideration should be given to requests for the inclusion of other members of the family dependent upon the migrant”.

The Committee of Experts note that the law and practice of most countries where children are permitted to accompany the migrant worker is that this permission depends on their age, their dependency status in relation to the migrant worker or their marital status. In this respect, the Committee of Experts is of the opinion that the reference in the 1975 instruments to “dependant” rather than “minor” children would seem to indicate that it is the actual situation of the children in relation to their parents, and not their legal status, which should be taken into consideration in deciding whether to admit them under the heading of family reunification.

Conditions for family reunification

According to the Committee of Experts, the prerequisite of appropriate accommodation should not be interpreted as giving receiving countries the possibility of endlessly preventing family reunification.

Safety and health at the workplace

Despite the fact that the changes which have occurred in the nature and extent of migration may have reduced the relevance of certain risks, the Committee of Experts considers that migrants may still be subject to occupational hazards and diseases to which the national population in the country of employment is not exposed.

In this respect, the Committee of Experts notes that migrant workers are particularly vulnerable to industrial accidents and emphasizes the urgency of reinforcing safety and health mechanisms in such occupations.¹⁵⁷

¹⁵⁷ Migration specialists often describe typical migrant occupations as dirty, dangerous and often undertaken in degrading conditions, highlighting some of the causes of the special health risks to

Education

As emphasized above, Convention No. 97 and Recommendation No. 86 do not relate directly to the situation of migrants in an irregular situation in the country of employment. However, the Committee of Experts draws attention to the fact that large numbers of *children of migrant workers* are currently in an irregular situation, given the extent of irregular migration.

In its 1999 General Survey, the Committee of Experts notes with concern the existence of certain practices, such as obliging schools to inform the authorities of migrant children suspected of entering or residing in the country illegally, or the prohibition of children of clandestine migrants from having access to the education system (from kindergarten to university).

Recognition of qualifications obtained abroad

One prerequisite for being able to compete with nationals in gaining access to employment is to have qualifications which are recognized in the country of employment. According to the Committee of Experts, the recognition of qualifications obtained abroad is an area in which significant changes to national policy and practice are desirable in order to ensure that regular entry migrant workers can access employment on equal terms with national workers.

Language training

The Committee of Experts notes that learning the language of the host country is essential to ensuring that migrant workers and members of their families make a smooth transition to the country of employment and are not marginalized either in the workplace or in society at large.

E. Employment, residence and return

The object of the instruments in this respect is to guarantee the rights of migrant workers relating to the extent to which they should be allowed to continue to reside in the receiving country beyond periods of actual employment, and their rights relating to their possible return to the country of origin.

Employment

Employment injury benefits

Employment injury insurance or workers' compensation schemes do not always provide for the payment of benefits to an individual residing abroad, as indicated by Recommendation No. 151. However, the Committee of Experts notes that, in practice, this shortcoming is often remedied by the conclusion of bilateral agreements.

which they may be exposed. For example, migrants are frequently employed in seasonal agricultural occupations, or in factory work which national workers may be unwilling to perform. For this reason, occupations which are primarily undertaken by migrant workers often do not attract large investments in health and safety at the workplace.

Holiday entitlement

In the view of the Committee of Experts, migrant workers, irrespective of the legality of their stay, are entitled to compensation in lieu of any holiday entitlement acquired but not used.

Reimbursement of social security contributions

The Committee of Experts notes that migrant workers are entitled to reimbursement of any social security contributions which have not been given and will not give rise to rights under national laws or regulations or international arrangements, provided that, where social security contributions do not permit entitlement to benefits, every effort should be made with a view to the conclusion of bilateral or multilateral agreements to protect the rights of migrants.

Liquidation and transfer of the property of migrants

According to the Committee of Experts, States are under the obligation to authorize migrants for permanent settlement to liquidate and transfer their property from their home country to the country of employment.

*Remittances*¹⁵⁸

The Committee of Experts considers that the establishment by a government of the same restrictions concerning the transfer of capital for nationals and non-nationals, under the principle of equality of treatment, may be prejudicial to the interests of the latter, since migrants who regularly support their family in the country of origin are likely to be much more affected by legislation on this subject than their national counterparts.

With regard to regulations which differentiate between transfers of currency by migrant workers depending on their length of stay and their status as permanent migrants, the Committee of Experts recalls that, unless explicitly stated in the instruments, no distinctions between migrants on the basis of their length of stay are permitted. The provisions respecting remittances therefore apply to all migrants for employment regardless of the length of their stay.

The Committee of Experts also considers that the practice of requiring nationals working abroad to pay a certain percentage of their earnings to the government is contrary to the spirit of Convention No. 97.

Appeal against loss of employment

In the view of the Committee of Experts, a migrant worker who has lodged an appeal against the termination of his or her employment should be allowed sufficient time to obtain a final decision. If the court rules that the employment was unjustly terminated, the migrant should be entitled to the same remedies as national workers in a comparable situation, as well as sufficient time to find alternative employment if reinstatement is not an available remedy.

¹⁵⁸ Remittances play a significant role in transferring capital from receiving to sending countries. In 1998, the World Bank estimated that the global flow of remittances through official channels amounted to some 71 billion United States dollars. This flow, which is equivalent to almost two-thirds of the value of official development assistance, may be considered as “a major form of transfer of resources” from industrialized to developing countries.

The Committee of Experts notes that, in practice, the problem that migrant workers face is not the inability to use the same redress mechanisms as nationals and to benefit from the same rights in this regard, but rather the inability to obtain an extension to their residency while awaiting the judicial decision.

Residence

Migrant workers and the members of their families should not be subjected to arbitrary expulsion orders. A migrant worker who is the object of an expulsion order should have a right of appeal. Migrant workers should also have the right to recover outstanding remuneration, wages, fees or other amounts which may be due.

Non-return in the case of loss of employment

On condition that they have resided legally in the territory for the purpose of employment, migrant workers shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of their employment, which shall not in itself imply the withdrawal of their authorization of residence or, as the case may be, work permit.

The Committee of Experts recalls that this principle refers exclusively to migrant workers who *lose* their employment, as opposed to those whose employment comes to an end as foreseen in the employment contract. According to the Committee of Experts, Convention No. 143 does not require a State to extend a migrant worker's residence permit in the case of loss of employment, but refers only to equality of treatment with national workers for the remainder of the validity of that permit.

In this regard, the Committee of Experts points out that the practice of returning migrants to their country of origin at the end of a time-bound contract of employment does *not*, in itself, constitute a violation of the Convention.

The Committee of Experts notes that although in general the application of Article 8 of Convention No. 43 to migrants who have been granted the status of *permanent* residents does not pose major problems, more significant difficulties appear to arise when endeavouring to apply this provision to migrant workers who are recruited for *time-bound* employment and who have lost their employment before the period envisaged in the initial contract.

The Committee of Experts draws attention to the fact that Convention No. 143 goes beyond permitting migrants to reapply for a new work permit, and expressly requires that permission to reside in the State not be revoked increases where the migrant loses his or her employment *prematurely*.

Noting that in a number of countries the extension of the residence permit, while independent of the expiry of the work permit, depends upon the migrant not becoming a "burden upon public funds", the Committee of Experts draws attention to the fact that economic stability and the provision of accommodation often go hand in hand with paid employment. Thus, in practice, when a worker becomes unemployed, economic stability and continued accommodation cannot be guaranteed.

Alternative employment, retraining and relief work in case of loss of employment

Convention No. 143 states that the migrant worker shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.

In the opinion of the Committee of Experts, this right of equal treatment remains subject to the duration of the residence or work permit of the migrant worker. This means, in practice, that migrant workers who have lost their employment are not entitled to training for new employment if this would continue beyond the duration of the residence or work permit. The same would apply to alternative employment in a case where the loss of the original employment occurs at a time when the residence permit expires. Furthermore, the safeguards which a migrant worker should enjoy in case of loss of employment may be subject to such conditions and limitations as are specified in the work permit, but these should not prevent attainment of the objective stated in Convention No. 143.

Refugees and displaced persons

According to the Committee of Experts, if a migrant worker who is a refugee or a displaced person becomes redundant in any employment on a territory of immigration, the competent authority of that territory must use its best endeavours to enable him or her to obtain suitable employment which does not prejudice national workers, and must take such steps as will ensure his or her maintenance pending placement in suitable employment or resettlement elsewhere.

Continued residence in case of incapacity for work

Under the terms of Convention No. 97, a migrant for employment who has been admitted on a *permanent* basis and the members of his family who have been authorized to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry.

In the case of migrants admitted on a permanent basis *upon arrival* in the country, these provisions shall come into force only after a “reasonable period” which shall in no case exceed five years from the date of admission of such migrants.

Noting that this provision gives rise to many difficulties of application in practice, the Committee of Experts points out that repatriation on the grounds of ill health or injury is a practice which Convention No. 97 explicitly discourages, since permanently resident migrants may thus find themselves living under the constant threat of repatriation. In this respect, the Committee of Experts recalls that security of residence for permanent migrants and members of their families in case of ill health or injury constitutes one of the most important provisions of Convention No. 97.

Return

Costs of return

The Committee of Experts recalls that if a migrant for employment introduced into the territory of a Member fails, for a reason for which he is not responsible, to secure the employment for which he has been recruited or other suitable employment, the cost of his return and that of the members of his family who have been authorized to accompany or join him, including administrative fees, transport and maintenance charges to the final destination, and charges for the transport of household belongings, shall not fall upon the migrant.

Redress in the event of an expulsion order

In the view of the Committee of Experts, migrants contesting an expulsion order should be permitted to reside in the country for the duration of the case, subject to the duly

substantiated requirements of national security or public order. They should also have access in the same way as national workers to legal assistance, and should have access to an interpreter.

Where an objection or action against the refusal to grant or renew a residence permit does not postpone its effect, effectively implying that migrants may be removed from the country on the basis of an expulsion order which may turn out to be unjustified, in the view of the Committee of Experts, the unintended effect of such policies may be to dissuade migrants who may otherwise consider their employment to have been unjustly terminated, from lodging an appeal.

Reintegration in the country of origin

According to the Committee of Experts, when migrants for employment or members of their families have returned to their country of origin, that country should admit such persons to the benefit of any measures in force to assist the unemployed (such as exempting them from any obligation to comply with conditions as to previous residence or employment in the country of origin) to facilitate their re-employment.

Chapter 5

Protection of children and young persons

T. Caron

Introduction

The economic activity of children for their parents in the limited context of economic production in the family unit in pre-industrial societies was considered as the main factor in teaching them their role in society.¹ However, from a source of learning, child labour² rapidly turned into exploitation which was unbearable and harmful to their development. Legal protection therefore became necessary once child labour involved a third party.

At the international level, action to combat the economic exploitation of children commenced in earnest in 1919 with the creation of the ILO. Up to then, children had been protected against exploitation only at the national level by States which had taken the initiative of adopting legislation. The protection of children from work and at work is part of the fundamental mandate assigned to the ILO in the Preamble of its Constitution. At its very first session of the Conference in 1919, the delegates of governments and of employers' and workers' organizations, in their awareness of the need to protect children against economic exploitation, included child labour on the agenda and adopted the Minimum Age (Industry) Convention, 1919 (No. 5). This Convention marks the beginning of the ILO's standard-setting activities to combat child labour. Between 1919 and 1972, the Conference adopted or revised over ten Conventions and four Recommendations on the minimum age for admission to employment or work in the various sectors.³ Moreover, ILO action also covered the conditions of work of children and young persons whose employment was not prohibited by international standards and resulted in the adoption of three Conventions and two Recommendations on the night work of young persons,⁴ as well as four Conventions and one Recommendation concerning the medical examination of

¹ By "economic activity" is meant the production of goods and services as defined by the United Nations System of national accounts. According to this system, the production of goods and services comprises: all production and processing of primary products, whether intended for the market, for exchange or for own consumption; production for the market of all other goods and services; and, in the case of the households producing such goods and services for the market, the corresponding production for own consumption. See on this subject the Labour Statistics Recommendation, 1985 (No. 170). See doc. GB.264/ESP/1, p. 2, note 4.

² See doc. GB.264/ESP/1, para. 6. In this text, the term "child labour" covers all economic activities carried out by a child or young person. In general, these activities are covered by national laws and regulations, which must be in conformity with ILO instruments.

³ These are: the Minimum Age (Industry) Convention, 1919 (No. 5); the Minimum Age (Sea) Convention, 1920 (No. 7); the Minimum Age (Agriculture) Convention, 1921 (No. 10); the Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15); the Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 33); the Minimum Age (Sea) Convention (Revised), 1936 (No. 58); the Minimum Age (Industry) Convention (Revised), 1937 (No. 59); the Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (No. 60); the Minimum Age (Fishermen) Convention, 1959 (No. 112); the Minimum Age (Underground Work) Convention, 1965 (No. 123); and the Minimum Age (Non-Industrial Employment) Recommendation, 1932 (No. 41); the Minimum Age (Family Undertakings) Recommendation, 1937 (No. 52); the Minimum Age (Coal Mines) Recommendation, 1953 (No. 96); and the Minimum Age (Underground Work) Recommendation, 1965 (No. 124).

⁴ The Night Work of Young Persons (Industry) Convention, 1919 (No. 6); the Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 79); the Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90); the Night Work of Young Persons (Non-Industrial Occupations) Recommendation, 1946 (No. 80); and the Night Work Recommendation, 1990 (No. 178).

young persons.⁵ The issue of child labour has also been raised by the ILO's supervisory bodies in relation to the application of the Forced Labour Convention, 1930 (No. 29).

Before 1973, all the ILO instruments on the minimum age for admission to employment or work were essentially intended to address specific sectors, namely industry, maritime work, non-industrial work and underground work. Although this approach allowed member States to ratify only the Conventions which corresponded more fully to their particular situation,⁶ it was found that the development of "basic conventions on minimum age for admission to employment can no longer be an effective instrument of concerted international action to promote the well-being of children".⁷ New instruments were therefore needed. In order to enable a greater number of member States to ratify it, the new Convention had to apply to all sectors and be adapted to national situations. It was in that spirit that in 1973 the Conference adopted the Minimum Age Convention (No. 138) and Recommendation (No. 146).

Although since its creation the ILO has been concerned to protect children against work and at work, the international community was very slow to develop a real system to safeguard the integrity of the child. Even though the 1890 Berlin Conference addressed the issue and certain international instruments refer to children,⁸ none of them defines the international legal status of the child.⁹ On 20 November 1989, the United Nations General Assembly remedied this situation with the unanimous adoption of the Convention on the

⁵ The Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16); the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77); the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78); the Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124); and the Medical Examination of Young Persons Recommendation, 1946 (No. 79). Moreover, the Conference has adopted seven Conventions and four Recommendations principally addressing other subjects, but which contain provisions on minimum age. See in this respect for hazardous and unhealthy work, the White Lead (Painting) Convention, 1921 (No. 13); the Radiation Protection Convention, 1960 (No. 115); the Maximum Weight Convention, 1967 (No. 127); the Benzene Convention, 1971 (No. 136); the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152); the Lead Poisoning (Women and Children) Recommendation, 1919 (No. 4); the Conditions of Employment of Young Persons (Underground Work) Recommendation, 1965 (No. 125); the Maximum Weight Recommendation, 1967 (No. 128); and the Benzene Recommendation, 1971 (No. 144). See also: the Social Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82); the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117); the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180); and the Unemployment (Young Persons) Recommendation, 1935 (No. 45). In June 2001, at its 89th Session the Conference adopted the Safety and Health in Agriculture Convention (No. 184) and Recommendation (No. 193). These new instruments contained provisions on the safety and health of young workers. Art. 16, para. 1, of Convention No. 184 provides that "[T]he minimum age for assignment to work in agriculture which by its nature or the circumstances in which it is carried out is likely to harm the safety and health of young persons shall not be less than 18 years".

⁶ Indeed, many countries were not able to set, and particularly to apply, a minimum age for admission to employment or work in all sectors. This remains true today.

⁷ ILO, *Minutes of Sessions 178-181, 181st Session*, Geneva 1970, Appendix II, para. 8.

⁸ By way of illustration, reference may be made to the Declaration of the Rights of the Child of 1924, the Universal Declaration of Human Rights of 1948, the Declaration of the Rights of the Child of 1959, the International Covenant on Civil and Political Rights of 1966 and the International Covenant on Economic, Social and Cultural Rights of 1966.

⁹ The Declaration of the Rights of the Child of 1924 and the Declaration of the Rights of the Child of 1959 directly concern children.

Rights of the Child.¹⁰ The adoption of the Convention made a major contribution to the renewal of interest in issues related to the exploitation of children. However, other factors were important. In the first place, greater awareness that the economic exploitation of children could become worse in the various regions of the world as a result of the deterioration in the economic situation and its negative impact on social development. Concern was also expressed increasingly widely regarding the possibility that certain countries, through the use of the labour of children at ages and under conditions which are not in conformity with ILO standards, would be able to obtain a comparable advantage in relation to other countries which endeavour to apply these standards. Finally came the increased support from public opinion for the cause of human rights, and particularly the rights of the child.¹¹

The ILO accompanied this renewal of interest by committing itself more actively to combating child labour, particularly through the launching in 1992 of a large-scale technical cooperation programme, namely the International Programme for the Elimination of Child Labour (IPEC).¹² The Governing Body then reached the conclusion that existing ILO standards contained a number of shortcomings and that, despite the efforts made, child labour remained a matter of concern, particularly in view of the numbers of children involved, which remained very high.

In June 1996, at its 84th Session, the Conference adopted the resolution concerning the elimination of child labour. That year, the ILO considered that the time had come for the Conference to adopt new instruments addressing the worst forms of child labour. On 17 June 1999, the Conference unanimously adopted the Worst Forms of Child Labour Convention (No. 182) and Recommendation (No. 190).

Moreover, on 18 June 1998, at its 86th Session, the Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.¹³ The Declaration provides that “all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization,

¹⁰ The Convention on the Rights of the Child is the most widely ratified international Convention by members of the United Nations. It has been ratified by 191 member States, and only the United States and Somalia have not yet ratified the Convention, although the United States has signed it. The Convention entered into force on 2 September 1990.

¹¹ See doc. GB.264/ESP/1, para. 2.

¹² IPEC’s aim is the progressive elimination of child labour worldwide, emphasizing the eradication of the worst forms as rapidly as possible. It works to achieve this in several ways: through country-based programmes which promote policy reform and put in place concrete measures to end child labour; and through international and national campaigning intended to change social attitudes and promote the ratification and effective implementation of ILO child labour Conventions. Complementing these efforts are in-depth research, legal expertise, policy analysis and programme evaluation carried out in the field and at the regional and international levels. The political will and commitment of individual governments to address child labour – in alliance with employers’ and workers’ organizations, non-governmental organizations and other civil society actors – is the foundation for ILO-IPEC action. IPEC realizes on a coalition of nearly 100 partners, comprising member countries that have invited IPEC to set up local programmes, donor governments and other contributing governmental and non-governmental organizations. Since its inception in 1992, IPEC programmes in more than 60 countries have had considerable impact in both removing hundreds of thousands of children from the workplace and raising general awareness of the scourge of child labour.

¹³ Through the Declaration the ILO intends to provide a response to the challenges of economic globalization, which has been the subject of many debates within the Organization since 1994.

to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely [...] the effective abolition of child labour [...]”. Convention No. 182 entered into force 15 months after its adoption and has received a considerable number of ratifications, with over half of member States having ratified it up to now.¹⁴ This commitment by Governments has also been beneficial to Convention No. 138, for which the number of ratifications has almost doubled since 1995.¹⁵ This mobilization by Governments, and more broadly by the population, bears witness to their will to take action against the economic exploitation of children and achieve lasting protection for childhood.

This chapter is intended to present the whole range of ILO standards on child labour.

The adoption of standards is one of the means available to the ILO to achieve the objective of social justice set forth in the Preamble to its Constitution. The Conventions and Recommendations adopted by the Conference on the protection of children and young persons form an important part of the ILO’s activities in this area. The main elements of the principle standards on child labour are described below, focusing first on the Conventions and Recommendations on the elimination of child labour, followed by those addressing the conditions of work of young persons.

I. Elimination of child labour

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Minimum Age Convention, 1973 (No. 138)	112	Fundamental Convention
Minimum Age Recommendation, 1973 (No. 146)	–	This Recommendation is related to a fundamental Convention and is considered up to date.
Worst Forms of Child Labour Convention, 1999 (No. 182)	100	Fundamental Convention
Worst Forms of Child Labour Recommendation, 1999 (No. 190)	–	This Recommendation is related to a fundamental Convention and is considered up to date.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Minimum Age (Non-Industrial Employment) Recommendation, 1932 (No. 41)	–	The Governing Body has decided to maintain the status quo with regard to Recommendations Nos. 41 and 52.
Minimum Age (Family Undertakings) Recommendation, 1937 (No. 52)	–	

¹⁴ As of 1 October 2001, 100 member States had ratified Convention No. 182.

¹⁵ As of 1 October 2001, 112 member States had ratified Convention No. 138.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Minimum Age (Industry) Convention, 1919 (No. 5)	24	The Governing Body has invited the States parties to Convention No. 5 to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), and denouncing Convention No. 5 at the same time, with recourse to technical assistance as required.
Minimum Age (Agriculture) Convention, 1921 (No. 10)	14	The Governing Body has invited States parties to Convention No. 10 to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), which would involve the denunciation of Convention No. 10 on the condition stated in Article 10(5)(b) of Convention No. 138, with recourse to technical assistance as required.
Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 3)	9	The Governing Body has invited States parties to Convention No. 33 to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), which would <i>ipso jure</i> involve the immediate denunciation of Convention No. 33 on the condition stated in Article 10(4)(b) of Convention No. 138, with recourse to technical assistance as required.
Minimum Age (Industry) Convention (Revised), 1937 (No. 59)	15	The Governing Body has invited States parties to Convention No. 59 to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), which would <i>ipso jure</i> involve the immediate denunciation of Convention No. 59 on the condition stated in Article 10(4)(a) of Convention No. 138, with recourse to technical assistance as required.
Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (No. 60)	1	The Governing Body shelved Convention No. 60 with immediate effect. It also invited the State party to Convention No. 60 to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), and denouncing at the same time Convention No. 60. Finally, the Governing Body decided that the status of Convention No. 60 would be re-examined in due course with a view to its possible abrogation by the Conference.
Minimum Age (Underground Work) Convention, 1965 (No. 123)	25	The Governing Body has invited States parties to Convention No. 123 to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), which would <i>ipso jure</i> involve the immediate denunciation of Convention No. 123 on the condition stated in Article 10(4)(f) of Convention No. 138, with recourse to technical assistance as required.
Minimum Age (Underground Work) Recommendation, 1965 (No. 124)	–	The Governing Body has noted that Recommendation No. 124 was obsolete and that this recommendation should be withdrawn, while deferring the proposal to the Conference to withdraw the instrument until the situation has been re-examined at a later date.
Minimum Age (Coal Mines) Recommendation, 1953 (No. 96)	–	The Governing Body has noted that Recommendation No. 96 is obsolete and has decided to propose to the Conference the withdrawal of the Recommendation in due course.

1. Content of the standards

The emphasis placed by international labour standards on the abolition of child labour reflects the conviction of ILO constituents that childhood is a period of life which should not be devoted to work, but to the physical and mental development of children, their education, learning their social roles and to games and recreational activities. This conviction is reflected in both the Minimum Age Convention, 1973 (No. 138), and its

corresponding Recommendation (No. 146), and in the new Worst Forms of Child Labour Convention, 1999 (No. 182), and the corresponding Recommendation (No. 190).

1.1. Determination of a minimum age for admission to employment or work: Convention No. 138 and Recommendation No. 146

The adoption of international labour standards was for a long time the principal means used by the ILO to combat child labour. Over the years, these standards have forged the ILO's doctrine in this respect.¹⁶

Evolution of the standards on the minimum age for admission to employment or work

For the ILO, children under a certain age should not engage in an economic activity.¹⁷ Indeed, when appropriately regulated, certain forms of activity are not necessarily harmful for children and do not jeopardize their physical, moral and intellectual development.¹⁸ In the very year of its creation, the ILO resolutely followed this approach with the adoption of the Minimum Age (Industry) Convention, 1919 (No. 5). The nine sectoral Conventions on the minimum age for admission to employment or work which were adopted after 1919 (industry, agriculture, trimmers and stokers, maritime work, non-industrial work, fishing and underground work) adopted the same approach.

The first Conventions adopted between 1919 and 1932¹⁹ set the general minimum age for admission to employment or work at 14 years. The Conventions adopted in 1936 and 1937 then set the minimum age for admission to employment or work at 15 years.²⁰ Other Conventions which cover occupations or activities involving a risk to the health, safety or life of children set stricter standards. For example, the minimum age for admission to employment or work underground was not to be less than 16 years,²¹ while work performed in high-risk workplaces or those involving a risk of exposure to radiation or hazardous chemical substances was set at 18 years.²²

These Conventions nevertheless included a number of exceptions.²³ Furthermore, exceptions from the general minimum age for admission to employment or work are permitted by certain Conventions. Others envisage the possibility of determining, under certain conditions, a general minimum age that is either higher or lower, or of determining a lower minimum age for light work. However, all of these instruments were of restrictive

¹⁶ *ibid*, para. 81.

¹⁷ *ibid*, para. 82.

¹⁸ See note 56 below.

¹⁹ Conventions Nos. 5, 7, 10 and 33.

²⁰ Conventions Nos. 58, 59 and 60.

²¹ Convention No. 123.

²² Conventions Nos. 15, 115 and 136.

²³ These various possibilities are described in the analysis of Convention No. 138.

scope and only covered limited sectors. The ILO therefore engaged in the revision and regrouping of these standards, resulting in the adoption of Convention No. 138.

The objective of the 1973 instruments: The effective abolition of child labour and the progressive raising of the minimum age for admission to employment or work

Under Article 1 of Convention No. 138, the primary objective is the pursual of a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age of admission to employment or work. The aim pursued is to enable young persons to achieve their fullest physical and mental development. In contrast with the Worst Forms of Child Labour Convention, 1999 (No. 182), it is not a requirement of Convention No. 138 that measures be taken to abolish child labour within a certain time frame. Indeed, there are graduations in the obligation upon States to pursue a national policy. Convention No. 138 is not a static instrument, but is intended to improve progressively the policies adopted by States. The development of the policy is therefore conditioned by national circumstances and the level of standards already in force in the country.²⁴

Part I of Recommendation No. 146 proposes a framework for action and essential measures which may be implemented to achieve the objectives set out in Article 1 of the Convention. For example, high priority should be given in national development policies and programmes to the measures to be taken to meet the needs of children and youth and to the progressive extension of the inter-related measures necessary to provide the best possible conditions of physical and mental growth for children and young persons. The following areas should be given special attention in such programmes and measures:

- (a) the national commitment to full employment;²⁵
- (b) economic and social measures to alleviate poverty;
- (c) social security and family welfare measures;
- (d) education and vocational orientation and training policy; and
- (e) the policy for the protection and welfare of children and young persons.

A national policy on child labour is meaningless unless it is coordinated with a policy for childhood. It is therefore necessary to ensure coordination with training, child health and employment policies.²⁶

²⁴ ILO, *Minimum age for admission to employment*, ILC, 58th Session, 1973, Geneva, Report IV(2), p. 7 (hereinafter Report IV(2), 1973).

²⁵ The Recommendation indicates that the commitment to full employment should be in accordance with the Employment Policy Convention (No. 122) and Recommendation (No. 122), 1964.

²⁶ Picard, L.: *La lutte contre le travail des enfants: cadre normatif*, ILO, Geneva, mimeo, p. 2.

Scope of application of the 1973 instruments

Convention No. 138 and Recommendation No. 146 are the most recent and complete instruments on the minimum age for admission to employment. They revise the ten earlier instruments on minimum age and form a synthesis of the principles set out therein. These instruments are intended to resolve specific problems, without however achieving the aim set forth in the Preamble to Convention No. 138, namely achieving the total abolition of child labour. Convention No. 138 is intended to be “a dynamic instrument” aimed not only at setting a basic standard, but also at its progressive improvement.²⁷

Types of employment or work covered

As noted above, the Conventions on minimum age for admission to employment or work developed by the ILO between 1919 and 1973 essentially cover specific sectors, namely industry, agriculture, maritime work, non-industrial work and underground work. However, Convention No. 138 applies to all sectors, whether or not the children are employed.

It should be emphasized that the terms “employment” and “work” are used together, as in previous Conventions on minimum age, “in order to cover all economic activity regardless of the formal employment status of the person concerned”.²⁸

Geographical scope

Article 2, paragraph 1, of Convention No. 138 provides that a government which ratifies the Convention shall specify a minimum age for admission to employment or work within its territory and on means of transport registered in its territory. This reference to means of transport is intended, in particular, to cover ships. A government which ratifies the Convention therefore has to regulate the minimum age for admission to employment or work on ships.²⁹

Minimum ages for admission to employment or work

It is more precise to refer to several minimum ages for admission to employment. Indeed, Convention No. 138 establishes various minimum ages, depending on the types or characteristics of the employment or work performed. Convention No. 138 lays down a general minimum age, a higher age for hazardous work and, under certain conditions, a lower age for light work.

Establishment of a general minimum age for admission to employment or work

Convention No. 138 provides in Article 2, paragraph 1, that each Member which ratifies the Convention shall specify a minimum age for admission to employment or work.

²⁷ Report IV(2), 1973, op. cit., p. 7.

²⁸ ILO, *Record of proceedings*, ILC, 57th Session, 1972, Geneva, No. 25, para. 21, p. 539.

²⁹ ILO, *Minimum age*, General Survey of the Reports relating to Convention No. 138 and Recommendation No. 146 concerning Minimum Age, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), ILC, 67th Session, Geneva, 1981, Report III(Part V(B)), para. 62.

This provision also lays down that, subject to exceptions permitted by the Convention, “no one under that age shall be admitted to employment or work in any occupation”.

The issue of the minimum age for admission to employment is closely related to that of the age at which compulsory school ends, in view of the desirability of avoiding any gap between the completion of schooling and admission to work.³⁰ In accordance with Article 2, paragraph 3, of the Convention, the general minimum age for admission to employment or work shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years. Paragraph 4 of Recommendation No. 146 reinforces this principles by indicating that “[f]ull-time attendance at school or participation in approved vocational orientation or training programmes should be required and effectively ensured up to an age at least equal to that specified for admission to employment”.³¹

Compulsory education is one of the most effective means of combating child labour. Indeed, if the two ages do not coincide, various problems may arise. If compulsory schooling comes to an end before the young persons are legally entitled to work, there may be a period of enforced idleness which may lead to problems such as delinquency.³² On the other hand, if the age of completion of compulsory schooling is higher than the minimum age for admission to work or employment, then children required to attend school are also legally allowed to work and may thus be encouraged to leave school. It is for this reason that legislation on compulsory education and on minimum age are mutually reinforcing. Nevertheless, legislation on compulsory school attendance is meaningless if school facilities are inadequate.

Under Article 2, paragraph 4, of the Convention, a government whose economy and educational facilities are insufficiently developed, may initially specify a minimum age of 14 years. In such cases, the organizations of employers and workers concerned must have been consulted beforehand. This flexibility measure must, however, only be an interim stage. Article 2, paragraph 5, of the Convention provides that in the reports submitted to the Office under article 22 of the Constitution, countries must indicate the follow-up to their decision.

Under the terms of Article 2, paragraph 1, of the Convention, the minimum age that has been set must be specified by member States in a declaration appended to the ratification. Once set, the minimum age applies to all economic activities, except for the exemptions allowed by the Convention. However, Paragraph 8 of Recommendation No. 146 indicates that, where it is not immediately feasible to fix a minimum age for all employment in agriculture and in related activities in rural areas, a minimum age should be fixed at least for employment on plantations and in the other agricultural enterprises referred to in Article 5, paragraph 3, of the Convention.

Finally, under Article 2, paragraph 2, of Convention No. 138, the general minimum age for admission to employment or work may subsequently be raised, with the Member having to notify the Director-General of the ILO by further declarations. In this respect, Paragraph 7(1) of Recommendation No. 146 indicates that “Members should take as their

³⁰ The link between minimum age and compulsory schooling has been emphasized since the creation of the ILO. See, ILC, 3rd Session, 1921, Vol. II, Third Part, Appendices and Index, Appendix XVIII, Report of the Director presented to the Conference, para. 252, p. 1052.

³¹ Art. 19 of Convention No. 82 and Art. 15 of Convention No. 117 on social policy cover the provisions to be taken for the progressive development of broad systems of education, vocational training and apprenticeships.

³² *General Survey*, 1981, op. cit., para. 140.

objective the progressive raising to 16 years of the minimum age for admission to employment or work specified in pursuance of Article 2” of Convention No. 138.

Establishment of a higher minimum age for admission to work that is likely to jeopardize health, safety or morals

Article 3, paragraph 1, of Convention No. 138 provides that the minimum age “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 shall not be less than 18 years”. Paragraph 9 of Recommendation No. 146 indicates that where the minimum age for admission to hazardous work is below 18 years, immediate steps should be taken to raise it to that level.

Convention No. 138 does not provide any specific definition of hazardous work. Under Article 3, paragraph 2, of the Convention, these types of employment or work shall be determined by national laws or regulations or by the competent authority. However, the organizations of employers and workers concerned have to be consulted first. Nor does Recommendation No. 146 give examples of hazardous work, although in Paragraph 10(1) it indicates that, in determining these types of employment or work, “full account should be taken of relevant international labour standards”, such as those concerning dangerous substances, agents or processes, including standards relating to ionizing radiations, the lifting of heavy weights and underground work. In so doing, the Recommendation recognizes the hazardous nature of activities in certain sectors covered by the above international labour standards, which are intended to protect the health and safety of workers. Moreover, in accordance with Paragraph 10(2) of the Recommendation, the list of hazardous types of work should be re-examined periodically, “particularly in the light of advancing scientific and technical knowledge”.

It should also be recalled that Article 6 of Conventions Nos. 33 and 60 provides that a higher age or ages shall be fixed “for admission of young persons and adolescents to employment for purposes of itinerant trading in the streets or in places to which the public have access, to regular employment at stalls outside shops or to employment in itinerant occupations, in cases where the conditions of such employment require that a higher age should be fixed”. These provisions may prove to be useful where governments have to determine the types of employment that are hazardous. However, they do not explicitly state that these jobs are dangerous. Paragraph 6 of the Minimum Age (Non-Industrial Employment) Recommendation, 1932 (No. 41), indicates that dangerous employment might include certain employment in public entertainments such as acrobatic performances; in establishments for the cure of the sick such as employment involving danger of contagion or infection; and in establishments for the sale of alcoholic liquor such as serving customers.

Article 3, paragraph 3, of the Convention sets out the conditions under which certain types of employment or work, notwithstanding the provisions of paragraph 1, may be performed as from the age of 16 years. However, the following conditions must be met: 1) the organizations of employers and workers concerned must have been consulted beforehand; 2) the health, safety and morals of the young persons concerned must be fully protected; and 3) they must have received adequate specific instruction or vocational training in the relevant branch of activity.

Night work of children

The Conventions on the night work of young persons are intended to protect them against conditions of work which are prejudicial to their health and development. The

principle set out in these Conventions is the prohibition of night work for persons under 18 years of age. However, a number of exceptions are possible.

The Night Work of Young Persons (Industry) Convention, 1919 (No. 6), authorizes night work by young persons over the age of 16 in a limited number of processes which are required to be carried on continuously day and night. The Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 79), provides that States may make exemptions from the general prohibition of night work for domestic service in private households and employment on work which is not deemed to be harmful, prejudicial or dangerous to children or young persons, in family enterprises in which only parents and their children or wards are employed. And finally, the Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90), envisages the same exceptions as Convention No. 79. It also authorizes night work by young persons aged between 16 and 18 for purposes of apprenticeship or vocational training in specified industries or occupations which are required to be carried on continuously.

Paragraph 3(e) of the Worst Forms of Child Labour Recommendation, 1999 (No. 190), indicates that “work under particularly difficult conditions”, such as the night work of children, should be given consideration as a hazardous form of work to be eliminated as a matter of urgency.

Admission of young persons to certain types of employment or work at a lower age than the general minimum age

Convention No. 138 and Recommendation No. 146 provide that children and young persons may be admitted to employment or work at a lower age than the general specified minimum age in the case of light work. In the same way as earlier Conventions,³³ Convention No. 138 provides that, in certain cases and under certain conditions, young persons may be admitted to employment or work at an age that is lower than the minimum age specified at the time of ratification. The Convention does not provide a definition light work.³⁴ Article 7, paragraph 1, of the Convention simply provides that national laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work which is:

- (a) not likely to be harmful to their health or development; and

³³ The Minimum Age (Agriculture) Convention, 1921 (No. 10), was the first Convention to set a minimum age for admission to employment or work that was lower than the general minimum age in the case of “light work”. It places the concept of “light work” in the context of vocational instruction. Its provisions on this subject therefore differ from those of Convention No. 138 of 1973. See *General Survey*, 1981, op. cit., para. 154. The Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 33), and the Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (No. 60), also provide that an age lower than the general minimum age may be specified for “light work”. However, these Conventions contain standards which are more complex and detailed on this subject than Convention No. 138. They explicitly set out the hours and days when such work is authorized, and also limit the possibilities of employing children who are still engaged in compulsory school during the holidays.

³⁴ Examples of types of work considered to be light are given in Para. 2 of the Minimum Age (Non-Industrial Employment) Recommendation, 1932 (No. 41): running errands, distribution of newspapers, odd jobs in connection with the practice of sports or the playing of games, and picking and selling flowers or fruits. For the admission of children to light work, in accordance with the Recommendation, the consent of parents or guardians, a medical certificate of physical fitness and, “where necessary, previous consultation with the school authorities” should be required. The hours of work should be adapted to the school time-table and the age of the child.

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- (b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority, or their capacity to benefit from the instruction received.

In the absence of a precise definition of “light work”, it is the responsibility of the competent authority in each country which ratifies Convention No. 138 to determine the activities to be considered as light work, taking into consideration the conditions set out in Article 7, paragraph 1, of the Convention. Under paragraph 2 of the same Article, the employment or work of persons who are at least 15 years of age but have not yet completed their compulsory schooling may be permitted, subject to the above conditions.

Convention No. 138 also contains flexibility clauses in the case of light work. Article 7, paragraph 4, allows a Member which has specified a general minimum age for admission to employment or work of 14 years³⁵ to substitute the ages of 12 and 14 for the ages of 13 and 15 and, where appropriate, the age of 14 for the age of 15.³⁶

Under Article 7, paragraph 3, of the Convention, the competent authority shall determine the activities in which employment or work may be permitted under paragraphs 1 and 2 of the Article. In so doing, the competent authority must prescribe the number of hours during which and the conditions in which such employment or work may be undertaken. Paragraph 13 of Recommendation No. 146 provides details of hours of work and conditions of work and indicates that, in giving effect to Article 7, paragraph 3, of Convention No. 138, special attention should be given to

- the provision of fair remuneration and its protection, bearing in mind the principle of “equal pay for equal work”;
- the strict limitation of the hours spent at work in a day and in a week;
- the prohibition of overtime;
- a minimum consecutive period of 12 hours’ night rest;
- an annual holiday with pay of at least four weeks;
- coverage by social security schemes; and
- the maintenance of satisfactory standards of safety and health.

The light work covered by Convention No. 138 is directly related to the conditions under which it is performed (its duration, arduous nature, conditions adapted to the age of the young person, protection of safety and health, etc.) and the schooling of the young persons (attendance and capacity to benefit from the instruction received).

Exceptions

As noted above, Convention No. 138 is general in its scope. It is intended to achieve the objective set out in the Preamble to the Convention, namely “the total abolition of child labour”. However, with a view to its adaptation to all national circumstances, the

³⁵ As permitted by Art. 2, para. 4, of Convention No. 138 for States whose economy and educational facilities are insufficiently developed.

³⁶ Art. 7, para. 2.

Convention permits a number of exceptions to its application. In addition to the possibility of specifying minimum ages according to the types of employment or work, a Member may exclude from the application of the Convention limited categories of employment of work and certain branches of economic activity. Moreover, it is not bound to apply the Convention to work done by children in educational or training institutions.

Temporary exclusion of limited categories of employment or work

Under Article 4, paragraph 1, of Convention No. 138, it is possible to exclude from the application of the Convention on a temporary basis limited categories of employment or work in respect of which special and substantial problems of application arise. A State which wishes to avail itself of this provision must fulfil the following conditions:

- (1) the exclusion of limited categories of employment or work is permitted only in so far as necessary;
- (2) the organizations of employers and workers concerned must have been consulted beforehand; and
- (3) the limited categories of employment which have been excluded must be listed, giving the reasons for such exclusion, in the first report that the State has to submit on the application of the Convention under article 22 of the Constitution of the ILO.

Moreover, subsequent reports must indicate developments in the position of the country's law and practice in respect of these categories.

With a view to leaving a certain latitude to each country to adapt the application of the Convention to its national situation, it does not enumerate the categories of employment or work which may be covered by such an exclusion. However, examples might include employment in family enterprises, domestic service in private households, and home work or other work outside the supervision and control of the employer, including young persons working on their own account.³⁷ These illustrations are not restrictive.

It is important to recall that Article 4, paragraph 3, of Convention No. 138 does not permit the exclusion from its application of dangerous work.³⁸

Limitation of the scope of the Convention

Article 5, paragraph 1, of the Convention permits a Member whose economy and administrative facilities are insufficiently developed to initially limit the scope of application of the Convention. A Member which wishes to avail itself of this provision must fulfil the following conditions:

- (1) consult the organizations of employers and workers concerned;³⁹
- (2) specify, in a declaration appended to its ratification, the branches of economic activity or types of enterprises to which it will apply the provisions of the Convention;⁴⁰ and

³⁷ *General survey*, 1981, op. cit., para. 75.

³⁸ See the section on the establishment of a higher minimum age for admission to work that is likely to jeopardize the health, safety or morals of young persons.

³⁹ Art. 5, para. 1.

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- (3) indicate, in the reports that it has to submit under article 22 of the Constitution of the ILO the general position as regards the employment or work of young persons and children in the branches of activity which are excluded from the scope of application of the Convention, and any progress which may have been made towards wider application of the provisions of the Convention.⁴¹

As the Committee of Experts has emphasized on a number of occasions, this flexibility clause must be used at the time of ratification and cannot be invoked subsequently. Under Article 5, paragraph 4(b), a Member may at any time extend the scope of application of the Convention by a declaration addressed to the Director-General of the ILO.

Nevertheless, Article 5, paragraph 3, lays down seven sectors which must as a minimum be covered by the Convention: mining and quarrying; manufacturing; construction; electricity; gas and water; sanitary services; transport, storage and communication, as well as plantations and other agricultural enterprises mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.

A distinction should be made between the provisions of Article 5 and those of Article 4 reviewed above. While Article 5 permits the exclusion of an entire economic sector, Article 4 allows exceptions for limited categories of employment or work, and thereby permits the exemption of a profession.

Work done by children and young persons in general, vocational or technical education

Article 6 of Convention No. 138 addresses two aspects. Firstly, it provides that the Convention does not apply to “work done by children and young persons in schools for general, vocational or technical education or in other training institutions”.⁴² Secondly, it also lays down that the Convention does not apply to work done by persons at least 14 years of age in enterprises where such work is carried out in accordance with conditions prescribed by the competent authority, after consultation with the organizations of employers and workers concerned, and where it is an integral part of:

- (a) a course of education or training for which a school or training institution is primarily responsible;
- (b) a programme of training mainly or entirely in an enterprise, where the programme has been approved by the competent authority; or
- (c) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.

⁴⁰ Art. 5, para. 2.

⁴¹ Art. 5, para. 4(a).

⁴² The earlier Conventions on the minimum age for admission to employment or work address a single aspect of this issue, namely work carried out in vocational training institutions. Conventions Nos. 5, 7, 10, 15, 58, 59 and 112 exclude from their application work done by children in technical schools and school-ships or training ships, provided that such work is approved and supervised by public authority. Conventions No. 33 and 60 contain more detailed provisions on vocational training with a view to employment or work in non-industrial activities and, under certain conditions, do not apply to work done in technical schools.

This latter provision, without using the term, is intended to cover apprenticeship.

Under Paragraph 12(2) of Recommendation No. 146, measures should also be taken to safeguard and supervise the conditions in which children and young persons undergo vocational orientation and training and to formulate standards for their protection and development.

Artistic performances

Article 8 of Convention No. 138 authorizes the participation of children who have not attained the general minimum age for admission to employment or work in activities such as artistic performances. In contrast with certain of the earlier Conventions,⁴³ Convention No. 138 is less restrictive in the conditions it sets for such authorization. It requires that:

- (1) permits must be granted in individual cases;
- (2) the organizations of employers and workers concerned must be consulted first; and
- (3) the permits must limit the number of hours during which and prescribe the conditions in which employment or work is allowed.

National legislation cannot provide for general exceptions. Convention No. 138 is therefore intended to ensure strict supervision of the circumstances and conditions under which young persons participate in artistic performances.⁴⁴ It should be noted that the Convention does not lay down a minimum age for the participation of children in this type of activity.

Conditions of work of children

Convention No. 138 contains very few provisions relating to the conditions of work of young people. When it mentions them, it does so in a specific context. For example, Article 7, paragraph 3, provides that the competent authority shall prescribe the number of hours during which and the conditions in which light work may be undertaken, including by persons who are at least 15 years of age but have not yet completed their compulsory schooling. Article 8, paragraph 2, provides that permits granted for participation in such activities as artistic performances “shall limit the number of hours during which and prescribe the conditions in which employment or work is allowed”. These provisions are examined below in the relevant sections.

The Convention does not contain explicit standards relating to the conditions which must be applied to young persons and children performing an occupational activity other than in these special circumstances. Nevertheless, it should be emphasized that most international labour standards apply without distinction on grounds of age. They therefore apply to children who are engaged in work in the same way as to adults, irrespective of their sex.⁴⁵

⁴³ Conventions Nos. 33 and 60 on the minimum age for admission to employment in non-industrial work contain much more detailed and restrictive provisions than Convention No. 138. For example, see Art. 4.

⁴⁴ Report IV(2), 1973, op. cit., p. 21.

⁴⁵ Picard, op. cit., p. 7.

These issues are covered by Recommendation No. 146 in Paragraphs 12 and 13. Paragraph 12 indicates that the conditions in which children and young persons under the age of 18 years are employed or work should be specified and supervised. The same applies to the conditions in which children and young persons undergo vocational orientation and training. Furthermore, Paragraph 13 of the Recommendation contains a list of points relating to conditions of employment to which special attention should be given:

- the provision of fair remuneration and its protection, bearing in mind the principle of “equal pay for equal work”;
- the strict limitation of the hours spent at work in a day and in a week, and the prohibition of overtime, so as to allow enough time for education and training (including the time needed for homework related thereto), for rest during the day and for leisure activities;
- the granting, without possibility of exception save in genuine emergency, of a minimum consecutive period of 12 hours’ night rest;⁴⁶
- the granting of an annual holiday with pay of at least four weeks and, in any case, not shorter than that granted to adults;
- coverage by social security schemes, whatever the conditions of employment or work may be; and
- the maintenance of satisfactory standards of safety and health and appropriate instruction and supervision.

Application of the standards

The ratification of a Convention by a member State is an expression of its political will to take action and gives rise to obligations for that State. In particular, these include the substantive obligation for the State to give full effect to the Convention in law and in practice.⁴⁷ Convention No. 138 is no exception.

Necessary measures and appropriate penalties

Under the terms of Article 9, paragraph 1, of Convention No. 138, the competent authority must take all necessary measures, including the provision of appropriate penalties, to ensure the effective enforcement of the provisions of the Convention. The necessary measures may take several forms. For example, they may consist of the adoption of national legislation on child labour or the development of a national policy.⁴⁸ The strengthening of labour inspection services is also essential for the effective implementation of the Convention. As indicated in Paragraph 14 of Recommendation No. 146, such strengthening may be achieved, for example, by the special training of

⁴⁶ This point takes into account the provisions of the Conventions on the night work of young persons.

⁴⁷ The obligation to make effective ratified Conventions is set out in article 19, para. 5(d), of the Constitution. The formal obligation is set out in article 22 of the Constitution, which requires member States to provide reports on the application of ratified Conventions.

⁴⁸ With regard to the national policy, see above the section on the objective of the 1973 instruments: the effective abolition of child labour and the progressive raising of the minimum age for admission to employment or work.

inspectors to detect abuses in the employment or work of children and young persons. It should also be noted that Paragraph 14 of the Recommendation emphasizes the important role played by inspection services in the application of national legislation respecting child labour.⁴⁹ Programmes to inform and raise awareness of persons who are regularly in contact with children, as well as the population in general, concerning the forms and effects of child labour are also a means of giving effect to the Convention. Reference may be made, for example, to parents and children themselves, employers, organizations of employers and teachers.

The adoption of national legislation is essential as it establishes a framework within which society determines its responsibilities with regard to young persons. However, the best legislation only takes on real value when it is applied. For this purpose, the Convention also provides that penalties have to be adopted. However, it does not indicate the types of penalties and confines itself to indicating that they have to be “appropriate” and designed to ensure “the effective enforcement” of the provisions of the Convention. They may consist of fines or sentences of imprisonment. In general terms, in terms of the application of labour law, it may be said that although sanctions are indispensable, they do not suffice in themselves to ensure the application of labour legislation.

Determination of the persons responsible for compliance with the Convention

Article 9, paragraph 2, of Convention No. 138 provides that national laws or regulations or the competent authority shall define the persons responsible for compliance with the provisions giving effect to the Convention. It should be noted that “the persons responsible for compliance with the provisions” are not the governmental bodies enforcing the provisions of the Conventions, but those against whom they are enforced.⁵⁰ These persons may be employers, parents or other persons required to respect legal provisions.

Maintenance of registers

In accordance with Article 9, paragraph 3, of Convention No. 138, the employer has to keep and make available registers or other documents. These registers or documents must contain the names and ages or dates of birth of persons who are less than 18 years of age and who are employed or work for the employer. Paragraph 16(a) and (b) of Recommendation No. 146 indicates the measures which should be taken to facilitate the verification of the ages of the persons concerned. The Recommendation suggests the maintenance of an effective system of birth registration and the keeping by employers of registers containing information not only on children and young persons employed by them, but also on those receiving vocational orientation or training.

⁴⁹ Several ILO instruments address the subject of labour inspection. See the Labour Inspection Convention, 1947 (No. 81) [Protocol of 1995 to the Labour Inspection Convention, 1947]; the Labour Inspection Recommendation, 1947 (No. 81); and the Labour Inspection (Agriculture) Convention (No. 129) and Recommendation (No. 133), 1969. Under the terms of these instruments, the functions of the system of labour inspection shall be “to secure the enforcement of the legal provisions relating to [...] the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors”. See Art. 3, para. 1(a), of Convention No. 81 and Art. 6, para. 1(a), of Convention No. 129.

⁵⁰ *General survey*, 1981, op. cit., para. 328.

With regard to the form of the required registers, the terms of the Convention leave broad latitude to member States to determine the manner in which effect is given to these requirements.⁵¹

Implementation of the instruments under examination: Problems and challenges

The abolition of child labour is first and foremost a national responsibility. Practice shows that collaboration with organizations of employers and workers, NGOs, local communities and other associations is essential for a strategy to combat the economic exploitation of children. However, without the commitment and political will of governments, it is difficult to combat this scourge. Indeed, both the Constitution of the ILO and the provisions of the various Conventions leave great latitude to member States in their implementation. Moreover, in addition to the substantive obligation of member States, there is also a formal obligation, as set out in article 22 of the Constitution of the ILO, by virtue of which member States must provide reports on the application of ratified Conventions. On the basis of these reports, the Committee of Experts endeavours to establish a constructive dialogue with member States with a view to the full application of the Convention.

National policy

In its general observation of 1996, the Committee of Experts recalled that member States ratifying Convention No. 138 undertake to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work. Since then, a number of member States have adopted a national policy.

Establishment of a general minimum age for admission to employment or work

Almost all countries have adopted laws and regulations to prohibit the employment of children who have not reached a certain age. However, a large number of countries set the minimum age for admission to employment or work for specific sectors of activity. One of the issues raised most frequently by the Committee of Experts therefore concerns the scope of such legislation. On several occasions, the Committee of Experts has reminded governments that the Convention applies to all sectors of economic activity and that it covers all forms of employment or work, whether or not there is a contract of employment and regardless of whether or not the work is remunerated. Furthermore, the Committee of Experts has emphasized that own-account work is covered by the Convention.

Examination of national legislation shows that certain member States have raised the minimum age that they initially declared when ratifying the Convention. On a number of occasions, the Committee of Experts has therefore drawn the attention of governments to the possibility afforded by the Convention to raise the minimum age and that a declaration to this effect may be transmitted to the Director-General of the ILO. In contrast, certain member States adopt legislation lowering the minimum age specified at the time of ratification. The Committee of Experts has therefore indicated to the governments concerned that once the minimum age for admission to employment or work has been specified and indicated in the declaration appended to the instrument of ratification, it can no longer be lowered.

⁵¹ *ibid.*, para. 332.

Dangerous work

The great majority of countries have adopted laws and regulations prohibiting work that is dangerous for children. However, some have not specified the age for admission to such work, or have set an age that is lower than that authorized by the Convention, namely 18 years. On several occasions, the Committee of Experts has therefore requested the governments concerned to take the necessary measures to set the age for admission to dangerous work at 18 years and, when this age has been specified, to ensure that young persons under 18 years of age are not employed in such activities.

In cases in which children of at least 16 years of age are permitted to perform dangerous work, the Committee of Experts has recalled that the Convention only authorizes this under strict conditions. Another difficulty arising in the application of the Convention concerns the determination by laws and regulations of the types of employment or work considered to be dangerous. The legislation sometimes enumerates in detail the types of work that are dangerous, and sometimes defines dangerous work according to the general terms of the Convention. The Committee of Experts has recalled that it is indispensable to determine at the national level, the nature of the work and the types of employment or work which are prohibited for young persons under 18 years of age.

Convention No. 138 provides that dangerous work must be determined after consultation with the organizations of employers and workers concerned. On many occasions, the Committee of Experts has emphasized this essential provision.

Light work

The Committee of Experts has often addressed the issue of light work jointly with that of the determination of the general minimum age for admission to employment. Indeed, in several countries, the legislation allows children under the age of 15 to work, without however determining the types of work that they may perform. The Committee of Experts has therefore reminded the countries concerned that admission to light work is only possible under the conditions set out in Article 7 of the Convention and for persons between 13 and 15 years of age.⁵² On several occasions, the Committee of Experts has also emphasized that the competent authority must determine the activities in which such employment or work can be authorized, and the number of hours and conditions of work.

Artistic performances

Certain member States have adopted legal provisions concerning artistic performances. However, the conditions for the implementation of Article 8 are not always met. In certain cases, the Committee of Experts has therefore recalled that an exception to Article 2 concerning the prohibition of employment or work before reaching the minimum age for admission to employment or work, which is to be specified when ratifying the Convention, for the purposes of participation in artistic performances is only allowed when the competent authority issues an individual permit specifying the conditions governing the employment or work. Furthermore, the Committee of Experts has emphasized that prior consultation of the organizations of employers and workers is required.

⁵² Unless the minimum age for admission to employment or work has been set at 14 years of age. In this case, in accordance with Art. 2, para. 4, the age range for light work is between 12 and 14 years.

In 2000, the Committee of Experts made a general observation concerning the Labour Inspection Convention, 1947 (No. 81). The general observation directly addressed the issue of labour inspection and child labour. In this respect, the Committee of Experts noted that the government reports and annual reports on the work of the inspection services which are communicated to the ILO contain an increasing volume of detailed information on the matters covered by the Convention, including those related to the protection of the fundamental rights of workers. The Committee of Experts also noted that cooperation between the inspection services and the various bodies and institutions concerned, as well as collaboration with employers' and workers' organizations, has made it possible in a large number of countries to establish effective systems for the communication of information in many fields related to the protection of workers while engaged in their work. However, the Committee of Experts regretted that information was provided too infrequently by governments in their reports or by the central authority in the annual reports on the work of the inspection services concerning the supervisory and advisory work relating to child labour. The Committee of Experts therefore requested governments to take appropriate measures to ensure that supervising the application of legal provisions on child labour is henceforth one of the priorities of the labour inspection services and that information on this matter is regularly included in the annual reports to be submitted under article 22 of the Constitution.

1.2. Prohibition and elimination of the worst forms of child labour: Convention No. 182 and Recommendation No. 190

As noted above, since the beginning of the 1990s, the international community has been showing growing interest in the issue of the rights of the child. However, despite the efforts made, child labour is an increasingly serious problem in many countries. Therefore, following the discussions on child labour held in 1995 and 1996,⁵³ the Governing Body decided to include this issue on the agenda of the Conference in 1998 with a view to the adoption of new instruments.⁵⁴ These discussions identified a number of shortcomings in the existing instruments. There was therefore broad consensus on the need to launch new concerted action to combat child labour. The origins of the new instruments lie in the need to remedy these shortcomings and to respond to the will of constituents to take action.⁵⁵ The objective is to strengthen ILO standards with a binding instrument focusing on the worst forms of child labour.

Following the discussions in the Committee on Child Labour at the Conference in 1998 and 1999, the Worst Forms of Child Labour Convention (No. 182) and Recommendation (No. 190) were adopted unanimously on 17 June 1999.

⁵³ These discussions were held in the Employment and Social Policy Committee of the Governing Body. See docs. GB.264/ESP/1, GB.264/10 and GB.264/2.

⁵⁴ See docs. GB.265/2 and GB.265/205. Discussions were also held at the Informal Tripartite Meeting at the Ministerial Level and at the Conference in June 1996.

⁵⁵ Picard, L. "Why new international instruments on child labour?" in *Protecting children in the world of work*, Labour Education 1997/3, No. 108, ILO, Geneva.

Objective of the 1999 instruments

Since its creation, the ILO has been advocating the abolition of child labour and indicating that children under a certain age should not engage in any economic activity. Convention No. 182 is based on Convention No. 138, which is one of the ILO's fundamental Conventions and the key instrument for the development of a coherent strategy to combat child labour at the national level.⁵⁶ The Preamble to Convention No. 182 indicates, *inter alia*, that it is necessary to adopt new instruments for the prohibition and elimination of the worst forms of child labour, as the main priority for national and international action [...] to complement the Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973 [...].

Convention No. 182 sets forth the principle that certain forms of child labour cannot be tolerated and therefore cannot be subject to progressive elimination.⁵⁷ Under Article 1 of Convention No. 182, each "Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency". With regard to the term "immediate", the Office has emphasized that it has the meaning of "done at once or without delay". Proceeding immediately therefore implies taking immediate measures without waiting for progress on achieving longer-term goals.⁵⁸

Under the terms of this provision, the measures taken must ensure not only the prohibition, but also the elimination of the worst forms of child labour. For the effective elimination of child labour, both immediate action and time-bound measures would therefore seem to be necessary.⁵⁹ In this respect, Article 1 has to be read in conjunction with Article 7, paragraph 2, of Convention No. 182.

Definition of child

Under Article 2 of Convention No. 182, "the term 'child' shall apply to all persons under the age of 18". This definition is given "for the purposes of this Convention". The Convention does not therefore give a general definition of the term "child". It is intended to cover all persons under 18 years of age, who include children, adolescents and young persons. The age of 18 years corresponds to the higher age limit set out in Convention No. 138 for work which is likely to jeopardize the health, safety or morals of young persons, as well as the general definition of the child contained in Article 1 of the Convention on the Rights of the Child. It does not therefore have any impact on the lower

⁵⁶ ILO, *Child labour*, ILC, 87th Session, 1999, Geneva, Report IV(2A), Office commentary, p. 19 (hereinafter Report IV(2A), 1999).

⁵⁷ Report IV(2A), 1999, *op. cit.*, p. 34. However, the ILO's experience shows that all forms of work are not necessarily harmful for children and that certain activities, when they are appropriately regulated, may even have beneficial effects for the children themselves and for society, particularly where they facilitate the transmission of professional knowledge from one generation to another. This is the underlying reason for a number of the provisions of Convention No. 138, authorizing child labour below the specified minimum age. However, other forms of child labour amount to economic exploitation and jeopardize the dignity, morals, safety, health and education of children.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

age limits for admission to employment or work which are authorized by Convention No. 138.⁶⁰

The worst forms of child labour

As indicated above, Convention No. 182 places emphasis on the worst forms of child labour and obliges States which ratify it to take priority measures in the form of immediate action. It is based in part on Convention No. 138 and, to a lesser extent, on Convention No. 29.⁶¹ Convention No. 182 enumerates in detail the types of work which are prohibited for children under the age of 18. The definition of the “worst forms of child labour” is therefore fundamental to an understanding of the scope of the new instruments.

As will be seen below, the worst forms of child labour include all forms of slavery or practices similar to slavery, prostitution and the production of pornography or pornographic performances, and illicit activities. It is important to note that the ILO’s concern with these practices is that, “while they are crimes they are also forms of economic exploitation akin to forced labour and slavery”.⁶²

All forms of slavery or practices similar to slavery

Under Article 3(a) of Convention No. 182, “the term ‘the worst forms of child labour’ comprises”, inter alia “all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour”.

In view of the fact that Convention No. 182 does not provide any definition of forced labour, the definition contained in Article 2 of Convention No. 29 remains valid for the purposes of Convention No. 182.⁶³ With regard to debt bondage and serfdom, it is necessary to refer to the instruments of the United Nations⁶⁴ for a definition, as Convention No. 29 does not contain one. The expression “the sale and trafficking of children” is not meant to cover issues unrelated to the worst forms of child labour, such as adoption.⁶⁵

⁶⁰ Report IV(2A), 1999, op. cit., Office commentary, p. 39.

⁶¹ Indeed, the forms of slavery or practices similar to slavery referred to in Art. 3(a) of Convention No. 182 are covered by Convention No. 29. The use, procuring or offering of a child, inter alia, for prostitution referred to in Art. 3(b) of Convention No. 182 are considered by the Committee of Experts to be forms of forced labour under Convention No. 29.

⁶² ILO, *Child labour: Targeting the intolerable*, ILC, 86th Session, Geneva, 1998, Report VI(1), p. 66 (hereinafter, Report VI(1), 1998).

⁶³ ILO, *Record of Proceedings*, ILC, 87th Session, 1999, Geneva, Report of the Committee on Child Labour, para. 136, p. 19/31. For the definition of forced labour, see Chapter 3.

⁶⁴ Particularly the International Agreement for the suppression of the “white slave trade”, 1904; the International Convention for the Suppression of Traffic in Women and Children, 1921; the Slavery Convention, 1926; the Protocol amending the Slavery Convention of 1926; and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions, and Practices Similar to Slavery.

⁶⁵ As confirmed by the Office at the request of the Government of Canada. See Report IV(2A), 1999, op. cit., Office commentary, p. 60. With regard to the trafficking of children it should be noted that on 1 November 2000, the General Assembly of the United Nations adopted the

In reply to a Government member who raised the question of the implications of this provision “for member States which allowed compulsory military service as of the age of 17”, the Legal Adviser explained that “the purpose of the proposal on Article 3(a) was to cover forced or compulsory recruitment of children for use in armed conflict”.⁶⁶

Prostitution, the production of pornography or pornographic performances

Under Article 3(b) of Convention No. 182, the term “the worst forms of child labour” also comprises “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances”. It should be noted that Article 3(b) of Convention No. 182 does not provide a definition, in view of the existence of relevant international instruments.⁶⁷ In this regard, the Office emphasized that “where there are no internationally accepted definitions, national definitions apply”.⁶⁸

Finally, it should be recalled that procuring or offering a child, which may also occur over the Internet, is covered by this provision of the Convention. The medium of dissemination and consumption of the material produced using children is not directly addressed, and is thus left to the national legislator. However, the existence of pornographic material on the Internet would constitute proof of violation of the prohibition against using children to produce such material.⁶⁹

Illicit activities

Under Article 3(c) of Convention No. 182, the term “the worst forms of child labour” comprises “the use, procuring or offering of a child for illicit activities”. Examples of such illicit activities include the use, procuring or offering of a child for the production and trafficking of drugs. Convention No. 182 does not provide a definition of the drugs to which this provision refers. However, subparagraph (c) makes reference to “the relevant

Convention against Transnational Organized Crime, as well as its Additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

⁶⁶ ILO, *Record of Proceedings*, 1999, op. cit., paras. 141 and 143, pp. 19/32 and 33. On 25 May 2000, the United Nations General Assembly adopted, without a vote, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts. As of 25 June 2001, four States had ratified the Protocol.

⁶⁷ On 25 May 2000, the General Assembly of the United Nations adopted without a vote the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. As of 26 June 2001, three States had ratified the Protocol. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, may also be taken into consideration. The Rome Statute of the International Criminal Court, adopted in 1998 by a United Nations Conference of Plenipotentiaries, affords additional protection to children involved in armed conflict.

⁶⁸ ILO, *Child labour*, ILC 86th Session, Geneva, 1998, Report VI(2), p. 52 (hereinafter, Report VI(2), 1998). In this respect, it should be noted that Art. 2 to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography provides that, for the purposes of the Protocol: (a) sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration; (b) child prostitution means the use of a child in sexual activities for remuneration or any other consideration; (c) child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

⁶⁹ Report IV(2A), 1999, op. cit., Office commentary, pp. 60 and 61.

international treaties”.⁷⁰ This provision recalls Article 33 of the Convention on the Rights of the Child.⁷¹

Hazardous work

Under Article 3(d) of Convention No. 182, “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children” is also considered to be one of “the worst forms of child labour”. The types of work covered by subparagraph (d) are those considered to be particularly hazardous and which must therefore be prohibited and eliminated in all sectors, in accordance with the objective, which is to prohibit types of work which are intolerable in all countries, irrespective of their level of development.⁷²

Paragraph 3 of Recommendation No. 190 establishes a list of activities or types of work to which consideration should be given when such types of hazardous work are being determined. This list includes:

- work which exposes children to physical, psychological or sexual abuse;
- work underground, under water, at dangerous heights or in confined spaces;
- work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
- work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;
- work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

Further to this list, it should be emphasized that Article 4, paragraph 1, of Convention No. 182 provides that, when determining the types of work referred to under Article 3(d), consideration must be given to “relevant international standards”. This reference does not oblige governments to comply with the provisions of instruments that they have not ratified,⁷³ or which are not by their nature ratifiable.⁷⁴ They consist of standards which can aid in the determination of what is likely to jeopardize the health, safety or morals of

⁷⁰ The Office views the relevant treaties as being the following: the Single Convention on Narcotic Drugs, 1961; the Convention on Psychotropic Substances, 1971; the Protocol amending the Single Convention on Narcotic Drugs, 1972; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. See, on this subject, Report IV(2A), 1999, op. cit., Office commentary, p. 61.

⁷¹ Art. 33 provides that “States parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances”.

⁷² Report IV(2A), 1999, op. cit., p. 62.

⁷³ International labour Conventions or United Nations Conventions.

⁷⁴ International labour Recommendations. On this subject, see Report IV(2A), 1999, op. cit., Office commentary, p. 77.

children. The obligation in this respect is one of procedure: to examine in good faith whether the types of work covered by these instruments should or should not, in a country covered by the Convention, be considered as “the worst forms of child labour” within the meaning of Article 3(d) of the Convention. The types of work to be determined may be activities or occupations.⁷⁵

In the absence of a precise definition of hazardous work, as indicated in the instruments on minimum age, it is therefore left to national laws or regulations to determine hazardous types of work, based on the examples provided in these instruments and the relevant international standards. In the same way as Convention No. 138, Convention No. 182 adds the obligation in Article 4, paragraph 2, of consultation with the organizations or employers and workers concerned in identifying the types of work covered by Article 3(d). However, Article 4, paragraph 2, of Convention No. 182 is more detailed than the provision in Convention No. 138, since it requires the competent authority to identify where hazardous types of work so determined exist.

Reference should be made to the differences in the wording of the two instruments. Article 3 of Convention No. 138 refers 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”, while Article 3(d) of Convention No. 182 refers to “work which, by its nature or the circumstances it is carried out, is likely to harm the health, safety or morals of children”. The principal difference is that the wording of Convention No. 138 covers a larger number of situations than Convention No. 182. It may logically be deduced that the types of hazardous work covered by Convention No. 182 are less numerous than those referred to by Convention No. 138. The list envisaged by Article 4 of Convention No. 182 should therefore only contain the “worst forms” of hazardous work and, in any case, those which are likely to “harm”, and not only “jeopardize”, the health, safety or morals of children.

Effective implementation of the standards

Under Article 5 of Convention No. 182, each Member which ratifies the Convention shall establish or designate appropriate mechanisms to monitor the implementation of its provisions. These mechanisms must be determined after consultation with employers’ and workers’ organizations.

With regard to the terms “appropriate mechanisms”, the Legal Adviser of the ILO indicated that “the draft instruments did not define the nature of the mechanisms but required the establishment or designation of a national mechanism”.⁷⁶ With regard to the term “monitoring”, the Office recalled that it has the sense of “overseeing implementation, and the monitoring body could involve representation from civil society”. The committees set up under the United Nations Convention on the Rights of the Child or national committees or advisory bodies on child labour were mentioned as examples by certain countries. “The United Nations Committee on the Rights of the Child suggests that the reference be to a multidisciplinary mechanism.”⁷⁷

Paragraph 8 of Recommendation No. 190 indicates that Members should establish or designate appropriate national mechanisms to monitor the implementation of national

⁷⁵ *ibid.*, pp. 65 and 66.

⁷⁶ *Record of proceedings*, 1999, op. cit., para. 194, p. 19/42.

⁷⁷ Report IV(2A), 1999, op. cit., p. 80.

provisions for the prohibition and elimination of the worst forms of child labour. It also indicates that such designation should be made after consultation with employers' and workers' organizations.

In accordance with Article 6 of Convention No. 182, governments are under the obligation to "design and implement programmes of action to eliminate as a priority the worst forms of child labour". Moreover, such "programmes of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organizations, taking into consideration the views of other concerned groups as appropriate".

With regard to the terms "other concerned groups", neither Convention No. 182 nor Recommendation No. 190 specify their meaning. However, these could "for example, be parents' organizations, children's associations or organizations for the defence of children". Article 6, paragraph 2, takes into account the tripartite role of the constituents and accords them priority in the consultation process.⁷⁸

Moreover, Paragraph 2 of Recommendation No. 190 indicates that the programmes of action referred to in Article 6 of the Convention should be designed and implemented as a matter of urgency. The relevant government institutions and employers' and workers' organizations should be consulted, and the views of the children directly affected by the worst forms of child labour, their families and, as appropriate, other concerned groups committed to the aims of the Convention and the Recommendation, should be taken into consideration. The programmes should aim at, inter alia: identifying and denouncing the worst forms of child labour; preventing the engagement of children in or removing them from the worst forms of child labour; giving special attention to younger children and the girl child; identifying, reaching out to and working with communities where children are at special risk; and informing, sensitizing and mobilizing public opinion and concerned groups.

Article 7, paragraph 1, of Convention No. 182 provides that member States which ratify the Convention shall "take all necessary measures to ensure the effective implementation and enforcement of the provisions [...] including the provision and application of penal sanctions or, as appropriate, other sanctions". The objective is for sanctions to be imposed which may be, penal or of any other nature as appropriate.⁷⁹ The Convention does not indicate the types of sanctions. As noted in the case of Convention No. 138, the necessary measures may take several forms. Fines, sentences of imprisonment, temporary or permanent prohibition from exercising a specific activity, or damages with interest are illustrations of the types of sanctions which may be taken by a member State.

Paragraph 12 of Recommendation No. 190 indicates that Members should provide that all forms of slavery or practices similar to slavery, prostitution or the production of pornography or pornographic performances, and the use, procuring or offering of a child for illicit activities, as set out in Convention No. 182, are criminal offences. Paragraph 13 of the Recommendation suggests that penalties including, where appropriate, criminal penalties should be applied for violations of the national provisions for the prohibition and

⁷⁸ *Record of proceedings*, 1999, op. cit., para. 143, p. 19/33. A number of other Conventions, such as the Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), and the Minimum Wage Fixing Convention, 1970 (No. 131), include similar references to other concerned groups or competent persons.

⁷⁹ Report IV(2A), 1999, op. cit., Office commentary, p. 98.

elimination of any type of hazardous work referred to in Article 3(d) of Convention No. 182.

Under Article 7, paragraph 2, of Convention No. 182, each Member “shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:”

- prevent the engagement of children in the worst forms of child labour;
- provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;
- ensure access to free basic education, and, wherever possible, appropriate, vocational training, for all children removed from the worst forms of child labour;
- identify and reach out to children at special risk;
- take account of the special situation of girls.

It is important to specify the meaning of the phrase “take effective and time-bound measures”. As noted above,⁸⁰ to proceed immediately implies taking immediate measures without waiting for progress on achieving longer-term goals. However, effective elimination would seem to require both immediate and time-bound measures. Immediate measures could include, for example, removal from intolerable situations. For example, as soon as children are found in bondage, in a brothel or deep in a mine, it is necessary to take action and emergency measures are required until assistance and rehabilitation can be provided to them. Other measures could then be taken, for example with a view to prevention, which could require a certain time frame for implementation and should be time-bound. Prevention, rehabilitation and social reintegration, as called for in Article 7, could give rise to immediate and time-bound action.⁸¹

Finally, article 8 of the Convention provides that member States which ratify it shall take appropriate steps to assist one another in giving effect to the provisions of the Convention “through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education”. With regard to the obligation for member States “to assist one another”, the Legal Adviser of the ILO, in response to a question raised by a Government member of the Conference Committee “stressed the idea of partnership contained in the spirit of the Article”. He emphasized that “no obligation would arise from either proposal for ratifying member States in relation to a particular level or form of cooperation or assistance. There was only an obligation to take appropriate steps towards enhanced international partnerships, and it was up to individual States to decide on those appropriate steps.”⁸² A Government member of the Conference Committee, referring to the comments of the Legal Adviser, indicated that the term “partnerships” used by the Legal Adviser meant “working together” and that Article 8 encouraged member States to work together to meet the goals of the Convention.⁸³

⁸⁰ See the comments concerning Art. 1 of Convention No. 182.

⁸¹ Report IV(2A), 1999, op. cit., pp. 34 and 35.

⁸² *Record of proceedings*, 1999, op. cit., para. 242, p. 19/49.

⁸³ *ibid*, para. 243, p. 19/49.

Paragraphs 11 and 16 of Recommendation No. 190 provide indications on the manner in which member States could cooperate and/or assist in international efforts to prohibit and eliminate the worst forms of child labour. For this purpose, they could: gather and exchange information concerning criminal offences, including those involving international networks; detect and prosecute those involved in the sale and trafficking of children, or in the use, procuring or offering of children for illicit activities, for prostitution, for the production of pornography or for pornographic performances; and register perpetrators of such offences. Such international cooperation and/or assistance should include: mobilizing resources for national and international programmes; mutual legal assistance; technical assistance including the exchange of information; and support for social and economic development, poverty eradication programmes and universal education.

II. Conditions of employment

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77)	43	The Governing Body has invited member States to contemplate: (i) ratifying Conventions Nos. 77, 78 and 124 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay the ratification of these Conventions; and (ii) the need for a full or partial revision of these Conventions, including their possible consolidation.
Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78)	39	
Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124)	41	
Medical Examination of Young Persons Recommendation, 1946 (No. 79)	—	The Governing Body has invited member States to give effect to Recommendations Nos. 79 and 125 and to inform the Office of any obstacles or difficulties encountered in the implementation of these Recommendations.
Conditions of Employment of Young Persons (Underground Work) Recommendation, 1965 (No. 125)	—	
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Night Work of Young Persons (Industry) Convention, 1919 (No. 6)	51	The Governing Body has decided upon the revision of Conventions Nos. 6, 79 and 90 and Recommendations Nos. 14 and 80. These revisions are included in the item on night work of children and young persons which is among the proposals for inclusion on the agenda of the Conference.
Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 79)	20	
Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90)	50	
Night Work of Children and Young Persons (Agriculture) Recommendation, 1921 (No. 14)	—	
Night Work of Young Persons (Non-Industrial Occupations) Recommendation, 1946 (No. 80)	—	

Outdated instruments	(Instruments which are no longer up to date; this category includes Conventions that member States are no longer invited to ratify and Recommendations whose implementation is no longer encouraged.)
In the area of conditions of employment and work of children and young persons, no instrument has been considered as outdated by the Governing Body.	

1. Content of the standards

Certain ILO Conventions provide that in specific sectors, before being admitted to employment, young persons must undergo a medical examination for fitness for employment with a view to limiting the risks inherent in the work that they are to perform. They set a minimum age up to which it is compulsory for a young person to undergo such an examination and provide for regular medical examinations up to a certain age.

1.1. Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77), and Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78)

Scope of application of Conventions Nos. 77 and 78

Convention No. 77 applies to children and young persons employed or working in, or in connection with, industrial enterprises, whether public or private.⁸⁴ For the purposes of the Convention, industrial enterprises are considered to include: mines, quarries and other works for the extraction of minerals from the earth; enterprises in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including enterprises engaged in ship building or in the generation, transformation or transmission of electricity or motive power of any kind; enterprises engaged in building or civil engineering work, including constructional, repair, maintenance, alteration and demolition work; and enterprises engaged in the transport of passengers or goods by road, rail, inland waterway or air, including the handling of goods at docks, quays, wharves, warehouses or airports.

Convention No. 78 applies to children and young persons employed for wages, or working directly or indirectly for gain, in non-industrial occupations, which mean all occupations other than those recognized by the competent authority as industrial, agricultural or maritime occupations.⁸⁵ Convention No. 78 envisages the possibility of exempting from its application work which is recognized as not being dangerous to the health of children or young persons in family enterprises in which only parents and their children or wards are employed.⁸⁶

⁸⁴ Art. 1, para. 1, of Convention No. 77.

⁸⁵ Art. 1, paras. 1 and 2, of Convention No. 78.

⁸⁶ Art. 1, para. 4, of Convention No. 78.

Medical examination

Although they apply to different sectors, Conventions Nos. 77 and 78 contain analogous provisions which make it compulsory for young persons to undergo a medical examination for fitness for employment before they are admitted to employment.

Thorough medical examination

Conventions No. 77 and 78 provide that children and young persons under 18 years of age shall not be admitted to employment by an industrial enterprise or in non-industrial occupations unless they have been found fit for the work on which they are to be employed by a thorough medical examination.⁸⁷ The medical examination for fitness for employment has to be carried out by a qualified physician approved by the competent authority and certified either by a medical certificate or by an endorsement on the work permit or in the workbook.⁸⁸ In occupations which involve high health risks, the medical examination for fitness for employment shall be required until at least the age of 21 years.⁸⁹

The medical examination shall not involve the child or young person, or his or her parents in any expense.⁹⁰

Repetition of medical examinations

The fitness of children or young persons for the employment in which they are engaged shall be subject to medical supervision until they have attained the age of 18 years.⁹¹ The continued employment of children or young persons under 18 years of age shall be subject to the repetition of medical examinations at intervals of not more than one year.⁹² In the same way as for the medical examination for fitness for employment, in occupations which involve high health risks, periodical medical re-examinations have to be required until at least the age of 21 years.⁹³

⁸⁷ Art. 2, para. 1, of Conventions Nos. 77 and 78.

⁸⁸ Art. 2, para. 2, of Conventions Nos. 77 and 78. Under the terms of para. 3, the document certifying fitness for employment may be issued subject to specified conditions of employment and issued for a specified job or for a group of jobs or occupations involving similar health risks which have been classified as a group by the authority responsible for the enforcement of the laws and regulations concerning medical examinations for fitness for employment.

⁸⁹ Art. 4, para. 1, of Conventions Nos. 77 and 78. Art. 4, para. 2, of the Conventions provides that national laws or regulations shall either specify, or empower an appropriate authority to specify, the occupations or categories of occupations in which medical examination for fitness for employment shall be required until at least the age of 21 years.

⁹⁰ Art. 5 of Conventions Nos. 77 and 78.

⁹¹ Art. 3, para. 1, of Conventions Nos. 77 and 78.

⁹² Art. 3, para. 2, of Conventions Nos. 77 and 78.

⁹³ Art. 4, para. 1, of Conventions Nos. 77 and 78. Under Art. 4, para. 2, of Convention No. 78, national laws or regulations shall either specify or empower an appropriate authority to specify, the occupations or categories of occupations in which medical examination and re-examination for fitness for employment shall be required until at least the age of 21 years.

With regard to medical re-examinations, national laws or regulations shall make provision for the special circumstances in which a medical re-examination shall be required in addition to the annual examination or at more frequent intervals in order to ensure effective supervision in respect of the risks involved in the occupation and of the state of health of the child or young person as shown by previous examinations; or empower the competent authority to require medical re-examinations in exceptional cases.⁹⁴

Implementation of the instruments under examination

Although Convention No. 77 applies to industrial work and Convention No. 78 to non-industrial occupations, several of their provisions are similar. Reference is made below firstly to the comments of the Committee of Experts on the provisions of the Conventions which are similar, and then on certain aspects which are related to each Convention.

Similar provisions of Conventions Nos. 77 and 78

Medical examination for fitness for employment for children and young persons under 18 years of age

In most cases, the Committee of Experts has reminded Governments that the medical examination for fitness for employment is obligatory for children and young persons under 18 years of age. In addition, it has emphasized that the fitness of children and young persons must be determined by means of medical examinations until the age of 18.

It has also drawn the attention of Governments to the fact that the medical examination must be thorough and go beyond the issuing of a mere certificate of good health.

Medical examination for fitness for employment up to the age of 21 years

The Committee of Experts has frequently emphasized that, in occupations involving high health risks, medical examinations for fitness for employment and re-examinations must be carried out up to the age of 21 years. Moreover, it has recalled that the occupations and categories of occupations in which medical examinations for fitness for employment shall be required until at least the age of 21 years have to be specified by national laws or regulations.

Provision of medical examinations free of charge

In certain cases, the Committee of Experts has emphasized that the medical examinations required by Conventions Nos. 77 and 78 shall not involve any expense for the children or young persons or their parents.

⁹⁴ Art. 3, para. 3, of Conventions Nos. 77 and 78.

Measures for vocational guidance and physical and vocational rehabilitation

In several cases, the Committee of Experts has recalled that appropriate measures have to be taken for the vocational guidance and physical and vocational rehabilitation of children and young persons found by medical examination to be unsuited to certain types of work or to have physical handicaps or limitations.

Convention No. 77

In contrast with Convention No. 78, no exceptions from its provisions are envisaged by Convention No. 77. In certain cases, the Committee of Experts has therefore recalled that the Convention applies to all industrial enterprises, irrespective of the number of workers that they employ.

Convention No. 78

Employment covered by the Convention

In certain cases, the Committee of Experts has emphasized that, apart from the possibilities of exempting from the application of the Convention employment in family enterprises in which only parents and their children or wards are occupied on work which is recognized as not being dangerous to the health of children or young persons, no other employment may be excluded, including domestic service.

Supervising the application of the system of medical examinations

In the great majority of cases, the Committee of Experts has recalled that identification measures are required to monitor the application of the system of medical examinations for fitness for employment of children and young persons working on their own account or for their parents in itinerant trading or in any other occupation carried on in the streets or in places to which the public has access.

**1.2. Medical Examination of Young Persons
(Underground Work) Convention,
1965 (No. 124)**

Scope of application of Convention No. 124

Convention No. 124 applies to employment or work underground in mines, including employment or work underground in quarries.⁹⁵ For the purpose of the application of the Convention, the term “mine” means any enterprise, whether public or private, for the extraction of any substance from under the surface of the earth by means involving the employment of persons underground.⁹⁶

⁹⁵ Art. 1, paras. 1 and 2, of Convention No. 124.

⁹⁶ Art. 1, para. 1.

Medical examination

In the same way as Conventions Nos. 77 and 78, provision is also made in Convention No. 124 that a thorough medical examination, and periodic re-examinations at intervals of not more than one year, for fitness for employment shall be required for employment or work underground in mines.⁹⁷ These examinations are required for persons under 21 years of age. Nevertheless, alternative arrangements for medical supervision of young persons between 18 and 21 years are permitted where the competent authority is satisfied on medical advice that such arrangements are at least equivalent to those required, provided that the most representative organizations or employers and workers concerned have been consulted and have reached agreement.⁹⁸ The medical examinations have to be carried out under the responsibility and supervision of a qualified physician approved by the competent authority and have to be certified in an appropriate manner.⁹⁹

As envisaged in Conventions Nos. 77 and 78, the medical examinations shall not involve the young persons, their parents or guardians, in any expense.¹⁰⁰

Implementation of the instruments under examination

Medical examination for fitness for employment up to the age of 21 years

On several occasions, the Committee of Experts has drawn the attention of governments to the fact that Convention No. 124 requires a thorough medical examination for fitness for employment of persons under 21 years of age with a view to their employment or work underground in mines.

Medical examinations

On several occasions, the Committee of Experts has recalled that medical examinations have to be carried out under the responsibility and supervision of a qualified physician and certified in an appropriate manner. In the great majority of cases, it has also drawn the attention of governments to the fact that an X-ray film of the lungs must be required on the occasion of the initial medical examination and, when regarded as medically necessary, on the occasion of subsequent re-examinations.

Measures necessary for the enforcement of the Convention

In most cases, the Committee of Experts has recalled that records have to be maintained by employers and that the latter must make them available to inspectors. The records have to indicate the duly certified date of birth, the nature of the occupation and a certificate attesting fitness for employment. The Committee of Experts has sometimes drawn attention to the fact that records have to be made available to workers' representatives, at their request.

⁹⁷ Art. 2, para. 1.

⁹⁸ Art. 2, para. 2.

⁹⁹ Art. 3, para. 1.

¹⁰⁰ Art. 3, para. 3.

*Consultation of organizations of
employers and workers*

On certain occasions, the Committee of Experts has drawn the attention of governments to the fact that the Convention requires that organizations of employers and workers be consulted before determining general policies for the implementation of the Convention and before adopting regulations to give effect to it.

Chapter 6

Employment policy

E. Sims

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Employment Policy Convention, 1964 (No. 122)	92	Priority Convention
Employment Policy Recommendation, 1964 (No. 122)	–	This Recommendation is related to a priority Convention and is considered up to date.
Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169)	–	This Recommendation is related to a priority Convention and is considered up to date.
Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189)	–	This Recommendation was adopted after 1985 and is considered up to date.
Vocational Rehabilitation (Disabled) Recommendation, 1955 (No. 99)	–	The Governing Body has invited member States to give effect to Recommendation No. 99.
Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)	73	The Governing Body has invited member States to contemplate ratifying Convention No. 159.
Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168)	–	The Governing Body has invited member States to give effect to Recommendation No. 168.
Private Employment Agencies Convention, 1997 (No. 181)	10	This Convention was adopted after 1985 and is considered up to date.
Private Employment Agencies Recommendation, 1997 (No. 188)	–	This Recommendation was adopted after 1985 and is considered up to date.
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Cooperatives (Developing Countries) Recommendation, 1966 (No. 127)	–	The revision of Recommendation No. 127 has been the subject of a first discussion. The second discussion will take place at the 90th Session (2002) of the Conference.
Requests for information (Instruments for which the Governing Body has confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments or on specific issues.)		
Employment (Transition from War to Peace) Recommendation, 1944 (No. 71)	–	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendation No. 71.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Unemployment Convention, 1919 (No. 2)	52	The Governing Body has decided on the maintenance of the status quo with regard to Convention No. 2.
Employment Service Convention, 1948 (No. 88)	80	The Governing Body has decided on the maintenance of the status quo with regard to Convention No. 88.
Employment Service Recommendation, 1948 (No. 83)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 83.
Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96)	32	The Governing Body has invited the States parties to Convention No. 96 to contemplate ratifying, as appropriate, the Private Employment Agencies Convention, 1997 (No. 181), the ratification of which would, ipso jure, involve the immediate denunciation of Convention No. 96.

Social Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82)	4	The Governing Body has requested the Office to enter into consultations with the States parties to Convention No. 82 in order to determine whether or not its provisions are being applied in the framework of other Conventions in the non-metropolitan territories concerned. It has also deferred the decision to shelve Convention No. 82 pending receipt of the relevant information from the Office on the results of its consultation.
Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117)	32	The Governing Body has decided on the maintenance of the status quo with regard to Convention No. 117.
Special Youth Schemes Recommendation, 1970 (No. 136)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 136.
Older Workers Recommendation, 1980 (No. 162)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 162.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Fee-Charging Employment Agencies Convention, 1933 (No. 34)	3	The Governing Body has decided to shelve Convention No. 34 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying either the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), or the Private Employment Agencies Convention, 1997 (No. 181). The Governing Body has noted that Recommendations Nos. 42, 1, 11, 45, 50, 51, 72, and 73 are obsolete. An item on the withdrawal of these Recommendations is on the agenda of the 90th Session (2002) of the Conference.
Employment Agencies Recommendation, 1933 (No. 42)	–	
Unemployment Recommendation, 1919 (No. 1)	–	
Unemployment (Agriculture) Recommendation, 1921 (No. 11)	–	
Unemployment (Young Persons) Recommendation, 1935 (No. 45)	–	
Public Works (International Co-operation) Recommendation, 1937 (No. 50)	–	
Public Works (National Planning) Recommendation, 1937 (No. 51)	–	
Employment Service Recommendation, 1944 (No. 72)	–	
Public Works (National Planning) Recommendation, 1944 (No. 73)	–	

The employment-related Conventions and Recommendations pertain to employment policy, human resources development and training (HRD), placement services and security of employment. Many employment-related instruments are promotional in nature. Promotional Conventions differ from other Conventions in that they prescribe the ends a government should attain, but do not lay down precise means, other than methodology and some general safeguards.

I. Content of the standards on employment

Employment policy

The Employment Policy Convention, 1964 (No. 122), contains the following provisions:

- With a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.
- The said policy shall aim at ensuring that:
 - (a) there is work for all who are available for and seeking work;
 - (b) such work is as productive as possible;
 - (c) there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.
- The said policy shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices.
- Each Member shall, by such methods and to such extent as may be appropriate under national conditions:
 - (a) decide on and keep under review, within the framework of a coordinated economic and social policy, the measures to be adopted for attaining the objectives specified in Article 1 of the Convention;
 - (b) take such steps as may be needed, including when appropriate the establishment of programmes, for the application of these measures.
- In the application of this Convention, representatives of the persons affected by the measures to be taken, and in particular representatives of employers and workers, shall be consulted concerning employment policies, with a view to taking fully into account their experience and views and securing their full cooperation in formulating and enlisting support for such policies.

The Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169), develops the principles set forth in Convention No. 122 as follows:

- The policies, plans and programmes referred to in this Recommendation should aim at eliminating any discrimination and ensuring for all workers equal opportunity and treatment in respect of access to employment, conditions of employment, wages and income, vocational guidance and training and career development.
- Members should take measures to combat effectively illegal employment, that is employment which does not comply with the requirements of national laws, regulations and practice.

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- Members should take measures to enable the progressive transfer of workers from the informal sector, where it exists, to the formal sector to take place.
 - Members should adopt policies and take measures which, while taking account of national law and practice, should:
 - (a) facilitate adjustment to structural change at the global, sectoral and enterprise levels and the re-employment of workers who have lost their jobs as a result of structural and technological changes; and
 - (b) safeguard the employment or facilitate the re-employment of workers affected in the case of sale, transfer, closure or relocation of a company, establishment or equipment.
 - In accordance with national law and practice, the methods of giving effect to employment policies might include negotiating collective agreements on questions having a bearing on employment such as:
 - (a) the promotion and safeguarding of employment;
 - (b) the economic and social consequences of restructuring and rationalization of branches of economic activity and undertakings;
 - (c) the reorganization and reduction of working time;
 - (d) the protection of particular groups; and
 - (e) information on economic, financial and employment issues.
 - Members should, after consultation with the organizations of employers and workers, take effective measures to encourage multinational enterprises to undertake and promote in particular the employment policies set forth in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1977, and to ensure that negative effects of the investments of multinational enterprises on employment are avoided and that positive effects are encouraged.
 - In view of increasing interdependence within the world economy, Members should, in addition to the measures taken at the national level, strengthen international cooperation in order to ensure the success of the fight against unemployment.

The Recommendation also contains provisions on population policy, employment of youth and disadvantaged groups and persons, technology policies, the informal sector, small enterprises, regional development policies, public investment and special public works programmes, international economic cooperation and international migration and employment.

Comments on the ILO's employment policy standards

The Employment Policy Convention is very brief. It is intended to focus on the issue of employment promotion rather than to specify the measures to be taken.

Governments should aim to promote full, productive and freely chosen employment. An employment policy should ensure that there is work for all who are available for and seeking work. There is no universal indicator of full employment, but for the purposes of the Convention a government should strive to decrease unemployment and simultaneously increase the participation rate (the percentage of the adult working-age population which is

economically active). A decrease in the unemployment rate alone does not necessarily signal a successful employment policy; after all, one way to decrease unemployment is to let jobseekers get so discouraged that they give up looking for work, which lowers the participation rate. This is why the unemployment rate and participation rate should always be evaluated together.

Productive employment refers to work that contributes in some way to economic or social development, rather than meaningless work such as digging ditches and filling them in again. This requirement is important for both society and the individual. No society can afford to waste the talents and abilities of its citizens. Similarly, every economically active person has the potential to contribute to society and the psychological and social need to do so.

Employment must be freely chosen. At the most fundamental level, this means that a person cannot be forced to work, or to perform a particular type of work. But it also means that a person should, broadly speaking, be allowed to choose his or her trade or profession. This presupposes government provision of universal general education and open access to higher education and training for those who qualify, based on general ability only.

Does a government violate the requirement that employment be freely chosen if it requires people receiving unemployment benefits or income support to justify refusing a job offer or to participate in a training programme? The Committee of Experts has indicated that “freely chosen” employment does not imply that an individual has the right to unconditional income support during periods of unemployment. For the first 26 weeks of benefits, the government must pay unemployment insurance benefits as of right, if the claimant is entitled to them, without any conditioning of benefits. This decision is based on the provisions of the Social Security (Minimum Standards) Convention, 1952 (No. 102) (see Chapter 11 for further information). However, after the initial 26-week period, the government may place conditions on continued receipt of benefits or income support if it so chooses. This dual approach is designed to give governments room to balance two competing interests. On the one hand, people need time to search for the job that is most appropriate for them, which is something that they are in the best position to know. Society also has an interest in encouraging people to use pre-existing skills and training so that it can save scarce training resources for those with little or no vocational training. On the other hand, there is a very strong likelihood that people who stay out of work for a long period of time will remain unemployed. Governments have a strong and legitimate interest in preventing long-term unemployment to the greatest extent possible. Conditioning benefits is one way of doing this. Therefore, governments should leave jobseekers a reasonable period of time, usually at least six months, to look for a job unhindered while receiving unemployment benefits or income support. But after this period, governments may require jobseekers to take certain action, such as participating in an apprenticeship or, training programme, in order to continue receiving benefits. In no case, though, may they threaten or physically coerce a person to take a job.

Similarly, governments may not coerce an employer to hire a particular person. Employers must be free to choose their staff as they see fit. Governments may only encourage employers to hire unemployed people through positive incentives, such as tax breaks, reduced social security contributions or subsidies. However, governments *must* prohibit employers from discriminating against certain categories of persons when hiring, including on grounds of sex, race, colour, religion, national extraction, social origin and political opinion. And governments *may* set quotas on hiring certain categories of persons who have historically been discriminated against.

Full, productive and freely chosen employment is central to human dignity. An employed person can become financially independent, participate more fully in society through work and help his or her family to secure a decent standard of living. There is also

dignity and autonomy in choosing for oneself how to make the most of one's talents, rather than being required to perform a particular type of work.

There are also important economic reasons to promote full, productive and freely chosen employment. Everyone has talents and abilities, and many jobs, particularly ones that contribute more to economic growth, require skills. An economic environment that promotes full, productive and freely chosen employment through education, training and non-discriminatory labour markets ensures the maximum individual, social and economic benefit from these talents.

How will a government know when it achieves full, productive and freely chosen employment? These aims should be thought of as guides for the direction a labour market should be moving, rather than as ends a government must obtain, hence the promotional nature of the Convention. Regardless of the level of development in a country, there should be a long-term trend of decreasing rates of unemployment (to a certain minimum) and increasing participation rates, although occasional deviations from these trends are to be expected.

Governments are given very wide discretion in choosing which policies and programmes are most appropriate for their economic and social conditions. However, policies and programmes should take into consideration the stage and level of economic development, and the relationship between employment and other economic and social objectives. Governments should develop their employment policies and programmes within the context of a "coordinated economic and social policy." This implies that employment promotion is the responsibility of all ministries whose work has an impact on employment, directly or indirectly, and not just the Ministry of Labour. Ministries of particular importance include those dealing with fiscal and monetary policy, trade and technology, and education and training. Governments should provide the relevant ministries with appropriate guidance, support and incentives to ensure that they give high priority to employment promotion in setting their respective policies and programmes. They also should ensure that the efforts of the various ministries are well coordinated to avoid conflicts.

Other groups have a right and responsibility to be involved in developing employment policies and programmes. These include representative workers' and employers' organizations, and representatives of other groups which are potentially affected by the policies and programmes, such as workers in rural areas and the informal economy. These groups possess information about the labour market that is essential for any successful employment policy, and they are the key actors in effectively carrying out policies and programmes. Therefore, any government that is serious about promoting employment cannot afford not to consult with these groups.

There are three important stages in developing a system of employment promotion:

- (1) *Setting policy.* This is the stage at which the government decides on priorities and strategies.
- (2) *Developing well-targeted programmes that support the priorities and strategies chosen.* Poorly designed programmes may negate the policy they are supposed to carry out, such as a government that adopts a policy to promote employment in rural areas, but concentrates training, expertise and other resources in urban areas, thereby inducing rural populations to migrate.
- (3) *Evaluating policies and programmes.* This is the key to a successful employment strategy. Evaluations let a government know if it is on the right track and provide information on how to fine tune programmes headed in the right direction. Evaluation

is an ongoing process, even for well-established programmes. Circumstances change and research and thinking on particular issues improve, so evaluations need to be regular and systematic.

All three phases require two key factors: statistical information and broad consultation with workers and employers. Labour statistics are essential for the formulation of effective policies – without them it is not possible to have a clear idea of what the labour market looks like, how it is likely to change in the coming decades, what problems exist and how well programmes are performing. However, many governments face tremendous obstacles to developing a reliable database on labour statistics, such as a lack of statisticians and a widely dispersed population without easy means of communication.

Representatives of employers' and workers' organizations, and of other potentially affected groups, should be consulted at all three stages. These groups possess valuable information: they are in the best position to know what programmes are feasible and how best to carry them out; and they can help governments anticipate potential problems. The information the groups possess is particularly valuable at the evaluation stage. A government can rely on labour statistics to estimate whether, after implementing policies and programmes, there is an improvement in the labour market. But it cannot discern very clearly the degree to which the policies and programmes have contributed to the improvement or merely coincided with it. Good quality information from the groups affected will indicate more clearly the actual impact and give a better idea of *why* a particular policy or programme has been a success or failure.

Rehabilitation and vocational training

The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), in Part I defines the term “disabled person” and the concept of vocational rehabilitation. It specifies that the latter shall be made available to all categories of persons with disabilities. Part II lays down the principles of a national policy for the vocational rehabilitation and employment of persons with disabilities. The policy must ensure that appropriate measures are made available to all categories of persons with disabilities and must be based on the principle of equality of opportunity between workers with disabilities and other workers, and equality of opportunity and treatment between men and women workers with disabilities. It also provides for consultation on the implementation of the policy with the representative organizations of employers and workers, as well as with representative organizations of and for persons with disabilities. Part III deals with the action to be taken to develop vocational rehabilitation and employment services for persons with disabilities.

The Convention requires Members to take the necessary steps to give effect to the above provisions. It provides for the setting up and evaluation of vocational guidance, vocational training, placement and employment services for persons with disabilities and recommends the use for this purpose of services existing for workers generally. Moreover, vocational rehabilitation and employment services for persons with disabilities should be established in rural areas and remote communities. Finally, the Convention requires Members to ensure the training and availability of rehabilitation councillors and qualified staff responsible for the vocational guidance, vocational training, placement and employment of persons with disabilities.

The Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168), is divided into nine parts. Part I deals with definitions and scope, in the same way as the Convention. Part II lists specific measures, both direct and indirect, that should be taken to promote the rehabilitation and employment of persons

with disabilities. Emphasis is placed on the purpose of such measures, which is to enable these persons to become integrated or reintegrated in ordinary working life. Part III recommends community participation (organizations of employers, workers and persons with disabilities) in organizing and operating vocational rehabilitation and employment services for persons with disabilities. Part IV suggests specific measures to establish vocational rehabilitation services in rural areas and remote communities. Part V covers the training and further training of vocational rehabilitation staff and suggests that persons engaged in the vocational guidance, vocational training and placement of workers generally should have an adequate knowledge of disabilities and their limiting effects. Parts VI and VII outline the contribution that can be made by employers' and workers' organizations, as well as persons with disabilities and their organizations, to the development of vocational rehabilitation services. In particular, it is recommended that employers' and workers' organizations, on the one hand, promote the integration or reintegration of persons with disabilities in enterprises and, on the other, raise the problem of their rehabilitation at trade union meetings. Part VIII refers to social security schemes and the ILO instruments on social security and invites Members to bring national social security provisions into line with standards providing for the vocational rehabilitation and employment of persons with disabilities. Finally, Part IX calls for coordination between vocational rehabilitation policies and programmes and social and economic development programmes.

Comments on the ILO's standards on the rehabilitation and employment of persons with disabilities

The Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) and Recommendation (No. 168), 1983, combine the principles established in the employment policy and human resources development Conventions to help persons with disabilities to obtain gainful employment. Because of the special needs of persons with disabilities, the Convention also includes the following obligations. Governments should provide physical rehabilitation services. Persons with disabilities need rehabilitation services to help them make the most of their capabilities as workers and as members of society. Governments should strive to integrate workers with disabilities into the mainstream labour market as much as possible. To this end, governments should also make efforts to adapt existing vocational training and placement services, rather than establishing a separate system for persons with disabilities. However, the Convention recognizes that specialized services and sheltered workshops play an important role for some persons with disabilities. More generally, governments should strive to integrate persons with disabilities into mainstream society by removing physical barriers to movement and communication and by challenging social barriers, such as popular misconceptions of disability, through education and information campaigns.

Governments should pay special attention to the needs of disabled persons in rural areas. In developing countries, up to 80 per cent of persons with disabilities live outside urban areas. Yet these people typically do not receive any services, due to the high cost of setting up services for geographically dispersed clients. Mobile rehabilitation and counselling units are one example of creative solutions to this problem which governments are encouraged to pursue.

Lastly, governments should ensure that staff members are specially trained to meet adequately their clients' more complex needs.

The Committee of Experts has noted substantial progress in addressing the needs of persons with disabilities in regions that have made special efforts to foster cross-country collaboration. The Latin American Group for Professional Rehabilitation (GLARP) has facilitated the success of numerous countries in developing innovative programmes for

rehabilitation and integration into the labour market, through the pooling of information and some resources. European Union assistance and sharing of information has also contributed substantially to improvements in several Eastern European countries. The Committee of Experts has noted with interest these intergovernmental cooperation efforts and has encouraged other member States to explore means of sharing ideas and resources. The rehabilitation and employment of persons with disabilities is an important issue that poses challenges for all governments, which have much to learn from each other's experiences.

With regard to the standards addressed particularly at persons with disabilities, the main problems of application pertain to attitudes towards such persons. Certain employers still mistakenly assume that a person with a disability is not able to contribute to the workplace. Or they may be willing to hire a person with a disability, but the cost of adapting the workplace may be too great without assistance from the government. Many governments also feel that they must focus first on employment promotion in general because they consider that the cost of rehabilitation and creating better access for persons with disabilities is too high. Other governments lack the technical resources and specially trained staff to implement effectively employment promotion policies and programmes for persons with disabilities.

Special categories of workers (young and older workers)

The Older Workers Recommendation, 1980 (No. 162), provides that older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with other workers as regards, in particular:

- (a) access to vocational guidance and placement services;
- (b) access, taking account of their personal skills, experience and qualifications, to:
 - (i) employment of their choice in both the public and private sectors: provided that in exceptional cases age limits may be set because of special requirements, conditions or rules of certain types of employment;
 - (ii) vocational training facilities, in particular further training and retraining;
 - (iii) paid educational leave, in particular for the purpose of training and trade union education;
 - (iv) promotion and eligibility for distribution of tasks;
- (c) employment security, subject to national law and practice relating to termination of employment and subject to the results of the examination referred to in Paragraph 22 of the Recommendation;
- (d) remuneration for work of equal value;
- (e) social security measures and welfare benefits;
- (f) conditions of work, including occupational safety and health measures;
- (g) access to housing, social services and health institutions, in particular when this access is related to occupational activity or employment.

Moreover, all appropriate measures should be taken to ensure that guidance, training and placement services provide older workers with the facilities, advice and assistance they may need to enable them to take full advantage of equality of opportunity and treatment.

The Recommendation advocates measures designed to:

- (a) remedy those conditions of work and of the working environment that are likely to hasten the ageing process;
- (b) modify the forms of work organization and working time which lead to stress or to an excessive pace of work in relation to the possibilities of the workers concerned, in particular by limiting overtime;
- (c) adapt the job and its content to the worker by recourse to all available technical means and, in particular, to ergonomic principles, so as to preserve health, prevent accidents and maintain working capacity;
- (d) provide for a more systematic supervision of the workers' state of health;
- (e) provide for such supervision on the job as is appropriate for preserving the workers' safety and health.

Among the measures to give effect to subparagraph (b) above, the following might be taken:

- (a) reducing the normal daily and weekly hours of work of older workers employed on arduous, hazardous or unhealthy work;
- (b) promoting the gradual reduction of hours of work, during a prescribed period prior to the date on which they reach the age normally qualifying workers for an old-age benefit, of all older workers who request such reduction;
- (c) increasing annual holidays with pay on the basis of length of service or of age;
- (d) enabling older workers to organize their work time and leisure to suit their convenience, particularly by facilitating their part-time employment and providing for flexible working hours;
- (e) facilitating the assignment of older workers to jobs performed during normal daytime working hours after a certain number of years of assignment to continuous or semi-continuous shift work.

Every effort should be made to meet the difficulties encountered by older workers through guidance and training measures such as those provided for in Paragraph 50 of the Human Resources Development Recommendation, 1975 (No. 150).

With the participation of the representative organizations of employers and workers, measures should be taken with a view to applying to older workers, wherever possible, systems of remuneration adapted to their needs.

These measures might include:

- (a) use of systems of remuneration that take account not only of speed of performance but also of know-how and experience;
- (b) the transfer of older workers from work paid by results to work paid by time.

Measures might also be taken to make available to older workers if they so desire other employment opportunities in their own or in another occupation in which they can make use of their talents and experience, as far as possible without loss of earnings.

In cases of reduction of the workforce, particularly in declining industries, special efforts should be made to take account of the specific needs of older workers, for instance by facilitating retraining for other industries, by providing assistance in securing new employment or by providing adequate income protection or adequate financial compensation.

Special efforts should be made to facilitate the entry or re-entry into employment of older persons seeking work after having been out of employment due to their family responsibilities.

Finally, the Recommendation contains a section on preparation for and access to retirement.

Moreover, in adopting the Special Youth Schemes Recommendation, 1970 (No. 136), the Conference decided that participation in such schemes should be voluntary. However, it considered that, in the specific context of programmes with the dual objective of providing an occupation and training to participants and contributing to development (but which should in no case be permanent education, training or employment arrangements), exceptions to the principle of voluntary participation could be permitted only by legislative action and where there is full compliance with the terms of the Conventions on forced labour and employment policy. The exceptions may include compulsory education and training for unemployed young people. In these cases, the obligation to participate should be accompanied, to the greatest possible extent, by a free choice among different available forms of activity and different regions.

Comments on the ILO's instruments on special categories of workers

Several instruments exist for the promotion of employment of particular categories of workers who, due to their special circumstances or those of their sector, require special standards.

Older workers are one of the most vulnerable groups of jobseekers. Although these workers have accumulated substantial work experience, they often find it difficult to keep up with the rapidly changing demands for skills. In addition, they often face discrimination in societies which emphasize youth over experience. The Older Workers Recommendation, 1980 (No. 162), addresses some of the difficulties older workers encounter in finding a job and in the workplace more generally. The key provisions that relate to employment emphasize the importance of integrating policies and programmes for older workers into the overall employment strategy of governments. In addition to preventing discrimination in hiring, governments should ensure that older workers have equal access to training, placement services and on-the-job training. Other conditions of work, such as working time and social security benefits, should take into account the special needs of older workers.

At the other end of the age spectrum, youth often also encounter special difficulties in finding employment due to their limited work experience. The Special Youth Schemes Recommendation, 1970 (No. 136), draws attention to some important issues governments should keep in mind in formulating policies and programmes for younger jobseekers, while respecting the minimum age requirements. As with programmes for older workers, youth schemes should be integrated into general employment and training policies and programmes. Governments are encouraged to involve youth in national economic and

social development projects. Programmes should provide a minimum level of education and skills for youth, to improve their competitiveness in the labour market. Youth should be given the opportunity to gain skills and experience in work, and should not simply be used as lower cost labour in apprenticeships and other programmes. Safeguards should exist to guarantee minimum standards in work and ensure that the duration of service does not go on too long. Most importantly, the aim of such schemes should be to prepare young people for mainstream employment.

Special sectors

Small and medium-sized enterprises

The Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189), indicates that Members should adopt measures which are appropriate to national conditions and consistent with national practice in order to recognize and to promote the fundamental role that small and medium-sized enterprises can play as regards:

- (a) the promotion of full, productive and freely chosen employment;
- (b) greater access to income-earning opportunities and wealth creation leading to productive and sustainable employment;
- (c) sustainable economic growth and the ability to react with flexibility to changes;
- (d) increased economic participation of disadvantaged and marginalized groups in society;
- (e) increased domestic savings and investment;
- (f) training and development of human resources;
- (g) balanced regional and local development;
- (h) provision of goods and services which are better adapted to local market needs;
- (i) access to improved quality of work and working conditions which may contribute to a better quality of life, as well as allow large numbers of people to have access to social protection;
- (j) stimulating innovation, entrepreneurship, technology development and research;
- (k) access to domestic and international markets; and
- (l) the promotion of good relations between employers and workers.

In order to promote the fundamental role of small and medium-sized enterprises, Members should adopt appropriate measures and enforcement mechanisms to safeguard the interests of workers in such enterprises by providing them with the basic protection available under other relevant instruments.

In order to create an environment conducive to the growth and development of small and medium-sized enterprises, Members should:

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- (a) adopt and pursue appropriate fiscal, monetary and employment policies to promote an optimal economic environment (as regards, in particular, inflation, interest and exchange rates, taxation, employment and social stability);
 - (b) establish and apply appropriate legal provisions as regards, in particular, property rights, including intellectual property, location of establishments, enforcement of contracts, fair competition as well as adequate social and labour legislation;
 - (c) improve the attractiveness of entrepreneurship by avoiding policy and legal measures which disadvantage those who wish to become entrepreneurs.

Member States should consider policies that:

- (1) create conditions which:
 - (a) provide for all enterprises, whatever their size or type:
 - (i) equal opportunity as regards, in particular, access to credit, foreign exchange and imported inputs; and
 - (ii) fair taxation;
 - (b) ensure the non-discriminatory application of labour legislation, in order to raise the quality of employment in small and medium-sized enterprises;
 - (c) promote observance by small and medium-sized enterprises of international labour standards related to child labour;
- (2) remove constraints to the development and growth of small and medium-sized enterprises, arising in particular from:
 - (a) difficulties of access to credit and capital markets;
 - (b) low levels of technical and managerial skills;
 - (c) inadequate information;
 - (d) low levels of productivity and quality;
 - (e) insufficient access to markets;
 - (f) difficulties of access to new technologies;
 - (g) lack of transport and communications infrastructure;
 - (h) inappropriate, inadequate or overly burdensome registration, licensing, reporting and other administrative requirements, including those which are disincentives to the hiring of personnel, without prejudicing the level of conditions of employment, the effectiveness of labour inspection or the system of supervision of working conditions and related issues;
 - (i) insufficient support for research and development;
 - (j) difficulties in access to public and private procurement opportunities;
- (3) include specific measures and incentives aimed at assisting and upgrading the informal sector to become part of the organized sector.

With a view to the formulation of such policies Members should, where appropriate:

- (1) collect national data on the small and medium-sized enterprise sector, covering inter alia quantitative and qualitative aspects of employment, while ensuring that this does not result in undue administrative burdens for small and medium-sized enterprises;
- (2) undertake a comprehensive review of the impact of existing policies and regulations on small and medium-sized enterprises, with particular attention to the impact of structural adjustment programmes on job creation;
- (3) review labour and social legislation, in consultation with the most representative organizations of employers and workers, to determine whether:
 - (a) such legislation meets the needs of small and medium-sized enterprises, while ensuring adequate protection and working conditions for their workers;
 - (b) there is a need for supplementary measures as regards social protection, such as voluntary schemes, cooperative initiatives and others;
 - (c) such social protection extends to workers in small and medium-sized enterprises and there are adequate provisions to ensure compliance with social security regulations in areas such as medical care, sickness, unemployment, old-age, employment injury, family, maternity, invalidity and survivors' benefits.

In times of economic difficulties, governments should seek to provide strong and effective assistance to small and medium-sized enterprises and their workers.

In formulating these policies, Members:

- (1) may consult, in addition to the most representative organizations of employers and workers, other concerned and competent parties as they deem appropriate;
- (2) should take into account other policies in such areas as fiscal and monetary matters, trade and industry, employment, labour, social protection, gender equality, occupational safety and health and capacity-building through education and training;
- (3) should establish mechanisms to review these policies, in consultation with the most representative organizations of employers and workers, and to update them.

The Recommendation also contains sections on the development of an enterprise culture, the development of an effective service infrastructure and on international cooperation.

The provisions of this instrument, as well as those of the Co-operatives (Developing Countries) Recommendation, 1966 (No. 127), which is currently in the process of being revised, are intended to promote employment through the development of small and medium-sized enterprises and cooperatives.

Small and medium enterprises (SMEs) are currently viewed as the primary source of job growth. Consequently, countries are focusing a great deal of attention on how to encourage and support SMEs. The Job Creation in Small and Medium-Sized Enterprises Recommendation, 1998 (No. 189), sets out detailed suggestions of ways in which governments, employers and workers can help promote SMEs.

The Recommendation addresses macroeconomic issues, such as inflation and exchange rate policies. It encourages the development of a general climate conducive to business development, including protection of property rights, promotion of fair competition rules, eliminating excess tax burdens and promoting social stability. Governments should, in particular, remove barriers to the development and growth of SMEs by improving access to: credit and capital markets, product and service markets, new technologies and adequate infrastructure. More generally, governments should create and strengthen an enterprise culture and provide a range of services to aid existing and aspiring entrepreneurs.

Governments should also ensure equal opportunities for all entrepreneurs, in particular women. They should promote observance by SMEs of labour legislation in order to raise the quality of employment generated. In addition, special measures should be taken to guard against the use of child labour in SMEs.

In order to develop appropriate policies, governments should collect data on SMEs, review policies and programmes, and review existing labour and social security legislation for possible adverse impacts on SMEs. Lastly, the Recommendation includes a list of suggested contributions by employers' and workers' organizations to develop SMEs, and encourages international cooperation.

Cooperatives

Cooperatives are collectives of producers who pool their resources and share the proceeds of their labour. Cooperatives spread risks, transfer knowledge more systematically and increase the bargaining power of producers. They also encourage savings and make credit more feasible. And they often contribute to the physical infrastructure and social services available in a community. Cooperatives promote employment directly by assisting small producers to acquire skills and access to equipment. And they contribute indirectly by better organizing productive resources, which increases incomes and standards of living, and in turn generates local demand for other types of goods and services.

With regard to cooperatives, in June 2001 the Conference adopted a large number of conclusions on a future Recommendation, which should be adopted in 2002, on the promotion of cooperatives. These conclusions call for a significant change in the role of the State in the promotion of cooperatives, through the adoption and implementation of policies to promote their development.

Employment service

The public employment service is one of the main means for workers and employers to find each other and therefore contributes to the proper functioning of the labour market. The Employment Service Convention, 1948 (No. 88), requires governments which ratify it to establish and operate a system of offices spread throughout the country to make employment services accessible to everyone. The specific functions of an employment service should include: registering jobseekers and vacancies; offering counselling; referring jobseekers to suitable vacancies; facilitating mobility (e.g. assisting workers financially in the cost of relocation); collecting data on the employment situation and labour market trends and disseminating that data; and cooperating with private non-profit placement agencies.

According to Convention No. 88, these services should be provided free of charge to both workers and employers. Historically, it was very important to provide these services free of charge because public employment services developed as a reaction to the

widespread corrupt practice of charging workers extortionary fees to obtain work. It remains important today as a means of encouraging as many workers and employers as possible to use the service, thereby increasing the likelihood of each worker finding the post most suitable to her or his interests and abilities, and each employer finding the employee most suitable for the job she or he has available. However, public employment services may charge employers for special services, such as organizing a job fair.

Staff of the public employment services should be independent of changes of government to ensure that the services are not abused as a form of political patronage.

Finally, the Convention requires governments to cooperate with employers' and workers' organizations and to set up a tripartite national advisory committee to oversee the administration of the employment service offices. There is no obligation to consult with other organizations, but the Committee of Experts encourages governments to do so as appropriate. For instance, the Committee of Experts has noted with interest that the Government of Lithuania is working with a non-governmental organization to help place former convicts in jobs.

Private placement agencies

Private placement services are playing an increasingly important role in the provision of job placement services to employers and jobseekers. There are numerous international labour standards concerning private placement agencies, as the ILO has struggled for many years to find the appropriate means of preserving the benefits of private agencies, while guarding against their potential to exploit workers. The Unemployment Convention, 1919 (No. 2), advocates establishing free public agencies and supervision by the State of private agencies; but the Unemployment Recommendation, 1919 (No. 1), supports measures to prohibit the establishment of private employment agencies in light of the widespread abuses by private agencies in that era. Nevertheless, limits to the state-only approach in providing adequate services, especially for specific sectors of the labour market, led to the adoption of the Fee-Charging Employment Agencies Convention, 1933 (No. 34), and the Employment Agencies Recommendation, 1933 (No. 42). Although the gradual abolition of private agencies is still advocated, these instruments allow exceptions for certain categories of employment.

The issue arose again in the aftermath of the Second World War, which brought major economic and social upheavals with which public agencies were not able to cope. The Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), allows governments to choose either the gradual abolition of private services or cohabitation with the public placement system. The key is the adequate supervision of private agencies. This solution worked well enough until the beginning of the 1960s, when many private employment agencies expanded into temporary work agencies, which subcontract workers temporarily to enterprises rather than placing them in permanent employment. The Committee of Experts has considered that temporary work agencies fall within the scope of the Convention, but many States disagree, considering them to be direct employers instead.

This controversy was resolved by the adoption of the Private Employment Agencies Convention (No. 181) and Recommendation (No. 188), 1997, which include temporary work agencies within their scope. These instruments take the position that private placement agencies can make a substantial contribution to efficiency in the labour market and should be allowed to play a complementary role alongside the public service. Private agencies should complement rather than replace public employment services. Such a dual system has the potential to maximize efficiency in labour matching because, while there may be some overlap of the services provided, the key contribution of private services is distinct from that of public services. Private services are able to concentrate their resources

in niche areas. Such specialized experience provides them with more detailed information, which they can use to anticipate job growth. Public services, which have a much broader mandate and face greater budgetary constraints, are not in a position to acquire specialized information on particular sectors of the labour market. The public service remains responsible for gathering data on general trends in the labour market and providing for more vulnerable jobseekers, such as retrenched workers, while private agencies are left to concentrate on niche services and to monitor certain labour market trends.

The main objectives of Convention No. 181 and Recommendation No. 188 include: setting general parameters for the relationship between public and private agencies, and between agencies and the clients they serve; establishing general principles to protect clients against unethical or inappropriate practices; protecting workers in complex arrangements, such as subcontracting, which make them more susceptible to poor working conditions; and protecting workers recruited from abroad. Governments, in consultation with the social partners, are left to determine the best way of achieving these objectives.

Governments must ensure that private agencies do not discriminate on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. Other obligations include protecting the privacy of jobseekers, protecting migrant workers and prohibiting the use or supply of child labour. Governments have to ensure that special safeguards exist for the right of freedom of association, particularly in the case of temporary work agencies. They also have to ensure that either the temporary work agency or the subcontracting employer is responsible for respecting basic rights at work, including collective bargaining, decent and safe working conditions, social security benefits, access to training and maternity and parental protection. Governments may license or certify private agencies to ensure that the prescribed objectives of the Convention are attained.

Lastly, governments should promote cooperation between public and private agencies. Although public services remain responsible for labour market policies, private agencies should provide information to the public service to assist it in formulating such policies and in monitoring the activities of the private agencies.

Placement of special categories of workers

Due to the unusual nature of their work, special provisions exist for the placing of seafarers and dockworkers. The Placing of Seamen Convention, 1920 (No. 9), mirrors the provisions of the instruments on general placement services. But it underlines even more strongly the importance of not permitting for-profit placement agencies, stating that pecuniary gain should be treated as a punishable offence. This is due to the exceptionally vulnerable position of seafarers, particularly if they are landed in a port in a country far from their port of residence. Governments are called upon to establish a system of public employment offices, specifically concerned with seafarers, and to ensure that the staff have practical maritime experience and have a good understanding of the unique nature of maritime work. The services should be provided free of charge to seafarers. Shipowners' and seafarers' representatives should be included in advisory committees established to oversee the operation of public employment offices.

The Continuity of Employment (Seafarers) Convention, 1976 (No. 145), focuses on the precariousness of seafaring, which makes workers in the maritime sector more vulnerable to frequent spells of unemployment. National maritime employment policies have to encourage continuous and regular employment and provide shipowners with competent workers. The main means of accomplishing this objective is to establish a register or list of eligible seafarers, who are to be given priority in job placements. To the greatest extent possible, seafarers are to be offered contracts for continuous employment, rather than short contracts on an ad hoc basis.

Dock work also tends to be discontinuous in nature, often with too many workers and not enough work. Technological improvements in the loading and unloading of ships have compounded this problem. The Dock Work Convention, 1973 (No. 137), aims to overcome the casual work system common in many ports by encouraging governments to ensure continuity of work, or at least a minimum regular income. As with the Continuity of Employment (Seafarers) Convention, 1976 (No. 145), governments are called upon to establish a register of dockworkers. Registered workers are to be given priority in assigning work and provided with training to use advanced technology efficiently.

II. Summary of the principles of the Committee of Experts

Employment policies should be comprehensive and well-coordinated with general economic and social policies. They should actively involve not just the Ministry of Labour, but all of the key ministries. They should be based on reliable labour force data and should be periodically reviewed for their effectiveness. Employment policies also should be carefully designed to ensure equal employment opportunities for all. Lastly, they should be formulated, implemented and reviewed in consultation with workers' and employers' organizations, and with representatives of other concerned groups. Employment policies aimed at persons with special needs, or at particular categories of workers, should strive to meet these special needs, but in the context of the overall employment strategy of a country. Similarly, particular issues in employment promotion, such as training and placement services, should be consistent with and reinforce the general employment policy. Security of employment in particular should be viewed as an integral part of any employment policy.

The Committee of Experts has recently emphasized the global context in which employment policy now exists. The objectives agreed to by States at the Social Summit, held in Copenhagen in 1995, have substantially shaped the Committee's interpretation of the instruments dealing with employment policy. The Committee of Experts has drawn attention to the growing realization that engaging in a wider dialogue in civil society is one of the linchpins of sustainable economic growth in an era of globalization of markets. Consequently, it has highlighted the obligation to engage the persons concerned in developing employment policy from the *initial stages* of the process.

Another essential element in successfully opening economies to trade is the minimization of risks to individuals from globalization. The Committee of Experts has emphasized the need for adequate social safety nets, as even the best employment policy cannot ensure full employment at all times; and often those hardest hit by volatility in financial, commodity and other markets are those least able to influence the outcome and bear the consequences. Informal sector workers are often the ones most in need of such protection. Safety nets should therefore aim to cover as much of the population as possible and not be limited to workers in the formal sector.

The Committee of Experts has noted that, although full employment in any country requires flexibility at all levels, such flexibility can be created either negatively in a climate of insecurity, or positively by social dialogue and cooperation. Furthermore, the social partners can play a key role in increasing labour market flexibility in a smooth and equitable manner, rather than in a climate of distrust or strong resistance.

The Committee of Experts has drawn attention to the importance of promoting employment of a certain minimum quality. The concept of decent work, developed by the Director-General, stresses that the goal of full employment should be the creation of jobs of acceptable quality and sets as a minimum criterion the application in law and practice of the Conventions covered by the ILO Declaration on Fundamental Principles and Rights at

Work. The Committee of Experts has encouraged member States to take into account the standards set forth in these fundamental Conventions when evaluating whether their employment policies have been successful in creating jobs of acceptable quality.

The Committee of Experts also has drawn attention to recent economic research which refutes the notion that governments must choose between employment promotion and decent work. There is a growing body of evidence concerning the synergistic relationship between economic growth and decent work. Economic growth requires, *inter alia*, basic health and safety, reasonable hours of work and adequate wages for workers to invest in developing their skills and the skills of their children. The skills base of a society, in turn, is now the predominate factor in promoting economic growth, which is essential for creating new jobs. This analysis appears to be valid for all countries, regardless of the level of development.

The Committee of Experts has noted that the World Bank and the International Monetary Fund have put in place a programme for debt relief to heavily indebted poor countries meeting certain qualifying conditions, and that the Group of Eight (G8) has committed funding. Given that the aim of the programme is to reduce poverty, the Committee of Experts has urged participating countries to give priority to employment promotion and human resources development, and has encouraged all member States to consider how they can contribute to expanding this important initiative.

The Committee of Experts has expressed regret that many employment policies are not very diversified. Too many governments still rely heavily on a few commodities or industries, such as tourism. Large and unpredictable fluctuations in world demand for these goods and services, together with stiff competition from numerous other countries that also rely on the same sources of foreign exchange, leave these countries highly vulnerable economically. Consequently, they are in a poor position to tackle large-scale unemployment. In contrast, governments which invest in a range of infrastructure to support diverse industries and services are much better placed to withstand fluctuations in demand for particular goods or services and are better able to compete in the global market.

Finally, governments are often quick to follow trends rather than adopting a more systematic and diversified approach to employment promotion. For example, the Committee of Experts has noted the marked trend towards promoting self-employment and micro- and small enterprises, sometimes as a primary component of employment policy. The Committee of Experts has welcomed this initiative and hoped that it will make a substantial contribution to retaining and generating employment, but it has also noted that much research is still needed on the financial and social benefits and the costs and limits of such initiatives. The ILO's Social Finance Unit has undertaken research on some of the key issues in micro- and small enterprise promotion with a view to providing decision-makers with relevant information on how to improve and sustain such programmes and to facilitate the exchange of experience and cooperation among key stakeholders from the public and private sectors, at both the national and international levels. The Committee of Experts has urged governments to take into account the findings of the Social Finance Unit in reviewing their employment policies and, in the interim, to take measures to offset some of the risks involved in being an entrepreneur and not to abandon altogether the promotion of other forms of employment.

III. Application of the standards in practice

Mention should be made of certain problems encountered in the application of employment-related standards. While policies and programmes should be comprehensive and complementary, governments rarely make a serious commitment to a truly

comprehensive and complementary approach. On the contrary, employment promotion tends to remain the exclusive responsibility of the Ministry of Labour, with only fragmented contributions by other ministries. Even when inter-ministerial cooperation is mandated in law, governments often fail to establish adequate incentives to ensure cooperation in practice.

Governments should systematically evaluate the effects of their policies and programmes, and make appropriate modifications, but often fail to do so. For instance, some countries have introduced more flexibility in the labour market, including casual employment, and have assumed that these changes have contributed to employment growth. Whether these trends are in fact ultimately helpful or harmful will depend on whether more jobs are created and the observance of a minimum level of employment security.

Assessments are important not only for new policies and programmes, but also for established ones, which may lose their relevance as economic conditions change. The Committee of Experts has urged governments to be constantly vigilant in assessing their policies and programmes and to strive to the greatest extent possible to improve and update their systems. To this end, the ILO Labour Standards Department and the Employment Department are together establishing a database of employment and training policies to give governments ideas of how they can improve their system of employment promotion.

Assessments require very good statistical data. No statistics are 100 per cent accurate, but they can give governments a very good idea of the impact of their policies and programmes. Moreover, disaggregated data are essential for governments to have a clear idea of the impact on particular groups, such as the long-term unemployed, youth and women. However, many developing countries experience tremendous problems in creating and maintaining a labour market database, because it is very complicated to collect reliable data and many governments have difficulty in competing with the private sector for highly skilled statisticians. In some cases, the problem is a lack of cooperation between ministries, for example, the Ministry of Finance may have labour market data but does not share them with the Ministry of Labour.

To appreciate the impact of a programme, it is necessary to know its value for the participants. Governments could be wasting a lot of money on programmes that have no significant impact on employment promotion. The key question in analysing any programme should be how many participants subsequently obtain jobs and for how long? However, most governments still focus on how much money is being spent, not on how many people are obtaining jobs, primarily because it is much cheaper to assess expenditures than outcomes.

Most governments engage in some form of consultation, but with highly varying degrees of success. The prevalent attitude has traditionally been that employment policy should be left to the “experts”, i.e. economists. The importance of consultation, in terms of access to better quality information and increased cooperation, is now better understood. But old habits appear to die hard, since many governments still tend to formulate policies with little genuine input from workers’ and employers’ organizations. And consultation with informal sector workers, rural workers, women’s organizations, etc., appears to be even less common.

The application of the instruments on placement services encounters similar problems in certain member States. Most countries have some form of public placement service, but in many countries it remains limited, both geographically and in terms of the services offered and the functions performed. In many countries, public placement offices are located only in larger urban areas. Jobseekers without access to these offices must rely on private placement services instead, which are not always carefully monitored to guard

against exploitative practices. Workers seeking employment abroad continue to be particularly vulnerable to abuses.

Moreover, an employment placement system which is heavily dependent on private agencies cannot fulfil its very important role of collecting data on labour supply and demand. Without such information, governments are unable to formulate appropriate employment and training policies.

Countries face difficulties in adequately maintaining and expanding their public services, mainly due to weak administrative structures. This is particularly true concerning the maintenance of registers for dockworkers. However, as technology improves and becomes more affordable, public placement services may be in a better position to improve and expand their services. Already, many public placement services in countries such as Thailand post employment information on the Internet and provide jobseekers with access to computers in smaller or more remote offices.

Chapter 7

Human resources development

E. Sims

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Paid Educational Leave Convention, 1974 (No. 140)	32	Pending a possible revision of Convention No. 140 in the light of further developments, which would aim at complementing it, the Governing Body has invited member States to examine the possibility of ratifying this Convention and to request technical assistance from the Office in case of obstacles and difficulties.
Human Resources Development Convention, 1975 (No. 142)	60	The Governing Body has invited member States to contemplate ratifying Convention No. 142.
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Human Resources Development Recommendation, 1975 (No. 150)	–	The Governing Body has placed an item on the revision of Recommendation No. 150 on the agenda of the 91st Session (2003) of the Conference.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Paid Educational Leave Recommendation, 1974 (No. 148)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 148.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications	Status
Vocational Education (Agriculture) Recommendation, 1921 (No. 15)	–	The Governing Body has noted that Recommendations Nos. 15 and 56 are obsolete. An item on the withdrawal of these Recommendations is on the agenda of the 90th Session (2002) of the Conference.
Vocational Education (Building) Recommendation, 1937 (No. 56)	–	
Vocational Training Recommendation, 1939 (No. 57)	–	The Governing Body has noted that Recommendations Nos. 57, 60 and 88 were replaced by the Vocational Training Recommendation, 1962 (No. 117).
Apprenticeship Recommendation, 1939 (No. 60)	–	
Vocational Training (Adults) Recommendation, 1950 (No. 88)	–	
Vocational Guidance Recommendation, 1949 (No. 87)	–	The Governing Body has noted that Recommendations Nos. 87, 101 and 117 were replaced by the Human Resources Development Recommendation, 1975 (No. 150).
Vocational Training (Agriculture) Recommendation, 1956 (No. 101)	–	
Vocational Training Recommendation, 1962 (No. 117)	–	

I. Content of the standards

General standards

Under the Human Resources Development Convention, 1975 (No. 142), States which ratify it have to adopt and develop comprehensive and coordinated policies and programmes of vocational guidance and vocational training, closely linked with employment, in particular through public employment services. These policies and

programmes should take due account of employment needs and opportunities, and the stage and level of national development and other economic, social and cultural objectives, and should be pursued by methods appropriate to national conditions. Designed to improve the capabilities of the individual, they have to encourage and assist all persons on an equal basis and be formulated and implemented in cooperation with employers' and workers' organizations. Open, flexible and complementary systems of education and training must be established and developed, and systems of vocational guidance and vocational training should be gradually extended.

The Human Resources Development Recommendation, 1975 (No. 150), supplements the Convention with detailed guidelines as to objectives and methods. It includes parts dealing with: training for managers and self-employed persons; programmes for particular areas or branches of economic activity; particular groups of population; promotion of equality of opportunity for women and men; migrant workers; training of staff for vocational guidance and training activities; research; administrative aspects and representative bodies; and international cooperation.

These instruments call for the formulation of policies. The implementation of such policies must be gradual and take account of national conditions, and employers' and workers' organizations must be associated with their formulation and implementation.

In the same way as the Employment Policy Convention, 1964 (No. 122), the Human Resources Development Convention, 1975 (No. 142), encourages governments to adopt a holistic and integrated approach to human resources development. It should be a well-thought out and integrated system, rather than a piecemeal collection of policies and programmes that may duplicate or negate each other. Most importantly, the human resources development system should be closely tied to employment policies and programmes. After all, the main function of a human resources development system is to help people find and retain a job, and to help firms obtain the skilled workers they need. Therefore, in order to have a truly effective human resources development system, governments should think of human resources development as a key component of their broader employment policy.

Nevertheless, the Convention also draws attention to the broader purpose of any human resources development system, namely helping people find their voice in society. Human resources development is not only about developing skilled workers, but also helping human beings to participate fully in working and civic life. Governments should not only focus on the technical aspects of human resources development. In the work context, human resources development should also include "soft skills", such as teamwork and trade union leadership. In civil society, it should include information on the rights and duties of citizens and should equip people to participate, for example, in politics and community activities. Information and guidance should address a broad range of issues to help the people make informed choices and prepare them more generally for the world of work. Governments are reminded that access to human resources development programmes must be free from discrimination. Indeed, human resources development should be used as a tool to combat discrimination by providing opportunities to the most disadvantaged groups.¹ Human resources development systems should be open in the

¹ The poor, particularly those from groups historically discriminated against, are often discouraged or even prohibited from pursuing certain occupations, even when they are clearly capable of doing the job. This is unjust for the individual and a tremendous loss of potential talent for society. Discrimination is not only wrong, it also has huge opportunity costs for the economy. Yet no country, however rich, has unlimited resources to meet everyone's aspirations. Countries must ensure that there is a balanced distribution of occupations and that the limited resources for human resources development are used most effectively. Therefore, requiring people to compete for

sense of allowing individuals to choose an occupation later in life, and not penalizing them for previous choices.² Human resources development systems also should be flexible, which means that they should accommodate the needs of people receiving training, such as full-time workers, parents with young children and persons with disabilities. Human resources development systems should make reasonable efforts to accommodate the needs of potential participants in order to ensure access for all.³ Human resources development systems should also develop synergies between general, technical and vocational education.⁴

The Convention recognizes that not all learning occurs in formal settings, and that informal learning has an important role to play in education and skills formation.⁵ The Convention allows governments to extend their vocational guidance and training system gradually.⁶ Guidance should include information on continuing employment, to help people think about their long-term prospects in an occupation, and not just whether they will be able to find a job.

Vocational guidance should be available to all, long before choosing an occupation, when choosing one and also in the midst of work life when changing occupations by choice or through necessity. Governments should also ensure that vocational guidance is available to people with disabilities.

The Convention stresses the importance of training throughout a person's working life, which is now known as "lifelong learning". The Convention was ahead of its time in

education and training is certainly acceptable, and in fact essential. The key is to ensure that competition is based on merit alone and is free from discrimination. Merit must be carefully defined so as to not preclude people from disadvantaged backgrounds.

² Many countries require students to choose between professional and vocational streams at a very young age, and are not very flexible about letting students move from one stream to another, or between subjects in the same stream. Governments should strive to develop a system that allows individuals to choose later in life, when they have better information and a clearer sense of what they would like to do.

³ By way of illustration, providing childcare services makes it much more feasible for single parents to participate in training courses.

⁴ The people who get the most out of training are those with a solid general education, which provides them with basic skills that facilitate further learning. Specialized training, in turn, helps people put their general education to best use.

⁵ Governments should resist the tendency to dismiss learning in informal environments, particularly since this may be the only option for many people in rural and impoverished communities. A system of mobile training units and informal teaching networks may be much more effective in meeting people's needs than a few formal training centres which are inaccessible to most people.

⁶ There are two important reasons for this. First, it is costly to set up a network of counselling centres, collect and disseminate information on labour market trends and establish training centres to meet skills demands. Hence governments must be provided with the option of establishing the system in phases. Second, it is actually preferable, and arguably essential, that such a system be developed in phases rather than all at once. Establishing a vocational guidance and training network is a trial-and-error process for any country, regardless of its level of development. Therefore, it is much better to start out slowly, carefully monitoring progress and making the necessary adjustments. Then the system can be extended based on what has been learned. One of the most common mistakes is to treat people as a homogenous group, without regard to special needs. Therefore, in many respects it is better to extend services to various groups one at a time, which helps governments to be more aware of differences between potential clients and their particular needs.

this respect; nowadays, the importance of lifelong learning is taken for granted. Individuals need ongoing access to training to continuously upgrade their skills, giving them opportunities for career advancement and greater employment security. Firms need ongoing training to ensure that all of their employees are as productive and innovative as possible. The benefits accruing to workers and employers help governments to achieve two of their main priorities, to reduce unemployment and to help the economy grow at the quickest sustainable rate possible.

Other groups have both the right and the responsibility to be involved in developing employment policies and programmes. These include representatives of workers' and employers' organizations, and representatives of other groups who are potentially affected by the policies and programmes, such as workers in rural areas and the informal economy. As with general employment policy formulation, these groups possess information that is essential for any successful human resources development policy, and they are the key actors in effectively carrying out policies and programmes.

It is important to note what is not in the Convention. Nowhere does it state that governments must provide all training. It simply highlights some of the functions that are most appropriate for governments, such as providing vocational guidance and labour market information, addressing the training needs of people with disabilities and, more generally, ensuring that a solid human resources development system exists. The Convention leaves open the possibility for employers and employers' associations, trade unions and workers' associations, and private for-profit and not-for-profit institutions to provide training as well. It is up to governments, in consultation with workers', employers' and other interested organizations, to decide what is the optimal mix of public, private, and not-for-profit institutions, bearing in mind the objectives of the Convention, including equal access for all. The Convention recognizes that each country has a unique set of economic circumstances, social concerns and cultural considerations. Consequently, priorities and solutions will vary between countries. Each government must be given wide latitude to develop the most appropriate human resources development system for its present situation. There is no one model of human resources development, even within the same country.

The Human Resources Development Recommendation, 1975 (No. 150), is currently being updated in light of changes in the world of work in general, and in particular the potential contribution of information and communications technology to provide training to many more people at a lower cost. In 2000, the International Labour Conference decided that the terms of reference for a review of the Human Resources Development Recommendation, 1975 (No. 150), should:

- (1) address training and education needs in the modern world of work in both developing and developed countries, and promote social equity in the global economy;
- (2) advance the decent work concept through defining the role of education and training;
- (3) promote lifelong learning, enhance employability of the world's workers, and address the economic challenges;
- (4) recognize the various responsibilities for investment and funding of education and training;
- (5) promote national, regional and international qualifications frameworks which include provision for prior learning;
- (6) improve access and equality of opportunity for all workers to education and training;

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- (7) build the capacity of the social partners for partnerships in education and training; and
 - (8) address the need for increased technical and financial assistance for the less advantaged countries and societies.

Paid educational leave

The right to continuing education and training is further developed in the Paid Educational Leave Convention (No. 140) and Recommendation (No. 148), 1974.

The Paid Educational Leave Convention, 1974 (No. 140), lays down the obligation of States which ratify it to formulate and apply a policy designed to promote, by methods appropriate to national conditions and practice and by stages as necessary, the granting of paid educational leave for the purpose of training at any level, general social and civic education, and trade union education. The policy has to take account of the stage of development and the particular needs of the country and be coordinated with general policies concerning employment, education and training, as well as hours of work. Employers' and workers' organizations and institutions concerned are to be associated with the formulation and application of the policy. The financing is to be on a regular and adequate basis. Leave may not be denied to workers on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin. A period of paid educational leave must be assimilated to a period of effective service for the purpose of establishing claims to social benefits and other rights deriving from the employment relation.

The Paid Educational Leave Recommendation, 1974 (No. 148), adds that paid educational leave is not a substitute for adequate education and training early in life. It lays down the promotional measures which should be taken and contains suggestions as to responsibility for financing. Pointing out that workers should remain free to decide on the programmes in which they wish to participate, the Recommendation sets out the principles applicable to the granting of leave and the payment of financial benefits.

These instruments promote continuing education both to expand and update skills and to obtain more general skills pertaining to trade unionism or general social and civic education. The Convention establishes the right to paid education leave during working hours with income support. The cost of training and income support generally should be borne by governments rather than employers. States are given substantial leeway in progressively implementing a system of continuing education, but it should be coordinated with the general human resources development system, and more generally with employment policy.⁷

II. Summary of the principles of the Committee of Experts

The Committee of Experts has emphasized that, by broadening the choice of employment and allowing for labour mobility, by safeguarding each person's opportunities on the employment market, training plays a decisive part in the implementation of ILO's fundamental principles. Vocational guidance and training contribute to greater social equity and promote the full exercise of freedom of choice and equality of access in respect

⁷ A good example of such coordination is Sweden, where unemployed people are provided with the opportunity to gain work experience as temporary substitutes for workers participating in a continuing education course.

of employment and occupation. In both industrialized and developing countries, human resources development henceforth occupies a vital place in employment policies; and the growing role of the social partners in drawing up and applying these policies can be seen as a guarantee of their effectiveness. The contribution of vocational guidance and training to the objectives of non-discrimination, equal opportunity and treatment and full, productive and freely chosen employment, and the need for the close involvement of employers' and workers' organizations in these areas, are now universally recognized. The fundamental role of international labour standards is thus enhanced, especially in the framework of a global strategy to deal with the problems arising from structural adjustment and meet the need in all countries to pursue policies that enable adjustment to the changing conditions of an interdependent world economy. In certain countries, substantial means are deployed to attain this objective, sometimes making use of costly technologies. Nevertheless, this must not lead to the assumption that these provisions cannot be applied in countries which cannot allocate to vocational training such a high level of human and financial resources. Convention No. 142 calls for the progressive extension of such systems, using methods adapted to national conditions.

III. Application of the standards in practice

Governments generally encounter financial difficulties in the provision of education and training. A system of education and training requires a substantial infrastructure and, most importantly, qualified and motivated teachers. This in turn requires substantial financial resources at a time when many countries are under pressure to cut public expenditure. Moreover, some governments tend to see in Convention No. 142 nothing more than prescriptions of an institutional nature, an invitation merely to set up central bodies, with little influence on the informal sector. Nevertheless, the informal sector, which by its nature tends to elude regulation, accounts for a sizeable share of vocational guidance and training.

The problems raised by the application of the instruments on human resources development open up a vast area for the Office's technical cooperation activities.

Paid education leave may appear to be a luxury for governments struggling to provide basic education. However, information and communications technology may help to reduce costs. Many governments also lack the finances to pay for the income support for participants.

Chapter 8

Employment security

E. Sims

Instruments	Number of ratifications (at 01.10.01)	Status
Termination of Employment Convention, 1982 (No. 158)	31	The Working Party on Policy regarding the Revision of Standards could not reach any conclusions regarding Convention No. 158 and Recommendation No. 166.
Termination of Employment Recommendation, 1982 (No. 166)	–	

Outdated instruments (Instruments which are no longer up-to-date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications	Status
Termination of Employment Recommendation, 1963 (No. 119)	–	The Governing Body noted the replacement of Recommendation No. 119 by the Termination of Employment Convention, 1982 (No. 158) and its accompanying Recommendation (No. 166).

I. Content of the standards

Historically, termination of employment was characterized by a symmetry of rights between the employer and worker. Either could end the employment relationship simply by giving notice, without any requirement to give a reason, and without any restrictions or any procedural protections. Although treating both parties equally may seem fair at first glance, the impact of termination of employment is not the same for both parties. Workers are generally more adversely affected by loss of employment than employers are by the departure of an employee. Furthermore, employers often have more bargaining strength and can negotiate provisions to protect their interests. Workers are much less well placed to negotiate similar protections. The Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982, seek to redress this imbalance of impact and bargaining power.

At the beginning of the twentieth century, various countries started to impose restrictions on the right of employers to terminate a labour contract at any time, a trend which became more firmly established as time went on. By mid-century, a notable number of countries had adopted laws which reflected the idea that an employer cannot terminate the employment relationship without a valid reason, based on the capacity or conduct of the worker, or the operational needs of the establishment or service. This principle was expressed in the Termination of Employment Recommendation (No. 119), which the ILO adopted in 1963. In subsequent decades the majority of countries adopted legislation following the same trend set out in the Recommendation. Another significant advance was the adoption by the then European Economic Community of Directive 75/129/EEC on 17 February 1975 concerning harmonization of the legislation of Member States governing collective dismissals. Finally, in 1982, the International Labour Conference adopted the Termination of Employment Convention (No. 158), which was supplemented by Recommendation No. 166, adopted in the same year.

The Convention may be applied in a variety of ways, depending on what is most appropriate for the system of labour law that exists in a particular country. Governments may exclude workers on fixed-term contracts, on probation, casual workers and workers on other types of non-permanent contracts. However, they must take steps to ensure that these exceptions do not constitute a giant loophole undermining the purpose of safeguards against arbitrary dismissal. Some categories of workers may not be in need of general protection, given the nature of their work and their level of compensation (such as upper management). Others need protecting, but the nature of the enterprise or industry makes

such protection difficult (for example, micro-enterprises where the worker also lives with the employer). Governments have to consult with the social partners concerned before excluding these categories and must attempt to gradually overcome the difficulties in protecting any excluded categories to the extent possible.

The cornerstone of the Convention is the principle that termination of employment at will by the employer is no longer acceptable for workers included within the scope of the Convention. Loss of a job has a substantial impact on the individual worker; at the same time, employers must be able to respond to change. Termination of employment should therefore be permitted, but limited to cases where there is a valid reason. Valid reasons include:

- (1) the worker is no longer able to carry out the work needed or behaves in a manner that is incompatible with the workplace; or
- (2) conditions (economic, technological, etc.) have changed which necessitate eliminating the worker's post.

Convention No. 158 contains a list of the prohibited grounds for termination of employment, in cases of either individual or collective dismissal relating either to the status of the individual or to his or her capacity to work. These include:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving the alleged violation of laws or regulations, or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

In practice, many countries have considered that the dismissal of a worker for one of the above motives goes beyond violation of an individual right in the sense that it also affects the public order (for example, freedom of association in the case of (a) and (b) above, prohibition against discrimination in the case of (d), maternity protection in the case of (e), and the exercise of what should be considered a civic obligation in the case of (c)). And so legislation is stricter in these cases than in others in which the worker has been dismissed for another arbitrary motive not enumerated above.

Temporary absence from work because of illness or injury also must not constitute a valid reason for termination. Governments may determine what constitutes temporary absence, preferably in consultation with workers' and employers' organizations. Often in countries with accident and illness insurance schemes, the definition of temporary absence is linked to the period for which an insured person would be entitled to sickness benefit. The idea is that it is better for both sick or injured workers and their colleagues for them to be able to recuperate without the anxiety of job loss which may drive them back to work before they are fully recovered, and perhaps still contagious or too weak to work safely. But limits may be set due to the cost to employers of keeping a post open for an indefinite period.

In the case of individual dismissal, the worker whose employment is to be terminated must be allowed the right to defend him or herself against allegations that he or she is either incapable of doing the job, or has behaved in a manner which justifies dismissal. It is important for this to occur before dismissal, to minimize both the damage done to the employment relationship and the negative consequences suffered by the individual in cases where the accusations prove unfounded. However, there may be exceptional circumstances where the employer cannot provide the opportunity to be heard prior to dismissal. For example, allegations of assault or theft may involve the arrest of the worker, in which case it would be reasonable for the employer to rely on the outcome of a public trial without a separate internal hearing.

In the case of collective dismissals, governments should aim to develop a constructive approach to restructuring or closing an operation. The employer should consult with the workers before taking action. The consultation should be genuine, even though the employer may feel strongly about the measures to be taken in light of the current situation, he or she must also give serious consideration to any alternative measures proposed by the workers. If none of the workers' proposals appear feasible, the employer and the workers should attempt to work out some other alternative together. Employers should be encouraged to consider the following measures to avert or minimize redundancies:

- (1) restrictions on hiring;
- (2) spreading the workforce reduction over a certain period of time to permit the natural reduction of the workforce;
- (3) internal transfers;
- (4) training and retraining;
- (5) voluntary early retirement with appropriate income protection;
- (6) restrictions on overtime; and
- (7) reduction of normal hours of work (with possible partial compensation for lost income).

However, the ultimate decision on what course of action should be taken remains with the employer.

The employer should provide workers with all the information they need to understand the current financial or other conditions motivating the firm to downsize and so that they can protect their interests, while bearing in mind the issues facing the firm. This information should be provided well enough in advance so that the workers' representatives have time to formulate an alternative strategy, or to propose ways of minimizing the negative impact of the restructuring on workers.

Governments may establish in advance, preferably in consultation with workers' and employers' organizations, a minimum anticipated number or percentage of workers to be affected before the consultation procedures must be adhered to.¹

¹ Although firms should be encouraged to consult when even one person is made redundant, consultations can hinder the employer's ability to react quickly to a situation and be very costly to the enterprise, thereby further aggravating an already serious financial situation. Requiring the employer to go through a potentially lengthy consultation process each time a worker is made

The competent authorities should be notified of a potential restructuring so that they may take one or more of the following steps:

- mediating in the consultations between the employer and the workers' representatives;
- taking possible preventive measures (such as a temporary cash injection for an otherwise healthy company which has been hit by a bad external shock); and
- preparing for the possibility of a substantial increase in unemployment and taking appropriate mitigating measures (for example, temporarily increasing investment in infrastructure to create jobs to absorb many of the unemployed, setting up training or retraining schemes or establishing revolving loan funds and training to support micro-enterprises).

In order to take the appropriate measures, the authorities need sufficient advanced warning. Governments may establish in advance a minimum number or percentage of workers to be affected before requiring the employer to give notice to the authorities.

The Convention also recognizes that the appeals procedure is costly to employers when it delays their ability to fill the post with someone else. Therefore, the right to appeal to an independent body is subject to a time limit, which governments are encouraged to determine in consultation with workers' and employers' organizations. Workers and employers should be encouraged to enter conciliation procedures prior to commencing an appeal.

In cases of collective dismissal, workers should be allowed to challenge the necessity of such action when there is substantial prima facie evidence that no such necessity exists (for example, the hiring of a substantial number of new workers shortly after the redundancies are carried out), or to contest the manner in which the dismissals were carried out. The impartial body should be empowered to overturn a decision to downsize, particularly in egregious cases. However, there are inherent risks in second-guessing the business strategies of firms and requiring the firm to disclose financial, technological and other sensitive information. Governments may therefore determine the limits of the adjudicating body's authority to review the decision of the firm and the conditions under which information is disclosed.

When a worker appeals against a decision to terminate employment, he or she should not have to bear the burden of proof alone. Workers usually do not have access to all of the necessary information, so it would be unfair to place the entire burden upon them.

Although the preferred remedy should normally be reinstatement, there are cases in which reinstatement would serve the interests of neither the employer nor the worker(s). Other remedies, such as payment of compensation, are therefore permissible. The remedy should seek to restore the loss to the worker, including damage to reputation where appropriate but it should not be punitive in nature, except perhaps in patently abusive cases.

Workers should be given adequate notice to prepare their job search. Where workers have been given notice of intent of dismissal, employers should be encouraged to provide

redundant would therefore ultimately be in no one's best interest. However, the employer may wish to consider setting up a less formal consultation mechanism in cases where smaller numbers of workers are affected, which would require less time, but would still protect the interests of workers. Furthermore, safeguards should be put in place to ensure that employers do not spread out redundancies simply to avoid having to consult with workers.

them with time off work during the period of notice to search for a new job. If notice is not possible, the employer should pay compensation (usually equal to the wages the worker would have received during the period of notice).²

Workers who lose their jobs should be entitled to either a severance benefit or a social security benefit. If a severance benefit is paid, it should take into account the length of time that the worker has been with the firm.³

Employers should be encouraged to pay severance benefits in addition to any social security benefits to which the worker may be entitled, particularly in view of the fact that the level of social security benefit provided may be quite low and severance payments are often a form of deferred compensation.⁴

Employers are not required (but are certainly encouraged) to pay severance benefits in cases where a worker is covered by the social security scheme, but does not qualify (for example, because he or she has not worked long enough, has failed to pay contributions or is not conducting an active job search). The idea is that employers should not be held financially liable for the fact that the worker does not qualify for social security benefits, if he or she would qualify under normal circumstances. Of course, if the fault disqualifying the worker lies with the employer (for example, failing to pay contributions or stealing the contributions of workers), then the employer should be required to pay severance benefits.

To the extent that it is feasible in a country, unemployment insurance is highly desirable for both employers and workers. For employers, unemployment insurance smoothes the cost of terminations; for workers, it provides guaranteed income for a longer period of time (albeit at a lower level) and is often more generous than severance payments for people facing longer spells of unemployment.

Finally, employers should be encouraged to give workers who have been made redundant priority in rehiring, if they once again hire workers with comparable qualifications within a limited period of time. Employers should also consider assisting workers in their search for suitable alternative employment, for example through direct contacts with other employers.

² However, in cases of serious misconduct, it would be unfair to the employer to require that a period of notice, or payment in lieu of notice, be given because it would in essence penalize the employer for the grave fault of the worker. But serious misconduct should be narrowly defined to ensure that it applies only in cases where the requirement of notice would be truly unjust to the employer.

³ Workers who have been with a firm for a long period of time are generally older and have much more firm-specific skills. These two factors make them generally less competitive in the labour market and hence more likely to be unemployed for longer and in greater need of income replacement. Severance payments should also take into account the previous wage of the worker, to ensure some continuity of income. The right to a severance allowance should not be conditional on a minimum length of service, but length of service may be taken into consideration in determining the amount of the severance allowance due. Payment in lieu of notice is a separate entitlement from severance allowances. Any payment made in lieu of notice should not be deducted from the amount owed to the worker as a severance allowance.

⁴ However, severance benefits are primarily income replacement and, therefore, to the extent that a worker is entitled to income from social security, additional income replacement becomes more discretionary.

II. Principles of the Committee of Experts concerning employment security

The Committee of Experts has expressed its regret that, despite the fundamental importance to workers of protection against unjustified dismissal, only 32 countries have ratified Convention No. 158. The Committee of Experts has noted the efforts being made by numerous countries to promote employment, in particular by increasing labour market flexibility and the implementation of other measures, such as training. In this respect, it has stressed that the provisions of the Convention are not incompatible with such a labour market approach; rather, the Convention furthers sound and humane resource planning at enterprise level. The Committee of Experts has drawn attention to the need to ensure fairness regarding basic security of employment to workers as a precondition for good labour relations, which can contribute to increased productivity. The Convention clearly demonstrates awareness of the need to balance the protection of workers from unjustified dismissal with the need to ensure labour market flexibility. Consequently, the Convention does no more than require that dismissals be based on a valid reason related to the conduct or capacity of the worker, or the operational needs of the enterprise, and sets out basic standards of procedural fairness. The Convention leaves considerable discretion to governments, in consultation with workers' and employers' organizations, to determine the specific forms of safeguards which are most appropriate for the economic and social conditions of the country.

The Committee of Experts has noted with interest that more and more governments and tripartite organizations are contacting the Office to request information on this Convention, and appear to appreciate more fully the flexibility built into the Convention and the valuable contribution it can make to a progressive and efficient employment policy. This is perhaps due to the fact that the globalization of markets generally intensifies competition and has the effect of reducing security of employment. The social disruption caused by unemployment has led a growing number of governments to realize the importance of ensuring that dismissals are substantively and procedurally fair.

The Convention offers a means of reconciling the achievement in practice of the promotion of the *right to work*, which requires the creation of employment, in particular by financially healthy enterprises, and the minimum protection afforded by *labour law*, which implies a universal level of protection for workers, both of which are essential for promoting the interest of society. The Committee of Experts also has emphasized that the implementation of the Convention will have a positive effect on social peace and productivity at the enterprise level, and on the reduction of poverty and social exclusion, leading to social stability. Finally, the Committee of Experts has recommended giving priority to the promotion of these important standards and has urged governments, in consultation with the social partners, to consider ratifying the Convention.

III. Application of the standards in practice

Important problems have been raised in relation with the application of Convention No. 158. The main problems encountered pertain to misconceptions of its provisions.

Governments often mistakenly equate job security with a job for life. They fear that requiring a valid reason and fair procedures for termination of employment will lead to labour market rigidities. In fact, empirical evidence shows that employment security legislation is increasing in some of the countries which are most enthusiastic about increasing labour market flexibility, because setting some limits on when and how a dismissal may be carried out provides a necessary counterweight to the increasing uncertainties to which workers are exposed as a result of globalization.

Governments also fear that employment security will discourage employers from hiring and will therefore lead to higher unemployment. However, Convention No. 158 and Recommendation No. 166 were adopted during a period of heightened concern for the promotion of employment. They are very careful to balance the needs of workers for job security, with the need to encourage employers to hire people. Consequently, in addition to focusing on fairness in termination of employment, rather than preventing terminations per se, the instruments also emphasize the importance of promoting employment security rather than job security, primarily through providing training and job placement assistance to people who have lost their jobs.

Other controversies in the application of the standards stem from misconceptions held by workers or employers. Many employers are still reluctant to consult with workers, in the misguided belief that workers will not be flexible. However, many examples exist of cooperation, since workers understand that a healthy enterprise is in their own best interests, and have often shown their willingness to work with managers to overcome difficult situations, so long as managers act in good faith and with due respect for the rights of workers.

On the other hand, some workers' organizations push for very tight restrictions on the ability to terminate employment, without appreciating the risks employers face when hiring new workers. The Committee of Experts has noted that the risks are even higher for employers when hiring the long-term unemployed. Governments may therefore be justified in permitting a longer probation period for the long-term unemployed in order to encourage employers to hire them.⁵

⁵ In addition to the General Survey undertaken in 1995 by the Committee of Experts on Convention No. 158 and Recommendation No. 166, the ILO has also more recently carried out a comparative study of law and practice in relation to termination of employment (*Termination of employment digest: A legislative review*, ILO, Geneva, 2000, which is also available on line: <http://www.ilo.org/public/english/dialogue/govlab/pdf/term/digest.pdf>)

Chapter 9

General conditions of work

9.1. Wages

G. P. Politakis

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Labour Clauses (Public Contracts) Convention, 1949 (No. 94)	59	The Governing Body has invited member States to contemplate ratifying Convention No. 94.
Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84)	–	The Governing Body has invited member States to give effect to Recommendation No. 84.
Protection of Wages Convention, 1949 (No. 95)	94	The Governing Body has invited member States to contemplate ratifying Convention No. 95 and has drawn their attention to the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173), which revises Article 11 of Convention No. 95.
Protection of Wages Recommendation, 1949 (No. 85)	–	The Governing Body has invited member States to give effect to Recommendation No. 85.
Minimum Wage Fixing Convention, 1970 (No. 131)	43	The Governing Body has invited member States to contemplate ratifying Convention No. 131 and to inform the Office of any obstacles or difficulties that might prevent or delay ratification of Convention No. 131.
Minimum Wage Fixing Recommendation, 1970 (No. 135)	–	The Governing Body has invited member States to give effect to Recommendation No. 135.
Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)	14	This Convention was adopted after 1985 and is considered up to date.
Protection of Workers' Claims (Employer's Insolvency) Recommendation, 1992 (No. 180)	–	This Recommendation was adopted after 1985 and is considered up to date.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Minimum Wage-Fixing Machinery Convention, 1928 (No. 26)	101	The Governing Body has decided upon the maintenance of the status quo with regard to Convention No. 26.
Minimum Wage-Fixing Machinery Recommendation, 1928 (No. 30)	–	The Governing Body has decided upon the maintenance of the status quo with regard to Recommendation No. 30.
Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99)	51	The Governing Body has decided upon the maintenance of the status quo with regard to Convention No. 99.
Minimum Wage-Fixing Machinery (Agriculture) Recommendation, 1951 (No. 89)	–	The Governing Body has decided upon the maintenance of the status quo with regard to Recommendation No. 89.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
In the area of wages, no instrument has been considered as outdated by the Governing Body.		

Remuneration is, together with working time, the aspect of working conditions that has the most direct and tangible impact on the day-to-day lives of workers. Since its early days, the questions of decent wage levels and fair labour remuneration practices have been at the centre of the ILO's action and the ILO has advocated labour standards seeking to

guarantee and protect workers' rights in respect of wages. The original Constitution of the ILO, which was established in 1919, referred to the "provision of an adequate living wage" as one of the improvements urgently required to promote universal peace and combat social unrest, hardship and privation affecting large numbers of people. It listed among the methods and principles which were considered to be well fitted to guide the policy of member States "the payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country". The 1944 Declaration of Philadelphia concerning the aims and purposes of the Organization reaffirmed that "poverty anywhere constitutes a danger to prosperity everywhere" and stressed the need for world programmes which will achieve "policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection".

The ILO standards in the field of wages analysed below cover four different aspects: (i) the protection of wages including principles and rules concerning the medium, periodicity, time and place of wage payment, deductions from wages or the preferential treatment of wage claims in case of bankruptcy; (ii) the protection of workers' claims in the event of the employer's insolvency by means of a privilege or through a guarantee institution; (iii) the right to a minimum wage and the regulation of the operation of wage-fixing machinery; and, finally (iv) the protection of socially acceptable wage rates in public procurement through the insertion of labour clauses in public contracts.

I. Protection of Wages Convention, 1949 (No. 95), and its Recommendation (No. 85)

Origins and objectives

National laws relating to the protection of wages are among the oldest measures of social protection. The question of adopting standards with a view to regulating the medium of wage payment as well as such other aspects as wage deductions, the attachment of wages and wage guarantees in case of bankruptcy was first placed on the agenda of the International Labour Conference in 1947. Until then, the Conference had given only incidental consideration to the problems of wage protection, adopting a number of resolutions and also some provisions in various Conventions and Recommendations. At its 19th Session, for instance, in 1935, the Conference adopted a resolution inviting the Office to undertake an inquiry into the "truck system" (the obligation to spend wages on goods supplied by the employers) and related practices, but the inquiry was later suspended because of the outbreak of the Second World War. At its 25th Session in 1939, the Conference included in the Contracts of Employment (Indigenous Workers) Convention, 1939 (No. 64), certain provisions relating to the question of the protection of wages, in the form of a requirement that the contracts of employment are to contain particulars concerning, inter alia, the rate of wages, the method of wage calculation, the manner and periodicity of wage payments, and advances of wages. Finally, the Social Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82), adopted at the 30th Session of the Conference in 1947, contains specific provisions on workers' remuneration and, in particular, provisions on wage payment in legal tender and at regular intervals, wage deductions, record keeping and wage statements, payments in kind, the place of wage payment and advances on wages. These principles had been for the most part set forth in the Social Security (Seafarers) Convention, 1946 (No. 70), adopted in 1944 by the 26th Session of the Conference, and in the Certification of Able Seamen Convention, 1946 (No. 74), adopted in 1945 by the 27th Session of the Conference.

The origins of Convention No. 95 are to be found in the report on the "Future policy, programme and status of the International Labour Organisation", prepared by the Office

for the 1944 Conference, in which it was pointed out that “wage policy lies at the core of the preoccupations of the International Labour Organisation” and further suggested that

... a Convention or Recommendation on methods of wage payment dealing with the periodicity of wage payments, deductions from wages, advances of wages, the prohibition of truck, the adequacy of remuneration in kind, the protection of wages in legal proceedings and similar subjects would also be of great value in relation to many parts of the world, especially in regard to rural workers.¹

The preliminary report prepared by the Office for the 31st Session of the Conference in San Francisco introduced the subject in these terms:

... the general purpose of legal measures for the protection of wages is to guarantee the worker against practices which would tend to make him unduly dependent on his employer and to ensure that he receives promptly and in full the wages which he has earned. To achieve these ends it is necessary that he should normally receive his wages in the form of money which he can spend as he wishes, that he should be paid regularly and at intervals short enough to allow him to live on a cash rather than a credit basis, that he should be protected against any unjustified or arbitrary deductions from his nominal earnings and, in general, that he should be kept informed of his wage conditions of employment.²

Convention No. 95 is the first international labour instrument dealing in a comprehensive manner with all practical aspects of labour remuneration and seeking to accord the fullest possible protection to workers' earnings.³

Scope and content

The Convention (Article 2) applies to all persons to whom wages are paid or payable, although the competent authority may, after consultation with employers' and workers' organizations, exclude persons who are not employed in manual labour or are employed in domestic service or similar work and whose conditions of employment are such that the application to them of all or any of the provisions of the Convention would be inappropriate. To make use of exemption possibilities, a ratifying State has to specify in its first annual report submitted under article 22 of the Constitution any categories of persons which it proposes to exclude from the application of the Convention, additional exclusions not being possible after the date of its first annual report, while in subsequent reports it has to indicate any progress made with a view to the application of the Convention to such categories of persons. The term “wages” (Article 1) is used in a generic sense to cover all earnings or remuneration, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered.

¹ See ILC, 26th Session, 1944, Report I, p. 51.

² See ILC, 31st Session, 1948, Report VI (c)(1), p.3.

³ For the Conference discussions, see *Record of Proceedings*, ILC, 31st Session, 1948, pp. 459-469, and *Record of Proceedings*, ILC, 32nd Session, 1949, pp. 324-332 and 499-524.

Wage payment in legal tender

The Convention (Article 3) guarantees that the remuneration owed by the employer to the worker by virtue of a contract of employment must be paid in cash. This requirement for legal tender may also take the form of a prohibition of payment in the form of promissory notes, vouchers, coupons or other tokens taking the place of money.

Payment in kind

In the earlier stages of industrial development wages were paid in other media such as food, clothing and shelter. This method of payment, known as the “truck system”, led to abuses and was thus generally prohibited. It has always been recognized, however, that in particular industries and occupations, such as agriculture, mining, construction work in remote areas, merchant marine, hotels and restaurants, hospitals and domestic service, allowances in kind offer certain advantages to the workers and are often equally beneficial to their family members. In a number of countries, therefore, labour laws and regulations provide for exceptions to the principle of payment in cash, while seeking to protect the wage earners by laying down concrete conditions which authorized payment in kind should meet. In some cases, regulations specify that the goods supplied to workers should be of suitable quality and sufficient quantity, while in other cases employers are required to supply allowances at cost price, or at specially favourable rates. Strict regulation is all the more necessary as, in many cases, the value of the goods provided in lieu of wages can be deducted from the cash wages. By way of safeguard, the labour legislation in certain countries specifies that deductions cannot be authorized except with the express consent of the worker concerned, whereas in other countries regulations fix the maximum percentage of cash wages which may be deducted.

The Convention (Article 4) recognizes that in those industries or occupations where the partial payment of wages in the form of allowances in kind is customary or desirable because of the nature of the industry or occupation concerned, national laws or regulations, collective agreements or arbitration awards may authorize such payment subject to the following conditions: (i) the payment of wages in the form of liquor of high alcoholic content or of noxious drugs is not permitted in any circumstances; and (ii) when authorized, adequate measures have to be taken to ensure that such allowances are appropriate for the personal use and benefit of the worker and his family and also that the value attributed to such allowances is fair and reasonable.

Freedom of the worker to dispose of wages

It is not enough that workers should receive the wages due to them in full and in a regular fashion. They must also be able to spend them as they choose. Any constraint on the part of the employer on the use of the wage should be forbidden. The Convention (Articles 6 and 7) expressly prohibits employers from limiting in any manner the workers' freedom to dispose of their wages and recognizes the workers' right to make use of a company store, where one exists, only if they so wish. It also provides that the competent authority has to take appropriate measures to ensure that works stores are not operated for the purpose of securing profit, but for the benefit of the workers concerned, and that the goods are sold at fair and reasonable prices, where access to other stores and services is not possible. These provisions are supplemented by another clause included in the Recommendation (Paragraph 9) suggesting appropriate measures to encourage arrangements for the association of representatives of the workers concerned, and more particularly members of works welfare communities or similar bodies, in the general administration of works stores or similar services established in connection with an undertaking for the sale of commodities or provision of services to the workers.

Wage deductions

The regulation of deductions is necessary to protect workers from arbitrary, unfair or excessive deductions which would amount to an unjust decrease of their remuneration. The Convention (Article 8) sets out the principle that deductions should be permitted only under prescribed conditions and that such conditions should be required to be brought to the notice of the workers in the manner deemed most appropriate by the competent authority.

Attachment or assignment of wages

The Convention (Article 10) provides that the conditions under which and the limits within which wages may be attached or assigned should be prescribed by national laws or regulations. It also stipulates that wages should be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family. The rationale behind this provision is similar to that regarding deductions, i.e. there must be a proportion of the worker's wage which is absolutely essential to the maintenance of the worker and his family and which for that reason must be immune from attachment or seizure.

Wage guarantee in the event of bankruptcy

One of the oldest established measures of social protection consists of provisions to protect workers' claims in the event of the insolvency of their employer, since wages are recognized as being essential for the worker's maintenance and often equally vital for the subsistence of the worker's family. To avoid a situation where wage earners are deprived of their livelihood upon the bankruptcy of their employer, provisions have to be made to guarantee the immediate and full settlement of debts owed by the employer to workers. The Convention (Article 11) spells out the almost universally recognized principle according to which wage claims should be treated as privileged debts in the event of the bankruptcy or judicial liquidation of an undertaking. The Convention leaves, however, to each State to determine the relative priority of wages constituting a privileged debt, as well as the overall limits, in terms of a maximum period of service or amount, within which outstanding wage claims are to be accorded preferential treatment. As analysed in greater detail below, the principle of the preferential treatment of wage claims in the event of the employer's insolvency was later substantially reinforced through the adoption of the Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173) and Recommendation (No. 180), 1992.

Periodicity, time and place of wage payments

The Convention (Article 12) lays down the obligation to pay wages at regular intervals, to be prescribed by national laws or regulations or fixed by collective agreement or arbitration award. The rationale underlying this provision is to discourage long wage payment intervals and thus to minimize the likelihood of indebtedness among workers. The Recommendation (Paragraphs 4 and 5) deals with the periodicity of wage payments in greater detail and suggests that workers whose wages are calculated by the hour, day or week should be paid not less often than twice a month, and not less than once a month for salaried employees. It also recommends that workers whose wages are calculated on a piece-work or output basis should be paid, so far as possible, not less often than twice a month, while in the case of workers employed by the task the completion of which requires more than a fortnight, payments should be made on account, not less often than twice a month in proportion to the amount of work completed, and the final settlement should be made within a fortnight of the completion of the task.

Notification of wage conditions and statement of earnings

The Convention (Article 14) calls for effective measures, where necessary, to ensure that the workers are informed in an appropriate and easily understandable manner of the general wage conditions to which they are subject before they enter employment as well as of the wage details concerning the calculation of their earnings in respect of each pay period. The provisions of the Convention are supplemented by more detailed provisions in the Recommendation. With respect to notification of wage conditions, the Recommendation (Paragraph 6) specifies that the details of the wage conditions which should be brought to the knowledge of the workers should include: (i) the rates of wages payable; (ii) the method of calculation; (iii) the periodicity of wage payments; (iv) the place of payment; and (v) the conditions under which deductions may be made. As regards wage statements and payroll records, the Recommendation (Paragraphs 7 and 8) provides that, in all appropriate cases, workers should be informed with each payment of wages of the following particulars relating to the pay period concerned, in so far as such particulars may be subject to change: (i) the gross amount of wages earned; (ii) the amount of any deduction which may have been made including the reasons therefor; and (iii) the net amount of wages due. In addition, employers should be required in appropriate cases to maintain records showing, in respect of each worker employed, the above particulars.

Implementation through national laws

The Convention (Article 15) requires that the laws and regulations giving effect to its provisions have to be made available for the information of persons concerned, define the persons or institutions responsible for compliance, prescribe effective sanctions or other remedies to punish infringements, and finally provide for the maintenance of adequate payroll records.

Role and impact of the supervisory bodies

The number and nature of the comments made by the Committee of Experts in recent years concerning the practical application of the Convention in ratifying States attest to the continued relevance of most of its provisions. While certain requirements of the Convention, such as those relating to the notification to workers of wage conditions, the payment of wages directly to the worker concerned, the operation of works stores or the payment of wages on working days and at or near the workplace seem to be generally complied with others, such as those regarding the payment of wages in kind, the wage deduction limits, or the preferential treatment of wage claims in case of bankruptcy, have not elicited the same degree of legislative conformity on the part of ratifying States. Yet, most importantly, the provision respecting the regular payment of wages has recently turned into an urgent issue for a growing number of countries, especially those of Central and Eastern Europe following their transition to a market economy, and also in Africa and Latin America.⁴ In the last five years, practically all the observations formulated by the

⁴ See ILO, Report of the Committee of Experts, 1997, General Report, paras. 71-73, p. 21. In Ukraine, for instance, the non-payment of wages began in 1994 and by 1998 wage arrears had grown to more than 5 billion hryvnya (nearly US\$3 billion). This amount is greater than a six-month wage bill for the entire country. In total, nearly 200,000 enterprises reported an inability to pay wages; see ILO, *Ukraine: Country Employment Policy Review*, 1999, p. 50. Similarly, in the Russian Federation, the number of workers affected by arrears is huge. According to March 1996 data, only 60 per cent of workers received their last wage in full and on time. About a quarter of employees received a wage on time but were not paid in full, whilst around 11 per cent received their wage late and not in full; see H. Lehmann, J. Wadsworth and A. Acquisti: *Crime and*

Committee of Experts in respect of Convention No. 95 have referred to problems of wage arrears and the failure of the governments concerned to ensure the regular payment of wages in accordance with Article 12, paragraph 1, of the Convention. Similarly, in the past ten years, the Conference Committee on the Application of Standards has regularly considered individual cases referring to persistent problems of wage arrears. In addition, in the past decade, the Governing Body has dealt with seven representations made under article 24 of the ILO Constitution alleging non-observance of Convention No. 95, mostly in respect of delayed payment of wages.

In relation to wage arrears, the Committee of Experts has consistently pointed out that delays in the payment of wages clearly contravene the letter and the spirit of the Convention and has stressed that the application of the Convention should comprise three essential elements in this respect: (i) efficient control; (ii) appropriate sanctions; and (iii) means to redress the injury caused, including not only the full payment of the amounts due, but also fair compensation for the losses incurred by the delayed payment.⁵ Another remark frequently made by the Committee of Experts is that putting an end to the accumulation of wage arrears calls for sustained efforts, an open and continuous dialogue with the social partners and a wide range of measures, not only at the legislative level, but also in practice.⁶

Apart from the issue of timely payment of wages and rapid settlement of outstanding wage debts, the Committee of Experts has made recurrent comments on other aspects of the Convention, such as the concept of the “wages” to be protected, the principle of wage payment in legal tender, the partial payment of wages in the form of allowances in kind, wage deductions and the attachment of wages. Concerning the notion of the “wage” to be protected under the Convention, the Committee has pointed out that while the wage nature of any sums paid by an employer to an employed person for work done may vary according to national legislation, all earnings, however termed or considered for the purpose of calculating the base wage, benefits and other allowances, have still to enjoy full wage protection in accordance with the provisions of Articles 3 to 15 of the Convention.⁷ In relation to the payment of wages in legal tender, the Committee has stressed that the relevant provision is sufficiently clear and precise, and therefore practices such as providing convertible tokens of the currency in place of cash, or paying wages in local

punishment: Job insecurity and wage arrears in the Russian Federation, 1998, p. 6. See also OECD: *Russian Federation*, Economic Surveys, 1997, pp. 36-37.

⁵ See, for instance, ILO, Report of the Committee of Experts, 2000, p. 215 (Russian Federation); 1998, p. 212 (Russian Federation); 1997, p. 227 (Ukraine); 1995, p. 233 (Turkey). See also the report of the Committee set up to examine the representation under article 24 of the Constitution alleging non-observance by the Russian Federation of Convention No. 95, Nov. 1997, GB.270/15/5, paras. 30-40, pp. 7-10; and the report of the Committee set up to examine the representation under article 24 of the Constitution alleging non-observance by Congo of Convention No. 95, March 1996, GB.265/12/6, paras. 21-24, pp. 6-7.

⁶ See, for instance, ILO, Report of the Committee of Experts, 2001, p. 354 (Congo); 1999, p. 319 (Ukraine); 1998, p. 216 (Ukraine). See also ILO, *Record of proceedings*, ILC, 86th Session, 1998, p. 18/101, and ILC, 75th Session, 1988, p. 28/48.

⁷ See, for instance, ILO, Report of the Committee of Experts, 1998, p. 217 (Venezuela). See also the report of the Committee set up to examine the representation under article 24 of the Constitution alleging non-observance by Venezuela of Convention No. 95, Mar. 1997, GB.268/14/9, paras. 17-23, pp. 5-8.

government bonds, or converting wage arrears into an internal debt are inconsistent with the requirements of the Convention.⁸

With regard to payments in kind, the Committee of Experts has principally focused its comments on the need for adequate guarantees that allowances in kind are indeed beneficial to workers and their families and they are valued reasonably.⁹ In concrete terms, the Committee has underlined three main points: first, the modalities of such payments are to be regulated by legislation, collective agreement or arbitration award, and not left to individual agreement between the employer and worker. Secondly, setting an upper limit on the amount of wages which may be paid in kind does not resolve the problem of how the valuation of these allowances is to be made. Thirdly, when payment consists of allowances other than food and lodging, specific provision needs to be made to ensure that allowances in kind are appropriate for the personal use and benefit of workers and their families. The Committee has also repeatedly emphasized the need for a legislative provision explicitly prohibiting the payment of wages in the form of alcoholic drinks or narcotic substances.¹⁰

With respect to deductions, the Committee of Experts has on a number of occasions drawn attention to the fact that provisions of national legislation authorizing deductions by virtue of individual agreement or consent are not compatible with the terms of the Convention.¹¹ The Convention is considered as fully applied by States whose national laws or regulations specify the types and fix the overall limits of permissible deductions, and also prohibit any other deductions.¹² In other instances, the Committee has emphasized that there is an obligation to keep workers informed of the legal provisions regulating wage deductions.

⁸ See, for instance, Report of the Committee of Experts, 2001, p. 355 (Costa Rica); 1997, p. 219 (Argentina). See also the report of the Committee set up to examine the representation under article 24 of the Constitution alleging non-observance by Congo of Convention No. 95, Mar. 1997, GB.268/14/6, para. 21, p. 5.

⁹ See, for instance, Report of the Committee of Experts, 1996, p. 179 (Greece); 1993, p. 245 (Egypt). See also direct requests, 1999 (Brazil); 1998 (Comoros); 1995bis (Grenada, Italy, Kyrgyzstan); 1995 (Belarus); 1987 (Colombia); 1977 (Iran); 1976 (Sudan); 1974 (Panama).

¹⁰ See, for instance, direct requests 2001 (Portugal); 1999 (Saint Lucia); 1995 (Sri Lanka). See also the report of the Committee set up to examine the representation made under article 24 of the Constitution alleging non-observance by the Republic of Moldova of Convention No. 95 which reads in part: "the Committee does not need to insist that Article 4 of the Convention may only be understood as laying down a comprehensive prohibition against replacing salaries and other contractual remuneration by harmful products such as alcoholic beverages, narcotic substances or tobacco. The Committee recalls, in this respect, that the Committee of Experts on the Application of Conventions and Recommendations has consistently read into the provision of Article 4, paragraph 1, of the Convention a clear proscription of wage payment in the form of alcoholic beverages or noxious drugs of any sort and in any circumstances. Moreover, the Committee is of the opinion that the exclusion of liquors and noxious drugs from permissible allowances in kind should be read in conjunction with the provision of Article 4, paragraph 2, of the Convention which limits payment in kind to those allowances which are appropriate and beneficial to the worker and his family"; GB.278/5/1, para. 32, p. 7.

¹¹ See, for instance, direct requests 1995bis (Bulgaria, Kyrgyzstan, Madagascar); 1995 (Djibouti, Poland); 1987 (Sudan); 1984 (Sudan); 1979 (Gabon).

¹² See, for instance, direct requests 2001 (Bolivia, Comoros); 1998 (Dominican Republic); 1987 (Venezuela); 1977 (Philippines).

Regarding the attachment or assignment of wages, the Committee of Experts has concentrated its comments on whether or not the ratifying States have in fact adopted national laws and regulations which set out the conditions and the limits within which wages may be attached or assigned, and which protect wages against both of these procedures to the extent deemed necessary for the maintenance of workers and their families.¹³ Concerning the requirement for a prompt final settlement of outstanding wage payments upon the termination of the employment relationship, the ILO's supervisory bodies have affirmed that such an obligation applies to all persons to whom wages are paid or payable, irrespective of the characteristics of their contracts, formal or non-formal, whatever the cause of the termination, and independently of the nationality of the workers concerned.¹⁴

II. Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173) and Recommendation (No. 180), 1992

Origins and objectives

Before 1992, the year in which Convention No. 173 was adopted, the main ILO standard in the area of the protection of workers' claims in the event of the bankruptcy or judicial liquidation of an undertaking was Article 11 of the Protection of Wages Convention, 1949 (No. 95), according to which wage claims are to be treated as privileged debts. A similar provision is contained in Article 11 of the Workmen's Compensation (Accidents) Convention, 1925 (No. 17), but refers only to the payment of compensation for personal injury or death in case of industrial accident.

Over the years, the protection afforded by Article 11 of Convention No. 95 came to be considered as inadequate and came under increasing criticism for a number of reasons: first, wages due after insolvency, where the enterprise has resumed its activities, are not protected. Secondly, by offering the possibility of setting a ceiling to the privilege without establishing a minimum fraction of the wages due, Article 11 is often of little practical value. Thirdly, Article 11 requires national laws or regulations to determine the relative priority of workers' claims in relation to other privileged claims, but does not effectively guarantee a minimum rank to be accorded to the workers' privileged debt. Finally, Article 11 does not establish any safeguards as to the expeditious settlement of workers' claims, nor is it of assistance where there are no assets left in the bankrupt estate.¹⁵

¹³ See, for instance, direct requests 1995 (Belarus, Mauritius).

¹⁴ See, for instance, Report of the Committee of Experts, 2001, p. 356 (Côte d'Ivoire); 1997, p. 223 (Libyan Arab Jamahiriya); 1992, p. 260 (Iraq). See also direct requests 2001 (Libyan Arab Jamahiriya); 1991 (Bolivia). See also the report of the Committee set up to examine the representation made under article 24 of the Constitution alleging non-observance by Mauritania of Convention No. 95, *Official Bulletin*, Vol. 74, 1991, Series B, Supplement 1, paras. 68-69, 71 and 75, pp. 15-16, and the report of the Committee set up to examine the representation made under article 24 of the Constitution alleging non-observance by Iraq of Convention No. 95, May-June. 1991, GB.250/15/25, paras. 23-24, pp. 4-5.

¹⁵ According to a survey, several months are often required in most countries for payment of preferred wage and related claims. It is also very frequent that workers must wait one to two years, and occasionally even longer, to recover any part of their claims, while in some cases six to 12 years' delays have apparently occurred; see ILO, *Protection of workers in the event of the insolvency of their employer*, 1985, MEPWI/1985/D.1, p. 13.

Moreover, significant developments in national law and practice prompted the reconsideration of the existing legal framework and led to the call for the adoption of new standards. First, according to the labour legislation in many countries, the scope of wages covered by the privilege had been extended to cover various bonuses and allowances. Secondly, noticeable progress had also been made in respect of the priority granted to workers' claims, which had progressively come to be given preference over most other privileges. Thirdly, since 1967, numerous wage guarantee schemes have been established offering protection of workers' claims through the intervention of an independent institution.

The Meeting of Experts on the Protection of Workers in the Event of the Insolvency of their Employer, held in March 1985, offered a suitable opportunity for review of the different systems of worker protection in respect of wages and other claims in the event of insolvency of the employer, but views differed as to the advisability of adopting new international labour standards aimed at reinforcing the protection provided by Article 11 of Convention No. 95:

Most experts from the workers' circles emphasised that one point had clearly come out of the discussion: whatever the nature, the scope or the extent of priority accorded to wage claims, the latter could not be recovered by wage earners unless the assets of the insolvent enterprise were sufficient. Experience showed that very often wage claims remained unpaid. Consequently, the system of privileged claims, as provided for in Convention No. 95, only partially fulfilled its role. It was therefore necessary that the ILO adopt new international standards with a view to going beyond the protection provided for in 1949, in order to guarantee and protect the workers' rights in a better manner [...]. The experts from the employers' circles were of a different opinion. While they agreed that the system of privileged claims was, perhaps, not the most effective, they felt that Convention No. 95 was flexible enough to achieve the objective.[...] They were opposed to the idea of advocating the establishment of guarantee funds, since they felt that these could be a valid alternative for a certain number of countries, but not for all the member States of the ILO. It was true that the guaranteed fund was a desirable choice, but it was necessary to make a distinction between what was "desirable" and what was "possible", and guarantee funds were possible in only a limited number of countries.¹⁶

As finally adopted, Convention No. 173 is designed as a modern and flexible instrument; modern in that it covers new concepts such as the wage guarantee schemes whose use it wishes to spread, and flexible because it consists of two parts which can be ratified together or separately.¹⁷ It constitutes ILO's response to one of the major challenges faced by labour law today, created by the increasing number of bankruptcies and insolvencies in a globalized economy, and most noticeably in those countries experiencing market-based structural changes.¹⁸ Even though the 1992 instrument has not

¹⁶ Report of the Meeting of Experts on the Protection of Workers in the Event of the Insolvency of their Employer (March, 1985), MEWPI/1985/D.3/Rev., paras. 30-33, p. 7.

¹⁷ For the Conference discussions, see ILC, 78th Session, 1991, *Record of Proceedings*, pp. 20/1-20/27 and 26/2-26/6, and ILC, 79th Session, 1992, *Record of Proceedings*, pp. 25/1-25/40 and 30/2-30/8.

¹⁸ To give but one example, in Hungary the companies affected by bankruptcy or liquidation in 1992 produced 14 per cent of the total gross production value of the national economy, 25.5 per cent of exports and employed 17 per cent of the wage earners; see E. Hegedus: "The Hungarian framework for bankruptcy and reorganization and its effect on the national economy", in *Corporate Bankruptcy and Reorganization Procedures in OECD and Central and Eastern European Countries*, OECD, 1994, p. 104.

as yet attracted a significant number of ratifications, it marks a clear improvement over the standards contained in Convention No. 95, adopted over 50 years ago.

Scope and content

The Convention addresses the economic and social effects of insolvency by recognizing that workers are more vulnerable than other creditors in the event of insolvency and that they therefore deserve specific protection. It is framed as an instrument with two approaches, one for the protection of workers' claims by a privilege, and the other for protection by wage guarantee institutions. These two systems are conceptually distinct in that, whereas under the preferential claim system each employer is answerable individually for his own insolvency, and consequently accountable only to the extent of his own assets, the wage guarantee scheme establishes a principle of collective responsibility according to which the community of entrepreneurs assumes collectively the business risk of each of its members. The aim of a two-part instrument is to allow ratifying States to apply the system of protection which best suits their specific needs, interests and stage of development. This approach was based on the growing awareness, on the one hand, that while the system of privileged claims was implemented by the great majority of member States, it presented a number of weaknesses and needed to be improved, and on the other, that while wage guarantee funds in theory offered better protection than the traditional privilege system, the feasibility of such funds especially in developing countries was questionable and they would thus be unlikely to appeal to countries without a sufficiently organized labour market.¹⁹

The Convention (Article 4) applies in principle to all employees and to all branches of economic activity. It recognizes, however, that the competent authority may, after consulting the social partners, exclude specific categories of workers from the application of the Convention, in particular public employees on account of the nature of their employment relationship, or when they enjoy similar protection under other types of guarantee.

Definition of "insolvency"

The term "insolvency" is defined in the same manner in both the Convention and Recommendation. It refers (Article 1) to situations in which, in accordance with national law and practice, proceedings have been opened relating to an employer's assets with a view to the collective reimbursement of its creditors. However, a strict interpretation of this term would risk narrowing down unreasonably the scope of application of the Convention and thus defeat its purpose, which is to safeguard workers' outstanding claims in the event of an employer's insolvency. Therefore, both instruments allow member States to extend the term "insolvency" to other situations in which workers' claims cannot be paid by reason of the financial situation of the employer. As an example of such a

¹⁹ For a critical analysis of the preference system, see A.S. Bronstein: "The protection of workers' claims in the event of insolvency of their employer", in *International Labour Review*, Vol. 126, 1987, pp. 715-731. The similarities and differences of wage guarantee schemes operated in several European countries are discussed in J.-V. Gruat: "Schemes for guaranteeing wage claims in the event of bankruptcy", in *International Social Security Review*, Vol. 33, 1980, pp. 61-79. See also E. Yemin, and A.S. Bronstein (eds.): *The protection of workers' claims in the event of the employer's insolvency*, Labour Management Relations Series No. 76, 1991; *Unemployment protection schemes and employment policies*, International Social Security Association, European Series No. 5, 1981, pp. 155-215; L. Dallèves, and M. Ammann: *La protection des droits des travailleurs en cas d'insolvabilité de leur employeur – Etude comparative pour une assurance-insolvabilité*, 1979.

situation, the Convention cites explicitly the case where the amount of the employer's assets is recognized as being insufficient to justify the opening of insolvency proceedings. The Recommendation (Paragraph 1) adds three more cases, namely: where the enterprise has closed down or ceased its activities or is voluntarily wound up; where in the course of proceedings to recover a worker's claim it is found that the employer has no assets or that these are insufficient to pay the debt in question; or where the employer has died and his/her assets have been placed in the hands of an administrator and the amounts cannot be paid out of the estate.

Optional acceptance of Part II and/or Part III

Given the widely differing systems of protection practised in various countries, the Convention (Article 3) is devised to offer a wide range of options to ratifying States. A member State may thus, when ratifying the Convention, accept either the provisions of Part II, dealing with protection by privilege, or those of Part III regulating the protection of workers' claims by means of wage guarantee institutions. Nothing prevents a Member which has initially accepted only one of the two Parts to extend subsequently its acceptance to the other Part. A member may, at the time of its ratification, accept the obligations of both Parts, in which case it may, after consulting the most representative employers' and workers' organizations, exclude from the application of Part II those claims for which Part III clearly affords more effective protection.

To meet the concern that it would be very difficult to ratify a rigid instrument which did not make provision for the gradual or partial application of some of its obligations by member States whose level of economic development only allowed their application in certain sectors or branches of activity, the Convention further provides that a member State which has accepted both Parts may, after consulting the most representative employers' and workers' organizations, limit the application of Part III to certain categories of workers and to certain branches of economic activity. The member State is, however, under the obligation to give the reasons for limiting its acceptance and also to provide information on any extension of the protection under Part III to other categories of workers or other branches of economic activity.

The effect on Convention No. 95

The Convention (Article 3) affects existing standards in different ways, and particularly Article 11 of Convention No. 95, depending on the Part of the Convention that a ratifying State decides to accept. Acceptance of the obligations of Part II of the Convention, providing for the protection of workers' claims by means of a privilege, involves *ipso jure* the termination of the State's obligations under Article 11 of Convention No. 95. In contrast, a member which has accepted only the obligations of Part III of the Convention, providing for the protection of workers' claims by a guarantee institution, may by a declaration communicated to the Director-General of the Office terminate its obligations under Article 11 of Convention No. 95, but only in respect of those claims covered by such an institution. The Convention (Article 14) is deemed to partially revise Convention No. 95, only to the extent that it modifies the obligations under Article 11 of that Convention.

Granting preferential treatment to wage claims in insolvency or bankruptcy proceedings

The Convention seeks to improve the system of privileged claims foreseen by Convention No. 95 in three different ways. First, the Convention (Article 6) indicates that the minimum acceptable coverage of protected wage claims comprises: (i) workers' claims for wages relating to a prescribed period of not less than three months prior to the insolvency or prior to the termination of employment; (ii) claims for holiday pay as a result

of work performed during the year in which the insolvency or the termination of the employment occurred, and in the preceding year; (iii) claims for amounts due in respect of other types of paid absence relating to a prescribed period, which may not be less than three months prior to the insolvency or prior to the termination of the employment;²⁰ and (iv) severance pay. These minimum standards are considerably extended and improved in the Recommendation (Paragraph 3), which contains a substantially longer list of claims than those given in the Convention. The protection afforded by a privilege should cover, for instance, not only wage claims but also overtime pay, commissions and other forms of remuneration, as well as end-of-year and other bonuses relating to work performed during a period prior to the insolvency which should not be less than 12 months, payments due in lieu of notice of termination of employment, and compensation payable directly by the employer in respect of occupational accidents and diseases. Moreover, other claims such as contributions due in respect of national social security institutions or other social protection schemes might also be protected by privilege.²¹

Secondly, the Convention (Article 7) offers safeguards in respect of what constitutes meaningful compensation by providing that whenever national laws or regulations set a ceiling to the protection by privilege of workers' claims, the prescribed amount may not fall below a socially acceptable level, which consequently has to be reviewed periodically so as to maintain its value.²² In this respect, the Recommendation (Paragraph 4) further indicates that to establish what constitutes a socially acceptable level, account should be taken of variables such as the minimum wage, the part of wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

Thirdly, the Convention (Article 8) strengthens the effectiveness of the privilege system by stipulating that national laws or regulations must give workers' claims a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system (e.g. claims by the State for arrears in taxes or claims by social security schemes for unpaid contributions). The rationale behind this provision is that if the State, as the principal creditor in most insolvency proceedings, was reimbursed from the employer's assets in the first instance, there would be reason to fear that workers' claims would never be paid.²³ The Convention provides, however, that where workers' claims are

²⁰ The expression "other types of paid absence" is used to cover absences such as sick leave or maternity leave which could be due to workers pursuant to national laws, regulations or practice; see ILC, 79th Session, 1992, *Record of Proceedings*, para. 111, p. 25/11.

²¹ The word "might" – referring to what a government could keep in mind when drafting or revising legislation without it being a normative recommendation – was used to introduce greater flexibility and also to address some concerns as to the extent of the scope of protected claims; see ILC, 79th Session, 1992, *Record of Proceedings*, paras. 257-262, 279 and 284, pp. 25/22-25/23 and 25/25.

²² As the Conference discussions reveal, the obligation to "maintain the value" of the protection of privileged claims should not be interpreted as an obligation which either imposes or prohibits the automatic indexation of the prescribed amount; see ILC, 79th Session, 1992, *Record of Proceedings*, para. 133, p. 25/13.

²³ As noted in the Office background report, "if the claims of the State or the social security system are ranked higher than those of workers, any privilege granted to the latter is mere window-dressing, since once the claims of the former have been satisfied, little or nothing is left for the other creditors", see ILC, 78th Session, 1991, Report V(1), p. 31.

protected by a guarantee institution, the claims so protected may be given a lower rank than those of the State and the social security system.²⁴

The Recommendation contains two additional provisions addressing questions which are not covered in the Convention. The first (Paragraph 5) relates to the payment of workers' claims which fall due after the insolvency proceedings have been opened, that is when the enterprise is authorized to continue its activities, and specifies that workers' claims arising out of work performed after the date when the continuation was authorized should not be subject to the proceedings and should be paid, out of available funds, as and when they fall due. In addition, the Recommendation (Paragraph 6) provides that there should be a procedure for accelerated payment in case the insolvency proceedings cannot ensure rapid settlement of workers' privileged claims. This procedure should cover the totality of the claim, or at least a part of it to be fixed by national laws or regulations, and should reflect two main considerations: first, the payment of privileged claims should be made as soon as it is determined that they are genuine and payable, and second, when the claim is contested, the worker should be able to have its validity determined by a court or any other competent body so as to avoid protracted procedures and undue delays in the settlement of wage debts.

Protection of wage claims by guarantee funds

National law and practice on wage guarantee funds varies considerably from one country to another. Accordingly, the Convention sets forth a limited number of generally-worded principles rather than detailed rules regarding the operation of such funds. It is significant that neither the Convention nor the Recommendation define what the expression "guarantee institution" means. The Recommendation (Paragraph 7) merely indicates that the protection of workers' claims by a guarantee institution should have as wide a coverage as possible. The Convention (Article 11) leaves it to ratifying States to regulate, by means of laws or regulations or by any other means consistent with national practice, the modalities of its application including the organization, management, operation and financing of wage guarantee institutions. It provides, nevertheless, that when particular characteristics and needs so require, member States may allow insurance companies to provide the type of protection normally entrusted to guarantee institutions, as long as they offer sufficient guarantees. It further specifies (Article 10) that a member State may, after consulting the most representative employers' and workers' organizations, adopt appropriate measures for the purpose of preventing possible abuse.

The Recommendation (Paragraph 8) supplements these provisions by outlining the principles which might govern the operation of guarantee institutions.²⁵ Thus, guarantee institutions should be administratively, financially and legally independent of the employer. Employers should contribute to their financing, unless they are financed exclusively out of public resources, and the funds so collected should only be used for the purpose of satisfying claims in respect of unpaid wages. Moreover, the settlement of protected claims should be ensured irrespective of any outstanding contributions due by the insolvent employer to the guarantee institution. Finally, guarantee funds should operate on the principle of subsidiary guarantee, it being understood that even though they are not

²⁴ In this latter case, it is understood that even though the privilege could be lower than that of the State and the social security system, it must always remain higher than most other privileged claims; see ILC, 79th Session, 1992, *Record of Proceedings*, para. 152, p. 25/15.

²⁵ The use of the word "might" aims to maintain a high degree of flexibility, which should facilitate the acceptance of the principles in question by countries with little experience of guarantee schemes or countries operating widely differing systems.

principally liable for the settlement of wage debts, they often need to make advances to satisfy claims and later endeavour to recover the sums due from the principal debtor and should, by way of subrogation, be able to act in place of the workers to whom they have made payments.

The Convention (Article 12) lays down that the protection afforded by a guarantee institution must cover as a minimum the following workers' claims: (i) workers' claims for wages relating to a prescribed period of not less than eight weeks prior to the insolvency or prior to the termination of employment; (ii) claims for holiday pay as a result of work performed during a prescribed period which may not be less than six months prior to the insolvency or the termination of the employment; (iii) claims for amounts due in respect of other types of paid absence relating to a prescribed period which may not be less than eight weeks prior to the insolvency or prior to the termination of the employment; and (iv) severance pay. The shorter period of protection for a guarantee as compared to that covered by a privilege (eight weeks instead of three months with respect to wage claims, and six months instead of one year in relation to claims for holiday pay) is justified by the unquestionable advantages that a guarantee institution has over a system based on preference. In fact, since a wage guarantee scheme offers an assurance of payment which is not present in the case of a privilege, it was felt that social security legislation should be more generous regarding a privilege than in relation to a guarantee institution. With regard to the four categories of protected claims, the Recommendation (Paragraph 9) expands the scope of guarantee protection to cover additional claims similar to those indicated in the case of a privilege. Accordingly, a guarantee institution should also cover claims such as: overtime pay, commissions and other forms of remuneration relating to a period of not less than three months prior to the insolvency; end-of-year and other bonuses relating to a period of not less than 12 months prior to the insolvency; payments due in lieu of notice of termination of employment; or compensation payable directly by the employer in respect of occupational accidents and diseases. In addition, the coverage of the guarantee might be extended to include claims such as contributions due in respect of social security schemes, whether national, private, occupational or inter-occupational, as well as wages awarded to a worker through adjudication or arbitration within three months prior to the insolvency.

With regard to the possibility of setting an overall limit on the amount of protected claims, the Convention (Article 13) provides that the prescribed amount may not be below a socially acceptable level, and must be adjusted from time to time as may be necessary so as to maintain its value.²⁶ The Recommendation (Paragraph 10) further clarifies the notion of a socially acceptable level by reference to elements such as the minimum wage, the part of wage which is unattachable, the wage on which social security contributions are based or the average wage in industry.

With respect to guarantee institutions, the provisions of the Convention are inspired to a certain extent by the European Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. The 1980 Directive requires Member States to put in place an institution guaranteeing to employees whose employer has become insolvent the payment of their outstanding claims to remuneration for specific period. In order to restrict the duration of the guarantee, Member States are given the choice of three alternative dates marking the beginning of the reference period within which the minimum period of guaranteed remuneration must fall. The Directive also allows member States to set a ceiling for liability for employees' outstanding claims, and highlights the operating

²⁶ It is understood that, in laying down the requirement to "maintain the value" protected by a guarantee institution, the intention is neither to impose nor to prohibit the indexation of the amount protected; see ILC, 79th Session, 1992, *Record of Proceedings*, para. 214, p. 25/19.

principles for guarantee institutions, i.e. financial independence, employer's funding and liability irrespective of contributions record.²⁷

Provision common to both Parts

The final paragraph of the Recommendation (Paragraph 11) sets out the principle that workers or their representatives should receive timely information and be consulted with regard to insolvency proceedings which have been opened and to which the workers' claims pertain.²⁸

Role and impact of the supervisory bodies

The recent entry into force of Convention No. 173, and consequently the low number of ratifications (13 member States have so far ratified the Convention, nine of which have only accepted the provisions of Part II, two have accepted those of Part III, and another two have accepted both Parts), have not permitted the Committee of Experts to comment extensively on national laws and regulations giving effect to the provisions of the Convention. It is not, therefore, easy at this stage to draw any general conclusions regarding the practical application of the Convention or the degree of legislative conformity attained by ratifying States. However, the Committee has had the opportunity to draw attention to the criteria used to set the monetary limits for privileged or guaranteed claims, as well as the method for revising those limits so as to ensure that they do not fall below a "socially acceptable level".²⁹ In addition, the Committee has raised points relating to the time-limits applicable to protected claims and has requested the governments concerned to extend their coverage so as to comply with the minimum standards laid down by the Convention.³⁰ In some cases, the Committee has recalled the possibility of

²⁷ In January 2001, the European Commission finalized the text of a draft Directive amending the 1980 Directive with a view to adapting its content to new trends in insolvency law in the Member States, and better reflecting other Community directives adopted in the meantime, as well as the recent case law of the Court of Justice. The draft Directive proposes a wider definition of insolvency to cover not only bankruptcy or liquidation proceedings, but also other collective insolvency proceedings. It also extends the scope of protection in respect of the employees covered stating that member States may not exclude part-time workers, workers with fixed-term contracts or workers with a temporary employment relationship within the meaning of relevant Directives. Moreover, the draft Directive seeks to simplify the provisions on the time-limit applicable to the guaranteed pay claim by laying down a minimum period (three months) and leaving it to Member States to fix a date and a reference period. Finally, the Directive addresses the question as to how to designate the guarantee institution responsible for meeting pay claims in the event of firms with establishments in various Member States becoming insolvent. In accordance with recent jurisprudence (Case C-198/98, judgment of 16 December 1999), in cases with a cross-border dimension, that is when the opening of insolvency proceedings has been requested in a Member State other than that in which the worker habitually works, the competent guarantee institution is that in the latter Member State which also implies the automatic recognition of insolvency proceedings initiated in another Member State.

²⁸ Originally included in the Convention, this rule was thought likely to raise problems in its practical application and was finally omitted. It was later inserted in the Recommendation in order to stress the importance of promoting information and consultation in matters related to the social effects of bankruptcy; see International Labour Conference, 79th Session, 1992, *Record of Proceedings*, paras. 216-223, pp. 25/19-25/20, and paras. 361-368, pp. 25/32-25/33.

²⁹ See, for instance, ILO, Report of the Committee of Experts, 1999, p. 576 (Spain); and direct requests 1997 (Australia, Finland).

³⁰ See, for instance, direct requests 1998 (Switzerland); and 1997 (Finland).

extending the acceptance to the Part of the Convention which was not accepted at the time of ratification in view of favourable legislative developments. As national law and practice in the great majority of member States seems generally to conform to the requirements of the Convention in respect of privileged workers' claims, and also in view of the renewed interest in the establishment of guarantee institutions in a growing number of countries, the Convention may be expected to receive further ratifications in coming years.

III. Minimum Wage Fixing Convention (No. 131) and Recommendation (No. 135), 1970

Origins and objectives

Minimum wage fixing is often associated with one or more of the following four purposes: (a) bringing the lowest wages up to the general level of wages paid for similar work; (b) exerting upward pressure to the general level of wages as a whole; (c) eliminating unfair competition; and (d) serving as a policy tool aimed at promoting rapid growth and equitable distribution of the national income.³¹

Minimum wages have been the subject of close attention since the ILO was first created. Recognizing that minimum wage fixing in industries and countries where no institutional arrangements for effective regulation of wages exist could result in a substantial improvement in living standards of workers, the Organization has adopted several instruments setting standards on the principles and methods of minimum wage regulation. In 1928, the Minimum Wage-Fixing Machinery Convention (No. 26) was adopted laying down certain principles and rules for the application of minimum wage fixing machinery in those trades, including manufacture and commerce, in which no such mechanism was available and wages were exceptionally low. In 1946, the Conference adopted the Wages, Hours of Work and Manning (Sea) Convention (No. 76), prescribing the actual amount of an international minimum wage for seamen and making provision for the adjustment of this basic wage under certain conditions, while the Social Policy (Non-Metropolitan Territories) Convention (No. 82), adopted in 1947, sets forth the principles and methods which should be observed in fixing minimum wages in dependent territories. In 1951, the Minimum Wage Fixing Machinery (Agriculture) Convention (No. 99) was adopted to address the special problems of wage policy in agriculture.³²

Over the years, the provisions of the Conventions on minimum wage fixing machinery in industry, commerce and agriculture came to be seen as inadequate and incomplete. It was generally agreed that the obligations which appeared sufficient and acceptable in 1928 needed to be strengthened, especially in light of the generalization of minimum wage regulation and the widespread conception of a minimum wage fixing policy not only as an instrument of social protection but also as an element of a strategy of economic development. As the Committee of Experts noted in the first general survey on the instruments dealing with minimum wage fixing:

... since the adoption in 1928 of Convention No. 26, the concept of the minimum wage has undergone considerable evolution. Thirty years ago minimum wage fixing machinery seems to have been regarded primarily as a marginal

³¹ See above, ILO, *Minimum wage fixing and economic development*, 1968, pp. 5-12.

³² To date, Conventions Nos. 26 and 99 have been ratified by 101 and 51 countries respectively. For a summary account of the principal activities of the Organization in this field in the first 30 years, see *Wages – General Report*, ILC, 31st Session, 1948, Report VI(a), pp. 282-293.

mechanism intended to be applied in cases where, through lack of adequate wage regulating arrangements, there was a danger of sweated labour... In the intervening years the concept of the national minimum wage (or, as it is termed in French legislation, the inter-occupational guaranteed minimum wage) has developed. Such a minimum wage appears to have been adopted in a number of countries in the place of or even in addition to earlier legislation which permitted the fixing of minimum rates for particular trades. The trend towards the generalisation of minimum wage protection may be seen also in the tendency of certain minimum wage authorities to issue general minimum wage orders instead of orders for particular occupations, in the establishment of a basic or living wage as a standard of reference for particular wage orders, and in the extension to male workers of legislation previously applicable to women and minors only.³³

A Meeting of Experts, convened in 1967 to consider the problems of minimum wage fixing with special reference to developing countries, as well as possible ways in which existing instruments might be revised, concluded that the standards in force should be improved in three main respects: (a) the obligation to establish and operate a system of minimum wages as opposed to merely putting in place minimum wage fixing machinery; (b) the scope of the instruments which should be general and not limited to certain specific sectors; and (c) the nature of the criteria applied in the determination of minimum wages which should, in the case of developing countries, better reflect the needs of economic development and the characteristics of such countries.³⁴

In adopting Convention No. 131, the Conference considered that the older instruments on minimum wage fixing had played a valuable part in protecting disadvantaged groups of wage earners, but that the time had come to adopt a further instrument complementing these Conventions and providing protection for wage earners against unduly low wages which, while of general application, would pay special regard to the needs of developing countries.³⁵

Scope and content

The Convention (Article 1) lays down the obligation for ratifying States to establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate. Even though the Convention allows ratifying States to determine the groups of wage earners to be covered, which implies that one or more categories of wage earners may be excluded from the protection of a minimum wage, this right is conditional upon the consent or full consultation with the representative organizations of employers and workers concerned. Moreover, each ratifying State is under the obligation to list in its first report on the application of the Convention submitted under article 22 of the Constitution any groups of wage earners which may have not been covered, giving the reasons for their exclusion, while in subsequent reports it must indicate the extent to which effect has been given or is proposed to be given to the Convention in respect of such groups. In addition, the Recommendation

³³ ILC, 42nd Session, 1958, Report III (Part IV), para. 89, p. 120.

³⁴ Report of the Meeting of Experts on Minimum Wage Fixing and Related Problems, with Special Reference to Developing Countries, 1967, GB.170/6/10, para. 99, p. 20.

³⁵ For the Conference discussions, see ILC, 53rd Session, 1969, *Record of Proceedings*, pp. 678-687, and ILC, 54th Session, 1970, *Record of Proceedings*, pp. 378-385 and 440-446. For a brief survey of national law and practice at the time of the adoption of Convention No. 131, see ILC, 53rd Session, 1969, Report VII(1).

(Paragraph 4) states that “the number and groups of wage-earners who are not covered in pursuance of Article 1 of the Minimum Wage Fixing Convention, 1970, should be kept to a minimum”. The Recommendation (Paragraph 5) also provides that national legislation may opt either for a minimum wage system whereby a uniform national minimum wage is fixed to serve as a “floor” or lowest permissible wage for any worker, or for minimum wages differentiated by region, by economic sector or by occupation.³⁶

Definition of minimum wage

The term “minimum wage” is not defined in any of the various ILO instruments dealing with the manner in which minimum wages are designated. In its 1992 General Survey of the reports relating to Convention No. 131, the Committee of Experts noted that:

... minimum wage may be understood to mean the minimum sum payable to a worker for work performed or services rendered, within a given period, whether calculated on the basis of time or output, which may not be reduced either by individual or collective agreement, which is guaranteed by law and which may be fixed in such a way as to cover the minimum needs of the worker and his/her family, in the light of national economic and social conditions.³⁷

Minimum wage fixing machinery

Contrary to earlier instruments on the same subject, the obligation to create minimum wage fixing machinery under the Convention is general and absolute. The scope of the Convention thus goes beyond the requirements of Conventions Nos. 26 and 99. It should be noted that under Convention No. 26 this obligation is conditional on: (a) the absence of arrangements for the effective regulation of wages, and (b) the existence of exceptionally low wages, whereas Convention No. 99 limits its coverage to workers employed in agricultural undertakings and related occupations. Moreover, Conventions Nos. 26 and 99 stipulate that ratifying States undertake to create or maintain machinery whereby minimum wages can be fixed, but do not actually require the fixing of these wages. In contrast, Convention No. 131 clearly indicates that the ratifying State must not only take the necessary and appropriate measures to set up procedural rules; but that minimum wages must be effectively fixed in practice. The Recommendation (Paragraph 6) lists various forms of minimum wage fixing machinery, stipulating that minimum wages may be fixed by: (a) statute; (b) decisions of the competent authority, with or without formal provision for taking account of recommendations from other bodies; (c) decisions of wage boards or

³⁶ By way of example, the United States and France are among the countries with the longest practice in applying a single national minimum wage. In contrast, in the United Kingdom, a national minimum wage was introduced in April 1999. For more see M. Dollé: “Le salaire minimum en France: que nous apprennent les expériences étrangères?”, in *Droit social*, Jun. 1999, pp. 547-552 and D. Metcalf: “The British national minimum wage”, in *British Journal of Industrial Relations*, Vol. 37, 1999, pp. 171-201.

³⁷ ILC, 79th Session, 1992, Report III (Part 4B), para. 42, p. 13. As was observed by the 1967 Meeting of Experts, the concept of the minimum wage “contains three ideas: (a) the minimum wage is the wage considered sufficient to satisfy the vital necessities of food, clothing, housing, education and recreation of the worker, taking into account the economic and cultural development of each country [...]; (b) the minimum wage represents the lowest level of remuneration permitted, in law or fact, whatever the method of remuneration or the qualification of the worker; (c) the minimum wage is the wage which in each country has the force of law and which is enforceable under threat of penal or other appropriate sanctions. Minimum wages fixed by collective agreements made binding by public authorities are included in this definition”; see Report of the Meeting of Experts on Minimum Wage Fixing and Related Problems, with Special Reference to Developing Countries, 1967, GB.170, op.cit. para. 100, pp. 20-21.

councils; (d) industrial or labour courts or tribunals; or (e) giving the force of law to provisions of collective agreements.

Binding force of minimum wages

As in the earlier Conventions, Convention No. 131 (Article 2) recognizes that minimum wages, once fixed, have the force of law for both employers and workers, and shall not be subject to abatement. The Convention confirms and strengthens the principle of the binding force of minimum wages in that it does not provide, as did the earlier instruments, for possible exceptions to this principle.

Purpose of minimum wage fixing

The importance of these instruments stems from their main objective, namely the social protection of workers as regards minimum permissible levels of wages. As set out in the Recommendation (Paragraph 1), minimum wage fixing seeks to ensure the satisfaction of the needs of all workers and their families and as such it constitutes one element in a policy designed to overcome poverty. In order to play a meaningful role in social protection, minimum wages must preserve their purchasing power in relation to a basic basket of essential consumer goods and therefore should be kept in as a close association as possible with market conditions, the situation of national economy and the country's social context. As the Committee of Experts has pointed out:

... the fundamental and ultimate objective of the instruments in question is to ensure to workers a minimum wage that will provide a satisfactory standard of living for them and their families. It is however necessary to note that this objective is not always attained and that in some countries, allowing for the erosion of the value of money caused by inflation, minimum wages represent only a percentage of what workers really need. This fundamental objective of the minimum wage systems should constantly be borne in mind when, in certain countries, structural adjustment programmes are being applied or where, in other countries, the transition is under way from a planned to a market economy.³⁸

Consultation and participation of social partners

One of the core requirements of the minimum wage instruments is that the minimum wage fixing machinery must be established, operated and modified in consultation with organizations of employers and workers, who must participate on an equal footing. In this respect, Convention No. 131 (Article 4) consolidates the principle established in Conventions Nos. 26 and 99 in stipulating that provision has to be made for *full consultation* with representative organizations of employers and workers concerned or where no such organizations exist, representatives of employers and workers concerned, and also for *direct participation*, where appropriate, of representatives of employers' and workers' organizations concerned on a basis of equality, as well as of independent persons appointed after full consultation with representative organizations of employers and workers concerned. As the Committee of Experts stated in its 1958 General Survey on the minimum wage fixing machinery instruments, "consultation – and, if possible, participation – of employers and workers and of their organisations in the wage-fixing

³⁸ ILC, 79th Session, 1992, Report III (Part 4B), paras. 428 and 429, p. 162. According to an ILO study, minimum wages in the countries of the former Soviet Union "are still at a level of no more than 40 per cent of the average wages, and fall below social subsistence levels"; see ILO, *World Employment 1996/97: National policies in a global context*, 1996, p. 115.

process is desirable in all cases and in fact finds its most complete application in the case of collective bargaining”.³⁹

In line with earlier instruments, the Convention provides that the duty of consultation should apply at two different levels. First, it should relate to the preliminary question of the determination of the groups of the wage earners to be covered by the minimum wage fixing system, and second it should refer to the establishment, operation and modification of the minimum wage fixing machinery. This is further clarified in the Recommendation (Paragraph 7), which states that the opinion of the employers and workers should be sought and duly taken into consideration, in particular, with regard to the following matters: (a) the selection and application of the criteria for determining the level of minimum wages; (b) the rate or rates of minimum wages to be fixed; (c) the adjustment from time to time of the rate or rates of minimum wages; (d) problems encountered in the enforcement of minimum wage legislation; and (e) the collection of data and the carrying out of studies for the information of minimum wage fixing authorities.

Criteria for fixing and adjusting minimum wages

Convention No. 131 is the first minimum wage Convention to contain specific provisions on the criteria to be used in determining the level of minimum wages. In contrast, Conventions Nos. 26 and 99 did not address the question of the criteria to be taken into account in fixing minimum wages. The only reference to be found in Recommendations Nos. 30 and 89 is that in fixing the minimum rates of wages the wage-fixing body should in any case take account of the necessity of enabling the workers concerned to maintain a suitable standard of living. Convention No. 131 (Article 3) specifies that the needs of workers and their families, together with economic factors, have to be taken into account insofar as possible and appropriate in relation to national practice and conditions. According to the Convention, the needs of workers and their families are to be evaluated having due regard to the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups, while among economic factors consideration has to be given to the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment. It should be noted that the requirement to take social security benefits into account when considering the needs of workers and their families is a new criterion not mentioned in earlier instruments. The Recommendation (Paragraph 3) adds only a reference to changes in the cost of living to the criteria listed in the Convention. Moreover, it states (Paragraphs 11, 12 and 13) that minimum wage rates should be adjusted from time to time to take account of changes in the cost of living and other economic conditions and that, accordingly, reviews of minimum wage rates in relation to the cost of living and other economic conditions might be carried out, either at regular intervals or whenever appropriate in the light of variations in a cost-of-living index. Periodical surveys of national economic conditions, including trends in income per capita, in productivity and in employment, should also be made to the extent that national resources permit.⁴⁰

³⁹ ILO, 42nd Session, 1958, Report III (Part IV), para. 20, p. 108.

⁴⁰ The 1967, Meeting of Experts had taken the position that, although the frequency of such surveys depends on local conditions, intervals of three to five years would probably be appropriate; see Report of the Meeting of Experts on Minimum Wage Fixing and Related Problems, with Special Reference to Developing Countries, *op.cit.*, para. 86, p. 17.

Minimum wage enforcement measures

The Convention (Article 5) calls for appropriate measures, such as adequate inspection reinforced by other necessary measures, to ensure the effective application of all provisions relating to minimum wages. The Recommendation (Paragraph 14) specifies in some detail what constitute appropriate and adequate enforcement measures within the meaning of the Convention. The measures appear to address principally three different concerns: ample information of workers and employers; effective sanctions to punish infringements; and procedural guarantees enabling the worker to recover outstanding sums in respect of minimum wages and obtain compensation for the loss suffered. More specifically, enforcement measures should include the following: (a) arrangements for giving publicity to minimum wage provisions in languages or dialects understood by workers who need protection, adapted where necessary to the needs of illiterate persons; (b) employment of a sufficient number of adequately trained inspectors equipped with the powers and facilities necessary to carry out their duties; (c) adequate penalties for infringement of the provisions relating to minimum wages; (d) simplification of legal provisions and procedures enabling workers to exercise effectively their rights under minimum wage legislation, including the right to recover amounts by which they may have been underpaid; (e) the association of employers' and workers' organizations in efforts to protect workers against abuses; and (f) adequate protection of workers against victimization.

The Convention's added value

The 1970 Convention and its supplementing Recommendation mark a significant step forward in relation to the older instruments on minimum wage fixing. It should be noted, in this connection, that Conventions Nos. 26 and 99 were not revised or replaced by Convention No. 131 and are therefore still open to ratification. One advance marked by Convention No. 131 is that it requires the actual fixing of minimum wages, whereas under the earlier Conventions it was sufficient to create and maintain machinery for doing so. Secondly, its coverage is broader; ratifying States are required to report on groups of wage earners not covered and the reasons for not covering them. Moreover, the Convention allows for different policy considerations that may arise in fixing minimum wages, especially in developing countries. Thus the criteria for the determination of minimum wage levels include the need to consider the effect of increases in the minimum wages on economic growth and on employment. Finally, it requires ratifying States to provide for full consultation with workers' and employers' organizations in the establishment, operation and adjustment of the minimum wage fixing system and to take appropriate measures for a system of inspection to ensure the effective application of minimum wages. The Recommendation elaborates on most of the points covered by the Convention and covers some additional matters. Apart from defining the purpose of minimum wage fixing, it provides that the number and groups of wage earners not covered by the system of minimum wages should be kept to a minimum and that the minimum wages may differ between regions and zones. It also enumerates the various forms that minimum wage fixing machinery may take and the matters that should be subject to consultation. Moreover, it contains detailed provisions regarding the adjustment of minimum wages, as well as the enforcement of relevant laws and regulations.

Role and impact of the supervisory bodies

In supervising the application of the Convention by ratifying States in law and practice, the Committee of Experts has drawn up a wealth of comments shedding light on all aspects of the Convention. The Committee has emphasized on several occasions the obligatory nature of minimum wages and the corresponding principle according to which the abatement of minimum wages is not permissible for whatever reason such as, for

instance, the non-fulfilment of production quotas or non-compliance with quality standards.⁴¹ As it has been pointed out, in this connection:

... factors such as the quantity and the quality of the work performed by the individual worker, while appropriate elements in the determination of his actual remuneration, should not affect the right to payment of a minimum wage, which should be a guarantee of a just remuneration in return for work duly performed during a stated period. For these reasons also, where a minimum wage system is based primarily on piece rates, great care needs to be exercised to ensure that, under normal conditions, a worker can earn enough to be able to maintain an adequate standard of living, and that his output, and consequently his earnings, are not unduly limited by conditions independent of his own efforts.⁴²

With regard to certain vulnerable categories of workers, such as homeworkers and domestic workers, but also apprentices and agricultural workers, who often receive wages lower than the minimum wages, the Committee of Experts, while recognizing the practical difficulties involved in fixing the minimum wage for some or all of these categories of workers, has consistently emphasized the importance of extending the protection afforded by a system of minimum wages to all workers in accordance with the provisions of the Convention.⁴³ Among the recurrent matters raised in the Committee's comments is also the principle of the differentiation of minimum wages in respect of age. The Committee has clearly indicated that national policies establishing distinctions in minimum wages based on age are inconsistent with the Convention and has called upon the governments concerned to review such policies in light of the principle of equal pay for work of equal value and on the basis of objective criteria, such as the quality and quantity of the work performed.⁴⁴ The Committee has recognized, however, with special reference to apprentices, that lower minimum wages may be allowed provided that in exchange they actually receive training during working hours and at the place of work which enables them to acquire skills in a trade or occupation.⁴⁵

The Committee of Experts has often drawn attention to the fact that minimum wages must be sufficient for the subsistence needs not only of workers, but also of their families, and has given some indication as to the need to calculate minimum wages on the basis of a basket of essential goods, or by taking into account the minimum cost of education, health care and housing.⁴⁶ Another point frequently raised by the Committee is that, minimum wage fixing being an instrument of social and economic policy, minimum wages must be

⁴¹ See, for instance, direct requests 1999 (Latvia, France-St.Pierre and Miquelon) and 1998 (Netherlands-Aruba).

⁴² ILC, 42nd Session, 1958, Report III (Part IV), para. 92, p. 121.

⁴³ See, for instance, ILO, Report of the Committee of Experts, 2001, p. 550 (Uruguay); 1999, p. 516 (Sri Lanka); 1985, 340 (Spain) and general observation, pp. 74 and 339. See also direct requests 2000 (Bolivia); 1998 (Guatemala, Lebanon, Syrian Arab Republic); 1997 (Yemen); 1994 (Nepal).

⁴⁴ See, for instance, ILO, Report of the Committee of Experts, 1999, p. 513 (Portugal); 1998, p. 419 (Spain); 1994, p. 455 (Ecuador). See also direct requests 2000 (Portugal, United Republic of Tanzania) and 1998 (France-New Caledonia).

⁴⁵ See, for instance, ILO, Report of the Committee of Experts, 1998, p. 420 (Spain); 1995, p. 368 (Ecuador).

⁴⁶ See, for instance, ILO, Report of the Committee of Experts, 2001, p. 548 (Uruguay); 1989, p. 448 (Netherlands). See also direct request 1996 (Latvia).

adjusted from time to time in conformity with rules and procedures guaranteeing the full consultation and direct participation of social partners.⁴⁷

Yet, by far the most frequent comments of the Committee of Experts refer to the duty to undertake meaningful consultations with the social partners and to invite them to participate effectively at all stages of the minimum wage fixing process.⁴⁸ As applied by the Committee, “consultation” has a different connotation from mere “information” and from “co-determination”, implying rather a process whereby social partners are given the opportunity to have some influence on relevant decisions. The Committee has recalled that, although States are free to choose the means whereby consultation is carried out, the consultation must take place before decisions are made and must be effective, that is to say that it must enable employers’ and workers’ organizations to have a useful say in the matters that are the subject of consultation. The Committee has further specified that the obligation to consult is distinct from the obligation to negotiate, while other ILO supervisory bodies have noted that “while the obligation to initiate tripartite consultation rests with the government of a member State, effective consultation cannot take place without the active and willing participation of all the parties concerned”.⁴⁹

As regards the term “participation”, the Committee of Experts defines it as open collaboration with the responsible authorities in the application of the provisions of the minimum wage fixing instruments. To quote once again from the 1992 General Survey:

... the participation of employers and workers, of their organisations or their representatives, must be direct, including the possibility that the parties concerned form part of the relevant bodies, that their participation is effective –

⁴⁷ See, for instance, ILO, Report of the Committee of Experts, 1993, p. 439 (Spain); 1987, p. 419 (Sri Lanka); 1985, p. 340 (Bolivia). See also direct request 2000 (Niger).

⁴⁸ See, for instance, ILO, Report of the Committee of Experts, 2001, p. 543 (Bolivia); 2000, p. 408 (Spain); 1998, p. 415 (Brazil). See also direct requests 1997 (Lithuania); 1994 (Guatemala, Lebanon). See also the report of the Committee set up to examine the representation made under article 24 of the Constitution alleging non-observance of Convention No. 131 by Spain, where it is stated that: “the consultation in question should be aimed at more than just obtaining the opinion of the interested organisations. The party responsible for carrying out the consultation, in this case the Government, should take into consideration what is stated or proposed by the party it consults, in this case the Confederation, but this does not mean that the Government has to comply with all the requests of the Confederation consulted, particularly those concerning the economic indices that are taken into consideration in fixing the minimum wage or the amount proposed by the organisation consulted, still less that it should enter into negotiations, as this is not foreseen by the Convention either in letter or in spirit. This view can be strengthened by the consideration that Article 4, paragraph 2, of the Convention states that ‘provision shall be made for full consultation’ with representative organisations of employers and workers concerned. In this respect the Committee recalls that the adjective ‘full’ derives from an amendment proposed to the paragraph in question in order to prevent consultation by governments with employers’ organisations and trade unions from being ‘perfunctory’, which means therefore that it was wished to guarantee that the consultation had a real effect. The Committee recalls that the objective of consultation is specifically to obtain the maximum possible amount of information (‘full consultation’) from all parties, and not only to obtain their opinion, even where that opinion is well documented.[...]. The Committee considers it advisable to draw the Government’s attention to the need to carry out consultation not only as a purely formal or procedural act, but with the object of taking effective account of the opinion of one of the social partners regarding the matter forming the subject of the consultation, in the present case the minimum inter-professional wage”; GB.243/6/22, paras. 38-40, p. 9.

⁴⁹ Report of the Committee set up to examine the representation made under article 24 of the Constitution alleging non-observance of Convention No.131 by Bolivia, ILO, *Official Bulletin*, Vol. 68, 1985, Series B, Special Supplement 1/1985, para. 21, p. 6.

that is to say that the opinions reached by the parties concerned should be duly taken into consideration - and that the participation should take place on an equal footing... [However,] equal footing should not be interpreted as implying strict numerical equality between employers and workers but the attribution of equal weight to the opinions and interests of either side.⁵⁰

IV. Labour Clauses (Public Contracts) Convention (No. 94) and Recommendation (No. 84), 1949

Origins and objectives

The rationale behind the adoption of Convention No. 94 was that public authorities, in contracting for the execution of construction work or for the supply of goods and services, should be attentive to the working conditions under which those operations are carried out. The need for specific legislation to protect workers employed by a private contractor and paid indirectly out of public funds arises from the circumstances of intense competition involved in bidding for public contracts, which may incite employers to economise on labour costs. Consequently, it is the purpose of labour clauses in public contracts to ensure the observance of socially acceptable minimum standards in work done for the public account. More generally, it is recognized that fair labour clauses in public contracts may also play a useful role in the attainment and maintenance of a high standard of social protection at the national level. Furthermore, such clauses tend to influence inter-State relations to the extent that countries insert labour clauses in contracts for foreign procurement or make the approval of grants conditional upon the effective maintenance of certain labour standards.

Historically, labour provisions contained in the different national regulations applying to public contracts were known as “fair wages clauses”, since the original and primary concern of those regulations was with wages.⁵¹ Over the years, however, the scope of legislation became more general and extended to conditions of work as a whole, so that “fair wages clauses” also came to cover such questions as hours of work and the health and safety of workers.

The Conference gave early consideration to the question of labour standards in public works. In 1936, it adopted the Reduction of Hours of Work (Public Works) Convention (No. 51) which applies to “persons directly employed on building or civil engineering works financed or subsidised by central Governments” and provides for a normal work week of 40 hours, overtime work up to a limit of 100 hours in any year and overtime wage rates of not less than 25 per cent in excess of normal rates. In the Public Works (National Planning) Recommendation, 1937 (No. 51), the Conference reached conclusions concerning minimum standards of conditions of recruitment and wage rates. With respect to wage rates, the Recommendation provides that they “should not be less favourable than those commonly recognised by workers’ organisations and employers for work of the same

⁵⁰ ILC, 79th Session, 1992, Report III (Part 4B), paras. 239 and 241, pp. 82-83.

⁵¹ The original Fair Wages Resolution was passed by the House of Commons in Britain in 1891, while two more Fair Wages Resolutions followed in 1909 and 1946. See P.B. Beaumont: “The Use of fair wages clauses in government contracts in Britain” in *Labor Law Journal*, Vol. 28, 1977, pp. 147-165. Similar legislation was introduced in the United States in 1936 by virtue of the Walsh-Healey Public Contracts Act. See H.C. Morton: *Public contracts and private wages: Experience under the Walsh-Healey Act*, 1965. It is indicative, in this respect, that the item placed on the agenda of the Conference in 1948 by decision of the Governing Body referred to “Fair wages clauses in public contracts”.

character in the district where the work is carried out [or] where there are no such rates recognised or prevailing in the district, those recognised or prevailing in the nearest district in which the general industrial circumstances are similar should be adopted, subject to the condition that the rates should in any case be such as to ensure to the workers a reasonable standard of life as this is understood in their time and country”.

The Office report “*Future policy, programme and status of the International Labour Organization*”, submitted to the Philadelphia Conference of 1944, referred to the “question of the inclusion of a clause relating to fair wages and conditions of employment in contracts relating to work undertaken for or subsidised by public authorities” as one of the wage policy topics which might be covered by future instruments. In this connection, the report stated that “in countries where the principle of the fair wages clause has been adopted, the clause has been an important factor in eliminating sub-standard working conditions which tended to undercut standards set by better employers; the clause is, however, still relatively unknown in many of the countries with comparatively low wage standards and the adoption of a Convention on the subject by the International Labour Conference would be calculated to give a strong impetus towards its adoption there”.⁵² In the event, it was the need for “fair labour practices” in funding the gigantic effort of rebuilding devastated countries and restructuring ruined economies at the end of the Second World War that led to the adoption of Convention No. 94.⁵³

The Convention is of special interest because it represents a long accepted and prevailing view of how to integrate social aspects into public contracts and public procurement. The main focus is on public contracts concluded at the national level in which no transnational aspects are involved. The purpose is to restrict the possibility to use “social dumping” as a tool to compete in the area of public procurement. Even though the Convention is more than half a century old, it remains widely ratified and has had an important influence on the elaboration of other international instruments, such as recent European Union directives in the area of public procurement.⁵⁴

Scope and content

The Convention (Article 1) applies to contracts to which at least one of the parties is a public authority and which are entered into for: the construction, alteration, repair or demolition of public works; the manufacture, assembly, handling or shipment of materials, supplies or equipment; or the performance or supply of services. To qualify as a “public contract” within the meaning of the Convention, the contract must be awarded by a central

⁵² See ILC, 26th Session, 1944, Report I, p. 51.

⁵³ For the Conference discussions, see ILC, 31st Session, 1948, *Record of Proceedings*, pp. 445-455, and ILC, 32nd Session, 1949, *Record of Proceedings*, pp. 235-240 and 482-491.

⁵⁴ The impact of Convention No. 94, especially with reference to European Union procurement law, is analysed in K. Krüger, R. Nielsen, and N. Bruun: *European public contracts in a labour law perspective*, 1998, pp. 207-247. The relationship between the scope of application of Convention No. 94 and the legal regime of the European Union on public procurement has to be examined principally in the light of Directive 96/71/EC on the Posting of Workers, Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts, Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts and Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

authority of the ratifying State and its execution must involve the expenditure of funds by a public authority and the employment of workers by the contractor.⁵⁵

Public authority – Central authority

The Convention does not contain a specific definition of the term “public authority” so as to allow room for all the various forms of public and semi-public corporations that may be found in the national legal systems of member States.⁵⁶ The fact that at least one of the parties to a contract has to be a public authority, according to Article 1, paragraph 1, of the Convention, does not exclude contracts between two public parties. As the Conference discussions prior to the adoption of the Convention show, any explicit reference to “private” contractors was omitted, as it was considered that this would unduly restrict the scope of the Convention and might lead to the exclusion of semi-public or public bodies, including government corporations and local authorities which might contract with other public authorities.⁵⁷ It is also clear that the Convention does not apply to employment contracts regarding the conditions of work of civil servants and workers employed by the Government and other public bodies.

Contracts awarded by the central government are specifically covered, while it is left to the discretion of ratifying States to determine how and to what extent the Convention is to be applicable to contracts awarded by provincial, municipal or other local authorities. The term “central authority” was initially used to draw a dividing line between central and local authorities. As was pointed out during the preparatory work for the Convention, the language used conforms to usual practice and refers to “departments and other agencies of the central Government”,⁵⁸ while “in the case of a federal State, the central authority may be either the federal authority or a central authority of a constituent unit”.⁵⁹ In an informal opinion on the meaning of the terms “public” and “central authority”, the Office has taken the position that “it appears to have been the intent of the Conference to provide a certain margin to national legal systems in defining the term ‘public authority’ and in determining the extent to which different types of public and semi-public corporations, such as companies which are publicly owned, but organised on a basis of private law, shall be treated as public authorities in the application of the Convention”. The Office has further pointed out that the term “other authorities” was introduced with “local authorities in mind”, which implies that ratifying States have an option to apply the provisions of the Convention to local authorities. The term “local authority” may mean the authority of a province, a department, a region, a municipality, a port, etc., according to the country concerned. In general, the Convention leaves a large margin of discretion to member States regarding the definition of the terms central and public authority.

Subcontractors

The Convention (Article 1) specifically provides that its provisions also apply to work carried out by subcontractors and assignees of contracts. The rationale behind this provision is to ensure that multi-level subcontracting is not used to circumvent the

⁵⁵ All the above conditions are cumulative; see ILC, 31st Session, 1948, Report VI(b)(2), p. 40, and ILC, 32nd Session, 1949, Report VI(2), p. 12.

⁵⁶ See ILC, 31st Session, 1948, Report VI(b)(2), pp. 40-42.

⁵⁷ See ILC, 31st Session, 1948, *Record of Proceedings*, p. 447.

⁵⁸ See ILC, 31st Session, 1948, *Record of Proceedings*, p. 447.

⁵⁹ See ILC, 31st Session, 1948, Report VI(b)(1), p. 10

obligations arising from the Convention, particularly as regards wages. The Convention leaves to ratifying States, however, both the definition of “subcontractors” and the determination of appropriate measures of application. It is generally understood that the measures taken by the competent authority must ensure that subcontractors which do not conclude contracts directly with the State observe the labour clauses. It is not sufficient that a labour clause can be reimposed on the subcontractor. Labour clauses must be directly applicable to subcontractors and this should be explicitly set forth in the relevant legislation or regulations. The Convention therefore requires ratifying States to guarantee the implementation of the labour clauses enumerated in the Convention also in regard to subcontractors. The supplementing Recommendation (Paragraph 1) lays down that provisions substantially similar to those of the labour clauses in public contracts should be applied in cases where private employers are granted public subsidies or are licensed to operate a public utility.

Exemption possibilities

The Convention (Article 1) provides for possible exemptions in the case of contracts involving the expenditure of public funds below a limit to be determined by the competent authority. The idea expressed in this provision is that only contracts involving relatively small amounts of public funds may be exempted from the coverage of the Convention.⁶⁰

Another possibility of exemption relates to persons occupying positions of management or of a technical, professional or scientific character, whose conditions of work are not determined by legislation, collective agreement or arbitration award and who do not ordinarily perform manual work. The reason for the inclusion of this provision seems to be that the working conditions of these categories of workers do not require the same standard of protection as those of other groups of workers, especially in relation to certain national law systems in which such workers are often excluded from the application of the labour law. In both cases analysed above, there is an obligation under the terms of the Convention for the competent authority to hold adequate consultations with the employers’ and workers’ organizations concerned.

According to the terms of the Convention (Article 7), it is also permissible to exempt from its scope of application areas where, owing to the sparseness of the population or the stage of development of the area, it is considered impracticable to enforce it, either throughout the area or in respect of particular industries. Moreover, the operation of the Convention (Article 8) may be temporarily suspended, after consultations with the employers’ and workers’ organizations concerned, in cases of *force majeure* or in an emergency endangering the national welfare or safety.

Labour conditions prescribed in fair wages clauses

The Convention provides (Article 2) that public contracts must include clauses ensuring to the workers concerned wages, hours of work and other conditions of labour which are not less favourable than those established by collective agreement or other recognized machinery of negotiation, or by arbitration award, or by laws or regulations, for work of the same character in the trade or industry concerned in the district where the contract is carried out. If conditions of labour are not so regulated in the district, the labour clauses must ensure either conditions not less favourable than those established in the nearest appropriate district by collective agreement, arbitration or legislation, or the general level observed in the trade or industry in which the contractor is engaged by

⁶⁰ See ILC, 32nd Session, 1949, Report VI(2), p. 13, and, 32nd Session, 1949, *Record of Proceedings*, p. 484.

employers whose general circumstances are similar. The Convention does not aim to set specific standards. Its object is rather to determine which national regulations setting labour conditions are to be made applicable to the contracting employer. In this respect, the words “not less favourable” imply that the labour conditions prescribed in the labour clauses may not be less favourable than whichever is the most favourable of the three alternatives provided for in the Convention, i.e. collective negotiation, arbitration or legislation.

The emphasis placed on the conditions laid down in collective agreements or arbitration awards is based on the grounds that such conditions tend to be the most favourable ones for the workers, and are therefore most socially desirable, while the acceptance of less favourable conditions would penalize employers who have entered into agreements with their workers.⁶¹ The Convention also provides (Article 3) that adequate measures must be taken to ensure fair and reasonable conditions of health, safety and welfare, if appropriate provision is not already made under legislation, collective agreement or arbitration award. The supplementing Recommendation (Paragraph 2) specifies the details as to wages (normal and overtime rates, including allowances),⁶² hours of work and holiday and sick leave provisions which should be prescribed in labour clauses either directly or by reference to appropriate provisions contained in laws or regulations, collective agreements, arbitration awards or other recognized arrangements.⁶³

Obligation to inform tenderers

The Convention (Article 2) stipulates that the competent authority must take appropriate measures, by advertising specifications or otherwise, to ensure that persons tendering for public contracts are aware of the terms of the clauses.⁶⁴ This provision should be read in conjunction with the corresponding obligation of employers to inform the workers concerned about the labour clauses and the resulting conditions.

Enforcement measures

Under the terms of the Convention, compliance with labour conditions prescribed in public contracts requires three distinct types of measures: publicizing labour clauses and record keeping, supervision entrusted to labour inspectors, and imposition of penalties. With regard to the obligation of keeping the workers informed of their conditions of work, the Convention (Article 4) stipulates that the laws, regulations or other instrument giving effect to its provisions must be brought to the notice of all persons concerned and that the contracting employers must post notices to this effect in conspicuous places at the establishments and workplaces concerned. With respect to supervision, the Convention lays down the obligation for ratifying States to set up, except where other arrangements are operating to ensure effective enforcement, a system of inspection adequate to ensure effective enforcement and also to provide for the maintenance of adequate records of the

⁶¹ See ILC, 31st Session, 1948, Report VI(b)(2), p. 48.

⁶² The reference to “allowances” was inserted in order to make it clear that all the elements which formed part of the remuneration of workers would be covered; see *Record of Proceedings*, ILC, 31st Session, 1948, p. 450.

⁶³ From the preparatory work it follows that, according to the prevailing view, the Convention should concern itself largely with general standards, leaving points of detail to be dealt with in the Recommendation; see ILC, 31st Session, 1948, Report VI(b)(2), pp. 49-50.

⁶⁴ This provision was drafted so as to cover the different practices followed in respect of various types of contracts; see ILC, 32nd Session, 1949, *Record of Proceedings*, p. 486.

time worked by, and the wages paid to, the workers concerned. Ratifying States are thus left with a wide margin of discretion with respect to measures of supervision, as long as the observance of the Convention is adequately guaranteed. Finally, the Convention (Article 5) provides for effective sanctions, such as the withholding of contracts, for failure to observe and apply the provisions of labour clauses in public contracts, and also requires appropriate measures to be taken, such as the withholding of payments under the contract with a view to enabling the workers concerned to recover unpaid wages.⁶⁵

Role and impact of the supervisory bodies

In monitoring the conformity of national law and practice with the requirements of the Convention, the Committee of Experts has focused its comments on two central aspects: the scope of the protection afforded by labour clauses in public contracts and the application of adequate sanctions. Regarding the minimum standard of protection that labour clauses should guarantee, the Committee of Experts has often emphasized that the provisions of the Convention relate not only to the level of wages, and that the workers concerned must also enjoy labour conditions, such as hours of work and holidays, that are not less favourable than those normally observed for a similar kinds of work in the district.⁶⁶

On number of occasions, the Committee of Experts has considered statements to the effect that there is no specific legislation applying the Convention since the conditions of work of the workers employed by public contractors fall within the scope of general labour legislation. The Committee has pointed out, in this connection, that the fact that the general labour legislation is applicable to the activities concerned does not release a ratifying State from the obligation to take the necessary measures to ensure the inclusion of labour clauses in public contracts for the said activities.⁶⁷ This is because the minimum standards fixed by law are often improved upon by means of collective bargaining or otherwise, and also because the provision of penalties, such as the withholding of payments to the contractor, facilitate effective enforcement. However, where the conditions (e.g. wage levels) which are laid down in the national legislation constitute both maximum and minimum standards that may not be exceeded by more favourable collective agreements or arbitration awards, the Committee has expressed the view that a reference in the public contracts to the relevant provisions of the national legislation would be sufficient for the purpose of giving effect to the Convention.

The Committee of Experts has emphasized that the insertion of such clauses constitutes the basic requirement of the Convention, and that therefore exceptions, as in the

⁶⁵ The requirement for specific measures for the protection of workers' wage claims was criticized as pertaining more to the question of the protection of wages, but was finally retained as the general intention was to recognize the principle of withholding payments in public contracts legislation; see ILC, 32nd Session, 1949, *Record of Proceedings*, p. 487.

⁶⁶ See, for instance, ILO, Report of the Committee of Experts, 1999, p. 306 (Brazil) and 1996, p. 173 (Central African Republic).

⁶⁷ See for instance, ILO, Report of the Committee of Experts, 2001, p. 349 (Uruguay); 1997, p. 217 (Turkey); 1996, p. 175 (Rwanda); 1995, p. 221 (Guinea); 1994, pp. 242-243 (Brazil, Egypt); 1984, pp. 168-169 (Panama, Philippines); 1981, pp. 132-133 (Ghana, Guatemala, Mauritius); 1956, general observation, p. 79. See also direct requests 2000 (Algeria); 1999 (Netherlands-Aruba); 1995 (Iraq); 1983 (Suriname); 1976 (Brazil, Somalia).

case of subcontracting, are not permitted.⁶⁸ A further requirement is that a labour clause has to constitute an integral part of a public contract, so that the insertion of a model labour clause in the specifications of public contracts in general does not fully conform to the letter of the Convention. The Committee has further specified that measures to ensure the inclusion of appropriate labour clauses in all the public contracts covered by the Convention does not necessarily have to be given effect by the enactment of legislation, but could also take the form of administrative instructions or circulars. These clauses should be determined after consultation with employers' and workers' organizations and should be sufficiently publicized so that tenders are aware of such terms and clauses.⁶⁹ The Committee has also referred to the exemption possibilities provided under the Convention and has recalled that the possibilities are exhaustive and that therefore other grounds, such as the nationality of tenderers, may not be a basis for exclusion from the scope of the Convention.⁷⁰ With regard to contracts involving the expenditure of public funds below a certain limit, the Committee has taken the view that a limit which would leave a significant proportion of all public contracts, for instance half or more, outside the application of the Convention would be inconsistent with the requirements of the Convention and should be reduced.⁷¹

The Committee of Experts has commented upon practices such as requiring companies tendering for a public contract to obtain a certificate indicating, among other matters, that the company concerned has no record of labour law violation, particularly as regards payment of wages and hours of work. In this respect, the Committee has emphasized that the essential purpose of the insertion of labour clauses in public contracts under the Convention goes beyond the aims of simple certification, as its purpose is to eliminate the negative effects of competitive tendering on the workers' labour conditions.⁷²

With regard to enforcement, the Committee of Experts has often drawn attention to the requirement of keeping workers sufficiently informed of their conditions of work. It has observed, for instance, that the provisions of the Convention are not fulfilled if the information is supplied only upon the worker's specific request, nor is it sufficient to ensure the official publication of legislative texts in general since the requirement of posting notices of conditions of work concerns the situation in respect of a given public contract.⁷³

Concerning sanctions, the Committee has stated that they must apply to all forms of infringements and that it is not sufficient to specify mandatory penalties only for repeated violations, or to stipulate possible sanctions in legislative provisions without implementing

⁶⁸ See, for instance, ILO, Report of the Committee of Experts, 1996, p. 174 (Egypt); 157, general observation, p. 89. See also direct requests 1996 (France-French Guiana, Martinique); 1987 (Swaziland); 1981 (Philippines).

⁶⁹ See direct request 1995bis (Costa Rica, Guatemala, Jamaica).

⁷⁰ See direct request 1995 (Denmark).

⁷¹ See ILO, Report of the Committee of Experts, 1972, p. 174 (Burundi). See also direct requests 1982 (Turkey); 1966 (Malaysia); 1962 (United Kingdom-North Borneo).

⁷² See ILO, Report of the Committee of Experts, 1997, p. 215 (Ghana).

⁷³ See ILO, Report of the Committee of Experts, 1993, p. 244 (Mauritania). See also direct requests 1997 (Swaziland); 1995 (Uruguay).

them in practice.⁷⁴ In this connection, it has regularly requested the governments concerned to give full particulars of the functioning of control bodies, the number and nature of cases in which violations are observed and penal sanctions actually applied. The Committee has recalled that one of the reasons for using labour clauses in public contracts to protect working conditions is that the provision of penalties, such as the withholding of payments to the contractor, makes it possible to impose more directly effective sanctions in case of infringements.⁷⁵ With reference to the withholding of payments, in particular, the Committee has stated that this constitutes a substantive additional safeguard for the workers concerned, even when normal judicial proceedings are available for ensuring payment of wages, whereas it is not an appropriate sanction if the workers can recover wages due to them only if they bring about or threaten a stoppage of work.

Box 1

The concept of a minimum wage

The minimum wage, whether calculated on the basis of time or output, constitutes a level which may not be undercut, and whose application is guaranteed by law. In this respect, the concept of the minimum wage, being related to work, is distinct from that of “minimum income”, which is intended to guarantee minimum living conditions regardless of whether a person has an employment from which he gets a wage. [...] The concept of a minimum wage level that cannot be abated implies the concept of a “minimum living wage”. In this connection, it should be recalled that the establishment of a minimum wage system is often portrayed as a means for ensuring that workers (and in some cases, their families) will receive a basic minimum which will enable them to meet their needs (and those of their families); hence the frequent use of the term “minimum living wage”. Efforts to implement such a concept imply an attitude or a policy which aims at improving the material situation of workers and guaranteeing them a basic minimum standard of living which is compatible with human dignity or is sufficient to cover the basic needs of workers. Such a policy is in line with the International Covenant on Economic, Social and Cultural Rights as regards every person's right to receive remuneration equivalent at least to a wage which makes it possible for workers and their families to lead a decent life.

Source: General Survey of the reports on the Minimum Wage fixing Machinery Convention (No. 26), and Recommendation (No. 30), 1928; the Minimum Wage Fixing Machinery (Agriculture) Convention (No. 99), and Recommendation (No. 89), 1951; and the Minimum Wage Fixing Convention (No. 131), and Recommendation (No. 135), 1970, ILC, 79th Session, 1992, Report III (Part 4B), paras. 32-33, p. 10.

⁷⁴ See ILO, Report of the Committee of Experts, 1998, p. 202 (Austria).

⁷⁵ See ILO, Report of the Committee of Experts, 1998, p. 204 (Turkey) and direct request 1979 (Panama)

Box 2

Criteria for fixing and adjusting minimum wages

The Committee of Experts draws attention to the fact that the consideration of social criteria, such as the needs of workers and their families, cannot be independent of certain economic conditions. Therefore, these criteria must be taken into account in close association with the economic factors mentioned in Convention No. 131 and Recommendation No. 135. In this connection, the Committee recalls that it has had occasion, in comments addressed to governments, to point out that, when determining minimum wage levels, consideration must be given to social as well as economic criteria, and to the close relationship between the two. [...] Finally, the Committee recalls that the minimum wage implies that such a wage must be sufficient for the subsistence needs of workers and their families. Thus, the meeting of subsistence needs is both a criterion of minimum wage fixing and one of the objectives of the Convention. Nevertheless, the needs of workers and their families cannot be considered in a vacuum; they must be viewed in relation to the country's level of economic and social development. Moreover, it is important to remember that the practical application of this criterion implies an evaluation which requires taking into account other elements, such as those listed in Recommendation No. 135. The minimum wage fixing criteria specified in the various instruments in question do not represent precise models; nor do they pretend to give final and unequivocal answers to the question of how suitable minimum wage levels should be determined in a given situation to contribute as effectively as possible to the general welfare. The relative weight given to these elements, and to the anticipated impact of their interaction, is a subjective choice. Consequently, it is indispensable that information concerning these various elements be as complete and reliable as possible, and that it be fully accessible to all parties concerned, and especially to organizations of employers and workers in the context of minimum wage fixing and adjustment, thereby enabling them to make their observations which will surely contribute to clarifying the question.

Source: General Survey on Conventions concerning minimum wage fixing, op. cit., paras. 279 and 281-282, pp. 103-104.

Box 3

Direct participation and full consultation of social partners

The fact of consulting employers' or workers' representatives or their organizations, or of having them participate, is no guarantee either that the consultation or participation of the social partners will be effective. In a certain number of countries, consultation or participation is a mere formality in that the employers' and workers' representatives do not have a real opportunity to present their views on the establishment or modification of minimum wage fixing machinery or its operation. The consultation and participation of employers' and workers' representatives should be on an equal footing. The Committee of Experts has observed that, in a number of countries where consultation and participation does take place, it has been confined either to employers' representatives or workers' representatives. Even in countries where the organization of employers or workers is only emerging or is totally non-existent, governments should ensure that the consultation and participation of employers' and workers' takes place on an equal footing. Consequently, the Committee strongly urges governments to take the necessary action to ensure that the consultation and participation of social partners in the establishment and modification of minimum wage machinery or its operation is useful and effective, that is to say that these representatives are genuinely given an opportunity to express their views, in full knowledge of the facts, that their views are taken into consideration at the appropriate time, and that their consultation and participation are on an equal footing.

Source: General Survey on Conventions concerning minimum wage fixing, op. cit., paras. 423-425, pp. 161-162.

9.2. Working time

9.2.1. Hours of work, weekly rest and paid leave

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Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Weekly Rest (Industry) Convention, 1921 (No. 14)	117	The Governing Body has invited member States to contemplate ratifying Convention No. 14.
Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106)	62	The Governing Body has invited member States to contemplate ratifying to Convention No. 106.
Weekly Rest (Commerce and Offices) Recommendation, 1957 (No. 103)	–	The Governing Body has invited member States to give effect to Recommendation No. 103.
Part-Time Work Convention, 1994 (No. 175)	8	This Convention was adopted after 1985 and is considered up to date.
Part-Time Work Recommendation, 1994 (No. 182)	–	This Recommendation was adopted after 1985 and is considered up to date.
Reduction of Hours of Work Recommendation, 1962 (No. 116)	–	The Governing Body has invited member States to give effect to Recommendation No. 116.
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153)	7	The Governing Body has decided upon the revision of Convention No. 153 and the inclusion of this item among the proposals for the agenda of the Conference.
Hours of Work and Rest Periods (Road Transport) Recommendation, 1979 (No. 161)	–	The Governing Body has decided upon the revision of Recommendation No. 161 together with the revision of the Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153), and the inclusion of this item among the proposals for the agenda of the Conference.
Requests for information (Instruments for which the Governing Body has confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, the possible need for the revision of these instruments or on specific issues.)		
Hours of Work (Industry) Convention, 1919 (No. 1)	47	The Governing Body has decided that a General Survey should be carried out on Conventions Nos. 1 and 30. Nevertheless, it has not yet set a date for the preparation of this survey.
Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)	27	
Hours of Work (Inland Navigation) Recommendation, 1920 (No. 8)	–	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendation No. 8.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Forty-Hour Week Convention, 1935 (No. 47)	14	The Governing Body has decided on the maintenance of the status quo with regard to Convention No. 47 pending the adoption of revised standards on hours of work and working time arrangements.
Holidays with Pay Convention (Revised), 1970 (No. 132)	31	The Governing Body has decided on the maintenance of the status quo with regard to Convention No. 132 it being understood that any subsequent development will be taken into account in due course.
Holidays with Pay Recommendation, 1954 (No. 98)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 98.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Sheet-Glass Works Convention, 1934 (No. 43)	12	The Governing Body has decided to shelve Conventions Nos. 43 and 49 with immediate effect. It has also decided that these Conventions might be revised along with other instruments dealing with hours of work.
Reduction of Hours of Work (Glass-Bottle Works) Convention, 1935 (No. 49)	9	
Holidays with Pay Convention, 1936 (No. 52)	41	The Governing Body has invited the States parties to Convention No. 52 to contemplate ratifying the Holidays with Pay Convention (Revised), 1970 (No. 132), the ratification of which ipso jure would involve the immediate denunciation of Convention No. 52, and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 132.
Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No. 67)	3	The Governing Body has decided to shelve Convention No. 67 with immediate effect. It has also invited the three States parties to this Convention to contemplate ratifying the Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153), and denouncing Convention No. 67 at the same time. Finally, it has decided that the situation with regard to Convention No. 67 will be re-examined in due course, with a view to its possible abrogation by the Conference.
Hours of Work (Coal Mines) Convention, 1931 (No. 31)	—	Conventions Nos. 31, 46, 51 and 61 were withdrawn by the Conference at its 88 th Session (June 2000).
Hours of Work (Coal Mines) Convention (Revised), 1935 (No. 46)	—	
Reduction of Hours of Work (Public Works) Convention, 1936 (No. 51)	—	
Reduction of Hours of Work (Textiles) Convention, 1937 (No. 61)	—	
Control Books (Road Transport) Recommendation, 1939 (No. 63)	—	The Governing Body has noted that Recommendations Nos. 63, 65 and 66 are obsolete. An item on the withdrawal of these Recommendations is on the agenda of the 90th Session (2002) of the Conference.
Methods of Regulating Hours (Road Transport) Recommendation, 1939 (No. 65)	—	
Rest Periods (Private Chauffeurs) Recommendation, 1939 (No. 66)	—	
Holidays with Pay (Agriculture) Convention, 1952 (No. 101)	35	The Governing Body has invited the States parties to Convention No. 52 to contemplate ratifying the Holidays with Pay Convention (Revised), 1970 (No. 132), and denouncing Convention No. 101 at the same time, and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 132.
Holidays with Pay (Agriculture) Recommendation, 1952 (No. 93)	—	The Governing Body has noted that Recommendation No. 93 is obsolete and that it should be withdrawn, while deferring the proposal to the Conference to withdraw this instrument until the situation has been re-examined at a later date.
Weekly Rest (Commerce) Recommendation, 1921 (No. 18)	—	The Governing Body has noted that Recommendation No. 18 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.

Hours of Work (Hotels, etc.) Recommendation, 1930 (No. 37)	–	The Governing Body has noted that Recommendations Nos. 37, 38 and 39 are obsolete. An item on the withdrawal of these Recommendations is on the agenda of the 90th Session (2002) of the Conference.
Hours of Work (Theatres, etc.) Recommendation, 1930 (No. 38)	–	
Hours of Work (Hospitals, etc.) Recommendation, 1930 (No. 39)	–	
Holidays with Pay Recommendation, 1936 (No. 47)	–	The Governing Body has noted that Recommendation No. 47 is obsolete and that it should be withdrawn, while deferring the proposal to the Conference to withdraw this instrument until the situation has been re-examined at a later date.

I. Hours of work

Hours of Work (Industry) Convention, 1919 (No. 1)

Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)

The reduction of hours of work and the recognition of the eight-hour day have been among the most important and insistent claims of the workers' movement since the middle of the nineteenth century. It was not therefore surprising that when the International Labour Organization was founded in 1919, the preamble to Part XIII of the Treaty of Versailles should set forth the principle of maximum daily and weekly working hours among the urgent measures required to improve working conditions. More specifically, the general principles set out in article 427 of the Treaty, considered to be of special and urgent importance, include the "adoption of the eight hours day or a forty-eight hours week" as a standard to be attained by countries wherever it has not yet been achieved.

The first item on the agenda of the International Labour Conference held in Washington, DC in 1919 was accordingly the formulation of an instrument recognizing this principle. The result of the discussions was the adoption, almost unanimously, of the Hours of Work (Industry) Convention, 1919 (No. 1). Another 11 years passed before a similar standard was adopted for commerce and offices.

Even though various countries had already introduced the eight-hour day and the 48-hour week into their national legislation before the adoption of Convention No. 1, difficulties arose in the ratification of the instrument, particularly among the most industrialized countries. However, this did not prevent the Convention from having an important influence on the development of labour legislation on working time in many countries.

The issue of working time has also been covered by various sectoral Conventions and Recommendations, as well as in specific instruments intended to promote the reduction of daily and weekly working hours, including the various instruments adopted more recently which relate directly or indirectly to working time (special programmes for young persons, workers with family responsibilities, occupational safety and health, etc.).

Content of the Conventions

Scope of application

Convention No. 1 applies to any public or private undertaking (enterprise) or any branch thereof which, in accordance with the detailed prescriptions of Article 1, is of an

industrial nature. The competent authority in each country shall define the line of division which separates industry from commerce and agriculture. With regard to transport by sea and on inland waterways, the applicable provisions were to be determined by a special conference on this subject.

Enterprises in which only members of the same family are employed are exempted from the application of the Convention. Nor do the provisions of the Convention apply to persons holding positions of supervision or management, nor to persons employed in a confidential capacity (Article 2).

Convention No. 30 applies to public or private establishments engaged in the commercial activities and services referred to in Article 1. As in the case of Convention No. 1, Convention No. 30 provides that the competent authority in each country shall define the line which separates commercial and trading establishments and those mainly engaged in office work, on the one hand, from industrial and agricultural establishments, on the other.

The exceptions are more numerous than in the case of Convention No. 1, and consist of: establishments for the treatment or care of the sick, etc.; hotels, restaurants, boarding houses, clubs, cafés and other similar establishments; and theatres and places of public amusement. Nevertheless, the Convention applies to persons employed in branches of the above establishments which, if they were independent enterprises, would be included among the establishments to which the Convention applies.

On the other hand, the authorities can exempt from the application of the Convention: establishments in which only members of the employer's family are employed; offices in which the staff is engaged in connection with the administration of public authority; persons occupying positions of management or employed in a confidential capacity; and travellers and representatives, in so far as they carry on their work outside the establishment.

Hours of work: The general standard

The general standard for both Conventions is that hours of work shall not exceed 48 hours in the week and eight hours in the day (Articles 2 and 3, respectively). Convention No. 30 indicates that the term "hours of work" means the time during which the persons employed are at the disposal of the employer, which does not include rest periods during which the persons employed are not at the disposal of the employer (Article 2).

Working time arrangements

Both Conventions permit exceptions to the general rule. In the first place, in cases of the irregular arrangement of hours of work, Convention No. 1 provides that where by law, custom or agreement between employers' and workers' organizations or, where no such organizations exist, between employers' and workers' representatives, the hours of work on one or more days of the week are less than eight, the limit of eight hours may be exceeded on the remaining days of the week by the sanction of the competent public authority or by collective agreement, provided that the daily limit is not exceeded by more than one hour (Article 2). In exceptional cases, collective agreements between workers' and employers' organizations may set a daily limit of work based on a longer period of time. These agreements may be given the force of regulations where the Government so decides. However, the average number of hours worked per week shall not exceed 48 (Article 5).

Convention No. 30 contains similar provisions, which lay down in general that the 48 hours in a week may be so arranged that the hours of work in any day do not exceed ten

hours (Article 4). Furthermore, in exceptional cases where the circumstances in which the work has to be carried on make the general rule and Article 4 inapplicable, regulations made by public authority may permit hours of work to be distributed over a period longer than the week, provided that the average hours of work do not exceed 48 hours in the week and hours of work in any day do not exceed 10 hours (Article 6). The regulations have to be made after consultation with the workers' and employers' organizations concerned, with special regard being paid to any collective agreements existing between such workers' and employers' organizations (Article 8).

Shift work

This working time arrangement is addressed in Convention No. 1, which lays down that it is permissible in such cases to exceed eight hours in any one day and 48 hours in any one week, if the average number of hours over a period of three weeks or less does not exceed the general standard (Article 2). In exceptional cases in which these limits cannot be applied, the provisions concerning the arrangement of working time set out in Article 5 apply.

Continuous processes

This is another arrangement addressed by Convention No. 1 which is distinct from shift work. It consists of processes which require by reason of the nature of the process to be carried on continuously by a succession of shifts. This latter condition is not required for the application of Article 2 respecting shift work. In the case of work on continuous processes, the general standard can also be exceeded, subject to the condition that the working hours shall not exceed 56 in the week on average. This arrangement shall in no case affect any rest days which may be granted to workers in compensation for the weekly rest day (Article 4).

General interruptions of work

Another exception to the general standard is envisaged in Convention No. 30, which allows daily hours of work to be increased for the purpose of making up the hours of work which have been lost in case of a general interruption of work due to local holidays, accidents or *force majeure* (accidents to plant, interruption of power, light, heating or water, or occurrences causing material damage). This is subject to the following conditions: the hours of work shall not be allowed to be made up on more than 30 days in the year and shall be made up within a reasonable lapse of time; the increase in hours of work in the day shall not exceed one hour; and hours of work in the day shall not exceed ten. Detailed information has to be provided to the competent authority in this respect (Article 5).

Permanent exceptions

Under the terms of Convention No. 1, the public authority may issue regulations for industries or occupations (made after consultation with the organizations of employers and workers concerned) determining the permanent exceptions that may be allowed in preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working of an establishment, or for certain classes of workers whose work is essentially intermittent (Article 6).

Convention No. 30 also refers to regulations made after consultation with the workers' and employers' organizations concerned (with special regard being paid to any collective agreements existing between such organizations) (Article 8). The permanent exceptions which may be allowed concern inherently intermittent work (such as that of caretakers and persons employed to look after working premises and warehouses);

preparatory or complementary work; shops and other establishments where the nature of the work, the size of the population or the number of persons employed render inapplicable the working hours fixed in Articles 3 and 4 (Article 7).

Temporary exceptions

Convention No. 1 provides that the regulations referred to above may determine temporary exceptions to the hours of work determined in the various Articles so that establishments can deal with exceptional cases of pressure of work (Article 6).

The Convention also specifically states that the general standard concerning hours of work (eight in the day and 48 in the week) may be exceeded in case of accident, actual or threatened, or in case of urgent work to be done to machinery or plant, or in case of *force majeure*, but only so far as may be necessary to avoid serious interference with the ordinary working of the enterprise (Article 3).

Under the terms of Convention No. 30, the regulations referred to above may grant temporary exceptions in the case of accidents, urgent work and *force majeure*, as well as in the following cases: to prevent the loss of perishable goods or avoid endangering the technical results of the work; to allow for special work such as stocktaking and the preparation of balance sheets, settlement days, liquidations, and the balancing and closing of accounts; to enable establishments to deal with cases of abnormal pressure of work due to special circumstances, in so far as the employer cannot ordinarily be expected to resort to other measures (Article 7).

Additional hours

Both Conventions provide that the regulations respecting temporary and permanent exceptions shall fix the maximum of additional hours which may be permitted in each instance (Article 6 of Convention No. 1). However, Convention No. 30 specifically excludes the cases of accidents, urgent work and *force majeure*, and refers to the number of additional hours of work which may be allowed in the day and, in respect of temporary exceptions, in the year (Article 7).

With regard to the rate of pay for overtime, Convention No. 1 lays down that the pay for overtime shall not be less than one and one-quarter times the regular rate (Article 6). The same provision is contained in Convention No. 30 (Article 7).

Obligations of the employer

Both Conventions also set out the obligations of every employer with regard to: the notices which must be posted in the establishment concerning the hours at which work begins and ends, including the times of work of shifts; the rest periods which are not reckoned as part of the working hours; and the keeping of a record in the form prescribed by the legislation or the competent authority of all additional hours worked (Articles 8 and 11, respectively).

Communication of information to the ILO

Under the terms of Convention No. 1, each government shall communicate to the International Labour Office: a list of the processes which are classed as being necessarily continuous in character under Article 4; full information as to working of the collective agreements mentioned in Article 5; and full information concerning the regulations made under Article 6 and their application (Article 7).

Suspension of the provisions of the Conventions

Conventions Nos. 1 and 30 provide that the respective government may suspend the operation of their provisions in the event of war or other emergency endangering national safety (Articles 9 and 14, respectively).

Comments of the Committee of Experts

The main problems which have arisen in the application of the Conventions are reviewed below in the light of the comments made by the Committee of Experts. Many of these problems have been resolved through changes to the legislation in the respective countries. Nevertheless, other problems remain pending and relate in particular to the arrangement of working time, exceptions and overtime. The comments of the Committee of Experts are generally similar for both Conventions.

Scope of application

As noted above, the Conventions contain, respectively, a detailed list (Convention No. 1) and a description (Convention No. 30) of the activities to which they apply, with the various exceptions.

With regard to Convention No. 1, the Committee of Experts has indicated to various countries that, in accordance with these provisions, exceptions are not acceptable for road transport (the highest number of cases), road building, construction, food processing, work of public interest which by its nature is not subject to a timetable, mines and quarries, industrial establishments of a very rural nature, the construction and repair of means of communication, very small establishments and those which perform temporary tasks for a period not exceeding six months.

In the case of Convention No. 30, the problems which have arisen have been much more limited, and have concerned the exclusion, which is not permitted by the Convention, of very small establishments, those operating exclusively with nationals of the respective country in accordance with the latter's traditions, pharmacies, hairdressers and certain stores.

With regard to exceptions relating to specific categories of persons, the Committee of Experts has not accepted under Convention No. 1 the exclusion from the general standard of certain relatives of the employer, workers considered to be irreplaceable by reason of their knowledge or special skills, persons employed in functions which by their nature cannot be subject to a specific number of hours, temporary workers, employees in the railways and drivers of motor vehicles.

In the case of Convention No. 30, the exceptions not accepted by the Committee of Experts relate to temporary workers.

Working time: The general standard

The general standard of eight hours a day and 48 hours a week cannot be changed unilaterally by the employer, nor with the agreement of the worker.

In the context of Convention No. 1, the Committee of Experts has indicated, with regard to legislation which affords the employer discretion to change unilaterally the length of the working day, subject only to the requirement that the working week shall not exceed 48 hours, that the changes decided upon by the employer may not affect entitlement to weekly rest or rest on public holidays. Furthermore, where workers are in disagreement with the measures taken, they may have recourse to a conciliatory or judicial body. The

Committee of Experts has drawn attention to the fact that the authorization granted to employers to determine unilaterally a working day of more than eight hours, or the number of working days per week, is not among the exceptions envisaged by the Convention, particularly in Article 2, since, in the interests of the workers, the Convention explicitly requires exceptions to be determined by collective agreements or by decision of the competent authority.

In another case in which the legislation permits workers who have concluded a supplementary employment contract with their employer or with another employer to work up to 12 hours a day, subject to an uninterrupted period of rest of at least 12 hours between working days, the Committee of Experts has recalled that the limits to daily and weekly hours of work set out in the general standard of the Convention are of a binding nature (with the exceptions envisaged) and cannot be subject to alteration by contract.

With regard to Convention No. 30, referring to legislation which provides that hours of work and breaks must be organized in such a fashion that the presence of the worker at the workplace does not exceed 11 hours a day, the Committee of Experts has indicated that this provision is liable to result in abuse and should be amended so as not to require the presence of the worker at the workplace beyond the limits of normal working hours which, in accordance with the Convention, must not exceed eight hours in the day.

Distribution of work

The Conventions permit the general standard of eight hours a day and 48 hours a week to be exceeded in a limited fashion through certain arrangements for the distribution of work. However, in view of the increasing flexibility of working time, the Committee of Experts has had to draw attention to various violations of the standards in this respect.

With regard to Convention No. 1, the Committee of Experts has had occasion to express its view concerning legislation which authorizes the calculation on average of normal working hours over a period of up to one year, with the sole restriction that daily working hours shall not exceed 12 hours. The Committee of Experts has indicated that the extension of the working day up to 12 hours is contrary to Article 2 of the Convention, which only permits an extension of one hour beyond the limit of eight hours, and Article 6, which permits recourse to additional hours only in determined circumstances. The Committee of Experts has also pointed out that respect for daily and weekly limits on working hours is an essential guarantee to safeguard workers' health and welfare and to protect them against the possibility of abuse. Hence, the possibility of establishing daily hours of work over a period longer than the week, provided for in Article 5 of the Convention, is restricted to cases in which the limits on normal working hours set out in Article 2 are recognized as inapplicable. This may concern, in particular, branches of activity in which the nature of the work, technical reasons or seasonal variations and pressure of work require an irregular distribution of working time. As the Committee of Experts indicated in its 1967 General Survey on hours of work, cases in which calculation of the normal average working hours over a period exceeding a week is permitted must be exceptional and restricted to certain branches of activity where technical requirements so justify (paragraph 142).

In a case in which the legislation sets the maximum daily hours of work at nine hours, but provides for the possibility of other working time arrangements to be made by collective agreements or enterprise agreements (in compliance with the 12-hour rest period between working days), the Committee of Experts has also indicated that Article 2 of the Convention allows for recourse to an irregular distribution of work, but establishes the limit at one hour more than eight hours of work a day.

A similar situation occurs where the legislation permits the limits set for daily working hours to be modified by agreement between employers and workers, provided that compensatory arrangements are made and on condition that the total number of hours worked in a period of eight weeks does not exceed 44 hours a week on average. In this case, the Committee of Experts indicated that the provision did not appear to be restricted to the exceptions expressly provided for in the Convention, nor to require the authorization envisaged by the Convention. Furthermore, these agreements could provide for working hours exceeding eight hours in the day without the additional working time being limited to one hour a day.

Another situation is where the legislation permits the distribution of weekly hours of work over five days (which means exceeding the daily maximum of nine hours allowed by the Convention), while granting an additional day of rest and with such distribution being of a voluntary, exceptional and limited nature. In this case, the Committee of Experts recalled that the Convention had been so drafted as to emphasize the need to protect workers by placing a limit on the number of hours that may be worked per day in excess of the daily limit in the event of unequal distribution of the working week and that, for this purpose, daily overtime is restricted to one hour.

In another case, the Committee of Experts recalled that, in accordance with Article 5 of the Convention, where the daily limit of work is calculated over a period of time that is longer than a week, the extension of this limit must be decided upon in advance by the competent authority or body.

With regard to Convention No. 30, the Committee of Experts has examined legislation which permits the employer to calculate average hours of work over a period not exceeding six months, for work where the hours may not be established on a daily basis, and where another provision permits a maximum working day of 12 hours. In this case, the Committee of Experts observed that Article 6 of the Convention provides that only regulations made by public authority shall establish average hours of work, and that hours of work in any day shall not exceed ten hours.

General interruption of work

Convention No. 30 permits lost hours of work to be made up, but only in the limited cases set out in the Convention in the event of a general interruption of work. In a case in which the legislation provides that the labour inspector may authorize an extension of the working day to make up hours of work lost through lack of materials, primary commodities or goods, and where such an extension may be permitted for a period of three months, the Committee of Experts indicated that the making up of hours lost may not be authorized on more than 30 days in a year.

Temporary exceptions

The Conventions allow temporary exceptions to the limits on working time set out in their provisions. These exceptions are specified in the Conventions and the Committee of Experts has noted the cases of various countries in which the legislation goes beyond the cases envisaged in the Conventions. With regard to Convention No. 1, the Committee of Experts has not accepted, among others, the following exceptions: operations which due to their nature are not subject to normal hours of work; the need to maintain or raise the level of production; by reason of a shortage of manpower; seasonal work; work for the purposes of development and to increase production, and on important development projects; technical and skilled work when sufficient workers are not available; work subject to the discretion of the employer, the authorities or to an agreement between the employer and workers.

Additional hours

Overtime consists of the hours worked in excess of the limits set out in the Conventions, by virtue of the temporary and permanent exceptions which they authorize. The Conventions require work during additional hours to be authorized by regulations made by the public authority, which shall fix the maximum number of additional hours which may be allowed. Moreover, both Conventions provide for an increased rate of pay for additional hours of work.

The majority of observations made by the Committee of Experts in relation to the application of Convention No. 1 relate to the limitation of additional hours.

In a case in which the legislation allowed up to two additional hours of work a day, the Committee of Experts indicated that this provision could imply an excessively high number of hours of work per week, month or year, which would be contrary to the spirit of the Convention. It therefore considered that the Government should set a reasonable annual limit in accordance with the objectives of the Convention.

In another case in which the Government indicated that the reduction of the normal working week from 44 hours to 40 hours, decided upon in agreement with the social partners, provided sufficient guarantees against the abuse of additional hours, the Committee of Experts recalled that the limits set out in Article 6 of the Convention constitute elementary guarantees against the risk of abuse in this respect. Similarly, where a worker may refuse to perform overtime hours which exceed by four hours the normal working week of 40 hours, or a maximum of 44 hours a week in total (for which reason, according to the government, it was not necessary to set a maximum limit for such hours), the Committee of Experts nevertheless considered that the provision of the Convention which sets this limit affords protection against an excessive volume of additional work and prevents any misunderstanding between employers and their employees.

Along the same lines, the Committee of Experts has examined legislation which allows over 20 hours of overtime hours a week for certain occupations, or three or four additional hours a day without a monthly or annual limit, or three hours a day for three days a week, or which does not set any limit. In such cases, it has emphasized that a limit is necessary and must be reasonable, and has accepted as being reasonable a maximum of 12 additional hours a week.

However, in relation to the cases envisaged in Article 3 of Convention No. 1, and particularly accidents, actual or threatened, repairs of the damage caused by such accidents or to avoid certain loss, the Committee of Experts has clarified that the Convention does not require limits to additional hours in such circumstances. It should be noted that this exception is subject to more restrictive conditions in Convention No. 30.

Although problems have frequently arisen in this respect and still persist in certain countries, the observations of the Committee of Experts have in many cases led to governments amending their legislation.

In contrast, the increased rate of pay required by the Conventions has only in exceptional cases given rise to difficulties of application.

The problems referred to above also apply to Convention No. 30, in respect of which the Committee has made similar comments to those outlined above. By way of illustration, reference may be made to a case of legislation which allows a total of 468 hours of overtime a year, in which the Committee of Experts recommended that this should be amended taking into account the maximum of 250 hours per year proposed in a Bill drawn up with the assistance of an ILO expert.

II. Weekly rest

Weekly Rest (Industry) Convention, 1921 (No. 14)

Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106)

The issue of the weekly rest of workers was already included in the general principles set out in Article 427 of the Treaty of Versailles, and was accordingly covered by one of the first Conventions adopted by the ILO in 1921 in relation to workers in industry.

The Conference adopted a Recommendation on commerce in the same year, but the respective Convention was only formulated and adopted by the Conference various decades later, in 1957, namely the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106). This Convention is supplemented by Recommendation No. 103, also adopted in 1957.

It should be noted that there are also Conventions at the sectoral level covering plantations and seafarers.

Content of the Conventions

Scope of application

Convention No. 14 applies to any industrial undertaking (enterprise), public or private, carrying on the activities set out in Article 1. Where necessary, each country may define the line of division which separates industry from commerce and agriculture. Except as otherwise provided, the Convention covers the whole of the staff employed in the enterprise or in any branch thereof (Article 2).

In terms of the enterprises covered, those in which only the members of one single family are employed may be exempted (Article 3).

Convention No. 106 applies to all persons, including apprentices, employed in establishments, institutions or administrative services, whether public or private, which are of a commercial nature or in which the persons employed are mainly engaged in office work, including offices of persons engaged in the liberal professions (Article 2). When ratifying the Convention, countries may specify in a declaration accompanying its ratification that the Convention shall also apply to establishments, etc., providing personal services, post and telecommunications services; newspaper enterprises and theatres and places of public entertainment. Such an extension of the application of the Convention may also be communicated to the ILO subsequently (Article 3).

Where necessary, appropriate arrangements have to be made to define the line which separates the establishments to which the Convention applies from other establishments. In case of doubt concerning the scope of application of the Convention, the question shall be settled either by the competent authority after consultation with the representative organizations of employers and workers concerned, where such exist, or in any other manner which is consistent with national law and practice (Article 4).

With regard to exclusions from the application of the Convention, measures may be taken by the competent authority or through the appropriate machinery to exclude establishments in which only members of the employer's family are employed who are not or cannot be considered to be wage earners. Persons holding high managerial positions may also be excluded (Article 5).

Weekly rest: The general standard

In accordance with Convention No. 14, workers shall enjoy in every period of seven days a period of rest comprising at least 24 consecutive hours.

Wherever possible, the period of rest shall be granted simultaneously to the whole of the staff of each enterprise.

Wherever possible, the period of rest shall also coincide with the days already established by the traditions or customs of the country (Article 2).

The same provisions are contained in Convention No. 106, which however establishes the additional requirement that the traditions and customs of religious minorities shall, as far as possible, be respected (Article 6).

Special schemes

These schemes are only envisaged in Convention No. 106 in cases where the nature of the work, the nature of the service performed, the size of the population to be served or the number of persons employed is such that the general standard cannot be applied. The competent authority or the appropriate machinery in each country may apply such special weekly rest schemes to specified categories of persons or specified types of establishments covered by the Conventions.

In any case, all persons to whom such special schemes apply shall be entitled, in respect of each period of seven days, to rest of a total duration at least equivalent to the period provided for in the general standard.

Any measures adopted in this respect shall be taken in consultation with the representative employers' and workers' organizations concerned, where such exist (Article 7).

Total or partial exceptions

Total or partial exceptions to the general standard are envisaged in both Conventions, although with some differences. Under the terms of Convention No. 14, total or partial exceptions (including suspensions or diminutions) may be authorized, taking into account humanitarian and economic considerations. In order to do so, the authorities must first consult with responsible associations of employers and workers, wherever such exist (Article 4).

Convention No. 106 provides that temporary total or partial exceptions may be granted, both from the general standard and from special schemes, and contains more detailed provisions which are similar to those contained in the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30). Such exceptions may be granted in case of accident, actual or threatened *force majeure* or urgent work to premises and equipment. They may also be granted in the event of abnormal pressure of work due to special circumstances, in so far as the employer cannot ordinarily be expected to resort to other measures. And finally they may be granted in order to prevent the loss of perishable goods (Article 8).

As under Convention No. 14, the representative employers' and workers' organizations concerned shall be consulted, except in the event of exceptions in case of accidents, *force majeure*, etc.

Compensatory rest

Both Conventions also refer to compensatory periods of rest, with certain differences. Under Article 5 of Convention No. 14, each country shall make, as far as possible, provision for compensatory periods of rest for the suspensions of diminutions made in virtue of Article 4.

Convention No. 106 provides that, where temporary exceptions are made, the persons concerned shall be granted compensatory weekly rest of a total duration at least equivalent to the period provided for under the general standard (Article 8).

Wages

This issue is raised in Convention No. 106, which provides that, in so far as wages are regulated by laws and regulations, or are subject to the control of administrative authorities, there shall be no reduction of the income of persons covered by the Convention as a result of the application of its provisions (Article 9).

Obligations of the employer

Convention No. 14 refers to the obligation of the employer, director or manager to make known, by means of notices posted conspicuously, the days and hours of weekly rest given to the whole of the staff collectively. Where the rest period is not granted to the whole of the staff collectively, a roster must be drawn up to make known the workers or employees subject to a special system of rest, and to indicate that system (Article 7).

Inspection and penalties

Convention No. 106 contains a provision which envisages that measures shall be taken to ensure the proper administration of regulations or provisions concerning the weekly rest by means of adequate inspection or otherwise. In addition, where it is appropriate to the manner in which effect is given to the Convention, the necessary measures in the form of penalties shall be taken to ensure the enforcement of its provisions (Article 10).

Communication of information to the ILO

Both Conventions refer to this question. Under the terms of Convention No. 14, each country is under the obligation to communicate a list of the exceptions made under Articles 3 and 4 (family enterprises and total or partial exceptions) (Article 6).

In accordance with Convention No. 106, countries have to include in their annual reports lists of the categories of persons and the types of establishment subject to special weekly rest schemes, and information concerning the circumstances in which temporary exemptions may be granted (Article 11).

Suspension of the provisions of Convention No. 106

In the same way as Conventions Nos. 1 and 30, the provisions of Convention No. 106 may be suspended in any country by the government in the event of war or other emergency constituting a threat to the national safety (Article 13).

Comments of the Committee of Experts

The most frequent difficulties in the application of both Conventions arise in relation to the exceptions to the general standard for weekly rest and compensatory rest. The comments of the Committee of Experts are frequently similar in this respect, focusing on

recalling the provisions of the respective Convention. Observations on other aspects of the two Conventions relate to less numerous or isolated cases.

Scope of application

The exclusion of persons holding high managerial positions is not envisaged in Convention No. 14, which covers all staff without exception. In this it differs from Convention No. 106, which permits such an exclusion, when so decided by the competent authority.

Neither of the Conventions provides for the exclusion of small establishments, with the exception of establishments in which only members of the employer's family work.

Part-time workers are covered by both Conventions. Their coverage by the exceptions (or special schemes) would be possible, provided that they comply with the conditions envisaged in the instruments.

Weekly rest: The general standard

Both Conventions provide for an obligatory weekly rest period comprising not less than 24 hours in the course of each period of seven days. The Committee of Experts has always drawn attention to legislation which omits to refer to the subject of weekly rest.

Nor has the Committee of Experts accepted legal provisions under which an employer may agree with the representatives of the staff upon certain modifications to the working time arrangements which violate the general standard respecting weekly rest.

Another problem consists of the accumulation of weekly rest periods. The Committee of Experts has indicated that, where the legislation of a country permits in general, and at any time, an accumulation of the rest period for up to 14 days, without such accumulation being limited to the exceptions envisaged in Article 4 of Convention No. 14, it goes beyond the prescriptions of the general standard.

Nor has the Committee of Experts accepted the accumulation of weekly rest days to be taken once a month, as this provision is not in conformity with the general standard set out in Convention No. 106, which requires that the rest period be granted in the course of each period of seven days. In accordance with the same provision, the Committee of Experts has also found it unacceptable for certain seasonal enterprises to accumulate weekly rest days until the end of the season.

Special schemes

The Committee of Experts has on various occasions needed to recall that the application of special weekly rest schemes in accordance with Convention No. 106 is only possible after consultation with the representative employers' and workers' organizations. Moreover, the establishment of such schemes must be justified by the nature of the work, the nature of the service performed, etc., in accordance with the provisions of the Convention. Persons covered by such schemes are entitled to compensatory rest equivalent to that required by the general standard.

Total or partial exceptions

The exceptions to the general standard envisaged in both Conventions must be in compliance with the conditions set out in the instruments. The Committee of Experts has indicated that these conditions implicitly contribute to limiting recourse to such exceptions or special schemes to what is strictly necessary.

Compensatory rest

As noted above, the largest number of observations by the Committee of Experts relate to problems arising in the application of the Conventions in relation to compensatory rest. The Committee of Experts has indicated that compensatory rest must be granted in all cases, and not only in so far as possible in view of the needs of the enterprise. The rest period cannot be replaced by the payment of a special wage or compensation, but must be granted regardless of any cash compensation.

Cash compensation for days worked during the weekly rest period cannot be provided for by law, nor can it be decided upon by the employer unilaterally, nor with the agreement of the worker, nor in accordance with the will of the worker.

The compensatory rest period must be of 24 hours and is obligatory, even in the event of an exception arising out of an accident.

III. Holidays with pay

Holidays with Pay Convention (Revised), 1970 (No. 132)

Even though the issue of holidays with pay was raised at the First Session of the International Labour Conference in 1919 and subsequently on four other occasions, it was only in 1936 that the first instrument on the subject was adopted, namely the Holidays with Pay Convention, 1936 (No. 52). The subject is not covered by the Constitution of the ILO and the right to holidays for all workers had been included in very few national legislations, in most cases being governed by custom and collective agreements.

The year 1936 also saw the adoption of the first Convention on holidays for seafarers. Based on Convention No. 52, the right to holidays with pay began to be more generally applied in the various countries, as did the related conditions. At the international level, the subject was addressed once again by the Conference after the Second World War, in the maritime sector (on several occasions) and in agriculture (followed by plantations). It was also in the 1950s that the question arose of granting a longer period of holidays, which in Convention No. 52 are limited to six working days (due to the characteristics of the maritime sector, this period was already longer in the Holidays with Pay (Sea) Convention, 1936 (No. 54)). This trend had progressed at the national level and Recommendation No. 98 was adopted in 1954, setting holidays at a period of not less than two working weeks.

The lengthening of holidays continued at the national level and this trend was reflected in the Holidays with Pay Convention (Revised), 1970 (No. 132). It is also interesting to note that the trend for the lengthening of holidays, largely through collective agreements, continued after that date. In 1984, in its General Survey on working time, the Committee of Experts indicated that this trend had become even more marked in a number of cases, in both industrialized and developing countries, although it was clearer in the former. In that year, the legislation in more than 60 countries conformed with and even exceeded the standard of three working weeks for one year of service set out in Convention No. 132. Nevertheless, many problems of application persisted. In terms of the minimum length of holidays, over half of the member States of the ILO were still below the basic standard set out in Convention No. 132.

Content of the Convention

Scope of application

The Convention applies to all employed persons, with the exception of seafarers.

Where special problems exist of a substantial nature in the application of the Convention, or relating to legislative or constitutional matters, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude limited categories of employed persons from the application of the Convention.

Countries which ratify the Convention have to list in the first report submitted under article 22 of the Constitution of the ILO any categories which may have been excluded, giving the reasons for such exclusion, and have to state in subsequent reports the position in law and practice in respect of the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories (Article 2).

Holidays with pay: The general standard

Every person to whom the Convention applies shall be entitled to an annual paid holiday, which shall in no case be less than three working weeks for one year of service. Each country which ratifies the Convention must specify the length of the holiday in a declaration appended to its ratification (Article 3).

Minimum period of service

A minimum period of service may be required for entitlement to any annual holiday with pay, the length of which shall be determined in each country by the competent authority or through the appropriate machinery, but shall not exceed six months.

Under conditions to be determined by each country, absence from work for such reasons beyond the control of the employed person concerned as illness, injury or maternity shall be counted as part of the period of service (Article 5).

Proportionate holiday

A person whose length of service in any year is less than that required for the full entitlement prescribed in Article 3 shall be entitled in respect of that year to a holiday with pay proportionate to the length of service during that year. The expression “year” means the calendar year or any other period of the same length determined by the competent authority or through the appropriate machinery in the country concerned (Article 4).

Days and periods not counted as part of the holiday

Public and customary holidays, whether or not they fall during the annual holiday, shall not be counted as part of the minimum annual holiday of three weeks.

Under conditions to be determined by the competent authority or through the appropriate machinery in each country, periods of incapacity for work resulting from sickness or injury may not be counted as part of the minimum annual holiday (Article 6).

Remuneration

Every person taking the holiday envisaged in the Convention shall receive in respect of the full period of that holiday at least his or her normal or average remuneration,

calculated in a manner to be determined by the competent authority or through the appropriate machinery in each country. The remuneration shall include the cash equivalent of any part thereof that is paid in kind and which is not a permanent benefit continuing whether or not the person concerned is on holiday.

The amounts due shall be paid in advance of the holiday, unless otherwise provided in an agreement applicable to the person concerned and the employer (Article 7).

Division of the holiday

The division of the annual holiday into parts may be authorized by the competent authority or through the appropriate machinery in each country.

One of the parts shall consist of at least two uninterrupted working weeks, on condition that the length of service of the person concerned gives entitlement to such a period. It may be provided otherwise in an agreement applicable to the employer and the employed person concerned (Article 8).

The uninterrupted part of the annual holiday shall be granted and taken no later than one year from the end of the year in respect of which the holiday entitlement has arisen. The remainder of the annual holiday shall be taken no later than 18 months after that date.

With the consent of the employed person concerned, any part of the annual holiday which exceeds a stated minimum may be postponed beyond this latter period and up to a further specified time limit.

The minimum and the time limit referred to above shall be determined by the competent authority after consultation with the organizations of employers and workers concerned, or through collective bargaining, or in such other manner consistent with national practice as may be appropriate under national conditions (Article 9).

Timing of holidays

The time at which the holiday is to be taken shall, unless it is fixed by a regulation, collective agreement, arbitration award or other means consistent with national practice, be determined by the employer after consultation with the employed person concerned or his representatives (Article 10).

Termination of employment

An employed person who has completed a minimum period of service corresponding to that which may be required under Article 5 shall receive, upon termination of employment, a holiday with pay proportionate to the length of service for which that person has not received such a holiday, or compensation in lieu thereof, or the equivalent holiday credit (Article 11).

Relinquishment of holiday rights

Agreements to relinquish the right to the minimum annual holiday prescribed by the general standard, or to forego such a holiday, for compensation or otherwise, shall, as appropriate to national conditions, be null and void or be prohibited (Article 12).

Engagement in gainful activity during the holiday

Special rules may be laid down by the competent authority or through the appropriate machinery in each country in respect of cases in which the employed person engages,

during the holiday, in a gainful activity conflicting with the purpose of the holiday (Article 13).

Flexibility in accepting the Convention

The obligations of the Convention may be accepted separately in respect of employed persons in economic sectors other than agriculture, on the one hand, and in respect of employed persons in agriculture, on the other. When ratifying the Convention, the country shall specify whether it accepts the obligations of the Convention in respect of the former, the latter or both categories of persons. In the event that they are accepted for only one category, a notification may subsequently be made that the country accepts the obligations of the Convention in respect of all persons to whom it applies (Article 15).

Comments of the Committee of Experts

The scope of application of the Convention, the restrictions established by the Convention for the division and accumulation of holiday rights, and the exclusion of public holidays and periods of incapacity are the aspects which have given rise to the largest number of observations by the Committee of Experts. These aspects are followed in importance by certain problems relating to the relinquishment of holiday rights by workers, the payment of wages before the beginning of the holiday, termination of employment, the minimum period of service for entitlement to holidays and proportionate holidays. In a number of cases in which the Committee of Experts has encountered special situations relating to these problems, its comments have clarified the situation with regard to the Convention.

Scope of application

Taking into account the fact that the Convention applies to all employed persons, with the exception of seafarers, the Committee of Experts has made observations concerning legislation which excludes public servants, domestic service, homeworkers and part-time workers. At the same time, it has requested information on any amendment to the legislation relating to these categories.

Minimum period of service

In cases in which the legislation provides that entitlement to holidays is acquired after a period of service equal to (or higher than) one year and that collective agreements or individual contracts may extend this period to 30 months, the Committee of Experts has recalled that, in accordance with Article 5 of the Convention, the minimum period shall not exceed six months.

Days and periods not counted as part of the holiday

Under the terms of the Convention, this exclusion is obligatory and the days and periods referred to in the Convention cannot be counted as part of the holiday. The Committee of Experts has therefore not accepted situations in which customary holidays may be counted, under the terms of collective agreements, as part of the annual holiday with pay.

With regard to periods of incapacity for work resulting from sickness or injury, their exclusion from the holiday has to be established under conditions to be determined by the competent authority or through the appropriate machinery. In cases where the legislation of a country allows a certain latitude for collective agreements in relation to the regulation of holidays, under which periods of illness could be included in the holiday, the Committee of Experts has requested the government to take measures to determine clearly the conditions

under which periods of incapacity may not be counted as part of the holiday, so that Article 6 is interpreted and applied in accordance with the spirit and wording of the Convention.

The Committee of Experts has also requested the government concerned to clarify the legal situation in a case in which the principal case law only accepted a suspension of annual holidays in cases of illnesses which are particularly serious or require hospital treatment.

In general, the Committee of Experts always draws the attention of governments to the fact that, in accordance with the Convention, the conditions under which periods of incapacity for work resulting from sickness or injury may not be counted as part of the minimum annual holiday of three weeks are to be determined by the competent authority or through the appropriate machinery.

Remuneration

In a few cases, the legislation does not provide for the payment of wages in advance of the holiday. In such cases, the Committee of Experts has always referred to Article 7 of the Convention, which provides for the payment of remuneration in advance of the holiday, unless otherwise provided in an agreement applicable to the worker and the employer.

Division of holiday rights

Legislation exists in various countries allowing the postponement of holidays for a period of two years or more. In all the cases relating to the division and accumulation of holiday rights, the Committee of Experts has referred to Article 9 of the Convention, under which at least two uninterrupted working weeks shall be granted and taken no later than one year from the end of the year in respect of which the holiday entitlement has arisen. The remainder of the annual holiday shall be taken no later than 18 months after that date, although this latter time limit may be modified under the conditions set out in Article 9.

Termination of employment

In the few cases in which this is not set out in the legislation, the Committee of Experts has recalled that, in accordance with the Convention, an employed person who has completed a minimum period of service shall receive, upon termination of employment, a holiday with pay proportionate to the length of service for which such a holiday has not been received, or compensation in lieu thereof, or the equivalent holiday credit.

Relinquishment of holiday rights

The Convention lays down a general prohibition upon relinquishing holiday rights, at least covering the minimum period of three weeks. In a case in which the law provides that if the employer does not grant the holidays due, the employee is entitled to compensation, the Committee of Experts has requested the government to take measures to ensure that the worker enjoys the total period of holidays to which she or he is entitled, regardless of any cash compensation.

The Committee of Experts has also considered that a case in which the legislation allows workers whose remuneration consists in part in food and housing to relinquish their annual holiday rights in return for a doubling of this remuneration is a violation of the Convention.

IV. Reduction of hours of work

The Forty-Hour Week Convention, 1935 (No. 47), and the Reduction of Hours of Work Recommendation, 1962 (No. 116)

After two unsuccessful attempts in 1933 and 1934 to adopt general Conventions on the reduction of hours of work in industry and commerce, in 1935 the Conference adopted Convention No. 47, which introduces into international law the principle of the 40-hour week. In effect, the Office had proposed the adoption of a special resolution, contending that a Convention was not an appropriate instrument to set out a declaration of principle on the matter. Nevertheless, the Conference preferred to have recourse to the more formal instrument of a Convention, open to ratification and international commitments by the respective countries. Referring to the importance of the Convention, Albert Thomas, Director-General of the ILO, declared in his closing statement to the Conference that in effect it replaced with a new objective the principle of the eight-hour day and the 48-hour week set out in article 41 of the Constitution.

Convention No. 47 was adopted during a period of crisis and great unemployment, and one of its objectives is to contribute to the creation of employment. During the same period, the Conference adopted three other sectoral Conventions (glass bottle works, public works and textiles) on the same subject. In any event, the Convention only entered into force in 1957.

Many years after the adoption of Convention No. 47, and in a very different economic context, the Conference once again addressed the question of the reduction of hours of work. The objective of adopting Recommendation No. 116 in 1962 was (as stated in its preamble) to supplement and facilitate the implementation of the existing international instruments concerning hours of work and to indicate practical measures for the progressive reduction of hours of work. The Recommendation returned to the principle of the 40-hour week set out in Convention No. 47 and affirmed it as a social standard to be attained.

When the Committee of Experts made its General Survey on working time in 1984, it indicated that in around 60 countries the normal length of the working week was 48 hours, that the number of countries in which the working week had been reduced to 40 hours, or less in a few cases, had risen to around 40, and that in around 30 countries the normal working week was between 40 and 45 hours. It should be noted that in the meantime working time has continued to decrease through legislation and particularly collective agreements. In 1993, the European Union adopted its Working Time Directive, in which it set the maximum working week at 48 hours, calculated as an average over four months, and including overtime hours.

The content of Convention No. 47, and in brief that of Recommendation No. 116, are examined below. There are no comments by the Committee of Experts to clarify the application of the former. With regard to the Recommendation, the General Survey of the Committee of Experts referred to above may be consulted for any comparative information on legislation respecting working time and its reduction.

Content of Convention No. 47

The substantive text of this instrument is extremely brief and is preceded by a preamble which draws attention to its relation with the problems of the period.

The preamble emphasizes that unemployment has become so widespread and long continued that there are at the present time many millions of workers throughout the world

suffering hardship and privation for which they are not themselves responsible and from which they are justly entitled to be relieved. It adds that it is desirable that workers should as far as practicable be enabled to share in the benefits of the rapid technical progress which is a characteristic of modern industry. In pursuance of the two resolutions adopted by the Conference in 1934 and 1935, it is therefore necessary that a continuous effort should be made to reduce hours of work in all forms of employment to such extent as is possible.

The substantive text lays down that any country which ratifies the Convention declares its approval of:

- (a) the principle of a 40-hour week applied in such a manner as the standard of living is not reduced in consequence; and
- (b) the taking or facilitating of such measures as may be judged appropriate to secure this end.

This principle is to be applied to classes of employment in accordance with the detailed provisions to be prescribed by such separate Conventions as are ratified by the respective country.

It should be pointed out that there are only three such other Conventions covering the sectors mentioned above.

Content of Recommendation No. 116

General principles

Each country should formulate and pursue a national policy designed to promote by methods appropriate to national conditions and practice and to conditions in each industry the adoption of the principle of the progressive reduction of normal hours of work. This principle may be given effect through laws or regulations, collective agreements or arbitration awards, or by a combination of these various means.

The progressive reduction of normal hours of work should have the objective of attaining the social standard indicated in the preamble (40 hours a week), without any reduction in the wages of the workers. Where the duration of the normal working week exceeds 48 hours, immediate steps should be taken to bring it down to this level without any reduction in wages. Where normal weekly hours of work are either 48 or less, the progressive reduction of hours of work should be implemented in a manner suited to the particular national circumstances and the conditions of each sector.

The measures to be adopted should take into account various factors, among which the Recommendation enumerates: the level of economic development and the possibilities of reducing hours of work without reducing total production or productivity, or the country's competitive position in international trade, and without creating inflationary pressures; the progress achieved and which it is possible to achieve in raising productivity by the application of modern technology; the need to improve the standards of living of the population; and the preferences of employers' and workers' organizations as to the manner in which the reduction in working hours might be brought about.

Methods of application

Definition: Normal hours of work are defined as the number of hours fixed in each country by or in pursuance of laws or regulations, collective agreements or arbitration awards or, where not so fixed, the number of hours in excess of which any time worked is

remunerated at overtime rates or forms an exception to the recognized rules or custom of the establishment or of the process concerned.

Determination of hours of work: The calculation of normal hours of work as an average over a period longer than one week should be permitted when special conditions in certain branches of activity or technical needs justify it. The competent authority or body in each country should fix the maximum length of the period over which the hours of work may be averaged. Special provisions may be formulated with regard to continuous processes or shifts, but normal hours of work as an average in continuous processes should not exceed the normal hours of work fixed for the economic activity concerned.

Exceptions: The Recommendation enumerates exceptions which may be permitted based on and supplementing those permitted by Conventions Nos. 1 and 30. The permanent exceptions include: intermittent work; certain exceptional cases required in the public interest; and operations required for technical reasons. The temporary exceptions include: accidents; urgent work; *force majeure*; abnormal pressure of work; making up for time lost; and in case of national emergency. In addition, exceptions may be permitted periodically for stock-taking and the preparation of balance sheets, and for seasonal activities.

Overtime: Except for cases of *force majeure*, limits should be determined for the total number of hours of overtime, which should be remunerated at a higher rate than normal hours of work. This rate should not be less than that specified in Convention No. 1 (one and one-quarter times the normal rate).

Consultation of employers and workers: The competent authority should consult the most representative employers' and workers' organizations in relation to the various measures set out in the Recommendation.

Supervision: Supervision measures should include labour inspection, the posting of notices in establishments and the keeping of records. Provision should also be made for appropriate sanctions to give effect to the provisions of the Recommendation.

Scope of application: The Recommendation does not apply to agriculture, to maritime transport or to maritime fishing. Special provisions should be formulated for these branches of economic activity.

V. Part-time work

Part-Time Work Convention, 1994 (No. 175)

Since the beginning of the 1970s, when the labour market and the organization of work started to change, part-time work has become increasingly widespread, particularly in industrialized countries with a market economy. In the European Union, for example, this form of work concerns over 20 per cent of the active population in various countries, and in one case over 30 per cent. For enterprises, its advantages consist of a better adaptation to their operational needs. This form of work is also adapted to the needs of specific categories of workers, who do not wish to or are unable to engage in full-time work. This explains the high percentage of women employed in part-time work. However, there is also a significant minority who work for part of the day because they cannot find full-time employment. On the other hand, part-time work is considered to promote the creation of employment and various countries have adopted legislation to encourage it as one of the means of combating unemployment.

Although part-time work is adapted to the aspirations of many people from the point of view of the amount of time spent working, it is also clear that many of them earn lower wages, enjoy lower levels of social protection and have a feeling of being precarious in their employment. This unequal treatment of part-time workers led to the adoption of Convention No. 175, supplemented by Recommendation No. 182, the objective of which is to provide better protection for those concerned and, at the same time, promote the use of this type of work. It was with the same objectives that the European Union in turn adopted its Directive 97/81/EC on part-time work.

The Convention entered into force in 1998, as a result of which the Committee of Experts has not had sufficient opportunities to make comments clarifying the scope of its provisions. The text below therefore only presents the content of the Convention.

Content of the Convention

Definitions

The Convention begins by providing definitions of the various terms and expressions used in its provisions:

- (a) the term “part-time worker” means an employed person whose normal hours of work are less than those of comparable full-time workers;
- (b) the normal hours of work referred to in subparagraph (a) may be calculated weekly or on average over a given period of employment;
- (c) the term “comparable full-time worker” refers to a full-time worker who:
 - (i) has the same type of employment relationship;
 - (ii) is engaged in the same or a similar type of work or occupation; and
 - (iii) is employed in the same establishment or, when there is no comparable full-time worker in that establishment, in the same enterprise or, when there is no comparable full-time worker in that enterprise, in the same branch of activity, as the part-time worker concerned;
- (d) full-time workers affected by partial unemployment, that is by a collective and temporary reduction in their normal hours of work for economic, technical or structural reasons, are not considered to be part-time workers (Article 1).

Scope of application

The provisions of the Convention are applicable to all part-time workers. Any country, after consulting the representative organizations of employers and workers concerned, may exclude wholly or partly from its scope particular categories of workers or of establishments when its application to them would raise particular problems of a substantial nature.

In this case, in its reports to the ILO under article 22 of the Constitution, the country must indicate any particular category of workers or of establishments thus excluded and the reasons therefor (Article 3).

The general standard

Measures have to be taken to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers in respect of:

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- (a) the right to organize, the right to bargain collectively and the right to act as workers' representatives;
 - (b) occupational safety and health;
 - (c) discrimination in employment and occupation (Article 4).

Basic wage

Measures appropriate to national law and practice have to be taken to ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or piece-rate basis, is lower than the basic wage of comparable full-time workers, calculated according to the same method (Article 5).

Social security

Statutory social security schemes which are based on occupational activity have to be adapted so that part-time workers enjoy conditions equivalent to those of comparable full-time workers.

These conditions may be determined in proportion to hours of work, contributions or earnings, or through other methods consistent with national law and practice (Article 6).

Equivalent conditions

Measures have to be taken to ensure that part-time workers receive conditions equivalent to those of comparable full-time workers in the fields of:

- (a) maternity protection;
- (b) termination of employment;
- (c) paid annual leave and paid public holidays; and
- (d) sick leave.

It is understood that pecuniary entitlements may be determined in proportion to hours of work or earnings (Article 7).

Exclusions

1. Part-time workers whose hours of work or earnings are below specified thresholds may be excluded:
 - (a) from the scope of any of the statutory social security schemes referred to in Article 6, except in regard to employment injury benefits;
 - (b) from the scope of any of the measures taken in the fields covered by Article 7 of the Convention, except in regard to maternity protection measures other than those provided under statutory social security schemes.
2. The thresholds referred to in paragraph 1 must be sufficiently low as not to exclude an unduly large percentage of part-time workers.
3. Any country which avails itself of the possibility provided for in paragraph 1 shall:

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- (a) periodically review the thresholds in force;
 - (b) in its reports on the application of the Convention under article 22 of the Constitution of the ILO, indicate the thresholds in force, the reasons therefor and whether consideration is being given to the progressive extension of protection to the workers excluded.
 4. The most representative organizations of employers and workers must be consulted on the establishment, review and revision of the thresholds referred to in this Article (Article 8).

Promotion of part-time work

1. Measures have to be taken to facilitate access to productive and freely chosen part-time work which meets the needs of both employers and workers, provided that the protection referred to in Articles 4 to 7 of the Convention is ensured.
2. These measures must include:
 - (a) the review of laws and regulations that may prevent or discourage recourse to or acceptance of part-time work;
 - (b) the use of employment services, where they exist, to identify and publicize possibilities for part-time work in their information and placement activities;
 - (c) special attention, in employment policies, to the needs and preferences of specific groups such as the unemployed, workers with family responsibilities, older workers, workers with disabilities and workers undergoing education or training.
3. These measures may also include research and dissemination of information on the degree to which part-time work responds to the economic and social aims of employers and workers (Article 9).

Transfer from full-time to part-time work, or vice versa

Where appropriate, measures must be taken to ensure that transfer from full-time to part-time work or vice versa is voluntary, in accordance with national law and practice (Article 10).

More favourable provisions in other Conventions

This Convention does not affect more favourable provisions applicable to part-time workers under other international labour Conventions (Article 2).

Implementation of the Convention

The provisions of the Convention are to be implemented by laws or regulations, except in so far as effect is given to them by means of collective agreements or in any other manner consistent with national practice. The most representative organizations of employers and workers must be consulted before any such laws or regulations are adopted (Article 11).

VI. Road transport

Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153)

The Convention was adopted at a period when road transport was in full development. In the first preparatory report for the instrument, based on a study carried out by the International Road Transport Union, it was indicated that road transport had become the most important form of transport and that its importance could be measured by the growth rate of the industry, which was ahead of the progression of gross national output in industrialized countries, as well as by the way traffic was shared between the various means of transport, by the development of road networks, by the size of the fleet of vehicles and by the size of the labour force employed in it. Road transport at that time carried 50 per cent of all transported goods, as opposed to a mere 15 per cent by rail transport.

Nevertheless, social progress in the road transport sector had not kept pace with its technical and economic development. Compared with other modes of inland transport, and particularly railways, the hours of work were highest and the working conditions most arduous in the road transport industry. The above report indicated that these conditions of work, which were dictated by economic imperatives and by the need for the greatest possible utilization of equipment and economy of time, were bound to affect the personal, family and social lives of the workers concerned. It added that such conditions endangered the safety not only of the personnel, but of all road users.

It therefore emphasized that it was essential to devote the maximum care and attention to the organization of road safety, which was closely connected with working conditions in general and with hours of work and rest periods in particular.

These are the matters addressed by Convention No. 153, supplemented by Recommendation No. 161, which adapts to new circumstances and renders more flexible the Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No. 67).

The problems encountered most frequently by the Committee of Experts in supervising the application of the Convention are related to the hours of work and rest periods of road transport drivers, as well as the methods of control adopted. The Committee of Experts has focused on requesting information from governments to clarify the situation and directly pointing out the provisions of the Convention which are not respected in the laws and regulations of the country concerned, but has not needed to make comments to determine the scope of the international labour standards concerned.

Content of the Convention

Scope of application

The Convention applies to wage-earning drivers of motor vehicles engaged professionally in the internal or international transport by road of goods or passengers, whether working for enterprises engaged in transport for third parties or for enterprises transporting goods or passengers for their own account.

Except as otherwise provided in the Convention, it also applies to owners of motor vehicles engaged professionally in road transport and non-wage-earning members of their families, when they are working as drivers (Article 1).

Exclusions

The competent authority or body in each country may exclude from the application of the provisions of the Convention, or of certain of them, persons who drive vehicles engaged in:

- (a) urban transport or certain types of urban transport, by reference to the particular technical operating conditions involved and to local conditions;
- (b) transport by agricultural or forestry enterprises in so far as such transport is carried out by means of tractors or other vehicles assigned to local agricultural or forestry activities and is used exclusively for the work of such enterprises;
- (c) transport of sick and injured persons, transport for rescue or salvage work and transport for fire-fighting services;
- (d) transport for the purpose of national defence and police services and, in so far as it is not in competition with that effected by enterprises engaged in transport for third parties, transport for the purpose of other public authority essential services;
- (e) transport by taxi; or
- (f) transport which, by reason of the type of vehicle used, the passenger or goods capacity of the vehicles, their limited routes or their maximum authorized speed can be considered as not requiring special regulations concerning driving time and rest periods.

The competent authority or body in each country must lay down adequate standards concerning driving time and rest periods of drivers excluded from the application of the provisions of the Convention, or of certain of them, in accordance with the previous paragraph (Article 2).

Definition of “hours of work”

According to the Convention, the term “hours of work” means the time spent by wage-earning drivers on: (a) driving and other work during the running time of the vehicle; and (b) subsidiary work in connection with the vehicle, its passengers or its load.

Periods of mere attendance or stand-by, either on the vehicle or at the workplace and during which the drivers are not free to dispose of their time as they please, may be regarded as hours of work to an extent to be prescribed in each country by the competent authority or body, by collective agreements or by any other means consistent with national practice (Article 4).

Continuous driving without a break

No driver shall be allowed to drive continuously for more than four hours without a break.

The competent authority or body in each country, taking into account particular national conditions, may authorize the above period to be exceeded by not more than one hour.

The length of the break and, as appropriate, the way in which it may be split, must be determined by the competent authority or body, which may specify cases in which these provisions are inapplicable because drivers have sufficient breaks as a result of stops provided for in the timetable or as a result of the intermittent nature of the work (Article 5).

Maximum total driving time

The maximum total driving time, including overtime, must not exceed either nine hours per day or 48 hours per week. Total driving times may be calculated as an average over a number of days or weeks to be determined by the competent authority or body in each country. The total driving times must be reduced in the case of transport activities carried out in particularly difficult conditions. The competent authority or body has to define these activities and determine the total driving times to be applied in these cases (Article 6).

Continuous periods of work

Every wage-earning driver must be entitled to a break after a continuous period of five hours of work, as defined in Article 4.

The length of the break and, as appropriate, the way in which the break may be split, must be determined by the competent authority or body (Article 7).

Daily rest

The daily rest of drivers must be at least ten consecutive hours during any 24-hour period starting from the beginning of the working day.

The daily rest may be calculated as an average over periods to be determined by the competent authority or body, provided that the daily rest is in no case be less than eight hours and is not reduced to eight hours more than twice a week.

The competent authority or body may provide for daily rest periods of different duration according to whether passenger or goods transport is involved and to whether the rest is taken at home or elsewhere, on condition that the provisions of the two above paragraphs concerning the minimum number of hours are observed.

Exceptions may also be made to the above paragraphs as regards the duration of the daily rest periods and the manner of taking such rest periods in the case of vehicles having a crew of two drivers and of vehicles using a ferry boat or a train.

During the daily rest the driver must not be required to remain in or near the vehicle if the necessary precautions have been taken to ensure the safety of the vehicle and its load (Article 8).

Temporary exceptions

The competent authority or body may permit as temporary exceptions, but only in so far as may be necessary for the performance of indispensable work, extensions of the driving time, extensions of the continuous working time, and reductions in the duration of the daily rest periods provided for in Articles 5, 6, 7 and 8 of the Convention:

- (a) in case of accident, breakdown, unforeseen delay, dislocation of service or interruption of traffic;
- (b) in case of *force majeure*; and
- (c) in case of urgent and exceptional necessity for ensuring the work of services of public utilities.

When national or local conditions in which road transport operates do not lend themselves to the strict observance of Articles 5, 6, 7 or 8, the competent authority or body

may also authorize extensions of the driving time, extensions of the continuous working time and reductions in the duration of the daily rest periods. It may also authorize exceptions as regards the application of Articles 5, 6 or 8 in respect of owners of motor vehicles and non-wage-earning members of their families, when they are working as drivers.

In such cases, the ratifying country has to describe these conditions, extensions, etc., in a declaration appended to its ratification. In its subsequent reports, it must indicate any progress which may have been made with a view towards stricter or wider application of these Articles. It may also at any time cancel the declaration by a subsequent declaration (Article 9).

Supervision

The competent authority must:

- (a) provide for an individual control book and prescribe the conditions of its issue, its contents and the manner in which it is to be kept by the drivers; and
- (b) lay down a procedure for notification of the hours worked in accordance with Article 9, paragraph 1, and the circumstances justifying them.

Each employer must:

- (a) keep a record, in a form approved by the competent authority or body in each country, indicating the hours of work and of rest of every driver employed by him or her; and
- (b) place this record at the disposal of the supervisory authorities in a manner determined by the competent authority or body.

The traditional means of supervision referred to in the previous paragraphs must, if this proves to be necessary for certain categories of transport, be replaced or supplemented as far as possible by recourse to modern methods, as for instance tachographs, according to rules established by the competent authority or body (Article 10).

Inspection

The competent authority or body must make provision for: (a) an adequate inspection system, with verification carried out in the enterprise and on the roads; and (b) appropriate penalties in the event of breaches of these requirements (Article 11).

Consultation of organizations of employers and workers

The representative organizations of employers and workers concerned have to be consulted by the competent authority or body in each country before decisions are taken on any matters covered by the provisions of the Convention (Article 3).

9.2.2. Night work

G. P. Politakis

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Night Work Convention, 1990 (No. 171)	6	This Convention was adopted after 1985 and is considered up to date.
Night Work Recommendation, 1990 (No. 178)	–	This Recommendation was adopted after 1985 and is considered up to date.
Requests for information (Instruments for which the Governing Body has confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments or on specific issues.)		
Night Work (Women) Convention, 1919 (No. 4)	28	Pursuant to a recommendation of the Working Party on Policy regarding the Revision of Standards, the Committee of Experts on the Application of Conventions and Recommendations carried out a General Survey on Conventions Nos. 4, 41 and 89, and the 1990 Protocol to Convention No. 89, which was submitted to the Committee on the Application of Standards at the 89th Session, June 2001, of the Conference. These instruments will be re-examined by the Working Party at the 282nd Session, November 2001, of the Governing Body.
Night Work (Women) Convention (Revised), 1934 (No. 41)	16	
Night Work (Women) Convention (Revised), 1948 (No. 89)	47	
Protocol of 1990 relative to Convention No. 89	1	
Night Work of Women (Agriculture) Recommendation, 1921 (No. 13)	–	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendation No. 13.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Night Work (Bakeries) Convention, 1925 (No. 20)	9	The Governing Body has decided to shelve Convention No. 20 with immediate effect. It has also invited the States parties to this Convention to contemplate ratifying the Night Work Convention, 1990 (No. 171), and denouncing Convention No. 20 at the same time.
Night Work (Road Transport) Recommendation, 1939 (No. 64)	–	The Governing Body has noted that Recommendation No. 63 is obsolete. An item on the withdrawal of this Recommendation is on the agenda of the 90th Session, 2002, of the Conference.

The regulation of night work has its origins in the legislative measures first introduced by certain European countries towards the end of the 19th century prohibiting the employment of women at night in industrial work. In the early days of industrialization, factories such as spinning mills, glass factories or sugar refineries, in an effort to step up production to offset the cost of expensive equipment, drew heavily on women and children shift workers, often imposing upon them particularly arduous and inhumane working conditions. Night working only accentuated the concerns about women's safety, health, moral integrity and family welfare and called for the enactment of special protective laws. The first international instrument on night work, adopted in 1906, gave expression to the notion that women belonged to a special class of factory workers

needing extra protection based on the assumption that they were physically weaker than men, more exposed to the hazards of night work and more susceptible to exploitation. The idea of according differential treatment to women and young workers was later taken up in the ILO Constitution, which states in its Preamble that “an improvement of those [labour] conditions is urgently required; as, for example, by the regulation of the hours of work, including [...] the protection of children, young persons and women”. This double concern about containing the harmful effects of night work while protecting the health and welfare of women and children significantly influenced the Organization’s first steps in standard-setting and led to the adoption of several Conventions, such as the Night Work (Women) Convention, 1919 (No. 4), the Night Work of Young Persons (Industry) Convention, 1919 (No. 6), and the Night Work (Bakeries) Convention, 1925 (No. 20).

It is commonly acknowledged that the night shift is the most disruptive of all shifts in terms of physiological adjustment, sleep and well-being. Even though night work tolerance varies considerably, depending on the worker’s age, economic situation, family condition and of course the nature of the night occupation, it is generally agreed that regular night work may affect the worker’s health in many different ways.⁷⁶ Over-fatigue and severe sleepiness due to the disruption of the biological sleep/wake cycle, known also as the body clock, are the most common of the health complaints of night workers. In some cases, it has been shown that night/shift work may be related to digestive and nervous disorders, an increased risk of cardiovascular diseases and reproductive health problems. Apart from its medical effects, night work is also believed to have detrimental effects on the worker’s social and family life, as it disturbs normal family relations and prevents participation in community life. There is therefore broad consensus about the elevated human cost of working at night or on irregular shift schedules. As an ILO study concluded, “it appears to be well established that, from both the physiological point of view and the family and social point of view, night work is harmful to the large majority of workers and is, therefore, to be deprecated”.⁷⁷

Modern law and practice concerning night/shift work issues echoes two main preoccupations: first, gender as such plays no role in shift work tolerance or adaptation to night work, so there seems to be no valid justification for only protecting women by maintaining sex-based restrictions, except for cases of pregnancy and maternity. Secondly, the growing recognition and acceptance of the principle of equality between the sexes and the improved understanding of the health implications of night work warrant fresh standards on night work ensuring multifaceted protection to all night workers, especially with regard to safety and health, social support and maternity protection, as well as participatory processes and effective consultations with the workers concerned in designing shift systems.

The four instruments analysed below are the result of the ILO’s effort to satisfy the different priorities given by constituents in matters of night work regulation; on the one hand, Convention No. 89, as revised by the Protocol of 1990, reflects the concern that women workers employed in industrial undertakings may still need protection against exploitative practices, especially in view of their double load due to work and family responsibilities, while providing for flexible solutions to specific problems. On the other, Convention No. 171 and its Recommendation encapsulate a modern gender-neutral

⁷⁶ See, for instance, P. Knauth: “Hours of work”, in *Encyclopaedia of Occupational Health and Safety*, 4th edition, ILO, 1998, Vol. 2, pp. 43.2-43.15; K. Kogi: “Sleep deprivation”, *ibid.*, Vol. 1, pp. 29.52-29.55.

⁷⁷ See J. Carpentier and P. Cazamian: *Night work: Its effects on the health and welfare of the worker*, 1977, p. 7. See also J.M. Harrington: *Shift work and health*, 1978; P.J. Taylor: “The problems of shift work” in *Night and shift work*, 1969, pp. 15-30.

approach focusing on the occupational safety and health needs of all night workers in all sectors of economic activity and occupations.

I. Night Work (Women) Convention (Revised), 1948 (No. 89), and its Protocol of 1990

ILO standards in historical perspective

As mentioned above, the first ILO instrument dealing with the night work of women in industry was Convention No. 4, adopted at the first session of the International Labour Conference, which laid down a blanket prohibition against the employment of women without distinction of age during the night in all industrial undertakings.⁷⁸ At that time there was overwhelming support for this prohibition as a measure of public health designed to decrease the mortality rate of women and protect them against exploitation and miserable working conditions. Women factory night workers were believed to be generally predisposed to chronic anaemia and tuberculosis due to sunlight deprivation. Night work was also considered immoral and disruptive of family values, as it prevented women from devoting themselves to childcare and housekeeping.⁷⁹

The principle underlying Convention No. 4 was extended to women employed in agriculture by Recommendation No. 13, adopted at the Third Session of the Conference in 1921, which provided for a night rest period for women of not less than nine hours. In 1934, the Conference adopted Convention No. 41 with a view to rendering the definition of the banned night period more flexible and also introducing additional exemption possibilities to the scope of the prohibition.⁸⁰ In 1948, the Conference decided to partially revise Convention No. 41 in order to allow for greater flexibility in the application of the Convention by facilitating the working of the double day-shift system, exclude more categories of women from the prohibition of night work, introduce the possibility of

⁷⁸ For the main part, the 1919 Convention took over the provisions of the Bern Convention, adopted in 1906 through the efforts of the International Association for Labour Legislation, which was the first international instrument abolishing industrial work for women at night. See also, *Memorial explanatory of the reasons for an international prohibition of night work for women*, issued by the Board of the International Association for Labour Legislation, 1904; M.D. Hopkins: *The employment of women at night*, US Department of Labor: Bulletin of the Women's Bureau, No. 64, 1928, pp. 16-26; B.E. Lowe: *The International protection of labour: International Labour Organization, history and law*, 1935, pp. 112-131; L.-E. Troclet: *Législation sociale internationale*, 1952, pp. 218-244; M. Caté : *La Convention de Berne de 1906*, 1911.

⁷⁹ The adoption of Convention No. 4, it was hoped, “would constitute a valuable advance in the protection of the health of women workers, and, through them, of their children, and that of the general population in each country, by making the prohibition of night work for women engaged in industry more complete and more effective than it has ever yet been”; see *Record of Proceedings*, ILC , First Annual Meeting, 1919, p. 246.

⁸⁰ See, Partial Revision of the Convention concerning Employment of Women during the Night, ILC, 18th Session, 1934, Report VII, and ILC, 18th Session, 1934, *Record of Proceedings*, pp. 650-654. Proposals for revision had been considered also in the 1931 session of the Conference, but had failed to obtain the two-thirds majority due to doubts concerning the exact scope of application of Convention No. 4, which ultimately gave rise to a request for an advisory opinion filed with the Permanent Court of International Justice; see *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Advisory Opinion, P.C.I.J. Series A/B, Fasc. No. 50, 15 Nov. 1932, pp. 373-377.

suspension of the prohibition in exceptional circumstances, and safeguard the principle of the consultation of employers' and workers' organizations when considering exceptions.⁸¹

As from the early 1970s, the question was raised about the continuing validity of the prohibition of night work for women in industry in view of changing technological and economic conditions, while serious doubts were also expressed as to the appropriateness of maintaining special protective measures for women in light of the principle of equal treatment and non-discrimination between men and women in employment. In the ensuing years, the debate was animated by two opposing schools of thought; one favouring a general removal of restrictions on the employment of women, including the prohibition on night work, in furtherance of the objectives of gender equality and equal employment opportunities for men and women; the other suggesting a limited relaxation of existing restrictions and arguing that the protective function of the Conventions on the night work of women should not be weakened, as women continued to be exploited as cheap labour.

The controversy blocked the Organization's standard-setting policy in the field of night work for nearly three decades, as it was practically impossible to obtain sufficiently broad agreement on either the purpose or scope of a possible revision of existing standards, or on the advisability of adopting new standards and their content.⁸² Thus, the Tripartite Advisory Meeting on Night Work which was held in October 1978 reached no conclusion and confined itself to confirming the complexity of the issue and the significant divergence of opinions.⁸³ Similarly, the Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment, held in October 1989, reviewed all ILO standards aimed at protecting women only, with the sole exception of the prohibition of night work for women.⁸⁴

Over the years, criticism mounted at the international level, with the ILO's standards on the night work of women being regarded as inherently discriminatory in character and incompatible with the principle of equality of opportunity and non-discrimination between men and women, as embodied in other international instruments. The 1979 United Nations

⁸¹ See Partial Revision of the Convention (No. 4) concerning Employment of Women during the Night (1919) and of the Convention (No. 41) concerning Employment of Women during the Night (revised 1934), International Labour Conference, 31st Session, 1948, Report IX, pp. 23-33, and ILC, 31st Session, 1948, *Record of Proceedings*, pp. 494-499.

⁸² See, for instance, *Draft report of the Governing Body of the International Labour Office on the working of the Convention concerning Night Work of Women in Industry (Revised 1948) (No. 89, and of the corresponding Conventions of 1934 and 1919 (Nos. 41 and 4), D.5., 1973, p. 30. See also GB.191/SC/1/1, GB.191/16/25 and GB.198/SC/1/1, p. 7.*

⁸³ According to the report of the Meeting, "at the conclusion of its work, the Meeting noted that there was not unanimity on the desirability of adopting new international standards on night work. The Worker participants declared themselves in favour of such standard-setting action as did the majority of Government participants, although there were differences of opinion among the latter about what form such standards should take. On the other hand, the Employer participants and a minority of Government participants were strongly opposed"; see GB.208/8/4, para. 92, p. 15.

⁸⁴ The Meeting of Experts recommended that "measures should be taken in each country to review all protective legislation applying to women in the light of up-to-date scientific knowledge and technological changes and to revise, supplement, extend, retain or repeal such legislation according to national circumstances" while noting that "the review of protective measures for women is but one means of action to ensure equal opportunity and treatment between men and women in employment"; see ILO, *Special protective measures for women and equality of opportunity and treatment*, documents considered at the Meeting of Experts on Special Protective measures for Women and Equality of Opportunity and Treatment (October 1989), MEPMW/1989/7, p. 78.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) affirms that States parties agree to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” and further prescribes that only measures offering special protection to women during pregnancy in types of work proved to be harmful to them or measures aimed at protecting maternity shall not be considered discriminatory.⁸⁵ In the same vein, the European Social Charter, as revised in 1996, endorses the prevailing view that regulations on the employment of women for night work are justified only in the case of maternity, providing in Article 8, paragraph 4, that parties undertake “to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants”. Reference should also be made to the European Council’s Equal Treatment Directive 76/207/EEC, and the extensive jurisprudence of the Court of Justice of the European Communities subsequently built on this Directive, which eventually led all European Union Member States which had previously ratified Convention No. 89 to proceed to its denunciation.⁸⁶

In practice, the Office adopted a dual approach by submitting to the 1989 session of the Conference a proposal for the adoption of both a Protocol partially revising Convention No. 89 and a new night work Convention applicable to all night workers and nearly all occupations. By opting for the solution of a Protocol, that is an instrument that may not be ratified separately from the “mother” Convention, the intention was to introduce greater flexibility in the application of Convention No. 89, while leaving it open to further ratifications. In practical terms, member States which were already parties to Convention No. 89 could avail themselves of the new provisions by ratifying the Protocol; their

⁸⁵ In a legal opinion given by the Office in 1984 on the compatibility of the CEDAW Convention and certain ILO Conventions on the protection of women, it was argued that “there need not be any contradiction between the obligations arising under the United Nations Convention and those assumed by a State having ratified ILO Conventions providing for special protection for women for reasons unconnected with maternity, namely Convention No. 45 and Conventions Nos. 4, 41 and 89”. It was further stated that “States having ratified both the United Nations Convention and an ILO Convention are bound to review their protective legislation periodically in accordance with Article 11, paragraph 3, of the United Nations Convention. They do not have to repeal this legislation – or denounce the corresponding Convention – if this is not deemed necessary for the time being”; see GB.228/24/1, para. 17, p. 6.

⁸⁶ In its well-known decision of July 1991 in the *Stoeckel* case, the Court of Justice of the European Communities declared that the Council Directive 76/207/EEC was “sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that obligation is subject to exceptions, where night work by men is not prohibited”. The Court further reasoned that “the concern to provide protection, by which the general prohibition of night work by women was originally inspired, no longer appears to be well founded and the maintenance of that prohibition, by reason of risks that are not peculiar to women or preoccupations unconnected with the purpose of Directive 76/207/EEC, cannot be justified by the provisions of article 2(3) of the Directive”. See also, C. Kilpatrick: “Production and Circulation of EC Night Work Jurisprudence”, in *Industrial Law Journal*, Vol. 25, 1996, pp. 169-190; M.-A. Moreau: “Travail de nuit des femmes, observations sur l’arrêt de la CJCE du 25 juillet 1991”, in *Droit social*, 1992, pp. 174-185; A. Supiot: “Principe d’égalité et limites du droit du travail (en marge de l’arrêt *Stoeckel*)”, *ibid.*, pp. 382-385. In its judgment of August 1993 in the *Levy* case, the Court reconsidered its earlier position on the precedence of Community law principles over international legal obligations of Member States arising out of the acceptance of international agreements, and ruled that a “national court is under an obligation to ensure that article 5 of Directive 76/207/EEC is fully complied with by refraining from applying any conflicting provision of national legislation, unless the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty”, reference being made to ILO Convention No. 89.

obligations would then relate to the Convention as revised by the Protocol. Those States parties to Convention No. 89 that decided not to ratify the Protocol would continue to be bound by the Convention in its original terms. Finally, any State which ratified the Convention after the adoption of the Protocol could accept either the original provisions of the Convention only or, by also ratifying the Protocol, its revised ones. The Office report introducing the proposal for the possible adoption of an additional Protocol reads in part:

... the lack of flexibility in the standards laid down in these instruments [Conventions Nos. 4, 41 and 89] is doubtless not unconnected with the difficulties encountered. Although the ban established by Convention No. 89 may be lifted in some cases, this is only possible within such narrowly confined conditions that it is practically impossible for governments, employers and workers to adjust them to national circumstances and to the particular needs of a branch of industry, region or enterprise. In these conditions one might envisage a limited extension of the possible exceptions envisaged by the present text of Convention No. 89 which could take due account of the current economic situation, particularly in cases where there is or might be a high proportion of women in the labour force, and the interests of women workers, with particular reference to their chances of finding and retaining employment. In order to take due account of the specific problems of all the parties concerned, such new exceptions or exemptions might be subject to the conclusion of an agreement to that effect between the representatives of the employers and workers concerned at the level deemed appropriate.⁸⁷

Definitions, scope of application and main provisions

Convention No. 89 (Article 3) prohibits the employment of women without distinction of age during the night in any public or private industrial undertaking other than an undertaking in which only members of the same family are employed. The term “industrial undertaking” (Article 1) is defined as including particularly: (a) mines, quarries, and other works for the extraction of minerals from the earth; (b) undertakings in which articles are manufactured, altered, cleaned, repaired, ornamented, finished, adapted for sale, broken up or demolished, or in which materials are transformed, including undertakings engaged in shipbuilding or in the generation, transformation or transmission of electricity or motive power of any kind; and (c) undertakings engaged in building and civil engineering work, including constructional, repair, maintenance, alteration and demolition work.⁸⁸ The Convention leaves it to the competent authority of each country to

⁸⁷ See ILC, 76th Session, 1989, Report V(1), p. 69. For the Conference discussions, see *Record of Proceedings*, ILC, 76th Session, 1989, pp. 30/30-30/35, and *Record of Proceedings*, ILC, 77th Session, 1990, pp. 26/21-26/26.

⁸⁸ This is a simplified definition of the term “industrial undertaking” as compared to that used in Conventions Nos. 4 and 41, and which is also found in all the Conventions applying to “industry” adopted up to 1939. The definition contained in Convention No. 89 was first used in the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77), the intention being to avoid the problem that detailed lists of industrial occupations were invariably found after some years to exclude new categories of work the development of which could not have been foreseen at the time those lists were drawn up. As the preparatory work for Convention No. 89 indicates, there had been lengthy discussions on the possible revision of the definition of industrial undertakings so as to include the transport industry within the scope of application of the Convention. It was finally decided that sufficient information was not available as to the extent and nature of the employment of women in transport, and as a result the Conference adopted a resolution referring the question to the Governing Body “for examination with a view to appropriate action”; see *Record of Proceedings*, ILC, 31st Session, 1948, p. 495.

determine the limits separating industry from agriculture, commerce and other non-industrial occupations.⁸⁹

Definition of “night”

The term “night” signifies a period of at least eleven consecutive hours, including an interval prescribed by the competent authority of at least seven consecutive hours falling between ten o’clock in the evening and seven o’clock in the morning. However, the competent authority may prescribe different intervals for different areas or industries, but has to consult the employers’ and workers’ organizations concerned before prescribing an interval beginning after 11 o’clock in the evening.⁹⁰

Exemptions from the prohibition and variations of the night period

Apart from the case of family enterprises, which are excluded from the prohibition of night work, the provisions of the Convention (Articles 4 and 8) also do not apply (a) in case of *force majeure*, when in any undertaking there occurs an interruption of work which it was impossible to foresee, and which is not of a recurring character; (b) in cases where the work has to do with raw materials or materials in course of treatment which are subject to rapid deterioration when such night work is necessary to preserve the said materials from certain loss; (c) to women holding responsible positions of a managerial or technical character;⁹¹ and (d) to women employed in health and welfare services who are not ordinarily engaged in manual work.⁹²

⁸⁹ In a communication of 11 May 1920 answering certain enquiries made on behalf of the Swiss Government, the Office advised that the liberty given to the competent authority in determining the line of demarcation between industry and commerce and agriculture should not go beyond reasonable limits as it is essential to maintain a certain unity in the interpretation of the terms industry, commerce and agriculture in order to secure the necessary uniformity in the application of international labour legislation; see ILO, *Official Bulletin*, Vol. III, 1921, p. 389.

⁹⁰ By way of comparison, the minimum duration of the night rest of women was originally set out in Article 2, para. 1, of Convention No. 4 to be a period of 11 hours including the interval between 10 p.m. and 5 a.m. For its part, Convention No. 41 rendered this provision somewhat more flexible, while maintaining the length of the night rest (11 hours), as well as that of the barred period (seven hours), by allowing the competent authority in exceptional circumstances and after consultation with the employers’ and workers’ organizations concerned to substitute the interval between 11 p. m. and 6 a.m. for the interval between 10 p.m. and 5 a.m. Finally, Article 2 was further redrafted when adopting Convention No. 89 to enhance the adaptability of the Convention to dissimilar national conditions while reaffirming the need for prior consultations with the social partners.

⁹¹ In an Office Memorandum prepared in response to a request for interpretation made by the Government of Yugoslavia, it was pointed out that in both categories, i.e. positions of a managerial or technical character, the manual or non-manual nature of the work performed by the women in question is not an operative condition and that the determining factor is whether such posts involve responsibility. According to the same opinion, “Convention No. 89 does not apply to: (a) women holding responsible positions of managerial character although it does apply to women holding ‘positions of supervision’ and ‘women employed in a confidential capacity’; (b) to women holding responsible positions of a technical character although it would appear that in respect of this category of women workers the Conference wished the wording of the Convention to be left fairly flexible”; see ILO, *Official Bulletin*, Vol. 38, 1955, pp. 382-384.

⁹² The words “not ordinarily engaged in manual work” were added upon a proposal of the Workers’ members for fear that the expression “welfare services” could be interpreted as meaning persons employed in manual labour in canteens. As finally worded, however, Article 8(b) of the Convention has given rise to doubts as to whether nurses’ normal work should be regarded as

Moreover, the Convention (Articles 6 and 7) provides for the possibility of limited variations in the duration of the period of compulsory night rest in the following two cases: (a) in industrial undertakings which are influenced by the seasons, and in all cases where exceptional circumstances demand it, the night period may be reduced to ten hours on 60 days of the year; and (b) in countries where working by day is particularly trying due to climatic conditions, shorter night periods may be prescribed, provided that compensatory rest is accorded during the day.

The 1990 Protocol (Article 1) significantly extends the possibilities of exemptions from the prohibition of night work and variations in the duration of the night period to be introduced by decision of the competent authority with the agreement of, and/or in consultation with, the representative employers' and workers' organizations or workers' representatives (depending on the level at which the derogation or variation is to be applied) in a specific branch of activity or occupation, or in one or more specific establishments. More specifically, the Protocol provides that national laws or regulations may provide that variations in the duration of the night period as defined in Article 2 of the Convention and exemptions from the prohibition of night work contained in Article 3 thereof may be introduced by decision of the competent authority:

- (a) in a specific branch of activity or occupation, provided that the organizations representative of the employers and workers concerned have concluded an agreement to this effect;
- (b) in one or more specific establishments not covered by a decision taken under (a) above, provided that: (i) an agreement has been concluded in the establishment concerned between the employer and the workers' representatives; and (ii) the employers' and workers' organizations at the branch level have been consulted;
- (c) in a specific establishment not covered by a decision taken under (a) above and where no agreement has been reached in accordance with (b)(i) above, provided that: (i) the employers' and workers' organizations at the branch level have been consulted; (ii) the competent authority has satisfied itself that adequate safeguards exist in the establishment as regards occupational safety and health, social services and equality of opportunity and treatment for women workers; and (iii) the decision is for a specified period of time; which may be renewed subject to the same criteria.

Minimum protection for pregnant women and nursing mothers

The Protocol (Article 2) provides that the possible exemptions from the prohibition of night work or variations in the duration of the night period which may be introduced by means of the procedure described above may not apply to women workers during a period

“manual work”. In a reply to a request for interpretation of this provision made by the Austrian Government, the Office has taken the view that nurses' work “cannot ordinarily be regarded as manual; the carrying out of a nurse's normal duties frequently calls for personal and psychological qualities, experience and expert knowledge compared with which the material aspect of the work assumes secondary importance, and undoubtedly the quality and effectiveness of the work would frequently suffer considerably by its being carried out in a purely mechanical fashion [...]. The permission of night work by nurses in fact is justified only because the persons concerned possess special qualifications (or equivalent experience) which lead to their being classed among the paramedical professions and give their work a predominantly intellectual character. It follows that the prohibition of night work must be strictly observed, in accordance with the Convention, wherever the manual aspect of the work predominates, particularly as regards women whose work in health services is similar to that of cleaning staff, even if at times they are called upon to assist a doctor, to replace a full-time nurse, or even to treat certain simple cases”; see ILO, *Official Bulletin*, Vol. 39, 1956, pp. 700-701.

before and after childbirth of at least 16 weeks, of which at least eight weeks shall be before the expected date of childbirth, as well as during such additional periods throughout pregnancy or after childbirth in respect of which a medical certificate is obtained stating that this is necessary for the health of the mother or child.⁹³ This proviso reflects the understanding that, even though the prohibition on the night work of women may in practice be lifted in specific branches of activity or specific establishments, minimum protection is still needed for pregnant workers and nursing mothers and thus an outright prohibition of night work should continue to apply at least during the two months preceding childbirth and the two months following it. The Protocol recognizes, however, that national laws or regulations may allow for the lifting of this prohibition at the express request of the woman worker concerned, on condition that the performance of night work does not put at risk either her health or that of her child.

The Protocol also contains provisions on income security and the protection of pregnant workers and nursing mothers against unfair dismissal, laying down that, during the periods indicated above, a woman worker may not be dismissed or given notice of dismissal, except for justifiable reasons not connected with pregnancy or childbirth, and that her income has to be maintained at a level sufficient for the upkeep of her child in accordance with a suitable standard of living. This income maintenance may be ensured through assignment to day work, extended maternity leave, social security benefits or any other appropriate measures, or through a combination of these measures.

Suspension of the prohibition

The Convention (Article 5) provides that the prohibition of night work for women may be suspended by the government, after consultation with the employers' and workers' organizations concerned, when in case of serious emergency the national interest demands it, and that any such suspension measure has to be notified to the Director-General of the International Labour Office in the government's annual report on the application of the Convention.⁹⁴

Supervision of compliance and practical application through the ILO's supervisory machinery

The Committee of Experts' most recent General Survey on the application of ILO Conventions concerning the prohibition of night work for women in industry offers valuable guidance as to the continued relevance of those instruments and the as yet unresolved question of the compatibility of women-specific protective standards with the principle of equality of opportunity and treatment between men and women in employment. While noting that the likelihood of Convention No. 89 and its Protocol receiving further ratifications appears remote, the Committee concluded that "Convention No. 89, as revised by the 1990 Protocol, retains its relevance for some countries as a means of protecting those women who need protection from the harmful effects and risks of night

⁹³ Reference was made to a minimum period of "eight plus eight" weeks instead of the originally proposed period of "three plus three" months in order to align the text of the Protocol with the corresponding provision of Convention No. 171; see *Record of Proceedings*, ILC, 77th Session, 1990, p. 26/24.

⁹⁴ No similar provision is to be found in either Convention No. 4 or Convention No. 41. Article 5 of Convention No. 89 reflects the experience during the Second World War when the night work prohibition was lifted in several belligerent and neutral countries to allow the massive employment of women, especially in munition factories. The Conference discussions confirm the intention of the drafters of the Convention to limit the possibility of suspension to cases of serious emergency, such as in time of war; see *Record of Proceedings*, ILC, 31st Session, 1948, p. 497.

work in certain industries, while acknowledging the need for flexible and consensual solutions to specific problems and for consistency with modern thinking and principles on maternity protection”.⁹⁵ Having reviewed national law and practice on the basis of the information communicated by member States in their reports, the Committee has found that the record shows a clear trend to move away from the approach taken in Conventions Nos. 4, 41 and 89. In the words of the Committee,

... the three night work Conventions under review appear to have a diminishing impact on national laws and practice. Not only does the level of ratification remain low, but a number of countries formally bound by the Conventions have ceased to apply them and often have contradictory legislation. Several others are in the process of introducing legislative amendments lifting all restrictions on women’s night work, while others have announced their intention to proceed to their denunciation. National laws are replete with permissive clauses and exceptions which often bear little relevance to those allowed by the Conventions. Some States have even introduced such broad exceptions that they practically nullify the basic principles of the prohibition of night work for women.⁹⁶

With regard to the uneasy relationship between Convention No. 89 and the principle of non-discrimination, as reflected in the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the 1985 Conference resolution on equal opportunities and equal treatment for men and women in employment, the Committee of Experts has stood by its previous observations drawing attention to the need for balanced progress and individualized responses to widely differing realities. Securing equal opportunity for women in the labour market is a universally accepted principle, but the path towards its full implementation is necessarily conditioned by the specific needs of each country. The Committee has taken pains to demonstrate that the debate is often reduced to a false dilemma between protection or equality, whereas the ILO has always strived to achieve protection and equality. While acknowledging that sex-based prohibitions or restrictions on night work are by definition incompatible with the principle of equality of treatment between men and women, the Committee has considered that situations may still exist where special protective measures serve a meaningful purpose and that in many countries women workers themselves continue to regard the provisions of Convention No. 89 as necessary to guard against exploitation. Moreover, the Committee has insisted on the need for periodic review of all protective legislation in light of scientific and technological knowledge, giving special consideration to the principles contained in the Workers with

⁹⁵ See ILC, 89th Session, 2001, Report III (Part 1B), para. 201, p. 143. In contrast, the Committee found that “Convention No. 4 is manifestly of historical importance only”, “a rigid instrument, ill-suited to present-day realities” and therefore that “for all practical purposes it no longer makes a useful current contribution to attaining the objectives of the Organization”; *ibid.*, para. 193, pp. 139-140. With respect to Convention No. 41, the Committee noted that “not only is it poorly ratified and its relevance is diminishing, but also that it would be in the interest of those member States which are parties to this Convention to ratify instead the revising Convention No. 89 and its Protocol which allow for greater flexibility and are more easily adaptable to changing circumstances and needs”; *ibid.*, para. 194, pp. 140-141. The Committee’s conclusions corroborate the recommendations of the Working Party on Policy regarding the Revision of Standards, approved by the ILO Governing Body in November 1996, calling for the promotion of the ratification of Convention No. 89 and its Protocol of 1990 or, where appropriate, of Convention No. 171, and the denunciation as appropriate of Conventions Nos. 4 and 41; see GB.267/LILS/4/2(Rev.), paras. 47-49, and GB.267/9/2, para. 14.

⁹⁶ See Report III (Part 1B), 2001, *op. cit.*, para. 153, p. 122. It should also be added that, since the adoption of the Protocol of 1990, there have been only three ratifications of the Protocol, but nine denunciations of Convention No. 89, substantiating past evidence to the effect that the Conventions on women’s night work have been among the most widely denounced ILO instruments.

Family Responsibilities Convention, 1981 (No. 156), but has emphasized that a process of revision should not result in a legal vacuum with night workers being deprived of any regulatory safeguards. To quote from the General Survey:

the Committee concludes that a blanket prohibition on women's night work, such as that reflected in Conventions Nos. 4 and 41, now appears objectionable and that it cannot be defended from the viewpoint of the principle of non-discrimination.[...] It would, however, be unwise to believe that eliminating at a stroke all protective measures for women would accelerate the effective attainment of equality of opportunity and treatment in employment and occupation in countries at different stages of development. Before repealing existing protective legislation, therefore, member States should ensure that women workers will not be exposed to additional risks and dangers as a result of such repeal. [...] The Committee recognizes that the full realization of the principle of non-discrimination requires the repealing of all laws and regulations which apply different legal prescriptions to men and women, except for those related to pregnancy and maternity. At the same time, the Committee is aware that, as a long-term goal, the full application of this principle will only be attained progressively through appropriate legal reforms and varying periods of adaptation, depending on the stage of economic and social development or the influence of cultural traditions in a given society.⁹⁷

It should also be noted that in earlier comments the Committee had made repeated reference to paragraph 142 of its General Survey of 1988 on equality in employment and occupation, in which it pointed out that eliminating the protection afforded to women by the ban on night work in industrial enterprises cannot be deemed the only measure necessary in order to promote equality of opportunity and treatment in employment and occupation and that other measures could be adopted to satisfy the requirements of the promotion of equality which should not be sought at the expense of a degradation of working conditions, and much less be based on such a degradation.⁹⁸

The Committee of Experts' comments in recent years reflect the increasing difficulty experienced by several States parties to the Convention to conform to its requirements for different reasons.⁹⁹ Most of those States have stated that the prohibition of night work for women has been formally abolished, ceased to apply or otherwise fallen into disuse, following the enactment of new legislation promoting the principle of equal rights and job opportunities for men and women. Some States have invoked the compelling need for the night work of women dictated by their economic situation, while others have justified the

⁹⁷ *ibid*, paras. 162, 163 and 168, pp. 126 and 128.

⁹⁸ See, for instance, ILO, Report of the Committee of Experts, 1995, pp. 211, 213 (Czech Republic, Zambia). The Committee has been commenting on the obligation for regular review of gender-specific legislation also in relation to Convention No. 111. While noting that the specific needs of each country vary, the Committee has invited the governments concerned to consider the possibility of reviewing such legislation, in consultation with the social partners and in particular with women workers, in order to decide whether it is really necessary to prohibit access of women workers to certain occupations, and has drawn attention to the provisions covering this question, i.e. the Protocol of 1990 to Convention No. 89, the Night Work Convention No. 171, and the 1985 resolution on equal opportunities and equal treatment; see, for instance, direct requests 1999 (Algeria, Belarus, Jordan, Zambia); 1998 (Malawi); 1997 (Lebanon); 1995bis (Slovakia).

⁹⁹ In its general observation in its 1986 report, the Committee noted a trend of opinion among a number of governments to the effect that the prohibition of night work for women would be discrimination against them and would also be contrary to present-day thinking on the role of women in society, and it drew the attention of the Governing Body to the importance of seeking a rapid solution; see ILO, Report of the Committee of Experts, 1986, paras .69-71, p. 24.

lifting of the prohibition for reasons of national interest.¹⁰⁰ While noting such statements and the growing tendency among States parties to Convention No. 89 to no longer give effect to its provisions, the Committee has consistently observed that, as long as a government does not proceed to denounce the Convention, it has the obligation to take the necessary measures to eliminate the incongruity between national legislation and international commitments made on account of the acceptance of the Convention. It has also invited the governments concerned to give favourable consideration to the ratification, as the case may be, of the Night Work Convention No. 171 or of the 1990 Protocol. Referring to the same situation in its recent General Survey, the Committee expressed the view that “it is not sufficient to invoke the principle of non-discrimination in employment and occupation or the principle of equality of treatment to nullify the obligations incumbent upon a member State by virtue of its formal acceptance of an international Convention” and strongly appealed to the member States concerned to bring their national legislation into conformity with practice – an implicit reference to the advisability of denouncing the Convention if the possibility of reintroducing limitations on women’s night work was not envisaged.¹⁰¹

Most of the Committee of Experts’ comments relate to the length of the banned night period, pointing out that prohibitions of only seven to ten hours’ duration fail to meet the definition of “night” and the compulsory night rest of at least eleven consecutive hours required under Article 2 of the Convention.¹⁰²

Another point frequently raised in the Committee of Experts’ comments is the authorized exemptions under the terms of the Convention. In this connection, the Committee has stressed that the exemption possibilities stipulated in the Convention are exhaustive and therefore member States may not authorize exceptions on some other grounds such as the special nature of the work requiring the manual skill and dexterity of female workers, the existence of special circumstances as may be determined by the labour inspector, the prior consent of the women workers concerned or the non-availability of male workers.¹⁰³

The Committee of Experts has recalled on a number of occasions that, according to Article 5 of the Convention, the prohibition of night work for women may be suspended only when in case of serious emergency the national interest demands it, and after consultation with the employers’ and workers’ organizations concerned, it being understood that by serious emergency allusion is made to exceptional circumstances, such as a war situation. Accordingly, the Committee has observed that reasons such as the general needs of production, the interruption of work by reason of a strike or the demand

¹⁰⁰ See, for instance, ILO, Report of the Committee of Experts, 2001, p. 341 (Costa Rica); 1994, pp. 235, 237 (Brazil, Philippines, South Africa). See also direct request 2000 (Burundi, Malawi, Rwanda). In contrast, other States have clearly announced their intention to denounce the Convention at the first possible date; see direct requests 2000 (Austria, Czech Republic, Dominican Republic, Zambia).

¹⁰¹ Report III (Part 1B), 2001, op. cit. para. 93, p. 61.

¹⁰² See, for instance, ILO, Report of Committee of Experts, 2001, pp. 339-340 (Algeria, Bolivia); 1982, p. 133 (Philippines). See also direct requests 2000 (Czech Republic, France-New Caledonia, Lebanon, Paraguay, Slovenia, Swaziland).

¹⁰³ See, for instance, ILO, Report of the Committee of Experts, 2001, pp. 339-340 (Algeria, Bolivia); 1990, p. 216 (Dominican Republic); 1982, p. 133 (Philippines). See also direct requests 2000 (Angola, Egypt, Iraq, Slovenia, Swaziland); 1987 (Romania).

for night work by women in export processing zones are not valid grounds for suspension.¹⁰⁴

II. Night Work Convention (No. 171) and Recommendation (No. 178), 1990

ILO standards in historical perspective

The doctrinal discussions which shaped the new night work standards adopted in 1990 have been reviewed above. Convention No. 171, submitted for adoption at the same time as the Protocol to Convention No. 89, is part of ILO's response to the debate which had been going on for nearly three decades in the Organization on the outdated state of ILO standards on night work, the need to keep abreast of technological and economic changes and the importance of promoting equality in employment between men and women. It was devised as the first general ILO instrument regulating conditions of night work, as contrasted to earlier Conventions and Recommendations, which contained restrictions on night work in certain branches of activity (e.g. bakeries, road transport) or for certain categories of workers (e.g. women, young persons). By shifting the emphasis from a specific category of workers and sector of economic activity to the safety and health protection of all night workers irrespective of gender in all branches and occupations, Convention No. 171 was designed to harmonize ILO standards with contemporary practice and modern thinking on equal opportunities and equal treatment for men and women in employment, and also to reflect a new flexible approach to the problems of organizing shift work. As pointed out in the Office report introducing the question of night work to the 1989 session of the Conference,

... the prohibition of night work of women in industry, once a widely accepted element of national labour legislation and international instruments, has become increasingly controversial. It was this controversy that originally led the Office to propose to the Governing Body that there should be standard-setting activities relating to night work, and in particular that the Night Work (Women) Convention (Revised), 1948 (No. 89), should be revised. However, it soon became clear that night work could also be re-examined from another angle, and that general measures, that is measures applying irrespective of the sex of the worker or the sector of activity, could be envisaged to improve the conditions in which night work is performed. The Governing Body decided to place this item on the agenda of the Conference in the twofold expectation that Convention No. 89 would be partly revised, and that new standards would be worked out for night work in general.¹⁰⁵

Definitions, scope of application and main provisions

The Convention (Article 2) is of general application covering all employed persons, both men and women, and nearly all occupations, with the exception of those workers employed in agriculture, stock raising, fishing, maritime transport and inland navigation. In addition, the Convention recognizes that member States may, after consulting the representative organizations of employers and workers concerned, exclude wholly or partly from its scope limited categories of workers when the application of the Convention to

¹⁰⁴ See, for instance, ILO, Report of the Committee of Experts, 2000, p. 207 (India); 1986, p. 191 (Ghana); 1980, p. 124 (Greece). See also direct requests 1995 (India) and 1982 (Romania).

¹⁰⁵ See ILC, 76th Session, 1989, Report V(1), p. 2. For the Conference discussions, see ILC, 76th Session, 1989, *Record of Proceedings*, pp. 30/5-30/30, and ILC, 77th Session, 1990, *Record of Proceedings*, pp. 26/1-26/21.

them would raise special problems of substantial nature. Whenever making use of this possibility of exclusion, however, member States have to indicate in their reports on the application of the Convention submitted under article 22 of the Constitution the particular categories of workers excluded, the reasons for their exclusion and also describe the measures taken with a view to extending the coverage of the Convention to the workers concerned.

Definition of “night work” and “night worker”

Contrary to the instruments concerning the prohibition of night work of women in industry, the new night work Convention (Article 1) does not define the term “night”, but rather the term “night work” as meaning all work performed during a period of not less than seven consecutive hours, including the interval from midnight to 5 a.m., to be determined by the competent authority after consulting the most representative organizations of employers and workers or by collective agreement. The Convention also defines the term “night worker” as an employed person whose work requires the performance of a substantial number of hours of night work which exceeds a specified limit, to be fixed by the competent authority after consulting the most representative organizations of employers and workers or by collective agreements.¹⁰⁶

Progressive implementation

The Convention (Article 3) allows ratifying States to introduce and apply the specific measures required for the protection of night workers and the improvement of their working and living conditions gradually over a period of time. The application of the Convention may thus proceed at a rate adapted to the conditions and capability of each country.

Health assessment and medical advice

The Convention (Article 4) establishes the right for night workers to undergo a health assessment without charge and to receive advice on how to reduce or avoid health problems associated with their work before taking up a night work assignment, at regular intervals during such assignment, or at any other moment if they experience health problems caused by the performance of night work.¹⁰⁷ The findings of such health assessments may not be communicated to others without the workers’ consent and may not be used to their detriment. The Recommendation (Paragraphs 10-12) provides some additional guidance on protection against occupational hazards in stipulating that the content of the tasks assigned to night workers should be determined taking especially into consideration environmental factors such as toxic substances, noise, vibrations and lighting levels, and also forms of work involving heavy physical or mental strain. Moreover, the

¹⁰⁶ The expression “substantial number of hours” instead of “certain number of hours/days” used in the original draft was meant to narrow the definition in order to cover only those workers seriously affected by night work, excluding occasional or marginal cases. No agreement could be reached on a minimum figure, but a proposed threshold of 200 hours performed in a year was found to be too low; see ILC, 77th Session, 1990, Report IV(2A), p. 35 and *Record of Proceedings*, pp. 26/5-26/6. As finally worded, Article 1(b) leaves it open to the competent authority to choose the period with respect to which it fixes a specified limit, e.g. the week, the month or the year. What is required is that this should be done in good faith and that the number of hours fixed should be substantial by reference to the period chosen.

¹⁰⁷ The term “health assessment” does not necessarily mean a fully fledged medical examination, nor does it imply that it should be carried out by a certified doctor; see *Record of Proceedings*, ILC, 77th Session, 1990, p. 26/8.

Recommendation provides that the employer should take the necessary measures to ensure during night work the same level of protection against occupational hazards as by day, in particular avoiding as far as possible the isolation of workers.

First-aid facilities

The Convention (Article 5) requires that suitable first-aid facilities be made available for workers performing night work, including arrangements whereby such workers can, when necessary, be taken quickly to a place where appropriate treatment can be provided.

Unfitness for night work

The Convention (Article 6) lays down an obligation for the employer to transfer night workers, whenever practicable, to a similar job involving day work in the event that these workers are certified to be unfit for night work for reasons of health. If transfer to such a job is not practicable, the workers concerned are entitled to the same benefits as other workers who are unable to work or to secure employment, while in case of temporary unfitness for night work the workers concerned shall enjoy the same protection against dismissal or notice of dismissal as other workers who are prevented from working for reasons of health.¹⁰⁸

Maternity protection

It is generally acknowledged that women workers are more exposed to the hazards of night work during pregnancy and immediately after confinement, thereby justifying some special protection for pregnant workers and nursing mothers over a specified period. The Convention (Article 7) accordingly provides that measures have to be taken to ensure that an alternative to night work is available to women workers who would otherwise be called upon to perform such work: (i) during a period of at least sixteen weeks before and after childbirth, of which at least eight weeks shall be before the expected date of childbirth; and (ii) during such additional periods throughout pregnancy or after childbirth, as may be fixed by the competent authority after consulting the most representative organizations of employers and workers, in respect of which a medical certificate is produced stating that it is necessary for the health of the mother or child. These measures may consist of the transfer to day work where this is possible, the provision of social security benefits, or an extension of maternity leave.¹⁰⁹

During the maternity periods indicated above: (a) a woman night worker may not be dismissed or given notice of dismissal, except for justifiable reasons not connected with pregnancy or childbirth; (b) her income has to be maintained at a level sufficient for the upkeep of herself and her child in accordance with a suitable standard of living; and (c) she may not lose the benefits regarding status, seniority and access to promotion which may attach to her regular night work position. The Recommendation (Paragraph 19) extends the

¹⁰⁸ The substance of this provision was originally included in the Recommendation. The current wording of Article 6, para. 2, was adopted following an amendment seeking to revise the initial Office proposal, which provided that unfit workers whose transfer was not possible had to be granted the same benefits as other workers who were unfit for work for reasons of health; see *Record of Proceedings*, ILC, 77th Session, 1990, p. 26/9.

¹⁰⁹ As originally drafted, Article 7 referred to a period of six months, three months before and three after childbirth. The six-month period was later found to be too long in relation to the provisions of the Maternity Protection Convention (Revised), 1952 (No. 103), and the actual practice in many countries, and was shortened to a total period of sixteen weeks; see *Record of Proceedings*, ILC, 77th Session, 1990, p. 26/10.

scope of protection with regard to maternity by providing that, at any point during pregnancy, women night workers who so request should be transferred to day work assignments as far as practicable.¹¹⁰

Compensation

The Convention (Article 8) sets forth the principle that night work is of a particular nature and therefore must entail special compensation in the form of working time, pay or similar benefits. The Recommendation (Paragraphs 8-9) supplements the provisions of the Convention and provides that night work should generally give rise to appropriate financial compensation. Such compensation should be additional to the remuneration paid for the same work performed during the day, it should respect the principle of equal pay for men and women for the same work or for work of equal value, and it should be convertible into reduced working time by mutual agreement. The Recommendation further specifies that where financial compensation is a normal element of a night worker's earnings, it should be included in the calculation of the remuneration of paid annual leave, paid public holidays and other absences that are normally paid, as well as in the fixing of social security contributions and benefits.¹¹¹

Hours of work and rest periods for night workers

No binding provisions on the working time of night workers are to be found in the Convention. In contrast, the Recommendation (Paragraphs 4-7) contains a number of principles relating to normal hours of work and rest breaks for night workers. The normal hours of work of night workers should generally be less on average than, and in any case not exceed on average those of workers performing the same work to the same requirements by day. They should not exceed eight in any 24-hour period, except in case of work which includes substantial periods of mere attendance or stand-by, in cases in which alternative working schedules give workers at least equivalent protection over different periods, or in cases of exceptional circumstances recognized by collective agreements. Overtime by night workers should be avoided as far as possible, while in occupations involving special hazards or heavy physical or mental strain, no overtime should be performed by night workers except in cases of *force majeure* or of actual or imminent accident. Where shift work involves night work, no worker should be required to perform two consecutive full-time shifts, except in cases of *force majeure* or imminent accident, and a rest period of at least 11 hours between two shifts should be guaranteed as far as possible. Work schedules which include night work should provide for a break or breaks to enable workers to rest and eat, taking into account the demands placed on workers by the nature of night work.

Social services

The Convention (Article 9) calls for appropriate social services to be provided for night workers and, where necessary, for workers performing night work. The

¹¹⁰ The purpose of this provision is to go beyond the Convention and point out that everything feasible should be done to meet a request from a pregnant woman for transfer to day work, given the fact that night work is generally associated with higher reproductive risks, such as spontaneous abortion, pre-term birth and lower birth weight; see *Record of Proceedings*, ILC, 77th Session, 1990, p. 26/19.

¹¹¹ By "normal element in a night worker's earnings" reference was made to night work allowances and shift premiums which are generally consolidated into payable remuneration, in contrast with special indemnities for additional expenses due to night work, such as transportation, which should not be considered part of the salary for purposes of calculating compensation for paid absences and social security; see *Record of Proceedings*, ILC, 77th Session, 1990, p. 26/17.

Recommendation (Paragraphs 13-18) specifies concrete measures which should be adopted in this respect. Such measures should aim: (a) at limiting or reducing the time spent by night workers in travelling between their residence and the workplace, avoiding or reducing additional travelling expenses for them and improving their safety when travelling at night; (b) improving the quality of rest for night workers; (c) enabling night workers to obtain meals and beverages; and (d) facilitating the daily life of night workers with family responsibilities, especially in relation to the operation of crèches or similar services, as well as encouraging night workers to participate in cultural, sporting or recreational events. Concerning the journey to and from the workplace, consideration should be given to the following measures: (i) coordination between the starting and finishing times of daily periods of work which include night work and the schedules of local public transport services; (ii) provision by the employer of collective means of transport for night workers where public transport services are not available; (iii) assistance to night workers in the acquisition of appropriate means of transport; (iv) the payment of appropriate compensation for additional travelling expenses; and (v) the building of housing complexes within a reasonable distance of the workplace. As regards the quality of rest for night workers, measures should be taken to: (i) provide advice and assistance to night workers for noise insulation of their housing; (ii) design and equip housing complexes which take into account the need for noise level reduction; and (iii) provide night workers with suitably equipped resting facilities in appropriate places in the enterprise. With respect to the availability of appropriate meals and beverages on the night shift, the employer should either provide, at appropriate places in the enterprise, food and beverages suitable for consumption at night, or give access to facilities where workers could prepare or heat and eat their food provisions. Insofar as the needs of night workers for convenient child-care facilities are concerned, the extent to which night work is performed locally should be one of the factors to be taken into consideration when deciding on the establishment of crèches or other services for the care of young children, choosing their location and determining their opening hours. Finally, the specific constraints on night workers should be duly taken into consideration by the public authorities and by employers within the framework of measures to encourage training and retraining, as well as cultural, sporting or recreational activities for workers.

Other measures

The Recommendation (Paragraphs 20-27) also addresses other needs of night workers and sets out general principles to guide the action of governments in regulating such matters. In cases of shift work, for instance, the special situation of workers with family responsibilities, of workers undergoing training or of older workers should be taken into consideration in deciding the composition of night crews. Workers who have spent a considerable number of years as night workers should be accorded special consideration with respect to such day work vacancies as may correspond to their qualifications, as well as early retirement opportunities where such opportunities exist.¹¹² All workers should be given reasonable notice of a requirement to perform night work, except in cases of *force majeure* or of actual or imminent accident. On a more general level, the Recommendation provides that statistics on night work should be improved and that studies on the effects of different night work patterns should be intensified, while aiming at limiting recourse to night work by taking advantage to the extent possible of scientific and technical progress and of innovations relating to work organization.

¹¹² The record indicates that “special consideration” is not to be construed as meaning absolute priority, as this would contravene the principle of equality of treatment for all workers; see ILC, 77th Session, 1990, Report IV(2A), pp. 96-97.

Consultation with workers' representatives

According to the Convention (Article 10), the employer is under an obligation, before introducing night work schedules, to consult the workers' representatives concerned on the details of such schedules and the forms of organization of night work that are best adapted to the establishment and its personnel, as well as on the occupational health measures and social services which are required, while in establishments employing night workers this consultation has to take place regularly.¹¹³

Implementation in the national legal order

Under the terms of the Convention (Article 11) a ratifying State may give effect to its provisions by means of national laws or regulations, collective agreements, arbitration awards or court decisions, a combination of these means or in any other manner appropriate to national conditions and practice. The Convention specifies, however, that in case the provisions are implemented by laws or regulations, there need to be prior consultations with the most representative organizations of employers and workers.

Supervising compliance and practical application through the ILO supervisory machinery

The relatively recent entry into force of the Convention, and consequently the limited number of ratifications registered so far, have not permitted the Committee of Experts to examine to any appreciable extent the practical application of the standards set forth in the Convention, or to offer insight as to their scope and meaning. To date, the Committee has mostly formulated comments requesting the member States concerned to enact specific legislation giving effect to concrete aspects of the Convention, such as social services for night workers,¹¹⁴ measures with regard to the protection of pregnant workers and nursing mothers over a period of at least 16 weeks before and after childbirth,¹¹⁵ or health assessment in relation to a night work assignment.¹¹⁶

The most recurrent issue, however, in the Committee's comments relates to Article 6, paragraph 2, of the Convention, which refers to workers who are medically certified to be unfit for night work and whose transfer to an alternative post has proven impracticable.¹¹⁷ The Convention requires that such workers be granted the same benefits as other workers who are unable to work or to secure employment, without specifying whether allusion is made to unemployment, sickness or disability benefits. Moreover, doubts have been raised as to the propriety of recognizing that workers who may be permanently unfit to work at night, but not unfit for day work, should be entitled to the same benefits as those day workers who are generally unfit for work. The question is not free of controversy and could even compromise the ratification prospects of the Convention, as was already noted at the time of the Conference discussions.¹¹⁸ In 1992, the Office was requested to give an

¹¹³ The Conference discussions on this provision show that consultation would not be about the introduction of night work but about its consequences, that it is to take place before the actual implementation of any night work schedule and that the results of consultations are not binding on the employer; see *Record of Proceedings*, ILC, 77th Session, 1990, pp. 26/12-26/13.

¹¹⁴ See direct request 1997 (Portugal).

¹¹⁵ See direct request 1999 (Dominican Republic).

¹¹⁶ See direct request 1999 (Lithuania).

¹¹⁷ See, for instance, direct requests 1999 (Dominican Republic); 1998 (Lithuania); 1997 (Portugal).

¹¹⁸ See *Record of Proceedings*, ILC, 77th Session, 1990, pp. 26/8-26/9.

informal opinion concerning the compatibility of the legislation of a member State with the requirements of the Convention in light of the fact that under the legislation in question workers who found themselves in the situation described in Article 6, paragraph 2, of the Convention were not entitled to any benefits since they did not qualify under any insurance scheme of protection. In its reply, the Office expressed the view that considering the purpose of the provision, i.e. the right of night workers certified for reasons of health as unfit for night work to be transferred whenever practicable to a similar job for which they are fit, and also in view of the deletion of the reference to “reasons of health” in the second paragraph of Article 6, protection should be envisaged in terms of unemployment benefits in the first place. It was also specified that there is nothing in the Convention to impose a particular type of benefits, provided that the principle of equality of treatment between night and day workers is fully applied.

In the General Survey on the application of the Conventions concerning the night work of women in industry, the Committee of Experts has expressed some concern about the slow progress in the ratification of Convention No. 171, which in conjunction with the growing tendency of States parties to Conventions Nos. 4, 41 or 89 to no longer give effect to, or to denounce those instruments, may result in a legal vacuum with night workers being deprived of any regulatory safeguards. While recalling that “night work is generally considered to have harmful effects for all workers and calls for a regulatory legal framework”, the Committee has cautioned against the “risk of a complete deregulation of night work through the removal of all protective measures for women and the failure to replace them with a legislation offering appropriate protection to all night workers”.¹¹⁹

Box 1

Prohibition of night work for women and the principle of equal treatment

The Committee of Experts considers that recognition of the principle of equality between men and women is intended not only to eliminate legal provisions and practices which create advantages and disadvantages on the basis of gender, but also to achieve now and in the future effective equality of rights for both sexes by equalizing their conditions of employment and their roles in society so that women can enjoy the same employment opportunities as men. For this reason, differences in treatment between men and women can only be permitted on an exceptional basis, that is when they promote effective equality in society between the sexes, thereby correcting previous discriminatory practices, or where they are justified by the existence, and therefore the persistence, of overriding biological or physiological reasons, as in the case in particular of pregnancy and maternity. This requires a critical re-examination of provisions which are assumed to be “protective” towards women, but which in fact have the effect of hindering the achievement of effective equality by perpetuating or consolidating their disadvantaged employment situation. [...] It is recognized, therefore, that the ban on women’s night working in industry stands in the way of attaining the ultimate objective of the elimination of all forms of discrimination against women and that eventually it has to be dispensed with. It should not be forgotten, nevertheless, that the review process, which is to be guided by the identified needs and priorities of each country, and in which it is hoped that women themselves will play a full part, cannot be expected to proceed with uniform criteria or to produce the desired results within a uniform time frame in all of them. The Committee can therefore endorse the view that the gender-specific prohibition against industrial work during the night should progressively become irrelevant; and it is hoped that the prohibition will be overtaken by laws and practices which offer adequate protection to all workers. This is, though, subject to the understanding that national and, within countries, regional and sectoral conditions and progress in achieving the elimination of discrimination vary considerably; and that some women workers will still need protection along with the pursuit of genuine conditions of equality and non-discrimination.

Source: General Survey of the reports concerning the Night Work (Women) Convention, 1919 (No. 4), the Night Work (Women) Convention (Revised), 1934 (No. 41), the Night Work (Women) Convention (Revised), 1948 (No. 89), and the Protocol of 1990 to the Night Work (Women) Convention (Revised) 1948, ILC, 89th Session, 2001, Report III (Part 1B), paras. 161 and 164, pp. 125-126.

¹¹⁹ See ILC, 89th Session, 2001, Report III (Part 1B), paras. 195 and 202, pp. 141 and 143.

Box 2

The protective function of standards on women's night work in modern conditions

The Committee of Experts considers that international labour legislation should not be divested of all regulatory provisions on night work of women, on condition and to the extent that such regulation still serves a meaningful purpose in protecting women workers from abuse. In particular situations where women night workers are subject to severe exploitation and discrimination, the need for protective legislation may still prevail, especially where the women themselves are anxious to retain such protective measures. The Committee will therefore have to consider whether prohibitions on night work for women in certain situations serve to protect those women from abuses of their rights, in relation in particular to security and transport issues, quite apart from and in addition to health risks for pregnant women or nursing mothers caused by their working at night. In such situations, the protective function of the night work standards may, for the time being and on a limited basis, subject to regular review, be legitimately considered by some constituents to be justified.

Source: General Survey on Conventions concerning women's night work, op. cit., para. 75, pp. 47-48.

Box 3

The relationship between Convention No. 89 and its Protocol, and Convention No. 171

Although the two instruments (Conventions Nos. 89 and 171) are often perceived as mutually exclusive, member States could still, technically speaking, ratify both Conventions. The two instruments are the result of much differing approaches to the problem of night work; whereas the Protocol follows the gender-oriented perspective of Convention No. 89, Convention No. 171 addresses the issue of night work for both men and women in its occupational safety and health dimension. While a major premise of the Conventions on night work of women is the vulnerability and special need of protection of the female worker, Convention No. 171 shifts its focus to the nature of night work as such, meaning work detrimental to health, generative of difficulties for the family and social life of the worker, and calling for special compensation. The Committee deems it necessary, therefore, to emphasize that the standards set out in the Protocol and the Convention of 1990 on night work may operate perfectly well in parallel in those countries which decide to relax some but not all limitations on women's night work and which want to offer optimum protection to these women workers who would be entitled to engage in night work.

Source: General Survey on Conventions concerning women's night work, op. cit., para. 184, pp. 135-136.

Chapter 10

Occupational safety and health

K.-M. Felderhoff, I. Kröner-Moosmann
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Introduction

The protection of workers against sickness, disease and injury arising out of employment has always been at the forefront of the ILO's concerns: it is featured in the Preamble of its Constitution, and is confirmed by the Declaration of Philadelphia which "recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve [...] (g) adequate protection for the life and health of workers in all occupations [...]". Furthermore, the protection of workers against risks arising from employment was the subject of four Recommendations adopted in 1919 at the first session of the International Labour Conference.

In this spirit, the Director-General of the ILO underlined in his 1999 Report to the International Labour Conference the crucial importance of the ILO's activities in the field of occupational safety and health by stating that the "key social protection issue is occupational health and safety."¹ He further indicated that, "... Every year about 250 million workers suffer accidents in the course of their work, and over 300,000 are killed. Taking account of those who succumb to occupational diseases, the death toll is over 1 million people a year."²

Over the years, the ILO has made a definite contribution to improving working conditions considerably through its standard-setting activities.

Close to 50 per cent of the ILO's instruments adopted by the Conference relate directly or indirectly to occupational safety and health. Occupational safety and health standards broadly fall into four groups or categories. The first includes standards which aim at guiding policies for action, such as the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Health Services Convention, 1985 (No. 161), and their accompanying Recommendations. The second group provides for protection in given branches of economic activity, including mining, the building industry, commerce and offices and dock work. The third highlights measures of protection, such as the guarding of machinery and the maximum weight of loads to be transported by a single worker. The fourth group provides for protection against specific risks, including ionising radiation, benzene, asbestos, the prevention of occupational cancer, the prevention of air pollution, noise and vibration in the working environment, and safety in the use of chemicals, including the prevention of major industrial accidents.

In the late seventies, a new trend in occupational safety and health policy was to be observed, namely the desire to render work more human. The tendency now is to emphasize not so much the protection of workers against a hostile and dehumanizing environment, as the improvement of the environment itself, so as to make it less hostile and more humane. Consequently, in 1975 and 1976, on three consecutive occasions, the Conference drew attention to this fairly new development by adopting three resolutions in which the need for a global prevention policy was stressed. For example, the 1975 resolution dealt with the future action of the ILO in the field of working conditions and environment. It invited member States, inter alia, "... to promote the objectives and the improvement of both working conditions and environment with all aspects of their economic, educational and social policies, and to set periodically for themselves a number of definitive objectives to reduce as far as possible certain industrial accidents and

¹ ILO, *Decent Work*, Report of the Director-General, ILC, 87th Session, Geneva, 1999, p. 37.

² *ibid.*

occupational diseases ...".³ In the same resolution, the Conference invited the Governing Body of the ILO to instruct the Director-General to prepare a programme reflecting the different aspects of the working environment in the discussions on occupational safety and health standards.

In this respect, the Committee of Experts has emphasized more recently, in 1996, that "[t]he new instruments are characterized by an approach which consists of ensuring a safe and healthy working environment to all workers and of adapting work to their capabilities. To this end, the recently adopted Conventions establish obligations for ratifying States: (i) to formulate and implement a coherent national policy in the field of occupational safety and health in consultation with the most representative organizations of employers and workers; (ii) to provide favourable conditions for a cooperation between employers and workers, for the solution of practical problems of safety and health; and (iii) to take measures for providing employers and workers with advice so as to help them conform to their obligations."⁴ While the ILO instruments contain the necessary guidelines, useful provisions and technical parameters upon which national regulations can be established or further developed, as emphasized by the Committee of Experts, member States which have ratified Conventions on occupational safety and health often encounter an increasing number of problems in the application of these instruments.⁵ In view of the complexity of some of these instruments, and their technical nature, their accompanying Recommendations in most cases provide more detailed indications on the manner of giving effect to the respective Convention. Nevertheless, the details provided in these Recommendations do not always suffice to guide the implementation of the Conventions. For this reason, the ILO has developed a series of instruments of two types, either model regulations or compilations of guidelines designed to supplement the various provisions of its Conventions and Recommendations, thereby permitting a better application of ratified Conventions. The importance of these model provisions and guidelines is such that the Committee of Experts in its comments often draws the attention of the governments concerned to them so that they can take into consideration the suggestions contained in these instruments to give adequate effect to ratified Conventions.

In the analysis which follows, reference is made firstly to the content of the standards that are in force in the field of occupational safety and health, followed by the general principles which can be derived from these standards. Finally, the problems raised by the Committee of Experts concerning the application of the various Conventions are summarized.

³ ILO, *Safety and health in the working environment*, ILC, 66th Session, Geneva, 1980, Report VII(a)(1), p. 1.

⁴ ILO, *Report of the Committee of Experts on the Application of conventions and Recommendations*, ILC, 83rd Session, Geneva, 1996, Report III (Part 4A), para. 61.

⁵ ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 85th Session, Geneva, 1997, Report III (Part 1A), paras. 68 and 69.

10.1. Content of the standards on occupational safety and health and the working environment

I. General standards

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Occupational Safety and Health Convention, 1981 (No. 155)	36	The Governing Body has invited member States to contemplate ratifying Convention No. 155 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention.
Occupational Safety and Health Recommendation, 1981 (No. 164)	–	The Governing Body has invited member States to give effect to Recommendation No. 164.
Occupational Health Services Convention, 1985 (No. 161)	20	This Convention was adopted in 1985 and is considered up to date.
Occupational Health Services Recommendation, 1985 (No. 171)	–	This Recommendation was adopted in 1985 and is considered up to date.
Protection of Workers' Health Recommendation, 1953 (No. 97)	–	The Governing Body has invited member States to give effect to Recommendation No. 97.
Welfare Facilities Recommendation, 1956 (No. 102)	–	The Governing Body has invited member States to give effect to Recommendation No. 102.
Workers' Housing Recommendation, 1961 (No. 115)	–	The Governing Body has invited member States to give effect to Recommendation No. 115.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Prevention of Industrial Accidents Recommendation, 1929 (No. 31)	–	The Governing Body decided on the maintenance of the status quo with regard to Recommendation No. 31.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications	Status
Living-in Conditions (Agriculture) Recommendation, 1921 (No. 16)	–	The Governing Body has noted that Recommendations Nos. 16 and 21 are obsolete and has decided to propose to the Conference the withdrawal of these Recommendations in due time.
Utilisation of Spare Time Recommendation, 1924 (No. 21)	–	
Occupational Health Services Recommendation, 1959 (No. 112)	–	The Governing Body has noted that Recommendation No. 112 has been replaced by the Occupational Health Services Recommendation, 1985 (No. 171).

Occupational Safety and Health Convention (No. 155) and Recommendation (No. 164), 1981

The aim of the Convention is to encourage ratifying Members to formulate, implement and periodically review a coherent national policy on occupational safety and health and the working environment.

The Convention is applicable to all branches of economic activity, including the public service. However, a Member ratifying the Convention is permitted to exclude from its application, in whole or in part, particular branches of economic activity, such as maritime shipping and fishing, where special problems of a substantial nature arise. This is possible only after consultations, at the earliest possible stage, with the representative organizations of employers and workers concerned. Such Members are required to list, in their first reports on the application of the Convention, any branches so excluded, giving reasons for such exclusions and describing the measures of adequate protection given to the workers in the excluded branches. In subsequent reports, they have to indicate any progress made towards wider application of the Convention. Similar exclusions, in whole or in part, of limited categories of workers with particular difficulties is also possible for ratifying Members, after consultation at the earliest stages, with representative organizations of employers and workers. The first reports by these Members on the application of the Convention, have to list such excluded categories of workers, with the reasons for the exclusions and any progress made towards wider application in subsequent reports (Articles 1 and 2).

The definition of “workplace” covers all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of the employer.

The term “health”, in relation to work, indicates not merely the absence of disease or infirmity, but includes physical and mental elements affecting health which are directly related to safety and hygiene at work (Article 3(c)(e)).

Principles of national policy

Each Member is required to formulate, implement and periodically review a coherent national policy on occupational safety and health and the working environment, in light of national conditions and practice and in consultation with the representative organizations of employers and workers. The aim of this policy is the prevention of accidents and injury to health arising out of, linked with or occurring in the course of work, by minimizing, as far as practicable, the causes of hazards inherent in the working environment (Article 4). In this respect Paragraph 4 of the Recommendation provides further details and indications of the types of functions that could be carried out by the competent authorities to give effect to the national policy on occupational safety and health.

The said national policy has to take into account the following main spheres of action, to the extent that they affect occupational safety and health and the working environment: (a) the design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (such as workplaces, working environment, tools, machinery and equipment, chemical, physical and biological substances and agents, work processes); (b) the relationships between the material elements of work and the persons who carry out or supervise the work, and the adaptation of machinery, equipment, working time, organization of work and work processes to the physical and mental capacities of the workers; (c) the training and if necessary further training, qualifications and motivations of persons involved, in one capacity or another, in the achievement of adequate levels of safety and health; (d) communication and cooperation at all the levels of the working group and the enterprise at all other appropriate levels up to and including the national level; and (e) the protection of workers and their representatives from disciplinary measures resulting from actions properly taken by them in conformity with the national policy on occupational safety and health and the working environment, in accordance with the Convention (Article 5).

In formulating the said national policy, indications are required to be given of the respective functions and responsibilities of public authorities, employers, workers and others regarding occupational safety and health and the working environment, taking into

account the complementary nature of such responsibilities and of national conditions and practice (Article 6). The situation regarding occupational safety and health and the working environment, overall or in respect of particular areas, has to be reviewed at appropriate intervals, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, and evaluating results (Article 7). Paragraph 9 of the Recommendation indicates what should be included in the periodic review of the national policy, namely the situation of the most vulnerable workers, such as the disabled.

Action at the national level

In order to give effect to the requirements of the Convention (Article 4), each Member is required to take steps, as may be necessary, by laws or regulations or any other method consistent with national conditions and practice and in consultation with representative organizations of employers and workers (Article 8). The enforcement of laws and regulations concerning occupational safety and health and the working environment has to be secured by an adequate and appropriate system of inspection, and adequate penalties have to be provided for violations of these laws and regulations (Article 9). Measures have to be taken to give guidance to employers and workers to help them to comply with legal obligations (Article 10). Paragraph 5 of the Recommendation suggests that the system of inspection provided for in Article 9, paragraph 1, of the Convention should be guided by the provisions of the Labour Inspection Convention, 1947 (No. 81), and the Labour Inspection (Agriculture) Convention, 1969 (No. 129).

With a view to giving effect to the national policy, the competent authority or authorities have to ensure that the following functions are progressively carried out:

- (a) where the nature and degree of hazards so require, the determination of conditions governing the design, construction and layout of enterprises, the commencement of their operations, major alterations including those affecting their purposes, the safety of technical equipment used at work, as well as the application of procedures defined by the competent authorities;
- (b) the determination of work processes and of substances and agents the exposure to which is to be prohibited, limited or made subject to authorization or control by the competent authority or authorities; health hazards due to simultaneous exposure to several substances or agents shall be taken into consideration;
- (c) the establishment and application of procedures for the notification of occupational accidents and diseases, by employers and, where appropriate, insurance institutions and others directly concerned, and the production of annual statistics on occupational accidents and diseases;
- (d) the holding of inquiries, where cases of occupational accidents, diseases or other injuries appear to reflect serious situations;
- (e) the annual publication of information on measures taken in accordance with the national policy, including on occupational accidents and diseases; and
- (f) the introduction or extension of systems to examine chemical, physical and biological agents and their risks to the health of workers, taking into account national conditions and possibilities (Article 11).

Measures are required to be taken, in accordance with national law and practice, with a view to ensuring that those who design, manufacture, import, provide or transfer machinery, equipment or substances for occupational use: (a) satisfy themselves, as far as reasonably practicable, that it does not entail dangers for the safety and health to those

correctly using it; (b) make available information on the correct installation and use of machinery and equipment, the correct use of substances, on hazards of machinery and equipment and dangerous properties of chemical substances and physical and biological agents or products, as well as instructions on how known hazards are to be avoided; and (c) undertake studies and research or otherwise keep abreast of scientific and technical knowledge necessary to comply with the requirements in (a) and (b) above (Article 12).

Workers who remove themselves from situations, which they have reasonable justification to believe present imminent and serious dangers to their life or health, must be protected from undue consequences in accordance with national law and practice (Article 13).

Measures have to be taken to promote, in a manner appropriate to national conditions and practice, the inclusion of questions occupational safety and health and the working environment at all levels of education and training, including higher technical, medical and professional education, in a manner that meets the training needs of all workers (Article 14).

Arrangements that are appropriate to national conditions and practice have to be made to ensure the necessary coordination between various authorities and bodies called upon to give effect to the provisions of the Convention, with a view to ensuring the coherence of the national policy. These arrangements have to be made after consultation, at the earliest possible stage, with the most representative organizations of employers and workers. In addition, whenever circumstances so require and when national conditions and practice permit, such arrangements have to include the establishment of a central body (Article 15). Regarding the requirements concerning the coherence of the national policy provided for in Article 15 of the Convention, Paragraph 7 of the Recommendation indicates in some detail the elements and main purposes of the arrangements to be made to that effect.

Action at the level of the enterprise

Employers are required to ensure that, so far as reasonably practicable, workplaces, machinery, equipment and processes under their control are safe and without risk to health, and that the chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken. They have to provide, where necessary, adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health (Article 16).

Two or more enterprises engaged in activities simultaneously at one workplace have to collaborate in applying the requirements of the Convention (Article 17). Employers are required to provide, where necessary, for measures to deal with emergencies and accidents, including adequate first-aid arrangements (Article 18).

Arrangements are required to be made at the level of the enterprise to ensure that: (a) in the course of their work, workers cooperate in the fulfilment by employers of the obligations placed on them; (b) representatives of workers in enterprises cooperate with employers in the field of safety and health; (c) representatives of workers in enterprises are given adequate information on measures taken by employers to secure occupational safety and health, and they may consult their representative organizations regarding this information provided they do not disclose commercial secrets; (d) workers and their representatives in enterprises are given appropriate training in occupational safety and health; (e) workers or their representatives and, as the case may be, their representative organizations in enterprises, in accordance with national law and practice, are enabled to enquire into, and are consulted by employers on all aspects of occupational safety and health associated with their work, and technical advisers may be brought in from outside

the enterprises for this purpose; and (f) workers report forthwith to their immediate supervisors any situation which they have reasonable justification to believe presents imminent and serious danger to their life or health, and until employers have taken remedial action, if necessary, they cannot require workers to return to work situations where there is continuing imminent and serious danger to life or health (Article 19). Paragraphs 10, 14 and 15 of the Recommendation contain further details of the obligations of employers regarding occupational safety and health.

Cooperation between management and workers and/or their representatives is essential in this regard (Article 20). It is indicated in Paragraph 12 of the Recommendation that the cooperation referred to in Article 20 of the Convention should include, where appropriate and necessary, the appointment, in accordance with national law and practice, of workers' safety delegates, workers' safety and health committees, and/or joint safety and health committees where workers should have at least equal representation with employers' representatives. The functions and purposes of these committees are set out in this Paragraph. Record keeping by employers relevant to occupational safety and health including on occupational accidents and diseases is evoked in Paragraph 15(2) of the Recommendation.

Finally, occupational safety and health measures must not involve expenditure for workers (Article 21).

Occupational Health Services Convention (No. 161) and Recommendation (No. 171), 1985

The Convention aims at encouraging ratifying Members to formulate, implement and periodically review a coherent national policy on occupational health services.

Definition

The term "occupational health services" is defined as meaning the services entrusted with essentially preventive functions and responsibilities for advising the employer, the workers and their representatives in enterprises on: (a) the requirements for establishing and maintaining a safe and healthy working environment which will facilitate optimal physical and mental health in relation to work; and (b) the adaptation of work to the capabilities of workers in light of their state of physical and mental health (Article 1(a)).

Principles of national policy

Each Member is obliged to formulate, implement and periodically review a coherent national policy on occupational health services, in the light of national conditions and practice and in consultation with the most representative organizations of employers and workers, where they exist (Article 2). Members undertake to develop progressively such services for all workers, including those in the public sector and the members of production cooperatives, in all branches of economic activity and all enterprises. The provision of such services has to be adequate and appropriate to the specific risks of the enterprises (Article 3, paragraph 1).

Plans have to be drawn by Members for the establishment of occupational health services in consultation with the most representative organizations of employers and workers, where they exist, if such services cannot be immediately established for all enterprises. The first reports on the application of the Convention following ratification must indicate the plans so drawn up, and in subsequent reports indications have to be given on any progress made in their application (Article 3, paragraph 2 and 3).

Consultations with the most representative organizations of employers and workers, where they exist, have to be undertaken by the competent authority on the measures to be taken to give effect to the provisions of the Convention (Article 4).

Functions

Occupational health services must discharge a certain number of functions, without detracting from the responsibilities of employers for the health and safety of the workers in their employment, and taking into account the need for workers to participate in matters of occupational safety and health. They should have such of the following functions as are adequate and appropriate to the risks of the enterprise: (a) identification and assessment of risks from health hazards in the workplace; (b) surveillance of the factors in the working environment and working practices which may affect workers' health, including sanitary installations, canteens and housing where they are provided by the employer; (c) advising on the planning and organization of work, including the design of workplaces, on the choice, maintenance and condition of machinery and other equipment and on substances used in work; (d) participation in the development of programmes for the improvement of working practices, as well as testing and evaluation of health aspects of new equipment; (e) advising on occupational health, safety and hygiene and on ergonomics and individual and collective protective equipment; (f) surveillance of workers' health in relation to work; (g) promotion of the adaptation of work to the worker; (h) contribution to measures of vocational rehabilitation; (i) collaboration in providing information, training and education in fields of occupational health and hygiene and ergonomics; (j) organization of first-aid and emergency treatment; and (k) participation in analysis of occupational accidents and occupational diseases (Article 5).

Organization

Occupational health services have to be established: by laws or regulations; or by collective agreements or as otherwise agreed upon by the employers and workers concerned; or in any other manner approved by the competent authority after consultation with the representative organizations of employers and workers concerned (Article 6). Occupational health services may be organized for a single enterprise or as a service common to a number of enterprises. In accordance with national conditions and practice, these services may be organized by: (a) enterprises or groups of enterprises; (b) public authorities or official services; (c) social security institutions; (d) any other bodies authorized by the competent authority; and (e) a combination of any of the above (Article 7). Cooperation and participation between employers, workers and their representatives, where they exist, is required in the implementation of the organizational and other measures relating to occupational health services on an equitable basis (Article 8).

Conditions of operation

Occupational health services should be multidisciplinary, in accordance with national law and practice. They have to cooperate with other services in the enterprise in carrying out their functions, and measures have to be taken to ensure adequate cooperation and coordination, as appropriate, with other bodies concerned with the provision of health services (Article 9). The composition of their personnel must be determined according to the nature of the duties to be performed, and such personnel has to enjoy full professional independence from employers, workers and their representatives, where they exist, in relation to the functions referred to above (Article 10). Their qualifications must be determined by the competent authority, according to the nature of the duties to be performed and in accordance with national law and practice (Article 11).

There is to be no loss of earnings for workers due to the surveillance of their health, which must be free of charge and must take place as far as possible during working hours (Article 12).

All workers must be informed of health hazards in their work (Article 13). Occupational health services must be informed by employers and workers of any known factors and of any suspected factors in the working environment which may affect the workers' health (Article 14). They also have to be informed of occurrences of ill health among workers and of absence from work for health reasons, in order to enable them to identify whether there is any relation between the reasons for ill health or absence and any health hazards present at the workplace. However, the employer must not require the personnel of occupational health services to verify the reasons for absence from work (Article 15).

The authority or authorities responsible both for supervising the operation of and for advising occupational health services, once they have been established, must be designated by national laws or regulations (Article 16).

Recommendation No. 171 supplements Convention No. 161. In addition to the matters specifically covered by the Convention, it recommends the extension of analogous occupational health services to the self-employed. It spells out in some detail the preventive functions of occupational health services, and it provides specific guidelines on the surveillance of the working environment, the surveillance of workers' health and on the provision of information, education, training and advice to workers. Detailed guidelines are provided for the competent authority regarding the provision of or participation in the provision of first-aid treatment and health programmes by occupational health services in enterprises, including immunization, campaigns for the protection of health, the treatment of workers who have not stopped work, the treatment of occupational diseases and of health impairment aggravated by work, medical aspects of vocational re-education and rehabilitation, and other functions. Supplementary details regarding the organization and conditions of operation of occupational health services are also included in the Recommendation.

II. Protection against specific risks

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Radiation Protection Convention, 1960 (No. 115)	47	The Governing Body has invited member States to contemplate ratifying Convention No. 115 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention.
Radiation Protection Recommendation, 1960 (No. 114)	–	The Governing Body has invited member States to give effect to Recommendation No. 114.
Occupational Cancer Convention, 1974 (No. 139)	35	The Governing Body has invited member States to contemplate ratifying Convention No. 139 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention.
Occupational Cancer Recommendation, 1974 (No. 147)	–	The Governing Body invited member States to give effect to Recommendation No. 147.

Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148)	41	The Governing Body invited member States to contemplate ratifying Convention No. 148 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention.
Working Environment (Air Pollution, Noise and Vibration) Recommendation, 1977 (No. 156)	–	The Governing Body invited member States to give effect to Recommendation No. 156.
Asbestos Convention, 1986 (No. 162)	26	This Convention was adopted after 1985 and is considered up to date.
Asbestos Recommendation, 1986 (No. 172)	–	This Recommendation was adopted after 1985 and is considered up to date.
Chemicals Convention, 1990 (No. 170)	9	This Convention was adopted after 1985 and is considered up to date.
Chemicals Recommendation, 1990 (No. 177)	–	This Recommendation was adopted after 1985 and is considered up to date.
Prevention of Major Industrial Accidents Convention, 1993 (No. 174)	6	This Convention was adopted after 1985 and is considered up to date.
Prevention of Major Industrial Accidents Recommendation, 1993 (No. 181)	–	This Recommendation was adopted after 1985 and is considered up to date.
Instruments to be revised (Instruments whose revision has been decided on by the Governing Body.)		
At its 280th session (March 2001) the Governing Body decided to implement the integrated approach to the ILO standards-related activities in the area of occupational safety and health. A general discussion on this subject will take place at the 91st Session (June 2003) of the Conference. The question of the revision of the instruments listed below will be addressed in this framework.		
White Lead (Painting) Convention, 1921 (No. 13)	62	The Governing Body has decided on the revision of Conventions Nos. 13 and 136 and Recommendations Nos. 3, 4, 6 and 144, and the inclusion of these revisions in the item on the use of hazardous substances in the proposals for the agenda of the Conference.
Benzene Convention, 1971 (No. 136)	36	
Benzene Recommendation, 1971 (No. 144)	–	
Anthrax Prevention Recommendation, 1919 (No. 3)	–	
Lead Poisoning (Women and Children) Recommendation, 1919 (No. 4)	–	
White Phosphorus Recommendation, 1919 (No. 6)	–	
Guarding of Machinery Convention, 1963 (No. 119)	49	The Governing Body has decided on the revision of Recommendation No. 118 together with the revision of Convention No. 119 and the inclusion of this question among the proposals for the agenda of the Conference.
Guarding of Machinery Recommendation, 1963 (No. 118)	–	
Maximum Weight Convention, 1967 (No. 127)	25	The Governing Body has decided on the revision of Recommendation No. 128 together with the revision of Convention No. 127 and the inclusion of this question among the proposals for the agenda of the Conference.
Maximum Weight Recommendation, 1967 (No. 128)	–	

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications	Status
Power-driven Machinery Recommendation, 1929 (No. 32)	–	The Governing Body noted that Recommendation No. 32 was obsolete and decided to propose to the Conference the withdrawal of this Recommendation in due course.

White Lead (Painting) Convention, 1921 (No. 13)

In the year in which it was founded, the ILO addressed the problem of an occupational disease, namely lead poisoning, which had made many victims and had long been in the first rank of occupational diseases.⁶ It adopted the Lead Poisoning (Women and Children) Recommendation, 1919 (No. 4).⁷ The more general issue of the prohibition of using white lead in the painting of buildings was also raised at the same time. The studies prepared by the ILO showed the very serious risks arising out of the use of lead compounds, and particularly white lead, and the matter was submitted to the Conference in 1921 with a view to the adoption of a Convention. Although the serious nature of the risks involved in the use of lead compounds was generally admitted, divergences emerged as to measures to be taken. There were opponents to the prohibition of the use of white lead, who did not hesitate to invoke the interests of producers of white lead.⁸ Nevertheless, the White Lead (Painting) Convention, 1921 (No. 13), was adopted almost unanimously.

Objective

The Convention aims to prevent lead poisoning, which is an occupational disease caused by lead and its compounds.⁹

Prohibition of the use of white lead and sulphate of lead and of all products containing these pigments in the internal painting of buildings

Article 1, paragraph 1, of the Convention, sets out a general prohibition of the use of white lead and sulphate of lead and of all products containing these pigments, in the internal painting of buildings, except where the use of white lead or sulphate of lead or products containing these pigments is considered necessary for railway stations or industrial establishments by the competent authority after consultation with the employers' and workers' organizations concerned.

Use of white lead in artistic painting

As an exception to the general prohibition set out in the first paragraph of Article 1, the use of the above pigments is authorized, provided that they contain a maximum of 2 per cent of lead (Article 1, paragraph 2) in artistic painting or fine lining (Article 2, paragraph 1).

Governments have to define the limits of such forms of painting and regulate the use of white lead in artistic painting (Article 2, paragraph 2).

⁶ ILO, *Encyclopaedia of occupational medicine, health and safety*, Geneva, 1972, Vol. II, p. 768.

⁷ Recommendation No. 4 proposes to member States that, "in view of the danger involved to the function of maternity and to the physical development of children, women and young persons under the age of 18 years be excluded from employment" in the processes enumerated in the Recommendation. In other precise types of work, which are also enumerated, the employment of women and young persons should be subject to authorization and protective measures. Finally, the replacement of soluble lead compounds by non-toxic substances is recommended.

⁸ ILO, International Labour Conference, Third Session, Vol. I, First and Second Parts, Geneva, 1921, pp. 421 and 422.

⁹ See Lefebvre, H.. (ed.), *Dictionnaire de l'hygiène, de la sécurité et des conditions de travail*, Société alpine de publications, Grenoble, 1983, p. 184.

Regulation of the use of white lead in operations for which their use is authorized

Each member undertakes to regulate the use of white lead, sulphate of lead and of all products containing these pigments in operations for which their use is not prohibited, in accordance with the principles set out in Article 5 of the Convention.

Methods of use

- White lead, sulphate of lead, or products containing these pigments must not be used in painting operations except in the form of paste or paint ready for use.
- Measures have to be taken in order to prevent danger arising from the application of paint in the form of spray.
- Measures have to be taken, wherever practicable, to prevent danger arising from dust caused by dry rubbing down and scraping.

Facilities and personal protection

- Adequate facilities have to be provided to enable working painters to wash during and on cessation of work.
- Overalls must be worn by working painters during the whole of the working period.
- Suitable arrangements must be made to prevent clothing put off during working hours being soiled by painting material.

Measures against the propagation of lead poisoning

- Cases of lead poisoning and suspected lead poisoning must be notified, and subsequently verified by a medical practitioner appointed by the competent authority.
- The competent authority may require, when necessary, a medical examination of workers.

Work by young persons and women

The Convention establishes the principle of the prohibition of the employment of young persons under 18 years of age and all women in any painting work of an industrial character involving the use of white lead or sulphate of lead or other products containing these pigments (Article 3, paragraph 1). However, the competent authorities may, after consulting the employers' and workers' organizations concerned, make an exception from this prohibition, on condition that the assignment of young persons to work involving the use of the above substances forms part of their vocational education (Article 3, paragraph 2).

Instructions to personnel and statistics

Instructions with regard to the special hygienic precautions to be taken in the painting trade have to be distributed to working painters (Article 5, IV):

Furthermore, statistics with regard to lead poisoning among working painters have to be compiled concerning:

- morbidity, by notification and certification of all cases of lead poisoning; and

-
- mortality, by a method approved by the official statistical authority in each country.

Finally, the competent authority has to take such steps as it considers necessary to ensure the observance of the regulations prescribed concerning the use of white lead, sulphate of lead and of all products containing these pigments, after consultation with the employers' and workers' organizations concerned (Article 6).

Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27)¹⁰

This Convention was developed in the context of the prevention of employment accidents. The main objective was the protection of workers in docks against the dangers to which they are exposed during loading and unloading in cases where, due to the fact that their weight is not marked, large packages or objects are raised by machines, cranes, etc., designed for lighter loads and such machinery is liable to break under this abnormal effort, with mortal consequences for workers in the vicinity.

Objective

The objective of the Convention is the protection of dockworkers engaged in loading and unloading against the risk of accidents related to the overloading of machines.¹¹

Content of the Convention

The Convention requires the marking of any object for transport by ship of 1,000 kilograms or more gross weight. The weight is to be marked plainly and durably on the outside of the object before it is loaded (Article 1, paragraph 1). The obligation to see that this requirement is observed rests solely upon the government of the country from which the package or object is consigned (Article 1, paragraph 3). The person on whom the obligation for having the weight marked falls, namely the consignor or some other person, must be determined by national laws or regulations (Article 1, paragraph 4).

Maximum Weight Convention (No. 127) and Recommendation (No. 128), 1967.

Despite the technical progress and the increased use of mechanical means for the transport of loads which generally occurs in the course of industrialization, the manual transport of loads is still very common in many sectors of industry and commerce. "The distances covered may not be long, but the weights carried, being usually determined by local tradition, by commercial packaging or by dismantling difficulties, are nonetheless heavy at times."¹²

¹⁰ Convention No. 27 is related to the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), as it establishes a principle which is amplified in Convention No. 152, which sets out in detail and in practical terms the measures to be adopted in handling operations in dock work. See, in particular, Article 4(a) of Convention No. 152.

¹¹ ILO, *Report on prevention of industrial accidents*, ILC, 12th Session, Geneva, 1929, p. 187.

¹² ILO, *Encyclopaedia of occupational health and safety*, op. cit., Vol. II, p. 1290.

Objective

The objective of the Convention is to diminish the risk of accidents and to make conditions more bearable for workers engaged in the manual transport of loads by categorically prohibiting the manual transport of a load which, by reason of its weight, is likely to jeopardize the health or safety of workers (Article 3). In this respect, Recommendation No. 128 advocates 55 kilograms as the maximum permissible weight which may be transported manually by an adult male worker (Paragraph 14).

Scope of application and definitions

The Convention applies to the regular manual transport of loads in all branches of economic activity in respect of which there is a system of labour inspection (Article 2). It therefore covers the regular manual transport of loads, including the lifting and putting down of loads, which are wholly borne by one worker. These may be activities carried out continuously or intermittently.

For the purpose of the Convention, the term “manual transport of loads” means the manual transport of loads, including the lifting and putting down of loads, which are wholly borne by one worker. The term “regular manual transport of loads” means any activity which is continuously or principally devoted to the manual transport of loads, or which normally includes, even though intermittently, the manual transport of loads. The term “young worker” means a worker under 18 years of age (Article 1).

Protective measures

Training of workers

Any worker assigned to manual transport of loads, other than light loads, must receive adequate training or instruction in working techniques (Article 5). Such training or instruction, given by suitably qualified persons or institutions, should include methods of lifting, carrying, putting down, unloading and stacking of different types of loads from the ergonomic point of view (Paragraph 5(2) of the Recommendation). Similarly, any worker occasionally assigned to manual transport of loads should be given appropriate instruction in this respect (Paragraph 6).

Technical devices

In order to limit or facilitate the manual transport of loads, suitable technical devices must be used as much as possible (Article 6).¹³

Women and young workers

The assignment of women and young workers to manual transport of loads other than light loads must be restricted.¹⁴ The weight of the loads transported by these categories of workers must be substantially less than that permitted for adult men (Article 7). In this respect, the Recommendation, in contrast with the maximum weight that it establishes for adult male workers, does not set a precise maximum weight for women. It confines itself to indicating that the maximum weight of such loads should be substantially less than that

¹³ Including mechanical means. See paragraphs 11 and 12 of the Recommendation.

¹⁴ Under the terms of Article 1(c) of the Convention, the term “young worker” means a worker under 18 years of age.

permitted for adult male workers.¹⁵ The Recommendation also indicates that women workers should not be assigned to regular manual transport of loads and, if this cannot be avoided, provision should be made to reduce the time spent on the actual lifting, carrying and putting down of loads and to prohibit the assignment of women to certain specified jobs which are especially arduous. Under the terms of the Recommendation, the assignment of women to manual transport of loads should also be prohibited during pregnancy and the 10 weeks following confinement (Paragraphs 15 to 18).

Nor does the Recommendation indicate the precise maximum weight of loads which can be transported manually by young workers. However, such loads should also be substantially less than those permitted for adult workers of the same sex,¹⁶ and young workers should not be assigned to the regular manual transport of loads. It also recommends that, where the minimum age for assignment to the manual transport of loads is less than 16 years, measures should be taken as speedily as possible to raise it to that level. Furthermore, the minimum age for assignment to the regular manual transport of loads should be raised with a view to reaching a minimum age of 18 years (Paragraphs 21 and 22).

Medical examination

The Convention does not provide for medical examinations. However, in Paragraphs 7 to 10, the Recommendation contains provisions concerning the medical examination of workers. It calls for a medical examination for fitness for employment before assignment to regular manual transport of loads, as far as practicable and appropriate. Such examinations, exclusively covering fitness for employment, should be certified and such certificates should not contain medical data. Moreover, further medical examinations should be made, as necessary. The competent authority should make regulations in this respect.

Methods of application

The Convention allows a certain discretion concerning the measures intended to give effect to its provisions, which may include laws or regulations or any other method consistent with national practice and conditions.¹⁷ However, it is important that these measures, to give effect to the Convention, should be adopted in consultation with the most representative organizations of employers and workers concerned (Article 8 of the Convention).

¹⁵ During the discussions prior to the adoption of the Recommendation, the Conference Committee on Maximum Weight indicated in its report that the maximum weight for women should be about 50 per cent of that laid down for adult male workers. See ILO, *Record of Proceedings*, ILC, 51st Session, Geneva, 1967, p. 386; see also ILO, *Encyclopaedia of occupational health and safety*, op. cit., Vol. II, p. 1291.

¹⁶ The Committee on Maximum Weight indicated that such loads should be around 40 per cent of the maximum weight permitted for adult male workers. See ILO, *Record of Proceedings*, 1967, op. cit., p. 386.

¹⁷ Including by collective agreement.

Radiation Protection Convention (No. 115) and Recommendation (No. 114), 1960

During the 1950s, the issue of protection against ionizing radiations was the subject of great attention due to the applications of atomic energy in very many sectors of occupational activity for peaceful purposes, including medical purposes.¹⁸ The common problems arising from such applications showed the importance of regulation at the international level. At its 38th Session in 1957, the Conference therefore adopted a resolution in which it invited the Governing Body of the ILO to consider what part the ILO could play in promoting the highest possible standards of health, safety and welfare among workers in atomic plants and in other undertakings affected by the development of the industrial uses of atomic energy.¹⁹ At its 137th Session, the Governing Body decided to include an item on the protection of workers against ionizing radiations on the agenda of the Conference in 1959. The study carried out by the ILO on the law and practice in member States in relation to the protection of workers against ionizing radiations, and the report of the Meeting of Experts on Protection against Ionizing Radiations, held in Geneva in 1957, served as a reference for the preparation of international instruments. The Convention and Recommendation concerning the protection of workers against ionizing radiations were adopted by the Conference in 1960.

Objective

The objective of the Convention is to set out basic requirements with a view to the protection of workers against the risks associated with exposure to ionizing radiations.

Scope of application

Under the terms of Article 2, paragraph 1, the Convention applies to all activities involving exposure of workers to ionizing radiations in the course of their work. However, radioactive substances, whether sealed or unsealed, and apparatus generating ionizing radiations which, by reason of the limited doses of ionizing radiations which can be received from them, may be exempted from its application by means of laws or regulations, codes of practice or other appropriate means (Article 2, paragraph 2).

Methods of application

The Convention must be applied by means of laws or regulations, codes of practice or other appropriate means. In this respect, the representatives of employers and workers must be consulted (Article 1). In this regard, in Paragraph 32, the Recommendation advocates the closest cooperation between employers and workers in carrying out the measures for protection against ionizing radiations. Finally, in view of the fact that many standards are drafted in general terms, Paragraph 3 of the Recommendation provides that the recommendations made from time to time by the International Commission on Radiological Protection (ICRP)²⁰ and standards adopted by other competent organizations should be taken into consideration for the purpose of giving effect to the provisions of the

¹⁸ ILO, *Protection of workers against radiations*, ILC, 43rd Session, Geneva, 1959, Report VI(1), pp. 3 and 5.

¹⁹ ILO, *Official Bulletin*, Vol. XXXVIII, 1955, No. 3, p. 125.

²⁰ The International Commission on Radiological Protection (ICRP) is a non-governmental organization created before the Second World War by the International Congress of Radiology. It is now a recognized authority on the subject. See ILO, *Protection of workers against radiations*, 1959, op. cit., p. 6.

Convention and, in particular, of Article 3, paragraph 2. Supervision of the application of protective provisions should be carried out by the inspection service (Article 15). Paragraphs 28 and 29 of the Recommendation provide further details of the composition of the inspection service and the powers entrusted to it.

Protective measures

The Convention contains various provisions on the measures to be taken.²¹

Technical protective measures

General provisions

In the light of the development of knowledge, all appropriate steps have to be taken to ensure effective protection of workers, as regards their health and safety, against ionizing radiations (Article 3, paragraph 1). Among the protective measures to be taken, Article 5 provides that the exposure of workers to ionizing radiations must be restricted to the lowest practicable level, avoiding any unnecessary exposure (Article 5). With this end in view, Paragraph 9(1) and (2) of the Recommendation provides that unsealed sources should be handled with due regard to their toxicity and that the methods of handling should be chosen with a view to minimizing the risk of entry of radioactive substances into the body and the spread of radioactive contamination. With regard to the principle that the protective measures to be taken must be guided by the knowledge available, Paragraph 3 of the Recommendation refers to the standards adopted by the competent organizations, and particularly the recommendations made by the International Commission on Radiological Protection (ICRP) reflecting current levels of knowledge.²²

Limitation of exposure to ionizing radiations under normal working conditions

Maximum permissible doses of ionizing radiations which may be received from sources external to or internal to the body and maximum permissible amounts of radioactive substances which can be taken into the body must be fixed for the various categories of workers. In this respect, the Convention makes a distinction between three categories of workers:

- workers who are directly engaged in radiation work and who are aged 18 and over (Article 7, paragraph 1(a));
- workers who are directly engaged in radiation and who are aged between 16 and 18 years (Article 7, paragraph 1(b)); and

²¹ In the choice of methods of protection, preference should be given to protection permanently built into the institution rather than to personal protective equipment. *ibid.*, p. 37.

²² The objectives of radiation protection, as stated by the ICRP, are to prevent acute radiation effects, and to limit the risks of late effects to an acceptable level. See ILO, *Encyclopaedia of occupational health and safety*, op. cit., Vol. II, p. 1182. The recommendations made by the International Commission on Radiological Protection in 1990, based on new physiological observations, were reproduced in 1994 in a publication entitled, *International Basic Safety Standards against Ionizing Radiation and for the Safety of Radiation Sources*, Safety Series No. 115, IAEA, Vienna, 1996. These standards were developed under the aegis of the International Atomic Energy Agency, International Labour Organization, World Health Organization and three other international organizations.

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- workers who are not directly engaged in radiation work, but who remain or pass where they may be exposed to ionizing radiations or radioactive substances (Article 8).

Maximum permissible doses and amounts must be kept under constant review in the light of current knowledge (Article 6, paragraph 2). To this effect, Paragraph 4 of the Recommendation provides that the levels referred to in Articles 6, 7 and 8 of the Convention should be fixed with due regard to the relevant values recommended from time to time by the International Commission on Radiological Protection (ICRP).

Administrative measures

With a view to ensuring effective protection to workers in the light of developing knowledge, the necessary rules and measures must be adopted and data essential for this purpose must be made available (Article 3, paragraph 2).

Under the terms of Article 9, paragraph 1, appropriate warnings must be used to indicate the presence of hazards from ionizing radiations. In accordance with Article 10, laws or regulations must require the notification of work involving the exposure of workers to ionizing radiations in the course of their work. In this respect, the Recommendation provides that such notification to the competent authority must be made before work involving exposure of workers to ionizing radiations is undertaken for the first time (Paragraph 30(2)(b)) and at the time of the final cessation of work involving exposure of workers to ionizing radiations (Paragraph 31). All workers directly engaged in radiation work must be adequately instructed, before and during such employment, of the precautions to be taken for their protection as regards their health and safety (Article 9, paragraph 2).

Monitoring of the workplace and the health of workers

Appropriate monitoring of workers and places of work must be carried out in order to measure the exposure of workers to ionizing radiations and radioactive substances, with a view to ascertaining that the applicable levels are respected (Article 11). Furthermore, all workers directly engaged in radiation work must undergo an appropriate medical examination prior to or shortly after taking up such work and must subsequently undergo regular medical examinations (Article 12). In this respect, Paragraphs 20 to 27 of the Recommendation provide details concerning such medical examinations. Moreover, appropriate medical examinations must be undertaken in the event of emergencies and under exceptional circumstances (Article 13(a)).

Specific provisions

Removal from work

Based on the results of medical examinations, no worker may continue to be employed in work contrary to qualified medical advice (Article 14).²³ In such cases, Paragraph 27 of the Recommendation sets out the obligation of the employer to provide the worker concerned with suitable alternative employment.

²³ For example, in the event of the premature accumulation of a lifetime maximum permissible exposure dose.

Women and young workers

No worker under the age of 16 may be engaged in work involving ionizing radiations (Article 7, paragraph 2).

With regard to special protection for women, only the Recommendation provides (in Paragraph 16) that every care should be taken to ensure that women of child-bearing age are not exposed to high radiation risks, in view of the special medical problems involved in their employment.²⁴

Emergency situations

In any emergency situation which may arise,²⁵ Article 13 of the Convention provides that certain special measures must be specified in advance, namely:

- the medical examination of exposed workers;
- notification of the competent authority in accordance with its requirements;
- examination of the conditions in which the worker's duties are performed by persons competent in radiation protection; and
- the adoption of any necessary remedial action by the employer on the basis of the technical findings and the medical advice.

Methods of protection

Paragraphs 7 to 16 of the Recommendation indicate the manner in which protection should be ensured. Under the terms of Paragraph 7, preference should be given to methods of collective protection, both physical and operational, in cases where they ensure effective protection. These should be supplemented by personal protective equipment and, as necessary, by other appropriate protective procedures. All protective devices and equipment, which should be examined regularly to determine whether they are in good condition, are operating satisfactorily and are properly sited, should be so designed or modified as to fulfil their intended purpose. Any defects found in these devices should be

²⁴ Based on the conclusions of the Expert Committee on Medical Supervision in Radiation Work convened in 1959 by the WHO, and of the ICRP, it is generally considered that there is no medical reason for differentiating between men and women in radiation work insofar as exposures below the recommended maximum permissible levels are concerned. And while the same might be said in the case of women who are pregnant, it should be borne in mind in this case that the unborn child may be irradiated if the mother is exposed to penetrating radiation, and because of the small size of the foetus, this is essentially whole body exposure, with the transfer of radioactive material across the placenta to the foetal tissues. In view of the vulnerability of the embryo, particularly during the early stages of development, at a time when the mother is apt to be unaware of her pregnancy, the only effective way of excluding women during the early period of pregnancy would be to prevent all women of child-bearing age from working under exposure to high radiation risks. See ILO, *The protection of workers against ionizing radiations*, ILC, 44th Session, Geneva, 1960, Report IV(2), p. 28. Moreover, in its current recommendations, to which the Committee of Experts referred in its general observation made under the Convention in 1992, the ICRP concludes that the methods of protection at work for women who may be pregnant should provide a standard of protection for any unborn child broadly comparable with that provided for members of the general public. See ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 79th Session, Geneva, 1992, Report III (Part 4A), p. 411.

²⁵ These situations result in particular from accidents.

remedied at once and, if necessary, the equipment to which they are fitted should be taken immediately out of service and kept out of service until the defects have been remedied (Paragraph 8).

Benzene Convention (No. 136) and Recommendation (No. 144), 171

Among industrial products, benzene is quite certainly one of the most dangerous. Because of its volatility it can penetrate into the organism via the lungs, and because it is a fat solvent it tends to penetrate the skin barrier. But the most serious danger from exposure to benzene lies in its specific effects of long-term or chronic toxicity resulting from repeated absorption of small doses, as may occur in various circumstances of its use. The question of how to protect workers against the risks of benzene and compounds containing benzene, with particular reference to benzene solvents, was raised on several occasions before the Convention and Recommendation were adopted, in various industrial committees, and particularly the Chemical Industries Committee, as well as at ILO tripartite technical meetings. It was also addressed in resolutions adopted by certain trade union federations. At the same time, the use of benzene in the chemical industry continued to increase, and the protection of workers against risks involved by exposure to benzene remained a difficult occupational health problem of concern to the ILO at the international level. In 1967, a meeting of experts was convened by the Governing Body to examine the protection of workers exposed to benzene and other solvents containing benzene. The experts came to the conclusion that, in view of the hazards involved in exposure to benzene and substances containing benzene, the ideal solution would be to forbid the use of benzene and such products whenever other less poisonous products were available. If that were not possible, use should only be made of such products as did not contain more than one per cent of benzene. At its 174th Session in 1969, the Governing Body decided to include the issue of the protection of workers against hazards arising from benzene on the agenda of the 56th Session of the Conference (1971) with a view to its examination under the single-discussion procedure.²⁶

Objective

The objective of the Convention is the prevention²⁷ of risks to the health of workers arising from poisoning due to benzene.²⁸

²⁶ ILO, *Protection against hazards arising from benzene*, ILC, 56th Session, Geneva, 1971, Report VI(1), pp. 3-5.

²⁷ Prevention: from the verb “prevent”, take precautionary action. Series of measures intended for the early identification of risks which may lead to an accident, incident or merely material damage; protection: a distinction should be made between: (a) collective protection, i.e. fixed or mobile devices on an installation or equipment preventing workers from having access to dangerous parts thereof, or which limits the diffusion of a hazard; and (b) individual protection: namely equipment borne by the worker for personal protection. It should be noted that individual protection does not remove the risk. See H. Lefebvre (ed.), *Dictionnaire de l'hygiène, de la sécurité et des conditions de travail*, Grenoble, 1983.

²⁸ As a raw material, benzene is widely used in industry for chemical synthesis and in a large number of manufacturing operations in view of its properties as a solvent. Benzene gives off a vapour which is both inflammable and extremely toxic. The most serious danger from exposure to benzene lies in its more specific effects of long-term or chronic toxicity resulting from repeated absorption of small doses, as may occur in various circumstances of its use. See ILO, *Protection*

Scope of application

The Convention applies to all activities involving the exposure of workers to benzene and products of benzene and products the benzene content of which exceeds 1 per cent by volume, hereinafter referred to as “products containing benzene” (Article 1).

Measures of protection

In general, it may be said that measures taken to provide effective protection for workers exposed to benzene and products containing benzene come under the heading of technical prevention, on the one hand, and medical prevention, on the other.²⁹

Technical prevention

Restrictions on the use of benzene

Article 2, paragraph 1, of the Convention provides that whenever harmless or less harmful substitute products are available, they must be used instead of benzene or products containing benzene subject, however, to certain exceptions listed in Article 2, paragraph 2. These consist of: the production of benzene; the use of benzene for chemical synthesis; the use of benzene in motor fuel; and analytical or research work carried out in laboratories (Article 2, paragraph 2). With regard to the replacement of benzene, Paragraph 26 of the Recommendation suggests that the competent authority should actively promote research into harmless or less harmful products which could replace benzene. Nevertheless, the use of benzene and of products containing benzene has to be prohibited in certain work processes to be specified by national laws or regulations (Article 4, paragraph 1). In this respect, Article 4, paragraph 2, provides that this prohibition must at least include its use as a solvent or diluent, except where the process is carried out in an enclosed system or where there are other equally safe methods of work.

Possible derogations

Certain temporary exemptions from the obligation to replace products containing benzene with harmless substitute products may be made, under conditions and within limits of time to be determined by the competent authority after consultation with the most representative organizations of employers and workers concerned, where such exist (Article 3, paragraph 1). The competent authority may also permit temporary derogations from the percentage of content of benzene for products whose benzene content exceeds the 1 per cent by volume set out in Article 1(b).

Other occupational hygiene and technical measures

The technical prevention and safety standards envisaged by the Convention are based on three fundamental aspects, namely the use of enclosed systems, where possible, the installation of effective ventilation systems and the provision of personal protective equipment to workers, as set out in the following provisions.

Work processes involving the use of benzene must as far as practical be carried out in an enclosed system (Article 7, paragraph 1). Where such a system is impossible, the removal of benzene vapour from the workplace to the extent necessary for the protection of the health of the workers must be ensured (Article 7, paragraph 2). At the same time, in

against hazards arising from benzene, Report VI(1), op. cit., p. 3. See also, *Encyclopaedia of occupational health and safety*, op. cit., Vol. I, pp. 167-169.

²⁹ *Protection against hazards arising from benzene*. Report VI(1), op. cit., p. 6.

premises where benzene or products containing benzene are manufactured, handled or used, all necessary measures must be taken to prevent the escape of benzene vapour into the air of the workplace (Article 6, paragraph 1). Moreover, where workers are exposed to benzene or products containing benzene, the employer must ensure that the concentration of benzene in the air of the workplace does not exceed a maximum which has to be fixed by the competent authority at a level not exceeding a ceiling value of 25 parts per million or 80 mg/m³ (Article 6, paragraph 2).³⁰ In this respect, the Recommendation adds that this concentration should be lowered as soon as possible if medical evidence shows this to be desirable (Paragraph 7(3)). In order to ensure the determination of the same values, the competent authority has to issue to directions on carrying out the measurement of the concentration of benzene in the air (Article 6, paragraph 3).

Workers who for special reasons may be exposed to concentrations of benzene in the air of places of employment which exceed the maximum ceiling of 80 mg/m³ must be provided with adequate means of personal protection against the risk of inhaling benzene vapour. In such cases, the duration of their exposure must be limited as far as possible (Article 8, paragraph 2). Workers who may have skin contact with liquid benzene or liquid products containing benzene must be provided with adequate means of personal protection against the risk of absorbing benzene through the skin (Article 8, paragraph 1). Furthermore, Paragraph 10 of the Recommendation advocates that every worker exposed to benzene or products containing benzene should wear appropriate work clothes. The Recommendation adds that the means of personal protection referred to and the work clothes should be supplied, cleaned and regularly maintained by the employer. However, the workers concerned should be required to use these means of personal protection and these work clothes, and to take care of them (Paragraph 14).

Labelling

The word “benzene” and the necessary danger symbols must be clearly visible on any container holding benzene or products containing benzene (Article 12).³¹ To prevent any confusion, Paragraph 21(3) of the Recommendation indicates that the danger symbols used should be internationally recognized. Moreover, Paragraph 22 adds that containers for benzene and products containing benzene should be constructed with suitable material of adequate strength.

Workers' education

Workers exposed to benzene, in whatever form, must receive appropriate instructions on the hazards involved in its use, namely measures to safeguard health and prevent accidents, as well as on the appropriate action if there is any evidence of poisoning (Article 13). In this respect, Paragraph 24 of the Recommendation proposes that notices should be displayed containing this information in appropriate positions in premises in which benzene is used. Moreover, in the context of medical examinations, the Recommendation proposes that written instructions should be provided to the workers concerned on protective measures against the health hazards of benzene (Paragraph 16).

³⁰ The Meeting of Experts convened by the Governing Body in 1967 also examined the problem of the supervision of the work environment. It recommended that the benzene content of the working atmosphere should not exceed the ceiling value of 80 mg/m³ (25 ppm). See, *Protection against hazards arising from benzene*, Report VI(1), op. cit., p. 5.

³¹ Labelling is closely related to the need to ensure the effective dissemination of information at all levels, from the factory to the international level. It should be recalled that the ILO, the Council of Europe and the United Nations have adopted an international system of hazard symbols. See, *Protection against hazards arising from benzene*, Report VI(1), op. cit., pp. 37 and 38.

Medical prevention

General standards

Medical examinations are compulsory for all workers who are to be employed in work processes involving exposure to benzene or to products containing benzene. Thorough medical examinations must take place prior to employment and periodically thereafter, and must include biological tests and blood tests at intervals to be fixed by national laws or regulations (Article 9, paragraph 1).³² However, with regard to the regularity of medical examinations, Paragraph 15(b) of the Recommendation indicates that the interval between two medical examinations should not be more than one year. With regard to the manner in which medical examinations are carried out, it is the obligation of the competent authority to approve a qualified physician responsible for such examinations with the assistance, as appropriate, of a competent laboratory (Article 10, paragraph 1).³³ Moreover, the medical examinations to which workers are subjected must be certified in an appropriate manner (Article 10, paragraph 1(b)) and must not involve the workers in any expense (Article 10, paragraph 2). Furthermore, Paragraph 18 of the Recommendation advocates that such examinations should be carried out during working hours.

Possible derogations

Derogations from the obligation to submit workers exposed to benzene to medical examinations may be permitted by the competent authority for specific categories of workers. For this purpose, prior consultation with the most representative organizations of employers and workers concerned is necessary (Article 9, paragraph 2).

Work by women and young persons

The Convention prohibits the employment of pregnant women and nursing mothers in work processes involving exposure to benzene or products containing benzene (Article 11, paragraph 1). This prohibition also covers young persons under 18 years of age, with the exception of young persons undergoing education or training who are under adequate technical and medical supervision (Article 11, paragraph 2).³⁴

Measures of application

Each member which ratifies the Convention is under the obligation, by laws or regulations or any other method consistent with national practice and conditions, to take such steps as may be necessary to give effect to its provisions (Article 14(a)). The persons responsible for compliance with the provisions of the Convention also have to be specified (Article 14(b)). Member States also undertake to provide appropriate inspection services to supervise the application of the Convention (Article 14(c)). Furthermore, in Paragraph 27,

³² According to experts, medical examinations are essential for the timely detection of cases of poisoning and for preventing their aggravation. On the other hand, they are also an essential means of checking the efficacy of protective measures. See ILO, *Protection against hazards arising from benzene*, ILC, 56th Session, Geneva, 1971, Report VI(2), p. 65.

³³ It should also be noted that the competent authority may also approve, not individual physicians, but categories of physicians whose qualifications or functions make them especially competent to carry out the examinations. Ibid., p. 68.

³⁴ The exposure of young persons under 18 years of age is particularly dangerous, since haematologists recognize that adolescents have a lower resistance to bone-marrow poisons. See ILO, *Encyclopaedia of occupational health and safety*, op. cit., Vol. I, p. 169.

the Recommendation provides that the competent authority should establish a statistical system to compile and publish data on observed cases of benzene poisoning.

Occupational Cancer Convention (No. 139) and Recommendation (No. 147), 1974

The prevention of occupational cancer is an issue which the ILO has addressed actively over the past 30 years, particularly since the adoption by the Conference at its 51st Session in 1967 of a resolution on this subject. The question gained added priority when the Governing Body decided to convene a meeting of experts to examine possible ILO action with a view to submitting proposals for international standards to the Conference. After examining the principles of the technical and medical prevention of hazards caused by exposure to carcinogenic agents at its Sessions in 1973 and 1974, the Conference finally adopted two instruments, a Convention and a Recommendation, on occupational cancer.³⁵

Objective

The objective of the Convention is to establish a framework mechanism for the creation of a programme to prevent the risks of occupational cancer caused by exposure, generally over a prolonged period, to chemical or physical agents of various types present in the workplace.

Determination of carcinogenic substances and agents with a view to their regulation

The Convention obliges ratifying States to periodically determine, on the one hand, the carcinogenic substances and agents to which occupational exposure must be prohibited or regulated, or in other words made subject to authorization or control and, on the other hand, the carcinogenic substances and agents to which the other protective provisions of the Convention have to apply (Article 1, paragraph 1).³⁶ In this respect, Article 1, paragraph 3, provides that the determination of these substances must be made taking into consideration codes of practice or guides published by the ILO in the light of current scientific knowledge, or information from other competent bodies.³⁷ Moreover, criteria should be established for determining the carcinogenicity of substances and agents (Paragraph 16(2) of the Recommendation). Paragraph 9(1) of the Recommendation adds that the necessary advice, particularly as regards the existence of substitute products or methods, should be secured.

³⁵ ILO, *Control and prevention of occupational cancer*, ILC, 58th Session, Geneva, 1973, Report VII(1), pp. 1 and 2; and *Control and prevention of occupational hazards caused by carcinogenic substances and agents*, ILC, 59th Session, 1974, Report V(1), pp. 34-39.

³⁶ In a dynamic situation of improved conditions and new methods of investigation, no list of carcinogens could ever be complete. See, Report of the Meeting of Experts on Control and Prevention of Occupational Cancer, Geneva, 1972, in ILO, *Control and prevention of occupational cancer*, Report VII(1), op. cit., p. 27. Moreover, the determination of carcinogenic substances and agents plays an important role in the recognition and compensation of diseases. In countries which have adopted the system of a list, occupational cancer is only compensated in relation to certain types of exposure. See Schedule I appended to the Employment Injury Benefits Convention, 1964 (No. 121) [Schedule I amended in 1980], an instrument which has been ratified by many countries. Ibid. p. 7.

³⁷ See, for example, ILO, *Occupational cancer: Prevention and control*, (second (revised) edition), Occupational Safety and Health Series, No. 39, Geneva, 1989.

Exemptions

The Convention allows the possibility of making exemptions from the general prohibition of occupational exposure to carcinogenic substances. However, such exemptions may only be granted by issue of individual certificates specifying in each case the conditions to be met (Article 1, paragraph 2). With regard to such authorizations, the Recommendation indicates in Paragraph 8 that the competent authority should specify in each case: the technical, hygiene and personal protection measures to be applied; the medical supervision or other tests or investigations to be carried out; the records to be maintained; and the professional qualifications required of those supervising exposure to carcinogenic substances.

Control of risks

There are two ways of combating occupational hazards and of preventing their effects: technical prevention and medical supervision. In the case of occupational cancer, there can be no doubt that emphasis must be laid on technical measures, which play a fundamental role.³⁸

Technical prevention

Technical prevention is based firstly on the replacement, whenever possible, of carcinogenic substances and agents to which workers may be exposed in the course of their work, by non-carcinogenic substances or agents or by less harmful substances or agents (Article 2, paragraph 1), and by the reduction to a minimum compatible with safety of the number of workers exposed, and of the duration and degree of such exposure (Article 2, paragraph 2). In this respect, the Recommendation provides that the competent authority should prescribe the measures to be taken to protect the workers concerned against the risks of exposure to carcinogenic substances or agents (Paragraph 3(1)). Furthermore, in Paragraph 4(1), the Recommendation indicates that employers should make every effort to use work processes which do not cause the formation, and particularly the emission in the working environment, of carcinogenic substances or agents, as main products, intermediates, by-products, waste products or otherwise. Where complete elimination of a carcinogenic substance or agent is not possible, employers should use all appropriate measures, in consultation with the workers and their organizations and in the light of advice from competent sources, including occupational health services, to eliminate exposure or reduce it to a minimum in terms of the numbers of workers exposed, duration of exposure and degree of exposure (Paragraph 4(2)).

Individual protection measures

Paragraph 5 of the Recommendation provides that workers and others involved in occupational situations in which the risk of exposure to carcinogenic substances or agents may occur should conform to the safety procedures laid down and make proper use of all equipment furnished for their protection or the protection of others.³⁹

³⁸ *Control and prevention of occupational cancer*, Report VII(1), 1973, op. cit., pp. 18 and 19.

³⁹ See also, in this respect, the compilation of practical guidelines on safety in the use asbestos, which provides indications concerning the individual protection of workers. ILO, *Safety in the use of asbestos*, Geneva, 1984, section 6.

Workers' education and information

All the available information on the dangers involved and on the measures to be taken must be provided to workers who have been, are, or are likely to be exposed to carcinogenic substances or agents (Article 4).⁴⁰ Paragraph 20 of the Recommendation indicates the manner in which instructions should be provided by the employer, namely before assignment and regularly thereafter, as well as on the introduction of a new carcinogenic substance or agent, and provides that the information should cover the dangers of exposure to such substances and the measures to be taken. For this purpose, employers themselves should carefully seek information, especially from the competent authority, on carcinogenic hazards which may arise with regard to any substance or agent introduced or to be introduced into the enterprise (Paragraph 18 of the Recommendation).⁴¹ Moreover, in the case of any substance or agent which is carcinogenic, an appropriate indication should be provided to any worker who may be liable to exposure to the danger which may arise (Paragraph 19). Employers' and workers' organizations should also take positive action to carry out programmes of information and education with regard to the hazards of occupational cancer and should encourage their members to participate full in such programmes (Paragraph 21). In addition to the dissemination of information, the competent authority should promote epidemiological and other studies and disseminate information on occupational cancer risks (Paragraph 16(1)).

Medical supervision

Although, in the case of occupational cancer, medical supervision cannot always prevent the emergence of the disease, it plays a fundamental part in protecting workers' health. In particular, upon recruitment to work involving exposure to carcinogenic substances, it makes it possible to avoid exposing persons who might be predisposed, because of certain physiological deficiencies, to the types of cancer in question. It also enables the effectiveness of the technical prevention measures to be checked and ensures the early detection of cancer.⁴²

Medical examination of workers

All workers, irrespective of their age, must be provided, during and after their employment, with the medical examinations or biological or other tests or investigations necessary to evaluate their exposure with a view to supervising their state of health in relation to the occupational hazards (Article 5).⁴³ In contrast with Article 5 of the Convention, the Recommendation, in Paragraphs 11 and 12, makes a clear distinction

⁴⁰ Objective knowledge of the risks, education and training in safe working methods are essential aspects of prevention. See, *Control and prevention of occupational cancer*, Report VII(1), 1973, op. cit., p. 21.

⁴¹ Paragraph 17 of the Recommendation also provides that the competent authority should draw up suitable educational guides for both employers and workers on substances and agents liable to give rise to occupational cancer.

⁴² *Control and prevention of occupational cancer*, Report VII(1), 1973, op. cit., p. 20.

⁴³ The need to examine workers after they have ceased their employment is also due to the fact that the occupational origin of cancer is often difficult to demonstrate, as from the clinical and pathological viewpoint, there is no difference between occupational cancer and other non-occupational forms. Its development is generally very slow, with the latent period stretching over anything from ten to 30 years or more. *Control and prevention of occupational cancer*, Report VII(1), 1973, op. cit., p. 3.

between medical supervision before and after the assignment of a worker to work involving exposure to carcinogenic substances or agents, and those measures to be taken after cessation of the assignment. In the former case, the worker should be subject to certain examinations, while in the latter case the competent authority is called upon to ensure that provision is made for workers to continue to benefit from medical examinations.⁴⁴

Establishment of a system of records

Another protective measure against the risks involved in exposure to carcinogenic substances or agents consists of the obligation of the member State to establish an appropriate system of records of the exposure of workers at risk (Article 3).⁴⁵

Measures of application

The Convention allows member States a certain latitude as to the measures to be taken for its application. Under the terms of Article 6(a) of the Convention, its application must be ensured by laws or regulations or any other method consistent with national practice and conditions. The methods of application determined in this way have to be taken in consultation with national organizations and the most representative organizations of employers and workers concerned. Moreover, in accordance with national practice, member States have to specify the persons or bodies on whom the obligation of compliance with the provisions of the Convention shall rest (Article 6(b)), as well as the inspection services responsible for supervising the application of the Convention (Article 6(c)).

Asbestos Convention (No. 162) and Recommendation, (No. 172), 1986

The harmful effects of exposure to asbestos dust have over the past 20 years become a matter of grave concern, not only to employers' and workers' organizations and the authorities responsible for health and labour matters, but also for public opinion. In view of the gravity of the diseases related to asbestos, a meeting of experts was convened by the Governing Body in 1973 to discuss prevention and control measures and the future action of the ILO in this field. The report of the meeting of experts mentioned, among other

⁴⁴ It should be recalled that the practical difficulties of ensuring medical surveillance after the cessation of the assignment to work involving exposure to the risks concerned were mentioned on several occasions during the preparatory work in 1974. During the Conference discussion in 1974, it was emphasized, *inter alia*, "that the core of the problem was to ensure that the worker had the opportunity to undergo these examinations", but it seemed that "it would be difficult to force a worker to take them, or to cause the employer to assume this responsibility, especially in cases where the man was no longer under a working contract". See, *Control and prevention of occupational cancer*, Report VII(2), 1974, *op. cit.*, pp. 55-57, and ILO, *Record of Proceedings*, ILC, 59th Session, Geneva, 1974, p. 332, para. 29. In reply to a question raised by the Government of Australia in a written communication to the ILO, the Office, referring to the discussions during the Conference, indicated that it was possible to conclude that Convention No. 139 did not require the imposition of compulsory medical examinations upon workers after the cessation of their assignment involving exposure to the risks in question, but that it was sufficient to take measures so that they could benefit from appropriate medical supervision.

⁴⁵ This consists of keeping records of exposure and of medical examinations so that, as the years go by, it is possible to measure the effectiveness of the measures of prevention and identify remaining dangers or new ones emerging. *Control and prevention of occupational hazards caused by carcinogenic substances and agents*, Report V(1), 1974, *op. cit.*, p. 32.

subjects, the need to adopt one or more international instruments on safety in the use of asbestos. At the same time, the ILO was working on the preparation of international instruments of a more general nature on occupational safety and health. This action resulted in the adoption of the following instruments: the Occupational Cancer Convention (No. 139) and Recommendation (No. 147), 1974; the Working Environment (Air Pollution, Noise and Vibration) Convention (No. 148) and Recommendation (No. 156), 1977; and the Occupational Safety and Health Convention (No. 155) and Recommendation (No. 164), 1981. All of these instruments contain general provisions addressing safety in the use of asbestos. Despite the existence of these instruments, a second Meeting of Experts on the Safe Use of Asbestos was convened in 1981 and reviewed the information available on the subject. It emphasized the urgent need to take action with a view to the adoption of one or more international instruments on the prevention and control of the risks of occupational exposure to asbestos.⁴⁶

Objective

The Convention and Recommendation, which address the same subject, are intended to prevent the risk of exposure to asbestos in the course of work, prevent the harmful effects of exposure to asbestos on the health of workers and indicate reasonable and practicable methods and techniques of reducing occupational exposure to asbestos to a minimum.

With a view to achieving this objective, the measures envisaged by the Convention are based essentially on three criteria, namely the prevention and control of health hazards due to occupational exposure to asbestos, and the protection of workers against these hazards (Article 3, paragraph 1, of the Convention).

Scope of application and definitions

The Convention applies to all activities involving exposure of workers to asbestos in the course of work (Article 1, paragraph 1). Paragraph 2 of Recommendation No. 172 enumerates activities involving a particular risk of occupational exposure to asbestos. With a view to the effective application of the Convention, Article 2 provides legal definitions of the terms “asbestos”, “asbestos dust”, “airborne asbestos dust”, “respirable asbestos fibres” and “exposure to asbestos”.⁴⁷ The term “asbestos” means the fibrous form of mineral silicates belonging to rock-forming minerals of the serpentine group, i.e. chrysotil (white asbestos), and of the amphibole group, i.e. actinolite, amosite (brown asbestos, cummingtonite-grunerite), anthrophyllite, crocidolite (blue asbestos), tremolite, or any mixture containing one or more of these minerals; the term “asbestos dust” means airborne particles of asbestos or settled particles of asbestos which are liable to become airborne in the working environment; the term “airborne asbestos dust” means, for purposes of measurement, dust particles measured by gravimetric assessment or other equivalent method; the term “respirable asbestos fibres” means asbestos fibres having a diameter of less than 3µm and a length-to-diameter ratio greater than 3:1, although only fibres of a length greater than 5µm have to be taken into account for purposes of measurement; the term “exposure to asbestos” means exposure at work to airborne respirable asbestos fibres or asbestos dust, whether originating from asbestos or from minerals, materials or products

⁴⁶ ILO, *Safety in the use of asbestos*, ILC, 71st Session, Geneva, 1985, Report VI(1), pp. 1 and 2.

⁴⁷ The term “asbestos” does not refer to a single chemical substance, but to a group of minerals with similar physical properties. *ibid.*, p. 24; *Encyclopaedia of occupational health and safety*, op. cit., Vol. I. p. 120.

containing asbestos. Paragraph 24 of the Recommendation proposes that cleaning staff should also come within the scope of application.

Method of application

The Convention must be applied by laws or regulations,⁴⁸ which have to prescribe the measures to be taken for the prevention and control of, and protection of workers against, health hazards due to occupational exposure to asbestos (Article 3, paragraph 1). With a view to the formulation of such national laws and regulations, Paragraph 4 of the Recommendation advocates that Articles 1 and 2 of the Occupational Cancer Convention, 1974 (No. 139), should be drawn upon.⁴⁹ The national laws and regulations on this subject must be periodically reviewed in the light of technical progress and advances in scientific knowledge (Article 3, paragraph 2). In this respect, the Recommendation indicates in Paragraph 5 that the information contained, in particular, in the Code of practice on safety in the use of asbestos, published by the ILO, should be used as guidance in reviewing national laws and regulations in force, as well as other information from competent bodies on asbestos and substitute materials. With regard to the measures to be taken to give effect to the provisions of the Convention, the competent authority is under the obligation to consult the most representative organizations of employers and workers concerned (Article 4). On the more specific subject of the appropriate measures to be taken for the prevention and control of exposure to asbestos, Paragraph 7 of the Recommendation adds that the employer should have recourse, in consultation and cooperation with the workers concerned or their representatives, to advice from competent sources, including occupational health services.⁵⁰ With regard to consultation and cooperation between the employer and the workers, in accordance with national law and practice, Paragraph 7(2) of the Recommendation advocates that workers' safety delegates, workers' safety and health committees or joint safety and health committees, or other workers' representatives should be consulted.

Derogations

Article 3, paragraph 3, of the Convention provides that the competent authority may permit temporary derogations from the measures prescribed under paragraph 1. These consist of measures for the prevention and control of health hazards due to occupational exposure to asbestos, and the protection of workers against these hazards. Such derogations must be strictly temporary and may therefore only be permitted under conditions and within the limits of time to be determined after consultation with the most representative organizations of employers and workers concerned. Furthermore, the competent authority must ensure that the necessary precautions are taken to protect the workers' health (Articles 3 and 4).⁵¹

⁴⁸ In contrast with most Conventions, under which measures of application at the national level may be selected according to national practice and conditions.

⁴⁹ Articles 1 and 2 of the Occupational Cancer Convention, 1974 (No. 139), set forth the following principles: the periodic determination of a list of carcinogenic substances and agents to which occupational exposure is prohibited or made subject to authorization or control; and the replacement of these substances by non-carcinogenic substances or less harmful substances.

⁵⁰ For further information on occupational health services, see the analysis of Convention No. 161 above.

⁵¹ The objective of such temporary derogations, as shown by the preparatory work, is clearly to provide enterprises with a certain period during which they can progressively introduce the

Responsibility of employers for compliance

In the first place, the employer is made responsible for compliance with the measures prescribed by national laws or regulations (Article 6, paragraph 1). In cases where two or more employers undertake activities simultaneously at one workplace, they must cooperate in order to comply with the prescribed measures, without prejudice to the responsibility of each employer for the health and safety of the workers that he or she employs (Article 6, paragraph 2). Moreover, each employer is responsible for the establishment and implementation of practical measures for the prevention and control of the exposure of the workers that he or she employs to asbestos and for their protection against hazards due to asbestos (Article 16). Employers and workers or their representatives are also under the obligation to cooperate as closely as possible and at all levels of the enterprise for the application of the measures prescribed pursuant to the Convention (Article 8). Finally, the enforcement of the laws and regulations adopted on measures for the prevention, control and protection of workers against hazards related to asbestos must be secured by an adequate system of inspection, including appropriate penalties provided for in laws or regulations (Article 5).

Rights and responsibilities of workers

Paragraph 9 of the Recommendation sets forth the general principle that workers who have removed themselves from work situations which they have reasonable justification to believe presents serious danger to their life or health should:

- alert their immediate supervisor; and
- be protected from retaliatory or disciplinary measures, in accordance with national conditions and practice.

No measure prejudicial to workers should be taken by reference to the fact that, in good faith, they complained of what they considered to be a breach of statutory requirements or a serious inadequacy in the measures taken by the employer in respect of occupational safety and health and the working environment.

Moreover, workers engaged in work with asbestos or products containing asbestos should be required, within the limits of their responsibility, to comply with the prescribed safety and health procedures, including the use of adequate protective equipment (Paragraph 8 of the Recommendation).

Protective and preventive measures

Technical measures

Technical prevention measures consist essentially of measures to prevent the formation of dust, to prevent its dispersion when created and to reduce the concentration of asbestos dust and/or fibres to the lowest amount achievable.⁵² In this respect, Article 9 of the Convention provides, in general terms, that exposure to asbestos must be prevented or controlled by means of adequate engineering controls and work practices, including

prevention, control and protection measures prescribed by national laws and regulations under the terms of the Article 3, paragraph 1, of the Convention. In the event that certain enterprises are not able to be in conformity with the requirements after a certain period of time, they may not, however, be exempted permanently from these obligations. ILO, *Safety in the use of asbestos*, ILC, 71st Session, Geneva, 1985, Report VI(2), pp. 15 to 17.

⁵² *Safety in the use of asbestos*, Report VI(1), 1985, op. cit., pp. 4 and 38

workplace hygiene, and by prescribing special rules and procedures, including authorization, for the use asbestos or of certain work processes. The national laws or regulations adopted to prevent, control and protect workers against health hazards due to occupational exposure to asbestos must therefore, where necessary to protect the health of workers and where technically practicable, prescribe one or more of the following measures:

- the replacement of asbestos or products containing asbestos by other materials or products or the use of alternative technology, evaluated as harmless or less harmful, whenever this is possible ⁵³ (Article 10, paragraph 1);
- the total or partial prohibition of the use of asbestos or of certain types of asbestos or products containing asbestos in certain work processes (Article 10, paragraph 2). In this respect, the Recommendation advocates in Paragraph 12(2) that all potential substitute materials should be thoroughly evaluated for their possible harmful effects on health.

Similarly, Article 11, paragraph 1, of the Convention prohibits the use of crocidolite and products containing this fibre. However, Article 11, paragraph 2, provides the possibility for the competent authority to permit derogations from this prohibition, after consultation with the most representative organizations of employers and workers concerned, where replacement is not reasonably practicable, ⁵⁴ provided that measures are taken to ensure that the health of workers is not prejudiced. ⁵⁵ Moreover, spraying of all forms of asbestos has to be prohibited (Article 12, paragraph 1). However, the competent authority is empowered, as in the case of crocidolite, to permit its use under the same conditions as those set out above for crocidolite (Article 12, paragraph 2).

The competent authority must prescribe limits for the exposure of workers to asbestos or other exposure criteria for the evaluation of the working environment (Article 15, paragraph 1). These limits have to be fixed and periodically reviewed and updated in the light of technological progress and advances in technological and scientific knowledge (Article 15, paragraph 2). With regard to the method to be used in determining exposure limits, Paragraph 22(1) of the Recommendation suggests that they should be fixed by reference to the time-weighted concentration of airborne asbestos dust, commonly expressed in terms of an eight-hour day and a 40-hour week, and to a recognized method of sampling and measurement. Similarly, the Recommendation advocates in Paragraph 23 that the installations, ventilation systems, machinery and protective appliances designed for the technical control of asbestos dust should be regularly checked and maintained in good working order. In order to prevent the accumulation of asbestos dust on surfaces, workplaces should be cleaned by a safe method as frequently as is necessary (Paragraph 24). Furthermore, to ensure that the exposure limits or other exposure criteria are complied with, and also to reduce exposure to as low a level as possible, the employer must be required to take all appropriate measures in all workplaces where workers are exposed to asbestos to prevent or control the release of asbestos dust into the air (Article 15, paragraph 3). Under the terms of Article 20, paragraph 1, the employer has to

⁵³ The expression “technically feasible” does not allow consideration of the cost of the replacement measures in relation to the human risk. *Ibid.*, p. 38.

⁵⁴ This is the case, for example, where the cost of replacement would be excessive, while the human risk is small. *ibid.*, p. 38.

⁵⁵ In contrast to the conditions under which derogations are possible under the terms of Article 3, para. 3, of the Convention, derogations from the prohibition upon the use of crocidolite and products containing this fibre are not subject to a restriction in time.

measure the concentrations of airborne asbestos dust in workplaces and regularly monitor the exposure of workers to asbestos. Moreover, employers must take responsibility for the establishment and implementation of practical measures for the prevention and control of the exposure of workers to asbestos and for their protection against the hazards due to asbestos (Article 16).

Individual protection measures

Where collective technical prevention measures are insufficient and do not bring exposure to asbestos within the fixed limits, the employer is under the obligation to provide, maintain and replace, as necessary, at no cost to the workers, adequate respiratory protective equipment and special protective clothing as appropriate (Article 15, paragraph 4). Respiratory protective equipment must comply with standards set by the competent authority and must be used only as a supplementary, temporary, emergency or exceptional measure and not as an alternative to technical control (Article 15, paragraph 4). In this respect, Paragraph 25(3) of the Recommendation adds that when the use of respiratory equipment is required, adequate rest periods in appropriate rest areas should be provided for, taking into account the physical strain caused by the use of such equipment. Moreover, where workers' personal clothing may become contaminated with asbestos dust, the employer has to provide appropriate work clothing, which must not be worn outside the workplace (Article 18, paragraph 1). Article 18, paragraph 3, provides that national laws or regulations must prohibit the taking home of work clothing and special protective clothing and of personal protective equipment. Paragraph 26(2) of the Recommendation also indicates that employers should provide workers with adequate information in an appropriate form on the health hazards to their families or others which could result from taking home clothing contaminated by asbestos dust.⁵⁶ The handling and cleaning of used work clothing and special protective clothing must be carried out under controlled conditions, as required by the competent authority, and under the responsibility of the employer, to prevent the release of asbestos dust (Article 18, paragraphs 2 and 4). Moreover, the employer has to provide facilities for workers exposed to asbestos to wash, take a bath or shower at a workplace, as appropriate (Article 18, paragraph 5).

Administrative measures

National laws and regulations must oblige employers to notify to the competent authority certain types of work involving exposure to asbestos, in a manner and to the extent prescribed by the authority (Article 13). With regard to the manner and the extent to which this notification should be carried out, Paragraph 13 of the Recommendation enumerates the information which should be supplied in the notification of work with asbestos and which should be prescribed by the competent authority.⁵⁷ In addition, producers and suppliers of asbestos and manufacturers and suppliers of products containing asbestos must be made responsible for adequate labelling of the container and, where appropriate, the products, in a language and manner easily understood by the workers and the users concerned, as prescribed by the competent authority (Article 14). The label should be printed in the language or languages in common use in the country concerned (Paragraph 20(2) of the Recommendation). In this respect, the Recommendation

⁵⁶ Asbestos dust in clothing has been shown to be a possible hazard. *Encyclopaedia of occupational health and safety*, op. cit., Vol. I., p. 123.

⁵⁷ Under the terms of Paragraph 13(2) of the Recommendation, this information should include in particular: the type and quantity of asbestos used; the activities and processes carried out; the products manufactured; the number of workers exposed and the level and frequency of their exposure; the preventive and protective measures taken to comply with the national laws and regulations; and any other information necessary to safeguard the workers' health.

provides for the development and provision by all of the above actors of a data sheet listing the asbestos content, health hazards and appropriate protective measures for the material or product (Paragraph 20(3)). With regard to the demolition of plants or structures containing friable asbestos insulation materials, and the removal of asbestos from buildings or structures in which asbestos is liable to become airborne, this must be undertaken only by employers or contractors who are recognized by the competent authority as qualified to carry out such work and who have been empowered to undertake such work (Article 17, paragraph 1).⁵⁸ Before starting demolition work, the contractor must be required to draw up a work plan, in consultation with the workers or their representatives, specifying the measures to be taken, including measures to:

- provide all necessary protection to the workers;
- limit the release of asbestos dust into the air; and
- provide for the disposal of waste containing asbestos (Article 17, paragraph 2).⁵⁹

Waste

The disposal of waste containing asbestos must be carried out by the employer in a manner which does not pose a health risk to the workers concerned, nor to the population in the vicinity of the enterprise, in accordance with national law and practice (Article 19, paragraph 1). With regard to asbestos dust released from the workplace, the competent authority and employers are under the obligation to take appropriate measures to prevent pollution of the general environment (Article 19, paragraph 2).

Surveillance of the working environment and workers' health

Working environment

Where it is necessary for the protection of the health of workers, the employer must measure the concentrations of airborne asbestos dust in workplaces and monitor the exposure of workers to asbestos at intervals and using methods specified by the competent authority (Article 20, paragraph 1). In this regard, Paragraph 30(3) of the Recommendation indicates that the frequency and extent of sampling and measurement should be related to the level of risk, to changes in the work processes or other relevant circumstances. Records of the monitoring of the working environment and of the exposure of workers to asbestos must be kept for a period prescribed by the competent authority (Article 20, paragraph 2). The workers concerned, their representatives and the inspection services must have access to these records (Article 20, paragraph 3). Moreover, the workers or their representatives must have the right to request the monitoring of the working environment and to appeal to

⁵⁸ Article 17, paragraph 1, of the Convention leaves it the competent authority in each country to decide the most appropriate way in which employers or contractors are recognized as qualified to carry out demolition and removal work and are empowered to do so. It may be through a system of pre-authorization of recognized contractors, limiting demolition work where asbestos is known to be present to a restricted number of licensed specialized firms, or through a system under which, for each demolition or removal project known to involve asbestos, the competent authority empowers the contractor concerned, provided it recognizes him as qualified, to undertake the job. See, Memorandum prepared by the ILO in reply to requests for clarification concerning Conventions Nos. 150 and 162, ILO, *Official Bulletin*, Vol. LXXI, 1998, Series A, No. 1, pp. 52 to 57.

⁵⁹ Article 17 of the Convention only applies to demolition and removal work when asbestos is known in advance to be present. *ibid.* p. 56.

the competent authority concerning the results of such monitoring (Article 20, paragraph 4).

Health surveillance

Workers who are or have been exposed to asbestos must be provided, in accordance with national law and practice, with such medical examinations as are necessary to supervise their health in relation to the occupational hazard, and to diagnose occupational diseases caused by exposure to asbestos (Article 21, paragraph 1).⁶⁰ Workers must be informed in an adequate and appropriate manner of the results of their medical examinations and receive individual advice concerning their health (Article 21, paragraph 3). The monitoring of workers' health in connection with the use of asbestos must not result in any loss of earnings for them. Moreover, such monitoring must be free of charge and, as far as possible, take place during working hours (Article 21, paragraph 2). When continued assignment to work involving exposure to asbestos is found to be medically inadvisable, every effort must be made, consistent with national conditions and practice, to provide the workers concerned with other means of maintaining their income (Article 21, paragraph 4). Finally, the competent authority is required to develop a system of notification of occupational diseases caused by asbestos (Article 21, paragraph 5). On the subject of the frequency of medical examinations, the Recommendation advocates that they should be carried out prior to assignment and then periodically at appropriate intervals, which should be determined by the competent authority, taking into account the level of exposure and the worker's state of health in relation to the occupational hazard (Paragraph 31(1) and (2)). Moreover, the competent authority should ensure that provision is made, in accordance with national law and practice, for appropriate medical examinations to continue to be available to workers after termination of an assignment involving exposure to asbestos (Paragraph 31(3)).

Workers' information and education

The competent authority, in consultation with the most representative organizations of employers and workers concerned, is required to make appropriate arrangements to promote the dissemination of information and the education of all concerned with regard to health hazards due to exposure to asbestos and to methods of prevention and control (Article 22, paragraph 1). For this purpose, Article 22, paragraph 2, makes the competent authority responsible for ensuring that employers have established written policies and procedures on measures for the education and periodic training of workers on asbestos hazards and methods of prevention and control. In this respect, Paragraph 41 of the Recommendation advocates the drawing up of suitable educational guides for employers, workers and others. Paragraph 44 also indicates that employers' and workers' organizations should take positive action to cooperate in and contribute to programmes of training, information, prevention, control and protection in relation to occupational hazards due to exposure to asbestos. Finally, employers are required to ensure that all workers exposed to or likely to be exposed to asbestos are informed about the health hazards related to their work, instructed in preventive measures and correct work practices and receive continuing training in these fields (Article 22, paragraph 3). The provisions on issue of information and training are supplemented by Paragraphs 42 and 43 of the Recommendation, which indicate that the training should be provided at no cost to the workers and that it should be carried out in a language and manner which are easily understood by them and which show the harmful effects of exposure on the health.

⁶⁰ In particular, a medical examination prior to employment should be used to eliminate those who already have chest diseases which might subsequently be confused with asbestosis. *Encyclopaedia of occupational health and safety*, op. cit., p. 124.

Furthermore, such education should focus on the particular danger to the health of workers created by the culmination of smoking and exposure to asbestos.

Guarding of Machinery Convention (No. 119) and Recommendation (No. 118), 1963

Convention No. 119 and Recommendation No. 118 are designed to ensure the broadest possible scope of application, while remaining at the same time sufficiently flexible to accommodate a wide variety of national conditions and circumstances. The scope of the instruments is determined by two major considerations, the types of machinery and the branches of economic activity covered.

Scope of application

The scope of the instruments is determined by the types of machinery and the branches of economic activity covered.

Types of machinery covered

According to Article 1 of the Convention, all power-driven machinery, which also means machinery driven by animal power,⁶¹ shall be considered as machinery for the purpose of the application of the Convention, which applies to all categories of machinery used for industrial purposes, new and second hand.⁶² Imported machinery also falls under the scope of the Convention.⁶³

The Convention allows discretionary application also to machinery operated by manual power, although only in so far as the competent national authority in each country so determines, after consultation of the representative employers' and workers' organizations concerned.

The Convention allows more flexible application in respect of certain types of machinery. Thus, it applies to road and rail vehicles only when they are in motion and only in relation to the safety of the operator or operators, and to mobile agricultural machinery only in relation to the safety of workers employed in connection with such machinery.⁶⁴

The coverage of Recommendation No. 118 as to types of machinery is the same as that of the Convention (Paragraph 1(1)).

General application to all branches of economic activity

The instruments apply to all branches of economic activity (Article 17 of the Convention and Paragraph 16 of the Recommendation), unless the Member ratifying the Convention specifies a more limited application in on accompanying ratification of the

⁶¹ ILO, *Prohibition of the sale, hire and use of inadequately guarded machinery*, ILC, 47th Session, Geneva, 1963, Report IV(1), p. 6; and ILO, *Record of Proceedings*, ILC, 47th Session, Geneva, 1963, p. 567.

⁶² *Record of Proceedings*, ILC, 1963, op. cit., p. 780.

⁶³ ILO: *Official Bulletin*, Vol. LIII, No. 4, 1970, p- 382; General Survey of the Committee of Experts on the Application of Conventions and Recommendations on Safety in the Working Environment, Report III (Part 4B), ILC, 73rd Session, 1987, para. 70.

⁶⁴ *Record of Proceedings*, 1963, op. cit., p. 567.

Convention. To limit the possible extent of such restrictions, the Convention must be applicable as a minimum to enterprises or branches of economic activity where machinery is extensively used. It is for the competent authority to determine, after consultation with the labour inspection services and with the most representative organizations of employers and workers concerned, which enterprises and which branches of economic activity use machinery extensively.⁶⁵

Manufacture, sale, hire, transfer in any other manner and exhibition of machinery

General considerations

The essential provisions of the instruments are contained in Part II of the Convention dealing with the prohibition or prevention of the sale, hire, transfer in any other manner and exhibition of unguarded machinery, supplemented by Part I of the Recommendation, which adds provisions on the design and manufacture of machinery, and Part III of the Convention, supplemented by Part II of the Recommendation, concerning the use of machinery.

Measures concerning the manufacture, sale, hire, transfer in any other manner and exhibition of machinery

As regards the measures concerning the manufacture, sale, hire, transfer in any other manner and exhibition of dangerous machinery, guarding requirements are restricted to certain specified dangerous parts of machinery (Article 2 of the Convention and Paragraph 1 of the Recommendation), whereas the measures concerning the use of machinery require guarding of any dangerous parts of machinery, including the point of operation (Article 6 of the Convention).

The sale and hire of machinery of which the dangerous parts are without appropriate guards shall be prohibited by national laws and regulations if they cannot be prevented by other equally effective measures (Article 2, paragraph 1, of the Convention).

To the extent to be determined by the competent authority, the transfer in any other way and exhibition of machinery of which the dangerous parts are without adequate guards are also to be prohibited or prevented. In respect of the exhibition of machinery, the Convention further provides for the possibility of the temporary removal of the guards in order to demonstrate the machinery, as long as appropriate precautions are taken to prevent danger to persons (Article 2, paragraph 2, of the Convention).

Guarding requirements concerning the sale, hire, transfer in any other manner and exhibition of dangerous machinery are restricted to the guarding of certain specified dangerous parts of it. On the other hand, guarding requirements concerning the use of machinery are not limited in that respect and require guarding of any dangerous parts of the machinery. The parts of machinery that are identified as dangerous consist of two groups: (i) any moving parts having projections; and (ii) gearing and transmissions when they are in motion, including controls.⁶⁶ Both groups are listed in Article 2, paragraphs 3 and 4, of the Convention, which further provides that other parts of machinery also liable

⁶⁵ See memorandum of the ILO, *Official Bulletin*, Vol. LIII, No. 4, 1970. p. 381.

⁶⁶ *Prohibition of the sale, hire and use of inadequately guarded machinery*, Report V(1), op. cit., pp. 7-8.

to present danger shall be guarded to the extent to be determined by the competent authority.

In addition to the parts specified in Article 2 of the Convention, the Recommendation also deals with dangerous working parts that relate to the point of operation of particular types of machinery specified by legal or other measures (Paragraph 1) and suggests the dangers enumerated in Paragraph 2 should be taken into account for that purpose. The Conference Committee indicated that this provision covers in particular the risks due to the explosion and action of toxic substances, dust, flying particles, liquids, heat, ionizing radiations and the risks due to noise and harmful vibrations, thereby establishing a link between the instruments on the guarding of machinery and those covering the working environment (air pollution, noise and vibration).⁶⁷

Provisions relating to operating instructions

The Recommendation stipulates that any operating instructions for machinery should be based on safe methods of operation (Paragraph 6).

Responsibility as to compliance

The obligation to ensure compliance with the provisions of the Convention shall rest on the vendor, the person letting out on hire or transferring the machinery in any other manner, or the exhibitor and, where provided by national law, on their respective agents. The same applies to the manufacturer when selling machinery, letting out on hire, transferring it in any other manner or exhibiting it (Article 4 of the Convention and Paragraph 4 of the Recommendation).

Use of machinery

Measures concerning the use of machinery

The use of inadequately guarded machinery shall be prohibited by national legislation or prevented by other equally effective measures. It is not sufficient to require the guarding of machinery in use without at the same time prohibiting the use of unguarded machinery.⁶⁸ However, where this prohibition cannot fully apply without preventing the use of the machinery, it shall apply to the extent that the use permits. On the other hand, appropriate guards should be provided for any dangerous part of machinery including the point of operation (Article 6 of the Convention and Paragraph 7 of the Recommendation).

Employers' obligations

The employer's responsibilities comprise: (i) providing appropriate guarding of machinery in use (Article 7 of the Convention and Paragraph 8 of the Recommendation); (ii) information and instruction of workers on the safe use of machinery (Article 10, paragraph 1, of the Convention, Paragraph 11(1) of the Recommendation); and (iii) the overall safe environmental conditions at the workplace (Article 10, paragraph 2, of the Convention and Paragraph 11(2) of the Recommendation), which might consist in good lighting, ventilation or perception of oral commands.⁶⁹

⁶⁷ *Record of Proceedings*, 1963, op. cit., p. 572.

⁶⁸ General Survey, 1987, op. cit., para. 180.

⁶⁹ *ibid.*, para. 215.

Agents of the employer, as prescribed under national legislation, are also held responsible (Article 14 of the Convention and Paragraph 15 of the Recommendation).

Workers' obligations and guarantees

Workers must not use machinery without the guards being in the proper position nor must they make its guards inoperative. On the other hand, they shall not be compelled to use machinery where the guards are not in place or are made inoperative (Article 11 of the Convention and Paragraph 12 of the Recommendation).

The ratification of the Convention does not affect the acquired rights of workers under national laws and regulations concerning social security and social insurance legislation (Article 12 of the Convention and Paragraph 13 of the Recommendation).

Obligations of self-employed workers

The provisions relating to the obligations of employers and workers concerning the use of machinery also apply to self-employed workers, if and in so far as the competent authority so determines (Article 13 of the Convention and Paragraph 14 of the Recommendation).

Exceptions allowed under the instruments

The instruments allow four different categories of exceptions: (1) those concerning machinery or parts thereof made safe by virtue of their construction or installation; (2) exceptions with respect to maintenance and similar operations; (3) exceptions concerning storage, scrapping or reconditioning of machinery; and (4) possible temporary exemptions from the provisions of the instruments. Of these, the exceptions concerning storage, scrapping or reconditioning of machinery concern only Part II of the Convention and Part I of the Recommendation, dealing with the sale, hire, transfer in any other manner and exhibition of machinery, whereas the other exceptions apply also to those parts of the instruments which deal with the use of machinery.

Article 3, paragraph 1, of the Convention provides that the prohibition of the sale, hire, transfer in any other manner and exhibition of machinery does not apply to machinery or dangerous parts thereof specified in Article 2 which are by virtue of their construction, installation or position as safe as if they were guarded by appropriate safety devices. With regard to the use of machinery, Article 8, paragraph 1, of the Convention also excludes machinery made safe by virtue of its construction, installation or position (see also Paragraphs 3(1) and 9(1) of the Recommendation).

Similar exceptions are included in Article 3, paragraph 2, of the Convention which allows the sale, hire, transfer in any other manner or exhibition of not properly guarded machinery if during maintenance, lubrication, setting-up or adjustment of working parts, such operations can be carried out in conformity with accepted standards of safety. Moreover, the prohibition of the use of unguarded machinery, as well as the obligation not to remove or to make inoperative the guards provided (Articles 6 and 11 of the Convention) does not prevent the above operations as long as they can be carried out in conformity with accepted standards of safety (see also Paragraph 3(2), which also concerns manufacture, and Paragraph 9(2) of the Recommendation).

The sale or transfer in any other manner of machinery for storage, scrapping or reconditioning are not prohibited, provided that sale, hire, transfer in any other manner or exhibition after storage or reconditioning can be carried out in conformity with the safety provisions set out in Article 2 (Article 3, paragraph 3, of the Convention and Paragraph 3(3) of the Recommendation).

Governments may provide by laws or regulations or equally effective measures for a temporary exemption from the provisions of Articles 2 and 6 of the Convention for a period not exceeding three years from the coming into force of the Convention for the country concerned, and after consultation with the most representative organizations of employers and workers concerned (Articles 5 and 9 of the Convention and Paragraphs 5 and 10 of the Recommendation).

The possibility for a ratifying country to avail itself of the temporary exemption from the prohibition of the sale, hire, transfer in any other manner, exhibition and use of unguarded machinery is an example, *inter alia*, of the flexibility of the Convention.⁷⁰

Measures of application and supervision

The instruments provide that necessary measures, including the imposition of appropriate penalties, must be taken to ensure their effective enforcement.

The Convention and the Recommendation further contain the usual provisions that governments should provide *appropriate inspection services* for the purpose of supervising the application of the provisions of the instruments, or shall satisfy themselves that appropriate inspection is carried out (Article 15 of the Convention and Paragraph 17 of the Recommendation).

Role of employers' and workers' organizations

Any national laws or regulations giving effect to the provisions of the Convention must be made by the competent authority after consultation with the most representative organizations of employers and workers concerned and, as appropriate, manufacturers' organizations (Article 16 of the Convention and Paragraph 19 of the Recommendation).

International transactions

Paragraph 18 of the Recommendation deals with the export and import of machinery. It recommends arrangements between the member States concerned on mutual cooperation regarding the application of the Convention and the Recommendation in cases of sale and hire from one country to the other. Furthermore, the provisions aim at uniform occupational safety and hygiene standards and refer to the relevant ILO model codes of safety regulations and ILO codes of practice, as well as to the appropriate standards of international organizations for standardization.

As far as the Convention is concerned, the provisions of Part II (Articles 2 to 5) do not apply to the export of machinery for sale.⁷¹ They are, however, applicable to any sale, hire, transfer or exhibition of the machinery in the importing country, which must ensure that the relevant safety standards are met by imported machinery.⁷²

Chemicals Convention, 1990 (No. 170)

The Convention aims to encourage ratifying Members to formulate, implement and periodically review a coherent policy on safety in the use of chemicals at work.

⁷⁰ *ibid.*, para. 244.

⁷¹ ILO, *Official Bulletin*, Vol. LIII, No. 4, 1970, p. 382.

⁷² General Survey, 1987, *op. cit.*, paras. 69 and 70.

Scope and definitions

The Convention applies to all branches of economic activity in which chemicals are used (Article 1, paragraph 1). It is possible for the competent authority of a Member to exclude particular branches of economic activity and of enterprises and products from the Convention, or from certain provisions of the Convention, after consulting the most representative organizations of employers and workers concerned, and on the basis of an assessment of the hazards involved and the protective measures applied. This is possible when: (a) special problems of a substantial nature arise; and (b) the overall protection afforded in accordance with national law and practice is not inferior to that which would result from the full application of the provisions of the Convention (Article 1, paragraph 2(a)). The Convention does not, however, apply to articles that will not expose workers to a hazardous chemical under normal or reasonably foreseeable conditions of use. Nor does it apply to organisms, which do apply to chemicals derived from organisms (Article 1, paragraphs 3 and 4). The competent authority, after consulting the most representative organizations of employers and workers concerned, has to make special provision to protect confidential information whose disclosure to a competitor would be liable to cause harm to an employer's business so long as the safety and health of workers are not compromised thereby (Article 1, paragraph 2(b)).

“Chemicals” are defined as chemical elements and compounds, and mixtures thereof, whether natural or synthetic. The term “hazardous chemical” includes any chemical that has been classified as hazardous in accordance with Article 6 of the Convention or for which relevant information exists to indicate that the chemical is hazardous. The term “use of chemicals at work” means any work activity which may expose a worker to a chemical, and includes their production, handling, storage, transport, the disposal and treatment of waste chemicals, the release of chemicals as a result of work activities and the maintenance, repair and cleaning of equipment and containers for chemicals (Article 2(a), (b) and (c)).

General principles

It is a general requirement that the most representative organizations of employers and workers are to be consulted on the measures to be taken to apply the provisions of the Convention (Article 3).

The Convention places each Member under the obligation to formulate, implement and periodically review a coherent national policy on safety in the use of chemicals at work, in the light of national conditions and practice and in consultation with the most representative organizations of employers and workers (Article 4). The competent authority must be empowered to prohibit or restrict the use of certain hazardous chemicals, or to require advance notification and authorization before such chemicals are used, if justified on safety and health grounds (Article 5).

Classification systems

The Convention requires the establishment by the competent authority, or by a body approved by the competent authority, and in accordance with national or international standards, of systems and specific criteria appropriate for the classification of all chemicals according to the type and degree of their intrinsic health and physical hazards and for assessing the relevance of the information required to determine whether a chemical is hazardous. The hazardous properties of mixtures composed of two or more chemicals may be determined by assessments based on the intrinsic hazards of their component chemicals. In the case of transport, such systems and criteria must take into account the United Nations Recommendations on the transport of dangerous goods. The Convention requires the classification systems and their application to be progressively extended (Article 6).

Further indications on the criteria of classification of chemicals referred to in Article 6 of the Convention are given in Paragraph 6 of the Recommendation, and Paragraph 7 provides for the compilation and periodic update of a consolidated list of chemicals and compounds. For those not yet included on the list, unless exempted, the manufacturers and importers should transmit to the competent authority, prior to use at work, such information as is necessary for the maintenance of the list.

Labelling and marking

All chemicals must be marked indicating their identity, and hazardous chemicals have, in addition, to be labelled in a way easily understandable to the workers, so as to provide essential information regarding their classification, the hazards they present and the safety precautions to be observed. Requirements for marking and labelling have to be established by the competent authority, or by a body approved or recognized by it, in accordance with national or international standards. In the case of transport, such requirements have to take into account the United Nations Recommendation on the transport of dangerous goods (Article 7).

Chemical safety data sheets

The Convention provides that, for hazardous chemicals, chemical data sheets containing detailed essential information regarding their identity, supplier, classification, hazards, safety precautions and emergency procedures, must be provided to employers. The criteria for the preparation of safety data sheets are to be established by the competent authority, or by a body approved or recognized by it, in accordance with national and international standards. The chemical or common name used to identify the chemical on the safety data sheet must be the same as that used on the label (Article 8).

Responsibilities of suppliers

Suppliers of chemicals, whether they are manufacturers, importers or distributors, are required to ensure that: (a) such chemicals have been classified in accordance with Article 6 of the Convention as described above, on the basis of knowledge of their properties and a search of available information; (b) such chemicals are marked so as to indicate their identity in accordance with Article 7, paragraph 1, of the Convention, as indicated above; (c) hazardous chemicals that they supply are labelled in accordance with Article 7, paragraph 2, of the Convention as indicated above; and (d) chemical safety data sheets are prepared for such hazardous chemicals, in accordance with Article 8, paragraph 1, of the Convention, as indicated above (Article 9, paragraph 1).

Suppliers of hazardous chemicals are required to ensure that revised labels and chemical data sheets are prepared and provided to employers, by a method which is in conformity with national law and practice, whenever new relevant safety and health information becomes available (Article 9, paragraph 2).

Suppliers of chemicals not yet classified in accordance with Article 6 of the Convention, are required to identify the chemicals they supply and assess their properties on the basis of a search of available information in order to determine whether they are hazardous chemicals (Article 9, paragraph 3).

Responsibilities of employers

Identification

Employers have the duty to ensure that all the chemicals used at work are labelled or marked as required by Article 7 of the Convention and that chemical safety data sheets

have been provided as required by Article 8 and are available to workers and their representatives. Employers receiving chemicals not labelled or marked as required are under the obligation to obtain the relevant information from the supplier or from other reasonably available sources, and must not use the chemicals until such information is obtained. Employers have to ensure that only chemicals classified or identified and assessed, labelled or marked as required by the Convention are used, and that any necessary precautions are taken when they are used. Employers have to maintain a record of hazardous chemicals used at the workplace, cross-referenced to the appropriate chemical safety data sheets, and ensure that this record is accessible to all workers concerned and their representatives (Article 10).

Transfer of chemicals

When chemicals are transferred into other countries, Employers must ensure that the contents of chemicals are indicated in a manner that will make known to workers their identity, any hazards associated with their use and any safety precautions to be observed (Article 11).

Exposure

Employers are required to: (a) ensure that workers are not exposed to chemicals to an extent which exceeds exposure limits or other exposure criteria for the evaluation and control of the working environment established by the competent authority, or a body approved or recognized by it, in accordance with national or international standards; (b) assess the exposure of workers to hazardous chemicals; (c) monitor and record the exposure of workers to hazardous chemicals when this is necessary to safeguard their safety and health or as may be prescribed by the competent authority; and (d) ensure that the records of the monitoring of the working environment and of the exposure of workers using hazardous chemicals are kept for a period prescribed by the competent authority and are accessible to the workers and their representatives (Article 12).

Operational control

Employers are required to make an assessment of the risks arising from the use of chemicals at work, and to protect workers against such risks by appropriate means, such as: the choice of chemicals and technology that eliminate or minimise the risks; the use of adequate engineering control measures; the adoption of working systems and practices that eliminate or minimise the risks; the adoption of adequate occupational hygiene measures; and, where recourse to the above measures does not suffice, the provision and proper maintenance of personal protective equipment and clothing at no cost to the worker, and the implementation of measures to ensure their use. Employers also are required to limit exposure to hazardous chemicals so as to protect the safety and health of workers; they have to provide first aid and make arrangements to deal with emergencies (Article 13).

Disposal

Hazardous chemicals that are no longer required and containers which have been emptied but which may contain residues of hazardous chemicals must be handled or disposed of in a manner that eliminates or minimizes the risk to safety and health and to the working environment (Article 14).

Information and training

Employers are required to: (a) inform the workers of the hazards associated with exposure to chemicals used at the workplace; (b) instruct the workers on how to obtain and use the information provided on labels and chemical safety data sheets; (c) use the

chemical safety data sheets, along with information specific to the workplace, as a basis for the preparation of instructions to workers which should be written if appropriate; and (d) train the workers on a continuing basis in the practices and procedures to be followed for safety in the use of chemicals at work (Article 15).

Cooperation

In discharging their responsibilities, employers are required to cooperate as closely as possible with workers or their representatives with respect to safety in the use of chemicals at work (Article 16). With regard to the employer's responsibility to cooperate with workers and their representatives, Paragraph 20 gives more indications of the manner in which such cooperation should take place.

Duties of workers

Workers are required to cooperate as closely as possible with employers in the discharge by the employers of their responsibilities and to comply with all procedures and practices relating to safety in the use of chemicals at work. Workers have to take all reasonable steps to eliminate or minimize risk to themselves and to others from the use of chemicals at work (Article 17).

Rights of workers and their representatives

Workers must have the right to remove themselves from danger resulting from the use of chemicals when they have reasonable justification to believe there is an imminent and serious risk to their safety or health, and must inform their supervisor immediately. Workers who so remove themselves or who exercise any other rights under the Convention must be protected against undue consequences (Article 18, paragraphs 1 and 2).

The workers concerned and their representatives must have the right to: (a) information on the identity of chemicals used at work, the hazardous properties of such chemicals, precautionary measures, education and training; (b) information contained in labels and markings; (c) chemical safety data sheets; and (d) any other information required to be kept by the Convention (Article 18, paragraph 3).

The employer may, in providing the information required, protect the identity of an ingredient of a chemical mixture in a manner approved by the competent authority as provided with in Article 1, paragraph 2(b), of the Convention, if such disclosure to a competitor would be liable to cause harm to the employer's business (Article 18, paragraph 4).

More indications and guidance regarding the rights of workers (Article 18 of the Convention) are given in Paragraphs 24 to 26 of the Recommendation.

Responsibility of exporting States

When all or some uses of hazardous chemicals are prohibited for reasons of safety and health at work in an exporting member State, this fact and the reasons for it must be communicated by the exporting member State to any importing country (Article 19).

Prevention of Major Industrial Accidents Convention (No. 174) and Recommendation (No. 181), 1993

The purpose of the Convention is the prevention of major accidents involving hazardous substances and the limitation of the consequences of such accidents (Article 1, paragraph 1).

The Convention requires each Member to formulate, implement and periodically review a coherent national policy concerning the protection of workers, the public and the environment against the risk of major accidents. The policy is to be implemented through preventive and protective measures for major hazard installations and, where practicable, the promotion of the use of the best available safety technologies (Article 4). Paragraph 3, of the Recommendation advocates that the national policy provided for in the Convention and the national laws and regulations or other measures intended to implement it should be, as appropriate, guided by the ILO Code of practice on the prevention of major industrial accidents, published in 1991.

Scope and definitions

The Convention applies to major hazard installations. It does not apply to: nuclear installations and plants processing radioactive substances, except for facilities handling non-radioactive substances at these installations; military installations; or transport outside the site of an installation other than by pipeline. In addition, a Member ratifying the Convention may exclude installations or branches of economic activity for which equivalent protection is provided, after consulting the representative organizations of employers and workers concerned and other interested parties who may be affected (Article 1, paragraphs 2, 3 and 4). Paragraph 4 of the Recommendation provides that Members should develop policies aimed at addressing the major accident risks, hazards and their consequences within the sectors and activities excluded from the scope of the Convention.

Moreover, where special problems of a substantial nature arise that it is not immediately possible to implement all the preventive and protective measures provided for in the Convention, a Member is required to draw up plans for the progressive implementation of these measures within a fixed time-frame, in consultation with the most representative organizations of employers and workers and with other interested parties who may be affected (Article 2).

“Hazardous substance” is defined as meaning a substance or mixture of substances that by virtue of chemical, physical or toxicological properties, either singly or in combination, constitute a hazard. “Major hazard installation” is defined as an installation which produces, processes, handles, uses, disposes of or stores, either permanently or temporarily, one or more hazardous substances or categories of substances in quantities which exceed the threshold quantity. The “threshold quantity” means for a given hazardous substance or category of substances that quantity, prescribed in national laws and regulations by reference to specific conditions, which if exceeded identifies a major hazard installation. The term “major accident” means a sudden occurrence, such as a major emission, fire or explosion, in the course of an activity within a major hazard installation, involving one or more hazardous substances and leading to a serious danger to workers, the public or the environment, whether immediate or delayed. The terms “safety report” and “near miss” are also defined in the Convention (Article 3).

General principles

Establishment of a system for the identification of major hazard installations

The competent authority, or a body approved or recognized by it, is required to establish a system for the identification of major hazard installations as defined above, based on a list of hazardous substances or of categories of such substances or both, after consulting the most representative organizations of employers and workers and other interested parties who may be affected. This system has to be regularly reviewed and updated (Article 5).

Confidential information

The competent authority is required to make special provision to protect confidential information transmitted or made available to it in accordance with the Convention (Articles 8, 12, 13 or 14), whose disclosure would be liable to cause harm to an employer's business, so long as this provision does not lead to serious risk to the workers, the public or the environment. Such special provision must be made after consulting the representative organizations of employers and workers concerned (Article 6).

Responsibilities of employers

Identification

Employers are required to identify any major hazard installation within their control on the basis of the system of identification referred to above (Article 7).

Notification

Employers are required to notify the competent authority of any major hazard installation which they have identified within a fixed time-frame for an existing installation, and before it is put into operation in the case of a new installation. The competent authority also has to be notified by employers before any permanent closure of a major hazard installation (Article 8).

Arrangements at the level of the installation

Establishment and maintenance a documented system of major hazard control

Employers are required to establish and maintain a documented system of major hazard control for each major hazard installation. This system must include: (a) the identification and analysis of hazards and the assessment of risks including consideration of possible interactions between substances; (b) technical measures;⁷³ (c) organizational measures;⁷⁴ (d) emergency plans and procedures;⁷⁵ (e) measures to limit the consequences of a major accident; (f) consultation with workers and their representatives; and (g) improvement of the system, including measures for gathering information and analysing accidents and near misses. The lessons so learnt must be discussed with the workers and their representatives and recorded in accordance with national law and practice (Article 9).

⁷³ Including design, safety systems, construction, choice of chemicals, operation, maintenance and systematic inspection of the installation.

⁷⁴ Including training and instruction of personnel, the provision of equipment in order to ensure their safety, staffing levels, hours of work, definition of responsibilities, and control on outside contractors and temporary workers on the site of the installation.

⁷⁵ Including: (i) the preparation of effective site emergency plans and procedures, including emergency medical procedures, to be applied in case of major accidents or threat thereof, with periodic testing and evaluation of their effectiveness and revision as necessary; (ii) the provision of information on potential accidents and site emergency plans to authorities and bodies responsible for the preparation of emergency plans and procedures for the protection of the public and the environment outside the site of the installation; and (iii) any necessary consultation with such authorities and bodies.

Safety report

Based on the above requirements for arrangements at the level of the installation, employers have to prepare a safety report in the case of existing major hazard installations, within a period after notification prescribed by national laws or regulations, and in the case of any new major hazard installation, before it is put into operation (Article 10). Employers are required to review, update and amend the safety report: in the event of a modification which has a significant influence on the level of safety in the installation or its processes or in the quantities of hazardous substances present; when developments in technical knowledge or in the assessment of hazards make this appropriate; at intervals prescribed by national laws or regulations; and at the request of a competent authority (Article 11). These reports must be transmitted or made available to the competent authority by the employer (Article 12).

Accident reporting

Employers are required to inform the competent authority and other bodies designated for this purpose as soon as a major accident occurs (Article 13). They also have to present to the competent authority, within a fixed time frame after a major accident, a detailed report containing an analysis of the causes of the accident and describing its immediate on-site consequences, and any action taken to mitigate its effects. The report must include recommendations detailing actions to be taken to prevent a recurrence (Article 14).

Responsibilities of the competent authorities

Off-site emergency preparedness

The competent authority is required to ensure that emergency plans and procedures taking into account the information provided by the employer and containing provisions for the protection of the public and the environment outside the site of each major hazard installation are established, updated at appropriate intervals and coordinated with the relevant authorities and bodies (Article 15). They are also required to ensure the dissemination, updating and re-dissemination at appropriate intervals to the public liable to be affected by a major accident without their having to request it, of information on safety measures and the correct behaviour to adopt in the case of a major accident. They have to ensure that warning is given as soon as possible in the case of a major accident and, where such an accident could have transboundary effects, that the information required is provided to the States concerned, to assist in coordination arrangements (Article 16).

Siting of major hazard installations

The competent authority is required to establish a comprehensive siting policy arranging for the appropriate separation of proposed major hazard installations from working and residential areas and public facilities, and appropriate measures for existing installations. Such policy must reflect the general principles referred to above (Article 17).

Inspection

The competent authority is required to have properly qualified and trained staff with the appropriate skills, and sufficient technical and professional support, to inspect, investigate, assess and advise on matters dealt with in the Convention and to ensure compliance with national laws and regulations. Representatives of employers and of workers of major hazard installations must be given the opportunity to accompany inspectors, unless the inspectors consider, in the light of the general instructions of the competent authority, that this may be prejudicial to the performance of their duties (Article

18). The competent authority must have the right to suspend any operation posing an imminent threat of a major accident (Article 19).

Rights and obligations of workers and their representatives

Rights

Workers and their representatives in major hazard installations have to be consulted through appropriate cooperative mechanisms in order to ensure a safe system of work. In particular, they have to: (a) be adequately and suitably informed of the hazards associated with the major hazard installation and their likely consequences; (b) be informed of any orders, instructions or recommendations made by the competent authority; (c) be consulted in the preparation of, and have access to the safety report, emergency plans and procedures, and accident reports; (d) be regularly instructed and trained in the practices and procedures for the prevention of major accidents and the control of developments likely to lead to a major accident and in the emergency procedures to be followed in the event of a major accident; (e) within the scope of their job, and without being placed at any disadvantage, take corrective action and if necessary interrupt the activity where, on the basis of their training and experience, they have reasonable justification to believe that there is an imminent danger of a major accident, and notify their supervisor or raise the alarm, as appropriate, before or as soon as possible after taking such action; and (f) discuss with the employer any potential hazards they consider capable of generating a major accident and have the right to notify the competent authority of those hazards (Article 20). In Paragraph 5, the Recommendation urges Members to encourage the establishment of systems to compensate workers as quickly as possible after a major accident and adequately address the effects on the public and the environment, in view of the fact that such an accident could have serious consequences in terms of its impact on human life and the environment.

Obligations

Workers employed at the site of a major hazard installation are required to: comply with all practices and procedures relating to the prevention of major accidents and the control of developments likely to lead to a major accident within the major hazard installation; and with all emergency procedures if a major accident occurs (Article 21).

Responsibility of exporting States

When the use of hazardous substances, technologies or processes is prohibited as a potential source of a major accident in an exporting member State, the information on this prohibition and the reasons for it must be made available by the exporting member State to any importing country (Article 22).

Working Environment (Air Pollution, Noise and Vibration) Convention (No. 148) and Recommendation (No. 156), 1977

Convention No. 148 and Recommendation No. 156 have a wide scope defined in a comprehensive manner, as do the instruments on the guarding of machinery. The Office noted in its law and practice report that the improvement of the working environment has often been considered in a fragmentary way in all but a few legislations.⁷⁶ This appears particularly obvious in the measures taken against noise and vibration. These instruments are

⁷⁶ ILO, *Working environment*, ILC, 61st Session, 1976, Report VI(1), p. 10.

conceived as a first comprehensive approach to the problems, so that the general principles of prevention and protection in the field of atmospheric pollution, noise and vibration can find their place in all legislation adopted as a basis for regulations.

The instruments set out general provisions for ensuring the protection of the health of workers against hazards arising from air pollution, noise and vibration in the working place environment.

Scope and definitions

The Convention (Article 1, paragraph 1) generally applies to all branches of economic activity (see also Paragraph 1 of the Recommendation).

The Convention nevertheless provides for the possible exclusion from its scope of particular branches of economic activity in respect of which special problems of a substantial nature arise (Article 1, paragraph 2). The reference to “branches of economic activity” permits the exclusion either of certain branches requiring particular rules, or of certain technical processes according to the level of technical development, or of certain categories of persons such as self-employed workers in certain sectors.⁷⁷ Such exclusions must be made after consultation with the representative organizations of employers and workers concerned, where such exist.

The Convention further allows acceptance of its obligations separately with respect to air pollution, noise and vibration, after consultation with the representative organizations of employers and workers, where such exist (Article 2).

Article 3 of the Convention defines the risks covered in respect of air pollution, noise and vibration. The term “air pollution” covers all air contaminated by dangerous substances; the term “noise” covers all sound which can be dangerous; and the term “vibration” covers any vibration which is transmitted to the human body through solid structures and is dangerous.

General measures for protection of the working environment

Basic legislation dealing with air pollution, noise and vibration

Article 4 of the Convention lays down a general framework for the regulation of matters concerning occupational hazards in the working environment. The prevention and control of, and protection against, air pollution, noise and vibration must be regulated by national basic legislation, while the practical implementation of these measures may be dealt with by subsidiary provisions, such as technical standards or codes of practice (see also Paragraph 14 of the Recommendation). Such non-statutory measures may be made binding by being referred to in statutes. The criteria and exposure limits must be updated regularly in the light of current national and international knowledge and data (Article 8).⁷⁸

Article 5 of the Convention refers to tripartite consultations as a general principle to be applied in implementing national measures, both of statutory and operational character. Thus, in giving effect to the provisions of the Convention, the competent authority must act in consultation with the most representative organizations of employers and workers

⁷⁷ ILO, *Record of Proceedings*, ILC, 63rd Session, Geneva, 1977, p. 361.

⁷⁸ General Survey, 1987, para. 355.

concerned,⁷⁹ and the representatives of employers and workers must be associated with the elaboration of provisions concerning the practical implementation of the measures prescribed by Article 4. Provision must be made for close collaboration between employers and workers at all levels in the application of the prescribed measures; in principle, their representatives shall have the opportunity to accompany inspectors supervising the application of these measures.

Responsibilities of employers and workers and rights of workers

Employers must have the overall responsibility for compliance with the prescribed measures. Whenever several employers undertake activities simultaneously at one workplace, they have the duty to collaborate in the implementation of preventive measures. The sharing of responsibilities is without prejudice to the responsibility of each employer for the health and safety of his employees (Article 6). The competent authority may intervene in appropriate circumstances where in its opinion prescription of general procedures for the collaboration of employers would be useful.⁸⁰

Moreover, employers must be required, on conditions and in circumstances determined by the competent authority, to appoint a competent person, or use a competent outside service or service common to several enterprises to deal with prevention and control measures (Article 15).⁸¹

The responsibilities of workers concerning compliance with safety procedures are laid down in Article 7 of the Convention. As part of collaboration between workers and employers, workers or their representatives must have the right to present proposals, to obtain information and training and to appeal to appropriate bodies so as to ensure protection against occupational hazards due to air pollution, noise and vibration.⁸² The right to obtain information and instructions is also to be provided to all persons concerned (Article 13 of the Convention and Paragraph 21 of the Recommendation).

Establishment of criteria and exposure limits

The Convention requires the competent authority to establish criteria for determining the hazards of exposure to air pollution, noise and vibration in the working environment and, where appropriate, exposure limits on the basis of these criteria. It is not required to prescribe exposure limits by legislation. The competent authority is also required to take into account the opinion of technically competent persons designated by the most representative organizations of employers and workers concerned.

⁷⁹ With regard to the term “in consultation”, instead of the more usual expression “after consultation”, see below the section on the role of the competent authority, consultation with organizations of employers and workers concerned.

⁸⁰ General Survey, ILC, 1987, op. cit., para. 355.

⁸¹ The possibility of using a competent outside service or service common to several enterprises was included in Article 15 of the Convention especially considering the situation of small enterprises, *ibid.*, para. 631.

⁸² The right to training cannot be given to workers’ representatives foreign to the enterprise; this provision therefore refers to workers *or* their representatives and not to workers *and* their representatives. See ILO: *Record of Proceedings*, ILC, 1977, op. cit., p. 364.

Preventive and protective measures

Preventive and protective measures aimed at combating hazards in the working environment comprise administrative, technical and organizational measures and personal protective equipment.

The competent authority is required to specify dangerous processes, substances, machinery and equipment and to take appropriate administrative measures to regulate their use. According to Article 12 of the Convention, such measures consist of the notification of their use to the competent authority and the imposition of special conditions for their use or their prohibition.

As far as possible, the working environment must be kept free from any hazard due to air pollution, noise or vibration: by technical measures or, where this is not possible, by supplementary organizational measures regarding work organization and aimed at the reduction of the number of workers exposed, the duration and degree of such exposure to the minimum compatible with safety, as specified in various ILO codes of practice and other ILO publications (Article 9 of the Convention and Paragraphs 13 and 28 of the Recommendation).⁸³

Where, in spite of the technical or organizational measures taken in pursuance of Article 9 of the Convention, the specified exposure limits are exceeded, the employer is required to provide and maintain suitable personal protective equipment and must not require a worker to work without such equipment (Article 10 of the Convention and Paragraph 12 of the Recommendation).

Article 14 of the Convention deals with the promotion of research in the field of the prevention and control of hazards in the working environment due to air pollution, noise and vibration (see also Paragraph 22 of the Recommendation).

The relationship between the protection of the working environment and the protection of the general environment has become more and more evident as a result of a series of catastrophic accidents in different parts of the world which have created an awareness of the potential risks to nature and society in general resulting from industrial activities.⁸⁴

Recommendation No. 156 was the first ILO instrument to emphasize that account should be taken by the competent authority of the complementarity and interaction between the working and general environments (Paragraph 15).

Supervision of the health of workers

Workers who are exposed or liable to be exposed to occupational hazards due to air pollution, noise and vibration in the working environment must be subject to periodic medical supervision, including a pre-assignment medical examination, as determined by the competent authority. The supervision of health must be free of charge to the worker concerned. Where continued assignment to work involving exposure to these risks is found to be medically inadvisable, every effort has to be made to provide the worker concerned with suitable alternative employment or to maintain his or her income otherwise (Article 11 of the Convention). Paragraph 16 of the Recommendation adds, among

⁸³ General Survey, 1987, op. cit., paras. 504 and 505.

⁸⁴ General Survey, 1987, op. cit., para. 345.

measures, medical supervision after cessation of the assignment. According to Paragraph 17 of the Recommendation, the supervision of workers' health should normally be carried out during working hours.

Measures of application and supervision

In so far as prevention and control measures are dealt with by a competent person or service (Article 15 of the Convention), reference is made to the section below concerning the responsibilities of the employer.

The application of the Convention has to be ensured through national laws or regulations or any other method consistent with national practice, including the provision of appropriate penalties for non-compliance with this legislation. Its application also has to be supervised by appropriate inspection services, or ratifying States must otherwise satisfy themselves that appropriate inspection is carried out (Article 16 of the Convention and Paragraph 26 of the Recommendation). Paragraph 27 of the Recommendation also suggests that, in giving effect to its provisions, the competent authority should act in consultation with the most representative organizations of employers and workers concerned and, as appropriate, manufacturers', suppliers' and importers' organizations.

III. Protection in specific branches of activity

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Hygiene (Commerce and Offices) Convention, 1964 (No. 120)	49	The Governing Body has invited member States to contemplate ratifying Convention No. 120.
Hygiene (Commerce and Offices) Recommendation, 1964 (No. 120)	–	The Governing Body has invited member States to give effect to Recommendation No. 120.
Safety and Health in Construction Convention, 1988 (No. 167)	14	This Convention was adopted after 1985 and is considered up to date.
Safety and Health in Construction Recommendation, 1988 (No. 175)	–	This Recommendation was adopted after 1985 and is considered up to date.
Safety and Health in Mines Convention, 1995 (No. 176)	17	This Convention was adopted after 1985 and is considered up to date.
Safety and Health in Mines Recommendation, 1995 (No. 183)	–	This Recommendation was adopted after 1985 and is considered up to date.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Underground Work (Women) Convention, 1935 (No. 45)	84	The Governing Body has invited the States parties to Convention No. 45 to contemplate ratifying the Safety and Health in Mines Convention, 1995 (No. 176), and possibly denouncing Convention No. 45. It has also invited them to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 176.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Safety Provisions (Building) Convention, 1937 (No. 62)	23	The Governing Body has invited the States parties to Convention No. 62 to contemplate ratifying the Safety and Health in Construction Convention, 1988 (No. 167), the ratification of which would ipso jure involve the immediate denunciation of Convention No. 62, and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 167. Finally, it has decided to defer the decision on the shelving of Convention No. 62 to a later date and to re-examine the status of this Convention in due course.
Safety Provisions (Building) Recommendation, 1937 (No. 53)	–	The Governing Body has noted the replacement of Recommendations Nos. 53 and 55 by the Safety and Health in Construction Recommendation, 1988 (No. 175).
Co-operation in Accident Prevention (Building) Recommendation, 1937 (No. 55)	–	

Hygiene (Commerce and Offices) Convention (No. 120) and Recommendation (No. 120), 1964

The conditions of work of employees in commercial establishments and offices are becoming increasingly important as workers in these sectors become more numerous. The increase of the labour force in this sector has long been one of the most striking features of the distribution of the gainfully occupied population, not only in industrialized countries, but also in regions in the process of development. The Recommendations adopted at the international level by the ILO, before the inclusion of this subject on the agenda of the 47th Session of the Conference in 1963, did not make sufficiently specific and comprehensive provision for the conditions peculiar to the establishments in question. It therefore seemed essential to give separate consideration to the problems of workers in commercial establishments and offices and to adopt standards suited to their needs.⁸⁵

Objective

The Convention has the objective of preserving the health and welfare of workers employed in commerce and offices through measures of hygiene responding to the requirements of welfare at the workplace. For this purpose, it sets forth elementary hygiene measures to be respected in the premises lying within its scope of application.⁸⁶

Scope of application

Under the terms of Article 1 of the Convention, it applies to: trading establishments; establishments, institutions and administrative services in which the workers are mainly

⁸⁵ ILO, *Hygiene in shops and offices*, ILC, 47th Session, Geneva, 1963, Report VI(1), pp. 3 and 5.

⁸⁶ While the occupations in question do not involve the same hazards to workers' life and health as certain other branches of industrial activity, there are, however, not inconsiderable hazards, including nervous disorders which threaten all those employed in commerce and offices. Ibid., pp. 3 and 4.

engaged in office work;⁸⁷ and in commercial departments and offices in industry, mines, transport or agriculture in so far as they are not subject to national laws or regulations or other arrangements concerning hygiene.⁸⁸

Exclusions

The competent authority may, after consultation with the organizations of employers and workers, exclude from the application of the Convention specified classes of establishments, institutions or administrative services, or departments thereof, where the circumstances and conditions of employment are such that the application of the Convention to all or any of them would be inappropriate (Article 2).⁸⁹

However, in cases in which it is doubtful whether a specific establishment is one to which the Convention applies, the question has to be settled by the competent authority, after consultation with the representative organizations of employers and workers concerned, or in any other manner which is consistent with national law and practice (Article 3).

Method of application

The application of the provisions of the Convention, supplemented by those of the Recommendation, must be ensured by national laws or regulations, after consultation with the representative organizations of employers and workers concerned (Articles 4 and 5). The meaning and scope of the term “laws or regulations” is intended to cover both regulations issued by the central authority and those issued by a local authority. When a Convention provides for the adoption of “laws and regulations”, the term “laws and regulations” has to be understood in the broadest sense, that is as meaning not only laws adopted by the Parliament, but also regulations which are such as to “make effective the provisions of such a Convention”.⁹⁰ Furthermore, the labour inspectorate has to supervise the proper application of the Convention. For this purpose, the necessary measures have to be taken, including the imposition of penalties (Article 6).⁹¹

Main health, safety and welfare provisions

Each provision of Articles 7 to 19 of the Convention covers a specific aspect which must be set out in national laws and regulations in response to the specific health and safety needs in premises in which the workers are mainly engaged in office work. In general, all premises used by workers, and the equipment of such premises, must be properly maintained and kept clean (Article 7). Workplaces must have sufficient

⁸⁷ Paragraph 1(1) of Recommendation No. 120 indicates that it applies without distinction in the public and private sectors.

⁸⁸ In this respect, Paragraph 2 of the Recommendation adds an enumeration of other establishments, institutions and administrative services to which it applies.

⁸⁹ The premises, for example, of transport companies may be subject to special laws or regulations at the national level. Report VI(1), 1963, op. cit., pp. 50 and 51

⁹⁰ ILO, “Memorandum by the International Labour Office”, *Official Bulletin*, 1968, Vol. LI, No. 3, pp. 295-297; see also article 19, paragraph 5(e), of the Constitution of the ILO, which implicitly refers to the application of a Convention by legislation, administrative action, collective agreements, etc.

⁹¹ For more detailed information, see Chapter 12 on labour administration and labour inspection.

ventilation (Article 8), with sufficient and preferably natural lighting (Article 9).⁹² Furthermore, a comfortable and steady temperature has to be maintained in the workplace (Article 10).⁹³ Workplaces must be laid out and arranged so that there is no harmful effect on the health of the worker (Article 11), and underground or windowless premises have to comply with appropriate standards of hygiene (Article 16). Moreover, the Convention indicates that workers must be provided with a sufficient supply of wholesome drinking water (Article 12), sufficient and suitable washing facilities and sanitary conveniences (Article 13), suitable and sufficient seats (Article 14) and suitable facilities for changing (Article 15). In addition, workers must be protected against substances, processes and techniques which are obnoxious, unhealthy or toxic, including through the prescription of personal protective equipment, where necessary (Article 17).⁹⁴ Furthermore, workers in commercial establishments and offices have to be protected against the harmful effects of noise and vibrations as far as possible by appropriate and practicable measures (Article 18). Finally, every establishment, institution or administrative service, or department thereof, to which the Convention applies, must maintain its own dispensary or first-aid post, or maintain these facilities jointly with other establishments or institutions, or have one or more first-aid cupboards, boxes or kits (Article 19).

Moreover, the Recommendation contains further details on the specific requirements under Articles 7 to 19 of the Convention.

Safety and Health in Construction Convention (No. 167) and Recommendation (No. 175), 1988

The Safety Provisions (Building) Convention, 1937 (No. 62), was no longer sufficiently wide in scope and content to meet the conditions arising out of the technological changes in the construction industry since 1945; the adoption of new instruments appeared essential.⁹⁵

Reflecting the recommendation of the ILO Meeting of Experts on Safety and Health in Construction, held in 1985, and the Building, Civil Engineering and Public Works Committee, they provide a degree of flexibility which accommodates further technical progress and changes in methods of construction.⁹⁶ The inclusion of provision directed at protecting construction workers against risks of injury to health reflects the view endorsed by the Governing Body at its 114th Session in March 1951 that occupational safety and health are indivisible and should be treated as aspects of the same problem.

⁹² In this respect, Paragraph 17 of the Recommendation indicates that the lighting should be adapted to the nature of the work.

⁹³ The rules concerning temperature are influenced by climatic conditions and the need for heating or cooling of work premises. Report VI(1), 1963, op. cit., p. 23.

⁹⁴ These measures are less widely applied in commerce and offices than in industry. Nevertheless, in offices workers may come into contact with products in relation to which they are often not aware of the dangers, such as the liquids used in certain office machines. Report VI(1), 1963, op. cit., p. 35.

⁹⁵ ILO, *Safety and health in construction*, ILC, 73rd Session, 1987, Report V(1), p. 3.

⁹⁶ *ibid.*, p. 11.

Scope and definitions

The Convention applies to all construction activities, namely building, civil engineering, and erection and dismantling work, including any process, operation or transport on a construction site, from the preparation of the site to the completion of the project.

It nevertheless allows, after consultation with the most representative organizations of employers and workers, the exclusion from its scope of particular branches of economic activity or particular enterprises in respect of which special problems of a substantial nature arise, on condition that a safe and healthy working environment is maintained. The Convention also applies to such self-employed persons as may be specified by national laws or regulations, thus giving member States the discretion as to whether to apply the provisions of the Convention to the self-employed (Article 1).⁹⁷

Article 2 of the Convention defines the term “construction” and important related terms, for example “construction site”, “workplace”, “scaffold”, “lifting appliance” and “lifting gear”. The terms “employer”, “worker” and “competent person” are also defined by the Convention, while the term “workers’ representatives” is defined by the Recommendation (Paragraph 2(e)).

General provisions

Basic legislation

The application of the Convention has to be ensured by national laws and regulations, based on an assessment of the safety and health hazards involved (Article 4), while the practical implementation secured through technical standards or codes of practice which take account of internationally recognized standards (Article 5). This provision also permits the practical application of the laws and regulations adopted in pursuance of Article 4 by other appropriate methods consistent with national conditions and practice, such as collective agreements.⁹⁸ The ILO Code of practice on safety and health in construction, 1992, provides answers to the many practical problems confronting those who have specific duties or functions in this field. The Code is not intended to replace national legislation or accepted standards, but, has been drawn up with the object of providing guidance to those who may be engaged in the framing of provisions of this kind; in particular governmental or other public authorities, management or employers’ and workers’ organizations in this industrial sector. The issue of safety and health in construction may also be seen within the general framework of the International Programme for the Improvement of Working Conditions and Environment (PIACT).⁹⁹

Participation of employers and workers

The Convention also, deals with the participation of employers and workers. Their most representative organizations concerned must be consulted on the measures to be

⁹⁷ ILO, *Safety and health in construction*, ILC, 75th Session, 1988, Report IV(2A), p. 13.

⁹⁸ *ibid.*, p. 23.

⁹⁹ ILO, *Safety and health in construction: An ILO Code of Practice*, 1992, preface, p. vi; ILO, *Safety and health in construction*, ILC, 75th Session, 1988, Report IV(1), p. 4; see also GB.200/PFA/10/8.

taken to give effect to the provisions of the Convention (Article 3).¹⁰⁰ Employers and workers have to cooperate, in a manner defined by national legislation, in order to promote safety and health at construction sites (Article 6).

Responsibilities of employers and of persons concerned with the design and planning

Employers and self-employed persons must be made responsible for compliance with the prescribed safety and health measures and, therefore, have a general duty to provide a safe and healthy workplace (Article 7 of the Convention and Paragraph 4 of the Recommendation).

Where there is an imminent danger to the safety of workers, the employer is required to take immediate steps to stop the operation and evacuate workers as appropriate (Article 12, paragraph 2).

Moreover, employers are required to take specific technical and organizational measures to comply with the provisions set out in Articles 14 to 29 of the Convention in order to ensure the safety and health of workers working on special construction sites or under special operation conditions.¹⁰¹

Where adequate protection against risk of accident or injury to health, including exposure to adverse conditions, cannot be ensured by other means, suitable personal protective equipment and protective clothing must be provided and maintained by the employer, without cost to the workers, as may be prescribed by national laws or regulations. It is also incumbent on the employer to enable the workers to use individual protective equipment and to ensure its proper use by workers. The standards set by the competent authority, taking into account as far as possible ergonomic principles, must be obligatory for protective equipment and protective clothing (Article 30).

The employer is also be responsible for ensuring that first aid, including trained personnel, is available at any time and that workers who have suffered an accident or sudden illness can be removed for medical attention (Article 31 of the Convention and Paragraphs 49 and 50 of the Recommendation).

Workers must be provided with drinking water; sanitary, washing and changing facilities; accommodation for taking meals, and shelter (Article 32 of the Convention and Paragraphs 51 and 52 of the Recommendation). The inspection of welfare facilities is provided for in Article 35 of the Convention. Workers must also be adequately and suitably informed of potential safety and health hazards to which they may be exposed at their workplace, as well as instructed and trained in the measures available for the prevention and control of, and protection against, those hazards (Article 33).

Reporting of occupational accidents and diseases to the competent authority, as prescribed by national laws and regulations, also falls under the responsibility of the employer.

Whenever two or more employers undertake activities simultaneously at one construction site, the principal contractor, or other person or body with actual control over

¹⁰⁰ In its commentary, the Office considered that consultation is required before measures are taken and that it is implicit that the consultation is initiated by the government. Report IV(2A), ILC, 1988, op. cit., p. 21.

¹⁰¹ For more details, see the section below on *responsibilities of the employer*.

or primary responsibility for overall construction site activities, must be responsible for coordinating the prescribed safety and health measures and, in so far as is compatible with national laws and regulations, for ensuring compliance with such measures. Where the person with primary responsibility or actual control is not present at the site, he or she has to nominate a competent person at the site to ensure on his or her behalf coordination and compliance with the prescribed measures. This applies without prejudice to the responsibility of each employer for the safety and health of his or her workers. The Convention also requires cooperation between employers or self-employed persons in similar cases (Article 8 of the Convention and Paragraph 5 of the Recommendation). These provisions partly follow the relevant wording of Article 6 of the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148).

Those concerned with the design and planning of a construction project have to take into account the safety and health of the construction workers (Article 9 of the Convention and Paragraph 7 of the Recommendation).

Rights and obligations of workers

Workers must have the right and the duty to participate in ensuring safe working conditions and to express views on the working procedures (Article 10 of the Convention and Paragraph 11 of the Recommendation), the right to remove themselves from danger in case of an imminent and serious danger to their safety or health and the duty so to inform their supervisor immediately (Article 12).

The workers also have the duty to: cooperate with their employer; take care for their own safety and that of other persons; use facilities placed at their disposal; report forthwith to their immediate supervisor and to the workers' safety representative any situation which they believe could present a risk; and comply with the prescribed safety and health measures (Article 11).¹⁰² The workers must be required to make proper use of and to take good care of the personal protective equipment and protective clothing provided for their use (Article 30).

Reflecting the relevant duties of the employer, workers are entitled to welfare facilities, information, instruction and training (Articles 32 and 33).

Preventive and protective measures

It must be ensured that workplaces are safe and without risk of injury to the safety and health of workers. This implies safe means of access to and egress from all workplaces and protection from all possible risks of persons at or near a construction site (Article 13).

The Recommendation suggests additional preventive and protective measures during the planning and preparation of construction work (Paragraph 9 of the Recommendation) and the notification to the competent authority of specific details of construction sites (Paragraph 10).

The Convention and Recommendation then set out in concrete terms detailed technical measures targeted at ensuring the safety of workers who are required to carry on processes or operations in a specific working environment or with specific equipment. In this context, it should be emphasized that details as to the nature of potentially dangerous objects, processes and operations are matters to be dealt with in codes of practice, which

¹⁰² Reporting the workers' safety representatives is intended to enable them to function effectively without making them responsible for corrective action. Report IV(2A), ILC, 1988, op. cit., p. 30.

can be reviewed and if necessary revised from time to time to reflect changes in construction methods, materials and equipment.¹⁰³ The above measures concern the erection and use of scaffolds and ladders on high buildings (Article 14 of the Convention and Paragraphs 16 to 21 of the Recommendation); modern lifting appliances and gear, such as tower cranes (Article 15 of the Convention and Paragraphs 22 to 29 of the Recommendation); transport, earth-moving and materials-handling equipment (Article 16 of the Convention and Paragraphs 30 to 33 of the Recommendation); plant, machinery, equipment and hand tools (Article 17); work at heights, including roof work (Article 18); excavations, shafts, earthworks, underground works and tunnels (Article 19 of the Convention and Paragraphs 34 and 35 of the Recommendation); cofferdams and caissons (Article 20); work in compressed air (Article 21 of the Convention and Paragraphs 36 and 37 of the Recommendation); structural frames and formwork (Article 22); pile driving (Paragraphs 38 and 39 of the Recommendation); work over water (Article 23 of the Convention and Paragraph 40 of the Recommendation); demolition (Article 24); lighting (Article 25); electricity (Article 26); explosives (Article 27); fire precautions (Article 29 of the Convention and Paragraphs 46 and 47 of the Recommendation); and radiation hazards (Paragraph 48 of the Recommendation).¹⁰⁴

Where exposure to any chemical, physical or biological hazard reaches such an extent that it is liable to be dangerous to health, preventive measures must comprise: the replacement of hazardous substances by harmless or less hazardous substances; or technical measures applied to the plant, machinery, equipment or process; or, where replacement or technical measures cannot be executed, other effective measures, including the use of personal protective equipment and protective clothing. The Convention also deals with the specific risk of entry into confined spaces (Article 28, paragraph 3, of the Convention). The wording of the provisions is partly similar to that of Article 10 of the Asbestos Convention, 1986 (No. 162). Dangerous atmospheres may be regarded as a type of health hazard. The hazards from radiation, noise and vibration are dealt with in Conventions Nos. 115 and 148 and Recommendations Nos. 114 and 156.¹⁰⁵

The Recommendation includes among its provisions indicators on: an information system based on results of international scientific research; information for architects, contractors, employers and workers' representatives on the health risks emanating from hazardous substances used in the construction industry; information on products provided by manufacturers and dealers on health risks; the protection of workers, the public and the environment, as prescribed by national legislation, in connection with the use of materials containing hazardous substances; and the removal and disposal of waste.

Implementation

Each Member is required to take all necessary measures, including the provision of appropriate penalties and corrective measures, to ensure the effective enforcement of the provisions of the Convention, and to provide appropriate inspection services to supervise the application of the measures to be taken in pursuance of the Convention (Article 35).

¹⁰³ ILO, *Safety and health in construction*, ILC, 73rd Session, 1987, Report IV(2), p. 25; and Report V(1), 1988, op. cit., p. 33.

¹⁰⁴ For further information see the sections below on the *obligations of employers*.

¹⁰⁵ Report V(2), ILC, 1987, op. cit., p. 55.

Safety and Health in Mines Convention (No. 176) and Recommendation (No. 183), 1995

The development of international standards on mines was considered to be important to member States for the following reasons: firstly, because of the value to workers, employers and governments of instruments that address areas where existing instruments are deficient and to consolidate such standards as do exist for the benefit of the sector-specific regulatory authorities already established in member States. Secondly, the provision of new instruments would mark the recognition of the considerable economic importance of mining in both industrially developed and emerging nations. Furthermore mining, which is an industry undergoing rapid and significant technological change, is known to be one of the most hazardous occupations in view of the adverse effects on mineworkers' health of exposure to the multiple hazards of a working environment unique to mines.¹⁰⁶

In 1990, the Office published a collection of the ILO Coal Mines Committee's conclusions and resolutions in a document known at the Coal mineworkers' charter. This charter comprises a substantial body of social policy guidelines specific to the coalmining sector which, although not legally binding, could be considered as a minimum international social code.¹⁰⁷ Furthermore, there have been five meetings of the Tripartite Committee for Mines other than Coal Mines since 1957 to discuss and report on the social and labour issues in mining. The 1995 instruments recognize the opinions, recommendations and conclusions of these Committees.

A number of ILO standards have a direct or indirect bearing on safety and health in mines, such as: the Underground Work (Women) Convention, 1935 (No. 45); the Minimum Age (Underground Work) Convention (No. 123), and Recommendation (No. 124), 1965; and the Conditions of Employment of Young Persons (Underground Work) Recommendation, 1965 (No. 125). Although not specific to mines, other ILO instruments on the protection of workers from safety and health hazards in the working environment are equally applicable to them, such as: the Radiation Protection Convention, 1960 (No. 115); the Guarding of Machinery Convention, 1963 (No. 119); the Working Environment (Air Pollution, Noise and Vibration) Convention (No. 148), and Recommendation (No. 156), 1977; the Occupational Safety and Health Convention (No. 155), and Recommendation (No. 164), 1981; the Asbestos Convention, 1986 (No. 162); and the Chemicals Convention, 1990 (No. 170). While the provision of these standards also apply to mines, they do not specifically address the particular hazards prevalent in mines, such as the dangers resulting from the transient nature of operations, or the sudden geographical and other changes that jeopardize mineworkers' safety.¹⁰⁸

Definitions and scope

Article 1 of the Convention defines the terms "mine" and "employer" for the purpose of the Convention. The term "any physical or legal person", used to define the meaning of

¹⁰⁶ ILO, *Safety and health in mines*, ILC, 81st Session, 1994, Report V(1), p. 1.

¹⁰⁷ *ibid.*, p. 8.

¹⁰⁸ *ibid.*, pp. 9-10.

“employer”, may also include the operator, the principal contractor, contractor or subcontractor.¹⁰⁹

The Convention and the Recommendation apply to all mines (Article 2 of the Convention and Paragraph 2 of the Recommendation). The Office pointed out that the words “in particular” indicate a broader meaning of the mining activities enumerated in Article 1(a) so that national legislation can expand the scope of the definition, including options for its application to small, almost informal, mines.¹¹⁰ On the other hand, certain categories of mines may, after consultation with the most representative organizations of employers and workers, be excluded by the competent authority from the scope of the Convention. In this case, the overall protection afforded at these mines under national law and practice must at least correspond to the level of protection as provided in the case of full application of the Convention. The member State, moreover, has to make plans for progressively covering all mines and indicate in its reports on the application of the Convention the categories of mines excluded and the reasons for the exclusion.

Members are required to formulate, carry out and periodically review a coherent policy on safety and health in mines. This has to be done in the light of national conditions and practice and after consultation with the most representative organizations of employers and workers (Article 3).

The Recommendation also suggests that these consultations should include the effect of the length of working hours, night work and shift work on workers’ safety and health and that, after such consultations, the necessary measures concerning working time, especially maximum daily working hours and minimum daily rest periods, should be taken (Paragraph 3).

Means of application

Article 4 of the Convention calls for national laws and regulations to prescribe measures for ensuring the application of the Convention. Where appropriate, national laws and regulations must be supplemented by technical standards, guidelines or codes of practice, or other means of application consistent with national practice, as identified by the competent authority.¹¹¹

According to Article 5 of the Convention, national legislation, pursuant to Article 4 of the Convention, must designate the competent authority that is to monitor and regulate safety and health in mines and must provide for: supervision, inspection, reporting and investigating procedures; statistics; suspension or restriction of mining activities by the competent authority; procedures to ensure workers’ consultation and participation; supervision of the manufacture, storage, transport and use of explosives and initiating devices at the mine by competent and authorized persons; and the preparation of appropriate plans of work before the start of the operation, to be provided, updated and kept available by the employer in charge of the mine.

¹⁰⁹ ILO, *Safety and health in mines*, ILC, 82nd Session, 1995, Report IV(2A), p. 15.

¹¹⁰ *ibid.*, p. 15, and Report V(1), ILC, 1994, *op. cit.*, p. 21.

¹¹¹ The ILO codes of practice *Safety and health in coal mines*, 1986, and *Safety and health in opencast mines*, 1991, provide guidance on many practical problems confronting employers, workers and governments. Member States might consider these Codes in giving effect to any new instrument(s), thus avoiding the inclusion of specific provisions that may quickly become obsolete. Report VI(1), ILC, 1994, *op. cit.*, p. 21.

Further measures to be specified by national legislation are related to: mine rescue, first-aid and medical facilities; self-rescue respiratory devices; security in abandoned mine workings; safe storage, transportation and disposal of hazardous substances and waste; and sanitary conveniences and welfare facilities.

The Recommendation adds supplementary suggestions concerning: properly qualified staff and sufficient technical support for the competent authority; research and exchange of information; specific assistance by the competent authority to small mines on technical know-how, preventive safety and health programmes and cooperation between employers and workers; and the rehabilitation and reintegration of workers (Paragraphs 4 and 5 of the Recommendation).

The supervision of safety and health in mines should, where appropriate, also include certification and training; the handling, transportation, storage and use of explosives and hazardous substances; and performance of work on electrical equipment and installations (Paragraph 6).

Provision should be made for the responsibility of suppliers of equipment, appliances, hazardous products and substances to the mine, to comply with national safety and health standards and to provide comprehensible information and instructions (Paragraph 7).

Concerning mine rescue, first aid and medical facilities for emergency care, requirements should include: equipment; trained persons and mine rescue teams; communication and warning systems; and medical attention and transportation for workers who have been injured or become ill owing to work, without any cost to them (Paragraph 8).

Furthermore, national laws and regulations should prescribe how to use safely and maintain properly remote control equipment and should specify measures that are appropriate to be taken by the employer for the protection of workers working alone or in isolation (Paragraphs 10 and 11).

Preventive and protective measures

Responsibilities of employers

One of the main duties of the employer consists of risk assessment, followed by risk management. The Convention prescribes, as measures to be carried out by order of priority, the elimination, control or minimization of the risk and, in so far as the risk remains, provision for the use of personal protective equipment (Article 6 of the Convention and Paragraph 12 of the Recommendation).

Article 7 of the Convention imposes a wide range of technical and organizational measures on employers to eliminate or minimize risks to the safety and health of workers. In particular, they are required to ensure the appropriate design and construction of the mine and its provision with electrical, mechanical and other equipment, including a communication system; safe working conditions by the way in which the mine is commissioned, operated, maintained and decommissioned; the stability of the ground in areas of access of workers; two exits from underground worksites with separate means of egress to the surface; monitoring, assessment and regular inspection of the working environment to identify hazards and exposure level; good ventilation of underground workings; operating plans and procedures ensuring a safe system of work in zones

susceptible to particular hazards;¹¹² appropriate precautions against the outbreak and spread of fires and explosions; the stoppage of operations and evacuation of workers in cases of serious danger.

The Recommendation indicates more specific measures which may be undertaken by the employer in order to maintain the stability of the ground (Paragraph 13); to provide means of egress independent of each other and equipment for the safe evacuation of workers in case of danger (Paragraph 14 in conjunction with Article 7(d) of the Convention); and to ensure appropriate ventilation of underground mine workings in order to maintain a safe and healthy atmosphere in compliance with national or international standards on dusts, gases, radiation and climatic conditions (Paragraph 15 in conjunction with Article 7(f) of the Convention).

The Recommendation also enumerates specific hazards, such as mine fires and explosions, gas outbursts, rock bursts, or an inrush of water, which might require an operating plan and procedures (Paragraph 16 in conjunction with Article 7(g) of the Convention).

Paragraphs 17 and 18 of the Recommendation contain detailed suggestions regarding appropriate precautions against fires and explosions (Paragraph 17 in conjunction with Article 7(h) of the Convention). In this context, reference is made to the ILO codes of practice on the prevention of accidents due to fires underground in coal mines, 1959, the prevention of accidents due to electricity underground in coal mines, 1959, and the prevention of accidents due to explosion underground in coal mines, 1974. Mine facilities should include fireproof and self-contained chambers to provide refuge in the event of emergency (Paragraph 18 in conjunction with Article 7(i) of the Convention).

The employer is required to prepare an emergency response plan for foreseeable industrial and natural disasters in the specific mine (Article 8). Paragraph 19 of the Recommendation suggests details which might be included in the plan.

Where workers are exposed to physical, chemical or biological hazards, Article 9 of the Convention establishes the employer's obligations to: inform them of hazards, health risks and preventive and protective measures; take measures to eliminate or minimize the risks; where adequate protection cannot be ensured otherwise, provide and maintain, free of charge to the workers, suitable protective equipment, clothing and other facilities defined by national law; and provide workers who have suffered from an injury or illness at the workplace with first aid, transportation from the workplace and access to medical facilities.

Paragraphs 20 to 22 of the Recommendation give examples of hazards as referred to in Article 9 of the Convention, including airborne dusts, noxious mine gases, fumes and hazardous substances, radiation from rock strata and noise and vibration. They also enumerate measures to be taken pursuant to Article 9 of the Convention, such as: technical and organizational measures; where recourse to such measures is not possible, other effective measures, including personal protective equipment and protective clothing at no cost to the worker; or regular monitoring and inspection of areas which are or might be hazardous. And they mention types of protective equipment and facilities, such as protective structures against rollover and falling objects, seatbelts and harnesses, fully enclosed pressurized cabins and self-contained rescue chambers.

¹¹² According to the Office commentary, the word "procedures" includes instructions or rules. Report IV(2A), ILC, 1995, op. cit., pp. 29-30.

According to Article 10 of the Convention, the employer's responsibilities include: training and retraining programmes and instructions for workers, without any cost to them; supervision and control on each shift (see also Paragraph 23 of the Recommendation); investigation of accidents and dangerous occurrences; and reporting on accidents and dangerous occurrences.

Article 11 of the Convention establishes the employers' responsibility to ensure, on the basis of general principles of occupational health and in accordance with national laws and regulations, regular health surveillance of workers exposed to occupational health hazards specific to mining. Paragraph 24 of the Recommendation specifies further details on the health surveillance, which should be provided, at no cost to the worker and without any discrimination or retaliation.

Where two or more employers undertake activities at the same mine, the employer in charge of the mine has to bear the primary responsibility for the safety of the operations and coordinate the implementation of the necessary measures, without prejudice to the responsibility of each individual employer for the safety and health of his or her workers (Article 12).

Rights and duties of workers and their representatives

Workers must have, under the national laws and regulations referred to in Article 4 of the Convention, the rights listed in Article 13, paragraph 1, of the Convention. They must, accordingly, be able to report accidents and hazards to the employer and the competent authority; request and obtain, where there is cause for concern on safety and health grounds, inspections and investigations to be carried out by the employer and the competent authority; obtain information on occupational hazards that may affect their safety and health and information relevant to their safety or health, held by the employer or the competent authority; remove themselves from any location in the mine under certain circumstances; and collectively select safety and health representatives.

The Recommendation proposes that there should be no discrimination or retaliation against workers who exercise rights provided by national legislation or agreed upon by employers, workers and their representatives (Paragraph 32).

Safety and health representatives, in accordance with national legislation, must have the rights enumerated in Article 13, paragraph 2, of the Convention. In particular, they must be able to: participate in inspections and investigations conducted by the employer and the competent authority at the workplace; monitor and investigate safety and health matters; have recourse to advisers and independent experts; consult with the employer and the competent authority; and obtain information on accidents and dangerous occurrences relevant to the area for which they have been selected.

The procedures for exercising the rights of workers and their representatives have to be specified by national laws and regulations and through consultations between employers and workers and their representatives. National legislation must ensure that the abovementioned rights can be exercised without discrimination or retaliation (Article 13, paragraphs 3 and 4).

Paragraphs 26 to 29 of the Recommendation supplement the provisions of the Convention on the rights and duties of workers and their representatives concerning: information; the right of workers to remove themselves from any location at the mine; and the rights and duties of safety and health representatives.

According to Article 14 of the Convention, the duties of workers under national laws and regulations shall comprise, in accordance with their training: compliance with the

prescribed safety and health measures; taking care for their own safety and health and that of other persons who may be affected by their acts or omissions at work, including proper care and use of protective clothing, facilities and equipment placed at their disposal; reporting without delay to their immediate supervisor any situation which they believe could present a risk to their safety and health or that of other persons and which they cannot resolve by themselves; and cooperation with employers to enable them to fulfil their duties and responsibilities.

The Recommendation indicates that it is a duty of all persons to refrain from arbitrarily disconnecting, changing or removing safety devices fitted to machinery, equipment, appliances, tools, plant and buildings; and to use such safety devices correctly. Employers should be obliged to provide workers with training and instructions so as to enable them to comply with the above duties (Paragraph 30).

Cooperation of employers and workers

National laws and regulations must provide for measures to be taken to encourage cooperation between employers and workers and their representatives to promote safety and health in mines (Article 15).

Paragraph 31 of the Recommendation provides further details on these measures, which should include, for example: safety and health committees, with equal representation of employers and workers; the appointment by the employer of competent persons to promote safety and health; the consultation of workers and their representatives by the employer in establishing safety and health policies and procedures; and the inclusion by the employer of workers' representatives in the investigation of accidents and dangerous occurrences, as provided for in Article 10(d) of the Convention.

Implementation

Member States are required to take all necessary measures, including the provision of appropriate penalties and corrective measures, to ensure the implementation of the Convention. They also have to provide inspection services to supervise the application of the measures to be taken and furnish these services with the necessary resources (Article 16).

Paragraph 33 of the Recommendation draws attention to the possible impact of mining operations on the surrounding environment and the safety of the public. Due regard should be given in this respect.

10.2. Principles of occupational safety and health standards

General dynamic nature of standards

The occupational safety and health risks facing working populations are constantly affected and influenced by the introduction of new products, processes, work organization, technologies and the like, requiring equally constant assessment, determination, prevention and control of the hazards raised. The setting, review and implementation of occupational

safety and health standards is recognized as involving a progressive and incremental process of taking measures and is not limited to a one-time effort.¹¹³

Principles common to most occupational safety and health standards

ILO standards on occupational safety and health and the working environment embody the principles which define the consensus of rules in this field with the vital objective of ensuring that work takes place in a safe and healthy environment.¹¹⁴ They also allocate powers, duties and responsibilities to the competent authorities, as well as defining the rights and obligations of employers, workers and other organizations concerned.¹¹⁵

Role of the competent authority

Formulation, implementation and periodic review of national policy

Recent general and sector or risk-specific ILO occupational safety and health standards (such as the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Health Services Convention, 1985 (No. 161), the Chemicals Convention, 1990 (No. 170), the Prevention of Major Industrial Accidents Convention, 1993 (No. 174), the Safety and Health in Mines Convention, 1995 (No. 176)), have adopted an approach that requires Members to formulate, implement and periodically review the national policy covered by each Convention. This requirement goes further than and is often in addition to the standard approach of requiring the competent authorities concerned to take specified measures, often by means of laws, regulations or other means,¹¹⁶ to meet the technical requirements provided for in the Convention concerned.¹¹⁷

Coherence of national policy

Not only do these Conventions provide for the adoption, implementation and periodic review of such national policy, they also require that such national policy be coherent.¹¹⁸ This means that what is required is not only the taking of the various technical measures each on its own, but also the complementarity and coherence of all such measures when taken as a whole.

¹¹³ ILO: *Safety and health and the working environment*, ILC, 66th Session, Geneva, Report VII(a)(1), 1980.

¹¹⁴ ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 83rd Session, Geneva, 1996, Report III (Part IVA), para. 61.

¹¹⁵ Article 6 of Convention No. 155.

¹¹⁶ See, for example, Article 8 of Convention No. 155 and Article 4 of Convention No. 176.

¹¹⁷ *ibid.*

¹¹⁸ “This policy must be coherent, in other words, it must be made up of mutually compatible components making up a consistent whole.” Report VII(a)(1), 1980, *op. cit.*, p. 59.

Consultation with organizations of employers and workers concerned

“There are some instruments which deal with subjects where the need for consultations is particularly strongly felt, including the standards concerning occupational safety and health. The special provisions for consultations with employers’ and workers’ organisations which are included in these instruments reflect the vital role they play in ensuring protection of working people against hazards in the working environment.”¹¹⁹ The formulation, implementation and periodic review of the national policy is to be made in consultation with the most representative organizations of employers and workers¹²⁰ and after consultations with the same organizations.¹²¹ The Committee of Experts has indicated that the use of the words “in consultation”, instead of the more usual expression “after consultation” is intended “to point out that there may be several levels of consultation at various stages in the procedure established to give effect to the provisions of the Convention, and that these organisations should be actively involved in the processes of decision-making and implementation”.¹²² Such consultation requirements are common in the provisions contained in the parts of occupational safety and health Conventions dealing with measures to be taken at the national level, or in the flexibility clauses in provisions concerning the scope of application of these Conventions.¹²³

Consultations with other organizations

Other than employers’ and workers’ organizations, some of the Conventions require consultations to be carried out with other bodies or organizations. In this respect, the Committee of Experts has noted that “... the opinion of technically competent persons designated by the most representative organisations of employers and workers concerned shall be taken into account by the competent authority in the elaboration of the criteria and the determination of exposure limits, in accordance with Article 8, paragraph 2”, of the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148).¹²⁴ Furthermore, Convention No. 155 requires such additional consultations with other bodies as appropriate to ensure cooperation between various authorities and bodies with a view to ensuring the coherence of the national policy on occupational safety and health and the working environment.¹²⁵ Similarly, Convention No. 119 also requires that, as appropriate, manufacturers’ organizations should be consulted by the competent authority before any national laws or regulations giving effect to the provisions of the Convention are made (Article 16), and in case of allowing temporary exemptions from the prohibition of the sale, hire, transfer in any other manner and exhibition of machinery without

¹¹⁹ *Safety in the working environment*, General Survey, 1987, op. cit., para. 571.

¹²⁰ In the case of Conventions Nos. 155, 161, 170, 174.

¹²¹ In the case of Convention No. 176.

¹²² General Survey, 1987, op. cit., para. 574.

¹²³ See for example Article 1, para. 2, of Convention No. 148; Article 1, para. 2, Article 2, para. 2, of Convention No. 155; Article 3, paras. 2 and 3, of Convention No. 161; Article 3, para. 3 of Convention No. 162; Article 3 of Conventions Nos. 167 and 170; Article 6 of Convention No. 174. In the case of consultations under Article 17, para. 2, of Convention No. 119, they could be initiated by the most representative organizations of employers and workers.

¹²⁴ General Survey, 1987, op. cit., para. 575.

¹²⁵ Article 15, para. 1.

appropriate guards (Article 5, paragraph 3). Analogous provisions are found in Paragraphs 5(3) and 19 of Recommendation No. 118.¹²⁶ Another Convention also requires such consultations with “other interested parties who may be affected” when using the possibility of excluding from the application of the Convention installations or branches of economic activity that have equivalent protection; when a Member is drawing up plans for the progressive implementation of all the preventive and protective measures where special problems of a substantial nature arise which make it not immediately possible to implement all such measures; when formulating, implementing and periodically reviewing a coherent national policy concerning the protection of workers, the public and the environment against the risk of major accidents; when establishing a system for identification of major hazard installations; when employers establish and maintain a documented system of major hazard control which includes provision for emergency plans and procedures, including any necessary consultation with authorities and bodies responsible for the preparation of emergency plans and procedures for the protection of the public and the environment outside the site of the installation.¹²⁷

Occupational health services must carry out their functions in cooperation with the other services in the enterprise. Measures must also be taken, in accordance with national law and practice, to ensure adequate cooperation and coordination between occupational health services and, as appropriate, other bodies concerned with the provision of health services.¹²⁸

Institutional arrangements

The need for coherence of the national policy, the requirement of consultations with representative organizations of employers and workers, as well as the need to coordinate the various authorities and bodies called upon to give effect to the provisions dealing with the principles of national policy and the measures to be taken at the national level, are the reasons why arrangements, appropriate to national conditions and practice, have to be made, including, whenever circumstances so require and national conditions and practice permit, the establishment of a central body. Frequently, such central bodies take the form of national councils on occupational safety and health.

Measures to give effect to national policy

Members are obliged to take steps to give effect to the requirements of the Conventions. These steps have to be taken by means of laws or regulations or any other method consistent with national conditions and practice,¹²⁹ and in consultation with the representative organizations of employers and workers concerned. The formulation of a national policy should indicate the respective functions and responsibilities, in relation to occupational safety and health and the working environment, of public authorities, employers, workers and others.¹³⁰ These national laws and regulations must also designate

¹²⁶ General Survey, 1987, op. cit., para. 596.

¹²⁷ Articles 1, para. 4, 2, 4, 5, para. 1, 9(d)(i), of Convention No. 174.

¹²⁸ Article 9, paras. 2 and 3, of Convention No. 161.

¹²⁹ For example, in the case of Convention No. 176, provision is made for supplementing these laws and regulations by technical standards, guidelines or codes of practice or other means identified by the competent authority in para. 2(a) and (b) of Article 4. Article 4 of Convention No. 148, and Article 5, para. 1, of Convention No. 167 contain similar possibilities.

¹³⁰ See for example Article 8 of Convention No. 155; Article 5, para. 2(f), of Convention No. 176.

the competent authority that is to monitor and regulate the various aspects of safety and health covered by the Conventions.¹³¹

Providing for protective and preventive measures

The essence of ILO standards on occupational safety and health and the working environment is the establishment of the required preventive and protective measures. All these measures, whether they require the identification, elimination, minimizing, containment, prohibition, labelling of products or agents, or whether they fix exposure limits, must aim at the prevention and protection of workers and the working environment.¹³² Some Conventions provide the legal and institutional framework for occupational safety and health and the working environment.¹³³ Other standards covering specific risks, provide for generally worded protective and preventive measures.¹³⁴ Still others provide more detailed provisions on protective and preventive measures in specific sectors of economic activity, such as construction, mining or dock work.¹³⁵ In any event, these more or less detailed standards are supplemented by codes of practice that provide even more specific guidelines for practical application. Some of these codes are specifically referred to by the respective Conventions.¹³⁶ Some of these preventive and

¹³¹ See the example of Article 5, para. 1, of Convention No. 176.

¹³² For many substances and procedures which are hazardous to use, a substitute or measures offering the best possible protection have not yet been found. For this reason, fixing concentrations plays an important role and can serve as a criterion for assessing the danger present in the workplace and for studying and controlling preventive and protective measures. The competent authority accordingly has to set criteria through which exposure risks can be determined and, where appropriate, has to determine exposure limits on the basis of these criteria. Finally, exposure criteria and limits must be supplemented and revised at regular intervals, in the light of current scientific knowledge. In addition, certain Conventions and Recommendations call for the determination of exposure criteria and limits in relation to the various hazardous substances and agents. The Benzene Convention (No. 136) and Recommendation (No. 144), 1971, for example, place the obligation on the competent authority to fix a maximum concentration of benzene in the air of places of employment at a level not exceeding a ceiling value of 25 parts per million (80 mg/m³). The Convention adds that this maximum ceiling should be lowered as soon as possible if medical evidence shows this to be desirable. The Occupational Cancer Convention, 1974 (No. 139), sets forth measures to be taken to restrict the use of carcinogenic substances and agents in the workplace, and its accompanying Recommendation (No. 147) invites the competent authority to establish the criteria for determining the degree of exposure to the substances or agents in question, and where appropriate to specify levels as indicators for surveillance of the working environment. The maximum permissible doses of ionizing radiations which may be received from sources external to or internal to the body and the maximum permissible amounts of radioactive substances which can be taken into the body have to be fixed for various categories of workers, in accordance with the Radiation Protection Convention (No. 115) and Recommendation (No. 114), 1960. The Asbestos Convention (No. 162) and Recommendation (No. 172), 1986, also require the determination of limits for the exposure of workers to this substance. All of the above instruments provide that exposure criteria and limits must be periodically reviewed and updated in the light of technical and scientific progress.

¹³³ Conventions Nos. 155 and 161.

¹³⁴ Conventions Nos. 148, 115, 136 and 139.

¹³⁵ Conventions Nos. 167, 176 and 152.

¹³⁶ Examples are Article 1, para. 3, of Convention No. 139; Paragraph 7 of Recommendation No. 147; Paragraph 5 of Recommendation No. 172; and Paragraph 18(3) of Recommendation No. 118.

protective measures cut across most of these standards and are of general and vital application.

Measures of supervision and application

Given the “detailed and complex nature of the provisions of these instruments, a certain amount of emphasis may be focused on their implementation in practice”.¹³⁷ Occupational safety and health standards, understandably, include provisions concerning their application and the enforcement of their provisions. Invariably, these instruments “contain the usual provisions that governments should provide appropriate inspection services for the purpose of supervising the application of the provisions of the instruments, or should satisfy [themselves] that appropriate inspection is carried out.”^{138 139} Furthermore, another Convention recognizes the right of representatives of the employer and that of workers of a major hazard installation to have the opportunity to accompany inspectors supervising the application of the measures taken in pursuance of the Convention unless,¹⁴⁰ in light of the general instructions of the competent authority, this may be prejudicial to the performance of their duties.¹⁴¹ It is not uncommon to find provisions in such instruments requiring employers and workers or their representatives to cooperate as closely as possible at all levels in the enterprise in the application of the measures prescribed pursuant to the Convention concerned.¹⁴² This is also consistent with the requirements of the ILO’s basic labour inspection standards.¹⁴³ In addition, two other

¹³⁷ General Survey, 1987, *op. cit.*, para. 617. Even though this phrase concerns Conventions Nos. 119 and 148, it holds true for the other occupational safety and health instruments.

¹³⁸ *ibid.* para. 621. Although it is true both Conventions Nos. 119 and 148 (in Articles 15, para. 2, and 16(b) respectively) use the term inspection “for the purpose of supervising the application of the provisions of the Convention”, the more accurate or appropriate language is that contained in Article 9, para. 1, of Convention No. 155, which provides that the “enforcement of laws and regulations concerning occupational safety and health and the working environment shall be secured by an adequate and appropriate system of inspection”. This is also consistent with the requirements of the three principal instruments on labour inspection (Conventions Nos. 81, 129 and 178) that inspection is made for “legal provisions” (which include, in addition to laws and regulations, arbitration awards and collective agreements upon which the force of law is conferred – see Articles 3, para. 1(a), and 27, of Convention No. 81; Articles 2 and 6, para. 1(a), of Convention No. 129; and Articles 1, para. 7(c), and 3, para. 1(2), of Convention No. 178), which often have to be adopted or agreed upon to conform to the provisions of ratified Conventions.

¹³⁹ Instruments such as Convention No. 174 spell out the requirements in this respect by providing that the “competent authority shall have properly qualified and trained staff with the appropriate skills, and sufficient technical and professional support, to inspect, investigate, assess, and advise on matters dealt with in this Convention and to ensure compliance with national laws and regulations” (Article 18, para. 1); or that national laws and regulations shall provide for inspection of mines by inspectors designated for the purpose by the competent authority (Article 5, para. 2(b), of Convention No. 176); and that the Member shall provide the appropriate inspection services that supervise the application of the measures taken in pursuance of the Convention, with the resources necessary for the accomplishment of their tasks (Article 35(b) of Convention No. 167 and Article 16(b) of Convention No. 176).

¹⁴⁰ Article 18, para. 2, of Convention No. 174.

¹⁴¹ Similar provisions are to be found in Conventions Nos. 139 (Article 5) and 162 (Article 5).

¹⁴² For example, Article 8 of Convention No. 162, Article 8 of Convention No. 161 and Article 11(a) of Convention No. 167.

¹⁴³ Article 5(b) of Convention No. 81 and Article 13 of Convention No. 129.

Conventions¹⁴⁴ recognize that “[r]epresentatives of the employer and representatives of workers” of a major hazard installation and of the enterprise “shall have the opportunity to accompany inspectors ..., unless the inspectors consider, in light of the general instructions of the competent authority, that this may be prejudicial to the performance of their duties”,¹⁴⁵ while another Convention¹⁴⁶ gives the safety and health representatives of workers the right to participate in inspections and investigations conducted by the employer and by the competent authority at the workplace.¹⁴⁷ Members that have not ratified Conventions Nos. 81 and 129 should be guided by their provisions.¹⁴⁸

In addition to inspection services, under another Convention, a competent person has to examine and test lifting appliances, and pressure plants, and inspect scaffolds, and cofferdams and caissons.¹⁴⁹ The Convention defines a competent person as a person possessing adequate qualifications, such as suitable training and sufficient knowledge, experience and skill for the safe performance of the specific work.

Provisions requiring the taking of all necessary measures, including the provision of appropriate penalties and corrective measures for violations of the requirements set out therein, are to be found in almost all the Conventions.¹⁵⁰ Other measures, such as the power to order the suspension of operations, are also provided for.¹⁵¹

Occupational health surveillance

The Committee of Experts has emphasized the importance of the protection and supervision of the health of workers by noting that this question “has long been one of the major preoccupations of the ILO, and is widely reflected in its standard-setting activity”.¹⁵² The Committee of Experts has noted that “the question of medical examination has been the subject of several other ILO instruments in the field of

¹⁴⁴ Conventions Nos. 148 (Article 5, para. 4) and 174 (Article 18, para. 2).

¹⁴⁵ See also Part II (Collaboration of employers and workers in regard to health and safety) of Recommendation No. 81 of 1947, and Paragraph 10 of Recommendation No. 133 of 1969, “which advocate as one of the possible forms of collaboration in the establishment in undertakings of committees for hygiene and safety or similar bodies including representatives of employers and workers”. Report III (Part 4B), ILC, 71st Session, 1985, para. 283.

¹⁴⁶ Convention No. 176 (Article 13, para. 2(b)(ii)).

¹⁴⁷ Underlining the importance of allowing the members of committees and/or safety delegates to accompany labour inspectors on their inspection visits, the Committee of Experts considers that “... their knowledge of the working environment makes joint committees and safety delegates particularly able to detect certain problems which they may point out to the inspector during his[/her] visit”. *ibid.*, para. 285.

¹⁴⁸ It should also be pointed out that Paragraph 5 of Recommendation No. 164 recommends that, with respect to the system of inspection referred to in Article 9, para. 1, of Convention No. 155, Members should be guided by Conventions Nos. 81 and 129.

¹⁴⁹ Articles 15(d), 17, para. 3, 14, para. 4, 20, para. 3, of Convention No. 167.

¹⁵⁰ Article 16(a) of Convention No. 176; Article 16(a) of Convention No. 148; Article 35(a) of Convention No. 167.

¹⁵¹ Article 19 of Convention No. 174; Article 5, para. 2(e), of Convention No. 176.

¹⁵² General Survey, 1987, *op. cit.*, para. 519.

occupational safety and health, namely those [...] concerning benzene, occupational cancer and asbestos”.¹⁵³ In addition, it noted the adoption by the Conference in 1985 of the Occupational Health Services Convention (No. 161) and Recommendation (No. 171), “which constitute an important step in promoting further development of national systems of medical supervision of workers”.¹⁵⁴

“[D]ata resulting from the surveillance of the working environment should be recorded in an appropriate manner and be available to the employer, the workers and their representatives in the undertaking concerned or the safety and health committee, where they exist.”¹⁵⁵

The medical examinations in question are of two kinds. One kind is conducted by a qualified physician, approved by the competent authority,¹⁵⁶ and the other consists of laboratory tests conducted in conjunction with the medical examination.¹⁵⁷

Whereas occupational safety and health measures in general must not involve any cost for the workers,¹⁵⁸ a number of these instruments also provide that neither the supervision of the health of workers nor the medical examinations, tests and investigations must involve the workers in any expense, or must be free of cost to the workers concerned.¹⁵⁹ Moreover, they must be carried out,¹⁶⁰ or should normally be carried out¹⁶¹ as far as possible in or during working hours.¹⁶² In addition, another Convention¹⁶³ requires that the surveillance of workers’ health in relation to work shall involve no loss of earnings for them. Employers and workers must inform occupational health services of any known factors and any suspected factors in the working environment.¹⁶⁴ These services must also be informed of occurrences of ill health among workers and absence from work for health reasons,¹⁶⁵ and they should record data on workers’ health in personal confidential health files. Access to such files should be restricted to medical personnel

¹⁵³ *ibid.*, para. 523.

¹⁵⁴ *ibid.*, para. 519.

¹⁵⁵ Paragraph 6(1) of Recommendation No. 171.

¹⁵⁶ Article 10(a) of Convention No. 136.

¹⁵⁷ *ibid.*

¹⁵⁸ Article 21 of Convention No. 155.

¹⁵⁹ See Article 12 of Convention No. 161; Article 10, para. 2, of Convention No. 136; Paragraph 18 of Recommendation No. 144; Paragraph 13 of Recommendation No. 147; Article 11, para. 2, of Convention No. 148; Paragraphs 17 and 22 of Recommendation No. 114; Article 21, para. 2, of Convention No. 162.

¹⁶⁰ Article 12 of Convention No. 161, and Paragraph 18 of Recommendation No. 144.

¹⁶¹ Paragraph 17 of Recommendation No. 156.

¹⁶² Article 12 of Convention No. 161 and Paragraph 13 of Recommendation No. 147.

¹⁶³ Article 12 of Convention No. 161.

¹⁶⁴ Article 14 of Convention No. 161.

¹⁶⁵ Article 15 of Convention No. 161.

when they contain personal information covered by medical confidentiality, and personal data relating to health assessments may be communicated to others only with the informed consent of the worker concerned.¹⁶⁶ Questions relating to the obligation to keep records of the results of surveillance of the working environment, and of the health of workers, the length of time for which they are to be kept, by whom, the period of the confidentiality of the results of examinations and the related question of the rights of the worker have been evoked by the Committee of Experts.¹⁶⁷ However, access to these records must be allowed to the workers concerned, their representatives and the inspection services.¹⁶⁸

With a view to making the best possible use of the medical data collected, these must be examined in correlation with the worker's health file, particularly with regard to the characteristics of previous jobs, chemical products with which the worker may have been in contact, the duration and nature of such exposure, occupational and non-occupational diseases contracted, manufacturing processes used and the health, medical and hygiene measures taken. The keeping of medical files for exposed workers is required in particular by the instruments on ionizing radiations, occupational cancer and asbestos.¹⁶⁹

When continued assignment to work involving exposure to the hazard concerned is found medically inadvisable, every effort has to be made, consistent with national conditions and practice, to provide the workers concerned with other means of maintaining their income.¹⁷⁰

Reporting and investigation of occupational accidents, occupational diseases, incidents, dangerous occurrences, and the compilation and publishing of statistics

Monitoring and surveillance of the health of workers, and the maintenance of records relating to them and their results, are intended to enable public authorities to have an overview of the occupational health of workers in relation to the hazards they face at work. Moreover, workers are expected to report to the employer any accident or injury arising in the course of or in connection with work,¹⁷¹ and employers have to keep such records relevant to occupational safety and health and the working environment as are considered necessary by the competent authority or authorities, which might include records of all notifiable occupational accidents and injuries at or in connection with work and data

¹⁶⁶ Paragraph 14 of Recommendation No. 171.

¹⁶⁷ In its General Survey, 1987, *op. cit.*, in particular as regards Convention No. 148, paras. 519-569.

¹⁶⁸ Article 20, para. 3, of Convention No. 162.

¹⁶⁹ Paragraph 24 of Recommendation No. 114; Article 3 of Convention No. 139; Article 21, para. 5, of Convention No. 162; and Paragraph 36 of Recommendation No. 172.

¹⁷⁰ The need to find alternative employment for a worker whose continued employment in a particular job is contra-indicated for health reasons is a general principle of occupational medicine, set out in Paragraph 17 of the Occupational Health Services Recommendation, 1985 (No. 171); see also, Article 21, para. 4, of Convention No. 162. Examples of similar provisions are Article 14 of Convention No. 115; Article 11, para. 3, of Convention No. 148; and Paragraph 27(d) of Recommendation No. 183.

¹⁷¹ Paragraph 16(e) of Recommendation No. 164.

concerning exposure to specified substances and agents.¹⁷² In addition, other occupational safety and health standards contain provisions relating to the establishment, by the competent authorities, of procedures on the recording, compilation, reporting and publication of statistics relating to occupational accidents, occupational diseases, dangerous occurrences and incidents.¹⁷³ Another Convention requires the competent authority or authorities to ensure the progressive carrying out of the establishment and application of procedures for the notification of occupational accidents and diseases, by employers and, when appropriate, insurance institutions and others directly concerned, and the production of annual statistics on such accidents and diseases.¹⁷⁴

The same public authority or authorities are required to publish annually information on the measures taken in pursuance of the national policy, and on occupational accidents, occupational diseases and other injuries to health arising in the course of or in connection with work.¹⁷⁵ Moreover, the Occupational Health Services Convention, 1985 (No. 161), requires occupational health services to be informed of occurrences of ill health among the workers, as they also have the function of participating in the analysis of these accidents and diseases.¹⁷⁶

Convention No. 155 also requires that the competent authority ensure that inquiries are held, where cases of occupational accidents, occupational diseases or any other injuries to health arise in the course of or in connection with the work and appear to reflect situations which are serious.¹⁷⁷

First aid and emergencies

While primary responsibility is often placed on employers for the provision of first-aid and emergency treatment, there are provisions in the standards in this field that place a

¹⁷² Paragraph 15(2) of Recommendation No. 164. See also Article 3 of Convention No. 139 and Paragraph 15(1)(a) of Recommendation No. 147; Article 10, para. 1(b), of Convention No. 136; Paragraphs 17(b) and 27 of Recommendation No. 144; Paragraph 82 of Recommendation No. 120; Paragraphs 24, 25 and 26 of Recommendation No. 114; Article 10(d) and (e) of Convention No. 176; Paragraph 13(a) of Recommendation No. 183; Article 12(b)(c) and (d) of Convention No. 170; Paragraph 18 of Recommendation No. 156; Paragraph 13 of Recommendation No. 171. Similarly, the employers' obligation to inform the competent authority and other designated bodies as soon as a major accident occurs, including a detailed report containing an analysis of the causes and describing its immediate on-site consequences, and any action taken to mitigate its effects, are set out in Articles 13 and 14 of Convention No. 174.

¹⁷³ See Articles 11(d) and 34 of Convention No. 167; Articles 5, para. 2(c) and (d), and 10(d) and (e), of Convention No. 176; and Article 21, para. 5, of Convention No. 162.

¹⁷⁴ Article 11(c) of Convention No. 155.

¹⁷⁵ Article 11(e) of Convention No. 155.

¹⁷⁶ Articles 5(k) and 15 of Convention No. 161, and Paragraphs 8(f) and 13 of Recommendation No. 171. It should also be remembered that Conventions Nos. 81 (Articles 14 and 21(f) and (g), as well as Paragraph 9(f) and (g) of Recommendation No. 81) and 129 (Articles 19 and 27(f) and (g)) both contain requirements regarding the need to inform the labour inspection services of cases of occupational accidents and diseases, as well as the compilation and publication of statistics annually in labour inspection reports.

¹⁷⁷ Article 11(d).

certain amount of responsibility on public bodies.¹⁷⁸ To the extent that occupational health services are provided by or with the involvement of public bodies, these public bodies must be involved in organizing first-aid and emergency treatment. With respect to mine safety, national laws and regulations must specify requirements relating to mine rescue, first aid and appropriate medical facilities, and an obligation to provide and maintain adequate self-rescue respiratory devices for workers in underground coal mines and where necessary in other underground mines.¹⁷⁹ In the particular situation of major industrial accidents, the competent authority, taking into account the information provided by the employer, must ensure that emergency plans and procedures, including provisions for the protection of the public and the environment outside the site of the installation, are established, updated at appropriate intervals and coordinated with the relevant authorities and bodies.¹⁸⁰

Provision of information and training

Competent authorities concerned with occupational safety and health are generally not engaged directly in the provision of information and training to workers, and their obligation is often limited to ensuring that the primary providers of the information, training and instruction (employers, designers, manufacturers, importers, etc.) fulfil their obligations in this regard.¹⁸¹ There are, however, a number of instances where they are required to provide such information and training directly. For example, governments must take measures to provide guidance to employers and workers so as to help them to comply with legal obligations.¹⁸² They are also obliged to take measures to include questions of occupational safety and health and the working environment at all levels of education and training, including higher technical, medical and professional education, in a manner meeting the training needs of all workers.¹⁸³ With respect to specific agents or products, the competent authority must make appropriate arrangements to promote the dissemination of information and the education of all concerned with regard to health hazards due to exposure to dangerous products or substances (asbestos, carcinogenic substances, ionizing radiations) and methods of prevention and control.¹⁸⁴ With respect to carcinogenic substances and agents, each ratifying State must take steps to ensure that workers who have been, or are likely to be exposed to carcinogenic substances or agents, are provided with all the available information on the dangers involved and on the measures to be taken.¹⁸⁵ In the case of the protection of workers against ionizing radiations, governments

¹⁷⁸ It should also be remembered that Conventions Nos. 81 (Articles 14 and 21(f) and (g), as well as Paragraph 9(f) and (g) of Recommendation No. 81) and 129 (Articles 19 and 27(f) and (g)) both contain requirements regarding the need to inform labour inspection services of cases of occupational accidents and diseases and on the compilation and publication of statistics annually in labour inspection reports.

¹⁷⁹ Article 5, para. 4(a) and (b), of Convention No. 176.

¹⁸⁰ Articles 15 and 16 of Convention No. 174.

¹⁸¹ See, for example, Article 12(b) of Convention No. 155 and Article 22, para. 2, of Convention No. 162.

¹⁸² Article 10 of Convention No. 155.

¹⁸³ Article 14 of Convention No. 155.

¹⁸⁴ Article 22, para. 1, of Convention No. 162.

¹⁸⁵ Article 4 of Convention No. 139. See Paragraphs 16 to 21 of Recommendation No. 147.

must adopt rules and measures to ensure effective protection of workers, and data essential for such protection must be made available.¹⁸⁶ Appropriate warnings must indicate the presence of hazards from ionizing radiations, and any information necessary in this connection must be provided to workers. All workers directly engaged in radiation work must be adequately instructed before and during such employment.¹⁸⁷ With respect to chemicals, the competent authority must also ensure that: information on safety measures and the correct behaviour to adopt in the case of a major accident is disseminated to members of the public liable to be affected by a major accident without their having to request it and that such information is updated and redisseminated at appropriate intervals; warning is given as soon as possible in the case of a major accident; and where a major accident could have transboundary effects, such information is provided to the States concerned to assist in cooperation and coordination arrangements.¹⁸⁸ Finally, occupational health services must have the function of collaborating in providing information, training and education in the fields of occupational health and hygiene and ergonomics.¹⁸⁹

Research

Given the fact that the question of occupational safety and health and the working environment is in constant evolution and that it is important to have increased up-to-date knowledge about existing and new health and safety hazards, as well as the manner and means of preventing and protecting against them, it is logical for the standards to contain provisions on research. Governments or the competent authorities must take measures with a view to ensuring that those who design, manufacture, import, provide or transfer machinery, equipment or substances for occupational use, undertake studies and research or otherwise keep abreast of the scientific and technical knowledge necessary to ensure that they do not entail dangers for the safety and health of those using them correctly.¹⁹⁰ Measures must also be taken to promote research in the field of the prevention and control of hazards in the working environment due to air pollution, noise and vibration.¹⁹¹

Disclosure of confidential information

The question of the treatment of confidential information is pertinent in the domain of occupational safety and health because of the importance of information in preventive and protective measures. Governments and competent authorities are required to ensure that workers and others affected by occupational hazards are provided with the necessary information. This may involve commercial secrets. Arrangements at the level of the enterprise have to be made under which information on the measures taken by the

¹⁸⁶ Article 3, paras. 1 and 2, of Convention No. 115.

¹⁸⁷ Article 9 of Convention No. 115.

¹⁸⁸ Article 16 of Convention No. 174.

¹⁸⁹ Article 5(i) of Convention No. 16.

¹⁹⁰ Article 12 of Convention No. 15.

¹⁹¹ Article 14 of Convention No. 148. Similar provisions can be found in some of the Recommendations on the subject, such as Paragraph 22(1) of Recommendation No. 156; Paragraph 26 of Recommendation No. 144; Paragraph 27 of Recommendation No. 128; Paragraph 80(1) of Recommendation No. 120; and Paragraph 11 of Recommendation No. 172.

employer on occupational safety and health are given to representatives of workers in an enterprise, on condition that they do not disclose commercial secrets.¹⁹²

Women and young workers

While all occupational safety and health provisions are applicable to all workers covered by the standards concerned irrespective of sex, there are special provisions covering the minimum age for certain activities and risks and particular provisions pertaining to women workers with special protection because the consequences for them are considered more serious.¹⁹³ The special protection for women and young workers may take two forms: either the prohibition of employing these categories of workers for specific types or work; or the establishment of special working conditions in certain types of work.

Role of employers

Obligations

General standards

Earlier occupational safety and health Conventions, such as Conventions Nos. 115, 120, 136 and 139, contain only a limited number of provisions directly setting out the obligations of employers. It was for the government or competent authority, based on the provisions of the Conventions concerned, to define and provide for the obligations of employers by national laws, regulations or other appropriate means. Later Conventions, such as Conventions Nos. 148, 167, 170, 176, and more particularly Convention No. 162, spell out in some detail the various obligations of employers. In addition, Conventions Nos. 148 (Article 6, paragraph 1), 162 (Article 6, paragraph 1) and 167 (Article 7) explicitly place the responsibility for compliance with the prescribed measures on the employer.

Safety of workplaces, machinery, equipment and processes, chemical, physical and biological substances and agents

Employers are required to ensure that, so far as is reasonably practicable,¹⁹⁴ the workplaces, machinery, equipment and processes under their control are safe and without risk to health. They are also required to ensure that, so far as is reasonably practicable, the chemical, physical and biological substances and agents under their control are without risk to health when appropriate measures of protection are taken.¹⁹⁵ The obligation to

¹⁹² Article 19(c) of Convention No. 155; Articles 1, para. 2(b), 18, para. 4, of Convention No. 170; and Article 6 of Convention No. 174.

¹⁹³ Article 11 of Convention No. 136; Article 7 of Convention No. 115; Paragraph 16 of Recommendation No. 114; Article 3 of Convention No. 139; and Paragraph 25(4) of Recommendation No. 177. See also: *Occupational safety and health series*, 1974, pp. 25-26.

¹⁹⁴ This phrase “so far as is reasonably practicable” has been a subject of concern both to employers, who are clinging to its use to ensure that they are permitted to introduce the idea of practicability not only in the technical sense, but in the economic sense as well, and to workers, who would prefer its disappearance from such standards as they fear it would leave the safety and health protection of workers at the will of the employer without any objective yardstick. The Office has indicated in unofficial advice that the meaning of this phrase is dependent on each context, but in this context it would be not a requirement as to results, but as to means.

¹⁹⁵ Article 16, paras. 1 and 2, of Convention No. 155.

comply with the prescribed measures in the Conventions is placed on employers. This is explicitly stated in general terms in Article 6 of Convention No. 148, Article 7 of Convention No. 167 and Article 7 of Convention No. 119.¹⁹⁶ The other Conventions place the specific obligation for compliance on the employer under each specific provision.

Preventive and protective measures

Technical prevention measures must be an integral part of any process in which workers are exposed, or may be exposed, to risks to their safety and health.

Most of the Conventions addressing general and specific risks contain provisions on:

– Risk assessment

In eliminating and minimizing the risks to safety and health in mines under their control, employers are required in particular to ensure the monitoring and assessment and regular inspection of the working environment to identify the various hazards to which the workers may be exposed and to assess their level of exposure.¹⁹⁷ The employer's obligation is to assess the risks arising from the use of chemicals at work,¹⁹⁸ but not to assess the hazardous nature of the chemicals.¹⁹⁹ In respect of major hazard installations, employers must establish and maintain a documented system of major hazard control which includes provision for the identification and analysis of hazards and assessment of risks, including consideration of possible interactions between substances.²⁰⁰ The occupational health services must have, as one of their functions, the identification and assessment of the risks from health hazards in the workplace.²⁰¹

– Eliminate, minimize and take protective measures

In taking preventive and protective measures in mines, the employer must deal with the risk in the following order: eliminate it; control it at the source; minimize it; and if it remains, provide for the use of personal protective equipment.²⁰²

– Labelling, classifying, marking, fencing and appropriate warning

The obligation to classify, mark, label chemicals and to prepare chemical safety data sheets for hazardous chemicals rests with the suppliers.²⁰³ The employer also has the

¹⁹⁶ In the case of Convention No. 167, this obligation applies to the self-employed, and in the case of Convention No. 119 the obligation to comply with other measures not relating to the use of machinery (the sale, hire, transfer in any other manner and exhibition) is with the vendor, the person letting out on hire or transferring the machinery in any other manner, or the exhibitor and, where appropriate under national laws or regulations, with their agents (Article 4 of Convention No. 119). See also Article 12 of Convention No. 155.

¹⁹⁷ Article 7(e) of Convention No. 176.

¹⁹⁸ Article 13 of Convention No. 170.

¹⁹⁹ Articles 6 to 9.

²⁰⁰ Article 9(a) of Convention No. 174.

²⁰¹ Article 5 of Convention No. 161.

²⁰² Article 6 of Convention No. 176.

obligation to ensure compliance with these requirements before chemicals are made available to workers and their representatives.²⁰⁴ Appropriate warnings are to be used to indicate the presence of hazards from ionizing radiations, and any information necessary in this connection must be supplied to the workers. All workers directly engaged in radiation work must be adequately instructed, before and during such employment, in precautions to be taken for their protection, as regards their health and safety, and the reasons thereof.²⁰⁵

– *Respect exposure limits, monitor and reduce such exposures*

In the context of unhealthy and dangerous work, employers are required to take specific organizational measures. These are intended to restrict the numbers of workers exposed,²⁰⁶ and to reduce the duration and degree of such exposure to the minimum compatible with safety.²⁰⁷ Requirements also include limitation of access to premises which are at risk and the placing of warning signs.²⁰⁸ In all workplaces where workers are exposed to asbestos, the employer must take all appropriate measures to prevent or control the release of asbestos dust into the air, to ensure that exposure limits or other exposure criteria are complied with and to reduce exposure to as low a level as is reasonably practicable.²⁰⁹ Moreover, each employer is responsible for the establishment and implementation of practical measures for the prevention and control of the exposure to asbestos of the workers employed and for their protection.²¹⁰ Employers must ensure that workers are not exposed to chemicals in excess of the established exposure limits, and they must assess, monitor and record such exposure of workers.²¹¹

– *Disposal of waste*

Under Convention No. 170, hazardous chemicals which are no longer required and containers which have been emptied but which may contain residues of hazardous chemicals must be handled or disposed of in a manner which eliminates or minimizes the risk to safety and health and to the environment, in accordance with national law.²¹² Employers are also required to dispose of waste containing asbestos in a manner that does

²⁰³ Article 9 of Convention No. 170.

²⁰⁴ Article 10 of Convention No. 170. Under Convention No. 162, it is the producers and suppliers of asbestos and the manufacturers and suppliers of products containing asbestos that are responsible for labelling the container, in a language and manner easily understood by the workers and users concerned, as prescribed by the competent authority (Article 14). Article 12 of Convention No. 136 provides that the word “Benzene” and the necessary danger symbols must be clearly visible on any container holding benzene or products containing benzene.

²⁰⁵ Article 9 of Convention No. 115.

²⁰⁶ Article 2, para. 2, of Convention No. 139.

²⁰⁷ *ibid.*

²⁰⁸ Paragraph 17 of Recommendation No. 172.

²⁰⁹ Article 15, para. 3, of Convention No. 162.

²¹⁰ Article 16 of Convention No. 162.

²¹¹ Article 12 of Convention No. 170.

²¹² Article 14.

not pose a health risk to the workers concerned, including those handling asbestos waste, or to the population in the vicinity of the enterprise. Both the competent authorities and employers have to take appropriate measures to prevent pollution of the general environment by asbestos dust released from the workplace.²¹³

– *Appointment of a competent person or use of an outside service to deal with prevention and control of air pollution, noise and vibration*

On conditions and in circumstances determined by the competent authority, the employer must appoint a competent person, or use a competent outside service or service common to several enterprises, to deal with matters pertaining to the prevention and control of air pollution, noise and vibration in the working environment.²¹⁴

– *Preparation of an emergency response and provision of first aid*

Employers are required to provide, where necessary, for measures to deal with emergencies and accidents, including adequate first-aid arrangements.²¹⁵ Occupational health services must have the function of organizing first-aid and emergency treatment.²¹⁶ With respect to mines, the employer is required to prepare an emergency response plan, specific to each mine, for reasonably foreseeable industrial and natural disasters.²¹⁷ The employer must also provide workers who have suffered from an injury or illness at the workplace with first aid, appropriate transportation from the workplace and access to appropriate medical facilities.²¹⁸ With respect to major hazard installations, the documented system of major hazard control which has to be established and maintained must include: provision for emergency plans and procedures, including the preparation of effective site emergency plans and procedures, emergency medical procedures to be applied in case of major accidents or threat thereof, with periodic testing and evaluation of their effectiveness and revision as necessary; the provision of information on potential accidents and site emergency plans to authorities and bodies responsible for the preparation of emergency plans and procedures for the protection of the public and the environment outside the site of the installation; and any necessary consultation with such authorities and bodies.²¹⁹ In the case of chemicals, employers are required to provide first aid and to make arrangements to deal with emergencies.²²⁰ With respect to construction, the employer must also ensure that first aid, including trained personnel, is available at all

²¹³ Article 19 of Convention No. 162. See also Article 28, para. 4, of Convention No. 167 which, without explicitly stating that it is the duty of the employer, prohibits the destruction or disposal otherwise of waste on a construction site in a manner which is liable to be injurious to health (Article 28, para. 4).

²¹⁴ Article 15 of Convention No. 148.

²¹⁵ Article 18 of Convention No. 155.

²¹⁶ Article 5(j) of Convention No. 161.

²¹⁷ Article 8 of Convention No. 176.

²¹⁸ Article 9(d) of Convention No. 176.

²¹⁹ Article 9(d) of Convention No. 174.

²²⁰ Article 13, para. 2, of Convention No. 170.

times and that arrangements are made to ensure the removal for medical attention of workers who have suffered an accident or sudden illness.²²¹

– *Adoption of measures to limit consequences*

Under Convention No. 174, the employer's documented system of major hazard control must include provision for measures to limit the consequences of a major accident.²²² According to Convention No. 176, employers are required to take all necessary measures to eliminate or minimize the risks to safety and health in mines under their control, and in particular to ensure that when there is serious danger to the safety and health of workers, operations are stopped and workers are evacuated to a safe location.²²³ Once workers are exposed to physical, chemical or biological hazards, the employer must take appropriate measures to eliminate or minimize the risks resulting from the exposure to those hazards.²²⁴ Under Article 12, paragraph 2, of Convention No. 167, where there is an imminent danger to the safety of workers, the employer must take immediate steps to stop the operation and evacuate workers as appropriate. Article 7(i) of Convention No. 176, also requires employers to ensure that, when there is serious danger to safety and health, operations are stopped and workers are evacuated to a safe location.

– *Provision of personal protective equipment and clothing*

Where collective technical prevention measures are insufficient and do not make it possible to maintain exposure within the limits set by the competent authority, employers are required to provide appropriate individual protective equipment to persons who work on unhealthy processes or handle unhealthy agents. The provision of such special equipment must not replace collective measures to prevent and control exposure to such hazards. The equipment must be maintained and replaced as necessary. Convention No. 155, for example, requires employers to provide, where necessary, adequate protective clothing and protective equipment to prevent, as far as is reasonably practicable, the risk of accidents or of adverse effects on health.²²⁵ With respect to benzene, under Article 8 of Convention No. 136, workers who have skin contact with liquid benzene or liquid products containing benzene have to be provided with adequate means of personal protection against the risk of absorbing benzene through the skin. Workers who are exposed to concentrations of benzene in the air of places of employment exceeding the fixed limits must be provided with adequate means of personal protection against the risk of inhaling benzene vapour and the duration of such exposure must be limited as far as possible. When measures taken in pursuance of Convention No. 162 do not bring exposure to asbestos within the exposure limits or do not comply with other exposure criteria specified in the Convention, the employer must provide, maintain and replace, as necessary, at no cost to the workers, adequate respiratory protective equipment and special protective clothing as appropriate.²²⁶ Where the measures taken in pursuance of Convention No. 148 do not bring air pollution, noise and vibration in the working environment within the limits

²²¹ Article 31 of Convention No. 167.

²²² Article 9(e).

²²³ Article 7(i).

²²⁴ Article 7(i).

²²⁵ Article 16, para. 3.

²²⁶ Article 15, para. 3.

specified, the employer must provide and maintain suitable personal protective equipment, and must not require the worker to work without such equipment.²²⁷ With respect to mines, the last of the preventive and protective measures that the employer must take is to provide for the use of personal protective equipment when the risk remains.²²⁸ Under Convention No. 170, where all other protective measures do not suffice, the employer must provide and properly maintain personal protective equipment and clothing at no cost to the worker and ensure their use (Article 13(f)). In the case of construction, under Article 30 of Convention No. 167, where adequate protection against the risk of accident or injury to health, including exposure to adverse conditions, cannot be ensured by other means, suitable personal protective equipment and protective clothing, having regard to the type of work and risks, must be provided and maintained by the employer, without cost to the workers, as may be prescribed by national laws or regulations.

– *Ensuring health surveillance*

One of the functions of occupational health services must be the surveillance of workers' health in relation to work.²²⁹ With regard to asbestos, where it is necessary for the protection of the health of workers, the employer has to measure the concentrations of airborne asbestos dust in workplaces and must monitor the exposure of workers to asbestos at intervals and using methods specified by the competent authority. The records of the monitoring must be kept for the prescribed period.²³⁰ Employers are required to monitor and record the exposure of workers to hazardous chemicals when this is necessary to safeguard their safety and health, or as may be prescribed by the competent authority, and to keep the records of such monitoring for the prescribed period.²³¹ With respect to mines, Convention No. 176 requires the employer to ensure the provision of regular health surveillance of workers exposed to occupational health hazards specific to mining.²³²

– *Provision of sanitary and welfare facilities*

The employer is required to provide facilities for workers exposed to asbestos to wash, take a bath or shower at the workplace, as appropriate.²³³ With regard to construction,²³⁴ Convention No. 167 requires that at or within reasonable access of every construction site, an adequate supply of wholesome drinking water be provided. It also requires the provision and maintenance at or within reasonable access of every construction site, and depending on the number of workers and the duration of the work, of sanitary and washing facilities (separate for men and women), facilities for changing and for the storage and drying of clothing, accommodation for taking meals and for taking

²²⁷ Article 10.

²²⁸ Article 6(d) of Convention No. 176.

²²⁹ Article 5(f) of Convention No. 161.

²³⁰ Article 20, paras. 1 and 2, of Convention No. 162.

²³¹ Article 12 (c) and (d) of Convention No. 170.

²³² Article 11.

²³³ Article 18, para. 5, of Convention No. 162.

²³⁴ Article 32.

shelter during interruption of work due to adverse weather conditions.²³⁵ With respect to mines, Convention No. 176 requires that national laws and regulations specify, where appropriate, an obligation to supply sufficient sanitary conveniences and facilities to wash, change and eat, and to maintain them in hygienic condition.²³⁶ Regarding commerce and offices, Convention No. 120 requires the provision to workers of a sufficient supply of wholesome drinking water or some other wholesome drink, the provision and proper maintenance of sufficient and suitable washing facilities and sanitary conveniences, the supply of sufficient and suitable seats for workers and reasonable opportunities of using them, and the provision and proper maintenance of suitable facilities for changing, leaving and drying clothing.²³⁷ The maintenance and cleaning of workplaces are to be carried out by a safe method and as frequently as is necessary to prevent the accumulation of dust on surfaces.²³⁸ In addition, Convention No. 161 requires that one of the functions of the occupational health services is the surveillance of the factors in the working environment and the working practices which may affect workers' health, including sanitary installations, canteens and housing, where these facilities are provided by the employer (Article 5(b)).

Provision of information, instruction and training

Some Conventions require arrangements to be made at the level of the enterprise under which representatives of workers in an enterprise are given adequate information on the measures taken by the employer to secure occupational safety and health, and workers and their representatives in an enterprise are given appropriate training in occupational safety and health.²³⁹ Occupational health services are required to have, as one of their functions, collaboration in providing information, training and education in the fields of occupational safety and hygiene and ergonomics.²⁴⁰ The employer is required to take steps to instruct workers, as and where appropriate, regarding the dangers arising and the precautions to be observed in the use of machinery.²⁴¹ With respect to air pollution, noise and vibration,²⁴² Convention No. 148 requires that all persons concerned must be adequately and suitably informed of potential occupational hazards in the working environment due to air pollution, noise and vibration, and instructed in the measures

²³⁵ Although Article 32 does not explicitly place the obligation on the employer, as is done in Article 31, in accordance with Article 7 employers and self-employed persons are clearly responsible for compliance with the prescribed safety and health measures at the workplace. It is also difficult to conceive of this obligation as falling on the competent authority. In any event, the history of Articles 31 and 32 indicates the reference to the employer in Article 31 was added during the later stages of the second reading. See Reports V(1) and (2), 73rd Session, ILC, 1987, and Reports IV(2A) and (2B), 75th Session, ILC, 1988.

²³⁶ Article 5, para. 4(e).

²³⁷ Articles 12, 13, 14 and 15 of Convention No. 120.

²³⁸ Article 24 of Recommendation No. 172.

²³⁹ For example, Article 19(c) and (d) of Convention No. 155.

²⁴⁰ Article 5(i) of Convention No. 161.

²⁴¹ Article 10, para. 1, of Convention No. 119.

²⁴² Article 13.

available for the prevention and control of, and protection against those hazards.²⁴³ Similarly, another Convention²⁴⁴ requires that workers be adequately and suitably informed of potential safety and health hazards to which they may be exposed at their workplace, and instructed and trained in the measures available for the prevention and control of, and protection against, those hazards.²⁴⁵ Convention No. 162 requires the employer to ensure that all workers exposed or likely to be exposed to asbestos are informed about the health hazards related to their work, instructed in preventive measures and correct working practices and receive continuing training in these fields.²⁴⁶ In construction, the employer is required to ensure that adequate training and retraining programmes and comprehensible instructions are provided for workers, at no cost to them, on safety and health matters, as well as on the work assigned.²⁴⁷ Regarding major industrial accidents, Convention No. 174 requires employers to establish and maintain a documented system of major hazard control, which includes provision for organizational measures, including training and instruction of personnel.²⁴⁸ In the area of chemicals, Article 15 of Convention No. 170 makes employers responsible for: informing workers of the hazards associated with exposure to the chemicals used at the workplace; instructing workers how to obtain and use the information provided on labels and chemical safety data sheets; using the chemical safety data sheets, along with information specific to the workplace, as a basis for the preparation of instructions to workers, in writing if appropriate; and training workers on a continuing basis in the practices and procedures to be followed for safety in the use of chemicals at work.²⁴⁹

²⁴³ Even though this Article does not explicitly make employers responsible for meeting its requirements, Article 6, para. 1, makes employers responsible for compliance with the prescribed measures. The history of this Article (Report VI(1), paras. 21-23, p. 30; Report VI(2), pp. 80 to 86, 106 (para. 17), 108 (paras. 41-43), 61st Session, ILC, 1976; as well as Report IV(1), paras. 72-74 (pp. 19 and 20), 17 (pp. 40 and 41), 40 (p. 44), 63rd Session, ILC, 1977), and the text of Paragraph 21 of Recommendation No. 156, also make it clear that it is the role of the competent authorities to take measures to promote such training and information, while that of employers consists of the actual informing and instruction of the workers and their representatives on these matters.

²⁴⁴ Article 33 of Convention No. 167.

²⁴⁵ On the question of whether it is the competent authorities or the employer that are responsible for complying with this requirement, see Report IV(2A), 75th Session, ILC, 1988, pp. 60 and 61, regarding the amendments proposed by Brazil and the USSR, and the Office commentary on them.

²⁴⁶ Article 22, para. 3. In addition to requiring that the competent authorities make appropriate arrangements to promote the dissemination of information and education of all concerned regarding health hazards due to asbestos, Article 22 also requires the competent authorities to ensure that employers establish written policies and procedures on measures for the education and periodic training of workers on asbestos hazards and methods of prevention and control.

²⁴⁷ Article 10(a) of Convention No. 176.

²⁴⁸ Article 9(c) of Convention No. 174.

²⁴⁹ See also Article 13 of Convention No. 136, which requires governments to take appropriate steps to provide that any worker exposed to benzene or products containing benzene receives appropriate instructions on measures to safeguard health and prevent accidents, as well as on appropriate action if there is any evidence of poisoning, as well as Article 4 of Convention No. 139, which places similar duties on Members. Article 9 of Convention No. 115 requires appropriate warnings to be used on the presence of hazards from ionizing radiations, and any necessary information in this connection to be supplied to workers. It also requires workers engaged in radiation work to be adequately instructed, before and during employment, in the precautions to be taken and the reasons therefor.

Reporting and investigating accidents and diseases, compilation of statistics

The employer is required to inform the occupational health service of any known factors and any suspected factors in the working environment which may affect the workers' health. The occupational health services should also be informed of occurrences of ill health amongst workers and absence from work for health reasons.²⁵⁰ Employers are also required to inform the competent authority and other bodies designated for this purpose as soon as a major accident occurs.²⁵¹ Employers must, within a fixed time frame after a major accident, present a detailed report to the competent authority containing an analysis of the causes of the accident and describing its immediate on-site consequences, and any action taken to mitigate its effects. With respect to mines, Convention No. 176 requires the employer to ensure that: all accidents and dangerous occurrences are investigated and appropriate remedial action is taken; a report is made to the competent authority on accidents and dangerous occurrences; and a system is established so that the names of all persons who are underground can be accurately known at any time, as well as their probable location.²⁵²

Obligation to consult and cooperate with workers

Some Conventions require arrangements to be made at the level of the enterprise under which workers or their representatives and, as the case may be, their representative organizations, are enabled to inquire into, and are consulted by the employer on all aspects of occupational safety and health associated with their work.²⁵³ Moreover, they provide that cooperation between management and workers and/or their representatives within the enterprise must be an essential element of organizational and other measures taken in pursuance of the provisions regarding action at the level of an enterprise. Another Convention requires the employer, the workers and their representatives, where they exist, to cooperate and participate in the implementation of the organizational and other measures relating to occupational health services on an equitable basis.²⁵⁴ In discharging their responsibilities, employers must also cooperate as closely as possible with workers or their representatives with respect to safety in the use of chemicals at work.²⁵⁵ In respect of each major hazard installation, employers must establish and maintain a documented system of major hazard control, which includes provision for consultation with workers and their representatives.²⁵⁶

²⁵⁰ Articles 14 and 15 of Convention No. 161.

²⁵¹ Article 13 of Convention No. 161.

²⁵² Article 10(c), (d) and (e) of Convention No. 176.

²⁵³ For example, Articles 19(e) and 20 of Convention No. 155.

²⁵⁴ Article 8 of Convention No. 161.

²⁵⁵ Article 16 of Convention No. 170.

²⁵⁶ Article 9(f) of Convention No. 174. Article 6 of Convention No. 167 and Article 15 of Convention No. 176 provide for measures to be taken, in accordance with national laws and regulations, to encourage [Convention No. 176] and ensure [Convention No. 167] cooperation between employers and workers [Convention No. 167] and their representatives [Convention No. 176], to promote safety and health at the workplace concerned

Obligation to cooperate with other employers at one workplace or worksite

While recognizing the essential role of employers, international labour standards also set forth obligations for each person engaged in work-related activities, including manufacturers, suppliers, owners, administrators of premises, etc. The sharing of responsibility with regard to the application of prevention measures in cases of the presence at the same workplace of two or more employers is an important point.²⁵⁷ Some Conventions²⁵⁸ state that, whenever two or more enterprises are engaged in activities simultaneously at one workplace, they are required to collaborate in applying the requirements of the Convention.²⁵⁹ The competent authority must prescribe the general procedures for this collaboration, in appropriate circumstances. Whenever two or more employers undertake activities at the same time at the same mine, the employer in charge of the mine is required to coordinate the implementation of all measures concerning the safety and health of workers and is held primarily responsible for the safety of the operations.

Rights

Because the competent authorities are required to consult employers or their representative organizations on a host of questions (such as the use of flexibility clauses in ratified Conventions to exclude or exempt activities or workers covered by the Convention concerned, the formulation, implementation and periodic review of national policy in the field, the adoption of laws or regulations or any other method used nationally to give effect to the requirements of ratified Conventions, the making of arrangements to ensure the necessary coordination between various authorities and bodies called upon to give effect to provisions of the Conventions concerned), it is therefore also reasonable for them to be considered as rights of employers.

Under one Convention, the most representative organizations of employers can take the initiative for consultations to determine whether machinery is extensively used in a

²⁵⁷ This situation is occurring more and more frequently, particularly in building, fitting-out and maintenance work. General Survey, 1987, op. cit., para. 323.

²⁵⁸ Article 17 of Convention No. 155.

²⁵⁹ Article 6, para. 2, of Convention No. 148, and Article 6, para. 2, of Convention No. 162. In construction the same principle is spelt out in some detail in Article 8 of Convention No. 167, which provides that whenever two or more employers undertake activities simultaneously at one construction site, the principal contractor or other person or body with actual control over or primary responsibility for overall construction site activities, is required to be responsible for coordinating the prescribed safety and health measures, in so far as compatible with national laws and regulations for ensuring compliance with such measures. In so far as is compatible with national laws and regulations, where the principal contractor or other person or body with actual control over or primary responsibility for overall construction site activities is not present at the site, he or she must nominate a competent person or body at the site with the authority and means necessary to ensure on his or her behalf coordination and compliance with the measures foreseen. Each employer remains responsible for the application of the prescribed measures in respect of workers placed under his or her authority. Moreover, whenever employers or self-employed persons undertake activities simultaneously at one construction site, they have the duty to cooperate in the application of the prescribed safety and health measures, as may be specified by national laws or regulations.

sector of economic activity, and thus not excludable from the application of the Convention.²⁶⁰

Representatives of employers must have the opportunity to accompany inspectors supervising the application of the measures prescribed in pursuance of these Conventions, unless the inspectors consider, in light of the general instructions of the competent authority, that this may be prejudicial to the performance of their duties.²⁶¹

Role of workers

Rights and obligations

General provisions

As in the case of the obligations of employers, the responsibilities of workers are set forth in almost all the instruments and call, in particular, for compliance by workers with the safety and health measures prescribed in national laws and regulations in pursuance to international standards, as well as the specific rules and instructions developed in the establishments employing them. In view of the increasing complexity of operations, the role of workers' responsibility in ensuring their own safety and health and that of other persons is growing in importance. Accordingly, on many issues, the obligations of workers are developing in parallel with those of employers. For example, where employers are responsible for training and instructing workers in protective measures, the workers are often under the obligation to comply with the instructions given and to follow training courses. Employers are obliged to provide individual protective equipment and workers are obliged to use it correctly. Where employers are required to ensure medical examinations for workers, the latter are required to undergo such examinations.

Consultation on the formulation, implementation and periodic review of national policies

As can be seen from the requirements of most of the Conventions, as noted above under the roles of the competent authorities and those of employers, residual or consequential rights of workers to consult and be consulted on these matters are also recognized.²⁶²

²⁶⁰ Article 17, para. 2, of Convention No. 119.

²⁶¹ Article 5, para. 4, of Convention No. 148, and Article 18, para. 2, of Convention No. 174.

²⁶² See Article 4 of Convention No. 155; Article 2 of Convention No. 161; Article 16 of Convention No. 119; Article 5 of Convention No. 148; Article 4 of Convention No. 162; Article 3 of Convention No. 167; Articles 3 and 4 of Convention No. 170; and Article 4 of Convention No. 174. In addition, Article 19(e) of Convention No. 155 requires arrangements to be made under which workers or their representatives and, as the case may be, their representative organizations in an enterprise, in accordance with national law and practice, are enabled to inquire into, and are consulted by the employer on all aspects of occupational safety and health associated with their work. Article 8 of Convention No. 161 requires employers, workers and their representatives, where they exist, to cooperate and participate in the implementation of the organizational and other measures relating to occupational health services on an equitable basis. Article 13, para. 2(d) and (e), of Convention No. 176 also explicitly provides for the right of workers to consult with the employer and with the competent authority.

Consultations on the use of the flexibility clauses of Conventions

The representative or the most representative organizations of workers have the right to be consulted on the use of flexibility clauses respecting the scope of application of some Conventions.

Right of workers to consult their representative organizations

Article 19(c) of Convention No. 155 provides that arrangements must be made at the level of the enterprise under which representatives of workers in an enterprise are given adequate information on measures taken by the employer to ensure occupational safety and health and may consult their representative organizations about such information, provided they do not disclose commercial secrets.

Preventive and protective measures

Duty to take steps to eliminate or minimize risks

Recognizing that accidents at major hazard installations could have serious consequences in terms of their impact on human life and the environment, workers and their representatives have the duty to take corrective action within the scope of their job and their training and professional experience in the event that they have a well-founded suspicion that there is an imminent danger of a major accident. At the same time, they must notify their supervisor and raise the alarm before or as soon as possible after taking such action.²⁶³

Duty to comply with practices and procedures

In order to guarantee their effective protection, workers are obliged to act in accordance with the prescribed safety and health measures when performing their work, as well as with all practices and procedures established to prevent accidents and to control and protect workers against occupational hazards arising in the different fields of activity. This also includes the proper care and use of protective clothing and facilities and equipment placed at their disposal for this purpose.²⁶⁴

Duty of workers to take care of their own safety and that of others

When performing their work, workers have the duty to behave in such a way that risks to themselves or to others who may be affected by their acts at work, are eliminated or minimized. The obligation to take reasonable care for their own safety and health includes, in particular, the proper use of the protective clothing, facilities and equipment placed at their disposal for this purpose.²⁶⁵

²⁶³ See Article 20(e) of Convention No. 174. The adoption of corrective action also implies the workers' right to interrupt his or her activity, if necessary.

²⁶⁴ See Article 7, para. 1, of Convention No. 148; Article 21 of Convention No. 174; Article 14(a) of Convention No. 176; and Article 7 of Convention No. 162.

²⁶⁵ See Article 14(b) of Convention No. 176; Article 17, para. 2, of Convention No. 170; and Article 11(b) of Convention No. 167.

Duty to cooperate with the employer

In accordance with the obligations placed on the employer, the workers and their representatives in enterprises in turn have to cooperate as closely as possible with the employer for the application of the prescribed safety and health measures.²⁶⁶

Duty to report

In order to make possible timely remedial action in relation to occupational hazards, workers are obliged to report either to their superior, and to the workers' safety representative where one exists, or to the employer and the competent authority on accidents, dangerous occurrences and hazards, or on situations which they believe could present a risk and which the workers cannot properly deal with themselves.²⁶⁷

Right of removal and protection from disciplinary measures

In the event that workers have reasonable justification to believe that there exists a serious danger to their safety and health, they have the right to remove themselves from the workplace or work situation. In the exercise of this right, they are protected from undue consequences.²⁶⁸

Right to have recourse to technical advisers and independent experts

Workers, their representatives and their safety and health representatives, where they exist, have to be consulted and also have the right to inquire into all aspects of occupational safety and health associated with their work. To this end, safety and health representatives, in particular, have the right to have recourse to technical advisers and independent experts.²⁶⁹

Right to make proposals and right to appeal

With regard to occupational hazards arising out of air pollution, noise and vibration in the working environment, workers and their representatives have the right to present proposals, to obtain information and training and to appeal to the appropriate bodies, so as to ensure effective protection against these hazards.²⁷⁰

²⁶⁶ Article 14 of Convention No. 176; Article 17, para. 1, of Convention No. 170; Article 11(a) of Convention No. 167; Article 19(a) and (b) of Convention No. 155; and Article 20(f) of Convention No. 174.

²⁶⁷ Article 19(f) of Convention No. 155; Article 14 of Convention No. 161; Article 13, para. 1(a), of Convention No. 176; and Article 11(d) of Convention No. 167.

²⁶⁸ Articles 5(e), 13 and 19(f) of Convention No. 155; Article 12, para. 1, of Convention No. 167; Article 18, paras. 1 and 2, of Convention No. 170; and Article 13(e) of Convention No. 176.

²⁶⁹ Article 19(e) of Convention No. 155 and Article 13, para. 2(c), of Convention No. 176.

²⁷⁰ Article 7, para. 2, of Convention No. 148.

Right to select safety representatives

Workers occupied in mines have the right to collectively select safety and health representatives.²⁷¹

Right to personal protective clothing and equipment

Where adequate protection against risks of accident or injury to health, including exposure to adverse conditions, cannot be ensured by means of technical protective measures, workers have to be provided with suitable protective equipment and clothing, as necessary.²⁷²

Right to medical examination free of charge

Workers in general, and in particular those workers who are carrying out work under conditions adverse to their health, or workers assigned to work involving exposure to dangerous and toxic substances, have to be provided with such medical examinations as necessary to supervise their state of health in relation to the occupational hazards. The medical examinations carried out for this purpose must be free of charge to the workers.²⁷³

Right to monitoring of their working environment

Workers or their representatives have the right to request the monitoring of the working environment regarding the factors in the working environment which may affect their health.²⁷⁴

Right to first aid and emergency assistance

Workers who are exposed to occupational hazards and have suffered from an injury or illness at the workplace must be provided with first aid, appropriate transportation from the workplace and access to appropriate medical facilities. With regard to establishments where office work is performed, a dispensary or first-aid post has to be placed at the workers' disposal. Depending on the size of the establishment, the first-aid posts can also be shared jointly with other establishments. Moreover, workers have to be consulted in the preparation of arrangements for dealing with emergencies. They can also claim access to documents dealing with emergency plans and procedures.²⁷⁵

²⁷¹ Article 13, para. 1(f), of Convention No. 176.

²⁷² Article 8 of Convention No. 136; Article 9(c) of Convention No. 174; Articles 6(d) and 9(c) of Convention No. 176; Article 15, para. 4, and Article 18, of Convention No. 162; Article 10 of Convention No. 148; Article 30 of Convention No. 167; and Article 17 of Convention No. 120.

²⁷³ Article 21, paras. 1 and 2, of Convention No. 162; Article 11, paras. 1 and 2, of Convention No. 148; Articles 11, 12 and 13(a) of Convention No. 115; Article 5 of Convention No. 139; and Articles 9 and 10 of Convention No. 130. The ILO instruments on occupational safety and health provide for three types of medical examinations: pre-assignment, periodic and supervision after cessation of assignment. A distinction should be made between the pre-assignment medical examination and pre-employment examinations, which are another type of medical supervision not specifically covered by these instruments. General Survey, 1987, op. cit., para. 521.

²⁷⁴ See Article 20, paras. 1 and 4, of Convention No. 162.

²⁷⁵ Article 18 of Convention No. 155; Article 19 of Convention No. 120; Article 6, para. 3, of Convention No. 162; Article 31 of Convention No. 167; Article 13, para. 2(a) and (c), of

Right to welfare facilities

Depending on the kind of work to be performed, sufficient sanitary conveniences and facilities either to wash, or for changing, storage and drying of clothing and/or for taking meals has to be supplied to workers. In addition, a supply of drinking water has to be made available for workers.²⁷⁶

Right to occupational safety and health measures without cost to workers

Occupational safety and health measures must not involve any cost to workers.²⁷⁷

Right of transfer to other suitable employment or a means of maintaining the income of workers when, for medical reasons, continued assignment to the work concerned is found inadvisable

In the event that the medical supervision of workers reveals that continued assignment to work involving exposure to a specific occupational risk could negatively affect their health, and is therefore medically inadvisable, such workers have to be protected against the negative consequences for their income and career. In such cases, the workers concerned must be transferred to other suitable employment or ensured the maintenance of their income through social security or other measures.²⁷⁸

10.3. Practical application of occupational safety and health standards

General principles

In its general comments on the application of these Conventions in 1996, the Committee of Experts noted that large enterprises were generally well organized concerning occupational safety and health, but it did note certain deficiencies in its comments. It indicated that the situation was far more worrying in small enterprises, where workers were unprotected in dangerous places with many health risks. Generally speaking, it found that national legislation giving effect to international Conventions did not cover workers in these small enterprises, who were found both in the formal sector and the informal sector of the economy. Other obstacles to their application noted by the Committee of Experts were the absence of education and information on safety and health issues and the difficulties for the inspection services to intervene because of the nature and dispersion of enterprises. It also noted that the increasing number of observations from employers' and workers' organizations on the application of these Conventions bear

Convention No. 170; Article 13(a) and (d) of Convention No. 115; Article 20(c)(ii) of Convention No. 174; and Article 5, para. 4(a), and Article 9(d) of Convention No. 176.

²⁷⁶ See Articles 12, 13, 14 and 15 of Convention No. 120; Article 18, para. 5, of Convention No. 162; and Article 5, para. 4(e), of Convention No. 176.

²⁷⁷ Article 21 of Convention No. 155.

²⁷⁸ Article 11, para. 3, of Convention No. 148, in conjunction with Paragraph 19 of Recommendation No. 156; Article 21, para. 4, of Convention No. 162, in conjunction with Paragraph 35 of Recommendation No. 172; and Article 14 of Convention No. 115.

testimony to the growing consciousness of the issues in large or medium-sized enterprises.²⁷⁹

In its general comments on the application of the same Conventions in 1997, the Committee of Experts noted that several States that had ratified them, including those that had done so recently, were revising their national laws and regulations, but that some of them were selecting regional standards as a basis for such revision. It then pointed out that there was a difference between international standards and regional standards in the approach adopted to occupational safety and health problems and in the manner in which they are addressed. It indicated that the incorporation of regional standards into national legislation was not always sufficient to meet the requirements of the international standards of the ILO. It then recalled the need to remind States that greater attention should be paid to international standards in the revision and formulation of national laws and regulations. It also emphasized the increasing number of problems of application of these technical and detailed standards other than the existence of sound texts of laws and regulations. These concerned: the need for a whole series of coordinated measures, all of which are of fundamental importance, including training and the monitoring of workers' and managers' knowledge in this field; the correct use of equipment for individual and collective means of protection; and continued attention to personal safety and the safety of others, which all play a fundamental role. It pointed out the need to attach importance to workers' education and information on these issues, and the need to encourage the participation of workers' representatives in the formulation of legal texts and the evaluation of their application. It also emphasized the importance of inspection and the establishment of advisory bodies in the field composed of employers and workers. It also pointed out the failure of governments bound by these Conventions to provide information on the effect given to them in practice, such as extracts of inspection reports, statistics on the number of workers covered, the number and nature of violations, the nature and causes of accidents, etc.²⁸⁰

Convention No. 155

Problems encountered in the application of this Convention include the failure to adopt a framework national law, including the creation of a central body to coordinate the important requirements of consultations and coordination, not only with employers and workers, their representatives and representative organizations, but also with other bodies, as appropriate. Other problems include the failure to consult with all these parties as required by the Convention. There are also problems relating to the temporary initial exclusion from the scope of the Convention at the time of ratification of activities or workers, such as domestic service, the civil service and maritime transport, and the subsequent failure to extend the application of the Convention to them. Difficulties are also encountered in national policies and the laws or regulations, or other means implementing them, to take account of all the spheres of action (Article 5) and to ensure that the listed functions are progressively carried out (Article 11). Other similar technical shortcomings involve the failure of the national measures to cover all parties, including those who design, manufacture, import, provide or transfer machinery, equipment or substances for occupational use (Article 12). Other problems of application involve the failure to provide for the rights of workers to remove themselves from imminent and serious danger, and the protection of workers who properly take action in conformity with the national policy on occupational safety and health, including those who remove themselves from danger, from disciplinary measures, or undue consequences. Other failures relate to the provision of

²⁷⁹ ILO: *Report of the Committee of Experts*, 1996, paras. 63 and 64.

²⁸⁰ ILO: *Report of the Committee of Experts*, 1997, paras. 68-70.

information, instruction, personal protective equipment and clothing to workers and their representatives, ensuring that occupational safety and health measures do not involve any cost to the workers and failure to recognize the right of workers to inquire into safety and health matters. Other problems raised include the failure to provide for: situations in which two or more enterprises engage in activities simultaneously at one workplace; the requirement for employers to provide for emergencies and accidents, including first-aid arrangements; and the publication of information on measures taken in relation to occupational accidents and diseases and other injuries to health arising in the course of work.

Convention No. 161

The types of difficulties of application of this Convention include: the failure to consult with employers and workers and their representative organizations; the failure to provide for occupational health services to small enterprises; the need for the surveillance of workers' health to be carried out during working hours and not to involve loss of earnings for them; the confidentiality of health care data; and the need for employers and workers to inform the occupational health services of any known factors and any suspected ones in the working environment which may affect workers' health. Difficulties also occur in the organization of health services, including the need for them to be entrusted with preventive functions and to carry out the other functions enumerated in the Convention (Article 5), to be professionally independent and multidisciplinary, and not to be required by the employer to verify the reasons for the absence of workers from work.

Convention No. 119

Convention No. 119 entered into force in 1965 and has been ratified by 49 countries. Convention No. 119 and Recommendation No. 118 are to be revised in accordance with a decision made by the Governing Body.²⁸¹

In addition to the Comments of the Committee of Experts in its General Survey on the application of the Conventions,²⁸² during the last ten years, the Committee of Experts has consistently raised in its comments the key points described below.

The Committee of Experts has drawn attention to the need to prohibit explicitly, by national laws or regulations or other equally effective measures, the sale, hire, transfer in any other manner and exhibition of any machinery, whether new or second-hand, of which the dangerous parts are without appropriate guards. The governments concerned have been requested to indicate the provision designating the parts of machinery enumerated in the Convention which are liable to present danger to any person coming into contact with them and which have to be designed or protected so as to prevent such danger.

The Committee of Experts has noted that no provisions in the national legislation explicitly make it compulsory for the seller, hirer, person who transfers the machinery in any other manner, the exhibitor, their respective agents, or the manufacturer who sells, hires, transfers in any other manner or exhibits machines, to apply the provisions of the instruments concerning the prohibition from manufacturing, selling, hiring or transferring in any other manner, dangerous machinery.

²⁸¹ GB.276/2, paras. 243-301, GB.277/LILS/4 and GB.279/5/2, Appendix III. See the tables relating to the status of the instruments examined.

²⁸² General Survey, 1987, op. cit., para. 649.

The Committee of Experts has noted that the use of machinery of which any of the dangerous parts, including the moving parts (operation zone), is not provided with appropriate guards is not formally prohibited by national legislation or prevented by other equally effective measures.

The Committee of Experts has requested a number of governments to indicate the measures that the employer has to take to bring national laws or regulations relating to the guarding of machinery to the notice of workers.

The Committee of Experts has requested a number of governments to indicate the provisions or measures of a formal nature that ensure that no worker is required to use any machinery without the guards provided being in position and that no such guards are made inoperative.

The Committee of Experts has requested a number of governments to indicate, for the purpose of supervising the application of the Convention, appropriate sanctions and inspection services and to provide extracts from the reports of the inspection services, together with information on the number and type of infringements recorded.

[AF1]Convention No. 148

Convention No. 148, which entered into force in 1979, has been ratified by 41 countries. In its comments, the Committee of Experts has noted that only a few governments have attempted to formulate a cohesive system of protection even against air pollution in the working environment, which is the easiest to regulate of the three risks covered by the instruments. Even fewer have adopted measures concerning noise, and very few indeed have done anything about vibration.²⁸³ In monitoring the extent of conformity of national law and practice with the requirements of the Convention, the Committee of Experts has stated that, in spite of the considerable flexibility allowed by the Convention, this flexibility has been used very little by ratifying States.²⁸⁴ As for the practical measures which have been taken by ratifying States concerning air pollution, noise and vibration, there is a wide variation which is closely linked to the level of economic development.²⁸⁵ The Committee of Experts has noted with satisfaction the development, in an increasing number of countries, of some kind of general legislation on health and safety in the working environment which takes the same fundamental approach as that of Convention No. 148 and Recommendation No. 156.²⁸⁶

Concerning the definition of risk, the Committee of Experts has emphasized that it covers virtually every aspect of air pollution, noise and vibration which may be harmful to the health of workers. The main purpose of the instruments, in the view of the Committee, is to provide guidance for countries with a view to ensuring that all dangerous factors due

²⁸³ *ibid.*, para. 678.

²⁸⁴ *ibid.*, para. 679; see also: List of ratifications, ILC, 88th Session, 2000, Report III (Part 2), p. 173.

²⁸⁵ General Survey, 1987, *op. cit.*, paras. 276 and 680; see also, *Report of the Committee of Experts*, 1991, p. 458; 1992, pp. 508 and 509; 1993, pp. 465 and 466; 1994, pp. 474-476; 1995, pp. 388 and 389; 1996, pp. 377-380; 1998, p. 446; 2000, pp. 425-427; 2001, pp. 577-579; and, for instance, the direct requests of the Committee of Experts in 1997, 1999 and 2000.

²⁸⁶ General Survey, 1987, *op. cit.*, paras. 681 and 682.

to these hazards, including new ones, should be duly considered for the elaboration of measures aimed at prevention, control and protection.²⁸⁷

In monitoring the extent of conformity of national law and practice with the general protective measures provided by the instruments, the Committee of Experts has focused its comments on three crucial aspects: national legislation on occupational hazards in the working environment; the responsibilities of employers and workers; and the relationship between the protection of the working environment and that of the general environment. The Committee has found that the law and regulations of reporting countries can be divided into three categories: general standards of a comprehensive nature intended to ensure a minimum degree of protection; special safety and health standards applicable to particular branches of economic activity; and regulations dealing specifically with particular hazards.²⁸⁸ For the purpose of the practical implementation of preventive and protective measures, these three categories are generally supplemented by subsidiary technical standards, codes of practice and the like which lay down criteria and exposure limits for air pollution, noise and vibration.²⁸⁹

The questions of employers' and workers' participation and of collaboration between employers and workers have been raised regularly by the Committee of Experts in its observations and direct requests, for instance, over the past six years.

The Committee of Experts has emphasized that the requirements of the instruments with regard to the responsibilities of employers and workers reflect a new concept in the legislation on occupational safety and health: laws should establish a clear framework of basic statutory obligations covering not only safeguards against physical risks, but also concerning the whole working environment.²⁹⁰ In the majority of countries, employers have a positive duty to assure the safety and health of employees at work.²⁹¹ One gap that the Committee has noted in the legislation of many countries concerns the obligation to ensure the collaboration of two or more employers at the same workplace in respect of safety and health. Convention No. 148 was the first ILO instrument which dealt with this question, introducing an important innovation in the field of international labour law. Owing to the modern tendency to subcontract, this situation is occurring more and more often, particularly in building, fitting out and maintenance work.²⁹² The Committee has emphasized that close attention should be paid to this, both because of an increasing tendency for employers to share workplaces, and because when they do so it is often in industries which involve a particularly high level of occupational risk.²⁹³

Referring to a number of catastrophic accidents in several parts of the world, the Committee of Experts has also drawn attention to the responsibility of employers for risks escaping from the working environment into the general environment, thus threatening

²⁸⁷ *ibid.*, para. 266.

²⁸⁸ *ibid.*, paras. 271-273.

²⁸⁹ *ibid.*, para. 274.

²⁹⁰ *ibid.*, para. 303.

²⁹¹ *ibid.*, para. 684.

²⁹² Report VI(1), 1976, *op. cit.*, p. 23.

²⁹³ General Survey, 1987, *op. cit.*, para. 685; this question has also been raised repeatedly by the Committee of Experts in direct requests, for instance, over the past four years.

nature and the public at large. In this connection, the Committee has pointed out that it is in the working environment that the primary control should be exercised.²⁹⁴

The majority of countries have also laid down an obligation in their basic labour legislation for workers to respect safety and health measures, and the definition of these responsibilities is developing. The Committee of Experts has taken the view that this should in future be a subject of intensive re-examination by workers' and employers' organizations, as well as by governments, in order to achieve a more comprehensive and more balanced sharing of responsibilities between all the parties concerned.²⁹⁵

In addition to basic legislation dealing with air pollution, noise and vibration and the general responsibilities of employers and workers, a very important, if not the most fundamental requirement of Convention No. 148, is that criteria and exposure limits be set at the national level for exposure to hazards in the working environment due to air pollution, noise and vibration. The term "exposure limit" was used for the first time in Convention No. 148 to embrace the various formulations used to refer to quality limit values in workplaces. In this connection, the Committee of Experts has drawn attention to the fact that the Convention does not require that exposure limits be prescribed by legislation and that provisions concerning the implementation of the prescribed measures may be adopted by means of technical standards, codes of practice and other appropriate methods. Moreover, the Committee has indicated that such non-statutory measures may be made binding by statutory reference thereto. The Convention also allows a certain amount of flexibility to ratifying countries in establishing criteria and exposure limits through the use of the phrase "where appropriate" in Article 8, paragraph 1.²⁹⁶

The Committee of Experts has noted that a large number of governments have taken measures, of greater or lesser scope, to set criteria for air pollution. Far fewer have done so for noise, and a very limited number for vibration.²⁹⁷ More attention has been paid to air pollution at the international level as well, and both national and international standards now exist for most air pollutants and most working situations. As indicated above, the Committee has emphasized the value of a gradual approach to these matters when a government is unable to take immediate comprehensive measures. It has taken the view that it is often valuable, for instance, to set exposure limits on a substance-by-substance basis, or more general criteria, or to adopt criteria or exposure limits to be adhered to on a voluntary basis, as an interim or experimental measure.²⁹⁸ This gradual and progressive approach can be closely based on the various national and international standards which exist concerning air pollution, and to a lesser degree concerning noise and vibration,

²⁹⁴ General Survey, 1987, op. cit., paras. 345, 346, 686 and 687; see also International Programme for the Improvement of Working Conditions and Environment (PIACT), GB.200/PFA/10/8, p. 17.

²⁹⁵ General Survey, 1987, op. cit., paras. 339 and 688.

²⁹⁶ *ibid.*, paras. 354, 355 and 357.

²⁹⁷ *ibid.*, paras. 413, 417, 678, 680, 692.

²⁹⁸ *ibid.*, paras. 357 and 689-692; the question of the coverage of the different hazards by national legislation has been repeatedly raised by the Committee of Experts in direct requests, showing that in a number of cases noise and vibration still continue to raise problems.

supplemented by the various guidelines and codes of practice adopted at the international level by the ILO or by other international organizations and regional groupings.²⁹⁹

The Committee of Experts has recalled the importance of applying established basic criteria by administrative measures, technical measures of protection and organizational measures, as well as the use of personal protective equipment aimed at combating hazards in the working environment.³⁰⁰ The Committee has concluded from the information available that in general the requirements laid down in national legislation do not meet the requirements of the instruments in a way which might be said to provide a comprehensive system of protection for workers.³⁰¹

At the same time, it has taken the view that it should be easier to provide for some measures of protection through supervision of the health of workers by medical examinations and the establishment of a system of medical records. It has also drawn attention to the fact that both the Occupational Health Services Convention, 1985 (No. 161), and the Occupational Health Services Recommendation, 1985 (No. 171), provide even more comprehensively than does Convention No. 149 for protection in this regard. In its opinion, it should not however prove impossible for most countries to provide for at least minimal medical supervision in cases of the highest risk operations, pending the time when regular and more comprehensive supervision can be introduced. Similar measures could be taken at various levels for the keeping of medical records, as laid down in these instruments.³⁰²

Questions concerning the notification to the competent authority of processes, substances, etc. involving exposure to occupational hazards due to air pollution, noise and vibration and the authorization of the use of specified processes under conditions prescribed by the competent authority or its prohibition have been raised repeatedly by the Committee of Experts over the past ten years.³⁰³

Convention No. 167

Convention No. 167 entered into force in 1991 and has been ratified by 14 countries.

With regard to the general provisions of the Convention, the Committee of Experts has focused on the responsibilities of employers, self-employed persons and persons concerned with design and planning, as well as the duties and rights of workers. It has recalled the importance of an assessment of the safety and health hazards involved as a

²⁹⁹ See, for instance: ILO: *Occupational exposure to airborne substances harmful to health: ILO Code of Practice* (third edition), 1991; *Occupational exposure limits for air-borne toxic substances*, 2nd (revised) edition, 1980; *Noise and vibration in the working environment*, 1976; and *Protection of workers against noise and vibration in the working environment*, 1984.

³⁰⁰ General Survey, 1987, op. cit., para. 693.

³⁰¹ *ibid.*, paras. 496 and 695; concerning technical and organizational measures and personal protective equipment; see also, for instance, Reports of the Committee of Experts, 1991, p. 458; 1992, p. 509; 1993, p. 466; 1994, p. 476; 2000, p. 427; and, for instance, direct requests in 1997, 1999 and 2000.

³⁰² General Survey, 1987, op. cit., para. 696; this question has been raised repeatedly in a number of cases by the Committee of Experts over the past ten years: see Reports of the Committee of Experts, 1991-1994, 1996, 2000 and 2001 and, for instance, the direct requests of 1997, 1999 and 2000.

³⁰³ See, for instance, Reports of the Committee of Experts 1991, p. 458; 1992, p. 509; 1993, p. 466; 1994, p. 476; 2000, p. 427; and, for instance, direct requests in 1997, 1999 and 2000.

basis for national laws and regulations and of their practical application through technical standards or codes of practice, or other appropriate methods consistent with national conditions and practice, and with standards adopted by recognized international organizations.

A number of governments have been requested to provide particulars on the obligations of employers, self-employed persons and persons concerned with design and planning to comply with prescribed safety and health measures at the workplace. The same applies to the sharing of responsibilities between two or more employers undertaking activities simultaneously at one construction site.

As far as the rights and duties of workers are concerned, the Committee of Experts has mostly raised the matter of legislative or regulatory provisions respecting the right of workers to remove themselves from serious danger to their safety and health and the duty to inform their supervisor immediately. It has also often drawn attention to the need to ensure the safety of workplaces by providing and maintaining safe means of access to and exit from all workplaces, and by taking appropriate precautions to protect persons present at or in the vicinity of a construction site.

On a number of occasions, the Committee of Experts has dealt with the specific safety requirements provided for in the Convention for structures, lifting appliances, equipment, tools, etc., as well as for the different processes or operations on different construction sites. In this connection, the governments concerned have often been requested to indicate, for instance, national measures covering the design, construction, maintenance in good working order and correct use of plant, equipment and tools. Moreover, operation by appropriately trained workers, supervision of operations and inspection of equipment by a competent person are questions which have been raised regularly by the Committee. The same applies to preventive measures against the fall of workers or materials in relation to work at heights, underground work or work over water. Another issue frequently raised by the Committee concerns the provision of adequate means for persons working underground or in cofferdams and caissons to reach safety in the event of fire, an inrush of water or material. Special attention has also been given by the Committee to the need for a competent person to carry out the construction, installation and maintenance of electrical equipment and installations, as well as the storage, transport, handling and use of explosives. In this respect, the supervision of relevant operations by a competent person is considered to be insufficient.

In several cases, the Committee of Experts has requested further information from governments on measures taken or envisaged to provide protective equipment and protective clothing to workers free of charge, as prescribed by national legislation. It has also noted that no information is available on welfare facilities and on national legislation guaranteeing the reporting of occupational diseases to the competent authority.³⁰⁴

Convention No. 170

Convention No. 170 has been ratified by nine countries. When the Committee of Experts has examined the reports submitted by governments on the application of the Convention, it has emphasized that, in certain cases, national laws and regulations only contain provisions on hazardous chemical products and not other chemical products (which are not classified as being dangerous) and it has requested the governments concerned to take the necessary measures to give full effect to the Convention. Furthermore, the

³⁰⁴ Report of the Committee of Experts, 1999, p. 566, and direct requests of 1993, 1995, 1996, 1998, 1999 and 2000.

Committee of Experts has urged governments to adopt the necessary measures to give effect to the Convention in relation to its provisions respecting labelling, so that workers are informed of the identity of the chemical products and the precautions to be taken for their safety when they are being transported and, so that workers are not exposed to such products in excess of exposure limits or other exposure criteria established by the competent authority. The Committee of Experts has also requested information on: the measures adopted with regard to the evaluation which has to be carried out by employers of the risks arising from the use of chemical products at work; the instructions to be given to workers; the measures adopted concerning the obligation of workers to cooperate with employers in the discharge of their responsibilities in relation to hazards arising out of the use of chemical products; provisions providing protection to workers who remove themselves from a danger arising out of the use of chemical substances; the provisions permitting the employer to protect the specific identity of an ingredient of a chemical mixture, where disclosure would be liable to cause harm to the employer's business; and the measures taken to ensure the compilation and communication of information respecting the total or partial prohibition of the use of hazardous chemical substances.

* * *

In general terms, the comments made by the Committee of Experts concerning the application of occupational safety and health instruments, and more specifically concerning those addressing specific risks encountered at work, have dealt with very different aspects of the instruments.

In relation to Conventions No. 13, 115, 136, 139 and 162, a question which raises most problems and which has been brought up by the Committee of Experts in its comments, as already noted with regard to nearly all the occupational safety and health instruments, and particularly those addressing specific risks, concerns the situation of national laws and regulations. The Committee of Experts has emphasized the importance of the existence of specific laws and regulations. In this context, it has noted that in a significant number of countries, and particularly developing countries, the existing laws and regulations on specific hazards encountered at work or in certain sectors is still at an embryonic stage and that only the fundamental principles concerning occupational safety and health have been incorporated into the legislation. However, implementing regulations have not been adopted, or only certain aspects of the substantive provisions have been covered by regulations. These framework laws often commit the Government to adopting regulations for their application, which will have a direct impact on the application of the instruments respecting specific hazards. However, the process of formulating specific regulations of a technical nature in many countries requires the participation, in addition to employers' and workers' organizations, of a technical advisory body such as, for example, a national occupational safety and health council. Where the latter does not exist, it is necessary to create it; where it already exists, it must be reactivated.

In certain countries in which specific laws and regulations exist, the Committee of Experts has noted on several occasions that they provide for exemptions from protective provisions in the event that their application would give rise to economic problems. In this respect, the Committee has always emphasized that occupational safety and health Conventions in general do not allow for derogations by reason of the difficulty of the economic situation.

Another problem that the Committee of Experts has often encountered when examining the application of laws and regulations respecting fields in which workers are in contact with unhealthy substances or processes is that, in accordance with several instruments, the competent authority is under the obligation to determine precisely at the

national level the substances, agents and processes to which occupational exposure is prohibited or subject to control by means of labour regulations.³⁰⁵ The competent authority is under the obligation to specify exposure criteria and limits for the various substances and processes classified as hazardous, which in turn must be regularly reviewed. Although these provisions would appear to be fairly clear, the Committee of Experts has noted that in certain countries there are neither laws nor any specific measures prohibiting or preventing, by measures which are as effective, exposure to substances or processes recognized as being harmful.

In countries which have adopted specific laws and regulations setting forth this obligation, the Committee of Experts has frequently emphasized that they need to be periodically supplemented, reviewed and brought up to date in the light of current knowledge. In such cases, the Committee of Experts calls for consideration to be given, for example, to the recommendations of international commissions and those contained in other international instruments, such as the codes of practice published by the Office on various subjects, with a view to ensuring effective protection of workers against specific risks encountered at work.

With regard to the substantive provisions, the Committee of Experts has referred to the urgent need to develop technical standards on collective protection and personal protective equipment.

One of the shortcomings of national legislation which has frequently been noted by the Committee of Experts concerns the obligation for several employers, when they are engaged at the same time in activities at the same workplace, to cooperate with a view to ensuring the safety and health of the workers.

With regard to protective measures based on the health surveillance of workers through medical examinations, the Committee of Experts has emphasized the need to carry out medical examinations to assess exposure, particularly in the case of workers engaged in operations in contact with carcinogenic substances and mutagenic agents, not only prior to and during employment, but also after the cessation of employment, with a view to providing medical supervision of workers in relation to symptoms which may appear only some time after exposure to harmful substances has ceased. The Committee of Experts has also called upon governments to take the necessary measures at the various levels to develop a system for the recording of medical data, as well as the compilation of statistics.

The Committee of Experts has often noted the absence of specific regulations at the national level covering specific categories of workers, namely women and young workers, with a view to protecting them against the high risk of poisoning from certain substances, as set out in ILO instruments.³⁰⁶

With a view to the application of the provisions of the Conventions addressing the prevention of employment-related accidents (Conventions No. 27 and 127), the Committee of Experts has principally raised the points set out below.

With regard to the obligation to mark the weight of objects to be transported by ship, the Committee of Experts has often raised problems of application with regard to the marking of modern means of transport, such as containers.

³⁰⁵ It should be noted that these provisions are subject to certain exceptions, as explained in the sections presenting the various instruments.

³⁰⁶ Namely lead, benzene and ionizing radiations.

In relation to the manual transport of loads, the Committee of Experts has frequently emphasized that there exist in a large number of countries provisions which regulate the employment of women and young persons in the lifting and transport of loads. However, it has criticized the fact that the maximum weights established by national laws and regulations are, in a significant number of countries, too high when compared to the principle set forth in the Convention, under which the assignment of women and young persons to the manual transport of loads must be limited to light loads. In this context, for purposes of clarification, the Committee of Experts has drawn the attention of the governments concerned to the indications contained in the ILO publication on this subject.³⁰⁷

With regard the adoption of safety and health measures in commerce and offices (Convention No. 120), the Committee of Experts has identified problems of application in relation to general principles in various countries. These problems are often of a specific nature and are determined by local and climatic conditions. The problems concern, in particular, the provisions respecting lighting, ventilation and temperature.

³⁰⁷ ILO, *Maximum weights in load lifting and carrying*, Occupational Safety and Health Series, No. 59, Geneva, 1988.

Chapter 11

Social security

G. López Morales, R. Silva and A. Egorov

Comprehensive standards

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Social Security (Minimum Standards) Convention, 1952 (No. 102)	40	The Governing Body has invited member States to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 102 and of the reasons for the limited recourse to the flexibility clauses included in this Convention. It has also decided that the status of Convention No. 102 would be re-examined in due course, including the possible need for a full or partial revision of this Convention in the light of the information available.
Equality of Treatment (Social Security) Convention, 1962 (No. 118)	38	The Governing Body has invited member States to contemplate ratifying Convention No. 118 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention.
Maintenance of Social Security Rights Convention, 1982 (No. 157)	3	The Governing Body has invited member States to contemplate ratifying Convention No. 157 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention.
Maintenance of Social Security Rights Recommendation, 1983 (No. 167)	–	The Governing Body has invited member States to give effect to Recommendation No. 167 and, as the case may be, to inform the Office of any obstacles or difficulties encountered in the implementation of this Recommendation.
Income Security Recommendation, 1944 (No. 67)	–	The Governing Body has invited member States to give effect to Recommendation No. 67.
Other instruments (This category comprises instruments which are no longer fully up-to-date but remain relevant in certain respects.)		
Social Insurance (Agriculture) Recommendation, 1921 (No. 17)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 17
Social Security (Armed Forces) Recommendation, 1944 (No. 68)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 68.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
In the area of comprehensive standards, no instrument has been considered as outdated by the Governing Body.		

Medical care and sickness benefit

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Social Security (Minimum Standards) Convention, 1952 (No. 102)	40	See above (comprehensive standards).
Medical Care and Sickness Benefits Convention, 1969 (No. 130)	14	The Governing Body has invited member States to contemplate ratifying Convention No. 130 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention, as well as of the possible need for its revision.
Medical Care and Sickness Benefits Recommendation, 1969 (No. 134)	–	The Governing Body has invited member States to give effect to Recommendation No. 134 and to inform the Office of any obstacles or difficulties encountered in the implementation of this Recommendation.
Other instruments (This category comprises instruments which are no longer fully up-to-date but remain relevant in certain respects.)		
Medical Care Recommendation, 1944 (No. 69)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 69.

Outdated instruments (Instruments which are no longer up-to-date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Sickness Insurance (Industry) Convention, 1927 (No. 24)	27	The Governing Body has invited the States parties to Convention No. 24 to contemplate ratifying the Medical Care and Sickness Benefits Convention, 1969 (No. 130), and denouncing Convention No. 24 at the same time. It has also invited the States parties to Convention No. 24 to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 130. Finally, it has deferred the decision to shelve Convention No. 24 until the Office has submitted to it the information requested on the ratification prospects of Convention No. 130.
Sickness Insurance (Agriculture) Convention, 1927 (No. 25)	19	The Governing Body has invited the States parties to Convention No. 25 to contemplate ratifying the Medical Care and Sickness Benefits Convention, 1969 (No. 130), and denouncing Convention No. 25 at the same time. It has also invited the States parties to Convention No. 25 to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 130. Finally, it has deferred the decision to shelve Convention No. 25 until the Office has submitted to it the information requested on the ratification prospects of Convention No. 130.
Sickness Insurance Recommendation, 1927 (No. 29)	–	The Governing Body has noted that Recommendation No. 29 is obsolete and should be withdrawn, and has deferred the proposal to the Conference to withdraw this instrument until the situation has been re-examined at a later stage.

Old-age, invalidity and survivors' benefits

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Social Security (Minimum Standards) Convention, 1952 (No. 102)	40	See above (comprehensive standards)
Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128)	16	The Governing Body has invited member States to contemplate ratifying Convention No. 128 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 128, as well as of the possible need for its revision.
Invalidity, Old-Age and Survivors' Benefits Recommendation, 1967 (No. 131)	–	The Governing Body has invited member States to give effect to Recommendation No. 131 and to inform the Office of any obstacles or difficulties encountered in the implementation of this Recommendation.

Outdated instruments (Instruments which are no longer up-to-date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35)	10	The Governing Body has shelved with immediate effect Conventions Nos. 35, 36, 37, 38, 39 and 40. It has also invited the States parties to these Conventions to contemplate ratifying the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), and, where appropriate, to denounce at the same time Conventions Nos. 35, 36, 37, 38, 39 and 40, respectively.
Old-Age Insurance (Agriculture) Convention, 1933 (No. 36)	10	
Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37)	10	
Invalidity Insurance (Agriculture) Convention, 1933 (No. 38)	10	
Survivors' Insurance (Industry, etc.) Convention, 1933 (No. 39)	7	
Survivors' Insurance (Agriculture) Convention, 1933 (No. 40)	6	
Invalidity, Old-Age and Survivors' Insurance Recommendation, 1933 (No. 43)	–	The Governing Body has noted that Recommendation No. 43 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.
Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48)	7	The Governing Body has shelved Convention No. 48 with immediate effect. It has also invited the seven States parties to this Convention to contemplate ratifying the Maintenance of Social Security Rights Convention, 1982 (No. 157), and to denounce at the same time Convention No. 48.

Employment injury benefit

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Social Security (Minimum Standards) Convention, 1952 (No. 102)	40	See above (comprehensive standards).
Employment Injury Benefits Convention, 1964 (No. 121)	23	The Governing Body has invited member States to contemplate ratifying Convention No. 121. (due account being taken of the flexibility clauses which it contains) and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification. It has also decided that the status of Convention No. 121 will be re-examined in due course in the light of information received and the discussion to be held on the subject of social security.
Employment Injury Benefits Recommendation, 1964 (No. 121)	–	The Government Body has invited member States to give effect to Recommendation No. 121.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Workmen's Compensation (Agriculture) Convention, 1921 (No. 12)	75	The Governing Body has decided on the maintenance of the status quo with regard to Convention No. 12.
Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)	120	The Governing Body has invited the States parties to Convention No. 19 to contemplate ratifying the Equality of Treatment (Social Security) Convention, 1962 (No. 118), and to accept the obligations of this Convention in particular in respect of its branch (g) (employment injury benefit).
Equality of Treatment (Accident Compensation) Recommendation, 1925 (No. 25)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 25.

Outdated instruments (Instruments which are no longer up-to-date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Workmen's Compensation (Accidents) Convention, 1925 (No. 17)	68	<p>The Governing Body has invited:</p> <p>(a) the States parties to Convention No. 17 and the Employment Injury Benefits Convention, 1964 (No. 121) [Schedule I amended in 1980], to denounce Convention No. 17;</p> <p>(b) the States parties to Convention No. 17 to contemplate ratifying Convention No. 121 and denouncing Convention No. 17 at the same time;</p> <p>It has also decided that the status of Convention No. 17 will be re-examined in due course in the light of new ratifications of Convention No. 121, which should result in a substantial reduction in the number of ratifications of Convention No. 17.</p>

Workmen's Compensation (Minimum Scale) Recommendation, 1925 (No. 22)	–	The Governing Body has noted that Recommendation No. 22 is obsolete and that it should be withdrawn and has deferred the proposal to the Conference to withdraw this instrument until the situation has been re-examined at a later date.
Workmen's Compensation (Jurisdiction) Recommendation, 1925 (No. 23)	–	The Governing Body has noted that Recommendation No. 23 is obsolete and that it should be withdrawn and has deferred the proposal to the Conference to withdraw this instrument until the situation has been re-examined at a later date.
Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18)	59	The Governing Body has invited: a) the States parties to Convention No. 18 and the Employment Injury Benefits Convention, 1964 (No. 121) [Schedule I amended in 1980], to denounce Convention No. 18; b) the States parties to Convention No. 18 to contemplate ratifying Convention No. 121 and denouncing Convention No. 18 at the same time; It has also decided that the status of Convention No. 18 will be re-examined in due course in the light of new ratifications of Convention No. 121, which should result in a substantial reduction in the number of ratifications of Convention No. 18.
Workmen's Compensation (Occupational Diseases) Recommendation, 1925 (No. 24)	–	The Governing Body has noted that Recommendation No. 22 is obsolete and that it should be withdrawn and has deferred the proposal to the Conference to withdraw this instrument until the situation has been re-examined at a later date.
Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42)	41	The Governing Body has invited the States parties to Convention No. 42 to contemplate ratifying the Employment Injury Benefits Convention, 1964 (No. 121) [Schedule I amended in 1980], the ratification of which would, ipso jure, involve the immediate denunciation of Convention No. 42. It has also decided that the status of Convention No. 42 will be re-examined in due course in the light of new ratifications of Convention No. 121, which should result in a substantial reduction in the number of ratifications of Convention No. 42.

Unemployment benefit

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Social Security (Minimum Standards) Convention, 1952 (No. 102)	40	See above (comprehensive standards).
Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)	6	This Convention was adopted after 1985 and is considered up to date.
Employment Promotion and Protection against Unemployment Recommendation, 1988 (No. 176)	–	This Recommendation was adopted after 1985 and is considered up to date.

Outdated instruments (Instruments which are no longer up-to-date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Unemployment Provision Convention, 1934 (No. 44)	12	The Governing Body has invited the States parties to Convention No. 44 to contemplate ratifying the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), and denouncing Convention No. 44 at the same time. It has also invited the States parties to Convention No. 44 to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 168. Finally, it has deferred a decision to shelve Convention No. 44 until the Office has communicated to it the information requested on the ratification prospects of Convention No. 168.
Unemployment Provision Recommendation, 1934 (No. 44)	–	The Governing Body has noted that Recommendation No. 44 is obsolete and that it should be withdrawn and has deferred the proposal to the Conference to withdraw this instrument until the situation has been re-examined at a later date.

Maternity benefit

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Social Security (Minimum Standards) Convention, 1952 (No. 102)	40	See above (comprehensive standards).
Maternity Protection Convention, 2000 (No. 183)	2	This Convention was adopted after 1985 and is considered up to date.
Maternity Protection Recommendation, 2000 (No. 191)	–	This Recommendation was adopted after 1985 and is considered up to date.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Maternity Protection Convention, 1919 (No. 3)	30	The Working Party on Policy regarding the Revision of Standards decided that these instruments would be re-examined after the entry into force of the Maternity Protection Convention, 2000 (No. 183), on 7 February 2002.
Maternity Protection Convention (Revised), 1952 (No. 103)	38	
Maternity Protection Recommendation, 1952 (No. 95)	–	

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Maternity Protection (Agriculture) Recommendation, 1921 (No. 12)	–	The Governing Body has noted that Recommendation No. 12 is obsolete and has decided to propose to the Conference the withdrawal of this Recommendation in due course.

Family benefit

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Social Security (Minimum Standards) Convention, 1952 (No. 102)	40	See above (comprehensive standards).
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
In the area of family benefit, no instrument has been considered as outdated by the Governing Body.		

A review of the ILO's social security standards provides an opportunity to follow developments in the field of social security over the twentieth century. The adoption of these standards went hand in hand with the establishment of social security systems in many countries and had an important impact at the regional level, particularly in Europe and Latin America. These instruments were designed to provide a framework of standards reflecting the common aims and principles on which any social security system must be based.

The issue of social security has always been one of the principal concerns of the ILO. The Preamble to the Constitution gives the Organization the mandate to improve conditions of labour through "the prevention of unemployment, ... the protection of the worker against sickness, disease and injury arising out of his employment, ... provision for old age and injury". This concern was reaffirmed in 1944 by the International Labour Conference in the Declaration of Philadelphia, which endorses a very broad view of social security in calling, among other measures, for the provision of "a basic income to all in need of such protection". The ILO's standard-setting activities in relation to social security commenced at the First Session of the Conference in 1919 and continued throughout the century. The latest instruments were adopted in this field in 2000 and concern maternity protection. Two periods may be clearly distinguished: the first, inspired by the concept of social insurance, was from 1919 to 1936; while the second, based on a broader conception of social security, began in 1944.

The basic Convention in the field was adopted in 1952 and is the Social Security (Minimum Standards) Convention, 1952 (No. 102). This Convention has inspired not only the ILO, but also regional organizations, including the Council of Europe. It is a text which is intended to set out an overall standard for social security and establish minimum standards for both the persons to be protected and the level of benefits and the conditions under which they are granted.

In its awareness that the value and significance of international labour standards depend on their effect in practice, the Conference has always ensured that social security standards respond to social, economic and industrial changes in the world. It has accordingly revised all the Conventions adopted before the Second World War and, in accordance with article 19, paragraph 3, of the Constitution of the ILO, it has had recourse to a range of options and flexibility devices with a view to responding to the specific conditions of developing countries and allowing the progressive implementation of the principles set forth in the standards.

With the adoption of 31 Conventions and 16 Recommendations, the ILO has been very prolific in setting standards in the field of social security, and everything would appear to indicate that it will continue to be so in the future. It should be noted in this respect that social security was the subject of a general discussion at the 89th Session (June 2001) of the Conference.¹ The objective of this discussion was to establish an ILO vision of social security that, while continuing to be rooted in the basic principles of the ILO, responds to the new issues and challenges facing social security. Following this discussion, the Conference adopted conclusions which, inter alia, reaffirm that “ILO activities in social security should be anchored in the Declaration of Philadelphia, the decent work concept and relevant ILO social security standards”.²

I. Content of the standards on social security

Before reviewing the content of the up-to-date standards in the field of social security, a general overview will be provided of all the standards adopted in this field.

A. Overview of standards on social security

A review of over eight decades of ILO standard-setting activities in the field of social security shows that, historically and conceptually, the standards on social security can be divided into groups. Indeed, it is possible to speak of generations of standards on social security.

First generation of standards (1919-44)

The first generation of standards on social security corresponds to the instruments adopted up to the end of the Second World War. Most of these standards envisage *social insurance* as the means for their application.³ Their objective is the establishment of compulsory insurance systems for a specific branch and covering the principal sectors of activity and the main categories of workers. The first standards adopted cover the fields which appeared the most urgent and suited to international action (maternity,⁴

¹ The discussion was based on the report, *Social security: Issues, challenges and prospects*, ILC, 89th Session, Report VI, Geneva, 2001.

² For fuller information on this discussion and the conclusions adopted, see *Record of Proceedings*, ILC, 89th Session, Geneva, 2001, No. 16.

³ Nevertheless, the Conventions on employment injury accept systems of protection based on the responsibility of the employer.

⁴ The Maternity Protection Convention, 1919 (No. 3).

employment injury,⁵ sickness,⁶ etc.). Nevertheless, it was very rapidly found that these standards no longer reflected the developments in many social security systems.⁷

Second generation of standards (1944-52)

The second generation of standards corresponds to the *era of social security*. The Organization's standard-setting activities took on a more global and broader conception of social security. The idea was to unify and coordinate the various protection schemes within a single social security system covering all contingencies and all workers. Two important Recommendations adopted in 1944 set forth this new conception: the Income Security Recommendation, 1944 (No. 67), and the Medical Care Recommendation, 1944 (No. 69). These Recommendations opened the way for the adoption of the Social Security (Minimum Standards) Convention, 1952 (No. 102), which is based on the principle of a general social security system. This Convention marks a development in social security standards by addressing in a single instrument the nine principal branches of social security, namely medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit. Convention No. 102 introduced the concept of a general minimum level of social security that member States have to achieve and which takes into account the level of economic and social development of each State. In contrast with the preceding Conventions, Convention No. 102 sets out objectives to be achieved, rather than describing the applicable techniques. It is formulated with the necessary flexibility to take into account the various techniques and levels of development, and offers various flexibility devices: the possibility of ratifying the Convention by accepting at least three of its nine branches;⁸ the possibility of subsequently accepting obligations under other branches, thereby allowing States to progressively attain all of the objectives set out in the Convention; the determination of the level of minimum benefits with reference to the level of wages in the country concerned; and the fact of envisaging temporary exceptions for countries whose economy and medical facilities are insufficiently developed, thereby enabling them to restrict the scope of the Convention and the coverage of the benefits guaranteed. In these various respects, the Convention was designed to set forth minimum objectives to be achieved at the same time as the development of a more general programme of protection. In so doing, it provides a measure of the extent to which the level of protection which it envisages is achieved or exceeded by existing schemes.

Third generation of standards (1952-2000)

The third generation of standards on social security corresponds to the instruments adopted after Convention No. 102. It should be noted in this respect that it had been envisaged to adopt, in parallel with Convention No. 102, an instrument setting out a higher

⁵ The Workmen's Compensation (Agriculture) Convention, 1921 (No. 12), the Workmen's Compensation (Accidents) Convention, 1925 (No. 17), the Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18), and the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19).

⁶ The Sickness Insurance (Industry) Convention, 1927 (No. 24), and the Sickness Insurance (Agriculture) Convention, 1927 (No. 25).

⁷ The reasons why the Conference decided to revise the first generation standards are described in a report by the Committee of Social Security Experts, submitted to the 141st Session of the Governing Body (March 1959): doc. GB.141/6/7.

⁸ Including, however, at least one of those respecting unemployment benefit, employment injury benefit, old-age benefit, invalidity benefit and survivors' benefit.

standard of social security. Due to lack of time, and the complexity of the issue, the matter was not addressed by the Conference in 1952. However, the Conference called upon the Governing Body to take up the matter once again when appropriate. In the end, the idea of a single instrument was abandoned and a series of instruments were progressively adopted designed to supplement earlier standards.⁹ In general terms, these instruments revise the Conventions of the first generation and set forth a higher level of protection than that envisaged in Convention No. 102, which establishes minimum standards. These Conventions are inspired by Convention No. 102. Indeed, while guaranteeing a higher level of protection from the point of view of their scope and the level of the benefits guaranteed, they authorize certain exceptions which provide increased flexibility.

Finally, this review will be completed with two subjects addressed by the Conventions on social security. In the first place, emphasis should be placed on the constant concern of the Organization to afford protection to migrant workers, and particularly to foreign nationals. This subject is analysed below in the second part of the chapter. Furthermore, the Conference has also addressed the issue of the social security of seafarers. However, in view of the fact that the working conditions of seafarers require a highly specialized protection system, the policy followed by the Conference has consisted of adopting instruments which specifically apply to this category of workers at special Maritime Sessions. Seafarers are therefore excluded from the scope of the first generation of Conventions on social security, as well as from Convention No. 102, which applies to neither seamen nor seafisherman. The subsequent Conventions allow the exclusion of these categories of workers, provided that they are protected by special schemes providing benefits which are at least equivalent to those envisaged by the Conventions. In this respect, the Conference adopted Convention No. 165 in 1987, which specifically covers the social security of seafarers. Convention No. 165 is examined in Chapter 14.5 of this publication on the social security of seafarers.

For an overview of the status of the standards on social security following the decisions of the Governing Body, please refer to the tables in each section.

B. *Content of up-to-date standards*

The structure of Convention No. 102 serves as a basis for reviewing the content of the up-to-date standards in the field of social security. Convention No. 102 is composed of 15 Parts: Parts II to X correspond to the nine branches of social security mentioned above, while the other Parts (Part I and Parts XI to XV) contain provisions which are common to all the branches. The review below of each of the nine principal branches of social security refers, firstly, to the relevant Part of Convention No. 102 and, secondly, to the corresponding third generation Convention and, where appropriate, the corresponding Recommendation. For each of these branches, a brief definition is given of the contingency covered, that is the risk facing the protected person; the scope of the instruments in terms of persons protected, that is: the categories which are to benefit from the benefits guaranteed by the instruments; the scope of the benefits guaranteed; and the conditions under which they are granted. In short, the idea is to set out who is entitled to what, and under what conditions. The review below only encompasses the provisions relating to each

⁹ These are the Equality of Treatment (Social Security) Convention, 1962 (No. 118), the Employment Injury Benefits Convention, 1964 (No. 121) [Schedule I of which was modified in 1980], the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), the Medical Care and Sickness Benefits Convention, 1969 (No. 130), the Maintenance of Social Security Rights Convention, 1982 (No. 157), the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), and the Maternity Protection Convention, 2000 (No. 183), as well as the Recommendations supplementing these Conventions.

branch, with the provisions common to several branches being examined in the second section of the chapter, which is devoted to principles which are common to the various branches of social security.

1. Medical care

The relevant up-to-date instruments in this field are Convention No. 102, and particularly Part II, and Convention No. 130¹⁰ and the Medical Care and Sickness Benefits Recommendation, 1969 (No. 134).

Definition of the contingency

The contingency covered includes any morbid condition, whatever its cause, and the medical care required as a result. Convention No. 102 also covers the medical care necessitated by pregnancy, confinement and their consequences. The State also has to secure to the persons protected medical care of a preventive nature (Article 7 of Convention No. 102 and Article 8 of Convention No. 130). Medical care has to be afforded with a view to maintaining, restoring or improving the health of the persons protected and their ability to work and to attend to their personal needs (Article 10, paragraph 3, of Convention No. 102, and Article 9 of Convention No. 130).

Persons protected

Rather than defining their scope in relation to sectors of economic activity (such as industry or agriculture) or the legal status of the persons working in these sectors, as was done in the first generation Conventions, both Convention No. 102 and the Conventions adopted subsequently, out of an evident concern for flexibility, refer to quantitative criteria. The State has to protect a certain proportion of persons. These Conventions offer three options to gauge the scope of their application: the State may refer either to employees, the active population or residents.

- Where the State uses the criterion of employees, the persons protected must comprise not less than 50 per cent of all employees, and also their wives and children, under the terms of Article 9 of Convention No. 102, while under Article 10 of Convention No. 130, these must consist of all employees, including apprentices, and the wives and children of such employees.
- If the State adopts the criterion relating to the active population, the persons protected must comprise prescribed classes of economically active population constituting not less than 20 per cent of all residents, and also their wives and children, in the case of Convention No. 102, and not less than 75 per cent of the whole economically active population in the case of Convention No. 130.
- If the State uses the criterion of residents, the persons protected must comprise not less than 50 per cent of all residents in the case of Convention No. 102, and not less than 75 per cent of all residents for Convention No. 130.

Recommendation No. 134 advocates the extension of medical care by stages to all economically active persons and to all residents.

¹⁰ Convention No. 130 has five Parts containing, respectively, general provisions, provisions respecting medical care, provisions on sickness benefit, common provisions and final provisions.

Moreover, it should be emphasized that both Convention No. 102 and the Conventions adopted subsequently contain a number of flexibility devices or allow exceptions with regard to the scope of their application. The box below summarizes these flexibility devices for all the Conventions concerned and refers to each of the branches examined below in this section.

Scope of the Conventions in terms of the persons protected: Exceptions authorized

- Temporary exceptions for *countries whose economy and medical facilities are insufficiently developed* authorize these countries to cover a smaller number of persons protected, determined for example with reference to the numbers of persons employed in industrial enterprises (Article 3 of Convention No. 102, Article 2 of Convention No. 121, Article 4 of Convention No. 128, Article 2 of Convention No. 130 and Article 5 of Convention No. 168).
- *Seafarers, including seafishermen, and public servants* may be excluded from the application of Conventions Nos. 121, 128 and 130 where they are protected by special schemes which provide in the aggregate benefits at least equivalent to those required by these Conventions (Articles 3, 39 and 4 of the Conventions, respectively). Convention No. 168 only allows the exclusion of *public employees* where their employment up to a normal retirement age is guaranteed by national laws or regulations (Article 11). Finally, Convention No. 102 does not apply to *seamen or seafishermen*.
- Conventions Nos. 121, 128 and 130 (Articles 4, 37 and 5 respectively) authorize States whose legislation protects employees to exclude from their application persons performing *casual work*; *members of the employer's family* living in his house in respect of their work for him; *other categories of employees*, which shall not exceed in number 10 per cent of all employees; and in the case of Convention No. 121 alone, *out-workers* (in the sense of homeworkers).
- Finally, Conventions Nos. 128 and 130 (Articles 38 and 3 respectively) authorize States whose legislation protects employees to temporarily exclude from their application *employees in the agricultural sector*.

Nature of the benefit and sharing in its cost

Under Article 10 of Convention No. 102, the persons protected must enjoy the following benefits in the case of sickness: general practitioner care, including domiciliary visiting; specialist care; essential pharmaceutical supplies; and hospitalization where necessary. In addition to the above care, Convention No. 130 provides in Article 13 for dental care and medical rehabilitation, including the supply, maintenance and renewal of prosthetic and orthopaedic appliances. In accordance with Paragraph 3 of Recommendation No. 134, medical care should also include the supply of medical aids, such as eyeglasses, and services for convalescence.

The two above Conventions admit that beneficiaries may be required to share in the cost of the medical care received. However, such sharing in the cost must not result in hardship (Article 10, paragraph 2, of Convention No. 102 and Article 17 of Convention No. 30), nor prejudice the effectiveness of medical and social protection (Article 17 of Convention No. 130).

Qualifying conditions

Entitlement to benefit may be made subject to the completion of a *qualifying period*¹¹ as may be considered necessary to preclude abuse (Article 11 of Convention No. 102 and Article 15 of Convention No. 130). It should, however, be noted that Recommendation No. 134 advocates that the right to medical care should not be made subject to a qualifying period.

¹¹ The qualifying period may consist of a period of contribution, a period of employment, a period of residence or a combination of such periods. This definition covers all contingencies.

Once entitlement to benefits has been acquired, medical care must be granted throughout the contingency. Article 12 of Convention No. 102 nevertheless authorizes States to limit the duration of the benefit to 26 weeks in each case. Under Convention No. 130, such a limitation is only authorized where the beneficiary ceases to belong to the categories of persons protected and in a case of sickness which started while the beneficiary still belonged to such categories (Article 16). In both cases, the period of 26 weeks must, on the one hand, be extended while the beneficiary continues to receive a sickness benefit (see below) and, secondly, in the event of diseases recognized as entailing prolonged care. Furthermore, Convention No. 102 authorizes countries whose economy and medical facilities are insufficiently developed to limit the duration of the benefit to 13 weeks.

2. Sickness benefit

The up-to-date instruments in this field are the same as for medical care (Convention No. 102, Part III, and Convention No. 130 and Recommendation No. 134). These two branches are closely linked in international labour standards. These links are seen, in particular, in the definition of the contingency and the duration of benefit.

Definition of the contingency

The contingency covered includes incapacity for work resulting from a morbid condition and involving suspension of earnings.¹² Recommendation No. 134 advocates the granting of cash benefit in cases where absence from work is justified by the beneficiary being placed under medical supervision for the purpose of rehabilitation or convalescent leave.¹³

Persons protected

- Where the State uses the criteria relating to employees or the active population, the persons protected are the same as those set out above for medical care, with the exception of wives and children, who cannot by definition be covered by this branch (Article 15 of Convention No. 102 and Article 19 of Convention No. 130).
- If the State makes use of the criterion relating to residents, the persons protected must include, for both Convention No. 102 and Convention No. 130, all residents whose means during the contingency do not exceed prescribed limits.

The two Conventions envisage certain exceptions and derogations with regard to their scope of application. These are outlined in the box set out above.

It should also be noted that, in Paragraph 11, Recommendation No. 134 advocates the progressive extension of the right to sickness benefit to all economically active persons.

Level of benefit

In contrast with the first generation Conventions, Convention No. 102 and the Conventions adopted subsequently define the minimum level of benefit to be paid to persons protected. Benefit generally has to take the form of periodical payments calculated according to detailed rules. In this respect, Convention No. 102 sets out three formulae

¹² Article 14 of Convention No. 102 and Article 7(b) of Convention No. 130.

¹³ For further details, see Paragraph 8 of the Recommendation.

designed to be adapted to the practice of the various protection schemes: either benefit is calculated as a function of the previous earnings of the beneficiary or breadwinner (Article 65); or benefit is set at a flat rate or includes a minimum amount which the Convention compares to the wage of an ordinary adult male labourer (Article 66); or, finally, the benefit depends on the means of the persons concerned and its amount is determined as in the previous case (Article 67).¹⁴ For each contingency resulting in suspension of earnings, or a loss or reduction in means, the Convention sets out percentages that the payments must attain in relation to the reference wage. The reference wage of the standard beneficiary¹⁵ corresponds to the previous earnings of the beneficiary or the family breadwinner, where Article 65 is used, or to the wage of the ordinary adult male labourer in the case of Articles 66 and 67.¹⁶

In the case of sickness benefit, the level of the periodical payments for a standard beneficiary (man with wife and two children) must correspond to 45 per cent of the reference wage or earnings in the case of Convention No. 102, while under Convention No. 130, this level must correspond to at least 60 per cent of the reference wage.¹⁷

Convention No. 130 also provides that, in the case of the death of a beneficiary of sickness benefit, a funeral benefit shall be paid to the survivors or to the person who has borne the expense of the funeral.

Qualifying conditions

Entitlement to sickness benefit may be made subject to the completion of a *qualifying period* (Article 17 of Convention No. 102 and Article 25 of Convention No. 130). The benefit must be granted throughout the contingency. However, Convention No. 102 authorizes the limitation of the *duration* of the benefit to 26 weeks in each case of sickness and states that it need not be paid for the first three days of suspension of earnings (Articles 17 and 18). Under the terms of Convention No. 130, the grant of the benefit may be limited to not less than 52 weeks, with the same *waiting period* of three days (Article 26).

States whose economy and medical facilities are insufficiently developed may reduce the minimum duration of the provision of benefit in each case of sickness to 13 weeks under Convention No. 102 and to 26 weeks under Convention No. 130.

¹⁴ These three formulae may be applied in the case of the cash benefits envisaged for each of the branches examined in this section.

¹⁵ The standard beneficiary is defined by the Convention and varies according to the contingency.

¹⁶ The required percentages are indicated in the Schedule to Part XI of Convention No. 102 and are indicated for each of the contingencies examined.

¹⁷ Articles 65 or 66 of Convention No. 102, and Articles 22 or 23 of Convention No. 130, apply where employees or categories of the economically active population are protected. Where all residents whose means during the contingency do not exceed prescribed limits are protected, Article 67 of Convention No. 102 and Article 24 of Convention No. 130 apply.

3. Unemployment benefit

The relevant up-to-date instruments in this field are Convention No. 102, and particularly Part IV, and the Employment Promotion and Protection against Unemployment Convention (No. 168)¹⁸ and Recommendation (No. 176), 1988.

Definition of the contingency

Under the terms of Article 20 of Convention No. 102 and Article 10 of Convention No. 168, the contingency covered includes suspension or loss of earnings due to inability to obtain suitable employment in the case of a person protected who is capable of, and available for, work. Convention No. 168 also provides that the person must be actually seeking work.

Convention No. 102 focuses on full unemployment. However, Convention No. 168 provides that States must, on the one hand, endeavour to extend protection to loss of earnings due to partial unemployment and the suspension or reduction of earnings due to a temporary suspension of work and, on the other hand, provide the payment of benefits to part-time workers who are actually seeking full-time work. States in which the limited scope of the social security system so warrants may benefit from exceptions allowing them, *inter alia*, to defer the implementation of measures designed to guarantee such protection.¹⁹ Moreover, the Convention contains a series of provisions for new applicants for employment under which States must take account of the fact that there are many categories of persons seeking work who have never been, or have ceased to be, recognized as unemployed or have never been, or have ceased to be, covered by schemes for the protection of the unemployed. The Convention consequently requires the provision of social benefits to certain of these categories.²⁰

It should be noted that Convention No. 168 is not intended solely to protect unemployed persons, but also to promote employment. States ratifying the Convention undertake to adopt appropriate steps to coordinate their system of protection against unemployment and their employment policy. The system of protection against unemployment, and in particular the methods of providing unemployment benefit, have to contribute to the promotion of full, productive and freely chosen employment and must not

¹⁸ Convention No. 168 has eight Parts, entitled respectively: general provisions; promotion of productive employment; contingencies covered; persons protected; methods of protection; benefit to be provided; special provisions for new applicants for employment; and, finally, legal, administrative and financial guarantees.

¹⁹ It should be noted in this respect that Convention No. 168, out of a concern for flexibility, also envisages many other temporary exceptions. States where it is justified by the limited protection of the social security system may, by a declaration accompanying their ratification, avail themselves of all of these temporary exceptions, whereas other States may avail themselves of at most two of the exceptions. For more details on the nature of these exceptions and the conditions under which States may avail themselves thereof, see Article 5 of the Convention.

²⁰ In accordance with Article 26 of the Convention, social benefits have to be provided to at least three of the ten following categories of persons: young persons who have completed their vocational training; young persons who have completed their studies; young persons who have completed their military service; persons after a period devoted to bringing up a child or caring for someone who is sick, disabled or elderly; persons whose spouse had died, when they are not entitled to a survivor's benefit; divorced or separated persons; released prisoners; adults, including disabled persons, who have completed a period of training; migrant workers on return to their home country, except in so far as they have acquired rights under the legislation of the country where they last worked; and previously self-employed persons.

be such as to discourage employers from offering and workers from seeking productive employment. Part II of the Convention contains a series of provisions relating to the promotion of productive employment and refers to the Human Resources Development Convention (No. 142) and Recommendation (No. 150), 1975, and to the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169). For further information, please refer Chapters 6 and 7 of this publication which cover, respectively, employment policy and human resources development.

Persons protected

In accordance with Article 21 of Convention No. 102, the persons protected must comprise either prescribed classes of employees, constituting not less than 50 per cent of all employees; or all residents whose means during the contingency do not exceed prescribed limits. Under Article 11 of Convention No. 168, the persons protected must comprise prescribed classes of employees constituting not less than 85 per cent of all employees, including public employees and apprentices. The two Conventions envisage certain exceptions or temporary derogations from their scope, as described in the box above.

Recommendation No. 176 encourages States to extend progressively the application of the legislation concerning unemployment benefit to cover all employees.

The benefit

The benefit must be a periodical payment calculated in accordance with detailed rules.²¹ In the case of Convention No. 102, the benefit provided to a standard beneficiary must attain 45 per cent of the reference wage. In the case of Convention No. 168, this rate is 50 per cent of the reference wage.²² These percentages apply in cases of full unemployment and, under Convention No. 168, suspension of earnings due to a temporary suspension of work without any break in the employment relationship. In the case of countries benefiting from temporary exceptions, Convention No. 168 authorizes a rate of 45 per cent of the reference wage.

Recommendation No. 176 also contains detailed provisions respecting, among other matters, partial unemployment, the protection of workers who are experiencing hardship during a waiting period, new applicants for employment and part-time workers.

Qualifying conditions

Entitlement to unemployment benefit may be made subject to the completion of a *qualifying period*. However, such qualifying period must not exceed the duration considered necessary to preclude abuse.

Furthermore, unemployment benefit need not be paid for a *waiting period*, the duration of which must not exceed seven days in each case of suspension of earnings (Article 24 of Convention No. 102 and Article 18 of Convention No. 168). However, Convention No. 168 authorizes a waiting period of ten days in the case of countries

²¹ Article 22 of Convention No. 102, read in conjunction with Articles 65, 66 and 67, and Article 15 of Convention No. 168.

²² Under Convention No. 168, the reference wage corresponds to previous earnings where the benefits are based on contributions or previous earnings. Where the benefits are determined in another manner, they correspond to the statutory minimum wage, the wage of an ordinary labourer or the level which provides the minimum essential for basic living expenses.

benefiting from temporary exceptions. Moreover, both Convention No. 102 and Convention No. 168 provide, in the case of seasonal workers, that the waiting period may be adapted to their occupational circumstances. Once entitlement to benefit has been recognized, the unemployment benefit has to be granted to the person protected *throughout* the contingency. Nevertheless, the duration of the benefit may be limited. Under Article 24 of Convention No. 102, where classes of employees are protected, the duration of the benefit may be limited to 13 weeks within a period of 12 months. Where the protection covers all residents whose means during the contingency do not exceed prescribed limits, this duration may be limited to 26 weeks within a period of 12 months. In the case of Convention No. 168, the initial duration of payment of the benefit may be limited to 26 weeks in each spell of unemployment, or to 39 weeks over any period of 24 months. Convention No. 168 authorizes States benefiting from temporary exceptions to limit the duration of payment of benefit to 13 weeks over any period of 12 months (Article 19, paragraph 4, in conjunction with Article 5).

It should be noted that, in the case of the continuation of full unemployment for longer than this initial duration of the payment of the benefit, Convention No. 168 provides for the payment of benefit for a subsequent period, which may be limited to a prescribed period. Such benefit may be calculated in the light of the resources of the beneficiary and his or her family (Article 19, paragraph 2).

Finally, it should be noted that, when protected persons have received severance pay directly from their employer or from any other source, Convention No. 168 permits the suspension of the unemployment benefit to which they would be entitled or the reduction of the severance pay as a function of the total amount of the unemployment benefit (Article 22). The Convention also permits the refusal, withdrawal, suspension or reduction of the benefit when the person concerned refuses to accept *suitable employment*.²³ Article 21, paragraph 2, of Convention No. 168 enumerates a number of elements which must be taken into account in assessing the suitability of employment, including the age of unemployed persons, their length of service in their former occupation, their acquired experience, the length of their period of unemployment and the labour market situation. In paragraph 14, Recommendation No. 176 indicates the types of employment to which the concept of suitable employment should not be applied.

4. Old-age benefit

The up-to-date instruments in this field are Convention No. 102, and particularly Part V, and the Invalidity, Old-Age and Survivors' Benefits Convention (No. 128)²⁴ and Recommendation (No. 131), 1967.

Definition of the contingency

The contingency covered is survival beyond a prescribed age. Under Article 26 of Convention No. 102 and Article 15 of Convention No. 128, this age should not normally be more than 65 years.

²³ Other cases in which benefit may be suspended are examined in the second section of this chapter, which covers the principles common to the various branches of social security.

²⁴ Convention No. 128 contains eight Parts. To ratify the Convention, the member State must accept at least one of Parts II, III and IV, covering respectively invalidity benefit, old-age benefit and survivors' benefit. Part I, V, VI and VII respectively contain general provisions, standards to be complied with by periodical payments, common provisions and miscellaneous provisions.

However, the instruments allow a higher age to be fixed for certain specific reasons. In the case of Convention No. 102, these consist of taking into account the working ability of elderly persons and, for Convention No. 128, demographic, economic and social criteria, demonstrated statistically. Exceptions therefore have to be based on objective criteria demonstrated by statistics covering, for example, life expectancy and the activity rate of elderly persons.

States may also set a lower retirement age. If the prescribed age is 65 years or higher, Convention No. 128 provides that this age shall be lowered in respect of persons who have been engaged in occupations that are deemed to be arduous or unhealthy. Recommendation No. 131 also advocates, in Paragraph 7, the lowering of the pensionable age in respect of categories of persons for which such a measure is justified on social grounds.

Persons protected

- Under Article 27 of Convention No. 102, if the State uses the criterion of employees, the persons protected must comprise not less than 50 per cent of all employees, while, under Article 16 of Convention No. 128, all employees, including apprentices, have to be covered.
- In the case of Convention No. 102, where the criterion is applied of economically active persons, the persons protected must comprise classes of the economically active population constituting not less than 20 per cent of all residents while, under Convention No. 128, these shall comprise not less than 75 per cent of the whole economically active population.
- Finally, the use of the criterion of residents implies, both for Convention No. 102 and Convention No. 128, that all residents whose means during the contingency do not exceed prescribed limits are protected.

The two Conventions provide for certain derogations and exemptions from their scope, as described in the box above.

In Paragraph 2, Recommendation No. 131 calls for the extension by stages of coverage of old-age benefits to persons whose employment is of a casual nature and to all economically active persons

Qualifying conditions

Persons protected have to fulfil two conditions to receive old-age benefit: the first, which has already been mentioned above, is related to the *pensionable age*, and the second to the completion of a qualifying period.

With regard to the *qualifying period*, a distinction should be made between two points. In the first place, Article 29, paragraph 1, of Convention No. 102 and Article 18, paragraph 1, of Convention No. 128 refer to a **maximum** qualifying period which may be required to secure benefits of the minimum level prescribed by these Conventions. This qualifying period consists of a period of contribution or of employment which may not exceed 30 years,²⁵ or a period of residence which may not exceed 20 years. Moreover, the second paragraph of the above Articles indicates a **minimum** qualifying period which may be prescribed to acquire entitlement to benefit. Where the grant of old-age benefit is

²⁵ More flexible conditions are envisaged by the two instruments where all of the economically active population is protected.

subject to the completion of a minimum period of contribution or employment, a *reduced benefit* must be secured for protected persons who have completed a qualifying period of 15 years of contribution or employment. The objective of these provisions is not the payment of a reduced benefit in all cases, but merely to guarantee, where entitlement to a pension is subject to the completion of a period of contribution or employment, that protected persons who have completed a qualifying period of 15 years receive a pension at a reduced rate. In this respect, the Conventions leave it to national legislation to determine the conditions under which the qualifying period must be completed, provided that it does not exceed the durations indicated above.²⁶

Benefits

The objective of the relevant provisions of Conventions Nos. 102 and 128 is to guarantee protected persons who have reached a certain age the means of a decent standard of living for the rest of their life. These instruments accordingly envisage the payment of benefit in the form of periodical payments throughout the contingency, that is until the death of the beneficiary.

The level of benefit must attain, for a standard beneficiary (a man with a wife of pensionable age) after completion of the maximum qualifying period, 40 per cent of the reference wage, under the terms of Convention No. 102. This percentage is raised to 45 per cent under Convention No. 128,²⁷ and 55 per cent by Recommendation No. 131. In Paragraphs 23 and 25, the Recommendation also indicates that national legislation should fix minimum amounts of old-age benefits so as to ensure a minimum standard of living and that the level of the benefit should be increased in certain circumstances, and particularly for beneficiaries requiring the constant help of another person.

The maintenance of the purchasing power of pensions is a problem that has to be faced by social security systems. Pensioners are particularly vulnerable to the risks of inflation, especially where the pension is their main, if not their only source of income. The adjustment of long-term benefits is necessary in order to take into account changes in the cost of living and prevent the loss of the real value of pensions. Conventions Nos. 102 and 128 consequently set forth the principle of adjusting the rates of benefit following substantial changes in the general level of earnings or the cost of living. However, these instruments confine themselves to setting forth the principle, while leaving it to States to determine how this is to be given effect (methods and periodicity of adjustments).

5. *Employment injury benefit*

The relevant up-to-date instruments in this field are Convention No. 102, and particularly Part VI, and the Employment Injury Benefits Convention (No. 121) and Recommendation (No. 121), 1964 [Schedule I amended in 1980].

²⁶ *Social security protection in old age*, General Survey of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 76th Session, Geneva, 1989, Report III (Part IVB), paras. 99-100.

²⁷ These percentages may be decreased by up to ten points where benefit is secured to at least any person protected who has completed a qualifying period of not more than ten years of employment or contribution, or five years of residence.

Definition of the contingency

Under Article 32 of Convention No. 102 and Article 6 of Convention No. 121, the contingencies covered include: a morbid condition, incapacity for work, invalidity or a loss of faculty due to an accident or a prescribed disease resulting from employment. The contingency also includes loss of support as a result of the death of the breadwinner following employment injury. In the framework of Convention No. 102, the beneficiaries are the widow or child. In the case of Convention No. 121, they are prescribed categories of beneficiaries, namely: a widow, as prescribed by the law; dependent children of the deceased; a disabled and dependent widower;²⁸ and any other person prescribed by the legislation (generally parents, grandparents, etc.).

Convention No. 121 places the obligation upon States to prescribe a definition of “industrial accident”, including the conditions under which a commuting accident is considered to be an industrial accident. With regard to the concept of occupational disease, Convention No. 121 offers States three options: either to prescribe in their legislation a list of diseases, comprising at least the diseases enumerated in Schedule I to the Convention, which are to be regarded as occupational diseases; to include in its legislation a general definition of occupational diseases broad enough to cover at least the diseases enumerated in Schedule I to the Convention; or, finally, to prescribe a list of diseases, complemented by a general definition of occupational diseases. In its left-hand column, Schedule I of the Convention identifies 29 categories of occupational diseases and, in its right-hand column, the types of work involving exposure to the risk. This Schedule initially included 15 categories of occupational diseases, but was updated in 1980, in accordance with Article 31 of the Convention, which explicitly sets out the procedure for updating the list of diseases contained in the Schedule.²⁹ Protected persons who are victims of one of these diseases and employed in work involving exposure to the corresponding risk benefit from the presumption of the occupational origin of the disease.

Recommendation No. 121 indicates in Paragraphs 5 and 6 the cases in which accidents should be considered by national legislation as industrial accidents, as well as the conditions under which the occupational origin of the disease should be presumed.

Persons protected

Under Article 33 of Convention No. 102, the persons protected must comprise prescribed classes of employees constituting not less than 50 per cent of all employees. The scope of Convention No. 121 is broader, since it envisages that all employees, including apprentices in the public and private sector, including cooperatives, are to be protected. However, both instruments provide for temporary exceptions in relation to their scope for countries whose economy and medical facilities are insufficiently developed, as well as the exceptions which are set out in the above box. In this respect, Recommendation No. 121 calls for the extension, if necessary by stages, of the application of legislation providing for employment injury benefits to any categories of employees which may have been excluded. It also recommends States to secure the provision of benefits, if necessary through voluntary insurance, to prescribed categories of self-employed persons and certain

²⁸ In contrast with Conventions Nos. 102 and 128.

²⁹ It should be noted in this respect that the Governing Body has included on the agenda of the 90th Session (June 2002) of the Conference an item on the recording and notification of occupational diseases, including the possible revision of the list of occupational diseases, Schedule I of Convention No. 121. For further information point, see: *Recording and notification of occupational accidents and diseases and ILO list of occupational diseases*, ILC, 90th Session, Geneva, 2002, Report V(1), particularly Chapter II.

categories of persons working without pay. For further information on this point, see Paragraphs 2 and 3 of the Recommendation.

Benefits

The benefits envisaged by Conventions Nos. 102 and 128 are of three types: medical care; cash benefits in the event of incapacity for work and loss of earning capacity; and, where appropriate, cash benefits in the event of the death of the breadwinner.

With regard to *medical care* (Article 34 of Convention No. 102 and Article 10 of Convention No. 121), it has to be afforded with a view to maintaining, restoring or improving the health of the persons protected and their ability to work and to attend to their personal needs. The care must comprise: general practitioner and specialist in-patient care and out-patient care, including domiciliary visiting; dental care; nursing care at home or in hospital or other medical institutions; maintenance in hospitals, convalescent homes, sanatoria or other medical institutions; dental, pharmaceutical and other medical or surgical supplies, including prosthetic appliances, and eyeglasses; and the care furnished by members of such other professions as maybe recognized as allied to the medical profession, under the supervision of a medical or dental practitioner. Convention No. 121 also envisages emergency treatment of those at the place of work of persons sustaining a serious accident, and follow-up treatment of those whose injury is slight and does not entail discontinuance of work. In the case of States availing themselves of temporary exceptions, the extent of the care to be provided is more limited (Article 34 of Convention No. 102 and Article 12 of Convention No. 121).

The *cash benefits* to be provided in the event of incapacity for work, loss of earning capacity, corresponding loss of faculty or the death of the breadwinner, must be a periodical payment calculated according to detailed rules.³⁰ In case of temporary incapacity for work, total loss of earning capacity likely to be permanent or corresponding loss of faculty, the amount of the periodical payments must attain for a standard beneficiary (man with wife and two children) 50 per cent of the reference wage under the terms of Convention No. 102. This rate is raised to 60 per cent by Convention No. 121. Moreover, Recommendation No. 121 indicates that the rates of benefits should not be less than two-thirds of the injured person's earnings. In case of partial loss of earning capacity³¹ likely to be permanent, the rate of benefit must be a suitable proportion of that specified for total loss of earning capacity. The above benefits may nevertheless be commuted for a lump sum where the degree of incapacity is slight or where the competent authority is satisfied that the lump sum will be properly utilized (Article 36, paragraph 3, of Convention No. 102). The same applies in the case of Convention No. 121, which refers to loss of earning capacity which is not substantial and the particularly advantageous utilization of the lump sum for the injured person (Article 14, paragraph 4, and Article 15).

The rate of *survivors' benefit* in the event of the death of the breadwinner must attain, for a widow with two children, at least 40 per cent of the reference wage for Convention No. 102 and 50 per cent under the terms of Convention No. 121.

It should be emphasized that Convention No. 121 provides that no periodical payment may be less than a prescribed minimum amount. However, the Convention allows

³⁰ Article 36, in conjunction with Articles 65 and 66, of Convention No. 102, and Articles 13 and 14, in conjunction with Articles 19 and 20, of Convention No. 121.

³¹ Convention No. 121 refers to substantial partial loss of earning capacity which is in excess of a prescribed degree (Article 14, paragraph 3).

countries which lack the necessary administrative facilities for periodical payments to convert these payments into a lump sum.

As in the case of old-age and other long-term benefits, the Conventions provide that the rates of periodical payments have to be reviewed following substantial changes in the general level of earnings or the cost of living.

It should be noted that Convention No. 121 provides broader protection than Convention No. 102. By way of illustration, injured persons requiring the constant assistance of another person have to be provided with additional benefits. Moreover, a funeral benefit at a rate which is not less than the normal cost of a funeral also has to be provided for by the legislation. Under the terms of Article 26 of Convention No. 121, States also have to take measures to prevent industrial accidents and occupational diseases, provide rehabilitation services and take measures to further the placement of disabled persons in suitable employment.

Qualifying conditions

In contrast with other contingencies, the granting of benefits in the event of employment injury cannot be made subject to a *qualifying period*, either in the case of medical care or cash benefits. Benefits have to be provided from the first day of the contingency without a *waiting period*. However, but only in the case of incapacity for work resulting from employment injury, Article 38 of Convention No. 102 provides that the benefit need not be paid for the first three days in each case of suspension of earnings. Convention No. 121 is more restrictive in this respect, since the waiting period is only permitted in two cases: where the State benefits from temporary exceptions or where the waiting period was provided for in the legislation at the date on which the Convention comes into force and if the reasons for having recourse to this exception subsist. Recommendation No. 121 advocates the removal of the waiting period.

6. **Family benefit**

In the absence of a higher standard in this field, Convention No. 102, Part VII, is the only instrument addressing family benefit.

Definition of the contingency

Under Article 40 of the Convention, the contingency covered is “responsibility for the maintenance of children as prescribed”. Article 1 of the Convention indicates that the term “child” means a child under school-leaving age or under 15 years of age. The wording of Article 40 therefore means that the Convention leaves it to national laws or regulations to determine the number of children in respect of whom benefits are payable.

Persons protected

Article 41 provides that the persons protected must comprise:

- prescribed classes of employees, constituting not less than 50 per cent of all employees; or
- prescribed classes of the economically active population, constituting not less than 20 per cent of all residents; or
- all residents whose means during the contingency do not exceed prescribed limits.

Countries whose economies and medical facilities are insufficiently developed may avail themselves of temporary exceptions under which they are authorized to cover a lower number of persons.

Benefits

The Convention envisages the provision of benefit either in cash or in kind (food, clothing, housing, holidays or domestic help), or a combination of both. In contrast with the provisions for other contingencies, the level of family benefit is not determined as a function of a standard beneficiary, but as a global level. Under the terms of Article 44 of the Convention, the total value of the benefits granted for the whole of the country has to be such as to represent either 3 per cent of the wage of an ordinary adult male labourer, multiplied by the total number of children of persons protected, or 1.5 per cent of the said wage, multiplied by the total number of children of all residents.

Qualifying conditions

Entitlement to family benefit may be made subject to the completion of a *qualifying period*, which may be three months of contribution or employment, or one year of residence (Article 43). The benefit must be granted *throughout* the contingency, that is up to the fifteenth year of the child or up to school-leaving age.

7. Maternity benefit

The relevant up-to-date instruments in this field are Convention No. 102, and particularly Part VIII, and the Maternity Protection Convention (No. 183) and Recommendation (No. 191), 2000.

Definition of the contingency

Under Article 47 of Convention No. 102, the contingencies covered include, on the one hand, the medical care required by pregnancy, confinement and their consequences and, on the other hand, the resulting suspension of earnings.

Convention No. 183, although not explicitly defining the contingency, nevertheless covers the same contingencies as Convention No. 102 and provides for much broader benefits.

Persons protected

Under Article 48 of Convention No. 102, the persons protected shall comprise:

- all women in prescribed classes of employees, which classes constitute not less than 50 per cent of all employees; or
- all women in prescribed classes of the economically active population, which classes constitute not less than 20 per cent of all residents; or
- where a State benefits from temporary exceptions for countries whose economy and medical facilities are insufficiently developed, a lower number of employees.³²

³² In the three cases, for maternity medical benefit, the persons protected must also include the wives of men in these classes (employees or the economically active population).

The scope of application of Convention No. 183 is much broader. Under Article 2, the Convention applies to all employed women, including those in atypical forms of dependent work.³³ It is also indicated that the term “woman” applies to any female person without discrimination whatsoever. Nevertheless, the Convention offers States the possibility, after consulting the representative organizations of employers and workers concerned, to exclude wholly or partly from its scope limited categories of workers when its application to them would raise special problems of a substantial nature.

Benefits

In the first place, it should be noted that Convention No. 102 is an instrument that is devoted exclusively to social security and that it only addresses maternity from the point of view of social security, while Convention No. 183, in the same way as Conventions Nos. 3 and 103 in their time, is specifically devoted to maternity protection and therefore provides for much more extensive benefits.

Convention No. 102 envisages the provision of maternity medical benefit and, in the event of suspension of earnings resulting from pregnancy, confinement and their consequences, the provision of cash benefits for at least 12 weeks, as set out in Articles 49 and 50. *Medical care* must include at least prenatal, confinement and postnatal care, either by medical practitioners or by qualified midwives, and hospitalization where necessary. The minimum rate of *cash benefits* must correspond to at least 45 per cent of the reference wage or earnings.

Convention No. 183 sets forth in Article 4 *the right to a minimum period of maternity leave*. All women to whom the Convention applies must, on production of a medical certificate or other appropriate certification, be entitled to a period of maternity leave of not less than 14 weeks.³⁴ This leave must include a period of six weeks' compulsory leave after childbirth, unless otherwise agreed at the national level by the government and the representative organizations of employers and workers. The prenatal portion of maternity leave also has to be extended by any period elapsing between the presumed date and the actual date of childbirth. Finally, in case of illness, complications or risk of complications arising out of pregnancy or childbirth, additional leave must be granted (Article 5). In Paragraph 1, Recommendation No. 191 calls for the extension of the period of maternity leave to 18 weeks.

Women who are absent from work on maternity leave must be provided with *cash benefits* at a level which ensures that they can maintain themselves and their child in proper conditions of health and with a suitable standard of living (Article 6). Where such benefits are based on previous earnings, they must not be less than two-thirds of such earnings. Where other methods are used to determine the cash benefits, their amount has to be comparable to the amount resulting on average from the determination of benefits based on previous earnings. However, in the case of countries whose economy and social security system are insufficiently developed, the level of cash benefits may be equivalent

³³ It should be emphasized in this respect that the Maternity Protection Convention (Revised), 1952 (No. 103), already has a broader scope than Convention No. 102, since it applies to women employed in industrial undertakings and in non-industrial and agricultural occupations, including women wage earners working at home. At the time of the adoption of Convention No. 183, it clearly emerged that the objective should be that maternity protection should apply to the broadest possible number of employed women. *Maternity protection at work*, ILC, 88th Session, 2000, Report IV(2A); see also ILC, 87th Session, 1999, Report V(1), pp. 28 and 29.

³⁴ This constitutes progress in relation to the previous Conventions on maternity protection (Conventions Nos. 3 and 103), which prescribed maternity leave of 12 weeks.

to the benefits payable for sickness or temporary disability (Article 7). In paragraph 2, Recommendation No. 191 encourages member States to raise the level of maternity benefit to the full amount of the woman's previous earnings.

The *medical benefits* provided to protected persons must include, under Article 6 of the Convention, prenatal, childbirth and postnatal care, as well as hospitalization when necessary.

In addition to cash benefits and medical care, Article 10 of Convention No. 183 envisages the right of breastfeeding mothers to one or more daily breaks or a daily reduction of hours of work. These breaks or reduction of hours of work have to be counted as working time and remunerated accordingly.

The Convention also contains several provisions respecting *health protection*, *employment protection* and *non-discrimination*. Under Article 3, States must take measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined to be prejudicial to the health of the mother or the child. Moreover, Article 9 sets forth the obligation for States to adopt measures to ensure that maternity does not constitute a source of discrimination in employment or in access to employment. It is prohibited for employers to terminate the employment of a woman during her pregnancy or absence on leave or during a period following her return to work, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. Finally, when the woman returns to work, she must be guaranteed the right to return to the same position or an equivalent position paid at the same rate.

Qualifying conditions

Under Article 51 of Convention No. 102, the right to benefit may be made subject to the completion of a *qualifying period* as may be considered necessary to preclude abuse. Once the benefit has been granted, it must be provided *throughout* the contingency, although the cash benefit may be limited to 12 weeks (Article 52). Nevertheless, if national laws or regulations require or authorize maternity leave longer than 12 weeks, the cash benefit must be paid to the woman throughout the whole of the leave.

Convention No. 183 also envisages that entitlement to cash benefits may be made subject to certain conditions, although such conditions must nevertheless be able to be satisfied by a large majority of the women to whom the Convention applies. Furthermore, where women do not meet the prescribed conditions, they must be entitled to adequate benefits financed by social assistance funds (Article 6, paragraphs 5 and 6).

8. *Invalidity benefit*

The relevant up-to-date instruments in this field are Convention No. 102, and particularly Part IX, and the Invalidity, Old-Age and Survivors' Benefits Convention (No. 128)³⁵ and Recommendation (No. 131), 1967.

Definition of the contingency

The contingency covered is the inability to engage in any gainful activity (incapacity to engage in any gainful activity in Convention No. 128) where such inability is likely to be permanent or persists after the exhaustion of sickness benefit (Article 54 of Convention No. 102 and Article 8 of Convention No. 128).

³⁵ The structure of this Convention has been described in footnote 24.

Recommendation No. 131 also advocates taking into account incapacity to engage in an activity involving substantial gain.

Persons protected

- If the State uses the criterion of employees, the persons protected must comprise not less than 50 per cent of all employees, in accordance with Article 55 of Convention No. 102, while under Article 9 of Convention No. 128, all employees, including apprentices, must be protected.
- Where the criterion of the economically active population is applied, the persons protected must comprise prescribed classes of the economically active population constituting not less than 20 per cent of all residents in the case of Convention No. 102, and not less than 75 per cent of the whole economically active population under Convention No. 128.
- Finally, the use of the criterion relating to residents involves, for both Convention No. 102 and Convention No. 128, the protection of all residents whose means during the contingency do not exceed prescribed limits.

The two Conventions envisage certain exceptions or derogations with regard to their scope, as described in the box above.

Recommendation No. 131 encourages member States to extend the right to invalidity benefit to casual workers and to all economically active persons.

Benefits

The benefit has to take the form of a periodical payment calculated in accordance with detailed rules.³⁶ For a standard beneficiary (man with wife and two children), their rate must be equivalent to at least 40 per cent of the reference wage or earnings for Convention No. 102. This rate is raised to 50 per cent by Convention No. 128.

Recommendation No. 131 advocates increasing the amount of the benefit to 60 per cent of the reference wage. It also recommends, as for old-age and survivors' benefit, that national legislation should fix minimum amounts of invalidity, old-age and survivors' benefits, so as to ensure a minimum standard of living³⁷ and that increments to the amounts of these benefits should be provided in certain circumstances, and particularly for beneficiaries requiring the constant help of another person.

Invalidity benefit has to be granted throughout the contingency or until an old-age benefit becomes payable (Article 58 of Convention No. 102 and Article 12 of Convention No. 128). It should be recalled that, as in the case of old-age benefit, the two Conventions provide that the rates of the pension have to be reviewed following substantial changes in the general level of earnings or the cost of living.

³⁶ Article 56 of Convention No. 102, in conjunction with Articles 65, 66 and 67, and Article 10 of Convention No. 128, in conjunction with Articles 26, 27 and 28.

³⁷ It is interesting to note in this respect that the concept of minimum standard of living is only contained in Convention No. 121. While it was possible in the case of employment injury to prescribe in the Convention that invalidity and survivors' benefits must not be below a minimum standard of living, the same was not the case for invalidity of common origin. For this latter branch, the concept of minimum standard of living is only found in the Recommendation.

In addition to cash benefits, Convention No. 128 envisages the adoption of measures for the provision of rehabilitation services designed to prepare disabled persons for the resumption of their previous activity or for another activity suited to their aptitudes. The obligation to provide such services does not apply to countries benefiting from temporary exceptions.

Qualifying conditions

Invalidity benefit at the level envisaged by the Conventions must be secured to protected persons who have completed a *qualifying period* of 15 years of contribution or employment, or ten years of residence. As in the case of old-age benefit, where the invalidity benefit is conditional upon a minimum period of contribution, or employment, a *reduced benefit* must be secured to a person protected who has completed a qualifying period of five years of contribution, employment or residence. Where all economically active persons are protected, more flexible rules apply both for the full invalidity pension and the reduced pension (Article 57 of Convention No. 102 and Article 11 of Convention No. 128).

9. **Survivors' benefit**

The relevant up-to-date instruments in this field are Convention No. 102, and particularly Part X, and the Invalidity, Old-Age and Survivors' Benefits Convention (No. 128)³⁸ and Recommendation (No. 131), 1967.

Definition of the contingency

The contingency covered is the loss of support suffered by the widow or child as a result of the death of the breadwinner (Article 60 of Convention No. 102 and Article 21 of Convention No. 128). The protection provided therefore concerns widows who were dependent on the deceased breadwinner, and children whose breadwinner (father or mother) has died. The term "child" means a child under school-leaving age or under 15 years of age,³⁹ or a higher age where the child is an apprentice or student or has a chronic illness or infirmity disabling him or her any gainful activity.

In the case of a widow, the right to benefit may be made conditional on her being presumed to be incapable of self-support (Article 60, paragraph 1, of Convention No. 102). Article 21 of Convention No. 128 also indicates that the widow must have reached a prescribed age, which must not be higher than the pensionable age. However, where a widow is invalid or is caring for a dependent child of the deceased, there is no requirement as to age and the benefit must be accorded to her.

Persons protected

- Where the State uses the criterion relating to employees, the persons protected must comprise the wives and children of breadwinners in prescribed classes of employees, which constitute not less than 50 per cent of all employees, in accordance with Article 61 of Convention No. 102, while under Article 22 of Convention No. 128, the wives, children and other dependants of all breadwinners who were employees or apprentices must be covered.

³⁸ The structure of this Convention is described in footnote 24 above.

³⁹ Whichever age is the higher.

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- Where the criterion relating to the economically active population is used, the persons protected must comprise the wives and the children of breadwinners in prescribed classes of the economically active population which constitute not less than 20 per cent of all residents under the terms of Convention No. 102, and not less than 75 per cent of the whole economically active population in accordance with Convention No. 128.
 - Finally, recourse to the criterion relating to residents implies, for both Convention No. 102 and Convention No. 128, that all resident widows and resident children who have lost their breadwinner and whose means do not exceed prescribed limits have to be protected.

The two Conventions envisage certain exceptions and derogations with regard to their scope, which are described in the box above.

Recommendation No. 131 advocates the extension of entitlement to survivors' benefit to wives, children and other dependants of persons whose employment is of a casual nature and of all economically active persons. It also encourages member States to grant the same rights to an invalid and dependent widower as to widows (Paragraphs 2 and 12).

Benefits

The benefit must be a periodical payment calculated in accordance with detailed rules.⁴⁰ For a widow with two children, the rate of the benefit must correspond to at least 40 per cent of the reference earnings, in accordance with Article 62 of Convention No. 102. This rate is raised to 45 per cent by Convention No. 128 (Article 23) and to 55 per cent by Recommendation No. 131.

Survivors' benefit must be granted throughout the contingency. It is a long-term benefit which, in the same way as old-age and invalidity benefit, must be reviewed following substantial changes in the general level of earnings or in the cost of living.

Qualifying conditions

Article 63 of Convention No. 102 and Article 24 of Convention No. 128 contain a number of provisions respecting the *qualifying period* which the breadwinner must, as appropriate, have completed for survivors' benefit at the rate prescribed by these Conventions to be secured to protected persons. This qualifying period may consist of a period of contribution or employment of not more than 15 years, or a period of residence not exceeding ten years.

As in the case of old-age and invalidity benefit, where the granting of survivors' benefit is conditional upon the completion of a period of contribution or employment, a *reduced benefit* shall be secured to a person protected whose breadwinner has completed a qualifying period of five years of contribution, employment or residence. Where the wives and children of all economically active persons are protected, more flexible rules apply to the provision of the full benefit and the reduced benefit.

⁴⁰ Article 62 of Convention No. 102, in conjunction with Articles 65, 66 and 67, and Article 23 of Convention No. 128, in conjunction with Articles 26, 27 and 28.

Following the above description of the benefits secured by the up-to-date instruments for the nine branches of social security, the general principles set out by these instruments which relate to all of these branches are reviewed below.

II. Principles common to the various branches of social security

The up-to-date social security instruments establish general rules concerning the organization and functioning of social security schemes. These rules are reviewed below, and are followed by an examination of the manner in which the instruments address the issue of equality of treatment between nationals and non-nationals.

A. Organization and functioning of social security schemes

Flexibility of the instruments in terms of methods of protection

Both Convention No. 102 and most of the Conventions adopted subsequently were drawn up with the intention of leaving member States great flexibility regarding the organization of the schemes which provide the benefits guaranteed. Convention No. 102 authorizes the application of broadly diverging methods to guarantee the envisaged benefits with a view to taking into account the diversity of the situations in the various countries. According to Article 72 of Convention No. 102, the system may be administered by an institution regulated by the public authorities, by a government department or any other body, subject to the observance of certain rules.

Conventions Nos. 121, 128 and 130 followed this approach and do not contain provisions respecting methods of protection. By way of illustration, during the discussion in the Conference Committee leading up to the adoption of the Employment Injury Benefits Convention, 1964 (No. 121), it was considered that the instrument should be so designed that every country would be entirely free to choose the systems and methods which it deemed best, on condition that the benefits guaranteed by its laws attained the level and extent prescribed by the instrument.⁴¹

The Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), also shows flexibility in setting forth methods of protection. Article 12 of the Convention explicitly provides that States may determine the method or methods of protection by which they put into effect the provisions of the Convention, whether by a contributory or non-contributory system, or by a combination of such systems.⁴² Finally, a certain flexibility is also found in the Maternity Protection Convention, 2000 (No. 183), which in Article 6 refers to compulsory social insurance or public funds, or in a manner determined by national law and practice. Further reference will be made to Convention No. 183 in the section covering the financing of benefits.

The flexibility of Convention No. 102 has been recalled by the Committee of Experts and by the Conference Committee on the Application of Standards. In response to the

⁴¹ ILC, *Record of Proceedings*, Appendix VIII, Report of the Committee on Social Security, 48th Session, Geneva, 1964, para. 14.

⁴² Article 3 of Convention No. 168 also provides that the provisions of the Convention have to be implemented in consultation and cooperation with the organizations of employers and workers.

argument that a private pensions system could not be analysed within the context of Convention No. 102, the latter considered that “the coexistence in the social security system of both a public and a private system (...) was not in itself incompatible with the Convention, which allowed the minimum level of social security to be attained through various methods”.⁴³ The Committee of Experts, after examining the case, recalled in this respect the flexibility with which the Convention had been conceived, making it possible to achieve the same level of social security through various approaches, while at the same time setting forth a number of practical criteria of general applicability for the organization and functioning of social security schemes.⁴⁴ Indeed, it is an essential characteristic of the up-to-date instruments respecting social security that the flexibility offered in the methods of protection is accompanied by the very clear determination of rules relating to the organization and functioning of the schemes which provide benefits. These rules concern in particular the general responsibility of the State, the differing interests which should be represented in the administration of the system and the financing of benefits.

General responsibility of the State

The general responsibility of the State for the proper administration of the social security institutions is one of the rules set forth in both Convention No. 102 and the Conventions adopted subsequently.⁴⁵ Indeed, whatever system is chosen for the administration of institutions, the State has to take general responsibility for the proper administration of the institutions and services concerned in securing the protection envisaged in the Conventions.⁴⁶ In this respect, the preparatory work for the adoption of Convention No. 168 shows that the general responsibility of the State does not exclude the autonomy of management of the various schemes.

The responsibility of the State also covers the provision of benefits. Irrespective of the method of financing adopted, the competent authorities are under the obligation to take all the necessary measures to ensure that benefits are duly provided, whatever the system. Convention No. 102 indicates in this respect that the State shall ensure, where appropriate, that the necessary actuarial studies and calculations concerning financial equilibrium are made periodically and, in any event, prior to any change in benefits, the rate of insurance contributions or the taxes allocated to protection. In its General Survey on social security protection in old age, the Committee of Experts emphasized that the State’s supervisory or monitoring powers should in no way permit it to avail itself of monies earmarked for old-age pensions, which might cause insured persons to lose confidence in the institutions responsible for their protection.⁴⁷ In this respect, the provisions contained in the instruments concerning the participation of insured persons are reviewed below.

Participation of insured persons

The concern not to impose a uniform type of organization was accompanied by the need to take into account the various interests which should be represented in the

⁴³ *Record of Proceedings*, ILC, 85th Session, Geneva, 1997, No. 19, p. 120.

⁴⁴ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 86th Session, Geneva, 1998, Report III (Part IA), pp. 279-283.

⁴⁵ With the exception of Maternity Protection Convention, 2000 (No. 183).

⁴⁶ Article 72 of Convention No. 102, Article 24 of Convention No. 121, Article 35 of Convention No. 128, Article 30 of Convention No. 130 and Article 28 of Convention No. 168.

⁴⁷ *Social security protection in old age*, 1989, op. cit., para. 210.

administration of social security systems, and particularly those of the persons protected. Where the administration is not entrusted to an institution regulated by the public authorities or to a government department responsible to a legislature, the representatives of the persons protected must participate in its management or be associated therewith in a consultative capacity. Moreover, national laws or regulations may also decide as to the participation of representatives of employers and of the public authorities (Article 72 of Convention No. 102, Article 24 of Convention No. 121, Article 36 of Convention No. 128, Article 31 of Convention No. 130 and Article 29 of Convention No. 168).

Financing of benefits

Convention No. 102 is confined to setting forth principles concerning the financial guarantees of social security systems. Under Article 71, the cost of the benefits provided in compliance with the Convention and the cost of the administration of such benefits must be borne collectively by way of insurance contributions or taxation or both. This Article also contains certain provisions relating to the distribution of the financial burdens. In general, the methods of financing must avoid hardship to persons of small means and take into account the economic situation of the country and of the classes of persons protected. In the particular case of contributory schemes, Article 71 provides that the total of the insurance contributions borne by the employees protected must not exceed 50 per cent of the total of the financial resources allocated for protection.

The Conference did not wish to include provisions on the financing of benefits in Conventions Nos. 121, 128, 130 and 168 out of a concern for flexibility and in order to take into account the diversity of the situations in the various countries.

The case of Convention No. 183 is specific. Traditionally, Conventions on maternity protection have always contained provisions relating to the financing of benefits, on the one hand, which refer to insurance systems or public funds and, on the other hand, prohibiting the employer from being considered to be personally responsible for the cost of the benefit. The concern was to prevent maternity protection measures making the employment of women more expensive for employers, thereby leading to the recruitment of fewer women workers. This concern is found in Convention No. 183, which provides in Article 6, paragraph 8, that benefits are to be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. With regard to the responsibility of the employer in relation to the cost of benefits, the Conference wished in Convention No. 183 to retain the principle of their non-responsibility, however combined with three exceptions designed to take into account the diversity of situations in the various countries. An employer may therefore be liable for the cost of maternity cash benefits where that employer specifically agrees to do so; where such liability is provided for in national law or practice prior to the date of adoption of the Convention; or where it is subsequently agreed by the Government and the representative organizations of employers and workers.⁴⁸

⁴⁸ For more details on this issue, see the preparatory work for the adoption of Convention No. 183: *Record of Proceedings*, ILC, 88th Session, Geneva, 2000, No. 20, paras. 296-314.

Other questions

The up-to-date instruments contain similar provisions on two other points which should be reviewed.⁴⁹ These consist of the right of appeal of claimants and the rules for the suspension of benefit.

■ Right of appeal of claimants

The right of appeal in case of refusal of the benefit or complaint as to its quality or quantity is a principle recognized by Convention No. 102 and the Conventions adopted thereafter.⁵⁰ However, the instruments do not specify the channels of appeal which must be made available. The preparatory work for the adoption of Conventions Nos. 121 and 128 nevertheless provide indications on the nature of this right. For example, it was stated that, according to current interpretation, the right of appeal bears upon a decision which would have been final if this right had not existed. Furthermore, the concept of recourse implies that the matter must be determined by an authority that is independent of the administrative authority which made the first decision. The mere right to request re-examination of the matter by this authority is not sufficient to constitute an appeal procedure.⁵¹

Conventions Nos. 102, 121 and 130 attenuate this principle with regard to medical care where its administration is entrusted to a government department responsible to a legislature. In such cases, the right of appeal may be replaced by a right to have a complaint investigated by the appropriate authority.

Moreover, Conventions Nos. 128 and 168 provide that procedures must be prescribed which permit the claimant to be represented or assisted by a qualified person of his or her choice or by a delegate of an organization representative of persons protected. It should also be emphasized that Convention No. 168 refers to the right of the claimant to be informed in writing of the procedures available, which must be simple and rapid.

■ Suspension of benefit

Convention No. 102 and the Conventions adopted subsequently envisage a number of cases in which the benefit to which a person protected would otherwise be entitled may be suspended.⁵² These cases may be grouped into three types of situation: the absence of the person concerned from the territory of the State in which the right to benefit has been acquired; situations in which the person concerned is maintained at public expense, or at the expense of a social security institution or service or is in receipt of other benefit or indemnity; and a number of cases related to the personal conduct of the beneficiary. These latter include a fraudulent claim, cases where the contingency has been caused by a criminal offence, or the wilful misconduct of the person concerned, or neglect to make use

⁴⁹ With the exception of Convention No. 183 which, being exclusively devoted to maternity protection, does not contain certain of the provisions set out in other social security Conventions.

⁵⁰ Article 70 of Convention No. 102, Article 23 of Convention No. 121, Article 34 of Convention No. 128, Article 29 of Convention No. 130 and Article 27 of Convention No. 168.

⁵¹ ILC, 48th Session, Geneva, 1964, Report V(2), p. 60; and ILC, 50th Session, Geneva, 1966, Report V(1), p. 68.

⁵² For more details, see Article 69 of Convention No. 102, Article 22 of Convention No. 121, Article 32 of Convention No. 128, Article 28 of Convention No. 130 and Article 20 of Convention No. 168.

of the appropriate services (such as medical services or employment, guidance and training services). It should nevertheless be emphasized that Conventions Nos. 121, 128 and 130 provide that, in certain cases of suspension, part of the cash benefit otherwise due must be paid to the dependants of the person concerned.

There are other cases of suspension which are specific to the contingency of unemployment. Indeed, unemployment benefit may be refused, withdrawn, suspended or reduced where the person concerned has deliberately contributed to his or her own dismissal, has left employment voluntarily without just cause or, under certain conditions, during the period of a labour dispute (Article 20 of Convention No. 168).

B. *Equality of treatment*

The protection of the interests of workers employed abroad has always been considered as one of the essential roles of the ILO. To protect this category of particularly vulnerable workers, the Conference has adopted instruments which have adopted three approaches.

The Conference has adopted instruments devoted exclusively to migrant workers and relating to all the aspects of protection required by the situation of these workers. Reference should be made in this respect to the Migration for Employment Convention (Revised) (No. 97) and Recommendation (No. 86), 1949, the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), and the Migrant Workers Recommendation, 1975 (No. 151). For further information on these instruments, see Chapter 4.4.

The Conference has also adopted specific instruments on the social security of these workers and the members of their family. These instruments set forth the right to equality of treatment between foreign workers and nationals (Convention No. 118) and endeavour to establish an international system for the maintenance of acquired rights or rights in the course of acquisition for workers who transfer their residence from one country to another (Convention No. 157 and Recommendation No. 167).

Finally, the general social security Conventions provide either implicitly or explicitly for equality of treatment between nationals and non-nationals. A review will be made below of the manner in which these Conventions envisage the principle of equality of treatment, before proceeding to an analysis of Conventions Nos. 118 and 157.

Equality of treatment and social security Conventions

Most of the instruments relating to one or several branches of social security contain provisions which implicitly or explicitly provide that foreign workers employed on the territory of a State must have the same rights as national residents. For some of the instruments, the persons protected are defined very broadly with reference to all workers, without any condition as to their nationality. This is the case of the great majority of the first generation Conventions as well as, among more recent Conventions, the Maternity Protection Convention, 2000 (No. 183), which applies to all employed women.

The other up-to-date Conventions in the field of social security contain explicit non-discrimination clauses. For example, Part XI of Convention No. 102 is devoted to equality of treatment of non-national residents. Article 68, which applies to all the branches of social security covered by the Convention, sets forth the principle that all non-national residents must have the same rights as national residents. However, this principle is combined with two flexibility devices. The Convention authorizes special rules in respect of benefits payable wholly or mainly out of public funds and in respect of transitional schemes. The objective of this flexibility is to prevent possible abuses and safeguard the

equilibrium of non-contributory schemes, particularly for old-age, invalidity and survivors' benefit by, for example, retaining the possibility of requiring non-national residents to complete a period of residence which would not be required for nationals. The second element of flexibility provided by the instrument concerns contributory social security schemes which protect all employees. The Convention authorizes States to limit equality of treatment in the application of a Part of the Convention to nationals of States which have also accepted the obligations under that Part. In this case, equality of treatment may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity.

Most of the other up-to-date Conventions in the field of social security also contain a provision explicitly providing that States which ratify the Convention must within their territory assure to non-nationals equality of treatment with their own nationals as regards the benefits afforded by the instruments.⁵³

Equality of Treatment (Social Security) Convention, 1962 (No. 118)⁵⁴

Convention No. 118 was adopted with a view to specifically addressing the situation of foreign workers in relation to social security. It should, however, be noted that as early as 1925, the Conference adopted an instrument dealing with equality of treatment of nationals and non-nationals in respect of accident compensation (Convention No. 19). This latter Convention guarantees to nationals of any member State that has ratified the Convention, and who suffer personal injury due to industrial accidents, equality of treatment with national workers without any condition as to residence.

The scope of Convention No. 118 is much broader, since it covers all the branches of social security envisaged by Convention No. 102. However, States have the possibility of confining their ratification to one or more of the nine branches of social security. The Convention does not apply to special schemes for civil servants, special schemes for war victims or public assistance.

States which ratify Convention No. 118 undertake to grant, within their territory, equality of treatment to the nationals of any other State for which the Convention is in force. In contrast with Conventions Nos. 102, 121, 128 and 138, the equality of treatment envisaged by Convention No. 118 does not concern all non-national workers employed on the territory of the State which has ratified the Convention, but only those who are nationals of a State which has also ratified the Convention. It should also be noted that the provisions of the Convention are applicable to refugees and stateless persons, for whom equality of treatment must be secured without any condition of reciprocity (Article 10).

Equality of treatment relates to coverage⁵⁵ and the right to benefits and must be granted globally for all branches of social security for which member States have accepted the obligations of the Convention (Article 3).⁵⁶

⁵³ See Article 27 of Convention No. 121, Article 32 of Convention No. 130 and Article 6 of Convention No. 168. Convention No. 128 does not contain any provision on this subject.

⁵⁴ The Committee of Experts has carried out a General Survey on this Convention: *Equality of Treatment (Social Security)*, Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 63rd Session, Geneva, 1977, Report III(4B).

⁵⁵ With regard to coverage, the most common forms of discrimination are non-coverage, conditional or optional coverage by reason of foreign nationality.

With regard to the right to benefit, equality of treatment has to be granted without conditions as to residence.⁵⁷ This provision does not mean that benefits must be granted in all cases to non-nationals without any condition of residence, but that equality of treatment must not be limited by a condition of residence imposed solely upon non-nationals.

Under Article 5 of the Convention, States are under the obligation to provide certain benefits abroad, namely invalidity benefit, old-age benefit, survivors' benefit and death grants, and employment injury pensions. In case of residence abroad, these benefits must be paid to the nationals of the State and to the nationals of any other State which has accepted the obligations of the Convention in respect of the branch in question. Similarly, family allowances have to be guaranteed to the nationals of the State and to the nationals of any other State which has accepted the obligations of the Convention for the "family benefit" branch in respect of children who reside on the territory of any of these States (Article 6). These two Articles establish reciprocity on a branch by branch basis.

Finally, Article 7 of the Convention provides that States which have ratified the Convention must endeavour to participate in schemes for the maintenance of acquired rights and rights in the course of acquisition under the legislation of the nationals of the States for which the Convention is also in force. The fact that it is impossible to conclude an agreement for this purpose cannot be interpreted as a failure to give effect to the obligation deriving from Article 7. This Article contains provisions respecting the totalization of periods of insurance, employment or residence for the acquisition, maintenance or recovery of rights, as well as for sharing the cost of the benefits paid. When deciding to include provisions on the maintenance of rights in Convention No. 118, the Conference showed the importance that it attaches to this aspect of equality of treatment, which would subsequently be supplemented by the adoption of Convention No. 157.

Maintenance of Social Security Rights Convention, 1982 (No. 157)

For migrant workers to be on an equal footing with national workers, it is necessary, on the one hand, to enable them to acquire benefits despite their mobility during their active life and, on the other hand, when the right to benefits is acquired under the legislation of the host country, to ensure the effective provision of the benefits abroad when they return to their country of origin. The first instrument addressing the maintenance of social security rights was adopted in 1935 (the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48)). This instrument proposed an international system for the coordination of legislation respecting invalidity, old-age and survivors' pensions. It was undeniably a source of inspiration at the bilateral and the multilateral levels. The need to broaden and develop such coordination was one of the elements which

⁵⁶ It should be emphasized that the principle of global reciprocity is combined with an option which allows States to enjoy exceptions from the provisions of Article 3 for a specified branch in the case of nationals of any State which has legislation relating to that branch but does not grant equality of treatment in respect thereof to the nationals of the first State.

⁵⁷ However, the right to certain benefits paid under non-contributory schemes may be made subject to a condition of residence prior to claiming benefit, the duration of which must not exceed the limits set out in the Convention. For more details on this point, see paragraphs 70 to 76 of the General Survey of 1977, *op. cit.*

led to the revision of Convention No. 48 by the adoption of Convention No. 157, the main provisions of which are reviewed below.⁵⁸

■ **Scope of application**

In the same way as Convention No. 118, Convention No. 157 applies to all branches of social security for which States have legislation in force. It applies to general and special social security schemes, both contributory and non-contributory, as well as schemes consisting of obligations imposed on employers by legislation in respect of any branch of social security (Article 2). Article 3 defines the persons protected by the Convention with reference to persons who are or have been subject to the legislation of one or more States which have ratified the Convention, as well as the members of their families and their survivors.⁵⁹

■ **Applicable legislation**

Article 5 of the Convention provides that the legislation applicable in respect of the persons covered by the Convention must be determined by mutual agreement between the Members concerned, with a view to avoiding conflicts of laws and the undesirable consequence 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. This Article sets forth the rules under which the States concerned are to determine such legislation.

■ **Implementation of the Convention**

The objective of the Convention is to promote a very flexible and broad form of coordination between national security schemes.⁶⁰ This flexibility is demonstrated by Article 4 of the Convention, which makes a distinction between the provisions of the Convention which have to be applied immediately as from the coming into force of the Convention for the State concerned and the provisions for which the application depends on the conclusion of bilateral or multilateral social security agreements. These agreements must specify, among other matters, the branches of social security to which they apply, the categories of persons to which they are applicable, the arrangements for the reimbursement of the benefits provided and the rules for avoiding undue plurality contributions or benefits. Recommendation No. 167 contains model provisions for the conclusion of such agreements.

■ **Maintenance of rights in the course of acquisition**

The acquisition of entitlement to social security benefits is not subject to the same conditions under social security legislation in different countries. Transfer from one country to another exposes migrants to the risk of losing the benefit of a qualifying period

⁵⁸ Convention No. 157 is supplemented by the Maintenance of Social Security Rights Recommendation, 1983 (No. 167). This Recommendation proposes to States, with a view to implementing the principle set forth in Conventions Nos. 118 and 157 in relation to the maintenance of rights, model provisions for the conclusion of bilateral or multilateral social security instruments, as well as a model agreement for the coordination of these instruments.

⁵⁹ As in the case of Convention No. 118, Convention No. 157 does not apply to special schemes for civil servants, special schemes for war victims or social or medical assistance schemes (Article 2, para. 4).

⁶⁰ Nicolas Valticos, “Droit international du travail”, in *Traité de droit du travail*, Vol. 8, 2nd edition, Paris, Dalloz, 1983, para. 561.

completed in the first country and having to complete a new qualifying period in a second country where the legislation makes the right to benefits conditional upon the completion of a qualifying period. Article 6 of Convention No. 157 provides in this respect that each State must endeavour to participate with every other State concerned in schemes for the maintenance of rights in course of acquisition for each branch of social security covered by the Convention and for which every one of these States has legislation in force. This therefore consists of an obligation as to the means to be used. Under Article 7 of the Convention, schemes for the maintenance of rights in course of acquisition have to provide for the adding together of periods of insurance, employment, occupational activity or residence in accordance with the legislation of the States parties concerned for the purpose of, firstly, participation in voluntary or optional insurance and, secondly, the acquisition, maintenance or recovery of rights, and the calculation of benefits. Periods completed concurrently under the legislation of two or more States are to be reckoned only once. These schemes also have to determine the formula for awarding invalidity, old-age and survivors' benefits, and pensions in respect of occupational diseases. They also have to determine the apportionment of the costs involved (Article 8).

■ **Maintenance of acquired rights**

The maintenance of acquired rights is intended to remedy the disadvantages relating to the principle of the territorial application of rights in the provision of benefits. It consists of securing, particularly for long-term contingencies, the right to benefits for claimants who are not resident or are no longer resident on the territory of the State concerned, namely the State whose legislation was applicable during the acquisition of the rights. Convention No. 157 provides in Article 9 that each State must guarantee to the persons protected the provision of invalidity, old-age and survivors' cash benefits, pensions in respect of employment injury and death grants, to which a right is acquired under its legislation, irrespective of their place of residence. This is an obligation which is directly applicable due to the mere fact of ratification. However, States which participate in an international scheme for the maintenance of rights in course of acquisition, in accordance with Article 6 of the Convention, may agree to guarantee the provision of the benefits concerned within the framework of bilateral or multilateral social security agreements. Furthermore, as for the maintenance of rights in the course of acquisition, the States concerned have to endeavour to participate in schemes for the maintenance of rights acquired under their legislation. These schemes may vary according to the benefits concerned and whether or not the States have legislation in force for the specific branch (Article 10).

■ **Administrative assistance and assistance to persons protected**

The Convention contains a series of provisions respecting administrative assistance and assistance to persons protected. Under Article 12, the competent authorities and institutions of the various States must afford one another assistance with a view to facilitating the application of the Convention. In principle, such assistance is free of charge, although States may agree to reimburse certain expenses. Article 13 and 14 contain a series of provisions relating to assistance to persons protected. They cover, for example, the conditions under which protected persons may present their claims or lodge appeals outside the territory of the State concerned, as well as the obligation of the State to promote the development of social services to assist migrant workers in their dealings with the authorities, institutions and jurisdictions, particularly with a view to facilitating the award of benefits.

Following this review of the content of the up-to-date standards relating to the various branches of social security, and the common principles set out in these instruments, an examination is made below of certain of the difficulties to which their application gives rise in practice.

III. Application of the instruments in practice

Each year, the application of the up-to-date Conventions in the field of social security gives rise to many comments by the Committee of Experts. Many of these consist of requests for additional information or clarifications from States on “minor” points of divergence in the specific country. Other comments by the Committee of Experts relate to more general difficulties of application. Among the difficulties of application that are encountered regularly, three matters are of particular importance, namely: the provision of full statistical information; the problem of the adjustment of long-term benefits; and difficulties in the application of Conventions arising out of the reforms of social security schemes undertaken in recent years.

Supply of full statistical information

As noted above, the Conventions refer to quantitative criteria in determining the scope of their application. They offer several options for measuring the scope of their application, thereby allowing States to select the option that is best suited to their situation. This choice determines the nature of the information to be provided by the State so that the Committee of Experts can assess whether its legislation protects a sufficient number of persons. The report forms adopted by the Governing Body for each of the Conventions are extremely detailed and indicate precisely the nature of the statistical data to be communicated by governments. The same applies to the minimum level of benefits to be granted. As explained above, to give effect to the Convention, the level of cash benefits must attain a certain percentage of the reference wage of a standard beneficiary. The report forms also set out in detail the statistical data to be communicated by governments on this point.

The provision of full and up-to-date statistics is an essential element in enabling the Committee of Experts to assess the manner in which effect is given to ratified Conventions both as regards the scope and the level of benefits. The great majority of its comments therefore relate to this point. Indeed, despite the detailed nature of the report forms, the Committee of Experts often has to request governments to supplement the data supplied by providing additional statistics on precise points.⁶¹ The Committee of Experts also has to frequently remind governments to provide all the statistical data for the same reference period. These are isolated requests. However, when the information provided is too incomplete, the Committee of Experts makes more general comments in which it provides detailed explanations to the governments of the manner in which they have to provide the data. The Committee of Experts may have to recall the various options available to the government for the presentation of the statistics so that it can compare the amounts of the benefits provided under the national legislation with the minimum levels set out in the Convention. For example, with regard to the application of Convention No. 130, the Committee of Experts has recalled the two options available in Articles 22 and 24 of the Convention by indicating that “Article 22 is intended to take into account systems of

⁶¹ This consists for example, of requesting the government concerned to indicate the number of employees actually protected by the schemes which provide the benefits, the level of benefits paid in specific branches, the amount of the wage of a skilled manual male employee or the manner in which an ordinary an ordinary male labourer has been determined.

protection which, as is the case [of the system under examination], provide benefits calculated on the basis of the beneficiary's former earnings". The Committee of Experts went on to provide details of the statistical data which the State should provide in accordance with this Article of the Convention.⁶²

The communication of all the statistical data required would therefore appear to constitute a serious difficulty for certain governments. The Committee of Experts has accordingly very often had occasion to request additional information or even, as seen above, to indicate the manner in which these data are to be presented, as well as their content. In view of this complexity, the Committee of Experts does not fail to propose that governments that are encountering serious difficulties in this respect should have recourse to the technical assistance that the Office can provide them.

Readjustment of long-term benefits

In the case of contingencies for which long-term benefits are provided, the Committee of Experts has had occasion to make many comments on the manner in which benefits are adjusted in practice. Indeed, governments often confine themselves to indicating that they have increased the level of pensions, without providing further information. With a view to being able to assess the real impact of increases in pensions in relation to general changes in earnings or the cost of living, the Committee of Experts regularly has to request additional information, particularly on indices of the cost of living and of earnings at the beginning and end of the period under consideration, as well as on the average level of benefits paid at the beginning and end of the same period in cases where the level of benefits has been adjusted.

In 1999, the Committee of Experts made a general observation concerning the problem of the adjustment of benefits in relation to the application of Conventions No. 102 and 128.⁶³ It noted the absence of information in the reports of several States on the adjustment of current periodical payments in respect of old age, employment injury and occupational diseases, invalidity and death of the breadwinner. Some States had even indicated that they had suspended indexation of long-term benefits. The Committee emphasizes in this respect that "given the effects of inflation on the general level of earnings and increases in the cost of living, revision of the level of cash benefits in respect of the contingencies referred to above should receive governments' particular attention". The Committee of Experts has requested governments to take all possible steps to ensure the adjustment of benefits and provide the full statistical data required on this subject.

⁶² *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 89th Session, Geneva, 2001, Report III (Part 1A), p. 540. With regard to the application of Convention No. 121, see the explanations provided by the Committee of Experts concerning the choice between Article 19 or Article 20 of the Convention: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 82nd Session, Geneva, 1995, Report III (Part 4A), p. 342.

⁶³ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 76th Session, Geneva, 1989, Report III (Part 4A), pp. 312 and 443.

Repercussions of the reform of social security schemes on the application of the Conventions

The Committee of Experts has noted that, since the beginning of the 1990s, social security legislation has “entered into a period of constant revision and modification”.⁶⁴ These reforms, motivated by economic considerations, have led to a desire to reduce the cost of protection schemes and by a tendency to privatize certain of their components. For example, in the case of unemployment protection schemes, the concern to maintain the financial equilibrium of these schemes has resulted in the adoption of measures to tighten the qualifying conditions for entitlement to benefits and to reduce benefit levels. Noting this trend, the Committee of Experts has recalled the importance that it attaches to the protection of persons who are disadvantaged on the labour market and has requested governments to take fully into account the obligations deriving from Convention No. 102 in any new action that they might take in this respect.⁶⁵

The reforms have also led some governments to limit their responsibilities by broadening the role of private institutions and transferring responsibility for certain benefits to employers, particularly in relation to sickness benefit. This tendency is also found in pension schemes, where the public component is progressively being reduced. While it is true that, as shown in the second part of this chapter, the up-to-date Conventions in the field of social security are drafted in a sufficiently flexible manner to take into account the diversity of methods of ensuring protection, the privatization of certain protection schemes or certain of their components has nevertheless given rise to many comments by the Committee of Experts. Concerned by the direction taken by the reforms in certain countries, the Committee of Experts has drawn the attention of governments “to the need to safeguard, in the process of reform, these basic principles of organization and management which should continue to underlie the structure of the social security systems”. In the context of these privatization processes, the comments of the Committee of Experts relate principally to three points.

The first concerns the manner in which protected persons participate or are associated in the administration of schemes when they are not managed by an administration regulated by the public authorities or a government department. This is the case, for example, when benefits are provided by insurance companies or companies administering pension funds. Many requests for information have also been made concerning the manner in which the persons protected are represented on the body which is responsible in the last resort for supervising and controlling the proper functioning of the system providing the benefits as a whole.

The second point on which the Committee of Experts has commented relates to the manner in which benefits are guaranteed at a level which is in conformity with the Conventions. This problem arises principally in the context of pension schemes based on individual capital accumulation. In view of the fact that the rate of the pensions depends on the capital accumulated in individual accounts and on the return obtained on the capital,

⁶⁴ General comments of the Committee of Experts on the application of the Conventions on social security: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 83rd Session, Geneva, 1996, Report III (Part 4A), paras. 58 and 59. See also, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 85th Session, Geneva, 1997, Report III (Part 1A), paras. 62-67; *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 89th Session, Geneva, 2001, Report III (Part 1A), paras. 153-158.

⁶⁵ General direct request of the Committee of Experts on the application of Convention No. 102, 1993.

the issue for the Committee of Experts is to have at its disposal enough information to be able to assess, firstly, the extent to which the level of benefits attains the level prescribed by the Conventions and, secondly, whether these benefits can be guaranteed throughout the contingency, irrespective of the amount accumulated in the individual account and the type of pension chosen by the worker.

Finally, the last point on which the Committee of Experts has had occasion to make many comments concerns the general responsibility of the State for the provision of benefits and the proper administration of the institutions and services concerned. The Committee of Experts regularly recalls that it is the responsibility of the State to take all the necessary measures for the due provision of the benefits to the persons protected, irrespective of the manner in which the system providing these benefit is administered. For example, in the case of a country in which the employer is responsible for the provision of sickness benefit for a limited period, the Committee has recalled that, in the event of workers encountering difficulties in the receipt of benefits due to them, it is up to the State to take the necessary steps to ensure that the benefits are paid in practice.⁶⁶ The responsibility of the State calls for the adoption of special long-term planning measures, including periodic actuarial studies and calculations concerning financial equilibrium, as well as the carrying out of inspections and supervisory visits by the responsible authorities.⁶⁷

⁶⁶ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 89th Session, Geneva, 2001, Report III (Part 1A), p. 424.

⁶⁷ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC, 88th Session, Geneva, 2000, Report III (Part 1A), p. 404.

Chapter 12

**Labour administration and
labour inspection**

H. Sahraoui

Labour administration

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Labour Administration Convention, 1978 (No. 150)	52	The Governing Body has invited member States to contemplate ratifying Convention No. 150.
Labour Administration Recommendation, 1978 (No. 158)	–	The Governing Body has invited member States to give effect to Recommendation No. 158.
Labour Statistics Convention, 1985 (No. 160)	44	This Convention was adopted in 1985 and is considered up to date.
Labour Statistics Recommendation, 1985 (No. 170)	–	This Recommendation was adopted in 1985 and is considered up to date.
Requests for information (Instruments for which the Governing Body confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments or on specific issues.)		
Migration Statistics Recommendation, 1922 (No. 19)	–	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendation No. 19.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instrument	Number of ratifications (at 01.10.01)	Status
Convention concerning Statistics of Wages and Hours of Work, 1938 (No. 63)	15	The Governing Body has invited the States parties to Convention No. 63 to contemplate ratifying the Labour Statistics Convention, 1985 (No. 160), the ratification of which would, ipso jure, involve the immediate denunciation of Convention No. 63. It has also decided that the status of Convention No. 63 will be re-examined in due course, including the possibility of its shelving, when the number of the ratifications of Convention No. 63 has substantially decreased as a result of ratification of Convention No. 160.

A labour administration is an institution in the machinery of State through which society translates its will to subject human labour to rules, based on the belief that it cannot be left to arbitrary factors, but must be a result of the common will.

The Committee of Experts' 1997 General Survey on labour administration¹ alludes to the misgivings of certain governments concerning the idea of adopting standards at the international level on labour administration. Convention No. 150 is the result of proposals to provide for an overall system of national labour administration. It is based on the agreement achieved between governments, employers and workers on the formulation of an instrument defining the role, functions and organization of national systems of labour

¹ *Labour administration*, General Survey on the Labour Administration Convention (No. 150) and Recommendation (No. 158), 1978, ILC, 85th Session, 1997, Geneva, para. 5.

administration and containing general guidelines with a view to the establishment of an institutional framework for the preparation, administration, control and review of national labour policies. The content and wording of the instrument, reflecting the diversity of labour administration systems, are themselves a reflection of cultural diversity and the varying levels of economic and administrative development, and were finally adopted unanimously.

Labour administration is a tool designed to give effect in practice to the fundamental principles and rights of workers. It constitutes the framework for the implementation, for this purpose, of labour legislation. Solutions are developed within the labour administration to the problems facing governments in the field of labour. There is a close relationship between social policy and economic policy, and where this link is well appreciated, labour administration contributes to human development in harmony with economic objectives. During the preparatory work for the Labour Administration Convention (No. 150) and Recommendation (No. 158), 1978, the Government members from developing countries emphasized “the significance of labour administration to their economic and social development”.²

In its Preamble, Convention No. 150 refers to several other ILO instruments which deal specifically with certain aspects of labour administration: these are the Conventions and Recommendations on labour inspection, employment policy, human resources development, which are covered in other chapters. Direct and indirect links exist between most of the instruments adopted by the ILO and those relating to labour inspection in so far as the subjects addressed lie within the competence of one or more bodies of the labour administration system. One of the important objectives of Convention No. 150 is to promote the development of public administrative machinery to ensure in a coordinated manner the formulation, application and follow-up of national labour policies.

I. Content of the instruments on labour administration

As noted above, Convention No. 150 provides general guidelines regarding the role, functions and organization of national systems of labour administration. Its objective is the establishment of a general institutional framework for the preparation, administration, control and review of national labour policy, and the general nature of its provisions mean that it is an instrument which can be applied in a broad diversity of cultural, economic and administrative situations.

Recommendation No. 158 reproduces in full the first provisions of the Convention relating to definitions, the concept of delegation and basic principles. It also provides useful guidance for the application of the Convention and for the progressive improvement of the services and functioning of the labour administration system. Focusing on the four areas of intervention of the labour administration system, namely labour standards, industrial relations, employment and research in labour matters, the instrument emphasizes the fundamental importance of implementing measures to encourage the active participation of organizations of employers and workers in the preparation, development, adoption, application and review of labour standards. Emphasis should be placed on the particular importance attached by the Recommendation to the need to establish a system of labour inspection as an integral part of the system of labour administration.

² *Labour Administration: Role, functions and organisation*, ILC, 64th Session, 1978, Report IV(1), para. 14.

Definitions

The terms “labour administration” and “system of labour administration” are defined precisely in Convention No. 150 and these definitions are reproduced in full in Recommendation No. 158.

In accordance with this definition, all public administration activities in the field of national labour policy constitute “labour administration”.³

All the public administration bodies responsible for and/or engaged in labour administration form the labour administration system. The term covers ministerial departments or public agencies, including parastatal and regional or local agencies or any other form of decentralized administration, and any institutional framework for the coordination of the activities of such bodies and for consultation with and participation by employers and workers and their organizations.⁴ The labour administration system is not therefore only part of the ministerial department responsible for labour, since the complexity of labour administration activities involves the intervention of a range of public institutions and bodies. Moreover, the instruments envisage that certain activities of the public labour administration may be exercised, by delegation in accordance with national law or practice, by non-governmental organizations, such as employers’ and workers’ organizations or, where appropriate, employers’ and workers’ representatives.⁵ The access of parastatal actors to labour administration functions illustrates the flexibility and continuing relevance of the instruments in view of the many changes that have occurred in the development of macroeconomic and social policies.

Neither the Convention, nor the Recommendation define the concept of “national labour policy”. The scope of activity of a labour administration system is closely related to all the elements and aspects of the national labour policy. The instruments examined do not set forth an exhaustive list of the functions which should be discharged by the labour administration. Convention No. 150 confines itself to identifying those relating to labour protection, employment, industrial relations and the services and technical advice to be offered to employers and workers⁶ with a view to indicating the minimum scope of any national labour policy. More detailed indications on these functions are provided in Recommendation No. 158.⁷

The national labour policy is the result of the direct or indirect involvement to varying degrees of each of the competent bodies in the labour administration system.⁸ These bodies may be, depending on the individual case, either directly responsible for the preparation, implementation, coordination, control and review of the national labour policy, or may participate in each of these phases. Within the context of the public administration, they comprise the instruments for the preparation and application of the laws and regulations which give effect to the national labour policy.

³ Article 1(a) of Convention No. 150 and Paragraph 1(a) of Recommendation No. 158.

⁴ Article 1(b) of Convention No. 150 and Paragraph 1(b) of Recommendation No. 158.

⁵ Article 2 of Convention No. 150 and Paragraph 2 of Recommendation No. 158.

⁶ Article 6 of Convention No. 150.

⁷ Paragraphs 5-18 of Recommendation No. 158.

⁸ Article 6 of Convention No. 150.

The concept of labour administration should include all activities by ministerial departments and public agencies which have been set up by national laws and regulations to deal with labour matters, and the various institutions established for that purpose, as well as the institutional framework for the coordination of their respective activities and for consultations with and participation by employers and workers and their representative organizations in the formulation and evaluation of labour policy.⁹

Areas of intervention of the labour administration system

The responsibility of the labour administration in relation to the national labour policy is defined in Article 6, paragraph 1, of Convention No. 150. This provision indicates that the competent bodies within the system of labour administration shall, as appropriate, be responsible for or contribute to the preparation, administration, coordination, checking and review of national labour policy, and be the instrument within the ambit of public administration for the preparation and implementation of laws and regulations giving effect thereto.

Recommendation No. 158 gives labour standards pride of place among the fields in which the labour administration system should be discharged its functions. Consultation with organizations of employers and workers and their participation in all stages of the preparation, application and review of labour standards is strongly recommended.

Formulation of labour standards

The labour administration makes an important contribution to the preparation of national labour policy through the formulation, in consultation with the social partners, of the relevant draft laws and regulations. This consists principally of labour standards for the protection of labour.

Implementation of labour standards

The implementation of labour standards is a function which entails various tasks, ranging from regulation, in the form of administrative measures (regulations, procedures, implementation circulars), to ensuring the application of the standards at the enterprise level.

Supervising the application of labour standards

Supervising the application of labour standards is the principal function of the labour inspection services. This important aspect of the functions of the labour administration is referred to in the Preamble to the Convention and is examined in detail in this chapter.

Review of labour standards

In the view of the Committee of Experts, the assessment function is one of the basic tasks of labour administration which allows the effects of labour standards on labour protection, the protection of workers and on the economy to be studied, as well as the review and improvement of not only legal and regulatory provisions, but also of the machinery and procedures for their implementation.¹⁰

⁹ General Survey, 1997, op. cit., para. 41.

¹⁰ General Survey, 1997, op. cit., para. 71.

Employment and human resources development

Employment and human resources development policy is one of the essential functions of labour administration, in accordance with Article 6, paragraph 2(a) and (b), of Convention No. 150, under the terms of which the competent bodies within the system of labour administration have to “participate in the preparation, administration, co-ordination, checking and review of national employment policy” and “study and keep under review the situation of employed, unemployed and underemployed persons, taking into account national laws and regulations and national practice concerning conditions of work and working life and terms of employment, draw attention to defects and abuses in such conditions and terms and submit proposals on means to overcome them”.

An effective employment policy implies the coordination of the bodies or authorities responsible for its various components, the provision of a free and effective public employment service and the management of public funds to combat underemployment or unemployment being under the authority or with the involvement of labour administration bodies.

Convention No. 150 does not explicitly cover the role of the State in relation to vocational training and guidance. However, Paragraph 17 of Recommendation No. 158 provides indications on the responsibility which could be entrusted to the competent bodies in the labour administration relating to participation in the development of comprehensive and concerted policies and programmes of human resources development, including vocational guidance and training.

The establishment of a close relationship between vocational guidance and training and employment is explicitly required in the case of States which have ratified Convention No. 142, as indicated in Chapter 7 on this subject.¹¹

The coordination between employment services, employment promotion and creation programmes, vocational guidance and vocational training programmes advocated by Paragraph 12 of Recommendation No. 158 also emphasizes the relationship between employment and human resources development.

Studies, research and statistics

The activities of the labour administration in the field of studies, research and the compilation of statistics derive from the obligation set out in Article 6, paragraph 2(b), of Convention No. 150 to keep under review the situation of persons concerning conditions of work, employment and working life, which requires research work to be carried out with a view to adapting the national labour policy to developments in this situation. According to Paragraph 18 of Recommendation No. 158, research is an important function of the system of labour administration, which should carry out research itself and encourage research by others for the fulfilment of its social objectives. These objectives cannot be achieved if the appropriate data are not available. In Paragraph 20, Recommendation No. 158 indicates that the information or reports that each of the principle labour administration services should provide to the Ministry of Labour or other comparable body should include appropriate statistics “in such a manner as to permit an evaluation of present trends and foreseeable future developments in areas of major concern to the system of labour administration”. The Committee of Experts indicated in its General Survey in

¹¹ The Employment Policy Convention (No. 122) and Recommendation (No. 122), 1964, and the Human Resources Development Convention (No. 142) and Recommendation (No. 150), 1975.

1997 that even if the Convention says nothing about statistics, the latter are in practice a major source of information on conditions of work and employment.¹²

Labour relations

The promotion of labour relations is addressed from the point of view of the appropriate means to ensure the free exercise of the right of association, the right to organize and collective bargaining, including the provision of advisory services, the development and utilization of machinery for voluntary negotiation and the provision of conciliation and mediation facilities within the system of labour administration.

Convention No. 150 provides, in Article 6, paragraph 2(c), that the competent bodies in the field of labour relations must “make their services available to employers and workers, and their respective organisations [...] with a view to the promotion – at national, regional and local levels as well as at the level of the different sectors of economic activity – of effective consultation and co-operation between public authorities and bodies and employers’ and workers’ organisations, as well as between such organisations”. Under subparagraph (d), they have to “make technical advice available to employers and workers and their respective organisations on their request”.

Article 5 of the Convention provides in paragraph 1 that arrangements appropriate to national conditions must be made to secure, within the system of labour administration, consultation, cooperation and negotiation between the public authorities and the most representative organizations of employers and workers, or – where appropriate – employers’ and workers’ representatives. Paragraph 2 of Article 5 envisages that, to the extent compatible with national laws and regulations, and national practice, such arrangements must be made at the national, regional and local levels.

The principle and possibility of recourse to direct collective bargaining between employers’ and workers’ organizations is also derived from Article 3 of the Convention, under which a State which ratifies the Convention “may regard particular activities in the field of its national labour policy as being matters which, in accordance with national laws or regulations, or national practice, are regulated by having recourse to direct negotiations between employers’ and workers’ organisations”.

According to the Recommendation, labour relations constitute the second field in which the system of labour administration should exercise its functions. It calls upon member States to promote harmonious labour relations. The instrument provides indications on the means of achieving this objective: the free exercise of the right of association; the right to organize and bargain collectively; the provision of official advisory services; machinery for voluntary negotiation; and the development of conciliation and mediation facilities within the system of labour administration.

The Committee of Experts has emphasized the particularly important role of labour administration in labour relations, particularly in the preparation of draft legislation to protect the right to organize and collective bargaining and the free exercise of the right of association, in ensuring that such legislation is effectively applied and in setting up institutional structures to ensure that employers, workers and their respective organizations are consulted on and involved in all activities related to the national labour policy.¹³

¹² General Survey, 1997, op. cit., para. 113.

¹³ General Survey, 1997, op. cit., para. 121.

The settlement of collective labour disputes is another field in which the public labour administration intervenes. Services may be provided at an intermediary stage in the settlement of disputes between conciliation procedures and judicial intervention, or in examining certain practices which are contrary to laws and regulations. The functions of investigation, mediation and the handing down of decisions may be exercised by quasi-judicial bodies under the public labour administration.

International labour relations

Article 8 of Convention No. 150 envisages, to the extent compatible with national laws and regulations and national practice, the participation of the competent bodies within the system of labour administration in the preparation of national policy concerning international labour affairs and the representation of the State in this field, as well as the preparation of measures to be taken at the national level in this respect.

Organization of the system of labour administration

Administrative structure

Convention No. 150 does not impose any specific administrative form or structure on member States. Recommendation No. 158, with regard to the functions which should be discharged by the system of labour administration, indicates the main lines which could be followed in terms of its organization.

The diversity with which functions related to labour issues are organized in the various countries is compounded by variations in the scope of the public administration responsible for national labour policy.

The labour administration system is composed of three main groups of actors, which differ according to the role that they play and the interest that they defend: the State, employers and workers.

The central services of the ministry responsible for labour are entrusted with responsibilities relating to the management of the human, material and financial resources of the ministry (recruitment of staff, training, management of internal material resources and of the budget).

The external services of the ministry responsible for labour provide the link between the central labour administration and the general public, with whom they are in direct contact at the regional and local levels. In view of the Committee of Experts, vertical decentralization of authority guarantees the State's primary role in the supply of direct public services to enterprises, the social partners, particular categories of workers and other interested parties.¹⁴ This occurs through the delegation of some management and decision-making functions to technical and administrative services in the field. These functions relate in particular to occupational safety and health measures, labour relations, employment services, vocational training, labour statistics and labour inspection.

Cooperation between the various public actors in the labour administration

While the ministry responsible for labour is the competent central administration around which the functions of labour administration are organized, other government

¹⁴ General Survey, 1997, op. cit., paras. 158 and 159.

administrations intervene, each in their field of competence, in the composition and functioning of the system of labour administration.

The Committee of Experts has enumerated the various possible components of the public system of labour administration, which may be described as follows:

- the ministerial department responsible for labour matters, which intervenes either directly through its central administration and local structures at the regional and local levels, or indirectly through attached structures: parastatal bodies; public institutions under the authority of the Ministry of Labour or the control of other ministerial administrations with competence for certain labour administration activities;
- ministerial administrations (other than the ministry responsible for labour) which are competent with regard to matters concerning the national labour policy (migration, education, health, etc.) or for labour issues relating to a specific sector of economic activity (fishing, mines, transport, agriculture, etc.);
- administrations, institutions or public bodies coming under decentralized public authorities (local public authorities, generally elected and independent of the authority of the central government, such as constituent states, regions, provinces or cantons).

It is also provided in Article 2 that a Member which ratifies the Convention may, in accordance with national laws or regulations, or national practice, delegate or entrust certain activities of labour administration to non-governmental organizations, particularly employers' and workers' organizations, or – where appropriate – to employers' and workers' representatives.

The system of labour administration revolves around a central structure. This may be subdivided into specialized administrative units competent for each of the major technical functions entrusted by national legislation to the labour administration (such as, the development of standards relating to conditions of work, labour relations, employment, labour planning and human resources development, international labour relations, social security, minimum wage legislation and matters relating to specific categories of workers). External services are established, in consultation with employers' and workers' organizations, as a function of needs in the various regions, and operate with staff, equipment and means of transport that are appropriate for the nature and volume of the tasks to be performed, and are based on precise and adequate instructions to prevent laws and regulations being interpreted differently in the various regions.

Participation of the social partners

As both an actor and the principle controller of the implementation of the national labour policy, the ministerial department responsible for labour must be represented in an appropriate manner in administrative and consultative bodies responsible for economic and social issues on the basis of exchanges of information, technical reports and consultations with the most representative organizations of employers and workers.

In accordance with Article 5 of the Convention, the participation of employers and workers and their respective organizations in relation to national labour policy must be secured through consultation, cooperation and negotiation, to the extent compatible with national conditions, at the national, regional and local levels.

However, the Convention does not set out any precise obligation as to the objectives, level or form of consultation, cooperation or negotiation. The scope of such participation is to be determined by each country as a function of national practice.

Bodies for consultation, cooperation and negotiation vary as to the role they are to fulfil, their composition, the duration of their mandate and their local representation.

Consultation and cooperation bodies may intervene in the preparation of draft laws and regulations and participate in the implementation of laws and regulations, the design and formulation of government policy, in decision-making within bodies responsible for certain labour administration activities, and in the boards of research institutions carrying out labour studies and research or issuing recommendations on national labour policy strategy and orientation.

Consultation and cooperation bodies are traditionally tripartite, but may also be composed of only the social partners, or include representatives of interest groups and independent experts enjoying a high level of credibility or possessing considerable knowledge in the field concerned.

Among the permanent institutionalized forms of consultation, reference may be made to economic and social councils (the visible expression of the State's willingness to involve the social partners at the highest level in the debate on economic and social issues); national labour advisory councils (principal consultation bodies on national labour and employment policy issues, including on conditions of work, employment, vocational guidance and training, placement, labour flows, social insurance, the conclusion and implementation of collective agreements, the minimum wage, occupational safety and health, etc.); and sectoral advisory councils (specialized advisory bodies, such as labour relations advisory councils, vocational training and employment councils and minimum wage fixing boards).

Cooperation and negotiation bodies differ from consultative bodies in that they intervene at the implementation stage of national labour and employment policy in view of their executive function in the areas in which they operate, and for which they were specifically established. In the view of the Committee of Experts, their presence within the national labour administration system often reflects a two-fold intention on the part of governments: first, to manage labour administration activities, which are numerous and varied, more efficiently, in particular by decentralizing some of them to cooperation bodies, thereby streamlining the role and structure of the Ministry of Labour; and secondly, to involve employers' and workers' organizations more closely in managing some labour administration activities.¹⁵

Although they are often autonomous, parastatal bodies for cooperation and negotiation are nevertheless controlled by a public authority responsible for the administration of labour, both at the central and regional levels, as envisaged by Article 9 of the Convention. Employment agencies, national employment offices, national labour institutes, national occupational safety and health institutes, national research study institutes, vocational training centres and national social security funds are the most frequent examples of parastatal cooperation and negotiation bodies.

Human and financial resources

The effectiveness of the system of labour administration necessarily depends on it having at its disposal sufficient financial resources and qualified personnel, whose initial training is supplemented by further training during the course of their career, as well as research and the exchange of information, particularly in the context of international cooperation.

¹⁵ General Survey, 1997, op. cit., para. 186.

In accordance with Article 10, paragraph 1, of the Convention, “the staff of the labour administration system shall be composed of persons who are suitably qualified for the activities to which they are assigned, who have access to training necessary for such activities and who are independent of improper external influences”. Under the terms of paragraph 2 of the same Article, such staff “shall have the status, the material means and the financial resources necessary for the effective performance of their duties”.

These provisions imply the adoption of measures for the training of the staff of the labour administration (the establishment of national schools and institutes for high-level administrators and managers, administrative training centres for middle management in the public administration, training centres for staff specializing in labour inspection and the staff of employment services). The status of public servant generally provides a guarantee of the level of independence required by the Convention.

Coordination and effectiveness of the system of labour administration

Under Article 4 of Convention No. 150, each Member which ratifies the Convention undertakes, in a manner appropriate to national conditions, to ensure the organization and effective operation in its territory of a system of labour administration, the functions and responsibilities of which are properly coordinated.

The application of this provision depends very closely on that of Articles 5 and 6, which address respectively the tripartite aspect and the competence of the bodies of the labour administration. The precise and well-documented information provided to the ILO’s supervisory bodies in this respect shows the degree of effectiveness of the system of labour administration and indicates, where appropriate, the barriers or obstacles preventing or impeding the attainment of the objective of the Convention. This information concerns the measures taken to give effect to the requirements of the Convention relating to:

- the precise role played by each of the competent bodies within the system of labour administration in the national labour policy, and their methods of intervention;
- the position occupied by each body in the system of information collection designed to shed light on the situation of employed, unemployed and underemployed persons, taking into account national laws and regulations and national practice relating to conditions of work and working life and terms of employment;
- the manner in which it is envisaged that attention should be drawn to the defects and abuses which are observed and proposals submitted on the means to overcome them, in accordance with Article 6 of the Convention;
- the measures taken by the competent bodies in the system of labour administration to promote effective consultation and cooperation between public authorities and bodies and employers’ and workers’ organizations, as well as between such organizations, at the national, regional and local levels; and
- the methods through which the competent bodies in the system of labour administration make available to employers and workers and their respective organizations the technical opinions and advice requested.

Extending the functions of the system of labour administration

Under Article 7 of the Convention, when national conditions so require, with a view to meeting the needs of the largest possible number of workers, and in so far as such

activities are not already covered, each Member which ratifies the Convention undertakes to promote the extension, by gradual stages if necessary, of the functions of the system of labour administration to include activities, to be carried out in cooperation with other competent bodies, relating to the conditions of work and working life of appropriate categories of workers who are not, in law, employed persons, such as:

- (a) tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers;
- (b) self-employed workers who do not engage outside help, occupied in the informal sector as understood in national practice;
- (c) members of cooperatives and worker-managed enterprises; and
- (d) persons working under systems established by communal customs or traditions.

In its General Survey on labour administration, the Committee of Experts emphasized the flexibility of this provision, which only applies when national conditions so require and in so far as such activities are not already covered, and which imposes an obligation as to the means, rather than the end result, namely the adoption of measures to promote the objectives set out. The Committee of Experts has noted that the question of extending labour administration activities to workers who are not employed persons has become increasingly important, particularly for many developing countries “owing to the chronic poverty of some categories of workers and to underemployment and unemployment”, as well as because “the informal sector has become increasingly important and concerns many of the workers covered by the extension”.

II. Summary of principles

The Labour Administration Convention, 1978 (No. 150), and Recommendation No. 158 which supplements it, are promotional instruments. The provisions of the Convention consist of general guidelines rather than an attempt to prescribe specific requirements with respect to labour administration. The flexibility in achieving its aims and the variety of approaches that it permits offer the possibility of taking due account of the specific and changing situation in each country.

The tripartite approach is of fundamental importance to labour administration in view of the destabilizing effects currently faced by member States in view of the rapid developments arising out of the globalization of the economy, the increasing influence of market economies, the implementation of structural adjustment programmes, technical innovation, the increased rate of the privatization of public enterprises, the restructuring of enterprises and dismantling of state monopolies and the associated anti-competitive policies, which all add to the pressure to reduce public expenditure. These circumstances reinforce the need for tripartite cooperation for the development of strategies to meet these challenges in a planned and organized manner.

For the proper organization, effective operation and coordination of the system of labour administration, measures should be taken, including those ensuring means of action, in addition to laws and regulations establishing public administration bodies or delegating certain functions of labour administration to non-governmental bodies.¹⁶

¹⁶ General Survey, 1977, op. cit., para. 36.

Even if it plays a very important role in labour administration, the Ministry of Labour or its equivalent is not the only institution concerned with labour administration, since the complexity of labour administration activities mean that they nearly always come under the responsibility of several bodies.

III. Application in practice

As of 1 October 2001, the Labour Administration Convention, 1978 (No. 150), had been ratified by 52 countries. Reports on the measures taken for its application are due every five years. During its session in 2001, the Committee of Experts made observations to five countries and direct requests to 24 countries. It was able to note the constant efforts made by most countries to provide the labour administration with an increasingly substantive set of legal provisions. However, it noted that the plethora of legislative texts is not always accompanied by the allocation of the necessary means for their application in practice. This is almost always the case in developing countries, where political will comes up against the barrier of the paucity of available means, and particularly the secondary priority accorded by the public authorities to the objectives set out in the international instruments on labour administrative.

The instability of political regimes in certain regions of the world often results in constant reorganizations of ministerial departments and the transfer of skills between them, with the result that texts to apply legislative provisions in the areas covered by labour administration are rarely issued and, when they are adopted, are unfortunately not applied for a sufficiently long period to demonstrate their effectiveness.

In its General Survey on labour administration, the Committee of Experts noted that the range of approaches and choices observed in the various countries in this respect demonstrates the flexibility of Convention No. 150 and Recommendation No. 158 and the extent to which they can take account of the broad spectrum of national situations and conditions. The Committee of Experts also drew attention to the usefulness of the two instruments when preparing national and social labour policies, in view of the fact that they require the State to take responsibility for labour administration and encourage tripartite consultation.

In general, when examining the measures taken by governments to give effect to Convention No. 150, the Committee of Experts follows the whole development of their labour administration systems with a view to encouraging them by providing valuable guidance so that they can make continuous progress towards the achievement of the social peace to which the instruments are intended to contribute.

Labour inspection

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Labour Inspection Convention, 1947 (No. 81)	128	Priority Convention
Protocol of 1995 to the Labour Inspection Convention, 1947 (No. 81)	10	This Protocol is related to a priority Convention and is considered up to date.
Labour Inspection Recommendation, 1947 (No. 81)	–	This Recommendation is related to a priority Convention and is considered up to date.

Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82)	–	This Recommendation is related to a priority Convention and is considered up to date.
Labour Inspection (Agriculture) Convention, 1969 (No. 129)	40	Priority Convention
Labour Inspection (Agriculture) Recommendation, 1969 (No. 133)	–	This Recommendation is related to a priority Convention and is considered up to date.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947 (No. 85)	5	The Governing Body has invited States parties to Convention No. 85 to contemplate extending the application of the Labour Inspection Convention, 1947 (No. 81), and its Protocol of 1995 and/or the Labour Inspection (Agriculture) Convention, 1969 (No. 129), to non-metropolitan territories that continue to be governed by the provisions of Convention No. 85. The Office has to hold consultations on this issue with the States parties to Convention No. 85 and inform the Governing Body of the result of these consultations.
Labour Inspection Recommendation, 1923 (No. 20)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 20.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Labour Inspection (Health Services) Recommendation, 1919 (No. 5)	–	The Governing Body has noted that Recommendations Nos. 5, 54 and 59 are obsolete. An item on the withdrawal of these Recommendations has been placed on the agenda of the 90th Session (2002) of the Conference.
Inspection (Building) Recommendation, 1937 (No. 54)	–	
Labour Inspectorates (Indigenous Workers) Recommendation, 1939 (No. 59)	–	

Two series of instruments address the question of labour inspection: firstly, Convention No. 81 and Recommendation No. 81, which apply to inspection in industrial and commercial establishments, as well as the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82); and secondly, Convention No. 129 and Recommendation No. 133, which apply to labour inspection in agricultural enterprises, and which were adopted two decades later, in 1969.

Labour inspection is one of the functions of labour administration and has to be examined as an integral part of the system of labour administration. Its effectiveness is conditional on meeting the conditions set out by the national labour policy for the effective coordination of the competent bodies of the labour administration.

The above instruments form part of a large series of international labour standards which have the common objective of protecting workers while engaged in their work. For the sectors covered, they set forth the main lines to be followed by the public authorities to institutionalize a system of labour inspection responsible for ensuring in a coordinated and effective manner the protection of workers while engaged in their work and for promoting laws and regulations adapted to the changing needs of the labour market. The labour inspection Conventions contain provisions determining the fields of labour legislation which should be enforceable by labour inspection, the identifying of the workplaces

subject to inspection, the organization of the system of inspection and its relations with the various public, parastatal and private actors concerned, the criteria for determining the human, material and financial resources necessary for the functioning of labour inspection and the conditions for the recruitment and training of the staff of the inspectorate, their status and the powers with which they should be entrusted.

The two series of instruments are based on identical principles. The application of the 1947 instruments in the sectors of industry and commerce over nearly two decades had the effect of demonstrating their universal pertinence and of encouraging the ILO's constituents to adopt similar instruments in 1969 adapted to the agricultural sector, taking into account the significant progress in the will of member States to allocate increasingly substantial resources to the achievement of the objectives pursued. In 1947, the diversity of national situations as regards the possibility of determining the broadest possible scope for the application of the instruments on labour inspection made it necessary for the constituents at the time to limit the requirements placed on members. Nevertheless, the Conference, out of a concern to encourage them to extend the fields of competence of labour inspection as much as possible, at the same time adopted a resolution urging governments to apply to all workers employed in industrial and commercial enterprises the provisions for the protection of workers which are enforceable by labour inspectors.¹⁷ The definition of the scope of application of the Labour Inspection (Agriculture) Convention, 1969 (No. 129), is inspired by the spirit of this resolution.

States which have ratified them are under the obligation to apply the provisions of each Convention to an extent that is adapted to national conditions. Their application is subject to regular supervision by the Committee of Experts based on the examination of government reports due under article 22 of the Constitution of the ILO. As the labour inspection Conventions are classified as priority standards, these reports are due every two years. The Committee of Experts may request additional information from governments or request them to take the measures that it considers necessary in the period between the two regular reports.

Recommendations do not have binding force. However, they contain very useful practical guidance and advice on the manner of applying the corresponding Conventions,¹⁸ or in the case of the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), on the benefits of subjecting mining and transport enterprises, as defined by the competent authority, to the supervision of appropriate labour inspection services.

I. Content of the instruments

Convention No. 81 sets out a series of principles respecting the determination of the fields of legislation covered by labour inspection, the functions and organization of the system of inspection, recruitment criteria, the status and terms and conditions of service of labour inspectors, and their powers and obligations. Convention No. 129 reiterates for labour inspection in agriculture each of these principles, adapting them where appropriate to the specific characteristics of the sector and adding innovations with the clear objective of extending the competence of labour inspection and improving the effectiveness of the system of inspection.

¹⁷ *Record of Proceedings*, ILC, 30th Session, Geneva, 1947, Appendix XIII, p. 587.

¹⁸ See in this respect article 19, para. 6, of the Constitution of the ILO.

Subjects covered by labour inspection

Conventions Nos. 81 and 129 are very flexible with regard to the subjects over which labour inspectors should exercise supervision. Under Article 2, paragraph 1, of Convention No. 81, this supervision covers “legal provisions relating to conditions of work and the protection of workers while engaged in their work”. The instrument does not designate exhaustively the subjects covered by these legal provisions. It refers in Article 3, paragraph 1(a), to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters. This list is not peremptory. It is given by way of indication since, under the terms of the same provision, these subjects are only covered “in so far as such provisions are enforceable by labour inspectors”. It is therefore the responsibility of the State to determine the extent of the legal provisions which lie within the competence of the labour inspection services. Convention No. 129 also mentions in Article 6, paragraph 1(a), provisions relating to weekly rest, holidays and the employment of women. The fields listed are not binding on member States. They may be more confined or more numerous depending, on the one hand, on the political will of the legislator in each country and, on the other hand, its structural and economic capacity to take either immediately or progressively the measures necessary to improve the social climate.

According to Article 27 of Convention No. 81 and Article 2 of Convention No. 129, the term “legal provisions” includes, “in addition to laws and regulations, arbitration awards and collective agreements upon which the force of law is conferred and which are enforceable by labour inspectors”.

Scope of application of the instruments

Flexibility of Convention No. 81

This flexibility takes the form, on the one hand, of the discretion accorded to States to define the workplaces which shall be subject to inspection and, on the other hand, in the various exclusions allowed by the Convention.

Convention No. 81 does not set out a rigid definition of the commercial and industrial establishments which should be subject to inspection. These are designated by Article 2, paragraph 1, and Article 23 as “workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors”.

The scope of application of the Convention is therefore set by reference to legal provisions which are enforceable by labour inspectors, which leaves each State free to determine the workplaces which are to be covered by the system of inspection.

Moreover, according to Article 26, the question shall be settled by the competent authority in any case in which it is doubtful whether any enterprise, part or service of an enterprise or workplace is subject to Convention No. 81.

The Convention also allows certain exclusions from its application. Part II of the instrument concerning labour inspection in commerce is, under the terms of Article 25, paragraph 1, of the Convention optional in its application, since any Member may, by a declaration appended to its ratification, exclude it from its acceptance of the Convention. In accordance with Article 2, paragraph 2, mining and transport enterprises or parts of such enterprises may be exempted from the application of the Convention by national laws or regulations.

The authorization of the exemption under national laws or regulations of mining and transport enterprises from the application of Convention No. 81 does not mean in any way that, for constituents, the workers employed in these enterprises should not enjoy the same protection as other workers in industry and commerce. The special nature of the strategic and economic interests of mining and transport for each Member nevertheless appeared to require special treatment for the enterprises in question in relation to labour inspection. For this reason, during the same session of the Conference, a Recommendation was adopted emphasizing the need to make adequate provision in respect of mining and transport enterprises for the effective enforcement of legal provisions relating to conditions of work and the protection of workers while engaged in their work.¹⁹

The adaptability of Convention No. 81 to the diversity of national situations is also a result of the possibility left to member States, where the national territory includes large areas where, by reason of the sparseness of the population or the stage of development of the area, to exempt them from the application of the Convention either generally or in part.

Progress introduced in Convention No. 129

The two first decades of the application of Convention No. 81 demonstrated the willingness of member States to apply it generally to all industrial enterprises, and not to make use of the exclusions authorized, except for mining and transport enterprises, and enterprises discharging activities related to national defence. The drafters of Convention No. 129 drew from this experience the conviction that the constituents had the will to make its application more generalized. A broad consensus supported the adoption of provisions reflecting the commitment of Members to give the text the broadest possible scope. This commitment is reflected, among other provisions, in the definition of the concept of agricultural undertaking (Article 1, paragraph 1), which encompasses “undertakings and parts of undertakings engaged in cultivation, animal husbandry including livestock production and care, forestry, horticulture, the primary processing of agricultural products by the operator of the holding or any other form of agricultural activity”. Moreover, the Convention covers in a general manner agricultural undertakings in which employees or apprentices work, however they may be remunerated and whatever the type, form or duration of their contract (Article 4). To ensure that no agricultural enterprise is left out of the system of labour inspection, Article 1, paragraph 2, of the Convention provides that the line which separates agriculture from industry and commerce is to be defined by the competent authority, after consultation with the organizations of employers and workers concerned.

However, in any case in which it is doubtful whether an enterprise or part of an enterprise is one to which the Convention applies, the question has to be settled by the competent authority, in accordance with Article 1, paragraph 2.

Furthermore, the progressive extension is encouraged of the system of inspection in agriculture to one or more categories of self-employed persons, in the meaning set out in the national legislation, working in agricultural enterprises, such as “tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers; persons participating in a collective economic enterprise, such as members of a co-operative; members of the family of the operator of the undertaking, as defined by national laws or regulations” (Article 5, paragraph 1). The formal commitment to engage in such extension is undertaken in one or more successive declarations communicated to the Director-General of the ILO, in accordance with Article 5, paragraph 2, of the Convention. States which have ratified the Convention are obliged, under paragraph 3, of the same Article, to

¹⁹ The Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82).

inform the ILO in any case of the extent to which effect has been given or is proposed to be given to the possibility of extending the system of labour inspection to such of the above categories of persons as are not covered by a declaration. The supervisory bodies attach particular interest to the progress achieved in this respect, as such progress is a valuable indicator of prospects for developing the scope of national systems of labour inspection in the agricultural sector.

Functions of the inspection services

The enumeration in Article 3, paragraph 1, of Convention No. 81 and Article 6, paragraph 1(a), of Convention No. 129 of the functions of labour inspection is governed by the dual concern for their complementarity and the order of priority which should be attached to them.

The first of the principal functions of labour inspectors is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work.

The provision to employers and workers of technical information and advice concerning the most effective means of complying with the legal provisions (paragraph 1(b) of the above Articles of the two instruments) constitutes the second principal function of labour inspection. Guidance is given in Recommendation No. 81 on the methods for the provision of this information and advice on the application of labour legislation in general, and on the health and safety of workers.²⁰ This guidance is recalled and adapted to labour inspection in agriculture by Recommendation No. 133, which calls for education campaigns by all appropriate means, on such subjects as the dangers to the life or health of persons working in agricultural enterprises and the most appropriate means of avoiding them (conferences, use of the media, exhibitions and education in technical schools).²¹

The third principal function attributed to labour inspectors by the two Conventions is that of bringing to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions (Article 3, paragraph 1(c), of Convention No. 81 and Article 6, paragraph 1(c), of Convention No. 129).

Article 6, paragraph 2, of Convention No. 129 invites member States to also give labour inspectors in agriculture advisory or enforcement functions regarding legal provisions relating to the conditions of life of workers and their families.

This instrument includes as a principle of the functioning of labour inspection in agriculture the association of labour inspection services in the preventive control of potential risks to health and safety arising out of new plant, new materials or substances and new methods of handling or processing products. This preventive role of the inspection services was already encompassed by the drafters of the 1947 instruments and is set out in the text of Recommendation No. 81. Its implementation in practice by member States demonstrated its full relevance.²² It was raised up to the rank of a requirement in the Convention for labour inspection in agriculture by Article 17 of Convention No. 129.

²⁰ Paragraphs 6 and 7 of Recommendation No. 81.

²¹ Paragraph 14 of the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133).

²² Part I of Recommendation No. 81.

Matters requiring prior consultation with the labour inspectorate with a view to safeguarding the safety and health of workers are set out in Recommendation No. 133.²³

The duties entrusted to labour inspectors as part of their principal functions are complex and require sufficient time, resources and freedom of action. For this reason, Article 3, paragraph 2, of Convention No. 81 and Article 6, paragraph 3, of Convention No. 129 call for vigilance by member States concerning the need to ensure, where other duties are entrusted to labour inspectors, that they are “not such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers”.

Subject to this reservation, Recommendation No. 133 calls for the association of labour inspection in agriculture with the enforcement of legal provisions on such matters as the training of workers, social services in agriculture, cooperatives and compulsory school attendance.²⁴

Synergy in the organization and functioning of the inspection system

Structure of labour inspection

Convention No. 81 (Articles 1 and 22) and Convention No. 129 (Article 3) require each Member for which they are in force to maintain a system of labour inspection in the workplaces covered. The structure of the system must be a hierarchical organization placed under the supervision and control of a central authority. In the case of a federal State, the central authority may be either at the federal level or at the level of the federated unit (Article 4 of Convention No. 81 and Article 7 of Convention No. 129).

Under the terms of Article 7 of Convention No. 129, labour inspection in agriculture may be carried out for example:

- (a) by a single labour inspection department responsible for all sectors of economic activity;
- (b) by a single labour inspection department, which would arrange for internal functional specialisation through the appropriate training of inspectors called upon to exercise their functions in agriculture;
- (c) by a single labour inspection department, which would arrange for internal institutional specialisation by creating a technically qualified service, the officers of which would perform their functions in agriculture; or
- (d) by a specialised agricultural inspection service, the activity of which would be supervised by a central body vested with the same prerogatives in respect of labour inspection in other fields, such as industry, transport and commerce.

The placing of labour inspection under a central authority facilitates the development and application of a uniform policy for labour inspection throughout the territory and permits the rational use of the available resources, particularly by limiting duplication.

²³ Paragraph 11 of Recommendation No. 133.

²⁴ Paragraph 2 of Recommendation No. 133.

In any event, labour inspection should be a public service operating at two levels: local units principally oriented towards action and the central service, responsible for management and policy-making.

Although it is not explicitly set out in the instruments under examination, the supervision and control of labour inspection by a central authority implies powers in the administration and management of inspection resources, as well as its functioning and the follow-up of inspection activities, particularly by means of the reports that labour inspectors or local inspection offices have to submit to it periodically in accordance with Article 19, paragraph 1, of Convention No. 81 and Article 25, paragraph 1, of Convention No. 129. Recommendation No. 133 indicates that guidelines should be given to labour inspectors in agriculture by the central authority so as to ensure that they perform their duties throughout the country in a uniform manner.²⁵

In view of its responsibility for one of the essential functions of labour administration, the central labour inspection authority must participate in an effective manner in the development of an inspection policy, the formulation of a method for the intervention of the inspection services and the determination of an order of priority in its action based on the characteristics of the various sectors and the nature or activities of enterprises.

*Collaboration between the inspection services
and other government services and
public and private institutions*

The two Conventions require the competent authority to make arrangements to promote “effective” cooperation between the inspection services and other government services and public or private institutions engaged in similar activities to those discharged by the labour inspection services.²⁶ In countries in which there are several labour inspection services under the same central administration or attached to different ministerial departments, close collaboration should be encouraged by the competent authority by means of the exchange of information, the determination of methods and procedures of intervention and the establishment of programmes of common action.

The integration of the labour inspection system into the system of labour administration depends on effective cooperation with the services of the labour administration at the central and local levels. Reference may be made, for example, to employment services, those covering foreign workers, vocational training institutions and labour relations services, where this issue is the responsibility of specialized services.

Although the idea is not set forth in the international instruments on labour inspection, the placing of the inspection system under the control of a central authority can only encourage the exchange of information between the latter and the advisory bodies set up within the ministry responsible for labour, any other ministry concerned and the social partners, with a view to their rational intervention for the benefit of users of the labour administration. The central authority must itself, in the first place, make good use of the information received from the inspection services and follow them up in an appropriate manner, either through the activities of the inspection services, or in the form of draft laws or regulations prepared by the department responsible for administration alone or in conjunction with other ministerial departments concerned.

²⁵ Paragraph 8.

²⁶ Article 5(a) of Convention No. 81 and Article 12, para. 1 of Convention No. 129.

Cooperation with the institutions administering social security is also essential to meet the obligations deriving from the ratification of the Conventions on labour inspection in the fields of occupational safety and health, including issues relating to work-related accidents and occupational diseases. The principal objective of this specific area of cooperation should be the prevention of occupational risks in a spirit of shared responsibility between the services concerned for the achievement of this objective.

Collaboration with employers and workers and their organizations

The two Conventions on labour inspection require measures to be taken by the competent authority to promote collaboration between officials of the labour inspectorate and employers and workers or their organizations (Article 5(b) of Convention No. 81 and Article 13 of Convention No. 129).

Recommendation No. 81 emphasizes the importance that should be attached in particular to collaboration in the field of occupational safety and health. It recommends the establishment for this purpose of joint safety committees or similar bodies within each enterprise or establishment authorized to collaborate, under conditions determined by the competent authority, in investigations carried out by the inspection services in the event of industrial accidents or occupational diseases (Paragraphs 4 and 5 of Recommendation No. 81).

Composition, status and conditions of service of inspection staff

The two Conventions provide that the inspection staff must be composed of public officials (Article 6 of Convention No. 81 and Article 8, paragraph 1, of Convention No. 129). They also lay down that both men and women must be eligible for appointment to these functions and that special duties may be assigned to men and women inspectors, respectively (Article 8 of Convention No. 81 and Article 10 of Convention No. 129).

Inspection staff

Under Article 10 of Convention No. 81 and Article 14 of Convention No. 129, the number of labour inspectors has to be determined with due regard for the importance of the duties to be performed, the material means placed at the disposal of the inspectors and the conditions under which inspection visits have to be carried out in order to be effective. The duties to be performed depend on: the number, nature, size and situation of the workplaces liable to inspection; the number and classes of workers employed in such workplaces; and the number and complexity of the legal provisions to be enforced.

Qualifications of inspectors; collaboration of qualified technical experts and specialists

Taking into account, on the one hand, the complexity and diversity of the duties that they have to discharge and, on the other hand, the authority with which they have to be invested for this purpose, Article 7 of Convention No. 81 and Article 9 of Convention No. 129 provide that labour inspectors must be recruited with sole regard to their qualifications for the performance of their duties, according to means determined by the competent authority, and that they must be adequately trained.

Convention No. 129 adds in Article 9, paragraph 3 *in fine*, that measures must be taken to give labour inspectors in agriculture appropriate further training in the course of their employment. Paragraphs 4 to 7 of Recommendation No. 133 indicate a number of such measures.

Collaboration of technical experts and specialists

By ratifying Convention No. 81, member States commit themselves to taking, under Article 9, “the necessary measures to ensure that duly qualified technical experts and specialists, including specialists in medicine, engineering, electricity and chemistry, are associated in the work of inspection, in such manner as may be deemed most appropriate under national conditions, for the purpose of securing the enforcement of the legal provisions relating to the protection of the health and safety of workers while engaged in their work and of investigating the effects of processes, materials and methods of work on the health and safety of workers”.

Recourse to duly qualified technical experts and specialists is also envisaged by Article 11 of Convention No. 129. In general, their role is to help to solve problems requiring technical knowledge.

Indeed, to be effective, inspections of enterprises should permit the detection of potential risks with a view to determining the measures to be taken to eliminate them in so far as possible, or in any event to reduce them to a manageable level. Inspection visits increasingly frequently require a high level of technical expertise, and therefore depend on specialized technical experts from outside the inspection services.

It is desirable, where national conditions permit, for these technical experts and specialists to form part of the staff of labour inspectors. When they are outside the labour inspectorate, their role is to provide the relevant technical advice, draw the attention of labour inspectors to the observations that have been made and make proposals to remedy situations giving rise to risks.

The possibility is also set out in Article 8, paragraph 2, of Convention No. 129 of including in the system of labour inspection in agriculture officials or representatives of occupational organizations.

Status of labour inspectors

Labour inspectors should enjoy a status and conditions of service such that they are assured of stability of employment and are independent of changes of government and of improper external influences. These requirements are set out in Article 6 of Convention No. 81 and Article 8, paragraph 1, of Convention No. 129. Indeed, it may be supposed that, if their security of employment or career prospects depend on political considerations, they will not be able to act in full independence, as their function should allow them to do. Any officials or representatives of occupational organizations included in the system of labour inspection in agriculture must, under Article 8, paragraph 2, of Convention No. 129, enjoy the same guarantee of stability of employment and independence.

The preparatory work for Convention No. 81 shows that the status of public official was laid down for the inspection staff because it appeared best fitted to ensure the independence and impartiality necessary for the exercise of their functions. As public officials, labour inspectors are generally appointed on a permanent basis and can only be dismissed for serious professional misconduct, defined in sufficiently precise terms to avoid arbitrary and biased interpretations. The decision to dismiss a labour inspector, in the same way as any other decision involving a sanction with important consequences, should be taken or confirmed by a body offering the necessary guarantees of independence or autonomy with respect to the hierarchical authority, and in accordance with a procedure guaranteeing the right of defence and appeal.

Conditions of service

The conditions of service of labour inspectors are only referred to in the instruments under examination in terms of their effect on the security of employment and independence of inspectors from any improper external influence. The paragraphs devoted to this subject by the Committee of Experts in its 1985 General Survey on labour inspection²⁷ indicate that certain aspects of the status of labour inspectors have a direct influence on their security of employment and independence, namely the duration of their appointment, their remuneration and their career prospects. In this respect, the status of public official provides a guarantee of the duration of these functions once the probationary period has been passed. For this reason, Article 6 of Convention No. 81 and Article 8 of Convention No. 129 set forth this requirement. The result is normally that a labour inspector can only be dismissed for serious professional misconduct, which should be defined in as precise terms as possible in order to avoid arbitrary interpretations. In the view of the Committee of Experts, “it is important that a decision to dismiss an inspector, like any other decision to apply a sanction with important consequences, should be taken, or at least confirmed, by an organ offering the necessary guarantees of independence or autonomy with respect to the hierarchical authority and in accordance with a procedure guaranteeing the right of defence and appeal”. It also emphasized that, “while the enjoyment of security of tenure in a permanent administration is the prime guarantee of the independence of the labour inspection staff, the efficiency of the inspection services also demands levels of remuneration and career prospects that are sufficient to attract and retain high-quality personnel and to safeguard them from any undue influence”. Finally, good career prospects also contribute to the stability and quality of inspection staff.

Professional conduct of labour inspectors

In accordance with Article 15 of Convention No. 81 and Article 20 of Convention No. 129, labour inspectors, subject to such exceptions as may be made by national laws or regulations, must be prohibited from having any direct or indirect interest in the enterprises under their supervision; and must be bound on pain of appropriate penalties or disciplinary measures not to reveal, even after leaving the service, any manufacturing or commercial secrets or work processes which may come to their knowledge in the course of their duties. Subject to the same reservation of any exceptions made by national laws or regulations, they also have to treat as absolutely confidential the source of any complaint and give no intimation to the employer or his representative that a visit of inspection was made in consequence of the receipt of such a complaint.

Detachment

The obligation of detachment imposed upon inspectors by the instruments under examination constitutes an essential guarantee of the impartiality necessary for the performance of their duties. The Conventions do not determine precisely the cases of personal interest which are prohibited. These have to be set out by national legislation, either in a general manner by adopting the wording of the relevant provisions of the Conventions, or by determining the relevant cases, such as direct or indirect participation in the enterprise, the purchase of shares or financial bonds, involvement in the use of a patent or trademark. The obligation of detachment should also be extended to offers of

²⁷ ILO, *Labour inspection*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ILC, 71st Session, 1985, Report III (Part 4B), paras. 142 et seq.

gifts or services made by employers or workers, which may have been made or proposed with a view to corruption.²⁸

It would be desirable for measures to be taken to verify that inspectors are complying with their obligation of detachment and for any breach to be punishable, as in the case of any professional misconduct, by an appropriate disciplinary penalty.

Professional secrecy

Through their functions, labour inspectors naturally acquire information that employers have a legitimate interest in keeping confidential and they must be legally prevented from divulging it. To guarantee observance of professional secrecy, provisions establishing penal or administrative penalties are also required. The legitimate interests of employers have to be protected, notwithstanding the changes inherent in the careers of labour inspectors, and it is therefore logical that such provisions should apply even where they have ceased their functions.

Confidentiality of the source of complaints and the reasons for inspection visits

The obligation of discretion under which labour inspectors are placed concerning the source of complaints is an essential prerequisite for the collaboration of employees in supervising the application of labour provisions relating to occupational safety and health. If they are not safeguarded against the risk of reprisals by the employer, employees would hesitate or even fail to report defects and the supervision of the inspectors would be all the more ineffective.

Conditions and means of action of the labour inspection services

For the effective performance of the duties entrusted to the labour inspection, the competent services must have available, in addition to human resources that are of an adequate level in terms of their numbers and qualifications, appropriate material working conditions.

Inspection offices

Article 11, paragraph 1(a), of Convention No. 81 and Article 15, paragraph 1(a), of Convention No. 129 place the obligation upon the competent authority to make the necessary arrangements to furnish labour inspectors with local offices, suitably equipped and accessible to all persons concerned. Convention No. 129 specifies that these offices should be so located as to take account of the geographical situation of the agricultural enterprises and of the means of communication. Recommendation No. 133 suggests that employers should provide labour inspectors in agriculture, among other facilities, with the use of a room for interviews with persons working in the enterprise.²⁹

Transport facilities

Transport facilities and the reimbursement to labour inspectors of travelling and incidental expenses are necessary for them to perform one of their principal duties, namely inspecting establishments and enterprises. Provisions on this subject are contained in

²⁸ General Survey, 1985, op. cit., para. 196.

²⁹ Paragraph 12 of Recommendation No. 133.

Article 11 of Convention No. 81 and Article 15 of Convention No. 129. Where the economic conditions of the country do not make it possible to provide service vehicles for inspectors, transport facilities may consist, for example and as appropriate in individual cases, of arrangements with public transport bodies where they exist, or with private transporters. They may also consist of financial allowances set at a flat rate which rise in accordance with real needs to allow inspectors to cover their travel needs through the use of the available public or private means of transport or through the purchase of fuel and the maintenance of their personal vehicles, where appropriate. A combination of these various types of arrangements is also possible.

Inspection visits

Frequency and quality of inspections of establishments and agricultural enterprises

In accordance with Article 16 of Convention No. 81 and Article 21 of Convention No. 129, workplaces must be inspected as often and as thoroughly as is necessary to ensure the effective application of the relevant legal provisions. Workplace inspections, in both commercial and industrial activities and in agriculture, are the main means by which labour inspectors supervise the effective application of the legal provisions enforceable by the respective inspection systems. The effectiveness of this supervision therefore depends on the frequency and quality of inspection visits. In the view of the Committee of Experts, it is upon the practical implementation of the above provisions that any labour inspection system is judged. It has emphasized that “it is important that the management of labour inspection services ensures that inspectors spend most of their time (say, three or four days a week) actually doing field work (i.e. visiting enterprises), rather than sedentary office work”.³⁰ Inspection visits involve the performance of numerous and complex tasks, requiring the provision of adequate means to inspectors, particularly to ensure the required mobility.

Moreover, the authority and credibility of labour inspectors depends to a large extent on the seriousness with which inspection visits are carried out. For this reason, a sustained effort should be made to provide inspectors with the necessary means for each establishment subject to supervision to be visited at intervals which are appropriate to the branch of activity and the level of potential risks to the health and safety of workers. The categories of workers employed (young workers, women, migrant workers) may also constitute a criterion when determining the frequency of inspection visits to certain workplaces.

Types of inspection visit

The instruments under examination do not determine the various types of inspection visits which may be carried out by inspectors to supervise the application of the legal provisions for which they are responsible. However, Article 19 of Convention No. 81 and Article 25 of Convention No. 129 provide that the periodical reports that local inspection offices are required to submit to the central inspection authority on the results of their inspection activities must deal with such subjects as may from time to time be prescribed by the central authority. These provisions imply that, in the periods between receiving instructions from the central authority, labour inspectors may carry out inspection visits based on a programme designed to ensure that all workplaces and enterprises subject to inspection receive inspection visits, special inspections or follow-up inspections to ensure the implementation of the injunctions or recommendations which have been made.

³⁰ General Survey, 1985, op. cit., para. 248.

Routine inspections or those intended to verify observance of the measures imposed following an inspection, may be combined with inspections programmed within the framework of targeted campaigns to resolve specific or potential problems (chemical substances, procedures, categories of workers, sectors).

Inspection visits are also valuable following relatively serious employment accidents. Under Article 19, paragraph 2, of Convention No. 129, the labour inspectorate in agriculture must, in so far as possible, be associated with any inquiry on the spot into the causes of the most serious occupational accidents or occupational diseases.

Powers of labour inspectors

Right of free entry

The power to carry out inspection visits without previous notice is derived from Article 12, paragraph 1(a) and (b), of Convention No. 81 and Article 16, paragraph 1(a) and (b), of Convention No. 129. It is an essential prerequisite for the effectiveness of inspections. In accordance with these provisions, labour inspectors must be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection and to enter by day any premises which they may have reasonable cause to believe to be liable to inspection.

Recommendation No. 133 indicates that the activity of labour inspectors in agriculture during the night should be limited to those matters which cannot be effectively controlled during the day.³¹

Powers of investigation

Inspectors must also be empowered to carry out any examination, test or inquiry which they may consider necessary to satisfy themselves that the legal provisions are being strictly observed. The methods of investigation that they may use for this purpose are described in Article 12, paragraph 1(c), of Convention No. 81 and Article 16, paragraph 1(c), of Convention No. 129. These consist of conducting interrogations, examining books, registers or other documents the keeping of which is prescribed by the national laws or regulations subject to their supervision, and the taking or removing for purposes of analysis of samples of materials and substances used or handled at the workplace.

Inspectors discharging their duties in the industrial sector are also empowered, under Article 12, paragraph 1(c)(iii), of Convention No. 81, to require employers to post the notices required by legal provisions.

In general terms, on the occasion of an inspection visit, labour inspectors should notify the employer or his or her representative of their presence, in accordance with Article 12, paragraph 2, of Convention No. 81 and Article 16, paragraph 3, of Convention No. 129. However, the instruments provide that where they consider that such a notification may be prejudicial to the effectiveness of the inspection, they should be free to decide not to provide such notice.

The effectiveness of the supervision by labour inspectors of the application of the legislation depends on the extent of the powers invested in them. The instruments lay down

³¹ Paragraph 9 of Recommendation No. 133.

that labour inspectors should be legally entrusted with powers of injunction and to instigate legal proceedings, whether these powers are exercised directly or indirectly.

Powers of injunction

Under Article 13, paragraph 1, of Convention No. 81 and Article 18, paragraph 1, of Convention No. 129, national legislation should invest labour inspectors with the power to have steps taken with a view to remedying defects observed in plant, layout or working methods which they may have reasonable cause to believe constitute a threat to the health or safety of the workers.

Subject to any right of appeal set out in national laws or regulations, inspectors should for this purpose, under Article 13, paragraph 2(a), of Convention No. 81 and Article 18, paragraph 2(a), of Convention No. 129, be empowered to make or to have made orders requiring such alterations to the installation or plant, to be carried out within a specified time limit, as may necessary to secure compliance with the legal provisions relating to the health or safety of the workers. Measures with immediate executory force may be ordered, even where no legal provision has been infringed, in the event of imminent danger to the health or safety of the workers, under the terms of Article 13, paragraph 2(b), of Convention No. 81 and Article 18, paragraph 2(b), of Convention No. 129.

In the case of labour inspectors in agriculture, their direct or indirect powers of injunction may go as far, in accordance with Article 18, paragraph 2(b), of Convention No. 129, as measures with immediate executory force to halt the work, whether or not there has been a breach of a legal provision.

Choice of action to be taken in the event of violations

While the function of inspection implies the exercise of powers of injunction against those responsible for violations of legal provisions which are enforceable by labour inspectors, it also involves the discharge of duties which are educational, and therefore preventive in their nature. Indeed, this dimension is particularly important for the achievement of the respective objectives. While affirming the principle that persons who violate or neglect to observe such legal provisions will be liable to prompt legal proceedings, Article 17, paragraph 1, of Convention No. 81 and Article 22, paragraph 1, of Convention No. 129 provide that exceptions may be made by national laws or regulations in respect of cases in which previous notice to carry out remedial or preventive measures is to be given. Moreover, it has to be left to the discretion of the labour inspectors, under Article 17, paragraph 2, of Convention No. 81 and Article 22, paragraph 2, of Convention No. 129, to decide whether to give warning and advice instead of instituting or recommending proceedings.

Instituting proceedings

It should be noted that, in view of the difficulties which may arise out of the application of the provisions of Convention No. 81 authorizing labour inspectors to institute administrative or judicial proceedings against those responsible for violating the legislation which is enforceable by them, the drafters of the Convention on labour inspection in agriculture adopted the principle contained in Article 23 of Convention No. 129, according to which if labour inspectors in agriculture are not themselves authorized to institute proceedings, they must be empowered to refer reports of infringements of the legal provisions directly to an authority competent to institute such proceedings.

Penalties applicable for violations

Adequate penalties must be provided for by national laws or regulations for violations of the legal provisions enforceable by labour inspectors and for any obstruction of labour inspectors in the performance of their duties. Measures also have to be taken in accordance with Article 18 of Convention No. 81 and Article 24 of Convention No. 129 to ensure that such penalties are effectively enforced.

Adequate penalties are those which are fixed at a sufficiently high level to have a dissuasive effect with a view to reducing the number of violations. The amount of fines, for example, should be determined so as to prevent employers from being tempted to prefer to pay them rather than taking the required measures, which are more costly, to remedy the violation. Moreover, it is not sufficient for such penalties to be envisaged and imposed, but measures also have to be taken by the competent administrative and judicial authorities to ensure that they are effectively applied with a view to reinforcing the credibility and authority of labour inspectors. It is important in this respect that the central labour inspection authority seeks the cooperation of the judicial authorities for this purpose.

Inspection reports

Obligation of labour inspectors to submit reports

Under Article 19 of Convention No. 81 and Article 25 of Convention No. 129, labour inspectors are required to submit reports to the central inspection authority on the results of their inspection activities. These reports have to be drawn up in such a manner and deal with such subjects as may from time to time be prescribed by the central authority.

Obligation of the central authority to publish an annual report

The competent authority is under the obligation to publish an annual general report on the work of the inspection services under its control within a period not exceeding 12 months after the end of the year to which they relate. The authority is also bound to transmit a copy of the report to the International Labour Office within three months of its publication.³²

Form of annual reports

In the view of the Committee of Experts, it is desirable for the information to be contained in the annual inspection report to be published in a single document and not spread out in a number of publications. In countries where a number of autonomous labour inspection services exist for different branches of activity or different objects of supervision, the reports which have to be issued by each inspection system may be published separately. With regard to labour inspection in agriculture, Convention No. 129 provides that the report may be published either as a separate report, or as part of the general annual report of the central inspection authority.³³

³² Article 20 of Convention No. 81 and Article 26 of Convention No. 129.

³³ Article 26, paragraph 1, of Convention No. 129.

Content of annual reports

The annual reports must contain information reflecting the level of effectiveness of the inspection system, and the extent to which the Convention is applied. Conventions Nos. 81 and 129 enumerate matters on which information should be required to be included in annual reports covering respectively labour inspection in industry and commerce and in agriculture.³⁴ These consist of: laws and regulations relevant to the work of the inspection service; the staff of the labour inspection service; statistics of workplaces liable to inspection and the number of workers employed therein; as well as statistics of inspection visits, industrial accidents and occupational diseases. The Committee of Experts considers that this is a minimum requirement designed to ensure a measure of uniformity in the information requested, but that it would of course be useful for annual inspection reports to include other information, as advocated by Recommendations Nos. 81 and 133.

Recommendation No. 81 proposes a detailed presentation of the information required by Convention No. 81, while Recommendation No. 133 advocates that other subjects might also be dealt with in the annual reports, such as: statistics of labour disputes; identification of problems regarding the application of the legal provisions and progress made in solving them; and suggestions for improving the conditions of life and work in agriculture.³⁵

Objectives of the reports published by the central authority

In its General Surveys of 1966 and 1985, the Committee of Experts emphasized, as it has continued to do in most of its comments on the two Conventions, the great importance it attaches to the publication and communication to the ILO of annual inspection reports within the prescribed time limits.³⁶

These reports, if well prepared, constitute valuable sources of information from two points of view. From the national point of view, the annual inspection reports are essential for an assessment of the practical results of the activities of labour inspectorates. Moreover, these reports give the national authorities significant data for the application of labour legislation and may also reveal gaps in the legislation which may be instructive to the authorities for the future. The publication of annual inspection reports should also provide information to employers and workers and their organizations and elicit their reactions. From an international point of view, annual inspection reports also should make it possible to judge the manner in which inspection systems function in practice and to assess the extent to which the international labour Conventions ratified by the different countries are being applied with reference to the extent of application of the relevant national laws and regulations.

³⁴ Article 21 of Convention No. 81 and Article 27 of Convention No. 129.

³⁵ Paragraph 13 of Recommendation No. 133.

³⁶ ILO, *Labour inspection: A world survey of national law and practice*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, ILC, 50th Session, 1966, para. 203, and General Survey, 1985, op. cit., paras. 273 et seq.

II. Summary of principles as set out in the instruments examined, the General Survey and the comments of the Committee of Experts

Principles common to the 1947 and the 1969 instruments

Necessity of the political will to protect workers

The effectiveness of the inspection system depends on the awareness of the public authorities at the highest level of the need to provide it with the necessary support in the form of adequate human and material resources.

Need to establish an institutional framework and measures of a legal and practical nature

By its very nature, the organization of labour inspection services requires an institutional framework which is composed, on the one hand, of measures in laws and regulations and, on the other hand, of internal requirements for the orientation and guidance for labour inspectors for the satisfactory discharge of their activities.

Collaboration with research institutions

To be effective, the labour inspectorate has to follow technical developments and progress in social and human sciences and receive increasingly specialized information. In exchange, it must have the opportunity to play a major role in relation to research bodies, particularly by helping them to test their research results in the field and by participating actively in seminars, discussions and meetings on social issues and providing specialized information.

Adequacy of human and material resources to meet needs

The composition of the staff of the inspectorate must be adequate in quality and in numbers in relation to the number, geographical distribution, workforce and level of risk at the workplaces liable to inspection, as well as their previous record in terms of complying with the applicable technical and social standards and the extent to which the management and workers collaborate in their everyday application,³⁷ with it being important to manage optimally the technical specializations required for and available to the labour inspection services as a key factor in determining their effectiveness.³⁸

It is necessary to maintain and develop the facilities offered by ILO technical cooperation programmes for the poorer countries with the required support of international assistance.³⁹

It is necessary to achieve an adequate presence of women in the labour inspection staff in view of the growth of women's participation in the labour force.⁴⁰

³⁷ General Survey, 1985, op. cit., paras. 204, 207 and 218.

³⁸ *ibid.*, para. 222.

³⁹ *ibid.*, para. 224.

Appropriate infrastructure and transport facilities,⁴¹ the accessibility of the offices of the inspectorate to the public, their suitable arrangement and practical communication facilities are all required.⁴²

Labour inspection methods and measures need to be adapted every year to new developments with a view to the effective implementation of the relevant legislation.⁴³

Frequency and quality of inspection visits

The frequency and quality of workplace inspection visits determines the degree of application of the legal provisions and the effectiveness of the whole labour inspection system.⁴⁴

Most of the working time of labour inspectors should be spent visiting workplaces.⁴⁵

Participation of employers and workers

The participation of employers and workers in inspection visits is socially desirable and enhances the effectiveness of labour inspection, particularly where their respective organizations and enterprises set up specialized units concerned with problems of working conditions.⁴⁶

The notification of the employer and the representatives of the workers at the workplace of the defects noted by the inspector during the course of inspection visits is envisaged by Convention No. 129.⁴⁷

Powers of labour inspectors

When persuasion and previous warning with a view to bringing the conditions of work into conformity with the relevant legislation have proved ineffective, it is necessary to resort to the coercive measures provided for by the law which are available to labour inspectors and it is indispensable, if the proceedings are to be effective, that the period of transmittal of the reports is as short as possible.⁴⁸

Infringements of labour legislation are likely to cause prejudice to workers and it is for the competent authorities to decide on the nature and severity of penalties. However, it is essential for the effectiveness of inspection services that penalties should be fixed at a

⁴⁰ *ibid.*, para. 217.

⁴¹ *ibid.*, para. 204.

⁴² *ibid.*, para. 229.

⁴³ *ibid.*, para. 206.

⁴⁴ *ibid.*, paras. 235-241.

⁴⁵ *ibid.*, para. 248.

⁴⁶ *ibid.*, para. 247.

⁴⁷ Article 18, paragraph 4, of Convention No. 129.

⁴⁸ General Survey, 1985, *op. cit.*, para. 259.

sufficiently high level to have a dissuasive effect. It is the exemplary nature of penalties which in large measure determines the way in which enterprises heed the advice or warnings of the inspectors and it is important, when the penalty consists of a fine, that the rate of the fine should be periodically reviewed.⁴⁹

The effective imposition of appropriate penalties on those responsible for violations of labour legislation requires constant collaboration between the labour inspectorate and the public prosecutor's office (information on the judicial action taken on inspectors' reports) and the provision of information to magistrates, for example during their training, or through the organization of symposia on problems related to labour inspection.⁵⁰

Periodical reports from labour inspectors

It is the responsibility of the competent authority to determine the form and content of the periodical reports that labour inspectors or local inspection offices have to submit to the central inspection authority at least once a year in accordance with Article 19 of Convention No. 81 and Article 25 of Convention No. 129. The general use of a uniform model for the presentation of periodical reports makes it easier to summarize and interpret the information provided at the national level and for the central authority to prepare the annual general report on labour inspection in accordance with Articles 20 and 21 of Convention No. 81 and Articles 26 and 27 of Convention No. 129.⁵¹

Annual reports of the central inspection authority

These reports, if well prepared, are essential for an assessment of the practical results of the activities of labour inspectorates and provide significant data on the application of labour legislation, and may also reveal gaps in the legislation from which useful lessons for the future may be drawn.⁵²

The publication of annual inspection reports prepared by the central authority is also designed to provide information to employers and workers and their organizations and elicit their reactions.⁵³

The regular transmission to the ILO of annual reports prepared by the central inspection authority makes it possible for the ILO's supervisory bodies to assess the manner in which inspection systems function in practice and the extent to which the international labour Conventions ratified by the various countries are being applied.⁵⁴

Irrespective of the means used for the publication of the annual report of the central inspection authority, it is desirable that the information that it should contain be published in a single document and not scattered throughout a number of publications.⁵⁵ In countries

⁴⁹ *ibid.*, para. 263.

⁵⁰ *ibid.*, para. 267.

⁵¹ *ibid.*, para. 271.

⁵² *ibid.*, para. 273.

⁵³ *ibid.*, para. 273.

⁵⁴ *ibid.*, para. 273.

⁵⁵ *ibid.*, para. 278.

where a number of autonomous labour inspection services exist for different branches of activity or different objects of supervision, the reports of each inspection system may be published separately.⁵⁶

The matters on which the two Conventions require information to be included in the annual inspection reports constitute a minimum requirement designed to ensure a measure of uniformity in the information requested and may be supplemented by other information, such as suggestions and recommendations on the social objectives to be attained and on desirable improvements in the relevant fields.⁵⁷

Scope of application of the respective instruments

The 1947 instruments

Each State for which these instruments are in force is under the obligation to maintain a system of labour inspection in the workplaces covered.

States have full latitude to exempt from the protection envisaged by Convention No. 81 on labour inspection in industry both workers in commerce and those employed in mining and transport, although clearly, if they do not have explicit recourse to this facility, the instrument has to be applied to these workplaces in the same way as to other industrial workplaces.

The 1969 instruments

The scope of application of the instruments on labour inspection in agriculture extends to all agricultural undertakings, irrespective of their legal form (public and private sector, employees and apprentices in cooperatives).

Workers employed in the enterprise on a permanent basis, as well as those whose employment relationship is short term (casual or seasonal workers) are covered, whether they are paid on a time or piece-work basis. Apprentices are also covered, even where they are not considered to be employed persons by the national legislation.

III. Application of the standards and principles in practice

The number of ratifications is 40 for Convention No. 129 and 128 for Convention No. 81 (as of 1 October 2001), thereby placing the latter among the six international labour Conventions with the highest number of ratifications, the other five being Conventions on fundamental workers' rights. Classified as priority instruments, reports have to be provided on the measures taken for the application of both Conventions every two years.⁵⁸

Analysis of government reports and information from other sources shows that the improvement in conditions of work depends on the importance accorded by political decision-makers in member States to the role of labour inspection. The effectiveness of the labour inspection system is largely conditioned by the real level of awareness of the need to protect workers while engaged in their work and the adoption of adequate budgetary and

⁵⁶ *ibid.*, para. 278.

⁵⁷ *ibid.*, para. 279.

⁵⁸ Article 22 of the Constitution of the ILO.

institutional measures, provided that the social partners are able to be involved actively at the various levels.

During its session in 2000, the Committee of Experts addressed comments to 59 countries on the application of Convention No. 81 and to 19 countries on the application of Convention No. 129.

The efforts made by a large number of member States to develop the organization of inspection services in accordance with the principles set forth in the instruments on labour inspection bear witness to the growing concern to institutionalize real inspection systems. Nevertheless, the implementation in practice of legal texts continues to give rise to the same types of difficulties as those noted by the Committee of Experts in its General Survey of 1985.

However, the considerable progress achieved in the application of the principles concerning the functioning of labour inspection are less visible in the agricultural sector, where labour inspection often remains in its very early stages, particularly in countries encountering difficulties of an economic and political nature, or in which the action of trade unions is hindered or non-existent. In these same countries, the principle role of the labour inspection services, which should mainly be to supervise the application of legal provisions relating to the conditions of work of workers while engaged in their work, is often superseded by an arbitration role in individual and collective labour disputes.

The question of the recruitment, training and promotion of inspection staff is of particular importance when assessing the prospects for progress in the operation of inspection systems. The Committee of Experts often emphasizes this point and invites governments whose respective legal provisions are not in conformity with the instruments to take measures to guarantee that labour inspection is discharged by suitably qualified and motivated personnel.

The staff of the inspectorate is generally made up of public officials. However, in a number of countries, and particularly in the countries of Eastern Europe, the role of labour inspection is shared between public institutions established for that purpose and trade unions. The information provided by governments concerning the status and conditions of service of labour inspectors does not often provide a basis for establishing, as required by the instruments, their stability of employment and their independence of changes of government and of improper external influences.⁵⁹ The situation of inspectors in this respect differs according to the country. In certain inspection systems in Latin America, the inspectors are public officials who, for reasons of subsistence, exercise other occupations in parallel. In addition to the fact that this situation is not such as to ensure the authority and impartiality which are necessary to inspectors in their relations with employers and workers,⁶⁰ it constitutes a serious obstacle to the availability that is required of inspectors to discharge their labour inspection duties. Indeed, the fact that labour inspectors share their working time between their principle function and the activities of their secondary occupation considerably limits the unexpected nature of their inspection visits, which is essential to the effectiveness of inspection.⁶¹

⁵⁹ Article 6 of Convention No. 81 and Article 8, para. 1, of Convention No. 129.

⁶⁰ Article 3, para. 2, of Convention No. 81 and Article 6, para. 3, of Convention No. 129.

⁶¹ See in this respect General Survey, 1985, *op. cit.*, para. 158.

The Committee of Experts has also had occasion to note cases in which labour inspectors are hindered in the discharge of their duties by legal provisions which are contrary to the objectives of the Conventions, such as the requirement of prior administrative authorization before any workplace inspection. Such a provision is contrary to the spirit and terms of the Convention, firstly because it establishes the principle of a level of subordination of inspectors which is incompatible with the authority necessary for their relations with employers and workers and, secondly, it may seriously compromise the effectiveness of inspections, of which an essential guarantee is their unexpected nature. The Committee of Experts is continually drawing the attention of the governments concerned to these risks and requesting them to modify their law and practice so as to guarantee inspectors the right of free entry to workplaces in accordance with the conditions set out in the Convention.⁶²

The powers of injunction and to institute legal proceedings which should, under the terms of the instruments,⁶³ be accorded to inspectors with a view to ensuring compliance with legal provisions, particularly in the event of a threat to the health or safety of workers, are envisaged in different ways by the various national legislations. Although the Committee of Experts welcomes the large number of provisions whose terms reflect the principal clauses of the Conventions respecting this issue, it nevertheless often has occasion to observe that the existence of legal measures is not necessarily sufficient to ensure the effective exercise of the powers set out therein and attain the objectives pursued. The same applies to the penalties which are applicable.

The little information available concerning the manner in which the powers of injunction and to institute legal proceedings are exercised in practice, and on the impact of penalties, point in particular to the complexity of the relevant procedures and the slowness of machinery for cooperation between the competent authorities. Moreover, the applicable penalties, which the Committee of Experts constantly emphasizes must be really dissuasive, are often too low in relation to the costs required to bring conditions of work into conformity with requirements. One of the obstacles frequently noted by the Committee of Experts lies in the fact that the rates of financial penalties are set out in legal texts and can only therefore be reviewed within the context and at the speed of the procedures for their modification. In economies affected by inflation, the level of financial penalties incurred by employers rapidly becomes so derisory that they only have a moderate effect on employers, who are more prepared to pay them than to make the necessary investments in bringing plant and conditions of work into conformity with requirements. For this reason, as it did in its General Survey of 1985,⁶⁴ the Committee of Experts continues to draw the attention of the governments concerned to the benefits of adopting regulations or administrative machinery to determine and review the levels of the penalties applicable in the event of breaches of the labour legislation which is enforceable by labour inspectors.

Problems in the functioning of the various labour inspection systems are always reflected in the capacity or lack of capacity of the central authority to prepare an annual report. Where annual reports are produced and copies transmitted to the ILO, their content varies considerably from one country to another in relation to the requirements set out in the relevant provisions of the instruments. In many cases, it is not possible to ascertain

⁶² Article 12, para. 1(a) and (b), of Convention No. 81 and Article 16, para. 1(a) and (b), of Convention No. 129.

⁶³ Articles 13 and 17 of Convention No. 81 and Articles 18 and 22 of Convention No. 129.

⁶⁴ General Survey, 1985, *op. cit.*, para. 263.

whether the reports are published, as envisaged by the instruments. Moreover, the time limits within which they are prepared, published and transmitted to the ILO are not always adapted to the objective that is pursued, as described in the section on the content of the instruments.

Difficulties in the application of provisions respecting the form and content of annual inspection reports mainly have institutional and/or financial causes.

The concept of a central labour inspection authority gives rise to problems where supervision of the manner in which legal provisions are applied is not under the responsibility of the same authority for all the fields concerned. By way of illustration, if procedures for the transmission of information and cooperation do not function properly, the central authority designated by the government in its report on the application of the instruments does not have at its disposal useful information on each of the matters enumerated in the relevant Articles, and is not therefore in a position to include it in the annual report, which is therefore incomplete and less useful.

A large number of comments also address the issue of the numbers of inspectors, their distribution and the material means with which they are provided to perform their duties.

The Committee of Experts notes the increased will of public authorities to improve the level of resources of labour inspection systems. This is demonstrated by the wealth of laws and regulations in rich countries, as well as less developed countries. However, it notes that the economic situation of a large number of developing countries, combined with the lack of active involvement by the social partners in developing the national labour administration policy, result in the low level of effectiveness of the labour inspectorate, for reasons related to the very low budget allocated in relation to needs, the embryonic nature of the infrastructure, the lack of staff and their low level of qualification and motivation. As a consequence, legal texts establishing an inspection system and determining the manner in which it operates are only reflected by a minimal level of practical measures and activities requiring the minimum amount of resources, limited to the areas that are best equipped with transport facilities and communications.

Another obstacle to the effectiveness of labour inspection is the weakness or non-existence of the necessary tripartite framework for the implementation of the instruments under examination. In such cases, very few opportunities are provided to the social partners to express their respective points of view concerning decisions made at the executive level in fields which are nevertheless of prime interest to them. Failure to involve them in the determination of the objectives to be pursued means that they are subjected to the activities of the inspection system, rather than collaborating in them.

At its session in 1996, noting that for many years government reports and annual inspection reports had only rarely included information on industrial accidents and occupational diseases, the Committee of Experts considered it useful and necessary to make a general observation requesting governments to take the necessary measures to ensure that, in accordance with the provisions of the Conventions under examination,⁶⁵ that industrial accidents and occupational diseases are brought to the notice of inspection services in accordance with national legislation and that appropriate statistics are regularly included in annual inspection reports. The Committee of Experts also suggested that the competent authorities should follow the guidelines set out in the ILO publication of 1996 entitled *Recording and notification of occupational accidents and diseases*, with a view to

⁶⁵ Articles 14 and 21(f) and (g) of Convention No. 81 and Articles 19 and 27(f) and (g) of Convention No. 129.

the development of appropriate systems for the recording and notification of industrial accidents and occupational diseases. The Committee of Experts also emphasized the importance of the guidelines contained in the publication concerning joint action by employers and workers for the prevention of such accidents and diseases.

This observation rapidly had an effect and many governments have in subsequent reports provided extensive information on the measures taken or envisaged and on the difficulties encountered in the application of the relevant provisions of the instruments. The dialogue is being pursued and the Committee of Experts is convinced of the commitment of the authorities concerned in endeavouring to improve the effectiveness of inspection services in this respect.

Encouraged by the favourable reaction by most governments to the above initiative, and counting on the knock-on effect that it could have in another particularly sensitive field of labour inspection, namely action to combat the abusive exploitation of child labour, at its session in 1999, the Committee of Experts made an observation to all member States which have ratified the two Conventions, or only Convention No. 81, calling upon them to take action by once again having recourse to labour inspection services for this purpose. In particular, the Committee of Experts emphasized that labour inspectors are well placed in the normal discharge of their duties to gather valuable information concerning the conditions under which children work and the hazards to which they are exposed. Noting that, in a large number of countries, the simple fact that labour inspectors take an interest in the issue of child labour can raise awareness of the prejudicial effects of work on the development of the child, and that well-targeted inspections have given rise to the lodging of unprecedented numbers of complaints, the Committee of Experts recommended better training for labour inspectors with regard to national policy and legislation on compulsory education, wage rates, family allowances and parental leave. It considered that labour inspectors would accordingly be in a position to perceive the relationship between these factors and the promotion of a satisfying working environment, and to identify gaps in the legislation and hidden forms of exploitation facilitated by such legal voids. Indicating that the contribution of labour inspectors to the formulation of policies, legal measures and labour standards would be thus facilitated, the Committee of Experts therefore requested governments to take appropriate measures to ensure that supervising the application of legal provisions on child labour is henceforth one of the priorities of the labour inspection services and that information on this matter is regularly included in annual inspection reports.

The impact of this general observation was rapidly felt and in the following year many governments attached importance to the provision of information on the measures which had been taken to progressively control the phenomenon of child labour and even, in certain cases, on the results already attained. The information provided on the progress and prospects of the projects conducted in the framework of the ILO's International InFocus Programme on Child Labour (IPEC) show the considerable progress that is being made and foreshadow a favourable change in mentalities in many parts of the world.

Chapter 13

Industrial relations

A. Otero and C. Phouangsavath

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	103	Priority Convention
Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152)	—	This Recommendation is related to a priority Convention and is considered up to date.
Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113)	—	The Governing Body has invited member States to give effect to Recommendation No. 113.
Requests for information (Instruments for which the Governing Body has confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments, or on specific issues.)		
Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)	—	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendations Nos. 92, 94, 129 and 130.
Co-operation at the Level of the Undertaking Recommendation, 1952 (No. 94)	—	
Communications within the Undertaking Recommendation, 1967 (No. 129)	—	
Examination of Grievances Recommendation, 1967 (No. 130)	—	
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
In the area of industrial relations, no instrument has been considered outdated by the Governing Body.		

Industrial relations include, on the one hand, bilateral relations between one or several employers or an employers' organization and one or more trade union organizations and, on the other hand, tripartite relations in which, in addition to the actors referred to above, the representatives of the public authorities are also included. Industrial relations cover, in areas of common interest, the whole range of contacts, exchanges of information, discussions, consultations, exploratory talks, negotiations, cooperation activities and disputes (of a legal or economic nature) at the level of enterprises or public institutions, or at a more general, or even national level, as well as the ways and means of settling disputes. The framework of such relations may have differing degrees of formality. For example, in some cases, these relations and the rights, duties and obligations relating to the partners, such as the duty of recognition, good faith, facilities and guarantees to representatives in the discharge of their functions, etc., may be regulated by legislation, collective agreements, codes of conduct established by the parties, arbitration awards or judicial decisions, or finally just left to custom and practice. In any case, ILO Conventions and Recommendations give the autonomy of the parties a central role in industrial relations.

The collective rights of workers' and employers' organizations, and particularly collective bargaining, are vital to industrial relations. These matters have been addressed in Chapters 1 and 2 of this publication, since freedom of association and collective bargaining are fundamental labour rights. Other matters relating to industrial relations have also been covered: the settlement of disputes in Chapter 2 (collective bargaining); collective

dismissals for economic, technical or structural reasons in Chapter 8 (employment security); and the facilities and guarantees to be afforded to workers' representatives in Chapter 1 (freedom of association). Moreover, it should be recalled that very many ILO Conventions and Recommendations envisage consultations on the conditions of work of specific categories of workers, as well as other more general matters.

This chapter examines the ILO instruments which address cooperation between the social partners (bipartite information, communications and consultations), complaints, voluntary conciliation and arbitration, and tripartite consultation, including on matters relating to international labour standards. With regard to grievances, it should be recalled that the Examination of Grievances Recommendation, 1967 (No. 130), applies both to individual disputes and to disputes relating to several workers, particularly in the event of failure to comply with the provisions of applicable collective agreements, which justifies its analysis in this chapter. However, it should be borne in mind that this Recommendation does not apply to claims of a general nature, nor does it concern procedures for the settlement of collective disputes.

Collaboration at the enterprise level

The Co-operation at the Level of the Undertaking Recommendation, 1952 (No. 94), which is drawn up in general terms, provides firstly for measures to promote consultation and collaboration between employers and workers at the level of the enterprise on issues of common interest which do not lie within the framework of collective bargaining procedures or which are not normally covered by other procedures for the determination of terms and conditions of employment. It is then indicated that, in accordance with national custom or practice, such consultations and collaboration should be facilitated or implemented by one of the two following methods, or by a combination of them: either by the encouragement of voluntary agreements between the parties, or by laws and regulations establishing consultation and collaboration bodies and determining their scope, competence, structure and methods of operation, taking into account the conditions in the various enterprises.

Communications within the enterprise

The Communications within the Undertaking Recommendation, 1967 (No. 129), covers communications between management and workers within enterprises. It emphasizes the importance of establishing within enterprises a climate of mutual understanding and confidence that is favourable both to the efficiency of the enterprise and to the aspirations of the workers. It advocates various measures intended to promote such a climate, including the adoption by management of an effective policy of communication with the workers and their representatives. Such a policy should ensure that information is given and that consultation takes place before decisions on matters of major interest are taken by management, in so far as disclosure of the information will not cause damage to either party.

After indicating that communication methods should in no way derogate from freedom of association, the Recommendation enumerates and specifies the various elements of a communications policy within the enterprise.

The media of communication include meetings, house magazines, newsletters, noticeboards, etc., as well as media aimed at permitting workers to submit suggestions and express their ideas. The management should provide information regarding general conditions of employment, safety regulations, procedures for the examination of grievances and decisions which affect the situation of the personnel, etc.

Tripartite consultations

From the very beginning, the fundamental role of the ILO has been to seek the cooperation of employers, workers and governments for the attainment of social justice through the international regulation of labour matters with a view to the establishment of “universal and lasting peace”. Unchanged for over 80 years, this tripartite structure covering all of its activities is the unique feature of the ILO within the organizations in the United Nations system. However, the effectiveness of tripartite cooperation at the international level has to be based on similar tripartite dialogue at the national level. For this reason, certain provisions of the ILO Constitution (articles 19, 23 and 35) determine the role of organizations of employers and workers in relation to international labour standards. While it should be recalled that the very great majority of international labour Conventions provide, in one form or another, for the consultation and participation of employers and workers in their application, it should be recalled in particular that the International Labour Conference has adopted three specific standards to promote tripartite cooperation at the national level: the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113); the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144); and the Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152).

Convention No. 144 and Recommendations Nos. 113 and 152 have been discussed relatively recently during the work of the Committee on Tripartite Consultation at the 83rd Session of the Conference (1996).¹ Following the adoption by the Conference of the conclusions proposed by the Committee on Tripartite Consultation, according to which the ILO “should use all appropriate means” inter alia to “encourage the ratification and/or the effective application” of Convention No. 144, Recommendation No. 152 and Recommendation No. 113, the Governing Body selected Convention No. 144 and Recommendation No. 152 as the subject for requesting reports under article 19 of the Constitution. A second General Survey by the Committee of Experts on the 1976 instruments was accordingly submitted to the 88th Session of the Conference (2000).²

Tripartite consultation at the national level on economic and social policy

The Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113), principally covers consultation and cooperation measures to be taken between public authorities and representative organizations of employers and workers at the industrial and national levels to promote mutual understanding and good relations between the three social partners with a view to developing the economy as a whole, or individual branches thereof, improving conditions of work and raising standards of living. The Recommendation proposes various methods of consultation, which have to take into account national custom or practice (voluntary action by employers’ and workers’ organizations, promotional action on the part of the public authorities, laws or regulations, or a combination of these methods).

¹ ILO, *Tripartite consultation at the national level on economic and social policy*, ILC, 83rd Session, 1996, Report VI.

² The first General Survey was submitted in June 1982 to the 68th Session of the Conference (ILO, *General Survey of the reports relating to Convention No. 144 and Recommendation No. 152*, ILC, 68th Session, 1982, Report III (Part 4B)).

The Recommendation also indicates that consultations should not derogate from freedom of association or collective bargaining, and without discrimination of any kind against these organizations on grounds such as race, sex, religion or political opinion.

At the same time as adopting Recommendation No. 113 at its 44th Session (1960), the Conference also adopted two observations which place emphasis, in the first place, on the fact that the effective functioning of tripartite cooperation presupposes in particular that all the parties have the will to examine their problems in common in a spirit of good faith, trust and mutual respect and, on the other hand, that the machinery for tripartite cooperation may be very varied and should be adapted to national circumstances.

Tripartite consultation on international labour standards

Convention No. 144 and Recommendation No. 152 are more specific in scope than Recommendation No. 113, since they address tripartite consultation relating to ILO activities and, more particularly, the ratification and application of international labour standards. When examining these instruments, it should be borne in mind that they address the participation of employers' and workers' representatives in practically all the stages of the Organization's standard-setting activities, from determining the agenda of the Conference through to the supervising the application of standards. It was during the discussions held in the Committee on the Application of Standards at the 57th Session of the Conference (1972) concerning an in-depth review by the Committee of Experts of the situation with regard to the role of employers' and workers' organizations in the implementation of standards that the idea was envisaged of an instrument which specifically addressed the establishment of national tripartite machinery for this purpose. This proposal received very broad support in the Governing Body, which decided at its 191st Session (November 1973) to include on the agenda of the 60th Session (1975) of the Conference an item entitled "Establishment of national tripartite machinery to improve the implementation of ILO standards". The Conference adopted Convention No. 144 and Recommendation No. 152 at its 61st Session (1976).

Content of the instruments on tripartite consultation (international labour standards)

Convention No. 144, which entered into force on 16 May 1978, had received 103 ratifications as of 1 October 2001. In 1979 and 1987, the Convention and Recommendation No. 152 were classified by the Governing Body in the category of instruments, the ratification and application of which should be promoted on a priority basis.

States which ratify Convention No. 144 undertake to operate procedures which ensure effective consultations between representatives of the government, of employers and of workers on the following matters: government replies to questionnaires concerning items on the agenda of the Conference and their comments on proposed texts to be discussed by the Conference; the proposals to be made to the competent authority in connection with the submission of instruments in accordance with article 19 of the Constitution of the ILO; the re-examination of unratified Conventions and of Recommendations; reports on the application of ratified Conventions; and proposals for the denunciation of Conventions.

The nature and form of the consultation procedures are to be determined in accordance with national practice, after consultation with the representative organizations of employers and workers. For the purpose of these procedures, these organizations freely choose their representatives and must be represented on an equal footing in any bodies through which consultations are undertaken.

The consultations must be undertaken at appropriate levels fixed by common agreement, but at least once a year. The competent authority has to assume responsibility for the administrative support of the consultation procedures and appropriate arrangements must be made with the representative organizations for the financing of any necessary training of participants in these procedures. Finally, after consultation with the representative organizations, the competent authority may decide to issue an annual report on the working of the procedures.

Recommendation No. 152 takes up all the provisions of the Conventions and adds that the consultations should also cover the preparation and implementation of legislative or other measures to give effect to international labour Conventions and Recommendations, and on reports to be made under article 19 of the Constitution on the effect given to unratified Conventions and Recommendations. Furthermore, after consultation with the representative organizations, the consultation procedures may be extended to other matters, such as: the preparation, implementation and evaluation of technical cooperation activities in which the ILO participates; the action to be taken in respect of resolutions and other conclusions adopted by the Conference or other meetings convened by the ILO; and measures to improve knowledge of ILO activities.

In contrast with the Convention, the Recommendation also proposes examples of consultation machinery: through a committee specifically constituted for questions concerning the ILO; through a body with general competence in the economic, social or labour field; through a number of bodies with specific responsibility; or through written communications, where those involved in the consultation procedures are agreed that such communications are appropriate and sufficient.

Principles of the Committee of Experts concerning tripartite consultation (international labour standards)

Consultation procedures

The fundamental obligation set out in the Convention is to operate procedures which ensure *effective consultations* between representatives of the government, employers and workers on the matters which are specifically envisaged. These consultations are intended, rather than leading to an agreement, to assist the government or the competent authority in taking a decision. Nevertheless, the consultation procedure may set the objective of reaching a consensus between the various parties. Depending on national practice, consultation can mean either submitting the government's proposed decision to employers' and workers' representatives, or asking those representatives to help formulate the proposal. It can also be based on an exchange of communications, or on discussions within tripartite bodies. The important factor is that the persons consulted should be able to put forward their opinions before the government takes its final decision. The effectiveness of consultations therefore presupposes in practice that employers' and workers' representatives have all the necessary information far enough in advance to formulate their own opinions. It should be emphasized in this respect that the mere communication of information and reports transmitted to the Office under article 23, paragraph 2, of the Constitution of the ILO, does not in itself meet the obligation to ensure effective consultations since, by that stage, the government's position will already be final. The obligation of consultation therefore needs to be distinguished both from mere information, from negotiation and also from co-determination, since the consultations are only intended to assist the competent authority in taking a decision concerning ILO standards and activities. However, the results of consultations must not be considered to be binding, since the final decision is taken by the government or the legislator, as appropriate.

Another requirement of the Convention is the free choice of the *representatives of employers and workers* participating in the consultations by their representative

organizations, defined as the “most representative organizations of employers and workers enjoying the right of freedom of association”. The instruments do not indicate the manner in which they are to be designated in practice and leave full latitude to national law and practice. In a memorandum in reply to a request for interpretation from the Government of Sweden, the ILO indicated that the term “the most representative organizations of employers and workers” in Article 1 of the Convention “does not mean only the largest organization of employers and the largest organization of workers. If in a particular country there are two or more organizations of employers or workers which represent a significant body of opinion, even though one of them may be larger than the others, they may all be considered to be ‘most representative organizations’ for the purpose of the Convention. The government should endeavour to secure an agreement of all the organizations concerned in establishing the consultative procedures provided for by the Convention, but if this is not possible it is in the last resort for the government to decide, in good faith in the light of the national circumstances, which organizations are to be considered as the most representative”.³

The reference to the right of freedom of association guarantees that the required consultations take place under conditions in which compliance is guaranteed with the principles set out in the ILO’s instruments on freedom of association and collective bargaining, and particularly Conventions Nos. 87 and 98.

Finally, the Convention requires that employers and workers be “represented on an equal footing on any bodies through which consultations are undertaken.” However, this should not be interpreted as imposing strict numerical equality, which is sometimes difficult to achieve, but rather as being intended to ensure that the views expressed are given equal weight.

The two instruments also leave great latitude in selecting consultation procedures. Convention No. 144 refers to the procedures in force in each country (Article 2, paragraph 2). Recommendation No. 152 proposes four forms of consultation (Paragraph 2(3)). It is understood that this list is not exhaustive. In this respect, the two general surveys by the Committee of Experts have endeavoured to enumerate the machinery within which the required consultations are held. These appear to be extremely diverse: bodies with special competence for ILO matters; bodies with general competence in the economic, social or labour fields; through a meeting or body set up on an ad hoc basis; or by means of written communications.

Functioning of the consultation procedures

The Convention and Recommendation contain a series of provisions respecting practical aspects of the functioning of the procedures:

- responsibility for the administrative support of the procedures has to be assumed by the competent authority. Such support includes making meeting rooms available or the assistance of a secretariat;
- where necessary, arrangements have to be made for the training of the parties concerned, for which the financing does not necessarily have to be provided only by the government;
- without systematically covering all the points indicated, the consultations must be held at least once a year. In practice, the frequency of consultations is determined by

³ ILO, *Official Bulletin*, Vol. LXI, 1978, Series A, No. 3, pp. 193-198, para. 16.

their subject matter, such as the submission of new instruments to the competent authorities, which requires annual consultations;

- the organizations participating in the consultations have to be consulted on whether an annual report on the working of the procedures is to be issued. Such a report may, for example, but does not have to contain information on the number of participants and the meetings, the subjects covered, the proposals put forward and the recommendations made. The form taken by this report is left to the discretion of the parties and its purpose is the dissemination of information at both the national and international levels on the procedures adopted and their implementation.

Application of the standards and principles in practice

The Committee of Experts regularly comments on the application of Convention No. 144, mainly to request clarifications on the implementation of certain provisions. The principal difficulty encountered by the Committee of Experts in assessing the implementation of the Convention consists of the lack of relevant information provided by States parties in the reports that they submit in accordance with article 22 of the Constitution of the ILO.

The difficulties encountered most frequently in the implementation of the Convention are: (a) the choice of the most appropriate form of consultation when a change is requested by the organizations; (b) in some countries, difficulties of an administrative, financial or even political nature, which prevent the provision of the administrative support necessary for consultations, which cannot therefore be held at least once a year, as required by the Convention, and as a corollary; (c) hesitancy as regards the responsibility of the partners for the financing of any training necessary for the participants; (d) the absence in reports of full and detailed information on the consultations held during the periods covered; and, finally, (e) failure to consult the representative organizations on the question of issuing an annual report on the working of the procedures.

In its latest General Survey on tripartite consultation,⁴ the Committee of Experts noted that the difficulties which prevent the proper application of the Convention and the implementation of the Recommendation mostly concern practical obstacles which governments have indicated that they are endeavouring to overcome. Nevertheless, these difficulties do not affect the principle of tripartite consultation, which is no longer contested. In this respect, the Committee of Experts has welcomed the fact that tripartite consultation procedures, in one form or another, now exist in the large majority of member States, including those which have not ratified the Convention. Universal application of the instruments is therefore envisaged in the not too distant future.

Voluntary conciliation and arbitration

Adopted in 1951, at the same time as the Collective Agreements Recommendation, 1951 (No. 91), the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), primarily addresses voluntary conciliation. In this respect, it advocates in the first place the establishment of voluntary conciliation machinery to assist in the settlement of industrial disputes between employers and workers. Machinery constituted on a joint basis

⁴ The General Survey was submitted in June 2000 to the 88th Session of the Conference (ILO, *Tripartite consultation: International labour standards*, ILC, 88th Session, 2000, Report III (Part 1B)).

should include equal representation of employers and workers. The procedure should be free of charge and expeditious, with the time limits for the proceedings fixed in advance and kept to a minimum. Provision should be made to enable the procedure to be set in motion either on the initiative of any of the parties to the dispute or ex officio by the conciliation authority. The Recommendation adds that, if a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress. Finally, the agreements which the parties reach should be drawn up in writing and be regarded as equivalent to agreements concluded in the usual manner.

With regard to arbitration, the Recommendation advocates that, if a dispute has been submitted to arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the arbitration is in progress and to accept the arbitration award.

A final provision of the Recommendation indicates that none of its provisions may be interpreted as limiting, in any way whatsoever, the right to strike.

Examination of grievances within the enterprise

The Examination of Grievances Recommendation, 1967 (No. 130), establishes the principle of an appropriate procedure without prejudice to the person concerned (such as, for example, loss of pay) against measures concerning the relations between employer and worker, or which affect conditions of employment or are contrary to the provisions of a collective agreement or other provisions, including those in laws or regulations. The Recommendation is not applicable to cases in which a grievance is a collective claim to be dealt with by means of collective bargaining or under some other procedure for the settlement of disputes. Workers' organizations should be associated with employers' organizations in the establishment of grievance procedures. These procedures should be effective, simple, rapid, offer every guarantee of objectivity and not restrict the right of the worker to have recourse to the competent authority or the judicial authority. The right to have the case examined at one or more higher levels should be assured from the start. The worker concerned should have the right to be assisted or represented by a representative of a workers' organization, to be kept informed of the steps being taken under the procedure and of the action taken on the grievance.

Where all efforts to settle the grievance have failed, it should be possible to have recourse to the procedures provided for by collective agreement, to voluntary arbitration, to conciliation or arbitration by the competent public authorities, to the judicial authorities or to any other appropriate procedure.

Chapter 14

Seafarers

D.A. Pentsov

Introduction

The need to deal separately with a specific category of workers is usually justified by either the unique conditions of their work or the necessity for their special protection.¹ Both of these factors are fully applicable in the case of seafarers. This is primarily because for seafarers the ship is both a workplace and a home. This phenomenon is sometimes described by the sociological concept of a “total institution”, defined as “a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed formally administered round of life”.² Work on board ship at sea without the possibility of going onshore for prolonged periods of time requires the establishment of certain standards, such as crew accommodation, food and catering. Furthermore, the maintenance of ships, which are in constant operation not only at sea but also in port, as well as work in shifts (watches), has resulted in special regulations for hours of work and rest. In addition, the possibility faced by seafarers of the termination of their employment relationship in a location other than their place of residence requires consideration of the issue of transportation to that place of residence, especially for foreign seafarers.

The natural, technical and social risks inherent in maritime employment explain why it has been felt necessary to provide special protection to seafarers. Natural risks are caused by the perils of the sea; a vessel may suffer maritime casualty or even sink, unless it is properly maintained and operated. In addition, seafarers’ constant exposure to extreme temperatures, strong winds and humidity when at sea may adversely affect their health unless adequate protection is ensured. For this reason, it has been necessary to establish standards concerning crew accommodation and personal protective equipment for seafarers. These natural risks, in turn, are significantly increased by the so-called “human factor”, which still remains one of the major factors in maritime accidents.³ Recent studies have suggested that there is a link between shipboard living conditions, that is work organization, manning, hours of work and the health of crews and human error.⁴ The need to prevent fatigue and overwork therefore requires the establishment of standards for manning, hours of work and the rest and health of seafarers.

Since a modern vessel is a sophisticated mechanical structure, seafarers are constantly exposed to many particular technical risks stemming from the operation of their vessels. In addition to accidents caused by mechanical and electrical equipment, seafarers may also be exposed to toxic and carcinogenic materials which, as recent studies have suggested, have

¹ See, e.g., N. Valticos, G. von Potobsky, *International Labour Law (Second revised edition)*, Kluwer Law and Taxation Publishers, Deventer-Boston, 1995, para. 537, p. 228.

² See, P.K. Chapman, *Trouble on board: The plight of international seafarers*, ILR Press, Ithaca, New York, 1992, p. 115; J.S. Kitchen, *The employment of merchant seamen*, Croom Helm, London, 1980, p. 5 quoting E. Goffman, “On the characteristics of total institutions”, in *Asylums: Essays on the social situation of mental patients and other inmates*, Doubleday Anchor, New York, 1961, Introduction.

³ According to some estimates, 80 per cent of maritime casualties can be blamed on human error. See, e.g., P.K. Chapman op cit., p. 62.

⁴ C. Battut, “Opinion on merchant seafarers working and employment conditions”, in ILO, *The impact on seafarers’ living and working conditions of changes in the structure of the shipping industry*, Report for discussion at the 29th Session of the Joint Maritime Commission, ILO, Geneva, 2001 (doc. JMC/29/2001/3), p. 100.

been responsible for significant numbers of deaths of seafarers and acute and chronic illnesses.⁵

Finally, seafarers are also subject to numerous social risks. Throughout history, seafarers have been viewed as “easy targets”: they have been routinely cheated and abused (both on board and offshore), abandoned, refused repatriation and cheated on wages, intimidated, refused medical treatment, received poor food, subjected to non-compliance with their contracts and suffered from illegal practices by employment agencies.⁶ The excessive number of seafarers and, correspondingly, the shortage of employment opportunities for them creates continued favourable conditions for such abuses.⁷

The special conditions of maritime work, along with the need for the special protection of seafarers against the specific risks inherent in maritime employment, helps to explain why the regulation of the conditions of seafarers’ work occupies such a unique place in the ILO’s standards. As early as 1919, the Commission on International Labour Legislation, appointed by the 1919 Paris Peace Conference, adopted a resolution to the effect that seamen might be dealt with at a special meeting of the International Labour Conference devoted exclusively to the affairs of seamen.⁸ Since then, there have been 11 maritime sessions of the International Labour Conference,⁹ and 39 Conventions and 29 Recommendations have been adopted, covering a wide variety of labour and social security matters related specifically to maritime employment.¹⁰

ILO Conventions and Recommendations relating to maritime employment can be classified into five major groups. The *first* group, “General Provisions”, consists of Conventions and Recommendations which establish general rules applicable to all aspects of maritime employment. This group includes Conventions Nos. 108, 145, 147, the Protocol of 1996 to Convention No. 147, as well as Recommendations Nos. 9, 107, 108, 154, and 155. The *second* group, “Access to Employment”, consists of those instruments which establish: (i) the conditions of access to maritime employment, including minimum age (Convention No. 58); standards for physical fitness (Conventions Nos. 16 and 73); and qualifications requirements (Conventions Nos. 53, 69 and 74); (ii) the conditions for obtaining the qualifications necessary to access maritime employment (Recommendation

⁵ For example, the Norwegian Cancer Research Institute has found that mesothelioma deaths are six times more common among Norwegian ship engineers and engine ratings than among the general population. This is most probably a consequence of past asbestos exposure. See, ILO: *The impact on seafarers’ living and working conditions of changes in the structure of the shipping industry*. Report for discussion at the 29th Session of the Joint Maritime Commission, ILO, Geneva, 2001 (doc. JMC/29/2001/3), p. 86.

⁶ See, e.g., A.D. Couper, C.J. Walsh, B.A. Standberry and G.L. Boerne, *Voyages of abuse*, Pluto Press, 1999, pp. 41-59; P.K. Chapman op. cit., pp. 37-73.

⁷ The 2000 BIMCO/ISF study of the global supply of seafarers estimated that there are 404,000 officers and 823,000 ratings available, while the worldwide demand for seafarers is estimated to be 420,000 officers and 599,000 ratings. See, ILO: *The impact on seafarers’ living and working conditions of changes in the structure of the shipping industry*, op. cit., p. 33, quoting BIMCO/ISF: 2000 Manpower Update (University of Warwick, 2000).

⁸ Report and Minutes of the Commission on International Labour Legislation, Peace Conference, Paris, 1919, Rome, *Tipografia “Italia”*, 1921, p. 42.

⁹ In 1920, 1926, 1929, 1936 (two sessions), 1946, 1958, 1970, 1976, 1987 and 1996.

¹⁰ Thus, ILO maritime Conventions and Recommendations account approximately for one-fifth of all ILO Conventions (183) and one-sixth of ILO Recommendations (191) adopted so far.

No. 137); and (iii) the procedures of access to maritime employment (Convention No. 179 and Recommendation No. 186). The *third* group, “Conditions of Work”, is made up of Conventions and Recommendations which govern the procedure for determining conditions of work (Convention No. 22); hours of work, rest and holidays (Conventions Nos. 180 and 146; Recommendations Nos. 187 and 153); and repatriation (Convention No. 166 and Recommendation No. 174).¹¹ The *fourth* group, “Safety, Health and Welfare”, includes Conventions and Recommendations dealing with safety (Conventions Nos. 68 and 134; Recommendations Nos. 78 and 142), health (Convention No. 164); welfare (Convention No. 163 and Recommendation No. 173); and the accommodation of seafarers (Conventions Nos. 92 and 133; Recommendations Nos. 140 and 141). This group also includes Convention No. 178 and Recommendation No. 185 concerning the inspection of seafarers’ working and living conditions. The *fifth* and final group, “Social Security”, is made up of those instruments which deal with the social security of seafarers (Conventions Nos. 8, 55, 71 and 165; Recommendations Nos. 10, 75 and 76). Finally, it should also be noted, as indicated in the introductory section to this volume on the ILO’s standards policy, that the 29th Session of the Joint Maritime Commission (Geneva, January 2001) proposed to the Governing Body the development of a framework Convention to bring together in a consolidated text as much of the body of the ILO’s maritime labour standards as possible.

Although the content of these Conventions and Recommendations is discussed in greater detail in the following paragraphs, it is desirable at this point to address briefly the issue of definitions, in particular the definitions of the terms “seafarer” and “ship” that are used in these instruments. Significantly, there are no uniform definitions of these terms in ILO maritime Conventions and Recommendations. The term “seafarer”, for example, may include every person employed or engaged in any capacity on board any vessel and entered on the ship’s articles, excluding masters, pilots, cadets and pupils on training ships, and duly indentured apprentices, naval ratings and other persons in the permanent service of a Government;¹² all persons who are employed in any capacity on board a ship, other than a ship of war, registered in a territory for which a Convention is in force and ordinarily engaged in maritime navigation;¹³ any person who is employed in any capacity on board a seagoing ship to which a Convention applies;¹⁴ or any person fulfilling the conditions for employment or engaged in any capacity on board a seagoing ship other than a government ship used for military or non-commercial purposes.¹⁵ In certain cases, in addition, a Convention itself does not define the meaning of the term “seafarer”, but merely indicates that for its purposes this term means persons defined as such by national law or practice or by collective agreement who are normally employed as crew members on board seagoing ships other than: (a) ships of war; (b) ships engaged in fishing or whaling or similar pursuits,¹⁶ or persons defined as such by national laws or regulations or collective agreements who are employed or engaged in any capacity on board a seagoing ship to

¹¹ Sometimes repatriation is treated as a social security issue. See, e.g., ILC, 77th Session, *General Survey of the reports on the Merchant Shipping (Minimum Standards) Convention (No. 147) and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155)*, 1976, Geneva, ILO, 1990. para. 130 p. 69.

¹² Article 2(b) of Convention No. 22; and Article 2(b) of Convention No. 23.

¹³ Article 1, para. 1, of Convention No. 134.

¹⁴ Article 1, para. 4, of Convention No. 164; Article 1, para. 4, of Convention No. 166.

¹⁵ Article 1, para. 1(d), of Convention No. 179.

¹⁶ Article 1, para. 2, of Convention No. 145.

which the Convention applies.¹⁷ It may also refer the matter of definition to the competent authority which, in consultation with the shipowners' and seafarers' organizations concerned, are to delimit the meaning which may be given in good faith to the term "seafarer" for the purpose of the Convention.¹⁸

There is a clear tendency for expansion of the definition of the term "seafarer" and, correspondingly, for the coverage of ILO maritime Conventions and Recommendations. Earlier instruments specifically excluded from the scope of this definition masters, pilots, cadets and pupils on training ships and duly indentured apprentices, naval ratings and other persons in the permanent service of governments.¹⁹ But more recent instruments include in this definition any person who is employed in any capacity on board a seagoing ship to which a Convention applies.²⁰

Similarly, the term "ship" (or "vessel"), includes, in certain Conventions, all ships and boats of any nature whatsoever engaged in maritime navigation, whether publicly or privately owned, excluding ships of war.²¹ In other cases, a Convention itself indicates that the term "vessel" includes any ship or boat of any nature whatsoever, whether publicly or privately owned, ordinarily engaged in maritime navigation, but excludes certain types of vessels from the scope of application.²² In most of the maritime Conventions, however, the Convention itself does not define the meaning of this term. It merely states that the Convention applies, with a certain number of exceptions, to all vessels registered in a territory for which the Convention is in force that are engaged in maritime navigation²³ and explicitly refers, in certain cases, to the national laws or regulations, or in the absence of such laws or regulations, to collective agreements between employers and workers to determine the vessels or classes of vessels which are to be regarded as seagoing vessels for the purposes of the Convention.²⁴ Thus, in some instruments, the absence of uniform definitions for the terms "seafarer" and "ship" makes an exact determination of the meaning of these terms for the purposes of each particular Convention or Recommendation exceedingly important.

¹⁷ Article 2(d) of Convention No. 180.

¹⁸ Interpretation of a decision concerning the Seafarers' Identity Documents Convention, 1958 (No. 108), at the request of the Ministry of Labour of the United Kingdom, ILO, *Official Bulletin*, Vol. XLVI, 1963, No. 3. pp. 466-467.

¹⁹ Article 2(b) of Convention No. 22; Article 2(b) of Convention No. 23.

²⁰ Article 18, para. 4, of Convention No. 164; Article 1, para. 4, of Convention No. 166.

²¹ Article 1 of Convention No. 7; Article 1 of Convention No. 16.

²² Articles 1, para. 2, and 2(a), of Convention No. 22; Articles 1, para. 2, and 2(a), of Convention No. 23.

²³ Article 1 of Convention No. 53.

²⁴ Article 1, para. 2, of Convention No. 69; Article 1, para. 2, of Convention No. 147.

I. General provisions

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Seafarers' Identity Documents Convention, 1958 (No. 108)	60	The Governing Body has invited member States to contemplate ratifying Convention No. 108.
Continuity of Employment (Seafarers) Convention, 1976 (No. 145)	17	The Governing Body has invited member States to contemplate ratifying Convention No. 145 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of the Convention.
Continuity of Employment (Seafarers) Recommendation, 1976 (No. 154)	–	The Governing Body has invited member States to give effect to Recommendation No. 154.
Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)	42	The Governing Body has invited member States to contemplate ratifying Convention No. 147 and the Protocol of 1996 to this Convention. It has also decided that the list of Conventions in its Appendix be re-examined in due course in the light of developments in the industry and the adoption of new instruments.
Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)	2	
Merchant Shipping (Improvement of Standards) Recommendation, 1976 (No. 155)	–	The Governing Body has invited member States to contemplate ratifying Recommendation No. 155. It has also decided that the list of instruments in its Appendix be re-examined in due course in the light of developments in the industry and the adoption of new instruments.
Requests for information (Instruments for which the Governing Body has confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments or on specific issues.)		
Employment of Seafarers (Technical Developments) Recommendation, 1970 (No. 139)	–	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendation No. 139.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
National Seamen's Codes Recommendation, 1920 (No. 9)	–	The Governing Body has decided upon the maintenance of the status quo with regard to Recommendations Nos. 9, 107 and 108.
Seafarers' Engagement (Foreign Vessels) Recommendation, 1958 (No. 107)	–	
Social Conditions and Safety (Seafarers) Recommendation, 1958 (No. 108)	–	
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged).		
Among the general provisions on seafarers, no instrument has been considered outdated by the Governing Body.		

Seafarers' Identity Documents Convention, 1958 (No. 108)

Content of the Convention

The Convention establishes international standards concerning the form and content of national identity cards for seafarers, and provides for their reciprocal recognition in order to alleviate the difficulties and inconveniences which may arise when seafarers take shore leave in foreign ports, travel in transit or are in the course of repatriation.²⁵

Scope of application

Convention No. 108 applies to every seafarer who is engaged in any capacity on board a vessel, other than a ship of war, registered in a territory for which the Convention is in force and ordinarily engaged in maritime navigation.²⁶

Issuance of identity documents

Each Member for which the Convention is in force shall issue to each of its nationals who is a seafarer on application by him a seafarer's identity document conforming with the provisions of Article 4 of the Convention. If it is impracticable to issue such a document to special classes of its seafarers, the Member may issue instead a passport indicating that the holder is a seafarer and such passport shall have the same effect as a seafarer's identity document for the purpose of the Convention. Furthermore, each Member for which the Convention is in force may issue a seafarer's identity document to any other seafarer either serving on board a vessel registered in its territory or registered at an employment office within its territory who applies for such a document. The seafarer's identity document shall remain in the seafarer's possession at all times.

Content of the identity document

The seafarer's identity document shall be designed in a simple manner, be made of durable material, and be so fashioned that any alterations are easily detectable. It shall contain the name and title of the issuing authority, the date and place of issue, and a statement that the document is a seafarer's identity document for the purpose of the Convention, and shall include the following particulars concerning the bearer:

- full name (first and last names where applicable);
- date and place of birth;
- nationality;
- physical characteristics;

²⁵ The Convention is also intended to eliminate the need for bilateral agreements such as those which have been adopted by some countries to overcome the difficulties described above. ILO: *Record of Proceedings*, ILC, 41st Session, 1959, Geneva, p. 246.

²⁶ At the 41st (Maritime) Session of the Conference, paragraphs 1 and 2 of Article 1 of the Convention were adopted unanimously on the understanding that the phrase "every seafarer who is engaged in any capacity on board a vessel" refers not only to crew members actually employed on board ship at any given time, but also to all persons who might be regarded as genuine seafarers within the definition laid down by the competent authority in accordance with the provisions of paragraph 2 of this Article. *Record of Proceedings*, 1959, op. cit., p. 246.

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- photograph; and
 - signature or, if the bearer is unable to sign, a thumbprint.

If a Member issues a seafarer's identity document to a foreign seafarer it shall not be necessary to include any statement as to his nationality, nor shall any such statement be conclusive proof of his nationality. Any limit to the period of validity of a seafarer's identity document shall be clearly indicated therein. Subject to the provisions of the preceding paragraphs, the precise form and content of the seafarer's identity document shall be decided by the Member issuing it, after consultation with the shipowners' and seafarers' organizations concerned. National laws or regulations may prescribe further particulars to be included in the seafarer's identity document.

Use of the identity document

Any seafarer who holds a valid seafarer's identity document issued by the competent authority of a territory for which the Convention is in force shall be readmitted to that territory. The seafarer shall be so readmitted during a period of at least one year after any date of expiry indicated in the said document.

Each Member shall permit the entry into a territory for which the Convention is in force of a seafarer holding a valid seafarer's identity document, when entry is requested for temporary shore leave while the ship is in port.

If the seafarer's identity document contains space for appropriate entries, each Member shall also permit the entry into a territory for which the Convention is in force of a seafarer holding a valid seafarer's identity document when entry is requested for the purpose of:

- joining his ship or transferring to another ship;
- passing in transit to join his ship in another country or for repatriation; or
- any other purpose approved by the authorities of the Member concerned.

Any Member may, before permitting entry into its territory for one of these purposes, require satisfactory evidence, including documentary evidence, from the seafarer, the owner or agent concerned, or from the appropriate consul, of a seafarer's intention and of his ability to carry out that intention. The Member may also limit the seafarer's stay to a period considered reasonable for the purpose in question.

Practical application of the instrument

Analysis of the comments made by the Committee of Experts shows that there have been four major problem areas relating to the application of the Convention. The first relates to the fact that, under the terms of the Convention, a Member has an obligation to issue a seafarer's identity document to each of its nationals who is a seafarer. In the second place, identity documents issued pursuant to this Convention are sufficient for seafarers wishing to take temporary shore leave in States parties to the Convention and need not therefore be accompanied by a passport. In addition, where an identity document has space for appropriate entries, it entitles the seafarer to enter a territory for transit passage to join a ship, subject to the right of the receiving State to require documentary proof concerning the seafarer's engagement. Thirdly, the identity document should contain an entry that it is a seafarers' identity document for the purpose of the Seafarers' Identity Documents Convention, 1958 (No. 108). Finally, the identity document shall remain in the seafarer's possession at all times.

Continuity of Employment (Seafarers) Convention (No. 145) and Recommendation (No. 154), 1976

Convention No. 145 and Recommendation No. 154 are intended to deal with a rise in unemployment among seafarers, causing a drift of qualified seafarers towards other occupations and preventing young people who wish to enter the merchant navy from doing so. It is therefore necessary to provide better guarantees of employment to seafarers and to improve and develop vocational training and social services for them.²⁷ Both the Convention and the Recommendation pursue the basic objective of ensuring that the national policies of the countries ratifying them should stimulate all sectors concerned and as far as possible ensure continuous or regular employment to able seamen and provide at the same time to shipowners a stable and competent labour force either through fair clauses in contracts or what has been known as the system of lists or registers.²⁸

Content of the Convention

Scope of application

Convention No. 145 applies to persons who are regularly available for work as seafarers and who depend on their work as such for their main annual income.

National policy to provide continuous or regular employment

Under the Convention, in each member State which has a maritime industry it shall be national policy to encourage all concerned to provide continuous or regular employment for qualified seafarers in so far as this is practicable and, in so doing, to provide shipowners with a stable and competent workforce. Every effort shall be made for seafarers to be assured minimum periods of employment, or either a minimum income or a monetary allowance, in a manner and to an extent depending on the economic and social situation of the country concerned.

Measures to achieve these objectives might include:

- contracts or agreements providing for continuous or regular employment with a shipping undertaking or an association of shipowners; or
- arrangements for the regularization of employment by means of the establishment and maintenance of registers or lists, by categories, of qualified seafarers.

Registers and lists of seafarers

Where the continuity of employment of seafarers is assured solely by the establishment and maintenance of registers or lists, these shall include all occupational categories of seafarers in a manner determined by national law or practice or by collective agreement. Seafarers on such a register or list shall have priority of engagement for seafaring. Seafarers on such a register or list shall be required to be available for work in a manner to be determined by national law or practice or by collective agreement. To the extent that national laws or regulations permit, the strength of registers or lists of seafarers

²⁷ ILO: *Record of Proceedings*, Report of the Committee on Continuity of Employment of Seafarers, ILC, 62nd (Maritime) Session, Geneva, 1977, p. 146.

²⁸ ILC, 62nd (Maritime) Session, *Record of Proceedings*, ILO, Geneva, 1977, p. 179.

shall be periodically reviewed so as to achieve levels adapted to the needs of the maritime industry. When a reduction in the strength of such a register or list becomes necessary, all appropriate measures shall be taken to prevent or minimize detrimental effects on seafarers, account being taken of the economic and social situation of the country concerned.

Practical application of the instrument

Analysis of the comments of the Committee of Experts shows three major issues relating to the application of this Convention. The first concerns the requirement of a national policy for the encouragement of continuous or regular employment for qualified seafarers, and assuring them a minimum income or monetary allowance. The second area of concern relates to the responsibility of governments, under Article 2, paragraphs 2 and 3, of the Convention, towards all seafarers, whether or not they are nationals of the country concerned, to take measures to encourage their continuous or regular employment. The third issue concerns the keeping of registers or lists of seafarers, by category, and the need to review their strength periodically so as to achieve levels adapted to the needs of the maritime industry.

Content of Recommendation No. 154

Scope of application

Recommendation No. 154 applies to persons who are regularly available for work as seafarers and who depend on their work as such for their main annual income. Appropriate provisions of the Recommendation should, as far as practicable and in accordance with national laws and practice and collective agreements, also be applied to persons who work as seafarers on a seasonal basis.

Provision of continuous or regular employment

Under the Recommendation, in so far as practicable, continuous or regular employment should be provided for all qualified seafarers. Except where continuous or regular employment with a particular shipowner exists, systems of allocation should be agreed upon which reduce to a minimum the necessity for attending calls for selection and allocation to a job and the time required for this purpose. In so far as practicable, these systems should preserve the right of a seafarer to select the vessel on which he is to be employed and the right of the shipowner to select the seafarer whom he is to engage.

Guarantees of employment where continuous or regular employment is not practicable

Where continuous or regular employment is not practicable, guarantees of employment and/or income should be provided in a manner and to an extent depending on the economic and social situation of the country concerned. These guarantees might include the following: (a) employment for an agreed number of weeks or months per year, or income in lieu thereof; (b) unemployment benefit when no work is available.

Registers or lists of qualified seafarers

Where the measures to obtain regular employment for seafarers provide for the establishment and maintenance of registers or lists of qualified seafarers, criteria should be laid down for determining the seafarers to be included in such registers or lists. Such criteria might include the following:

- residence in the country concerned;

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- age and medical fitness;
 - competence and skill;
 - previous service at sea.

In so far as practicable, any necessary reduction in the strength of such a register or list should be made gradually and without recourse to termination of employment. In this respect, experience with personnel planning techniques at the level of the enterprise and at industry level can be usefully applied to the maritime industry. In determining the extent of the reduction, regard should be had to such means as:

- natural wastage;
- cessation of recruitment;
- exclusion of men who do not derive their main means of livelihood from seafaring work;
- reducing the retirement age or facilitating voluntary early retirement by the grant of pensions, supplements to state pensions, or lump-sum payments.

Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)

The adoption of Convention No. 147 in 1976 was a milestone in the ILO's efforts to tackle the problem of substandard vessels, particularly those flying a flag of convenience. Despite the fact that at the present time there is no generally accepted definition of this term among scholars and practitioners, the terms "flag of convenience" and "open registry" are usually understood as meaning those countries that satisfy one or more of the following criteria, laid down by a British Committee of Inquiry in 1970 (the so called "Rochdale Criteria"):

- the country of registration allows ownership and/or control of its merchant vessels by non-citizens;
- access to the registry is easy. A ship may usually be registered at a consular office abroad and, equally importantly, transfer from the register at the owner's initiative is not restricted;
- taxes on the income from the ships are not levied locally or are low. A registration fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given;
- the country of registration is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments;
- manning of ships by non-nationals is freely permitted; and

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- the country of registration has neither the power nor the administrative machinery to impose effectively any government or international regulations; nor has the country the wish or the power to control the companies themselves.²⁹

The objective of reducing crew costs under conditions of tough competition in the international shipping transportation market is traditionally considered as one of the principal motives for the registration of vessels in “open registries”.³⁰ Correspondingly, one of the stereotypes associated with such countries is the low level of seafarers' wages, as well as low labour and social security standards. In combination with the statistics of maritime casualties, in which ships registered in these countries traditionally occupy leading positions, and in light of the campaign against the “flags of convenience” conducted by the International Transport Workers' Federation (ITF),³¹ both these countries and the shipowners registering their ships in such countries have acquired a certain negative image in public opinion.

The phenomenon to which the expression “flags of convenience” came to be applied was first examined by the ILO in 1933 in connection with representations made by the ITF, acting at the request of the International Mercantile Marine Officers' Association: “in recent years, the shipowners have been making to an increasing extent [attempts] to transfer ships registries to the flag of a country where conditions of employment are on a lower level than in their own country”.³² In 1949 and 1950, an inquiry was conducted into the conditions on ships registered in Panama.³³ In 1958, two Recommendations, namely the Seafarers' Engagement (Foreign Vessels) Recommendation, 1958 (No. 107), and the Social Conditions and Safety (Seafarers) Recommendation, 1958 (No. 108), were adopted. They address, respectively, the engagement of seafarers for service in vessels registered in a foreign country³⁴ and flag transfer in relation to social conditions and safety.³⁵

Recommendation No. 107 calls upon each ILO Member to 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

²⁹ *Committee of Inquiry into Shipping*, HMSO, 1970, paras. 183-184 p. 51, (the so called “Rochdale Report”). Panama, Liberia, Cyprus, Bahamas and Malta have traditionally been considered as the most important countries of “Open Registry”. See, e.g., B. Farthing and M. Brownrigg, *Farthing on international shipping*, 3rd ed., LLP, London, 1997, pp. 188-189.

³⁰ See, e.g., G. C. Kasoulides, *Port state control and jurisdiction: Evolution of the port state regime*, Martinus Nijhoff Publishers, 1993, pp. 76-77.

³¹ See, e.g., International Transport Workers' Federation, *Flags of convenience: The ITF's campaign*, ITF, London, 1993; H.R. Northrup and R.L. Rowan, *The International Transport Workers' Federation and flag of convenience shipping*, University of Pennsylvania, 1983.

³² E. Argiroffo, ‘Flags of convenience and substandard vessels: A review of the ILO's approach to the problem’, in *International Labour Review*, 1974, No. 110, p. 439.

³³ ILO: *Conditions in ships flying the Panama flag*. Report of the Committee of Inquiry of the International Labour Organization, Studies and Reports, new series, No. 22, Geneva, 1950.

³⁴ ILO: *Record of Proceedings*, Report of the Committee on the Engagement of Seafarers, ILC, 41st Session, Geneva, 1959, pp. 234-236.

³⁵ ILO: *Record of Proceedings*, Report of the Committee on Flag Transfer, ILC, 41st Session, Geneva, 1959, pp. 237-239.

social standards accepted by bona fide organizations of shipowners and seafarers of maritime countries where such agreements and standards are traditionally observed.

Recommendation No. 108 specifically refers in its Preamble to the problem of flags of convenience, considering that the problems concerning social conditions and safety of seafarers have been brought into special prominence by the large volume of tonnage registered in countries not hitherto regarded as being traditionally maritime. It calls upon the countries of registration of ships to accept the full obligations implied by registration and to exercise effective jurisdiction and control for the purpose of the safety and welfare of seafarers in its seagoing merchant ships and, in particular, to make and adopt regulations designed to ensure that all ships on its register observe internationally accepted safety standards; to make arrangements for a proper ship inspection service adequate to the requirements of the tonnage on its register and to ensure that all ships on that register are regularly inspected to ensure conformity with such regulations; to establish both in its territory and abroad the requisite government controlled agencies to supervise the signing on and signing off of seafarers; to ensure or satisfy itself that the conditions under which those seafarers serve are in accordance with the standards generally accepted by the traditional maritime countries; to ensure freedom of association for the seafarers serving on board its ships by regulations or legislation, if not already otherwise provided for; to guarantee, either by regulations or legislation, that proper repatriation for the seafarers serving on board its ships is provided in accordance with the practice followed in traditional maritime countries; and to ensure that proper and satisfactory arrangements are made for the examination of candidates' competency and for the issuing of competency certificates.

Recommendations Nos. 107 and 108 are targeted mainly at vessels flying flags of convenience, but Convention No. 147, adopted in 1976, establishes the minimum internationally acceptable labour and social standards for merchant vessels *regardless of their place of registration*. It therefore includes, but is not limited to, vessels flying flags of convenience.

Content of Convention No. 147

Scope of application

Except as otherwise provided in Article 1, the Convention applies to every seagoing ship, whether publicly or privately owned, which is engaged in the transport of cargo or passengers for the purpose of trade or is employed for any other commercial purpose. National laws or regulations shall determine when ships are to be regarded as seagoing ships for the purpose of the Convention. The Convention applies to seagoing-tugs, but does not apply to ships primarily propelled by sail, whether or not they are fitted with auxiliary engines; ships engaged in fishing or in whaling or in similar pursuits; or small vessels and vessels such as oil rigs and drilling platforms when not engaged in navigation. The decision as to which vessels are covered by this latter category is to be taken by the competent authority in each country in consultation with the most representative organizations of shipowners and seafarers.

Duties of the ratifying Members in respect of laying down standards

Each Member of the ILO which ratifies Convention No. 147 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; (ii) appropriate social security measures; 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 the Convention, in so far as the Member is not otherwise bound to give effect to the Conventions in question.

The Appendix to Convention No. 147 lists the following ILO Conventions: the Minimum Age Convention, 1973 (No. 138), or the Minimum Age (Sea) Convention (Revised), 1936 (No. 58), or the Minimum Age (Sea) Convention, 1920 (No. 7); the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), or the Sickness Insurance (Sea) Convention, 1936 (No. 56), or the Medical Care and Sickness Benefits Convention, 1969 (No. 130); the Medical Examination (Seafarers) Convention, 1946 (No. 73); the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134) (Articles 4 and 7); the Accommodation of Crews Convention (Revised), 1949 (No. 92); the Food and Catering (Ships' Crews) Convention, 1946 (No. 68) (Article 5); the Officers' Competency Certificates Convention, 1936 (No. 53) (Articles 3 and 4); the Seamen's Articles of Agreement Convention, 1926 (No. 22); the Repatriation of Seamen Convention, 1926 (No. 23); the Freedom of Association and Protection of the Right to organize Convention, 1948 (No. 87); and the Right to organize and Collective Bargaining Convention, 1949 (No. 98). Convention No. 147 itself explicitly states that nothing in the Convention shall be deemed to extend the scope of the Conventions referred to in the Appendix to the Convention or the provisions contained therein.

“In so far as not otherwise bound”

The formula “in so far as the Member is not otherwise bound” means that when the Member has ratified both Convention No. 147 and other ILO Convention(s) listed in the Appendix to Convention No. 147, it has the duty to ensure strict compliance with the Convention listed in the Appendix. On the contrary, where the Member has ratified Convention No. 147, but has not ratified a specific ILO Convention(s) listed in the Appendix, it does not have a duty to ensure strict compliance with such Convention(s), but instead has the duty to apply it on the basis of the principle of “substantial equivalence”.

The question of the meaning of the term “substantial equivalence” was examined in 1990 by the Committee of Experts in a General Survey on labour standards on merchant ships.³⁶ The Committee of Experts has pointed out that, where there is not full conformity with the Convention's Appendix, the test that the Committee will apply will involve first determining what the general goal or goals of a Convention is or are, i.e. its object or objects and purpose or purposes. These may take the form of one main goal and several subordinate goals. The test for substantial equivalence will then be: first, whether the State has demonstrated its respect for or acceptance of the main general goals of the Convention and enacted laws or regulations which are conducive to their realization; and if so, second,

³⁶ ILC, 77th Session, *General Survey of the Reports on the Merchant Shipping (Minimum Standards) Convention (No. 147), and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155)*, 1976, Geneva, ILO, 1990. The Committee of Experts on the Application of Conventions and Recommendations is the main supervisory body of the International Labour Organization. It is composed of 20 experts of recognized competence, completely independent of government and appointed in their personal capacity. The Committee meets once a year in November-December in Geneva. See, N. Valticos, G. von Potobsky, 1995, op. cit., pp. 284-286.

whether the effect of such laws or regulations is to ensure that in all material respects the subordinate goals of the Convention are achieved.³⁷

What is “substantially equivalent” for each of the appended Conventions

In its 1990 General Survey on Convention No. 147 the Committee of Experts indicated what is required for the substantial equivalence for each of the appended Conventions.

With regard to *Conventions Nos. 7, 58 and 138*, the substantially equivalent requirement in Article 2(a) may be met where standards to ensure the safety of life on board ship include a minimum age of 14 applied by legislation, except to vessels where only members of the same family are employed or on authorized school or training ships; and where laws and regulations provide also for some form of registers in order to facilitate enforcement.³⁸

With regard to *Conventions Nos. 55, 56 and 130*, the determination as to whether there is substantial equivalence to one of the three Conventions must, according to the Committee of Experts, refer to the following points: under Convention No. 55 shipowners must, subject to certain limitations, be made liable for sickness and injury occurring while on articles (Article 2); medical care and maintenance should be defrayed for up to at least 16 weeks. Although the liability of shipowners ceases where there is a compulsory insurance scheme (perhaps of the kind anticipated in Convention No. 56), it may not so cease in respect of foreign workers or those not resident in the territory who are excluded as such from the scheme (Article 4); wages while on board should be paid, in addition to whole or partial wages from the time landed, subject to the same conditions as in Article 4 (Article 5); there is liability for repatriation (Article 6) and burial expenses (Article 7); there is provision for equality of treatment irrespective of nationality, domicile or race (Article 11). Under Convention No. 56, there should be a compulsory sickness insurance scheme (Article 1), with (subject to the usual limitations) cash benefits for the seafarer or his family at the national going rate for at least 26 weeks (Articles 2 and 4); medical benefit (Article 3); maternity benefits (Article 5); and death or survivors' benefits (Article 6); benefits should cover the normal interval between engagements (Article 7); the shipowner and seafarers should share the expenses of the scheme (Article 8). Convention No. 130, which includes flexibility provisions in favour of countries whose economic and medical facilities are insufficiently developed, lays down amongst other practical matters, details of the kind of medical care to be secured (Articles 13 and 14). For sickness benefit, it prescribes detailed methods for the calculation of earnings-related payments (Articles 21

³⁷ General Survey, 1990, op. cit., p. 44. In a 1983 Memorandum by the International Labour Office in response to a request of the Government of the United States, it was indicated that Article 2(a) of the Convention requires a ratifying State to satisfy itself that the general goals laid down in the instruments included in the Appendix to Convention No. 147 are respected. On the other hand, national laws and regulations can be different in detail and, as the Government has correctly assumed [in its second question], it is not required that the ratifying State adhere to the precise terms of these instruments as long as their general goals are respected, except of course in so far as it has also ratified the Conventions concerned. ILO, *Official Bulletin*, Vol. LXVI, 1983, Series A, No. 3. pp. 144-145.

³⁸ General Survey, 1990, op. cit., para. 111, p. 61.

to 24). It also stipulates safeguards in respect of qualifying periods (Articles 15 and 25) and cost sharing (Article 17).³⁹

The requirement of substantial equivalence in Article 2(a) of Convention No. 147 may be met in respect of *Convention No. 73* where there are laws or regulations providing for compulsory regular medical examinations for seafarers, preferably every two years (six years in respect of colour vision) (but certainly more frequently than every five years).⁴⁰ The certificate issued should attest to fitness in respect of hearing and sight and, where necessary in the deck department, colour vision, and should attest that no disease (including but not limited to pulmonary tuberculosis) incompatible with service at sea or likely to endanger the health of others is suffered; there should preferably be arrangements for re-examination in case of a refusal of a certificate.⁴¹

The essential features of Article 2(a) of Convention No. 147 in relation to *Articles 4 and 7 of Convention No. 134* are that there exist laws or regulations on the nine general and specific subjects listed in Article 4, paragraph 3, and that one or more crew members are appointed responsible for accident prevention under Article 7.⁴²

The substantive safety standards in *Convention No. 92* seem to include those requiring that the location, means of access, structure and arrangement in relation to other spaces of crew accommodation shall be such as to ensure adequate security, protection against weather and sea, and insulation from heat or cold, undue noise or effluvia from other spaces, having regard also to fire prevention needs (Article 6, paragraphs 1 and 8), adequate ventilation of sleeping and mess-rooms (Article 7, paragraph 1); an adequate system of heating, avoiding the risk of fire or other danger (Article 8, paragraphs 1 and 6); adequate lighting (Article 9, paragraph 2); the normal situation of sleeping rooms amidships or aft, above the load line (Article 10, paragraph 1); sufficient sanitary accommodation, ventilated and with adequate disposal pipes (Article 13, paragraphs 1, 8 and 10); the provisions of an approved medicine chest and, where a crew of 15 or more is carried, separate hospital accommodation (Article 14, paragraphs 1 and 7). Furthermore, in order to ensure the safety of life on board ship, additional requirements should also be included. The measures laid down in Convention No. 92 to ensure the implementation of these standards are of the kind also laid down in Convention No. 147, especially the enactment of legislation on substantive questions and the consultation of shipowners and seafarers in the framing and administration of these measures (Article 3, paragraph 2(e)); and the inspection of crew accommodation by the competent authority on registration or re-registration of the ship or when a complaint is received (Article 5), and by the responsible officer and crew members at least once a week (Article 17). In addition, Convention No. 92 provides for the approval of plans in advance (Article 4). There are also transitional provisions for application to existing ships (Article 18) and, to provide further flexibility, Article 1, paragraph 5 allows variations to be made in respect of the substantive provisions if the competent authority is satisfied, after consultation of shipowners and seafarers, that the variations provide corresponding advantages as a result of which the

³⁹ *ibid.*, para. 134, p. 71.

⁴⁰ The period of validity of five years envisaged in national legislation for the medical certificate would not be substantially equivalent to the relevant requirement under Article 5 of Convention No. 73, which prescribes a period of validity not exceeding two years. The discrepancy between five years and two years is too wide for the regulations to be considered substantially equivalent for the purpose of Convention No. 147, this being a material point. *ibid.*, para. 115, p. 63.

⁴¹ *ibid.*, para. 118, p. 64.

⁴² *ibid.*, para. 107, p. 59.

overall conditions are not less favourable than those which would result from the full application of the provisions of the Convention.⁴³

The Committee of Experts has also pointed out that, given that all matters of safety of life on board ship are material ones, any view of what is *substantially equivalent* to the provisions of Convention No. 92 in respect of safety must bear in mind the object and purpose of both Convention No. 147 and Convention No. 92 in relation to safety. National regulations on crew accommodation should be such as to ensure the safety of life on board ship in respect of the points referred to above.⁴⁴

According to the Committee of Experts, the substantive safety standards in *Article 5 of Convention No. 68* seem to be those requiring food and water supplies which are suitable in quantity, nutritive value and quality to secure the health of the crew. The requirement of substantial equivalence to Article 5 may be met simply where food and water are safe for consumption without risk to health. It has considered substantial equivalence to have been shown where there is legislation even if in only the general terms of Article 5.⁴⁵

Substantial equivalence for the purposes of *Articles 3 and 4 of Convention No. 53* involves essentially a licensing system which is compulsory (Article 3 of Convention No. 53) and in which both experience, leading to demonstrable ability on board ship, and the examination of qualifications are required (Article 4, paragraph 1(b) and (c)).⁴⁶

The provisions of Convention No. 22 do not actually contain standards for shipboard conditions of employment and living arrangements, but they do lay down the manner in which some such provisions are to be specified.⁴⁷ For the purposes of Article 2(a) of Convention No. 147, at least a large dose of law or regulations on matters covered by Convention No. 22 is necessary, although some minor points might be established by the alternative methods. The essential features of Convention No. 22 on which substantial equivalence has to be established include the provision of a document containing all the main particulars listed in Article 6, paragraph 3. Adequate protection of the seafarer against termination (Articles 10 to 14) is also essential.⁴⁸

According to the Committee of Experts, the question of whether there is substantial equivalence to Convention No. 23 would seem to turn on the following points: under Convention No. 23 (Article 3), a seafarer (except a master, pilot, cadet or pupil) landed during or on the expiration of his engagement is entitled to be taken back to his own country, or to the port of engagement or where the voyage commenced; the provision of suitable employment on a vessel going to such a destination counts as repatriation; such

⁴³ *ibid.*, para. 120, pp. 65-66.

⁴⁴ *ibid.*, para. 124, p. 67.

⁴⁵ *ibid.*, paras. 125-127, p. 68.

⁴⁶ *ibid.*, para. 86, p. 49. At the same time, the footnote to Convention No. 147 states, that in cases where the established licencing system or certification structure of a State would be prejudiced by problems arising from strict adherence to the relevant standards of Convention No. 53, the principle of substantial equivalence shall be applied so that there will be no conflict with that State's established arrangements for certification.

⁴⁷ *ibid.*, para. 182, p. 93.

⁴⁸ *ibid.*, para. 186, p. 95.

provision should apply to any seafarer engaged in a port in his own country, but otherwise national provisions may decide under what conditions a foreign seafarer has the repatriation right (Article 3, paragraph 4). The expenses may not be charged to a seafarer in cases of injury sustained in the service of the vessel, shipwreck or no-fault illness or discharge (Article 4). Relevant maintenance, accommodation and food expenses should be paid in addition to transport; if the seafarer is repatriated as part of a crew he should be remunerated (Article 5). In addition, the public authority in the vessel's country of registration should take responsibility for supervising repatriation, including that of foreigners and, where necessary, provide the seafarers with expenses in advance (Article 6).⁴⁹

In respect of *Convention No. 87*, the Committee of Experts indicated that the essence of the Convention is freedom vis-à-vis the public authorities for workers and employers to exercise the right to organize. This freedom is predicated on four basic guarantees: first, that all workers and employers have the right to establish and join organizations of their own choosing without previous authorization (Article 2 of Convention No. 87); second, that those organizations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes (Article 3 of Convention No. 87); third, that the organizations are not liable to be dissolved or suspended by administrative authority (Article 4 of Convention No. 87); and, fourth, that the organizations have the right to establish and join federations and confederations and affiliate with international organizations of workers and employers (Article 5 of Convention No. 87), such federations and confederations having the same rights as their constituent organizations (Article 6 of Convention No. 87). For the purposes of Convention No. 147, substantial equivalence to Convention No. 87 involves at the minimum the observance and implementation in full of these four guarantees in respect of seafarers on ships registered in the national territory.⁵⁰ Convention No. 98 in essence provides, first, that workers should be protected in their employment against acts of anti-union discrimination (Article 1 of Convention No. 98); and, second, that workers' and employers' organizations should be protected against mutual acts of interference (Article 2 of Convention No. 98). Equally, it requires measures to promote voluntary collective bargaining (Article 4). For the purposes of Convention No. 147, substantial equivalence to Convention No. 98 involves at least the full guarantee of those two forms of protection and the full implementation of such measures in respect of seafarers on ships registered in the national territory.⁵¹

Engagement of seafarers

Each Member which ratifies the Convention shall ensure that:

- adequate procedures – subject to overall supervision by the competent authority, after tripartite consultation amongst that authority and the representative organizations of shipowners and seafarers where appropriate – exist for the engagement of seafarers on ships registered in its territory and for the investigation of complaints arising in that connection;
- adequate procedures – subject to overall supervision by the competent authority, after tripartite consultation amongst that authority and the representative organizations of

⁴⁹ *ibid.*, para. 141, p. 76.

⁵⁰ *ibid.*, para. 188, p. 96.

⁵¹ *ibid.*, para. 189, p. 97.

shipowners and seafarers where appropriate – exist for the investigation of any complaint made in connection with and, if possible, at the time of the engagement in its territory of seafarers of its own nationality on ships registered in a foreign country.

Furthermore, each Member which has ratified the Convention shall, in so far as practicable, advise its nationals on the possible problems of signing on a ship registered in a State which has not ratified the Convention, until it is satisfied that standards equivalent to those fixed by the Convention are being applied.

Flag state control and port state control

Convention No. 147 provides for two forms of enforcement – the control by the Member in respect of the ships registered in its territory (so-called “flag state control”), and control by the Member in respect of the ships registered in a foreign State and calling into its ports (so-called “port state control”). As concerns “flag state control”, under Article 2(f) of Convention No. 147, each Member which ratifies the Convention has the duty to verify by inspection or other appropriate means that ships registered in its territory comply with applicable international labour Conventions in force which it has ratified, with the laws and regulations required by Article 2(a) of Convention No. 147 and, as may be appropriate under national law, with applicable collective agreements.

As distinct from “flag state control”, under Convention No. 147 the exercise of “port state control” is not the duty, but the right of the respective Member. Under Article 4, paragraph 1, of Convention No. 147, if a Member which has ratified the Convention and in whose port a ship calls in the normal course of its business or for operational reasons receives a complaint or obtains evidence that the ship does not conform to the standards of the Convention, it *may* prepare a report addressed to the government of the country in which the ship is registered, with a copy to the Director-General of the International Labour Office, and *may* take measures necessary to rectify any conditions on board which are clearly hazardous to safety or health (emphasis added). In taking such measures, the Member shall forthwith notify the nearest maritime, consular or diplomatic representative of the flag State and shall, if possible, have such representative present; it shall not unreasonably detain or delay the ship.

Content of Recommendation No. 155

Recommendation No. 155 calls upon each ILO Member to ensure that the provisions of the laws and regulations provided for in Article 2(a) of Convention No. 147, and to satisfy themselves that such provisions of collective agreements as deal with shipboard conditions of employment and shipboard living arrangements, are at least equivalent to the Conventions or Articles of Conventions referred to in the Appendix to Convention No. 147. In addition, steps should be taken, by stages if necessary, with a view to such laws or regulations, or as appropriate collective agreements, containing provisions at least equivalent to the provisions of the instruments referred to in the appendix to the Recommendation, i.e., the Officers’ Competency Certificates Convention, 1936 (No. 53); the Food and Catering (Ships’ Crews) Convention, 1946 (No. 68); the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133); the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134); the Workers’ Representatives Convention, 1971 (No. 135); the Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91), or the Seafarers’ Annual Leave with Pay Convention, 1976 (No. 146); the Social Security (Seafarers) Convention, 1946 (No. 70); the Vocational Training (Seafarers) Recommendation, 1970 (No. 137); and the IMCO/ILO Document for Guidance, 1975.

Content of the Protocol of 1996

Each Member which ratifies the Protocol shall extend the list of Conventions appearing in the Appendix to Convention No. 147 to include the Conventions in Part A of the Supplementary Appendix, as well as such Conventions listed in Part B of that Appendix as it accepts, if any. Part A of the supplementary appendix lists the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133), and the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180); and Part B lists the Seafarers' Identity Documents Convention, 1958 (No. 108), the Workers' Representatives Convention, 1971 (No. 135), the Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164), and the Repatriation of Seafarers Convention (Revised), 1987 (No. 166).

Summary of principles of the Committee of Experts

Taking into consideration the opinions expressed by the Committee of Experts in its 1990 General Survey,⁵² the norms and principles concerning minimum standards on merchant ships resulting from Convention No. 147 and Recommendation No. 155 may be summarized as follows:

Aims and goals of the instruments

- Convention No. 147 and Recommendation No. 155 are universal instruments aimed at all “substandard ships” regardless of the place of their registration; their goal is the raising of standards in respect of ships of all countries, including traditional maritime States.
- Convention No. 147 embodies minimum standards on a wide range of maritime labour questions and enables member States to accept obligations in respect of these questions, even if they are not able to implement the instruments listed in the Appendix in every detail.
- Since the social and labour standards laid down in Convention No. 147 could not be dissociated from the basic safety standards contained in IMO instruments, member States of the ILO have to satisfy the requirements laid down in Article 5(1) of Convention No. 147 in relation to certain IMO instruments in order to ratify this ILO instrument.
- While the modes of implementation of ILO maritime labour standards may be different in different countries, application of the notion of “substantial equivalence” must be aimed at ensuring that the minimum standards advocated by Convention No. 147 are achieved.
- The Convention, like other international labour Conventions, establishes minimum standards and does not prevent States from going beyond such minimum standards by ensuring more favourable conditions to the workers concerned.
- The decision as to which “small vessels, and vessels such as oil rigs and drilling platforms when not engaged in navigation” are to be covered by the Convention is to be taken by the competent authority in each country in consultation with the most representative organizations of shipowners and seafarers.

⁵² *Labour standards merchant ships*, 1990, op. cit.

Scope of the instruments

- While it is for national laws or regulations to determine when ships are to be regarded as seagoing ships for the purposes of the Convention, and, correspondingly, the scope of its application, such determination is always subject to a good faith requirement.
- The Convention covers those vessels in the fishing industry which are not “ships engaged in fishing” (for example, mother ships, fish carriers, hospital ships, protection vessels, survey vessels, research vessels and training vessels.). It is the activity in which ships are engaged rather than their type which governs their exclusion from or inclusion in the Convention.

The laying down of standards by member States

- While shipboard conditions of employment and shipboard living arrangements shall be laid down by laws or regulations only 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, the safety standards and appropriate social security measures (in relation to sickness, injury and medical care) shall be prescribed by laws or regulations.
- The reference in Article 2(a)(i) to standards of hours of work which are to be prescribed by laws or regulations should be taken into consideration only in so far as it is connected with safety standards; it is not intended to refer to compensatory time off, overtime or other such matters, and such standards could also be prescribed by collective agreements or laid down by competent courts.
- While the social security measures in relation to sickness, injury and medical care should be prescribed by laws or regulations, measures relating to repatriation could be prescribed by collective agreements or laid down by competent courts.
- The subject matter of standards required under Article 2(a) of the Convention is not limited to the standards prescribed by the Conventions listed in the Appendix, because there are certain issues (such as hours of work and manning) not explicitly covered by those instruments.

Engagement of seafarers

- Adequate procedures for the engagement of seafarers on ships registered in the territory of the Member and for the investigation of complaints arising in that connection, as well as in connection with the engagement in its territory of seafarers of its own nationality on ships registered in a foreign country, shall be established after tripartite consultations amongst the competent authority and the representative organizations of shipowners and seafarers regarding these matters.
- The supervisory role in engagement procedures attributed by the Convention to a competent authority must, in order to ensure the seafarer's protection, be discharged by a disinterested party.

Jurisdiction and control

- The Committee of Experts attaches significant importance to verification, by inspection and other appropriate methods, that ships conform to the prescribed standards.
- Under the terms of the Convention, a State's acceptance of “jurisdiction” must be manifested first by the competent judicial authorities taking jurisdiction over ships

registered in the territory, whether or not those ships themselves are present in the territory, and secondly, by the competent administrative authorities exercising their control by whatever means are appropriate, but especially by inspection.

- The wide range of standards on board ship and the possibility of applying some of them by methods other than legislation, as envisaged by Article 2(a) of the Convention, is reflected in Article 2(f) in the requirement for verification by inspection or by “other appropriate means” and in the acceptance by Article 2(c) and (f) of the two possible means of control where the standards are fixed by collective agreements.
- The final report of inquiry into serious marine casualties should normally be made public; where the publication of the final report is not provided for, this requirement seems to be satisfied where the final report is made available to interested parties and the conclusions are announced publicly.
- Port state action under Article 4 is optional rather than mandatory and, in so far as the ships of any State may, regardless of Convention No. 147, as a matter of international law, legitimately be subjected to control in a foreign port, Article 4 ought not to constitute an obstacle to ratification.

Practical application of the norms and principles

An analysis of the comments made by the Committee of Experts shows that seven major issues have been raised with regard to the application of the Convention. The first relates to Article 2(a) of the Convention, which states that each Member has an obligation to have laws or regulations laying down safety standards; this obligation is incumbent on the State and cannot be delegated to individuals, including professionals, to be dealt with according to their assessment of what is safe on an ad hoc basis under non-emergency conditions. The Convention requires that the State assume the primary responsibility in this regard, and the Committee considers that the use of subjective and imprecise safety criteria, such as *reasonable practicability* and normally available rest periods in order to achieve operational flexibility cannot be considered as meaningful safety standards, nor as fulfilling the State’s responsibility under Article 2 of the Convention. Secondly, the safety requirement set out in Article 2(a)(i) of the Convention calls for legislation in respect of hours of work relating not only to watchkeepers, but also to other persons on board the vessel. Thirdly, to the extent that the regulation of hours of work is a matter of safety of life on board ship, under the terms of Article 2(a)(i) it must be the subject of legislation. This matter cannot be covered exclusively by the collective agreements. Fourthly, under Article 2(a)(ii) of Convention No. 147, the appropriate social security measures in relation to sickness, injury and medical care have to be prescribed by laws or regulations, and cannot be established exclusively by the respective collective agreements. Fifthly, the absence of a national merchant fleet does not relieve a ratifying State from the duty to give effect to Convention No. 147, especially because a number of its provisions (notably, Articles 2(d)(ii), 3 and 4) relate to employment on foreign-registered ships. In sixth place, national laws or regulations shall contain specific provisions clearly establishing which inspection service (labour inspection, safety of navigation inspection, etc.) has the competence under paragraph 2(f) in respect of national ships. In addition, the mere existence of such provisions would not by itself satisfy the requirement of Article 2(f) of the Convention, unless the respective inspection services are sufficiently staffed, equipped and funded so that they can efficiently perform their statutory duties and inspections can be conducted regularly. Lastly, national laws and regulations do not always contain specific provisions laying down the powers of the competent authority to inspect foreign ships calling into the ports of the country from the point of view of their conformity with the standards of the Convention.

It should be added that, in its 1990 General Survey, the Committee of Experts expressed a modest degree of satisfaction at the level of acceptance of the Convention and the substantial level of the global merchant fleet covered by ratifying States, which have further increased in numbers over the past decade. In particular, it noted that action by port States in relation to the labour standards on board foreign-registered ships in accordance with the Article 4 of the Convention can now be regarded as an established and important feature of the international campaign against substandard vessels.

Employment of Seafarers (Technical Developments) ***Recommendation, 1970 (No. 139)***

Recommendation No. 139 was adopted in order to deal with employment problems arising out of rapid changes in the operation of merchant ships, both as regards technical and organizational methods and economic aspects, in order to safeguard and improve the conditions of seafarers, provide sufficient and suitable manpower for the maritime industry, and generally secure for all concerned the greater benefits from technical progress.

Manpower planning

Each Member which has a maritime industry should ensure the establishment of national manpower plans for that industry within the framework of its national employment policy. In preparing such manpower plans account should be taken of:

- the conclusion drawn from periodic studies of the size of the maritime labour force, the nature and extent of employment, the distribution of the labour force by such characteristics as age and occupational group and probable future trends in these fields;
- studies of trends in the evolution of new techniques in the maritime industry both at home and abroad, in relation, among other things, to structural changes in the industry in the form of:
 - (a) changed methods of operation of ships, technically and organizationally; and
 - (b) modifications in manning scales and job contents on different types of ships;
- forecasts, in the light of the foregoing studies, of the probable requirements, at different dates in the future, for various categories and grades of seafarers.

Recruitment and placement

Recruitment of seafarers into the maritime industry should take account of existing manpower plans and of the forecasts contained therein. Mobility within the maritime labour force should be facilitated by the operation of an effective employment service. Where the placement of seafarers is the concern of specialized employment offices, and where these offices are responsible for finding jobs ashore, placement in such jobs should be facilitated by close collaboration between those offices and the general public employment service. Having regard to natural wastage, positive steps should be taken by those responsible to avert or minimize as far as practicable the effects of any material reductions in the number of seafarers employed, by such measures as providing employment opportunities on as wide a range of ships as is reasonable and practicable, and by retraining where appropriate.

Training and retraining

Where technical changes require study of the need to train seafarers and to help them to adapt to these changes, account should be taken of the Vocational Training (Seafarers) Recommendation, 1970 (No. 137). Where changes in functions and required skills arising from technical developments are likely to affect seafarers, basic training of those concerned, including certificated personnel, should be reviewed to take account of these changes and to ensure that seafarers are adequately trained for the functions they will be required to carry out. Where the nature of technical developments so requires, consideration should be given to the possibility of retraining seafarers to enable them to take full advantage of the opportunities offered by these developments. There should be consultation with shipowners' and seafarers' organizations, and between them, where technical developments are likely to lead to changes in manning scales or in certification requirements or to significant changes in the duties and functions of various categories of seafarers.

Regularity of employment and income

Consideration should be given to schemes providing regularity of employment and income for seafarers and suitable personnel to man ships. Such schemes might provide, for instance, for contracts of employment with a company or with the industry for seafarers with appropriate qualifications. Consideration should also be given to arranging for seafarers, as part of the national social security system or otherwise, some form of benefits during periods of unemployment.

Efforts should be made to meet the needs of seafarers, particularly older persons, who have special difficulty in adjusting to technical change. Amongst possible measures, consideration should be given to:

- (a) retraining for other industries through government and other schemes that are available; and
- (b) the provision of adequate benefits, within the framework of social security systems or other schemes, for those who are required to leave the maritime industry at an earlier age than is generally the case.

International cooperation

To avoid hardship to such seafarers employed in foreign ships as are likely to be affected by technical changes aboard ship, the governments and shipowners' and seafarers' organizations concerned should undertake early consultation and should co-operate with a view to:

- (a) adjusting the supply of these seafarers gradually to the changing requirements of the foreign countries on whose ships they are employed; and
- (b) minimizing the effects of redundancy by the joint application of relevant provisions of this Recommendation.

National Seamen's Codes ***Recommendation, 1920 (No. 9)***

In order that the seamen of the world, whether engaged on ships of their own or foreign countries, may have a better comprehension of their rights and obligations, and in order that the task of establishing an International Seamen's Code may be advanced and facilitated, Recommendation No. 9 calls upon each ILO Member to undertake the embodiment in a seamen's code of all its laws and regulations relating to seamen and their activities as such.

II. Access to employment

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Recruitment and Placement of Seafarers Convention, 1996 (No. 179)	6	This Convention was adopted after 1985 and is considered up to date.
Recruitment and Placement of Seafarers Recommendation, 1996 (No. 186)	–	This Recommendation was adopted after 1985 and is considered up to date.
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)	81	The Governing Body has decided that Conventions Nos. 16 and 73 will be included among the proposals for the agenda of the International Labour Conference with a view to their joint revision.
Medical Examination (Seafarers) Convention, 1946 (No. 73)	43	
Certification of Ships' Cooks Convention, 1946 (No. 69)	36	The Governing Body has decided upon the revision of Convention No. 69 in conjunction with that of the Food and Catering (Ships' Crews) Convention, 1946 (No. 68), and the inclusion of this question among the proposals for the agenda of the International Labour Conference. It has also decided that the corresponding instruments of the International Maritime Organization (IMO) will be taken into account in the context of a revision of Conventions Nos. 68 and 69.
Certification of Able Seamen Convention, 1946 (No. 74)	27	The Governing Body has decided upon the revision of Convention No. 74 and the inclusion of this question among the proposals for the agenda of the International Labour Conference. It has also decided that the corresponding instruments of the IMO will be taken into account in the context of a revision of Convention No. 74.
Requests for information (Instruments for which the Governing Body has confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments or on specific issues.)		
Vocational Training (Seafarers) Recommendation, 1970 (No. 137)	–	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendation No. 137.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Officers' Competency Certificates Convention, 1936 (No. 53)	33	The Governing Body has decided upon the maintenance of the status quo with regard to Convention No. 53.
Minimum Age (Sea) Convention (Revised), 1936 (No. 58)	22	The Governing Body has invited the States parties to Convention No. 58: (i) to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), the ratification of which would, ipso jure, involve the denunciation of Convention No. 58 on the conditions stated in Article 10(4)(d) of Convention No. 138; or (ii) as an alternative, to contemplate ratifying the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180).

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Minimum Age (Sea) Convention, 1920 (No. 7)	12	The Governing Body has invited the States parties to Convention No. 7: (i) to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), the ratification of which would, ipso jure, involve the denunciation of Convention No. 7 on the conditions stated in Article 10(5)(c) of Convention No. 138; or (ii) as an alternative, to contemplate ratifying the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180) and to denounce Convention No. 7 when Convention No. 180 has entered into force.
Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15)	21	The Governing Body has noted that the activities which were the subject of Convention No. 15 no longer exist. It has invited the States parties to this Convention to contemplate ratifying the Minimum Age Convention, 1973 (No. 138), the ratification of which would, ipso jure, involve the denunciation of Convention No. 15 (on the conditions stated in Article 10(5)(c) of Convention No. 138). It also shelved Convention No. 15 with immediate effect. Finally, it has decided to consider, in due course, the abrogation of Convention No. 15 by the Conference.
Placing of Seamen Convention, 1920 (No. 9)	36	The Governing Body has invited member States parties to Convention No. 9 to contemplate ratifying the Recruitment and Placement of Seafarers Convention, 1996 (No. 179), the ratification of which would, ipso jure, involve the denunciation of Convention No. 9.
Vocational Training (Seafarers) Recommendation, 1946 (No. 77)	—	The Governing Body has noted the replacement of Recommendation No. 77 by the Vocational Training (Seafarers) Recommendation, 1970 (No. 137).

Conditions for admission to employment

Minimum age

There are four different Conventions fixing different minimum ages of admission for employment at sea: the Minimum Age (Sea) Convention, 1920 (No. 7),⁵³ the Minimum Age (Sea) Convention (Revised), 1936 (No. 58), the Minimum Age Convention, 1973 (No. 138), and Article 12 of the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180).⁵⁴

⁵³ Despite the fact that Convention No. 7 has been proposed for denunciation, its content may be summarized briefly as follows: The Convention sets forth a general prohibition of the admission of children under the age of 14 years to employment or work on any vessels engaged in maritime navigation, other than vessels upon which only members of the same family are employed. The work done by children on school-ships or training-ships is excluded from this general prohibition, provided that such work is approved and supervised by public authority. In order to facilitate the enforcement of the provisions of the Convention, every shipmaster shall be required to keep a register of all persons under the age of 16 years employed on board his vessel, or a list of them in the articles of agreement, and of the dates of their births.

⁵⁴ According to Article 12 of the Convention, no person under 16 years of age shall work on a ship.

**Minimum Age (Sea) Convention (Revised),
1936 (No. 58)****Content of the Convention**

Convention No. 58 establishes a general prohibition on the employment or work of children under the age of 15 years on vessels, other than vessels upon which only members of the same family are employed. At the same time, the Convention provides for the possibility of granting exemptions from this prohibition in respect of children of not less than 14 years of age, who could be employed on any ship 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 to the immediate benefit to the child of the employment proposed, that such employment will be beneficial to the child. The Convention also exempts from this general prohibition the work done by children on school-ships or training-ships, provided that such work is approved and supervised by a public authority. In order to facilitate the enforcement of the provisions of the Convention, every shipmaster is required to keep a register of all persons under 16 years of age employed on board his vessel, or a list of them in the articles of agreement, and of the dates of their births.

Practical application of the instrument

The Committee of Experts' comments show that three major issues have been raised concerning the application of this Convention. Firstly, since the Convention applies to all ships and boats, of any nature whatsoever, engaged in maritime navigation, the exclusion from the minimum age requirements of vessels of less than 75 net tons and vessels not engaged in foreign trade is not in conformity with the Convention. Secondly, in cases where under national laws or regulations persons under the age of 15 are permitted to take part occasionally in activities on board vessels under specified conditions, such special employment must be limited to children of not less than 14 years of age, taking into account all the conditions specified in Article 2, paragraph 2, of the Convention. Thirdly, the Committee of Experts' comments have also concerned the requirement that certificates for children of not less than 14 years of age permitting them to be employed have to incorporate all the considerations that the designated educational or other appropriate authority has to take into account (such as the health and physical condition of the child and the immediate and future benefit to the child of the employment proposed).

Minimum Age Convention, 1973 (No. 138)**Content of the Convention**

Convention No. 138 requires ratifying States to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons. Such age shall be not less than 15 years, except that in a country in which the national economy and educational facilities are insufficiently developed, this age may be reduced to 14 years. The minimum age shall be specified by the respective Member ratifying the Convention in a declaration appended to its ratification. The minimum age 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 jeopardize the health, safety or morals of young persons shall not be less than 18 years.⁵⁵

⁵⁵ For further details, see *Labour standards on merchant ships*, 1990, op. cit., para. 108, p. 60.

Practical application of the instrument

Analysis of the comments of the Committee of Experts concerning the application of this Convention permit the identification of four major issues concerning the minimum age for employment at sea. Firstly, the Convention allows and encourages the raising of the minimum age, but does not permit the lowering of the minimum age once it has been specified. Secondly, the Convention does not provide for the exemption of the employment of children under 14 years of age on a ship where only members of the same family are employed. Thirdly, the minimum age in the maritime sector cannot be less than the general minimum age specified at the time of the ratification of the Convention. Fourthly, depending on national circumstances, maritime employment may or may not be considered as employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons and for which a minimum age of not less than 18 years must be required.

Medical examination

There are two ILO Conventions prescribing standards for the medical examination of seafarers: the Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16), and the Medical Examination (Seafarers) Convention, 1946 (No. 73).

Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)

Content of the Convention

Convention No. 16 requires that the employment of any child or young person under eighteen years of age on any vessel, other than vessels upon which only members of the same family are employed, shall be conditional on the production of a medical certificate attesting fitness for such work, signed by a doctor who shall be approved by the competent authority. The continued employment at sea of any such child or young person shall be subject to the repetition of such medical examination at intervals of not more than one year, and the production, after each such examination, of a further medical certificate attesting fitness for such work. Should a medical certificate expire in the course of a voyage, it shall remain in force until the end of the said voyage.

Practical application of the instrument

Analysis of the comments made by the Committee of Experts shows that two major issues have been raised concerning the application of the Convention. Firstly, under the terms of Article 3 of the Convention, medical certificates issued for young people who are below the age of 18 years should not remain in force for more than one year. Secondly, legislative and/or regulatory provisions must be adopted to ensure that the medical examination is repeated at intervals of not more than one year.

Medical Examination (Seafarers) Convention, 1946 (No. 73)

Content of the Convention

Requirement to produce a certificate

The Convention requires that every person who is engaged in any capacity on board a seagoing vessel of 200 tons gross register tonnage or over, engaged in the transport of

cargo or passengers for the purpose of trade and registered in a territory for which the Convention is in force, except wooden vessels of primitive build such as dhows and junks, fishing vessels and estuarial craft, shall produce a certificate attesting to his fitness for the work for which he is to be employed. Such certificate shall be signed by a medical practitioner or, in the case of a certificate solely concerning his sight, by a person authorized by the competent authority to issue such a certificate. This requirement is not applicable to a pilot (who is not a member of the crew), persons employed on board by an employer other than the shipowner, except radio officers or operators in the service of a wireless telegraphy company, travelling dockers (longshoremen) who are not members of the crew, or persons employed in ports who are not ordinarily employed at sea, without prejudice to the steps which should be taken to ensure that these persons are in good health and not likely to endanger the health of other persons on board.

Nature of the medical examination and content of the medical certificate

The Convention provides that the nature of the medical examination to be made and the particulars that are to be included in the medical certificate must be prescribed by a competent authority, after consultation with the shipowners' and seafarers' organizations concerned. When prescribing the nature of the examination, due regard shall be had to the age of the person to be examined and the nature of the duties to be performed. In particular, the medical certificate shall attest: that the hearing and sight of the person and, in the case of a person to be employed in the deck department (except for certain specialist personnel, whose fitness for the work which they are to perform is not liable to be affected by defective colour vision), his colour vision, are all satisfactory; and that he is not suffering from any disease likely to be aggravated by, or to render him unfit for, service at sea or likely to endanger the health of other persons on board.

In accordance with decisions taken by the Governing Body of the ILO at its 268th Session (March 1997) and the 49th Session of the World Health Assembly (May 1996), an ILO/WHO Consultation on Guidelines for Conducting Pre-sea and Periodic Medical Fitness Examinations for Seafarers was held in Geneva from 25 to 27 November 1997. The Consultation adopted the Guidelines for Conducting Pre-sea and Medical Fitness Examinations for Seafarers.⁵⁶ These Guidelines are intended for use by competent authorities, medical examiners, shipowners, seafarers' representatives and other persons concerned with the conduct of medical fitness examinations of seafarer candidates and serving seafarers. They have been developed to reduce the wide differences in medical requirements and examination procedures and to ensure that the medical certificates which are issued to seafarers are a valid indicator of their medical fitness for the work they are to perform. Ultimately, the aim of the Guidelines is to contribute to the improvement of health and safety at sea.⁵⁷

Period of validity of medical certificates

The medical certificate shall remain in force for a period not exceeding two years and, in so far as it relates to colour vision, for a period not exceeding six years from the date on which it was granted. If the period of validity of a certificate expires in the course of a voyage the certificate shall continue in force until the end of that voyage.

⁵⁶ ILO: *Guidelines for Conducting Pre-sea and Medical Fitness Examinations for Seafarers*, ILO/WHO/D.2/1997.

⁵⁷ *ibid.*, p. 2.

Re-examination

Arrangements shall be made to enable a person who, after examination, has been refused a certificate to apply for a further examination by a medical referee or referees who shall be independent of any shipowner or of any organization of shipowners or seafarers.⁵⁸

Practical application of the instrument

Analysis of the comments of the Committee of Experts show that there are three major issues concerning the application of the Convention. Firstly, the validity of the medical certificate shall not exceed two years. Secondly, there should be consultations between the competent authority and shipowners' and seafarers' organizations as to the nature of the medical examination and the content of the medical certificate. Finally, the independence of the doctors of shipowners' and seafarers' organizations, even if they have been approved by the competent authority, is not sufficient to ensure compliance with Article 8 of the Convention, unless there are provisions providing for a second medical examination by a neutral referee in case of refusal of a medical certificate.

Competency

Officers' Competency Certificates Convention, 1936 (No. 53)

Content of the Convention

Certification requirements

The Convention provides that no person shall be engaged to perform or shall perform on board the duties of master or skipper, navigating officer in charge of a watch, chief engineer, or engineer officer in charge of a watch, unless he holds a certificate of competency to perform such duties, issued or approved by the public authority of the territory where the vessel is registered. The Convention applies to all vessels registered in the territory for which the Convention is in force and engaged in maritime navigation, with the exception of: ships of war; government vessels or vessels in the service of a public authority, which are not engaged in trade; and wooden ships of primitive build such as dhows and junks. Exceptions may only be made in cases of *force majeure*.⁵⁹ National laws

⁵⁸ The Convention seems to emphasize, on the one hand, the possibility of an appeal against the first decision and, on the other hand, the fact that appeal shall be heard by a doctor who is independent of any shipowner or any organization of shipowners or seafarers. The term "referee" used in this provision seems to relate essentially to the function exercised by the doctor in these circumstances. Thus, the provisions of the Convention would be complied with if the arrangements provide, in the case of a refusal of a certificate, for a further examination by an independent doctor, whether or not called a "medical referee". Interpretation of a decision concerning Convention No. 73, Medical Examination (Seafarers), 1946, Japan, ILO, *Official Bulletin*, Vol. XXXVIII, 1955, No. 7, pp. 376-377.

⁵⁹ While Convention itself does not define the term "*force majeure*", some guidance in respect of its meaning can be drawn from the preparatory work. Analysing the responses of various Governments to the previously submitted questionnaire, the 1931 preparatory report indicated that the draft Convention should expressly provide for the possibility of exceptions in cases of the kind referred to by the French Government (where at the moment of sailing a vessel is for some sudden and unforeseen cause deprived of the services of a certificated person already engaged and a certificated substitute is not available within sufficient time, or where owing to illness or accident

or regulations may grant exceptions or exemptions from the certification requirement in respect of vessels of less than 200 tons gross registered tonnage.

Requirements for granting certificates

Under the Convention, no person shall be granted a certificate of competency unless:

- he has reached the minimum age and obtained the minimum of professional experience prescribed for the issue of the certificate in question; and
- he has passed the examinations organized and supervised by the competent authority for the purpose of testing whether he possesses the qualifications necessary for performing the duties corresponding to the certificate for which he is a candidate.

Enforcement

Each Member which ratifies the Convention shall ensure its due enforcement by an efficient system of inspection. National laws or regulations shall prescribe penalties or disciplinary measures for cases in which the provisions of the Convention are not respected.

Practical application of the instrument

Analysis of the comments of the Committee of Experts shows the main areas in which problems have arisen in the application of the Convention. Firstly, under Article 3, paragraph 2, of the Convention, exceptions from the certification requirements may only be granted in cases of *force majeure*, and not merely in “exceptional cases” or under “emergency circumstances”. Secondly, the Convention does not permit the performance of navigational watch duties by non-certified seafarers under the supervision of an officer certificated for watch duty. Thirdly, in a case in which, in order to obtain a master’s or an engineer’s certificate, a minimum of 16 years’ study is required from the age of six (primary school), but such age is not specified in the legislation, the Committee of Experts has considered that the government should not experience difficulties in specifying the age and has requested it to provide information on any measures adopted in this respect.

during the voyage the duties of a certificated person have to be taken over for the time being by a person not possessing the requisite certificate). The Report further indicated that there can hardly be any question of giving any enumeration of the cases which might be taken into account or of endeavouring to define them closely and that in effect the cases contemplated can perhaps be reduced to what in the conditions in which shipping is carried on would amount to circumstances of *force majeure* and would generally be confined to circumstances arising after the voyage had been begun. ILC, 21st Session: *The minimum requirement of professional capacity in the case of captains, navigating and engineer officers in charge of watches on board merchant ships*, Report IV, Geneva, ILO, 1931, pp. 67-68. Thus, despite the fact that the report did not define the meaning of *force majeure*, it gave two examples of it. Further guidance can be drawn from the Interpretation concerning several ILO Conventions, including the Night Work (Women) Convention, 1919 (No. 4), published in 1951, indicating that the case of *force majeure*, referred to in Article 4(a) of Convention No. 4, involves: (i) the impossibility to foresee it; and (ii) non-recurring character. Interpretation of the Decision of the International Labour Conference, concerning Night Work (Women) Convention, 1919 (No. 4), Night Work of Young Persons (Industry) Convention, 1919 (No. 6), Night Work (Women) Convention (Revised), 1948 (No. 89), Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90). ILO, *Official Bulletin*, Vol. XXXIV, 1951, No. 3, pp. 246-248.

Certification of Ships' Cooks Convention, 1946 (No. 69)

Content of the Convention

Certification requirements

Under this Convention, no person shall be engaged as ship's cook on board any vessel, whether publicly or privately owned, which is engaged in the transport of cargo or passengers for the purpose of trade and registered in a territory for which the Convention is in force, unless he holds a certificate of qualification as ship's cook granted in accordance with the provisions of the Convention. The Convention allows the competent authority to grant exemptions from this requirement if in its opinion there is an inadequate supply of certificated ships' cooks.

Requirements for granting certificates

The Convention requires the competent authority to make arrangements for the holding of examinations and for the granting of certificates of qualification. No person shall be granted a certificate of qualification unless:

- he has reached a minimum age and has served at sea for a minimum period to be prescribed by the competent authority; and
- he has passed an examination to be prescribed by the competent authority.

Content of the examination

The prescribed examination shall provide a practical test of the candidate's ability to prepare meals; it shall also include a test of his knowledge of food values, the drawing up of varied and properly balanced menus, and the handling and storage of food on board ship. The prescribed examination may be conducted and certificates granted either directly by the competent authority or, subject to its control, by an approved school for the training of cooks or other approved body.

Practical application of the instrument

The comments made by the Committee of Experts show that there are three major issues relating to the application of this Convention. Firstly, the provisions of the Convention are applicable to publicly owned as well as privately owned vessels. Secondly, the laws or regulations applying the provisions of the Convention should require a diploma or certificate, and not just simply professional experience, in order to qualify for work as a ship's cook. Thirdly, it should be compulsory to obtain a certificate of qualification and to pass a proficiency examination in order to be hired as a ship's cook.

Certification of Able Seamen Convention, 1946 (No. 74)

Content of the Convention

Certification requirements

Under Convention No. 74 no person shall be engaged on any vessel as an able seaman unless he is a person who by national laws or regulations is deemed to be competent to perform any duty which may be required of a member of the crew serving in the deck department (other than an officer or leading or specialized rating) and unless he

holds a certificate of qualification as an able seaman granted in accordance with the provisions of the Convention.

Requirements for the granting of certificates

The competent authority shall make arrangements for the holding of examinations and for the granting of certificates of qualification. No person shall be granted a certificate of qualification unless:

- he has reached a minimum age and has served at sea in the deck department for a minimum period to be prescribed by the competent authority;
- he has passed an examination of proficiency to be prescribed by the competent authority.

The prescribed minimum age shall not be less than 18 years and the prescribed minimum period of service at sea shall not be less than 36 months. At the same time, the Convention also authorizes the competent authority to: (a) permit persons with a period of actual service at sea of not less than 24 months who have successfully passed through a course of training in an approved training school to reckon the time spent in such training, or part thereof, as sea service; and (b) permit persons trained in approved seagoing training ships who have served 18 months in such ships to be certificated as able seamen upon leaving in good standing.

Practical application of the instrument

Analysis of the comments of the Committee of Experts shows that it has raised the following three major issues relating to the application of this Convention. Firstly, national laws or regulations applying the provisions of the Convention shall refer to “able seaman” as such, and this should be specifically indicated among the categories of crew members subject to certification requirements. Secondly, under the Convention, the time spent in a course of training in an approved training school may be counted towards the 36-month service at sea requirement, although it does not reduce it. Thus, a provision prescribing that in order to qualify as an “able seaman” a seafarer must spend 24 months of service at sea and successfully pass an examination does not comply with the Convention. Lastly, whilst the Convention does not apply to fishermen as such, where a seafarer on a fishing vessel has to carry out duties in the deck department corresponding to those of an able seaman, the requirements as to minimum age, prior sea service in the deck department and the passing of an examination laid down in Article 2 of the Convention are applicable.

Training

The standards of training for seafarers are prescribed by the Vocational Training (Seafarers) Recommendation, 1970 (No. 137). In view of the fact that this Recommendation is specifically mentioned in Article 2(e) of Convention No. 147, its legal effect for a particular country depends on whether the country has ratified Convention No. 147. Where a country has not ratified Convention No. 147, the general rule that ILO Recommendations do not impose legally binding obligations on member States is applicable. In this case, the Recommendation is only to be used by a respective government for its own guidance. On the other hand, if a certain country has ratified Convention No. 147, under Article 2(e) it has the duty to have due regard to the Recommendation when ensuring that seafarers employed on ships registered in its territory are properly qualified or trained for the duties for which they are engaged.

Content of the Recommendation

Scope of application

Recommendation No. 137 applies to all training designed to prepare persons for work on board a publicly or privately owned seagoing ship engaged in the transport of cargo or passengers for the purpose of trade, engaged in training or engaged in scientific exploration. It applies to training for the performance of the duties of persons in the deck, engine, radio or catering departments or of general purpose crews; it does not apply to fishermen.

Objectives of vocational training

The basic objectives of policy concerning vocational training of seafarers should include: the maintenance and improvement of the efficiency of the shipping industry and the professional ability and potential of seafarers, with due regard to the educational needs of the latter and the economic and social interests of the country; the maintenance and improvement of accident prevention standards on board merchant ships, both at sea and in port, in order to reduce the risk of injury; and making training for upgrading and for promotion up to the highest ranks on board available to all seafarers with appropriate ability, and thereby assisting them to develop their efficiency, potential productivity and job satisfaction.⁶⁰ The training programmes of all public and private institutions engaged in the training of seafarers should be coordinated and developed in each country on the basis of approved national standards.

Training programmes and standards

Training programmes should be regularly reviewed and kept up to date in the light of the developing needs of the industry; and in their review, account should be taken of the 1968 IMCO/ILO Document for Guidance, as amended. Seafarers' training schemes should be systematically organized and their financing should be on a regular and adequate basis, having regard to the present and planned requirements and development of the shipping industry. Retraining necessitated by the introduction of technical innovations should be provided free of charge to the seafarers concerned; during the period of such retraining, seafarers should receive adequate allowances; seafarers sent to courses of such retraining by a shipowner should receive their full basic wage. Training standards should be laid down in conformity with national requirements for obtaining the various seafarers' certificates of competency and, in particular, there should be laid down: the nature of medical examinations required for persons entering training schemes; the level of general education required for admission to vocational training courses leading to certificates of competency; the subjects, such as navigation, seamanship, radio, electronics, engineering, catering and human relations, that should be included in the training curricula; and the nature of any examination to be taken upon completion of training courses which are subject to examination.

⁶⁰ The Committee of Experts has emphasized that the measures taken to implement a national policy on vocational training for seafarers should be calculated to satisfy the need on board ships for officers and ratings, both specialized and general purpose, who have the benefit of qualifications encompassing the best modern technology available in the shipping industry. *Labour standards on merchant ships*, op. cit., 1990, para. 208, p. 106.

Other matters

The Recommendation also contains provisions concerning training programmes; general training schemes for seafarers; advanced training; training methods; and international cooperation.

Placement

Recruitment and Placement of Seafarers Convention, 1996 (No. 179); Recruitment of Seafarers Recommendation, 1996 (No. 186)

Convention No. 179 revised the Placing of Seamen Convention, 1920 (No. 9), and took a new approach to the international regulation of recruitment and placement of seafarers, switching from a general prohibition on the finding of employment for seamen as a commercial enterprise for pecuniary gain (as in Convention No. 9)⁶¹ to the regulation of the activities of fee-charging agencies for the recruitment and placement of seafarers.⁶²

Content of the Convention

Definition of “recruitment and placement service”

The term “recruitment and placement service” means any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting seafarers on behalf of employers or placing seafarers with employers.

Definition of ‘seafarer’

The term “seafarer” means any person who fulfils the conditions to be employed or engaged in any capacity on board a seagoing ship other than a government ship used for military or non-commercial purposes.

Existence of public and private recruitment and placement services

The Convention does not prevent a Member from maintaining a free public recruitment and placement service for seafarers in the framework of a policy to meet the needs of seafarers and shipowners, whether it forms part of or is coordinated with a public employment service for all workers and employers; nor does impose upon a Member the obligation to establish a system for the operation of private recruitment and placement services.

⁶¹ For further details, see, ILO: *Unemployment: The provision of facilities for finding employment for seamen, and the application to seamen of the Convention and Recommendation adopted at Washington in regard to unemployment*, Report II, Seamen’s Conference, Genoa, June 1920, p. 34.

⁶² For further details, see, ILO: *Revision of the Placing of Seamen Convention, 1920 (No. 9)*. Report III, Tripartite Meeting on Maritime Labour Standards, Geneva, 1994, p. 31; Resolution concerning the recruitment of seafarers and the regulation of fee-charging employment agencies, adopted at the 74th (Maritime) Session of the International Labour Conference in 1987. ILO: *Record of Proceedings*. ILC, 74th (Maritime) Session, Geneva, 1987, pp. 16/24 and 25.

Conditions of operation of private recruitment and placement services

Where private recruitment and placement services have been or are to be established, they shall be operated within the territory of a Member only in conformity with a system of licensing or certification or other form of regulation. This system shall be established, maintained, modified or changed only after consultation with representative organizations of shipowners and seafarers. Undue proliferation of such private recruitment and placement services shall not be encouraged.

Obligations of the Member in respect of laying down standards

A Member shall, by means of national laws or applicable regulations:

- ensure that no fees or other charges for recruitment or for providing employment to seafarers are borne directly or indirectly, in whole or in part, by the seafarer; for this purpose, costs of the national statutory medical examination, certificates, a personal travel document and the national seafarer's book shall not be deemed to be "fees or other charges for recruitment";
- determine whether and under which conditions recruitment and placement services may place or recruit seafarers abroad;
- specify, with due regard to the right to privacy and the need to protect confidentiality, the conditions under which seafarers' personal data may be processed by recruitment and placement services including the collection, storage, combination and communication of such data to third parties;
- determine the conditions under which the licence, certificate or similar authorization of a recruitment and placement service may be suspended or withdrawn in case of violation of relevant laws and regulations; and
- specify, where a regulatory system other than a system of licensing or certification exists, the conditions under which recruitment and placement services can operate, as well as sanctions applicable in case of violation of these conditions.

Obligations of Members in respect of supervision

A Member shall ensure that the competent authority:

- closely supervises all recruitment and placement services;
- grants or renews the licence, certificate, or similar authorization only after having verified that the recruitment and placement service concerned meets the requirements of national laws and regulations;
- requires that the management and staff of recruitment and placement services for seafarers should be adequately trained persons having relevant knowledge of the maritime industry;
- prohibits recruitment and placement services from using means, mechanisms or lists intended to prevent or deter seafarers from gaining employment;
- requires that recruitment and placement services adopt measures to ensure, as far as practicable, that the employer has the means to protect seafarers from being stranded in a foreign port; and

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- ensures that a system of protection, by way of insurance or an equivalent appropriate measure, is established to compensate seafarers for monetary loss that they may incur as a result of the failure of a recruitment and placement service to meet its obligations to them.

Obligations of recruitment and placement services

All recruitment and placement services shall maintain a register of all seafarers recruited or placed through them, to be available for inspection by the competent authority.

All recruitment and placement services shall ensure that:

- any seafarer recruited or placed by them is qualified and holds the documents necessary for the job concerned;
- contracts of employment and articles of agreement are in accordance with applicable laws, regulations and collective agreements;
- seafarers are informed of their rights and duties under their contracts of employment and the articles of agreement prior to or in the process of engagement; and
- proper arrangements are made for seafarers to examine their contracts of employment and the articles of agreement before and after they are signed and for them to receive a copy of the contract of employment.

Investigation of complaints

The competent authority shall ensure that adequate machinery and procedures exist for the investigation, if necessary, of complaints concerning the activities of recruitment and placement services, involving, as appropriate, representatives of shipowners and seafarers. All recruitment and placement services shall examine and respond to any complaint concerning their activities and shall advise the competent authority of any unresolved complaint. Where complaints concerning working or living conditions on board ships are brought to the attention of the recruitment and placement services, they shall forward such complaints to the appropriate authority. The Convention does not prevent the seafarer from bringing any complaint directly to the appropriate authority.

Content of Recommendation No. 186

Functions of the competent authority

The competent authority should:

- take the necessary measures to promote effective cooperation among recruitment and placement services, whether public or private;
- take account of the needs of the maritime industry at both the national and international levels, when developing training programmes for seafarers, with the participation of shipowners, seafarers and the relevant training institutions;
- make suitable arrangements for the cooperation of representative organizations of shipowners and seafarers in the organization and operation of the public recruitment and placement services where they exist;
- maintain an arrangement for the collection and analysis of all relevant information on the maritime labour market, including:

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- (i) the current and prospective supply of seafarers classified by age, sex, rank and qualifications and the industry's requirements, the collection of data on age and sex being admissible only for statistical purposes or if used in the framework of a programme to prevent discrimination based on age and sex;
 - (ii) the availability of employment on national and foreign ships;
 - (iii) continuity of employment;
 - (iv) the placement of apprentices, cadets and other trainees; and
 - (v) vocational guidance to prospective seafarers;
- ensure that the staff responsible for the supervision of recruitment and placement services be adequately trained and have relevant knowledge of the maritime industry;
 - prescribe or approve operational standards and encourage the adoption of codes of conduct and ethical practices for these services; and
 - promote continued supervision on the basis of a system of quality standards.

Operational standards

Operational standards should include provisions dealing with:

- the qualifications and training required of the management and staff of recruitment and placement services, which should include knowledge of the maritime sector, particularly of relevant maritime international instruments on training, certification and labour standards;
- the keeping of a register of seafarers seeking employment at sea; and
- matters pertaining to medical examinations, vaccinations, seafarers' documents and such other items as may be required for the seafarer to gain employment.

In particular, operational standards should provide that each recruitment and placement service:

- maintain, with due regard to the right to privacy and the need to protect confidentiality, full and complete records of the seafarers covered by its recruitment and placement system, which should include but not be limited to:
 - (i) the seafarers' qualifications;
 - (ii) record of employment;
 - (iii) personal data relevant to employment;
 - (iv) medical data relevant to employment;
- maintain up-to-date crew lists of the vessels for which it provides crew and ensure that there is a means by which it can be contacted in an emergency at all hours;
- have formal procedures to ensure that seafarers are not subject to exploitation by the agency or its personnel with regard to the offer of engagement on particular ships or by particular companies;

- have formal procedures to prevent the opportunities for exploitation of seafarers arising from the issue of joining advances or any other financial transaction between the employer and the seafarer which are handled by it;
- clearly publicize costs which the seafarer will bear by way of medical or documentary clearance;
- ensure that seafarers are advised of any particular conditions applicable to the job for which they are to be engaged and of particular employers' policies relating to their employment;
- have formal procedures which are in accordance with the principles of natural justice for dealing with cases of incompetence or indiscipline consistent with national laws and practice and, where applicable, with collective agreements;
- have formal procedures to ensure, as far as practicable, that certificates of competency and medical certificates of seafarers submitted for employment are up to date and have not been fraudulently obtained and that employment references are verified;
- have formal procedures to ensure that requests for information or advice by families of seafarers while they are at sea are dealt with promptly and sympathetically and at no cost; and
- as a matter of policy, supply seafarers only to employers who offer terms and conditions of employment to seafarers which comply with applicable laws or regulations or collective agreements.

Practical application of the instrument

Convention No. 179 entered into force on 22 April 2000. The first reports by States which have ratified this instrument are not therefore due until 2004.

III. Conditions of employment

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)	13	The Governing Body has invited member States to contemplate ratifying Convention No. 146 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay the ratification of this Convention.
Repatriation of Seafarers Convention (Revised), 1987 (No. 166)	8	This Convention was adopted after 1985 and is considered up to date.
Repatriation of Seafarers Recommendation, 1987 (No. 174)	–	This Recommendation was adopted after 1985 and is considered up to date.
Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)	4	This Convention was adopted after 1985 and is considered up to date.
Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187)	–	This Recommendation was adopted after 1985 and is considered up to date.
Protection of Young Seafarers Recommendation, 1976 (No. 153)	–	The Governing Body has invited member States to give effect to Recommendation No. 153.

Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Seamen's Articles of Agreement Convention, 1926 (No. 22)	58	The Governing Body decided the revision of Convention No. 22 and the inclusion of this question among the proposals for the agenda of the Conference.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Repatriation of Seamen Convention, 1926 (No. 23)	45	The Governing Body has invited the States parties to Convention No. 23 to contemplate ratifying the Repatriation of Seafarers Convention (Revised), 1987 (No. 166), and to denounce at the same time Convention No. 23.
Repatriation (Ship Masters and Apprentices) Recommendation, 1926 (No. 27)	–	The Governing Body has noted the replacement of Recommendation No. 27 by the Repatriation of Seafarers Convention (Revised), 1987 (No. 166), and the Repatriation of Seafarers Recommendation, 1987 (No. 174).
Holidays with Pay (Sea) Convention, 1936 (No. 54)	4	The Governing Body has invited the States parties to Convention No. 54 to contemplate ratifying the Seafarers' Annual Leave with Pay Convention, 1976, (No. 146).
Paid Vacations (Seafarers) Convention, 1946 (No. 72)	1	The Governing Body has invited the States parties to Convention No. 72 to contemplate ratifying the Seafarers' Annual Leave with Pay Convention, 1976 (No. 146).
Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91)	17	The Governing Body has invited the States parties to Convention No. 91 to contemplate ratifying the Seafarers' Annual Leave with Pay Convention, 1976 (No. 146), the ratification of which would, ipso jure, involve the immediate denunciation of Convention No. 91. It has also shelved with immediate effect Convention No. 91. Finally, it has decided that the status of Convention No. 91 will be re-examined in due course, with a view to its possible abrogation when the level of ratifications of Convention No. 91 has substantially decreased as a consequence of the ratification of Convention No. 146.
Hours of Work and Manning (Sea) Convention, 1936 (No. 57)	4	The Governing Body has invited the States parties to Convention No. 57 to contemplate ratifying the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180). It has also decided to propose to the Conference the withdrawal of Convention No. 57.
Hours of Work and Manning (Sea) Recommendation, 1936 (No. 49)	–	The Governing Body has noted that Recommendation No. 49 is obsolete and has decided to propose the withdrawal of this Recommendation to the Conference in due course.
Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76)	1	The Governing Body has invited the State party to Convention No. 76 to contemplate ratifying the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180). It has also decided to propose to the Conference the withdrawal of this Convention.
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93)	6	The Governing Body has invited member States parties to Convention No. 93 to contemplate ratifying the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180). It has also decided to propose to the Conference the withdrawal of Convention No. 93.
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109)	16	The Governing Body has invited the States parties to Convention No. 109 to contemplate ratifying the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180). It has also decided that the status of this Convention, including its possible withdrawal, will be re-examined in due course, after the entry into force of Convention No. 180.

Wages, Hours of Work and Manning (Sea) Recommendation, 1958 (No. 109)	–	The Governing Body has noted the replacement of Recommendation No. 109 by the Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187).
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Determination of conditions of employment

Seamen's Articles of Agreement Convention, 1926 (No. 22)

Content of the Convention

Scope of application

The Convention applies to all seagoing vessels registered in the country of any member ratifying the Convention and to the owners, masters and seamen of such vessels. It does not apply to ships of war, government vessels not engaged in trade, vessels engaged in the coasting trade, pleasure yachts, Indian country craft, fishing vessels or vessels of less than 100 tons gross registered tonnage or 300 cubic metres, nor to vessels engaged in the home trade below the tonnage limit prescribed by national law for the special regulation of this trade at the date of the passing of the Convention.

Who shall sign articles of agreement

Under the Convention, every person employed or engaged in any capacity on board any vessel to which it applies and entered on the ship's articles shall have signed articles of agreement with the shipowner or his representative. Excluded from this requirement are masters, pilots, cadets and pupils on training ships and duly indentured apprentices, naval ratings and other persons in the permanent service of a Government.

Formalities and safeguards in respect of the completion of the agreement

Articles of agreement shall be signed both by the shipowner or his representative and by the seaman. Reasonable facilities to examine the articles of agreement before they are signed shall be given to the seaman and also to his adviser. The seaman shall sign the agreement under conditions which shall be prescribed by national law in order to ensure adequate supervision by the competent authority. 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 both by the shipowner or his representative and by the seaman.

National laws shall make adequate provision to ensure that the seaman has understood the agreement.

Content of the agreement

The agreement shall not contain anything which is contrary to the provisions of national law or the Convention. The agreement may be made either for a definite period or for a voyage or, if permitted by national law, for an indefinite period. The agreement shall state clearly the respective rights and obligations of each of the parties.

It shall in all cases contain the following particulars:

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- the surname and other names of the seaman, the date of his birth or his age, and his birthplace;
 - the place at which and date on which the agreement was completed;
 - the name of the vessel or vessels on board which the seaman undertakes to serve;
 - the number of the crew of the vessel, if required by national law;
 - the voyage or voyages to be undertaken, if this can be determined at the time of making the agreement;
 - the capacity in which the seaman is to be employed;
 - if possible, the place and date at which the seaman is required to report on board for service;
 - the scale of provisions to be supplied to the seaman, unless some alternative system is provided for by national law;
 - the amount of his wages;
 - the termination of the agreement and the conditions thereof, that is to say:
 - (a) if the agreement has been made for a definite period, the date fixed for its expiry;
 - (b) if the agreement has been made for a voyage, the port of destination and the time which has to expire after arrival before the seaman shall be discharged;
 - (c) if the agreement has been made for an indefinite period, the conditions which shall entitle either party to rescind it, as well as the required period of notice for rescission; provided that such period shall not be less for the shipowner than for the seaman;
 - the annual leave with pay granted to the seaman after one year's service with the same shipping company, if such leave is provided for by national law; and
 - any other particulars which national law may require.

Information as to the conditions of employment

In order that the seaman may satisfy himself as to the nature and extent of his rights and obligations, national law shall lay down the measures to be taken to enable clear information to be obtained on board as to the conditions of employment, either by posting the conditions of the agreement in a place easily accessible from the crew's quarters, or by some other appropriate means.

Termination of agreements

An agreement for an indefinite period may be terminated by either party in any port where the vessel loads or unloads, provided that the notice specified in the agreement shall have been given, which shall not be less than twenty-four hours. Notice shall be given in writing; national law shall provide such manner of giving notice as is best calculated to preclude any subsequent dispute between the parties on this point.

An agreement entered into for a voyage, for a definite period, or for an indefinite period shall be duly terminated by:

- mutual consent of the parties;
- death of the seaman;
- loss or total unseaworthiness of the vessel;
- any other cause that may be provided in national law or in the Convention.

National law shall determine the circumstances in which the owner or master may immediately discharge a seaman. National law shall also determine the circumstances in which the seaman may demand his immediate discharge.

Record of employment on board vessel

Article 5 of the Convention requires that every seaman be given a document containing a record of his employment on board the vessel. The form of the document, the particulars to be included and the manner in which such particulars are to be entered in it shall be determined by national law. The document shall not contain any statement as to the quality of the seaman's work or as to his wages.⁶³ Moreover, under Article 5 of the Convention, no statement concerning the wages of the seamen may be entered into such document, even with the consent of the person concerned.⁶⁴

Whatever the reason for the termination or rescission of the agreement, an entry shall be made in the document issued to the seaman in accordance with Article 5 and in the list of the crew showing that he has been discharged, and such entry shall, at the request of either party, be endorsed by the competent public authority. With regard to the content of this entry, it was simply intended that it should merely state the fact that the seaman had been discharged, *and not the grounds for such discharge* (emphasis added).⁶⁵ Finally, in addition to the record mentioned in Article 5, the seaman shall at all times have the right to obtain from the master a separate certificate as to the quality of his work or, failing that, a certificate indicating whether he has fully discharged his obligations under the agreement.

Practical application of the instrument

Analysis of the comment made by the Committee of Experts shows several major issues which have arisen in relation to the application of the Convention. In the first place, certain provisions of the Convention are not self-executing, but require the authorities to take specific legislative measures for their application. An indication in the national Constitution that “duly ratified international Conventions are part of domestic legislation”, is not sufficient in this respect. The second concerns the obligation assumed by States ratifying the Convention to take the necessary steps to ensure that the work of seafarers is

⁶³ The reasoning behind the inclusion of this provision in the text of the Convention was that the seaman must be able to use the document containing a record of his employment on board the vessel to help in obtaining further employment, and it should therefore be made impossible for the master of the ship to make a damaging entry in the seaman's record of service. ILO: *Record of Proceedings*, ILC, 9th Session, 1926, Geneva, p. 305.

⁶⁴ Interpretation of a decision concerning Convention No. 22, Seamen's Articles of Agreement, 1926, Japan. ILO, *Official Bulletin*, Vol. XXXVIII, 1955, No. 7, pp. 374-375.

⁶⁵ ILO: *Record of Proceedings*, 1926, op. cit., p. 524.

governed by articles of agreement signed by the shipowner or his representative (Article 3), even if there is a collective agreement applicable in this area. The third concerns entries in the seafarer's discharge book that provide for mention of any misconduct on the part of the seafarer and the penalties imposed by masters and employers, which is not in conformity with Article 5, paragraph 2, of the Convention, which prohibits any such comments in documents issued to seamen for the purpose of recording their employment on board. The fourth issue concerns the requirement under Article 6, paragraph 3(3), of the Convention, to enter on the agreement the name of the vessel or vessels on which the seaman undertakes to serve, which extends not only to a contract for a voyage, but also to agreements made either for a definite period or for an indefinite period. The fifth issue concerns provisions according to which a seaman is entitled to terminate his agreement, but such termination can only take effect in metropolitan ports or in ports of an overseas department or territory for a seaman embarked on a vessel registered in one of these ports which are not in conformity with Article 9, paragraph 1, of the Convention. The sixth issue relates to the fact that, to ensure full compliance with the Convention, in the case of a seafarer who does not understand English, it is necessary to have contracts written in a language he understands and, if need be, for the representative of the competent authority or the master, in the presence of witnesses, to explain the contents of the contract. Seventh, notice of termination of an agreement for an indefinite period has to be given in writing, and the requirement that national law shall provide such manner of giving of notice as is best calculated to preclude any subsequent dispute between the parties on this point. The eighth issue is that, while Article 9, paragraph 3, of the Convention explicitly empowers national law to determine the exceptional circumstances in which notice, even when duly given, shall not terminate an agreement, it does not give States which ratify it an unlimited right to disregard the general rule established in Article 9, paragraph 1, nor to replace it by another general rule under which an agreement for an indefinite period may be terminated only in a port of the country of registration of the vessel, and not in a foreign port. The ninth issue is that the separate certificate concerning the quality of work or the discharge of obligations which may be requested by the seafarer is distinct from the mandatory record of employment on board the vessel which shall be given to the seafarer in accordance with Article 5 of the Convention. The tenth issue is that, according to the definition of the term "seaman" contained in Article 2(b) of the Convention, non-resident foreign nationals, being persons employed on board ship, are to be regarded as seamen for the purpose of the Convention, provided that they are entered on the ship's articles, and the Convention should be applied to them. The eleventh issue is that the legislation giving effect to the Convention should also be applied to seamen engaged on national ships in ports outside their country. And finally, the inclusion of the sea service record in the seafarer's identity document is not in conformity with Article 5 of the Convention, which requires the issuance of a separate document.

Hours of work and rest

Seafarers' Hours of Work and the Manning of Ships Convention 1996 (No. 180); Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187)

Since its creation, the ILO has made several attempts to establish international standards governing the hours of work of seafarers. Over a period of 60 years, four ILO Conventions on the hours of work of seafarers have been adopted, but none of them has

ever come into force.⁶⁶ One of the difficulties associated with the ratification of these instruments is related to the fact that they combine, in the same Convention, wages and seafarers' hours of work. Even though these matters are closely connected, their combination in a single instrument may have prevented ratification by countries which could accept one standard, but not the other, particularly as there are significant differences in seafarers' wages between countries. The most recent ILO instrument in this area, the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180), takes a different approach. The Convention itself deals with the hours of work and manning of ships, but the seafarers' wages are dealt with by a separate instrument, the Seafarers' Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187).

Content of Convention No. 180

Scope of application

Convention No. 180 applies to every seagoing ship, whether publicly or privately owned, which is registered in the territory of any Member for which the Convention is in force and is ordinarily engaged in commercial maritime operations. To the extent it deems practicable, after consulting the representative organizations of fishing-vessel owners and fishermen, the competent authority shall apply the provisions of the Convention to commercial maritime fishing. In the event of doubt as to whether or not any ships are to be regarded as seagoing ships or engaged in commercial maritime operations or commercial maritime fishing for the purpose of the Convention, the question shall be determined by the competent authority after consulting the organizations of shipowners, seafarers and fishermen concerned.

Standards for hours of work and rest

For the purposes of Convention, the term "hours of work" means time during which a seafarer is required to do work on account of the ship, and the term "hours of rest" means time outside hours of work; this term does not include short breaks. The Convention refers to *three* basic standards:

- (i) the standard for normal working hours;
- (ii) the maximum hours of work; and
- (iii) the minimum hours of rest.

In respect of the first standard, the Convention places no specific responsibility on a Member which ratifies the Convention. Such Member merely acknowledges that the normal working hours' standard for seafarers, like that for other workers, shall be based on an eight-hour day with one day of rest per week and rest on public holidays; however, this shall not prevent the Member from having procedures to authorize or register a collective agreement which determines seafarers' normal working hours on a basis no less favourable than this standard. In respect of the second and third standards, the Member has the obligation to fix within the limits set out in the Convention *either* a maximum number of hours of work which shall not be exceeded in a given period of time, *or* a minimum number of hours of rest which shall be provided in a given period of time.

⁶⁶ The Hours of Work and Manning (Sea) Convention, 1936 (No. 57); the Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76); the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93); and the Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109).

The Convention prescribes the following limits:

Hours of work – *maximum hours of work* shall not exceed: (i) 14 hours in any 24-hour period; and (ii) 72 hours in any seven-day period; *or*

Hours of rest – *minimum hours of rest* shall not be less than: (i) ten hours in any 24-hour period; and (ii) 77 hours in any seven-day period. Hours of rest may be divided into no more than two periods, one of which shall be at least six hours in length, and the interval between consecutive periods of rest shall not exceed 14 hours.

Nevertheless, the Member is not prevented from having national laws or regulations or a procedure for the competent authority to authorize or register collective agreements permitting exceptions to the limits set out. Such exceptions shall, as far as possible, follow the standards set out but may take account of more frequent or longer leave periods or the granting of compensatory leave for watchkeeping seafarers or seafarers working on board ships on short voyages.

The Member shall require the posting, in an easily accessible place, of a table with the shipboard working arrangements, which shall contain for every position at least: the schedule of service at sea and service in port; and the maximum hours of work or the minimum hours of rest required by the laws, regulations or collective agreements in force in the flag State.

Records of daily hours of work or rest

Under the Convention, the Member shall also require that records of seafarers' daily hours of work or of their daily hours of rest be maintained to allow monitoring of compliance with the standards for maximum hours of work or minimum hours of rest. The competent authority shall determine the procedures for keeping such records on board, including the intervals at which the information shall be recorded. The competent authority shall establish the format of the records of the seafarers' hours of work or of their hours of rest taking into account any available ILO guidelines or shall use any standard format prepared by the Organization.⁶⁷

Manning requirements

Every ship to which the Convention applies shall be sufficiently, safely and efficiently manned, in accordance with the minimum safe manning document or an equivalent issued by the competent authority. When determining, approving or revising manning levels, the competent authority shall take into account: the need to avoid or minimize, as far as practicable, excessive hours of work, to ensure sufficient rest and to limit fatigue.

Minimum age

The Convention prohibits the work of persons under 16 years of age on a ship. It also prohibits night work of seafarers under 18 years (with a certain flexibility for training purposes).

⁶⁷ See, IMO/ILO *Guidelines for the development of tables of seafarers' shipboard working arrangements and formats of records of seafarers' hours of work or hours of rest*, IMO, London, 1999.

Content of Recommendation No. 187

The Recommendation contains provisions concerning seafarers' wages, minimum wages and the minimum monthly basic pay or wage figure for able seamen. In particular, the Recommendation prescribes that the basic pay or wages for a calendar month of service for an able seaman should be no less than the amount periodically set by the Joint Maritime Commission or another body authorized by the Governing Body of the International Labour Office. Upon a decision of the Governing Body, the Director-General of the ILO shall notify any revised amount to the Members of the International Labour Organization.⁶⁸

Practical application of the instrument

Convention No. 180 has not yet come into force.

Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)

Content of the Convention

Scope of application

Convention No. 146 applies to all persons who are employed as seafarers.

Minimum annual leave with pay

Every seafarer to whom the Convention applies shall be entitled to annual leave with pay of a specified minimum length. This length shall be specified by each Member which ratifies the Convention in a declaration appended to its ratification. The leave shall in no case be less than 30 calendar days for one year of service. A seafarer whose length of service in any year is less than that required for the full entitlement shall be entitled in respect of that year to annual leave with pay proportionate to his length of service during that year.

Calculation of the length of service

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.

The following shall not be counted as part of the minimum annual leave with pay:

- (a) public and customary holidays recognized as such in the country of the flag, whether or not they fall during the annual leave with pay;
- (b) periods of incapacity for work resulting from illness, injury or maternity, under conditions to be determined by the competent authority or through the appropriate machinery in each country;
- (c) temporary shore leave granted to a seafarer while on articles; and

⁶⁸ The 29th Session of the Joint Maritime Commission held in Geneva in January 2001 agreed to update the ILO minimum wage for seafarers from \$435 to \$450 with effect from 1 January 2002 and to \$465 as of 1 January 2003.

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- (d) compensatory leave of any kind, under conditions to be determined by the competent authority or through the appropriate machinery in each country.

Taking the leave

Every seafarer taking the annual leave envisaged in the Convention shall receive in respect of the full period of that leave at least his normal remuneration (including the cash equivalent of any part of that remuneration which is paid in kind), calculated in a manner to be determined by the competent authority or through the appropriate machinery in each country. In exceptional cases, provision may be made by the competent authority or through the appropriate machinery in each country for the substitution for annual leave due in virtue of the Convention of a cash payment at least equivalent to this remuneration. The time at which the leave is to be taken shall, unless it is fixed by regulation, collective agreement, arbitration award or other means consistent with national practice, be determined by the employer after consultation and, as far as possible, in agreement with the seafarer concerned or his representatives. Finally, under the terms of the Convention, a seafarer taking annual leave shall be recalled only in cases of extreme emergency, with due notice.

Practical application of the instrument

Analysis of the comments of the Committee of Experts shows that there have been seven major issues raised relating to the application of the Convention. In the first place, the Convention applies to all persons employed on board seagoing ships registered in the territory of a Member which has ratified the Convention, regardless of whether they are foreign nationals. The Committee of Experts has asked the respective governments to indicate which legislative provisions apply the Convention to non-nationals who are employed on board national ships. The second issue concerns provisions which establish that a worker is entitled to a certain number of days of paid leave for every six months of continuous service with the same employer, which are contrary to the requirements of the Convention regarding the right to proportional leave for periods of service that are less than the required period for full entitlement. Thirdly, temporary shore leave granted to a seafarer while on articles and compensatory leave period shall not be deducted from his annual paid leave. Fourthly, subject to the division or accumulation of annual leave due in one year that may be authorized by the competent authority or through the appropriate machinery in each country, the annual leave with pay prescribed by the Convention shall be of an interrupted period. In fifth place, annual leave may be substituted by remuneration only in exceptional cases. Sixthly, any agreement to relinquish the right to the minimum annual leave with pay, or to forgo such leave, other than in exceptional cases, shall be null and void. And, finally, the notion of extreme emergency implies a sudden and unexpected event which requires immediate intervention.

Repatriation

Repatriation of Seafarers Convention (Revised), 1987 (No. 166), and Repatriation of Seafarers Recommendation, 1987 (No. 174)

Content of Convention No. 166

Scope of application

The Convention applies to every seagoing ship whether publicly or privately owned which is registered in the territory of any Member for which the Convention is in force and which is ordinarily engaged in commercial maritime navigation and to the owners and

seafarers of such ships. To the extent it deems practicable, after consultation with the representative organizations of fishing vessel owners and fishermen, the competent authority shall apply the provisions of this Convention to commercial maritime fishing.

Definition of ‘seafarer’

For the purpose of the Convention, the term “seafarer” means any person who is employed in any capacity on board a seagoing ship to which the Convention applies. The Convention is therefore also applicable to foreign seafarers.

Entitlement to be repatriated

A seafarer shall be entitled to repatriation in the following circumstances:

- if an engagement for a specific period or for a specific voyage expires abroad;
- upon the expiry of the period of notice given in accordance with the provisions of the articles of agreement or the seafarer’s contract of employment;
- in the event of illness or injury or other medical condition which requires his or her repatriation when found medically fit to travel;
- in the event of shipwreck;
- in the event of the shipowner not being able to continue to fulfil his or her legal or contractual obligations as an employer of the seafarer by reason of bankruptcy, sale of ship, change of ship’s registration or any other similar reason;
- in the event of a ship being bound for a war zone, as defined by national laws or regulations or collective agreements, to which the seafarer does not consent to go;
- 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.

Maximum duration of service periods giving entitlement to repatriation

National laws or regulations or collective agreements shall prescribe the maximum duration of service periods on board following which a seafarer is entitled to repatriation; such periods shall be less than 12 months. In determining the maximum periods, account shall be taken of factors affecting the seafarer’s working environment.

Repatriation destinations

Under Article 3 of the Convention, the destinations to which seafarers may be repatriated shall be prescribed by national laws or regulations. 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.

A seafarer shall be deemed to have been duly repatriated when he or she is landed at a destination prescribed pursuant to Article 3, or when the seafarer does not claim his or her entitlement to repatriation within a reasonable period of time to be defined by national laws or regulations or collective agreements.

Arrangements for repatriation

It shall be the responsibility of the shipowner to arrange for repatriation by appropriate and expeditious means. The normal mode of transport shall be by air.

Cost of repatriation

The cost of repatriation shall be borne by the shipowner. Nevertheless, Article 4, paragraph 3, of the Convention provides that, where repatriation has taken place as a result of a seafarer being found, in accordance with national laws or regulations or collective agreements, to be in serious default of his or her employment obligations, nothing in this Convention shall prejudice the right of recovery from the seafarer of repatriation costs or part thereof in accordance with national laws or regulations or collective agreements.

The cost to be borne by the shipowner shall include:

- passage to the destination selected for repatriation;
- accommodation and food from the moment the seafarer leaves the ship until he or she reaches the repatriation destination;
- 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;
- transportation of 30 kg of the seafarer's personal luggage to the repatriation destination;
- medical treatment when necessary until the seafarer is medically fit to travel to the repatriation destination.

The shipowner shall not require the seafarer to make an advance payment towards the cost of repatriation at the beginning of his or her employment, nor shall the shipowner recover the cost of repatriation from the seafarer's wages or other entitlements, except where repatriation has taken place as a result of seafarer being found, in accordance with national laws or regulations or collective agreements, to be in serious default of his or her employment obligations.

Repatriation in case of the shipowner failing to discharge the obligations

If a shipowner fails to make arrangements for or to meet the cost of repatriation of a seafarer who is entitled to be repatriated:

- the competent authority of the Member in whose territory the ship is registered shall arrange for and meet the cost of the repatriation of the seafarer concerned; if it fails to do so, the State from which the seafarer is to be repatriated or the State of which he or she is a national may arrange for his or her repatriation and recover the cost from the Member in whose territory the ship is registered;

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- costs incurred in repatriating the seafarer shall be recoverable from the shipowner by the Member in whose territory the ship is registered;
 - the expenses of repatriation shall in no case be a charge upon the seafarer, except where repatriation has taken place as a result of seafarer being found, in accordance with national laws or regulations or collective agreements, to be in serious default of his or her employment obligations.

Other arrangements

Seafarers who are to be repatriated shall be able to obtain their passport and other identity documents for the purpose of repatriation. Time spent awaiting repatriation and repatriation travel time shall not be deducted from paid leave accrued to the seafarer. The text of this Convention shall be available in an appropriate language to the crew members of every ship which is registered in the territory of any Member for which it is in force.

Duty of supervision

The competent authority of each Member shall ensure by means of adequate supervision that the owners of ships registered in its territory comply with the provisions of the Convention, and shall provide relevant information to the International Labour Office.

Content of Recommendation No. 174

Recommendation No. 174 provides that whenever a seafarer is entitled to be repatriated pursuant to Convention No. 166, but both the shipowner and the Member in whose territory the ship is registered fail to meet their obligations under the Convention to arrange for and meet the cost of repatriation, the State from which the seafarer is to be repatriated or the State of which he or she is a national should arrange for his or her repatriation, and recover the cost from the Member in whose territory the ship is registered in accordance with Article 5(a) of the Convention.

Practical application of the instrument

Analysis of the comments made by the Committee of Experts show that three major issues have been raised relating to the application of this Convention. Firstly, the Convention establishes entitlement to repatriation in the event of a shipowner not being able to fulfil his legal or contractual obligations, but does not mention the need for any prior legal statement. Secondly, under the terms of the Convention, the shipowner has the duty not only to cover the cost of repatriation, but also to arrange for repatriation. Thirdly, the seafarer has the right to choose from among the prescribed repatriation destinations.

Conditions of work of young seafarers

Protection of Young Seafarers Recommendation, 1976 (No. 153)

For the purpose of the Recommendation, the term “young seafarer” includes all young persons under 18 years of age employed in any capacity on board a seagoing ship other than: a ship of war; and a ship engaged in fishing or in operations directly connected therewith or in whaling or similar pursuits. The Recommendation calls upon each Member in which ships in which young seafarers are employed are registered to make provision for: the effective protection of such seafarers, including the safeguarding of their health, morals and safety, and the promotion of their general welfare; and vocational guidance, education and vocational training of such seafarers, in their interest as well as that of the efficiency of

shipboard operations, in the interest of safety of life and of property at sea and in that of the creation of opportunities for the advancement of young seafarers within the seagoing profession. The Recommendation also contains specific standards in respect of hours of permitted duty and rest periods (Part IV); repatriation (Part V); safety in work and health education (Part VI); and opportunities for vocational guidance, education and vocational training (Part VII).

IV. Safety, health and welfare

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Seafarers' Welfare Convention, 1987 (No. 163)	11	This Convention was adopted after 1985 and is considered up to date.
Seafarers' Welfare Recommendation, 1987 (No. 173)	–	This Recommendation was adopted after 1985 and is considered up to date.
Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)	10	This Convention was adopted after 1985 and is considered up to date.
Labour Inspection (Seafarers) Convention, 1996 (No. 178)	5	This Convention was adopted after 1985 and is considered up to date.
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Food and Catering (Ships' Crews) Convention, 1946 (No. 68)	24	The Governing Body has decided upon the revision of Convention No. 68 in conjunction with the Certification of Ships' Cooks Convention, 1946 (No. 69), and the inclusion of this question among the proposals for the agenda of the International Labour Conference. It has also decided that the corresponding instruments of the International Maritime Organization (IMO) will be taken into account in the context of a revision of Conventions Nos. 68 and 69.
Prevention of Accidents (Seafarers) Convention, 1970 (No. 134)	27	The Governing Body has decided upon the revision of Convention No. 134 and the inclusion of this question among the proposals for the agenda of the Conference. It has also decided that the corresponding instruments of the IMO will be taken into account in the context of a revision of Convention No. 134.
Requests for information (Instruments for which the Governing Body confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments or on specific issues.)		
Bedding, Mess Utensils and Miscellaneous Provisions (Ships' Crews) Recommendation, 1946 (No. 78)	–	The Governing Body has invited member States to communicate to the Office any additional information on the possible need to replace Recommendations Nos. 78 and 142.
Prevention of Accidents (Seafarers) Recommendation, 1970 (No. 142)	–	
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Accommodation of Crews Convention (Revised), 1949 (No. 92)	43	The Governing Body has decided upon the maintenance of the status quo with regard to Conventions Nos. 92 and 133 and Recommendations Nos. 140 and 141.
Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)	26	

Crew Accommodation (Air Conditioning) Recommendation, 1970 (No. 140)	–	
Crew Accommodation (Noise Control) Recommendation, 1970 (No. 141)	–	

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Accommodation of Crews Convention, 1946 (No. 75)	1	The Governing Body has invited the State party to Convention No. 75 to contemplate ratifying the Accommodation of Crews Convention (Revised), 1949 (No. 92), and the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133). It has also decided to recommend to the Conference the withdrawal of Convention No. 75.
Labour Inspection (Seamen) Recommendation, 1926 (No. 28)	–	The Governing Body has noted the replacement of Recommendation No. 28 by the Labour Inspection (Seafarers) Convention, (No. 178), and Recommendation, (No. 185), 1996.
Seamen's Welfare in Ports Recommendation, 1936 (No. 48)	–	The Governing Body has noted that Recommendations Nos. 48, 105, 106 and 138 are obsolete and has decided to propose to the Conference the withdrawal of these Recommendations in due course.
Ships' Medicine Chests Recommendation, 1958 (No. 105)	–	
Medical Advice at Sea Recommendation, 1958 (No. 106)	–	
Seafarers' Welfare Recommendation, 1970 (No. 138)	–	

Safety

Food and Catering (Ships' Crews) Convention, 1946 (No. 68)

Content of the Convention

Scope of application

Under Convention No. 68, each Member shall maintain in force laws or regulations concerning food supply and catering arrangements designed to secure the health and well-being of the crews of its seagoing vessels, whether publicly or privately owned, which are engaged in the transport of cargo or passengers for the purpose of trade and registered in a territory for which the Convention is in force.

Content of the laws and regulations required under the Convention

Laws or regulations shall require: the provision of food and water supplies which, having regard to the size of the crew and the duration and nature of the voyage, are suitable in respect of quantity, nutritive value, quality and variety; and the arrangement and equipment of the catering department in every vessel in such a manner as to permit of the service of proper meals to the members of the crew.

Inspection

The Convention prescribes requirements in respect of the system of inspection by the competent authority, including inspection at sea at prescribed intervals, special inspection on written complaint made by a number or proportion of the crew prescribed by national laws or regulations or on behalf of a recognized organization of shipowners or seafarers, as well as with regard to courses of training for employment in the catering department.

Practical application of the instrument

Four major issues have been raised by the Committee of Experts concerning the application of this Convention. Firstly, legislation which requires the provision of food to comply with the standards determined by the internal rules of a vessel does not satisfy the requirement of the Convention that the competent authority shall discharge the functions (except in so far as they are discharged in virtue of collective agreements) of the framing and enforcement of regulations concerning food and water supply and catering. Secondly, the competent authority shall adopt measures to secure the cooperation of the organizations of shipowners and seafarers in the application of the Convention. Thirdly, legislation should be adopted providing for specific penalties for the infringements referred to in the Convention. Finally, governments should transmit to the ILO copies of the annual inspection reports published by the competent authorities.

Accommodation of Crews Convention (Revised), 1949 (No. 92)

Content of the Convention

Scope of application

Convention No. 92 applies to every seagoing mechanically propelled vessel, whether publicly or privately owned, which is engaged in the transport of cargo or passengers for the purpose of trade and is registered in a territory for which the Convention is in force. The Convention does not apply to: vessels of less than 500 tons; vessels primarily propelled by sail but having auxiliary engines; vessels engaged in fishing or in whaling or in similar pursuits; or tugs. However, it shall be applied where reasonable and practicable to vessels between 200 and 500 tons and the accommodation of persons engaged in usual seagoing routine in vessels engaged in whaling or in similar pursuits.

Approval of plans of ships

Under Convention No. 92, before the construction of a ship is begun a plan of the ship shall be submitted for approval to the competent authority. Similar approval should be obtained before the construction of the crew accommodation is begun and before the crew accommodation in an existing ship is altered or reconstructed.

Specific standards of crew accommodation

Convention No. 92 prescribes, inter alia, detailed requirements in respect of its location; ventilation; heating; lighting; floor area per person of sleeping rooms and their equipment; mess room accommodation; recreation accommodation; sanitary accommodation; and hospital accommodation.

Practical application of the instrument

Analysis of the comments made by the Committee of Experts shows the major issues that have arisen concerning the application of the Convention. Firstly, the Convention

applies to publicly as well as privately owned vessels. Secondly, effect shall be given to the Convention by laws or regulations setting out detailed crew accommodation requirements in accordance with Parts II, III and IV of the Convention. Thirdly, crew accommodation shall be inspected on every occasion when a ship is registered or re-registered. Fourthly, a complaint that the crew accommodation is not in compliance with the terms of the Convention, the filing of which requires the competent authority to inspect the ship, may be brought not only by a recognized bona fide trade union of seafarers representing all or part of the crew, but also by a prescribed number or proportion of the members of the crew. Fifth, the mandatory provision of mechanical ventilation only on ships of not less than 3,000 gross tonnage and on ships of not less than 1,000 gross tonnage trading regularly to the tropics does not give full effect to the Convention, which applies to every seagoing vessel of 500 tons or over and, when practicable, to vessels between 200 and 500 tons. Sixth, writing desks shall be provided not only for officers, but also for the other members of the crew. Seventh, the existence of a practice on board ships that the berthing of crew members shall be so arranged that watches are separated and that no daymen share a room with watchkeepers could not be considered as a substitute for legislation to this effect. Eighth, under Article 16 of the Convention, the requirements laid down in the Convention can be modified only by means of “special regulations” adopted in consultation with the recognized bona fide trade unions of seafarers concerned and the organizations of shipowners and/or the shipowners employing them. A provision authorizing the Government Inspector of Shipping to grant such exemptions in individual cases does not comply with the Convention. Ninth, the inspection reports supplied by the government under part V of the article 22 report form should contain, inter alia, specific information concerning the application of the Convention and on the inspections carried out when a ship is registered or re-registered, when the crew accommodation of a ship has been substantially altered or reconstructed, or following a complaint by the members of the crew to the competent authority. In this respect, the provision of information concerning annual inspection visits and visits upon the departure of the vessel is not sufficient.

Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)

The adoption of Convention No. 133 reflected the generally recognized fact that, since the adoption of Convention No. 92, considerable advances had been made in many countries in improving the standard of crew accommodation for seafarers, and that the international minimum standards contained in Convention No. 92 on this subject were generally below existing practice in many maritime countries.⁶⁹ Correspondingly, the standards prescribed by Convention No. 133 are higher than those set out by Convention No. 92.⁷⁰

Countries which have ratified Convention No. 92 could also ratify Convention No. 133, and other countries would have the choice of ratifying either one or other or both of these Conventions. If a country ratifies only Convention No. 92, it is clearly not bound by the provisions of Convention No. 133. A country which ratifies both Conventions has to comply with the relevant provisions of both instruments, while a country which ratifies only the supplementary Convention is, by virtue of Article 3 of that Convention, also

⁶⁹ ILO: *Record of proceedings*, ILC, 55th (Maritime) Session, Geneva, 1970, ILO, p. 171.

⁷⁰ For example, while under Convention No. 92, the floor area per person of sleeping rooms intended for ratings shall be not less than 2.35 m² (25. ft²) in vessels of 800 tons or over, but under 3,000 tons, and not less than 2.78 m² (30 ft²) in vessels of 3,000 tons or over, under Convention No. 133 the same floor area shall be not less than 3.75 m² (40.36 ft²) in ships of 1,000 tons and over but less than 3,000 tons, and 4.25 m² (45.75 ft²) in ships of 3,000 tons or over but less than 10,000.

required to comply with the relevant substantive provisions of Convention No. 92 in respect of ships to which Convention No. 133 applies.⁷¹

Content of the Convention

Convention No. 133 applies to every seagoing ship, whether publicly or privately owned, which is engaged in the transport of cargo or passengers for the purpose of trade or is employed for any other commercial purpose, which is registered in a territory for which the Convention is in force, and of which the keel is laid, or which is at a similar stage of construction, on or after the date of coming into force of the Convention for that territory. The Convention applies to tugs where reasonable and practicable. The Convention does not apply to: ships of less than 1,000 tons; ships primarily propelled by sail, whether or not they are fitted with auxiliary engines; ships engaged in fishing or in whaling or in similar pursuits; and hydrofoils and air-cushion craft. But the Convention shall be applied where reasonable and practicable: to ships between 200 and 1,000 tons; and the accommodation of persons engaged in usual seagoing routine in ships engaged in whaling or in similar pursuits.

Obligations of the ratifying State in terms of laying down standards

Each Member for which Convention No. 133 is in force undertakes to comply, in respect of ships to which the Convention applies, with the provisions of Parts II and III of Convention No. 92; and the provisions of Part II of Convention No. 133. Nevertheless, any such requirements may be varied in the case of any ship if the competent authority is satisfied, after consultation with the organizations of shipowners and/or the shipowners and with the bona fide trade unions of seafarers, that the variations to be made provide corresponding advantages as a result of which the overall conditions are not less favourable than those which would result from the full application of the provisions of the Convention.

Specific standards of crew accommodation

Part III of Convention No. 133 sets out detailed requirements in respect of: the floor area per person of sleeping rooms; the floor area of mess rooms and their equipment; recreation accommodation; sanitary accommodation; additional sanitary facilities in ships of 1,600 tons or over; the minimum headroom in all crew accommodation (not less than 198 centimetres); and lighting.

Crews having differing and distinctive religious and social practices

In the case of ships the manning of which has to take account, without discrimination, of the interests of crews having differing and distinctive religious and social practices, the competent authority may, after consultation with the organizations of shipowners and/or the shipowners and with the bona fide trade unions of the seafarers concerned, and provided that these two sides are in agreement, permit variations in respect of certain requirements concerning the floor area in sleeping rooms and sanitary accommodation, on condition that such variations do not result in overall facilities less favourable than those which would result from the application of the provisions of the Convention.

⁷¹ *Record of Proceedings*, 1970, op. cit., p. 171.

Practical application of the instrument

Analysis of the comments of the Committee of Experts shows that six major issues have been raised concerning the application of Convention No. 133. Firstly, effect to the Convention shall be given by laws or regulations setting out detailed crew accommodation requirements in accordance with Parts II and III of the Convention. Secondly, when a Member has ratified Convention No. 133, but has not ratified Convention No. 92, under Article 4, paragraph 1, of Convention No. 133, it should have legislation applying the provisions of Parts II and III of Convention No. 92. Thirdly, a provision which does not require, but only recommends the arrangement of smoking room or library rooms, hobby and game rooms on ships of 8,000 tons or over does not comply with the Convention. Fourthly, sleeping rooms for officers in ships between 10,000 and 15,000 tons shall have private or intercommunicating bathrooms fitted with a water closet, as well as a tub or shower and a washbasin having hot and cold running fresh water. Fifth, facilities for washing, drying and ironing clothes shall be provided in all ships to which the Convention is applicable, regardless of their area of navigation. Finally, Article 22 Reports on Convention No. 133 should include information on the number of seafarers covered by the measures giving effect to the Convention.

Bedding, Mess Utensils and Miscellaneous Provisions (Ships' Crews) Recommendation, 1946 (No. 78)

The Recommendation calls upon each Member of the ILO to apply the following principles and to inform the International Labour Office, as requested by the Governing Body, of the measures taken to give effect thereto:

- Clean bed linen, blankets, bedspreads and mess utensils should be supplied to the members of the crew by the shipowner for use on board during service on the ship, and such members should be responsible for their return at times specified by the master and on completion of service in the ship. In the event of any article not being returned in good condition, fair wear and tear excepted, the member of the crew concerned should pay cost price.
- Bed linen, blankets and bedspreads should be of good quality, and plates, cups and other mess utensils should be of approved material which can be easily cleaned.
- Towels, soap and toilet paper for the members of the crew should be provided by the shipowner.

Crew Accommodation (Air Conditioning) Recommendation, 1970 (No. 140)

The Recommendation calls upon each ILO Member to ensure that all ships of 1,000 gross register tons or over constructed after the adoption of the Recommendation, except those regularly engaged in trades where temperate climatic conditions do not require this, are equipped with air-conditioning of crew accommodation. The competent authority should investigate the possibility of installing air conditioning in ships of less than 1,000 tons constructed after the adoption of the Recommendation. It should also consider the possibility of providing existing ships with air conditioning of all or part of crew accommodation spaces by means of conversion of mechanical ventilation systems to full air conditioning at a time when substantial structural alterations are being made to the accommodation.

**Crew Accommodation (Noise Control)
Recommendation, 1970 (No. 141)**

The Recommendation provides that the competent authority in each maritime country, in conjunction with the competent international bodies and with representatives of shipowners' and seafarers' organizations, should review research into the problem of noise on board ships with the object of obtaining and pooling data on the basis of which authoritative criteria and standards can be established at an early date, so that national provisions can be drawn up to protect seafarers, so far as necessary, from the ill effects of noise. In the light of the research, it should establish provisions for the reduction of, and protection of seafarers from, excessive and harmful noise on board ship as soon as this becomes reasonably possible. The Recommendation also lists specific measures to be considered.

**Prevention of Accidents (Seafarers) Convention
(No. 134) Recommendation (No. 142,) 1970****Content of the Convention*****Basic definitions***

For the purpose of this Convention, the term "seafarer" covers all persons who are employed in any capacity on board a ship, other than a ship of war, registered in a territory for which the Convention is in force and ordinarily engaged in maritime navigation. The term "occupational accidents" covers accidents to seafarers arising out of or in the course of their employment.⁷²

Duty to report and investigate occupational accidents

The competent authority in each maritime country shall take the necessary measures to ensure that occupational accidents are adequately reported and investigated, and comprehensive statistics of such accidents kept and analysed. All occupational accidents shall be reported and statistics shall not be limited to fatalities or to accidents involving the ship. The statistics shall record the numbers, nature, causes and effects of occupational accidents, with a clear indication of the department on board ship – for instance, deck, engine or catering – and of the area – for instance, at sea or in port – where the accident occurred. The competent authority shall undertake an investigation into the causes and circumstances of occupational accidents resulting in loss of life or serious personal injury, and such other accidents as may be specified in national laws or regulations.

Provisions concerning the prevention of occupational accidents

Provisions concerning the prevention of occupational accidents shall be laid down by laws or regulations, codes of practice or other appropriate means. These provisions shall refer to any general provisions on the prevention of accidents and the protection of health in employment which may be applicable to the work of seafarers, and shall specify measures for the prevention of accidents which are peculiar to maritime employment.

⁷² Convention No. 134 is applicable to fishing vessels, and fishermen do not constitute a category of persons in respect of whom there can be any doubt as to whether they are seafarers so as to justify their exclusion from the scope of the Convention pursuant to Article 1, paragraph 2. ILO, Interpretation of a decision concerning Convention No. 134, Prevention of Accidents (Seafarers), 1970, Poland, *Official Bulletin*, Vol. LVII, 1974, Nos. 2, 3 and 4, pp. 208-213.

In particular, these provisions shall cover the following matters:

- general and basic provisions;
- structural features of the ship;
- machinery;
- special safety measures on and below deck;
- loading and unloading equipment;
- fire prevention and fire-fighting;
- anchors, chains and lines;
- dangerous cargo and ballast;
- personal protective equipment for seafarers.

These provisions shall clearly specify the obligation of shipowners, seafarers and others concerned to comply with them. Generally, any obligation on the shipowner to provide protective equipment or other accident prevention safeguards shall be accompanied by provision for the use of such equipment and safeguards by seafarers and a requirement that they comply with the relevant accident prevention measures.

Inspection

The Convention requires that appropriate measures be taken to ensure the proper application of the accident prevention provisions by means of adequate inspection or otherwise. All necessary steps shall be taken to ensure that inspection and enforcement authorities are familiar with maritime employment and its practices. In order to facilitate application, copies or summaries of the provisions shall be brought to the attention of seafarers, for instance by display in a prominent position on board ship.

Appointment of a suitable person or persons responsible for accident prevention

Provision shall be made for the appointment, from amongst the crew of the ship, of a suitable person or suitable persons or of a suitable committee responsible, under the Master, for accident prevention.

Programmes for the prevention of occupational accidents

Programmes for the prevention of occupational accidents shall be established by the competent authority with the cooperation of shipowners' and seafarers' organizations. Implementation of such programmes shall be so organized that the competent authority, shipowners and seafarers or their representatives and other appropriate bodies may play an active part. In particular, national or local joint accident prevention committees or ad hoc working parties, on which both shipowners' and seafarers' organizations are represented, shall be established.

Instruction in prevention of accidents

The competent authority shall promote and, in so far as appropriate under national conditions, ensure the inclusion, as part of the instruction in professional duties, of instruction in the prevention of accidents and in measures for the protection of health in employment in the curricula, for all categories and grades of seafarers, of vocational training institutions. All appropriate and practicable measures shall also be taken to bring to the attention of seafarers information concerning particular hazards, for instance by means of official notices containing relevant instructions.

Content of the Recommendation

Subjects to be investigated in case of occupational accidents

Under the terms of the Recommendation, subjects to be investigated in pursuance of Article 3 of Convention No. 134, might include

- working environment, such as working surfaces, layout of machinery and means of access and lighting, and methods of work;
- incidence of accidents in different age groups;
- special physiological or psychological problems created by the shipboard environment;
- problems arising from physical stress on board ship, in particular as consequence of increased workload;
- problems arising from and effects of technical developments and their influence on the composition of crews; and
- problems arising from any human failures such as carelessness.

Codes of practice

In formulating the accident prevention provisions called for by Article 4 of Convention No. 134, Members should have due regard to any code of practice concerning the safety and health of seafarers which may have been published by the International Labour Office.⁷³

Functions of the joint accident prevention committees

The functions of national or local joint accident prevention committees and ad hoc working parties might include:

- the preparation of accident prevention provisions, rules and manuals;
- the organization of accident prevention training and programmes;
- the organization of accident prevention publicity, including films, posters, notices and brochures;

⁷³ See, ILO: *Accident prevention on board ship at sea and in port: An ILO code of practice*, (second edition), Geneva, 1996.

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- the distribution of accident prevention literature and information so that it reaches seafarers on board ship.

Accident prevention publicity

There should be continuous accident prevention publicity. Such publicity might take the following forms:

- instructional films, film strips and shorts, for use in vocational training centres for seafarers and where possible in film programmes screened on board ship;
- display of safety posters on board ship;
- inclusion of articles on hazards of maritime employment and accident prevention measures in periodicals read by seafarers;
- special campaigns, during which various media of publicity are used to instruct seafarers in accident prevention and safe working practices.

The publicity should take into account that there are often seafarers of different nationalities, languages and habits on board ship.

International cooperation

Members should further have regard to the need for international cooperation in the continuous promotion of action for the prevention of occupational accidents. Such cooperation might take the form of:

- bilateral or multilateral arrangements for uniformity in accident prevention standards and safeguards;
- exchange of information on particular hazards affecting seafarers and on means of preventing accidents;
- assistance in testing of equipment and inspection according to the national regulations of the country of registration of the ship;
- collaboration in the preparation and dissemination of accident prevention provisions, rules or manuals;
- collaboration in the production and use of training aids;
- joint facilities for or mutual assistance in the training of seafarers in accident prevention and safe working practices.

Practical application of the instrument

Analysis of the comments made by the Committee of Experts shows that six major issues have been raised concerning the application of the Convention. Firstly, regulations or any other appropriate instrument on accident prevention for seafarers should apply to all seafarers, as well as to fishermen engaged on fishing vessels. Secondly, a specific instrument for the prevention of occupational accidents of seafarers, giving effect to the provisions of the Convention, shall be adopted, be it a statutory instrument, a code of practice or any other appropriate means. Thirdly, appropriate measures shall be taken to bring to the attention of seafarers copies of summaries relating to accident prevention measures and to bring to their attention information concerning particular hazards, for instance by means of official notices containing relevant instructions. Fourthly, the

Convention is applicable to all accidents to seafarers arising out of or in the course of their employment, such as accidents arising on open sea. Its scope cannot be limited to the process of loading and unloading ships in ports and harbours. Fifth, under Article 2, paragraph 2, of the Convention, all occupational accidents shall be reported and statistics shall not be limited to fatalities or to accidents involving the ship.

Health

Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)

Content of the Convention

Scope of application

Convention No. 164 applies to every seagoing ship whether publicly or privately owned, which is registered in the territory of any Member for which the Convention is in force and which is ordinarily engaged in commercial maritime navigation. To the extent it deems practicable, after consultations with the representative organizations of fishing-vessel owners and fishermen, the competent authority shall apply the provisions of this Convention to commercial maritime fishing.

Measures of health protection and medical care for seafarers

Under the Convention, each Member shall by national laws or regulations make shipowners responsible for keeping ships in proper sanitary and hygienic conditions. Each Member shall ensure that measures providing for health protection and medical care for seafarers on board ship are adopted which:

- ensure the application to seafarers of any general provisions on occupational health protection and medical care relevant to the seafaring profession, as well as of special provisions peculiar to work on board;
- aim at providing seafarers with health protection and medical care as comparable as possible to that which is generally available to workers ashore;
- guarantee seafarers the right to visit a doctor without delay in ports of call where practicable;
- ensure that, in accordance with national law and practice, medical care and health protection while a seafarer is serving on articles are provided free of charge to seafarers;
- are not limited to treatment of sick or injured seafarers but include measures of a preventive character, and devote particular attention to the development of health promotion and health education programmes in order that seafarers themselves may play an active part in reducing the incidence of ill health among their number.

Medicine chests

Every ship to which the Convention applies shall be required to carry a medicine chest. The contents of the medicine chest and the medical equipment carried on board shall be prescribed by the competent authority taking into account such factors as the type of ship, the number of persons on board and the nature, destination and duration of voyages.

Ship's medical guides

Ships shall be also required to carry a ship's medical guide adopted by the competent authority, which shall explain how the contents of the medicine chest are to be used and shall be designed to enable persons other than a doctor to care for the sick or injured on board both with and without medical advice by radio or satellite communication.

Medical advice

The competent authority shall ensure by a prearranged system that medical advice by radio or satellite communication to ships at sea, including specialist advice, is available at any hour of the day or night. Such medical advice, including the onward transmission of medical messages by radio or satellite communication between a ship and those ashore giving the advice, shall be available free of charge to all ships irrespective of the territory in which they are registered.

Requirement to carry a medical doctor

The Convention requires that all ships to which it applies carrying 100 or more seafarers and ordinarily engaged on international voyages of more than three days' duration shall carry a medical doctor as a member of the crew responsible for providing medical care. All ships to which this Convention applies and which do not carry a doctor shall carry as members of the crew one or more specified persons in charge of medical care and the administering of medicines as part of their regular duties.

Hospital accommodation requirements

In any ship of 500 or more gross tonnage, carrying 15 or more seafarers and engaged in a voyage of more than three days' duration, separate hospital accommodation shall be provided. The competent authority may relax this requirement in respect of ships engaged in coastal trade.

Medical report form

A standard medical report form for seafarers shall be adopted by the competent authority as a model for use by ships' doctors, masters or persons in charge of medical care on board and hospitals or doctors ashore.

Practical application of the instrument

Analysis of the comments made by the Committee of Experts shows that five major issues have been raised concerning the application of the Convention. Firstly, in adopting or reviewing the ship's medical guide used nationally, the competent authority shall take into account international recommendations in this field, including the most recent edition of the *International Medical Guide for Ships* and the *Medical First Aide Guide for Use in Accidents Involving Dangerous Goods*. Secondly, a standard medical report form for seafarers specially designed for the exchange of medical and related information concerning individual seafarers between ship and shore in cases of illness or injury should be adopted by the competent authority. Thirdly, specific measures should be taken to ensure that the information contained in the medical report form is kept confidential. Fourthly, the competent authority should ensure that the contents of the medicine chest are listed and labelled with generic names in addition to any brand names used, expiry dates and conditions of storage. Fifth, Members for which the Convention is in force shall cooperate with one another in promoting protection of the health of seafarers and medical care for them on board ship, regardless of whether these Members have a seacoast.

Welfare

Seafarers' Welfare Convention (No. 163) and Recommendation (No. 173), 1987

Content of the Convention

Meaning of "welfare facilities and services"

For the purposes of the Convention, the term "welfare facilities and services" means welfare, cultural, recreational and information facilities and services.

Provision of welfare facilities and services

Each Member for which the Convention is in force undertakes to ensure that adequate welfare facilities and services are provided for seafarers both in port and on board ship. Each Member shall also ensure that the necessary arrangements are made for financing the welfare facilities and services provided in accordance with the provisions of the Convention. The Convention does not create a legal obligation for the ratifying Member to provide the respective facilities and services or to finance them. The Member merely has to ensure that such facilities and services are provided and that the necessary arrangements are made for their financing.

"For all seafarers"

Each Member undertakes to ensure that welfare facilities and services are provided in appropriate ports of the country for all seafarers, irrespective of nationality, race, colour, sex, religion, political opinion or social origin and irrespective of the State in which the ship on which they are employed is registered. It shall also determine, after consultation with the representative organizations of shipowners and seafarers, which ports are to be regarded as appropriate for the purposes of the Convention. Furthermore, each Member undertakes to ensure that the welfare facilities and services on every seagoing ship, whether publicly or privately owned, which is registered in its territory, are provided for the benefit of all seafarers on board.

Periodic review of welfare facilities and services

Welfare facilities and services shall be reviewed frequently to ensure that they are appropriate in the light of changes in the needs of seafarers resulting from technical, operational and other developments in the shipping industry.

Cooperation requirements

Each Member undertakes: to cooperate with other Members with a view to ensure the application of the Convention; and to ensure cooperation between the parties engaged and interested in promoting the welfare of seafarers at sea and in port.

Content of the Recommendation

Recommendation No. 173 supplements Convention No. 163, by dealing in greater detail with welfare facilities and services in ports, welfare facilities and services at sea, and savings and remittance of wages.

Practical application of the instruments

Analysis of the comments made by the Committee of Experts shows that two major issues have been raised concerning the application of the Convention. Firstly, the cooperation with other Members with a view to ensuring the application of Convention No. 163 is not limited to cooperation between two Members which have ratified the Convention, but also extends to cooperation between a ratifying Member and any other Member of the ILO. Secondly, the determination of which ports are to be regarded as “appropriate ports” for the purposes of Article 3 of the Convention shall be made by the Member after consultation with the representative organizations of shipowners and seafarers.

Inspection of seafarers’ working and living conditions

Why a special system of inspection for seafarers is necessary?

The existence of a special system of inspection of seafarers’ working and living conditions and, respectively, of special ILO instruments, is due to the fact that the conditions of work of seafarers are quite different from those of land workers. Seafarer and their ships are constantly moving about, and consequently work at sea cannot, like work on land, be subjected to administrative supervision while it is taking place.⁷⁴ Another factor is the specific character of laws and regulations dealing with maritime employment, which is distinct from that of the laws and regulations dealing with land occupations. This may require specific knowledge and qualifications on the part of the inspection staff, which are not readily available to general inspection staff dealing with the land occupations. The need to develop specific standards concerning the labour inspection for seafarers was initially addressed by the ILO in the Labour Inspection (Seamen) Recommendation, 1926 (No. 28). This Recommendation was subsequently superseded by the Labour Inspection (Seafarers) Convention, 1996 (No. 178).

Labour Inspection (Seafarers) Convention, 1996 (No. 178)

Content of the Convention

Scope of application

Except as otherwise provided in Article 1, the Convention applies to every seagoing ship, whether publicly or privately owned, which is registered in the territory of a Member for which the Convention is in force and is engaged in the transport of cargo or passengers for the purpose of trade or is employed for any other commercial purpose. The Convention does not apply to vessels less than 500 gross tonnage and, when not engaged in navigation, to vessels such as oil rigs and drilling platforms. To the extent the central coordinating authority deems it practicable, after consulting the representative organizations of fishing vessel owners and fishermen, the provisions of the Convention shall apply to commercial maritime fishing vessels.

⁷⁴ ILO: *General principles for the inspection of the conditions of work of seamen*, ILC, 9th Session, 1926, Questionnaire II, Geneva, pp. 14-15.

Basic definitions

For the purpose of the Convention, the term “central coordinating authority” means ministers, government departments or other public authorities having power to issue and supervise the implementation of regulations, orders or other instructions having the force of law in respect of inspection of seafarers’ working and living conditions in relation to any ship registered in the territory of the Member; the term “inspector” means any civil servant or other public official with responsibility for inspecting any aspect of seafarers’ working and living conditions, as well as any other person holding proper credentials performing an inspection for an institution or organization authorized by the central coordinating authority. The term “seafarers’ working and living conditions” means the conditions such as those relating to the standards of maintenance and cleanliness of shipboard living and working areas, minimum age, articles of agreement, food and catering, crew accommodation, recruitment, manning, qualifications, hours of work, medical examinations, prevention of occupational accidents, medical care, sickness and injury benefits, social welfare and related matters, repatriation, terms and conditions of employment which are subject to national laws and regulations, and freedom of association as defined in the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87).

Obligation to maintain a system of inspection

Under the Convention each Member for which it is in force shall maintain a system of inspection of seafarers’ working and living conditions.

Functions of the central coordinating authority

The central coordinating authority shall coordinate inspections wholly or partly concerned with seafarers’ working and living conditions and shall establish principles to be observed. The central coordinating authority shall in all cases be responsible for the inspection of seafarers’ working and living conditions. It may authorize public institutions or other organizations it recognizes as competent and independent to carry out inspections of seafarers’ working and living conditions on its behalf. It shall maintain and make publicly available a list of such institutions or organizations.

Periodicity of inspections

Each Member shall ensure that all ships registered in its territory are inspected at intervals not exceeding three years and, when practicable, annually, to verify that the seafarers’ working and living conditions on board conform to national laws and regulations. If a Member receives a complaint or obtains evidence that a ship registered in its territory does not conform to national laws and regulations in respect of seafarers’ working and living conditions, the Member shall take measures to inspect the ship as soon as practicable. In cases of substantial changes in construction or accommodation arrangements, the ship shall be inspected within three months of such changes.

Status, conditions of service and powers of inspectors

Inspectors shall have the status and conditions of service to ensure that they are independent of changes of government and of improper external influences. Inspectors provided with proper credentials shall be empowered:

- to board a ship registered in the territory of the Member and to enter premises as necessary for inspection;

- to carry out any examination, test or inquiry which they may consider necessary in order to satisfy themselves that the legal provisions are being strictly observed;
- to require that deficiencies are remedied; and
- where they have grounds to believe that a deficiency constitutes a significant danger to seafarers' health and safety, to prohibit, subject to any right of appeal to a judicial or administrative authority, a ship from leaving port until necessary measures are taken, the ship not being unreasonably detained or delayed.

Compensation for unreasonable detention or delay of ships

If a ship is unreasonably detained or delayed, the shipowner or operator of the ship shall be entitled to compensation for any loss or damage suffered. In any instance of alleged unreasonable detention or delay, the burden of proof shall lie with the shipowner or operator of the ship.

Record of inspections and annual reports

The central coordinating authority shall maintain records of inspections of seafarers' working and living conditions. It shall publish an annual report on inspection activities, including a list of institutions and organizations authorized to carry out inspections on its behalf. This report shall be published within a reasonable time after the end of the year to which it relates and in any case within six months.

Labour Inspection (Seafarers) Recommendation, 1996 (No. 185)

The Recommendation contains detailed provisions concerning cooperation and coordination between public institutions and other organizations concerned with seafarers' working and living conditions as well as between inspectors, shipowners, seafarers and their respective organizations (Part I), the organization of inspection (Part II), the status, duties and powers of inspectors (Part III), and the annual reports published by the central coordinating authority and inspection reports (Part IV).

Practical application of the instruments

Convention No. 178 entered into force on 22 April 2000 and the first reports by States which have ratified the Convention are not due until 2004.

V. Social security

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments States	(Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)	
Social Security (Seafarers) Convention (Revised), 1987 (No. 165)	2	This Convention was adopted after 1985 and is considered up to date.

Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)	59	The Governing Body has decided upon the revision of Conventions Nos. 8, 55 and 71 and Recommendations Nos. 10, 75 and 76. It has considered that the revision of these instruments should be considered along with the Social Security (Seafarers) Convention (Revised), 1987 (No. 165), and other maritime instruments in the context of the elaboration of a draft framework instrument on seafarers.
Unemployment Insurance (Seamen) Recommendation, 1920 (No. 10)	–	
Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)	16	
Seafarers' Pensions Convention, 1946 (No. 71)	13	
Seafarers' Social Security (Agreements) Recommendation, 1946 (No. 75)	–	
Seafarers' (Medical Care for Dependents) Recommendation, 1946 (No. 76)	–	

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Sickness Insurance (Sea) Convention, 1936 (No. 56)	18	The Governing Body has invited the States parties to Convention No. 56 to contemplate ratifying the Social Security (Seafarers) Convention (Revised), 1987 (No. 165), the ratification of which would, ipso jure, involve the immediate denunciation of Convention No. 56.
Social Security (Seafarers) Convention, 1946 (No. 70)	6	The Governing Body has invited the States parties to Convention No. 70 to contemplate ratifying the Social Security (Seafarers) Convention (Revised), 1987 (No. 165), the ratification of which would ipso jure, involve the immediate denunciation of Convention No. 70. It has also decided that the status of Convention No. 70 will be re-examined in due course, in particular with regard to its possible withdrawal.

The Conference adopted standards on the social security of seafarers as early as 1920. It first turned its attention to the provision of unemployment benefit (Convention No. 8). In 1936, the Conference adopted two complementary texts: Convention No. 55, which determines the liability of shipowners in the case of sickness, accident or death of seafarers and Convention No. 56 covering the sickness insurance of seafarers. Ten years later, the Conference strengthened the protection of this category of workers through the adoption of two new Conventions: Convention No. 70, which is designed to resolve all the social security problems of seafarers for all contingencies in a simple and global instrument, and Convention No. 71 which covers seafarers' pensions. In the 1980s, the revision of all of the above Conventions was envisaged in so far as it was considered preferable to replace them by a single instrument of global scope. In 1987, the Conference therefore adopted the Social Security (Seafarers) Convention (Revised), 1987 (No. 165), which does not however revise Conventions Nos. 56 and 70.

At its 274th Session (March 1999), the Governing Body invited the Joint Maritime Commission to undertake an examination of the relevant ILO instruments, including the instruments concerning the social security of seafarers, and to submit its conclusions. The Commission met in Geneva in January 2001. It concluded that the development of an instrument which would bring together into a consolidated text as much of the existing body of ILO instruments as it proved possible should be a priority for the maritime sector

in order to improve the relevance of these standards to the needs of all the stakeholders in the sector. With particular reference to the social security instruments, the Commission recommended the revision of Conventions Nos. 8, 55 and 71 taking into account Convention No. 165 and other maritime instruments, in the context of the development of a framework Convention on labour standards in the maritime sector.⁷⁵ The Commission reached its conclusions on the basis, inter alia, of the proposals made by a Joint Working Group representing organizations of shipowners and seafarers set up to reach conclusions on these instruments. In this respect, it should be emphasized that the working group noted that, although a number of maritime social security standards had been superseded by Convention No. 165, the latter had only received two ratifications.⁷⁶ The working group also considered that Convention No. 165 “was unlikely to attract widespread ratifications in the near future and could not therefore be regarded as an adequate replacement for the previously adopted instruments.”⁷⁷ In this context, only a brief analysis is made of Conventions Nos. 8, 55, 71 and 165.

Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)

This Convention provides that, in every case of loss or foundering of any vessel, the shipowner shall pay each seafarer an indemnity against unemployment resulting from such loss or foundering. The indemnity shall be paid for the days during which the seafarer remains in fact unemployed, although the total indemnity payable may be limited to two months’ wages. Provision of this indemnity must not be made subject to a qualifying period nor depend on proof that the seafarer has done everything in his power to save the vessel, its passengers or its cargo.⁷⁸

Shipowners’ Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)

In the event of sickness and injury, the shipowner has to provide the seafarer with medical care (medical treatment, medicines and therapeutical appliances), board and lodging until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character. The shipowner also has to continue to pay full wages as long as the sick or injured person remains on board.⁷⁹ The liability of the shipowner (medical care and the payment of wages in whole or in part) may be limited by national laws or regulations to a period of 16 weeks. Furthermore, these liabilities cease if there is in force a compulsory insurance scheme providing medical care or cash benefits. The expense of repatriating sick or injured seafarers and, where appropriate, burial expenses, are also to be paid by the shipowner.

⁷⁵ See docs. GB. 280/LILS/WP/PRS/1/3 and GB.280/5(Corr.).

⁷⁶ Hungary (1989) and Spain (1991).

⁷⁷ See doc. GB.274/LILS/WP/PRS/2, p. 38, and the Appendix to doc. GB.280/LILS/WP/PRS/1/3.

⁷⁸ These two points are very frequently the subject of comments by the Committee of Experts.

⁷⁹ When the sick or injured seafarer is landed, the shipowner has to pay wages in whole or in part if the seafarer has dependants.

Seafarers' Pensions Convention, 1946 (No. 71)

States which ratify Convention No. 71 undertake to establish a scheme for the payment of pensions to seafarers on retirement from sea service. The pensions must be provided to seafarers having completed a prescribed period of sea service on attaining the age of 55 or 60 years. Where pensions are provided on attaining the age of 55 years, their rate shall not be less than the total obtained by computing for each year of sea service 1.5 per cent of the remuneration on the basis of which contributions were paid. This rate rises to 2 per cent for pensions provided at the age of 60 years. Furthermore, seafarers shall not contribute more than half the cost of the pensions payable under the scheme.

Social Security (Seafarers) Convention (Revised), 1987 (No. 165)

As indicated above, Convention No. 165 groups together in a single instrument all the contingencies to which seafarers may be exposed in relation to social security. The Convention affords them in this field protection not less favourable than that enjoyed by shoreworkers. States which ratify the Convention therefore undertake to comply with the obligations for at least three of the nine branches of social security set out in Article 3.⁸⁰ For each of the branches accepted, the State has to specify whether it intends to guarantee benefits corresponding to the level set out in Convention No. 102 or the higher levels guaranteed in Conventions Nos. 121, 128 and 130.⁸¹

The Convention also contains provisions governing the liability of shipowners in the event of sickness of the seafarer (medical care, maintenance of wages, repatriation) and the protection of foreign or migrant seafarers (determination of the applicable legislation, equality of treatment, participation in schemes for the maintenance of rights in course of acquisition and payment of benefits abroad).

⁸⁰ The nine branches set out in Article 3 of Convention No. 165 correspond to the nine branches covered by the Social Security (Minimum Standards) Convention, 1952 (No. 102), namely medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit. For each of these branches, Convention No. 102 sets out minimum levels to be attained with regard in particular to the persons protected, the nature and level of benefits and their qualifying conditions. A higher level of protection was subsequently set out in Conventions Nos. 121, 128 and 130, which respectively cover employment injury benefit, invalidity, old-age and survivors' benefit and medical care and sickness benefit.

⁸¹ Please see Chapter 11 on social security, in which these Conventions are examined.

Chapter 15

Fishermen

D.A. Pentsov

Instruments	Number of ratifications (at 01.10.01)	Status
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Medical Examination (Fishermen) Convention, 1959 (No. 113)	29	The Governing Body has decided upon the revision of Convention No. 113 and the inclusion of this question among the proposals for the agenda of the International Labour Conference.
Fishermen's Articles of Agreement Convention, 1959 (No. 114)	22	The Governing Body has decided on the partial revision of Convention No. 114.
Fishermen's Competency Certificates Convention, 1966 (No. 125)	10	The Governing Body has decided on the revision of Convention No. 125 and the inclusion of this question among the proposals for the agenda of the International Labour Conference.
Vocational Training (Fishermen) Recommendation, 1966 (No. 126)	–	The Governing Body has decided on the revision of Recommendation No. 126 and the inclusion of this question among the proposals for the agenda of the International Labour Conference.
Requests for information (Instruments for which the Governing Body has confined itself at this stage to requesting additional information from member States either on the possible obstacles to their ratification or implementation, or the possible need for the revision of these instruments, or on specific issues.)		
Accommodation of Crews (Fishermen) Convention, 1966 (No. 126)	22	The Governing Body has invited member States to inform the Office of any obstacles or difficulties encountered that might prevent or delay the ratification of Convention No. 126 or that might point to the need for a full or partial revision of the Convention.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Hours of Work (Fishing) Recommendation, 1920 (No. 7)	–	The Governing Body has decided on the maintenance of the status quo with regard to Recommendation No. 7.

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Minimum Age (Fishermen) Convention, 1959 (No. 112)	9	<p>The Governing Body has invited the States parties to Convention No. 112:</p> <p>(i) to contemplate ratifying the Minimum Age Convention, 1973 (No. 138);</p> <p>(ii) to take into consideration the conclusions of the Tripartite Meeting on Safety and Health in the Fishing Industry* (Geneva, 13-17 December 1999), in consultation with the employers' and workers' organizations concerned.</p> <p>* According to these conclusions, the minimum age for admission to employment and work in the maritime fishing industry should in no case be lower than 16 years and this activity should be considered as hazardous with regard to Article 3 of Convention No. 138.</p> <p>The Governing Body has also decided that the status of Convention No. 112 will be re-examined in due course, in the light of its possible abrogation when the level of ratifications of Convention No. 112 has substantially decreased as a consequence of ratification of Convention No. 138.</p>

Because fishermen's work, like seafarers' work, is related to the sea, similar factors to those that justify the need for separate treatment for seafarers underlie the ILO's instruments covering fishermen. As regards the special conditions associated with such work, they are also related to the fact that for many fishermen, or at least for those working on large fishing vessels, their vessel is both a workplace and a home. Fishermen's work on board vessels at sea without the possibility to go ashore for prolonged periods of time, as with seafarers, makes it important to establish certain standards, such as those for crew accommodation, food and catering, and health protection. Similarly, special protection for fishermen is necessitated by the existence of certain natural, technical and social risks inherent in maritime employment. The natural risks to which fishermen are exposed, caused by the perils of the sea, are aggravated by the necessity to operate fishing gear and equipment on open decks. Commercial fishing is generally considered to be one of the most hazardous of all occupations. The most frequent accidents to vessels are foundering, fire, stranding, capsizing and collision.¹ For small vessels, bad weather poses even greater risks, since they may be more easily damaged by or lost in powerful storms.² The technical risks faced by fishermen are also greater than those faced by seafarers. The necessity to carry the substantial amount of equipment that is required to store and (often) process fish does not leave much living and working space, and fishermen must therefore usually work very close to powerful and potentially dangerous machinery. In addition to fatalities and injuries, many fishermen also suffer from skin and respiratory diseases, as well as from the effects of noise and vibration.³ Finally, fishermen are subject to various social risks, again similar to those faced by seafarers, including abandonment in foreign ports following the bankruptcy of their employers, culture shock and abuses of human rights.⁴

In spite of all the apparent similarities between the work of seafarers and fishermen, there are significant differences from a technical and organizational point of view. First, while the shipping industry is more or less homogeneous, the fishing industry is extraordinarily diverse. Wide differences exist not only between countries, but also within individual countries. At one extreme are large multinational joint ventures, utilizing large factory trawlers and numerous other vessels, and employing thousands of workers on several oceans. At the other are small wooden canoes and other boats used by individual fishermen to catch sufficient food for their families and/or for sale in their local communities. Most fishing operations fall somewhere between these two extremes.⁵ Second, while there is usually a formal employment relationship between shipowner and a seafarer, the majority of fishermen still belong to the informal sector. This includes self-employed fishermen, the employees of very small fishing enterprises employing one or two fishermen on either a regular or casual basis, and fishermen who have no formal employment relationship with their employer.⁶ Third, while seafarers are usually subject to the system of paying fixed wages, the wage system in most general use in the fishing

¹ ILO: *Fishermen's conditions of work and life*, Geneva, 1988 (doc. CFI/4/1988/1), p. 46.

² ILO: *Safety and health in the fishing industry*, report for discussion at the Tripartite Meeting on Safety and Health in the Fishing Industry, Geneva, 1999, pp. 16-17.

³ *ibid.*, pp. 13-14.

⁴ *ibid.*, pp. 13-14.

⁵ *ibid.*, p. 3.

⁶ *ibid.*, p. 9.

industry is that of a share in the value of the catch.⁷ Fourth, while the profession of seafarers is generally considered to be a full-time occupation (even though there may be significant periods of time between two consecutive contractual engagements), many fishermen are engaged only partly in fishing and derive the rest of their income from agricultural or other occupations.⁸

The existence of such substantial differences between the work of seafarers and fishermen could well justify the existence of a general rule according to which the ILO maritime instruments are not applicable to fishermen, with fishermen's work being governed by separate ILO instruments.⁹ There are currently seven instruments (five Conventions and two Recommendations) which apply exclusively to fishermen: the Minimum Age (Fishermen) Convention, 1959 (No. 112); the Medical Examination (Fishermen) Convention, 1959 (No. 113); the Fishermen's Articles of Agreement Convention, 1959 (No. 114); the Fishermen's Competency Certificates Convention, 1966 (No. 125); the Accommodation of Crews (Fishermen) Convention, 1966 (No. 126); the Hours of Work (Fishing) Recommendation, 1920 (No. 7); and the Vocational Training (Fishermen) Recommendation, 1966 (No. 126). At the same time, the existence of numerous similarities between the work of seafarers and that of fishermen raises the question of the applicability of instruments dealing with seafarers to fishermen. Depending on the possibility of their application to fishermen, they could be subdivided into three major groups. Some maritime instruments, such as the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), expressly exclude fishermen. Other instruments, such as the Seafarers' Welfare Convention, 1987 (No. 163), the Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164), and the Recruitment and Placement of Seafarers Convention, 1996 (No. 179),¹⁰ may be applied by the competent authorities to commercial maritime shipping "to the extent it deems practicable, after consultation with the representative organizations of fishing vessel owners and fishermen". Some other instruments apply to fishermen expressly, such as the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55), and the Sickness Insurance (Sea) Convention, 1936 (No. 56), or implicitly, namely the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134). This chapter deals only with those ILO Conventions and Recommendations which apply exclusively to fishermen.

Minimum Age (Fishermen) Convention, 1959 (No. 112)

Content of the Convention

Scope of application

The Convention applies to fishing vessels, which include all ships and boats, of any nature whatsoever, whether publicly or privately owned, which are engaged in maritime

⁷ *ibid.*, p. 10.

⁸ *ibid.*, p. 10.

⁹ That is, that fishermen's work is governed exclusively by separate ILO Conventions and Recommendations.

¹⁰ Resolution concerning the application of revised Convention No. 9 to the fisheries sector, adopted at the 84th (Maritime) Session of the ILC, ILO: *Record of Proceedings*, 84th (Maritime) Session of the ILC, Geneva, 1997, p. 1 (resolutions adopted by the Conference).

fishing in salt waters, but does not apply to fishing in ports and harbours or in estuaries of rivers, or to individuals fishing for sport or recreation.

Minimum age of employment

Children under the age of 15 years must not be employed or work on fishing vessels.

Exceptions

Children under the age of 15 years may occasionally take part in the activities on board fishing vessels during school holidays, subject to the conditions that the activities in which they are engaged: (a) are not harmful to their health or normal development; (b) are not such as to prejudice their attendance at school; and (c) are not intended for commercial profit. The Convention also allows national laws or regulations to provide for the issue of certificates permitting children of not less than 14 years of age 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 to the immediate benefit to the child of the employment proposed, that such employment will be beneficial to the child. In addition, young persons under the age of 18 years must not be employed or work on coal-burning fishing vessels as trimmers or stokers.

Work on school ships or training ships

The age restrictions on the employment or work of children do not apply to work done by children on school ships or training ships, provided that such work is approved and supervised by public authority. This exception, however, cannot be applied so as to permit a 13-year-old child, who is not employed on board any other fishing vessel, to follow his father or elder brothers on board a small motor craft, sampan or bamboo raft engaged in coastal fishing, under the care and protection of his immediate family.¹¹

Practical application of the Convention

Analysis of the comments of the Committee of Experts shows that two major issues have been raised relating to the application of this Convention. First, specific measures must be taken to impose a minimum age of 15 years for employment in fishing vessels. Second, since the Convention applies to fishing vessels regardless of their tonnage or area of navigation, limitations on its application based on the tonnage of a vessel or the area of its navigation are contrary to the Convention.

Medical Examination (Fishermen) Convention, 1959 (No. 113)

Content of the Convention

Scope of application

Under this Convention, no person shall be engaged for employment in any capacity on a fishing vessel unless he produces a certificate attesting to his fitness for the work for

¹¹ ILC: interpretation of a decision concerning the Minimum Age (Fishermen) Convention, 1959 (No. 112) (China). See, ILO: *Official Bulletin*, Vol. L, 1967, No. 3, pp. 343-345.

which he is to be employed signed by a medical practitioner who has been approved by the competent authority. For the purposes of the Convention, the term “fishing vessel” includes all ships and boats, of any nature whatsoever, whether publicly or privately owned, which are engaged in maritime fishing in salt waters.

Nature of the medical examination and particulars to be included in the medical certificate

The Convention requires the competent authority, after consultation with the fishing boat owners’ and fishermen’s organizations concerned, where such exist, to prescribe the nature of the medical examination to be made as well as the particulars to be included in the medical certificate. In addition, when prescribing the nature of the examination, due regard must be had to the age of the person to be examined and the nature of the duties to be performed. In particular, the medical certificate must attest that the person is not suffering from any disease likely to be aggravated by, or to render him unfit for, service at sea or likely to endanger the health of other persons on board.

Period of validity of the medical certificate

In the case of young persons of less than 21 years of age, the medical certificate has to remain in force for a period not exceeding one year from the date on which it was granted. In the case of persons who have attained the age of 21 years, the competent authority has to determine the period for which the medical certificate shall remain in force. If the period of validity of a certificate expires during the course of a voyage, the certificate shall continue in force until the end of the that voyage.

Further examinations

Arrangements must be made to enable a person who, after examination, has been refused a certificate to apply for further examination by a medical referee or referees who must be independent of any fishing boat owner or of any organization of fishing boat owners or fishermen.

Practical application of the Convention

Three major issues have been raised by the Committee of Experts relating to the application of the Convention. First, the Convention requires that an annual examination for workers who are under the age of 21, and not only for those workers who are under the age of 18. Second, the consultations with the fishing boat owners’ and fishermen’s organizations concerned on the nature of the medical examination and the particulars to be included in the medical certificate should take place prior to the adoption of the applicable laws and regulations. Third, a medical referee or referees conducting a further medical examination in the case of a refusal of a certificate after an initial examination must be independent of any fishing boat owners or of any organization of fishing boat owners or fishermen. This independence is particularly important in those countries where, under the national legislation, employment may be terminated because of the inability of the employee to fulfil the responsibilities of a position due to poor health.

Fishermen's Articles of Agreement Convention, 1959 (No. 114)

Content of the Convention

Scope of application

Under Convention No. 114, all persons employed or engaged in any capacity on board any fishing vessel and entered on the ship's articles must sign articles of agreement with the owner of the fishing vessel or his authorized representative. Pilots, cadets and duly indentured apprentices, navel ratings and other persons in the permanent service of a government are excluded from this requirement. The members of fishermen's cooperatives fall within the scope of the Convention if they are entered on ship's articles. As regards the master, when he acts as the representative of the owner in signing articles of agreement with the crew, he does not come within the scope of the Convention. But when this responsibility is undertaken by the owner or some other person on his behalf, provided the master is entered on the ship's articles, he is covered by the terms of the Convention and is required to enter into articles of agreement in the same way as other members of the crew.¹²

Content of the agreement

The agreement shall not contain anything which is contrary to the provisions of national law. It may be made either for a definite period, or for a voyage or, if permitted by national law, for an indefinite period. The agreement must state clearly the respective rights and obligations of each of the parties. It must contain the following particulars, except in so far as the inclusion of one or more of them is rendered unnecessary by the fact that the matter is regulated in another manner by national laws or regulations:

- the surname and other names of the fishermen, the date of his birth or his age, and his birthplace;
- the place at which and date on which the agreement was completed;
- the name of the fishing vessel or vessels on board which the fisherman undertakes to serve;
- the voyage or voyages to be undertaken, if this can be determined at the time of making the agreement;
- the capacity in which the fisherman is to be employed;
- if possible, the place at which and date on which the fisherman is required to report on board for service;
- the scale of provisions to be supplied to the fisherman, unless some alternative system is provided for by national law;
- the amount of his wages, or the amount of his share and the method of calculating such share if he is to be remunerated on a share basis, or the amount of his wage and

¹² Interpretation of a decision concerning the Fishermen's Articles of Agreement Convention, 1959 (No. 114) (Netherlands), ILO: *Official Bulletin*, Vol. LVII, Nos. 2, 3 and 4, pp. 200-204.

share and the method of calculating the latter if he is to be remunerated on a combined basis, and any agreed minimum wage;

- the termination of the agreement and the conditions thereof, that is to say:
 - (i) if the agreement has been made for a definite period, the fixed date for its expiry;
 - (ii) if the agreement has been made for a voyage, the port of destination and the time which has to expire after arrival before the fisherman shall be discharged;
 - (iii) if the agreement has been made for an indefinite period, the conditions which shall entitle either party to rescind it, as well as the required period of notice for rescission: provided that such period must not be less for the owner of the fishing vessel than for the fisherman;
- any other particulars which national law may require.

Termination of agreements

An agreement entered into for a voyage, for a definite period, or for an indefinite period, is duly terminated by:

- mutual consent of the parties;
- death of the fisherman;
- loss or total unseaworthiness of the fishing vessel;
- any other cause that may be provided for in national law.

National law, collective agreements or individual agreements have to determine the circumstances in which the owner or skipper may immediately discharge a fisherman, as well as those in which the fisherman may demand his immediate discharge.

Record of employment

A record of employment must be maintained for every fisherman by, or in a manner prescribed by, the competent authority. At the end of each voyage or venture, a record of service in regard to that voyage or venture has to be made available to the fisherman concerned or entered in his service book.

Practical application of the Convention

An analysis of the comments made by the Committee of Experts shows that three major issues have been raised concerning its application. First, national legislation should contain provisions ensuring the application of the Convention. Second, in the case of the employment of a large number of non-national fishermen who may not speak the language of the employer, it becomes increasingly important for national legislation to include adequate provisions to ensure that the fishermen have understood the agreement. Third, if the model articles of agreement for fishermen are to be adopted in a certain country, they should incorporate all of the particulars that the Convention requires to be recorded in the individual articles of agreement.

Fishermen's Competency Certificates Convention, 1966 (No. 125)

Content of the Convention

Scope of application

The Convention applies to all ships and boats, of any nature whatsoever, whether publicly or privately owned, which are engaged in maritime fishing in salt waters and are registered in a territory for which the Convention is in force, with the exception of; (a) ships and boats of less than 25 gross registered tons; (b) ships and boats engaged in whaling or similar pursuits; (c) ships and boats engaged in fishing for sport or recreation; (d) fishery research and fishery protection vessels.

Obligation to establish standards of qualification

Each Member which ratifies the Convention undertakes to establish standards of qualification for certificates of competency entitling a person to perform the duties of skipper, mate or engineer on board a fishing vessel.

Minimum number of certificated personnel

All fishing vessels to which the Convention applies must be required to carry a certificated skipper. All fishing vessels over 100 gross registered tons engaged in operations and areas to be defined by national laws or regulations must be required to carry a certificated mate. All fishing vessels with an engine power above a level to be determined by the competent authority, after consultation with the fishing vessel owners' and fishermen's organizations where such exist, must be required to carry a certificated engineer, provided that the skipper or mate of a fishing vessel may act as engineer in appropriate cases and on condition that he also holds an engineer's certificate. Nevertheless, the competent authority may in individual cases permit a fishing vessel to put to sea without the full complement of certificated personnel if it is satisfied that no suitable substitutes are available and that, having regard to all the circumstances of the case, it is safe to allow the vessel to put to sea.

Minimum age for the issue of a certificate of competency

The minimum age prescribed by national laws or regulations for the issue of a certificate of competency must not be less than: (a) 20 years in the case of a skipper; (b) 19 years in the case of a mate; (c) 20 years in the case of an engineer.

Minimum professional experience for the issue of a certificate

The minimum professional experience prescribed by national laws or regulations must be as follows: for the issue of a mate's certificate of competency – not less than three years' sea service engaged in deck duties; for the issue of a skipper's certificate of competency – not less than four years' sea service engaged in deck duties; and for the issue of an engineer's certificate of competency – not less than three years' sea service in the engine room. In respect of persons who have successfully completed an approved training course, these periods of sea service may be reduced by the period of training, but in no case by more than 12 months.

Other matters

The Convention also prescribes the content of the examinations organized for the purpose of testing whether candidates for competency certificates possess the

qualifications necessary for performing the corresponding duties, and requires governments to ensure the enforcement of national laws or regulations giving effect to its provisions by an efficient system of inspection.

Practical application of the Convention

Analysis of the comments of the Committee of Experts shows that two major issues have been raised relating to the application of this Convention. The first concerns the requirement that effect is to be given to the Convention by national laws or regulations, and their absence cannot be substituted by certain practical arrangements. Secondly, national legislation should contain an explicit provision requiring all fishing vessels of over 100 gross registered tonnes, engaged in operations and areas to be defined by national laws or regulations, to carry a certificated mate regardless of whether the national fishing fleet comprises low tonnage boats, thereby rendering this provision of little relevance to the country concerned.

Accommodation of Crews (Fishermen) Convention, 1966 (No. 126)

Content of the Convention

Scope of application

Convention No. 126 applies to all seagoing, mechanically propelled ships and boats, of any nature whatsoever, whether publicly or privately owned, which are engaged in maritime fishing in salt waters and are registered in a territory for which the Convention is in force. The Convention does not apply to ships and boats of less than 75 tons, provided that it must be applied to ships and boats of between 25 and 75 tons where the competent authority determines, after consultation with the fishing vessel owners' and fishermen's organizations where such exist, that this is reasonable and practicable. In addition, the Convention does not apply to: ships and boats normally employed in fishing for sport or recreation; ships and boats primarily propelled by sail but having auxiliary engines; ships and boats engaged in whaling or similar pursuits; and fishery research and fishery protection vessels.

Approval of plans of vessels

Under Convention No. 126, before the construction of a fishing vessel is begun, and before the crew accommodation of an existing vessel is substantially altered or reconstructed, detailed plans of, and information concerning, the accommodation has to be submitted to the competent authority for approval. On every occasion when: (a) a fishing vessel is registered or re-registered; (b) the crew accommodation of a vessel has been substantially altered or reconstructed; or (c) complaint that the crew accommodation is not in compliance with the terms of this Convention has been made to the competent authority, in the prescribed manner and in time to prevent any delay to the vessel, by a recognized fishermen's organization representing all or part of the crew or by a prescribed number or proportion of the members of the crew of the vessel, the competent authority shall inspect the vessel and satisfy itself that the crew accommodation complies with the requirements of the laws and regulations.

Specific standards of crew accommodation

Convention No. 126 prescribes, inter alia, detailed requirements in respect of the location of crew accommodation, ventilation, heating, lighting, floor area per person of

sleeping rooms and their equipment, mess room accommodation, sanitary accommodation, accommodation for ill or injured members of the crew, accommodation for the hanging of oilskins, and galley and cooking equipment.

Practical application of the Convention

A review of the comments made by the Committee of Experts indicates that two major issues have been raised relating to the application of the Convention. First, as the Convention requires that one washbasin must be provided for every six persons or less, the provision of one washbasin for every eight persons is not in compliance with the Convention. Second, under the terms of the Convention, all practicable measures have to be taken to protect crew accommodation against the admission of flies and other insects. The full application of this requirement is not ensured when measures are only foreseen where the vessel regularly navigates in mosquito-infected zones. Third, adequate systems of heating of crew accommodation, as required by climatic conditions, must be provided on all vessels to which the Convention is applicable, including those below 500 tons.

Hours of Work (Fishing) Recommendation, 1920 (No. 7)

Recalling a declaration in the Constitution of the ILO that all industrial communities should endeavour to adapt, so far as their special circumstances will permit, “an eight hours’ day or a forty-eight hours’ week as the standard to be aimed at where it has not already been attained”, the Recommendation calls upon each Member of the ILO to enact legislation limiting the hours of work of all workers employed in the fishing industry, with such special provisions as may be necessary to meet the conditions peculiar to the fishing industry in each country. In framing such legislation, each government should consult with the organizations of employers and workers concerned.

Vocational Training (Fishermen) Recommendation, 1966 (No. 126)

The Recommendation applies to all training for work on board fishing vessels, but does not apply to persons fishing for sport or recreation. For the purposes of the Recommendation, the term “fishing vessel” includes all ships and boats, of any nature whatsoever, whether publicly or privately owned, which are engaged in maritime fishing in salt waters, with the exception of ships and boats engaged in whaling or similar pursuits and fishery research and fishery protection vessels. The Recommendation calls for the activities of all public and private institutions in each country engaged in the training of fishermen to be coordinated and developed on the basis of a national programme. To facilitate the planning, development, coordination and administration of fishermen’s training schemes, joint advisory policy and administrative bodies should whenever possible be set up at the national level and, where appropriate, also at the regional and local levels. The competent authorities, in cooperation with these joint bodies, should define and establish general standards for fishermen’s training applicable throughout the territory of the country. The curricula of the various training programmes for fishermen should be based on a systematic analysis of the work required in fishing and should be established in cooperation with such joint bodies. Training courses should be available for working fishermen to enable them to increase their technical skills and knowledge, to keep abreast of improved fishing and navigation techniques and to qualify for promotion. The training methods adopted by fishermen’s training schemes should be the most effective possible, having regard to the nature of the courses, the trainees’ experience, general education and age, and the demonstration equipment and financial support available.

Finally, the Recommendation calls upon countries to cooperate in promoting fishermen's vocational training, particularly in developing countries.

Chapter 16

Dockworkers

T. Samuel and C. Phouangsavath

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152)	20	The Governing Body has invited member States to contemplate ratifying Convention No. 152 and to inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of Convention No. 152 or that might point to the need for a full or partial revision of the Convention.
Occupational Safety and Health (Dock Work) Recommendation, 1979 (No. 160)	–	The Governing Body has invited member States to give effect to Recommendation No. 160.
Instruments to be revised (Instruments whose revision has been decided upon by the Governing Body.)		
Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27)	64	The Governing Body has decided upon the revision of Convention No. 27 and the inclusion of this question among the proposals for the agenda of the Conference.
Other instruments (This category comprises instruments which are no longer fully up to date but remain relevant in certain respects.)		
Dock Work Convention, 1973 (No. 137)	22	The Governing Body has decided the maintenance of the status quo with regard to Convention No. 137 and Recommendation No. 145. It has also invited member States to provide reports under article 19 of the Constitution and has requested the Committee of Experts to prepare a General Survey on this subject. This General Survey will be submitted to the 90th Session (June 2002) of the Conference.
Dock Work Recommendation, 1973 (No. 145)	–	

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Protection against Accidents (Dockers) Convention, 1929 (No. 28)	1	The Governing Body has shelved Convention No. 28 with immediate effect. It has also invited the State party to this Convention to contemplate ratifying the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), if appropriate, and denouncing Convention No. 28 at the same time. Finally, it has decided that the situation of Convention No. 28 will be re-examined in due course, with a view to its possible abrogation by the Conference.
Protection against Accidents (Dockers) Reciprocity Recommendation, 1929 (No. 33)	–	The Governing Body has noted that Recommendations Nos. 33 and 34 are obsolete and has decided to propose to the Conference the withdrawal of these Recommendations in due course.
Protection against Accidents (Dockers) Consultation of Organisations Recommendation, 1929 (No. 34)	–	

Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
Instruments	Number of ratifications (at 01.10.01)	Status
Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32)	33	The Governing Body has invited the States parties to Convention No. 32 to contemplate ratifying the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), which ipso jure would involve the immediate denunciation of Convention No. 32. It has also decided that the situation of Convention No. 32 will be re-examined in due course, in the light of information received pursuant to the Governing Body's request concerning Convention No. 152, including the possibility of shelving Convention No. 32.
Protection against Accidents (Dockers) Reciprocity Recommendation, 1932 (No. 40)	–	The Governing Body has noted that Recommendation No. 40 is obsolete and should be withdrawn, and has deferred the proposal of withdrawal of this instrument to the Conference until the situation is re-examined at a later date.

In general terms, dock work has long been considered as the archetypal form of occasional work only requiring a low-skilled workforce. Dock work could therefore seem to be one of the sectors in which industrial relations would be the least stable. However, the need to afford adequate protection to dockworkers, and particularly the need to regulate their working conditions meant that this was an early subject of discussion in the ILO. As early as 1929, the Conference adopted instruments on safety and health in docks (see section I). The continued development of new methods of work in docks also gave rise to the adoption in 1973 of two instruments on their impact on employment and the organization of the profession (see section II). The issue of dock work has been receiving renewed attention over the past 15 years. The globalization of all forms of economic activity has given rise to better prospects for trade, but has also intensified international competition. For many countries, the dock industry is today an important link in the transport network that has to be constantly made more effective in order to respond to the requirements of free trade. The considerable rise in volumes transported, the growing sophistication of infrastructure and the intensity of capital investment required for the development of dock activities have required deep-rooted reforms in the sector. In view of the social consequences of these changes, there are grounds for wondering whether the ILO's standards still provide adequate protection for dockworkers.

I. Occupational Safety and Health (Dock Work) Convention (No. 152) and Recommendation (No. 160), 1979

The Convention revises earlier standards on the subject.¹ This was made necessary by the rapid developments of ships and cargo-handling equipment and methods, and more

¹ Article 43 of the Convention specifically cites the Protection against Accidents (Dockers) Convention, 1929 (No. 28), and the Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32).

particularly by the introduction of freight containers,² which rendered some provisions of the earlier standards obsolete. There was also the concern that the new instrument should “... provide the degree of flexibility which is needed to accommodate further technical progress without sacrificing the protection of workers who are still loading and unloading ships by conventional methods but at the same time providing for the safety and health of persons employed at modern docks”.³

The aims and purposes of the Convention and Recommendation are to have technical measures complying with the detailed technical requirements contained in the Convention with a view to: providing and maintaining workplaces, equipment and methods of work that are safe and without risk of injury to health; providing and maintaining safe means of access to any workplace; providing information, training and supervision necessary to ensure protection of workers against risks of accident or injury to health at work; providing workers with personal protective equipment and clothing and any life-saving appliances reasonably required; providing and maintaining suitable and adequate first-aid and rescue facilities; developing and establishing proper procedures for emergency situations which may arise.

The various technical measures that need to be taken by means of national laws and regulations or other appropriate means including technical standards or codes approved by the competent authority, including both preventive and protective measures. In taking such measures, the competent authority must act in consultation with the organizations of employers and workers concerned. Another important requirement is that provision must be made for close collaboration between employers and workers or their representatives in the application of these measures.

The Convention lays down that national laws and regulations must require technical measures to be taken with a view to ensuring safety and health in dock work (Article 4).

Content of the standards

Main provisions

Scope and definitions

Definitions: The term “dock work” covers all and any part of the work of loading or unloading any ship as well as any work incidental thereto, and it is national law or practice that establishes and revises the definition of such work, in consultation with the organizations of employers and workers concerned. The Convention defines a “ship” as covering any kind of ship, vessel, barge, lighter or hovercraft, excluding ships of war (Article 3(h)). The term “worker” refers to any person engaged in dock work (Article 3(a)).

Definitions of terms that distinguish between three types of relevant persons are also provided. The term “competent person” refers to a person possessing the knowledge and experience required for the performance of a specific duty or duties and acceptable as such to the competent authority. The term “responsible person” is defined as meaning a person appointed by the employer, the master of a ship or the owner of the gear, as the case may be, to be responsible for the performance of a specific duty or duties and who has sufficient

² ILO, Revision of the Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32), Report IV(1), ILC, 64th Session, 1978, pp. 3-9.

³ *ibid.*, p. 35.

knowledge and experience and the requisite authority for the proper performance of the duty or duties. An “authorized person” is a person authorized by the employer, the master of the ship or a responsible person to undertake a specific task or tasks and possessing the necessary technical knowledge and experience (Article 3(b), (c) and (d)).

The term “lifting appliance” covers all stationary or mobile cargo-handling appliances, including shore-based power-operated ramps, used on shore or on board ship for suspending, raising or lowering loads or moving them from one position to another while suspended or supported. The term “loose gear” covers any gear by means of which a load can be attached to a lifting appliance but which does not form an integral part of the appliance or load (Article 3(e) and (f)).

Scope: The Convention allows flexibility for exemptions from its provisions regarding dock work which may be granted by a Member at any place where the traffic is irregular and confined to small ships, as well as in respect of dock work in relation to fishing vessels or specified categories thereof, on condition that: (a) safe working conditions are maintained; and (b) the competent authority is satisfied that it is reasonable in all the circumstances that there be such exemptions or exceptions, after consultation with the organizations of employers and workers concerned (Article 2, paragraph 1).

In addition, particular requirements of the Convention on technical measures (Part III) may be varied if the competent authority is satisfied, after consultation with the organizations of employers and workers concerned, that such variations provide corresponding advantages and that the overall protection afforded is not inferior to that which would result from the full application of the provisions of the Convention. The reports on the application of the Convention are required to indicate any such exemptions or exceptions and significant variations made, as well as the reasons thereof (Article 2(2)(3)).

General provisions

National laws or regulations: Technical measures complying with Part III of the Convention have to be prescribed by national laws or regulations. The purpose of these laws or regulations is to: (a) provide and maintain workplaces, equipment and methods of work that are safe and without risk of injury to health; (b) provide and maintain safe means of access to any workplace; (c) provide the information, training and supervision necessary to ensure the protection of workers against risks of accident or injury to health arising out of or in the course of their employment; (d) provide workers with any personal protective equipment and protective clothing and any life-saving appliances reasonably required where adequate protection against risks of accident or injury to health cannot be provided by other means; (e) provide and maintain suitable and adequate first-aid and rescue facilities; and (f) develop and establish proper procedures to deal with any emergency situations which may arise (Article 4, paragraph 1).

The measures to be taken in accordance with the Convention have to cover: (a) general requirements relating to the construction, equipping and maintenance of dock structures and other places at which dock work is carried out; (b) fire and explosion prevention; (c) safe means of access to ships, holds, staging, equipment and lifting appliances; (d) transport of workers; (e) opening and closing of hatches, protection of hatchways and work in holds; (f) construction, maintenance and use of lifting and other cargo-handling appliances; (g) construction, maintenance and use of staging; (h) rigging and use of ship’s derricks; (i) testing, examination, inspection and certification, as appropriate, of lifting appliances, of loose gear, including chains and ropes, and of slings and other lifting devices which form an integral part of the load; (j) handling of different types of cargo; (k) stacking and storage of goods; (l) dangerous substances and other hazards in the working environment; (m) personal protective equipment and protective

clothing; (n) sanitary and washing facilities and welfare amenities; (o) medical supervision; (p) first-aid and rescue facilities; (q) safety and health organization; (r) training of workers; and (s) notification and investigation of occupational accidents and diseases (Article 4, paragraph 2).

In this respect, Recommendation No. 160 provides more particulars in the following areas. Paragraph 4 calls upon each Member, when developing the measures called for by Article 4, paragraph 1, of the Convention, to take into consideration the technical suggestions contained in the latest edition of the code of practice on safety and health in dock work, published by the ILO, to the extent they appear to be appropriate and relevant in light of national circumstances and conditions. Paragraph 5 calls on each Member, when taking the measures provided for in Article 4, paragraph 1, of the Convention, to take account of the technical measures referred to in Part III of the Recommendation, which are supplementary to those of Part III of the Convention.

Technical standards or codes of practice: The practical implementation of the laws or regulations embodying the various measures required to be taken by the Convention referred to above are to be ensured by technical standards or codes of practice approved by the competent authority, or by other methods consistent with national practice and conditions (Article 4, paragraph 3).

Designation of responsible person for compliance with the required measures

National laws or regulations have to make appropriate persons, whether employers, owners, masters or other persons, as the case may be, responsible for compliance with the measures referred to above. In situations where two or more employers undertake activities simultaneously at one workplace, they have the duty to collaborate to comply with the required measures, without excluding the responsibility of each employer for the health and safety of their employees. General conditions for such collaboration have to be prescribed by the competent authority in appropriate circumstances (Article 5).

Workers' obligations

Arrangements have to be made under which workers are required: (a) neither to interfere without due cause with the operation of, nor to misuse, any safety device or appliance provided for their own protection or the protection of others; (b) take reasonable care for their own safety and that of other persons who may be affected by their acts or omissions at work; and (c) report forthwith to their immediate supervisor, with a view to corrective measures being taken, any situation which they have reason to believe could present a risk and which they cannot correct themselves (Article 6, paragraph 1).

Workers' rights

Workers must have a right at any workplace to participate in ensuring safe working conditions to the extent of their control over the equipment and methods of work, and to express their views on the working procedures adopted as they affect safety. In as far as appropriate under national law and practice, where safety and health committees have been formed in accordance with the Convention (Article 37), this right is to be exercised through these committees (Article 6, paragraph 2).

Consultation with organizations of employers and workers

The competent authority is required to act in consultation with organizations of employers and workers concerned in giving effect to the provisions of the Convention by national laws or regulations or other appropriate methods consistent with national practice

and conditions. Provision must be made for close collaboration between employers and workers or their representatives in the application of the measures referred to above (Article 7).

Technical measures

The technical measures to be taken include:

- where a workplace has become unsafe or there is risk of injury to health, effective measures (by fencing, flagging or other suitable means including, where necessary, cessation of work) to protect the workers until the place has been made safe (Article 8);
- suitable and adequate lighting in all places where dock work is carried out and any approaches thereto; and suitable and conspicuous marking and, where necessary, adequate lighting of any obstacle liable to be dangerous to the movement of a lifting appliance, vehicle or person if it cannot be removed for practical reasons (Article 9);
- ensuring that all surfaces used for vehicle traffic or for stacking of goods or materials are suitable for the purpose and properly maintained, and that stacking, stowing, unstacking or unstowing of goods are carried out in a safe and orderly manner with due regard to the nature of the goods or materials and their packing (Article 10);
- ensuring that adequate passageways are left to permit the safe use of vehicles and cargo-handling appliances and, where necessary and practicable, providing separate passageways for pedestrian use, which have to be of adequate width and, as far as practicable, separated from passageways used by vehicles (Article 11);
- provision of suitable and adequate fire-fighting means, which have to be kept available for use where dock work is carried out (Article 12);
- the Recommendation provides that all passageways are to be plainly marked and as far as reasonably practicable kept free of any obstruction not related to the work in progress, and those used for vehicles should be one-way in operation, as far as reasonably practicable. Wherever necessary, the means of access to a ship should be fitted with a safety net properly secured so as to prevent workers from falling into the water between the ship's side and the adjacent quay;
- junction plates used with ramps on roll-on/roll-off ships should be so designed and used as to be safe;
- effective guarding of all dangerous parts of machinery, the term "machinery" includes any lifting appliance, mechanized hatch cover or power-driven equipment (Article 13);⁴

⁴ All dangerous parts of machinery must be effectively guarded, unless they are in such a position or of such a construction as to be as safe as they would be if effectively guarded; effective measures must be provided to promptly cut off power to any machinery where this is necessary in an emergency; adequate measures must be taken for stopping machinery before cleaning, maintenance or repair work for ensuring that such machinery cannot be restarted until the work has been completed, provided that a responsible person may restart the machinery for the purpose of any testing or adjustment which cannot be carried out while the machinery is at rest; only an authorized person may remove any guard when this is necessary for the work being carried out, or remove a safety device or make it inoperative for the purpose of cleaning, adjustment or repair; adequate

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- construction, installation, operation and maintenance of all electrical equipment and installations so as to prevent danger and to conform to such standards as have been recognized by the competent authority (Article 14);
 - provision and securing of adequate and safe means of access to a ship being loaded or unloaded alongside a quay or another ship (Article 15);
 - adequate measures to ensure the safe embarking, transport and disembarking of workers who have to be transported to and from a ship or other place by water, and determination of the conditions to be complied with by the vessels used for this purpose; and ensuring the safety of the means of transport provided by the employer, when workers have to be transported to and from a workplace on land (Article 16);
 - access to a ship's hold or cargo deck must be by means of a fixed stairway or, where this is not practicable, by a fixed ladder or cleats or cups of suitable dimensions, of adequate strength and proper construction, or by other means acceptable to the competent authority; such means of access must be, as far as reasonably practicable, separate from the hatchway opening, and workers must not use or be required to use any other means of access to a ship's hold or cargo deck (Article 17);
 - hatch covers or beams may only be used if they are of sound construction, adequate strength for the use to which they are put and properly maintained; hatch covers handled with the aid of a lifting appliance must be fitted with readily accessible and suitable attachments for securing the slings or other lifting gear; where hatch covers and beams are not interchangeable, they must be kept plainly marked to indicate the hatch to which they belong and their position therein; only an authorized person (whenever practicable, a member of the ship's crew) may be permitted to open or close power-operated hatch covers, and the hatch covers must not be opened or closed while any person is liable to be injured by the operation of the covers; the same requirement applies, *mutatis mutandis*, to power-operated ship's equipment, such as a door in the hull of a ship, a ramp, a retractable car deck or similar equipment; the protection of any opening in or on a deck where workers are required to work, through which opening they or vehicles are liable to fall; the closing of every hatchway not fitted with a coaming of adequate height and strength, the replacement of its guard when the hatchway is no longer in use, except during short interruptions of work, and a responsible person has to be charged with ensuring that these measures are carried out (Articles 18 and 19);
 - the Recommendation provides that more than one means of escape from a hold should be provided, when necessary, due the size of the hold, and that there should be no refuelling of petrol-driven vehicles or lifting appliances in the hold of a ship and that those driven by other fuels should only be refuelled in the hold of a ship under conditions which, so far as is reasonably practicable, ensure the safety of the workers. Preference should be given to the use in the hold of engines that do not pollute the air, as far as reasonably practicable. Workers should not be required to work in the part of the hold where a trimming machine or grab is operating, as far as is reasonably practicable;

precautions must be taken if any guard is removed, and the guard must be replaced as soon as practicable; a safety device that has been removed or made inoperative must be replaced or its operation restored as soon as practicable and measures must be taken to ensure the relevant equipment cannot be used or inadvertently started until the safety device is replaced or its operation restored (Article 13).

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- measures to ensure the safety of workers required to be in the hold or on a cargo deck of a ship when power vehicles operate in that hold or loading or unloading operations are taking place with the aid of power-operated appliances; prohibiting the removal or replacement of hatch covers and beams while work is in progress in the hold under the hatchway, and the removal of any hatch cover or beam not adequately secured against displacement before loading or unloading takes place; the provision of adequate ventilation in the hold or on a cargo deck by circulating fresh air to prevent risks of injury to health arising from fumes emitted by internal combustion engines or from other sources; adequate arrangements, including safe means of escape, for the safety of persons when dry bulk cargo is being loaded or unloaded in any hold or 'tween deck or when a worker is required to work in a bin or hopper on board ship (Article 20);
 - the Recommendation provides that every hatchway on the weather deck not protected by means of a coaming of adequate height and strength should be effectively guarded or covered, and every 'tween-deck hatchway should, when it is open, be effectively guarded to an adequate height; if this is not implemented, an authorized person should ensure the safety of the workers. Where it is necessary for loading and unloading goods, guards may be temporarily removed on any side of a hatchway. Deck cargoes should not be placed on nor vehicles pass over any hatch cover which is not of adequate strength for that purpose;
 - the requirement that every lifting appliance, every item of loose gear and every sling or lifting device forming an integral part of a load is of good design and construction, of adequate strength for the purpose for which it is used, maintained in good repair and working order and, in the case of a lifting appliance in respect of which this is necessary, properly installed, and that it is used in a safe and proper manner and, in particular, is not loaded beyond its safe working load or loads, except for testing purposes as specified and under the direction of a competent person (Article 21);
 - the Recommendation provides that no new part of a lifting appliance or item of loose gear should be manufactured of wrought iron. No heat treatment should be applied to any item of loose gear unless it is carried out under the supervision of a competent person and in accordance with his/her instructions;
 - the requirement of the testing of every lifting appliance and every item of loose gear, in accordance with national laws or regulations, by a competent person before it is put into use for the first time and after any substantial alteration or repair to any part liable to affect its safety; the retesting at least once every five years of lifting appliances forming part of a ship's equipment; the retesting of shore-based lifting appliances at such times as prescribed by the competent authority; the thorough examination and certification by the person carrying out such tests, upon the completion of every test of a lifting appliance or item of loose gear (Article 22);
 - the Recommendation provides that operators should check the safety devices of lifting appliances before they commence work;
 - the requirement that every lifting appliance and every item of loose gear be periodically thoroughly examined and certified by a competent person, and that such examination must take place at least once every 12 months; for this purpose, examination means a detailed visual examination by a competent person, supplemented if necessary by other suitable means or measures in order to arrive at a reliable conclusion as to the safety of the appliance or item of loose gear examined (Article 23);

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- the requirement of the regular inspection of every item of loose gear before use; the inspection, as frequently as is reasonably practicable, of the slings of pre-slung cargoes; the requirement that expendable or disposable slings must not be reused; inspection means a visual inspection by a responsible person carried out to decide whether, so far as can be ascertained in such manner, the gear or sling is safe for continued use (Article 24);
 - the requirement of the keeping, on shore or on the ship as the case may be, of duly authenticated records as will provide prima facie evidence of the safe condition of the lifting appliances and items of loose gear concerned; the requirement that such records specify the safe working load and the dates and results of the tests, thorough examinations and inspections referred to above, provided that in the case of inspections referred to in the indent above, a record need only be made where the inspection discloses a defect; the requirement of the keeping of a register of lifting appliances and items of loose gear in the form prescribed by the competent authority, account being taken of the model recommended by the ILO; the register is to comprise certificates granted or recognized as valid by the competent authority, or certified true copies of the said certificates, in a form prescribed by the competent authority, account being taken of the models recommended by the ILO in respect of the testing, thorough examination and inspection, as the case may be, of lifting appliances and items of loose gear (Article 25);
 - the appointment or otherwise recognition, by the competent authority of each Member ratifying the Convention, of competent persons or national or international organizations to carry out tests and/or thorough examinations and related functions, under conditions that ensure that the continuance of appointment or recognition depends upon satisfactory performance; the acceptance or recognition by the Member ratifying the Convention of those so appointed or otherwise so recognized, or the adoption of reciprocal arrangements with regard to such acceptance or recognition; in either case, acceptance or recognition must be under conditions that make their continuance dependent upon satisfactory performance; the prohibition of the use of a lifting appliance, loose gear or other cargo-handling appliance if the competent authority is not satisfied by reference to a certificate of test or examination or to an authenticated record, as the case may be, that the necessary test, examination or inspection has been carried out in accordance with the provisions of the Convention, or if, in the view of the competent authority, the appliance or gear is not safe for use, provided that this is not so applied as to cause delay in loading or unloading a ship where equipment satisfactory to the competent authority is used (Article 26);
 - the requirement of the clear marking with its safe working load by stamping or, where this is impractical, by other suitable means, of every lifting appliance (other than a ship's derrick) having a single safe working load and every item of loose gear; the requirement of the fitting with effective means of enabling the driver to determine the safe working load under each condition of use, of every lifting appliance (other than a ship's derrick) having more than one safe working load; the requirement of the clear marking of every ship's derrick (other than a derrick crane) with the safe working load applying when it is used in single purchase, with lower cargo block, in union purchase in all possible block positions (Article 27);
 - the requirement that every ship carry rigging plans and any other relevant information necessary to permit the safe rigging of its derricks and accessory gear (Article 28);
 - the requirement that pallets and similar devices for containing or supporting loads be of sound construction, of adequate strength and free from visible defects liable to affect their safe use (Article 29);

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- the prohibition of the raising or lowering of loads unless they are slung or otherwise attached to the lifting appliance in a safe manner (Article 30);
 - the requirement that the laying out and operation of every freight container terminal is such so as to ensure, as far as is reasonably practicable, the safety of the workers; and in the case of ships carrying containers, the provision of means for ensuring the safety of workers lashing and unlashng the containers (Article 31);
 - the packing, marking and labelling, handling, storing and stowing of any dangerous cargo in accordance with the relevant requirements of international regulations applying to the transport of dangerous goods by water and those dealing with the handling of dangerous goods in ports; dangerous substances must not be handled, stored or stowed unless they are packed and marked and labelled in compliance with international regulations for the transport of such substances; if receptacles or containers of dangerous substances are broken or damaged to a dangerous extent, dock work in the area concerned, other than that necessary to eliminate danger, must be stopped and the workers removed to a safe place until the danger has been eliminated; adequate measures must be taken to prevent the exposure of workers to toxic or harmful substances or agents, or oxygen-deficient or flammable atmospheres; adequate measures must be taken to prevent accidents or injury to health where workers are required to enter any confined space in which toxic or harmful substances are liable to be present or in which there is liable to be an oxygen deficiency (Article 32);
 - the Recommendation provides that when work is to be carried out on top of freight containers, every reasonable measure should be taken to minimize risk of accidents. The handling, storing or stowage of dangerous substances should be done only under the supervision of a responsible person, and the workers concerned should be given adequate information on the special precautions to be observed, including action to be taken in the event of a spillage or accidental escape from containment;
 - suitable precautions for the protection of workers against the harmful effects of excessive noise at the workplace (Article 33);
 - where adequate protection against risks of accident or injury to health cannot be ensured by other means, workers must be provided with and required to make proper use of and take care of such personal protective equipment and protective clothing as is reasonably required for their work; such equipment and clothing must be properly maintained by employers (Article 34);
 - the ready availability of adequate facilities, including trained personnel, in case of accident, for the rescue of any person in danger, for the provision of first-aid and for the removal of injured persons, in so far as is reasonably practicable without further endangering them (Article 35);
 - the Recommendation provides that first-aid personnel should be proficient in the use of appropriate resuscitation techniques and rescue work. Where necessary and reasonably practicable, lifting appliances should be fitted with a means of emergency escape from the driver's cabin, and there should be arrangements for the removal of an injured or ill driver without further endangering the driver;
 - each Member must determine by national laws or regulations or other appropriate methods: (a) for which risks inherent in the work there is to be an initial medical examination or periodical medical examination, or both; (b) the maximum intervals at which periodical medical examinations are to be carried out, with due regard to the nature and degree of the risks and other particular circumstances; (c) the range of

special investigations deemed necessary in the case of workers exposed to special occupational health hazards; (d) appropriate measures for the provision of occupational health services for workers; such medical examinations and investigations must be free of cost to the worker; and their records must be confidential (Article 36);

- the Recommendation provides that the worker concerned should be informed of the results of the medical examinations and investigations referred to in Article 36 of Convention No. 152, the employer should be informed whether the worker is fit for the work to be carried out and whether he/she constitutes a risk to other persons, provided that the confidential character of the information is respected, subject to Article 39 of Convention No. 152;
- the requirement of the formation of safety and health committees including employers' and workers' representatives at every port where there is a significant number of workers, as well as at other ports as necessary; the establishment, composition and functions of such committees are to be determined by national laws or regulations or other appropriate methods consistent with national practice and conditions and after consultations with organizations of employers and workers concerned, and in the light of local circumstances (Article 37);
- the prohibition of the employment of workers in dock work unless they have been given adequate instruction or training as to the potential risks attaching to their work and the main precautions to be taken; the operation of a lifting appliance or other cargo-handling appliance only a person who is at least 18 years of age and who possesses the necessary aptitudes and experience or a person under training who is properly supervised (Article 38);
- the adoption of measures to ensure that occupational accidents and diseases are reported to the competent authority and, where necessary, investigated, with a view to assisting in their prevention (Article 39);
- the provision and the proper maintenance of a sufficient number of adequate and suitable sanitary and washing facilities at each dock, wherever practicable within a reasonable distance of the workplace (Article 40);
- the Recommendation provides that the sanitary and washing facilities referred to in Article 40 of Convention No. 152 should, in so far as is reasonably practicable, include changing rooms.

Implementation

Each Member is required to: (a) specify the duties in respect of occupational safety and health of persons and bodies concerned with dock work; (b) take the necessary measures to enforce the provisions of the Convention, including the provision of appropriate penalties; and (c) provide appropriate inspection services to supervise the application of the measures to be taken in pursuance of the Convention, or satisfy itself that appropriate inspection is carried out (Article 41).

Transitional provision

The time limits within which the provisions of the Convention are to apply to the following is to be determined by national laws or regulations: (a) the construction or equipping of a ship; (b) the construction or equipping of any shore-based lifting appliance or other cargo-handling appliance; and (c) the construction of any item of loose gear. Such

time limits must not exceed four years from the date of ratification of the Convention (Article 42).

Principles of the Convention and the Recommendation on occupational safety and health in dock work

National laws or regulations must designate appropriate persons, who may be employers, owners, masters or other persons, to be responsible for compliance with the technical measures required by the Convention. Like the other ILO occupational safety and health Conventions dealing with other sectors of economic activity, Convention No. 152 also requires two or more employers who may carry out activities simultaneously at one workplace to collaborate in complying with the required technical measures. Each employer remains responsible for the health and safety of his or her employees. The competent authorities may prescribe the general procedures for such collaboration, in appropriate circumstances.

The obligations of workers include the duty of non-interference, without due cause, in the operation of safety devices or appliances provided for their own protection and that of others, and the proper use of such devices or appliances; the taking of reasonable care for their own safety and that of others who could be affected by their acts or omissions; the reporting of any situation they have reason to believe presents a risk that they cannot correct themselves to their immediate supervisors so that corrective measures can be taken.

Workers have the right to participate in ensuring safe work with regard to equipment and methods of work under their control, and to express their views on the working procedures affecting safety. Safety and health committees made up of employers' and workers' representatives have to be established in every port where there is a significant number of workers, through national laws or regulations or other methods consistent with national practice and conditions, and after consultation with the organizations of employers and workers concerned.

As can be seen from the above description, the range of specific technical measures required by the Convention is important. These measures are intended to apply important occupational health principles to dock work. Many of the general principles evoked in the chapter on occupational safety and health are applicable to dock work. It may suffice here to mention in particular those that require: the testing, examination, inspection and certification of lifting appliances, of loose gear, including chains and ropes, and slings and other lifting devices forming an integral part of the load, as appropriate, by a responsible person or a competent person; the maintenance of a register of lifting appliances and items of loose gear in the form prescribed by the competent authority, account being taken of the model recommended by the ILO; the mutual acceptance or recognition, including through reciprocal arrangements by Members ratifying the Convention, of competent persons or national or international organizations appointed or recognized by other ratifying Members to carry out tests, examinations and related functions

Practical application of the standards

Like many technical labour standards, and more particularly like sectoral occupational safety and health standards, problems of application arise in the case of Convention No. 152, which mostly relate to the absence of specific laws, regulations or other means of ensuring the implementation of its provisions. Nearly all of its provisions relating to the technical requirements covered by Articles 4 and its corresponding provisions in Part III (Articles 8 to 40) have been the subject of the comments of the

Committee of Experts, mostly related to the absence of national provisions for their application. Examples frequently encountered include: medical examination; health services; precautions against noise; the prohibition of employing persons under 18 years of age; technical requirements relating to the design, testing, examination and inspection of lifting appliances and items of loose gear by competent persons or responsible persons; access to areas of work, ships, ships' holds; the transport of workers; the layout of freight container terminals; the construction, equipping and maintenance of dock structures; fencing, lighting and rigging plans; and sanitary facilities. Other difficulties concern: the absence of consultation with organizations of employers and workers concerned in defining dock work, in granting exemptions or exceptions to the Convention, in taking measures giving effect to the provisions of the Convention; the failure to provide for close collaboration between employers and workers or their representatives in the application of the measures called for by the Convention; the absence of provisions covering situations where two or more employers are undertaking work at one workplace; the failure to designate the responsible person for compliance with the measures called for by the Convention, which is particularly critical where there are various parties involved in dock work (port authorities, cargo-handling enterprises, owners of cargo-handling equipment, lifting appliances and loose gear, users of these materials, equipment and facilities); the failure to provide for the establishment of safety and health committees; and the failure to supply information on inspection visits (statistics on the number of workers covered by the national measures, number and nature of infractions, number of accidents and diseases). Still other difficulties encountered consist of whether the models recommended by the ILO are taken into account in establishing a register of lifting appliances and items of loose gear which are *prima facie* evidence of the safe condition of the said appliances and items of loose gear; the lack of information on the international regulations complied with in the transport of dangerous goods; and the mutual recognition among ratifying Members of appointed or recognized persons, national or international organizations to carry out tests, examinations and related functions on lifting appliances and items of loose gear.

II. Dock Work Convention (No. 137) and Recommendation (No. 145), 1973

The dock industry has undergone deep-rooted transformations in the post-war years. New methods of handling have made it possible to accelerate dock operations, reduce the costs of loading and unloading goods, speed up the turnaround of ships in ports and reduce the physical effort required for the handling of cargo. One of the undoubted advantages accorded to this technical progress in handling methods is that it has made it more possible to plan the various operations in ports, thereby offering the possibility for dockworkers to benefit from more regular employment, or at least a minimum of periods of employment and income. However, such transformations have also required a different approach to the management of dockworkers, while at the same time revealing the need to improve the conditions of employment of dockworkers, and particularly the organization of the profession. Under the terms of Convention No. 137 and Recommendation No. 147, States should apply a national policy to encourage the regular employment of dockworkers. These instruments provide a description of the means by which such a policy should be implemented. Their application should therefore contribute to protecting dockworkers from any negative impact of technical progress on employment.

Content of the standards

Taking into account the diversity of national situations, and the divergent views expressed by the Committee on Dock Work, the Conference at its 58th Session adopted a Convention containing general principles which can be applied to the varying conditions of countries, according to their level of development, accompanied by a Recommendation

with more detailed provisions advocating specific measures and providing indications for the implementation of certain provisions of the Convention.

Definitions: The need to take into account the diverse levels of competence, according to the country and the port, was the underlying reason for the flexibility of the two instruments in the preparation of their definitions. Both the Convention (Article 1, paragraph 2) and the Recommendation (Paragraph 2), indicate that “dockworkers” and “dock work” mean “persons and activities defined as such by national law or practice”. During the discussions on these instruments, many governments and Employer members expressed reservations concerning the adoption of a definition proposed by the Office and indicated that its application would encounter difficulties in practice. However, they all agreed on the obligation to consult the representative organizations of employers and workers in the establishment and revision of such definitions.⁵

Regular employment and a minimum income: With a view to taking advantage of the benefits deriving from new methods of handling, it is the responsibility of States to adopt a national policy ensuring permanent, or at least regular employment, and minimum periods of employment or a minimum income for dockworkers. This should be done in so far as practicable and depending on the economic and social situation of the country and port concerned (Article 2 of the Convention and Paragraphs 7 to 10 of the Recommendation), so as to take into account the diversity of situations and competence in countries and ports.

Registration: For this purpose, dockworkers have to be registered and have priority of engagement for work (Article 3 of the Convention and Paragraphs 11 to 16 of the Recommendation). In view of the point of view that the establishment of registers for all categories of dockworkers would not be possible in certain countries or for certain ports, it is envisaged that such registers are to be determined by national law or practice. In exchange, registered dockers have to be available for work.⁶

The registers established have to be periodically reviewed so as to take into account the needs of the port. Any necessary reduction in the strength of a register has, however, to be accompanied by appropriate measures designed to prevent or minimize detrimental effects on dockworkers (Article 4 of the Convention and Paragraphs 17 to 19 of the Recommendation).

Industrial relations: The instruments emphasize the importance of the participation of employers and workers with, as appropriate, the competent authorities, in the implementation of all the measures required to cope with the consequences of the new methods of cargo handling (Article 5 of the Convention and Paragraphs 23 to 30 of the Recommendation). For this purpose, certain provisions of the Recommendation provide for the establishment of joint machinery to facilitate the settlement of demarcation issues (Paragraph 25).

Conditions of work and life: Recalling that the changes resulting from the new methods of cargo handling affect not only the employment of dockworkers, but also their conditions of work and life, the two instruments provide that appropriate safety, health,

⁵ *Social repercussions of new methods of cargo handling (docks)*, Reports V(1) and V(2), ILC, 57th Session, Geneva, 1972; *Social repercussions of new methods of cargo handling (docks)*, Reports V(1) and V(2), ILC, 58th Session, Geneva, 1973; *Record of Proceedings*, Report of the Committee on Dock Labour, ILC, 58th Session, Geneva, 1973, pp. 277-288 and 497-509.

⁶ *ibid.*

welfare and vocational training provisions must apply to dockworkers (Article 6 of the Convention and Paragraphs 31 to 35 of the Recommendation).

Finally, reference may be made to certain specific measures envisaged in the Recommendation, including: (a) the regular compilation of statistics of freight movement through ports, estimates of future trends and forecasts of the manpower required (Paragraph 5); (b) the provision of attendance money or unemployment benefit where permanent or regular employment is not practicable for dockworkers (Paragraph 8); (c) procedures for envisaging in time the necessary adjustments in the strength of registers and carrying out reductions progressively; (d) adequate financial benefits for dockworkers and the assistance of public employment services in the event of reductions in the strength of registers (Paragraph 17 to 19); and (e) a reduction in the number of specialized categories and the abolition of the distinction between ship and shore workers, with a view to making it possible for dockworkers to carry out more varied tasks (Paragraph 29).

During the preparatory work, the issue of the application of the two texts to occasional dockworkers was raised. While the majority of governments favoured such an application, real agreement on how it should be applied was not achieved. Certain governments suggested the progressive extension of the scope of the two instruments to all dockworkers. Others preferred an explicit reference concerning the application of each provision to the various categories of dockworkers. While only a few governments stated that in principle only regular dockworkers should be engaged in dock work, and occasional workers should only be recruited in exceptional circumstances, all agreed that the conditions of employment of all dockworkers should be the same.⁷ As a result, even though in principle the texts adopted apply to persons who are regularly available for work as dockworkers and who depend on such work for their main income (Article 1, paragraph 1, of the Convention and Paragraph 1 of the Recommendation), Paragraph 36 of the Recommendation provides for the possibility of its application to occasional and seasonal dockworkers.

Principle set out by the Convention

As noted above, Convention No. 137 was adopted with a view to affording dockworkers for the first time adequate protection against any negative repercussions of technical progress on their employment. However, the need to take into account the diversity of national situations led to the adoption of a text which is as flexible as possible. This requirement is illustrated in particular by the provisions of Article 7 of the Convention, in accordance with which the provisions of the instruments are to be given effect by national laws or regulations, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice. Nevertheless, the work of the Committee on Dock Work at the Conference shows that the objective of this wording is to indicate clearly that, however the Convention is applied, the responsibility lies in the last resort with the Government for ensuring that it is applied.⁸

⁷ *ibid.*

⁸ *Record of Proceedings*, 1973, *op. cit.*, paras. 42-47.

Application of the standards in practice

The comments of the Committee of Experts are related to the information provided by States parties to the Convention in the reports that they are obliged to submit on its application. Requests for clarification most frequently relate to: (a) the manner in which the terms “dockworkers” and “dock work” are periodically reviewed and, where appropriate, revised in consultation with the employers’ and workers’ organizations concerned; (b) the measures taken to prevent or attenuate the prejudicial effects for dockworkers of a reduction in the strength of registers; and (c) the manner in which the national policy encourages employers or their organizations and workers’ organizations to cooperate in improving the efficiency of work in ports, with the participation, as appropriate, of the competent authorities.

Based on the provisions of the two instruments, and following a study published in 1985 on the impact of new techniques of cargo handling in docks on employment and training, which recommended that assistance be provided to developing countries to develop effective and systematic training programmes with a view to taking full advantage of technological progress in the sector,⁹ the ILO established a Portworker Development Programme (PDP). The objective of the PDP is to permit government and port authorities in developing countries to establish training programmes with a view to improving the efficiency of cargo handling, working conditions, safety and the status and welfare of dockworkers. The educational materials of the PDP are designed in the form of independent training modules intended for interactive teaching under the direction of a trained instructor. These modules cover a great variety of subjects of relevance to all the workers concerned (such as modules on safety in access to the workplace and at work), or more specifically for certain categories of workers (modules on loading and unloading operations for container vessels, for example). The PDP’s training materials are available to countries, ports and institutions specializing in port training. The ILO is also able to provide technical assistance for the development of the necessary framework for their proper use. These training materials are already in use in many ports and para-port institutions in Europe, Africa, Latin America and Asia and the Pacific.

At its 264th Session (November 1995), the Governing Body decided to convene a Tripartite Meeting on Social and Labour Problems Caused by Structural Adjustments in the Port Industry in May 1996. During its work, the Tripartite Meeting, attended by 60 participants, recognized that port activities were undergoing in-depth and continuing changes resulting both from the increased participation of the private sector in the administration of ports and cargo-handling activities, and from the integration of port-operations in an increasingly competitive and globalized transport sector. In order to manage effectively the impact of these changes on the employment of dockworkers, it is indispensable to develop dialogue between governments, who are responsible for setting out the legal framework for dock reforms, and with employers and workers. The Tripartite Meeting expressed the hope, in this context, that the ILO would continue to promote the ratification and application of the relevant international labour standards and would provide the necessary technical cooperation for this purpose. In its resolution on the future activities of the ILO, the Tripartite Meeting emphasized the importance of the port industry for the economic development of countries and requested the ILO, among other matters, to

⁹ A.D. Couper: *New cargo-handling techniques: Implications for port employment and skills*, ILO, Geneva, 1986.

prepare a report on difficulties in the ratification and application of Convention No. 137 and Recommendation No. 145.¹⁰

At its 273rd Session (November 1998), the Governing Body decided to invite governments to submit reports in 2001 under article 19 of the Constitution of the ILO on Convention No. 137 and Recommendation No. 145.¹¹ A General Survey by the Committee of Experts on the application of these two instruments will be submitted to the Conference at its 90th Session (June 2002).

¹⁰ *Note on the Proceedings: Tripartite Meeting on Social and Labour Problems Caused by Structural Adjustments in the Port Industry* (Geneva, 20-24 May 1996), ILO, TMPI/1996/10.

¹¹ Doc. GB.273/8/2, para. 34.

Chapter 17

Other categories of workers

R. Hernández Pulido

Introduction

By mandate and vocation, over the years, the ILO has adopted standards of universal value applicable to all workers and all enterprises, irrespective of the sector in which they are active. Nevertheless, the constituents, gathered together at the International Labour Conference, have on several occasions recognized the need to take into consideration the specific characteristics of certain categories of workers and to adopt standards applicable to them.

The characteristics of certain of these categories are such that it has been considered necessary to adopt not just a single Convention or Recommendation, but a whole series of Conventions and Recommendations. This is the case, for example, for seafarers. In other cases, a Convention accompanied by a Recommendation has been sufficient to respond to the specific needs of these categories of workers. This is the case of the categories of workers for which the instruments adopted by the Conference are examined below, namely workers in plantations, nursing personnel, workers in hotels and restaurants and homeworkers.

The instruments adopted for these workers, which are known as “sectoral instruments”, have given rise to much debate. Certain constituents of the ILO have been constantly opposed to their adoption.¹ Nevertheless, other constituents are still convinced of the importance of this type of instrument. At the last Session of the Conference, on the occasion of the adoption of the latest instruments considered to be sectoral, namely those concerning safety and health in agriculture, one of the speakers emphasized that “the Workers’ delegate asked correctly, and so did the Employers’ delegate, whether sector-specific instruments are relevant or not. It is my conviction that if we want to work at the grass-roots level, if we want to reach people where it matters, then obviously the future of sectoral instruments is not as bleak as some people want to believe [...] We do not have to decide on whether or not, but how best to combine sectoral and generic Conventions.”²

Indeed, one of the characteristics of sectoral instruments is to combine the provisions of instruments which already exist, particularly with regard to the fundamental rights of workers and their conditions of employment, with provisions which take into consideration the specific needs of certain categories of workers. This combination is intended to make the instruments as useful as possible, as shown below in the examination of the instruments respecting plantation workers, nursing personnel, workers in hotels and restaurants and homeworkers.

The pertinence of these instruments has been recognized by the Governing Body, which has encouraged and recommended member States who have not yet done so to examine the possibility of ratifying them. A summary of the status of these instruments based on the decisions of the Governing Body is provided in the tables included for each group of instruments.

¹ During the adoption of the instruments concerning safety and health in agriculture, the Employers once again indicated that they remained “opposed to the practice of concluding sector-specific ILO instruments ...”. ILO, *Provisional Record*, ILC, 89th Session, Geneva, 2001, pp. 21-2.

² *ibid.*, p. 214.

17.1. Plantation workers

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Plantations Convention, 1958 [and Protocol, 1982] (No. 110)	10	The Governing Body has decided that measures will be taken by the Office to promote the ratification of Convention No. 110 with a view to ameliorating its ratification rate.
Protocol of 1968 relative to Convention No. 110	2	
Plantations Recommendation, 1958 (No. 110)	–	The Governing Body has invited member States to give effect to Recommendation No. 110.
Tenants and Share-croppers Recommendation, 1968 (No. 132)	–	The Governing Body has invited member States to give effect to Recommendation No. 132.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
No instrument concerning plantation workers has been considered outdated by the Governing Body.		

In the light of the economic and social development in many regions of the world, it was considered in 1957 that plantations constituted an important sector of the economy for many countries located in tropical and sub-tropical regions. At the same time, the bad working and living conditions of workers in plantations was recognized. It was therefore considered necessary to raise the standard of living and improve the working conditions of these workers.³ In 1947, at the Preparatory Asian Regional Conference, this question was examined for the first time. Emphasis was placed on “the importance of plantations in the economy of a number of countries in Asia” and “the unsatisfactory conditions of life and work of a vast number of labourers engaged in many areas and the inadequacy of the national legislation governing these conditions.”⁴ This issue was subsequently discussed by the Governing Body, which finally decided in 1955 to include it as an item on the agenda of the Conference.⁵

The Office then prepared a report on the issue of the conditions of employment of plantation workers. In this report, it was indicated that, “in the early stages the conditions of employment of plantation workers were governed by custom alone. The first regulations were of a very limited character ...”.⁶ The report also noted that, “important as labour legislation is for the protection of plantation workers, its scope and effectiveness have been largely influenced by the conditions obtaining in countries which are economically and socially not highly developed ...”.⁷

³ ILO, *Conditions of employment of plantation workers*, ILC, 40th Session, 1957, Report VIII(1), p. 5

⁴ *ibid.*, p. 5.

⁵ *ibid.*, pp. 5-6.

⁶ *ibid.*, p. 61.

⁷ *ibid.*, p. 61.

In the above report, the office emphasized that “the provisions suggested for inclusion in the proposed instruments [...] have been selected from Conventions and Recommendations already adopted by the International Labour Conference”.⁸ However, it was emphasized that “the omission from the proposed instruments of provisions of existing Conventions and Recommendations does not mean, therefore, that such provisions are regarded as inapplicable to plantations”.⁹ This comment by the Office was reflected in one of the provisions of the Convention (see Article 4).

When the issue of adopting a Convention on plantations was discussed by the International Labour Conference, certain Government members expressed concern that “the adoption of the proposed Convention would create a dangerous precedent; each industry might demand an overall Convention on the same pattern.”¹⁰ For their part, the Worker members considered that “a special Convention was as necessary for plantation workers as for some of the other categories of workers for whom such instruments had been adopted”.¹¹ Following the general discussion, the technical Committee of the Conference decided “to recommend the adoption of instruments directly applicable to plantations and to take the proposed conclusions contained in Chapter II of Report VIII(2) as the basis for discussion.”¹² During the second discussion of the instrument, there was once more a debate on whether or not to adopt a Convention on this issue.¹³ Nevertheless, the Convention was adopted and entered into force on 22 January 1960.

Based on already existing instruments, a Convention, supplemented by a Recommendation, was accordingly adopted concerning the conditions of employment of plantation workers.

1. Content of the Plantations Convention, 1958 (No. 110)

The *principal objective* of the instruments concerning plantation workers is to afford broader protection to this category of workers, taking into account the particularly arduous conditions in which they perform their work.

General provisions

Definitions and scope: for the purpose of the Convention, the term “plantation” includes any agricultural undertaking regularly employing hired workers which is situated in the tropical or sub-tropical regions and which is mainly concerned with the cultivation or production for commercial purposes of coffee, tea, sugarcane, rubber, bananas, cocoa, coconuts, groundnuts, cotton, tobacco, fibres (sisal, jute and hemp), citrus, palm oil, cinchona or pineapple. The Convention is not applicable to family or small-scale holdings

⁸ *ibid.*, p. 62.

⁹ *ibid.*, p. 69.

¹⁰ ILO, *Conditions of employment of plantation workers*, ILC, 42nd Session, 1958, Report V(1), p. 4.

¹¹ *ibid.*, p. 5.

¹² *ibid.*, p. 5.

¹³ ILO, *Record of Proceedings*, ILC, 42nd Session, Geneva, 1958, p. 358 et seq.

producing for local consumption and not regularly employing hired workers (Article 1, paragraph 1).

For the purpose of this Article, the term “plantation” ordinarily includes services carrying out the primary processing of the product or products of the plantation (Article 1, paragraph 4).

Extension of the scope of application: member States for which the Convention is in force may, after consultation with the most representative organizations or employers and workers concerned, where such exist, make the Convention applicable to other plantations by: (a) adding to the list of crops referred to in paragraph 1 of Article 1 any one or more of the following crops: rice, chicory, cardamom, geranium and pyrethrum, or any other crop; and (b) adding to the plantations covered by paragraph 1 of Article 1 classes of undertakings not referred to therein which, by national law or practice, are classified as plantations. The government in question has to indicate any action taken to this effect in its annual reports on the application of the Convention submitted under Article 22 of the Constitution of the ILO (Article 1, paragraph 3).

When the Office prepared the first report submitted to constituents, it considered that agreement on a definition of plantations “would be extremely difficult to reach.”¹⁴ In view of this difficulty, the Office proposed that “the scope of the proposed instruments should not be defined in the instruments themselves but that the Members should specify the plantations to which they will apply the provisions of the instruments and should inform the Office of their decision in this regard.”¹⁵

When this issue was examined by the Conference, it was argued “that a clear definition of what constituted a plantation was necessary to ensure uniformity of application.”¹⁶

In this respect, since the adoption of the Convention, it has been emphasized on several occasions that the definition adopted by the Conference of the term “plantations” was an obstacle to the ratification of the Convention. One member State which denounced the Convention referred to difficulties of application deriving from the extent of the scope of application set out in Article 1 of the Convention. Following the in-depth review of international labour standards carried out by the Governing Body, Convention No. 110 and Recommendation No. 110 have been included in the category of instruments requiring revision. This also responds to the request made by the Committee on Work in Plantations and the Asian Regional Conference.¹⁷

¹⁴ Report VIII(1), 1957, op. cit., p. 63. On the question of the definition of the term “plantation”, see also ILO, *Definition of the term “plantation”*, Committee on Work on Plantations, Second Session, Havana, 1953 (Geneva, 1953), Report II.

¹⁵ Report VIII(1), 1957, op. cit., p. 63.

¹⁶ Report V(1), p. 6, 1958 (op. cit., p. 6). With regard to the definition of plantations adopted by the Conference, see also: “Plantations Convention, 1958 (No. 110). Memorandum by the International Labour Office addressed to the Ministry of Labour and Social Welfare of the Federation of Malaya,” in *Official Bulletin*, Vol. XLII, 1959, No. 7, pp. 389-395 and “Plantations Convention, 1958 (No. 110) (Article 1, para. 1). Memorandum sent by the International Labour Office to the Minister of Labour of India”, in *Official Bulletin*, Vol. XLIII, 1960, No. 7, pp. 575-578.

¹⁷ ILO, *Revision of the Plantations Convention (No. 110) and Recommendation (No. 110)*, 1958, ILC, 68th Session, 1982, Report VII(1), p. 1.

In 1982, the Conference therefore adopted a Protocol to the Plantations Convention, 1958, with a view to amending Article 1 of the Convention, in particular by adding a new paragraph which reads as follows:

A Member ratifying this Convention may, after consultation with the most representative organisations of employers and workers concerned, where such exist, exclude from the application of the Convention undertakings the area of which covers not more 12.5 acres (5 hectares) and which employ not more than ten workers at any time during a calendar year. It shall indicate, in its first report on the application of the Convention under article 22 of the Constitution of the International Labour Organisation, the categories of undertakings excluded and, in subsequent reports, any measures which it may have taken with a view to applying the Convention to some or all of the categories excluded, as well as any measures which it may have taken with a view to ensuring that the Convention continues to be applied to undertakings which come within the exclusion provided for in this paragraph but which have been created by the division of a plantation after the entry into force of Article 1 (revised) for the Member concerned.

It should be noted that it was decided, in accordance with the recommendations of the Office, not to amend Paragraph 1 of the Recommendation, in view of the fact that a Recommendation represents a target to be aimed at rather than, as in the case of a Convention, standards that ratifying Governments are obliged to apply. Moreover, by leaving the Convention open to ratification in its original form, it seems appropriate to leave the Recommendation unchanged, with the same scope as the original Convention.¹⁸ Paragraphs 1 to 4 of the Recommendation refer to the definition of the term plantation and the scope of its application.

Application of the Convention (non-discrimination): each Member which ratifies the Convention undertakes to apply its provisions equally to all plantation workers without distinction as to race, colour, sex, religion, political opinion, nationality, social origin, tribe or trade union membership (Article 2).

Parts of the Convention to be applied: each Member for which the Convention is in force must comply with: (i) Part I (general provisions); (ii) Parts IV (wages), IX (right to organize and collective bargaining) and XI (labour inspection); (iii) at least two of Parts II (engagement and recruitment of migrant workers), III (contracts of employment and abolition of penal sanctions), V (annual holidays with pay), VI (weekly rest), VII (maternity protection), VIII (workmen's compensation), X (freedom of association), XII (housing) and XIII (medical care); (iv) Part XIV (final provisions) (Article 3, paragraph 1(a)).

Declaration by the government and subsequent obligations: under the terms of Article 3, paragraphs 1(b), 2 and 3, the government must, if it has excluded one or more Parts from its acceptance of the obligations of the Convention, specify, in a declaration appended to its ratification, the Part or Parts so excluded. Each Member which has made a declaration under paragraph 1(b) of Article 3 has to indicate in its annual reports submitted under article 22 of the Constitution of the ILO any progress made towards the application of the excluded Part or Parts. Furthermore, each Member which has ratified the Convention, but has excluded any Part or Parts thereof under the provisions of the preceding paragraphs, may subsequently notify the Director-General of the ILO that it accepts the obligations of the Convention in respect of any Part or Parts so excluded. Such

¹⁸ ILO, *Revision of the Plantations Convention (No. 110) and Recommendation (No. 110), 1958*, ILC, 68th Session, 1982, Report VII(2), p. 27. It should be noted that, since its adoption, the Protocol has been ratified by two member States: Cuba and Uruguay.

undertakings will be deemed to be an integral part of the ratification and to have the force of ratification as from the date of notification (Article 3, paragraphs 1(b), 2 and 3).

The aim of this provision is to give greater flexibility to the Convention and to permit member States “to achieve gradual ratification”.¹⁹ Nevertheless, this provision gave rise to long debates at the second discussion of the instruments, since the distinction between the obligatory Parts of the Convention and the optional Parts was not accepted by everyone. Even so, it was considered that this would make it possible to recognize the specific situation of the various States.²⁰

More favourable provisions to the workers concerned: the Convention provides that nothing in the instrument shall affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for by the Convention (Article 4). This provision was included in the Convention “to safeguard superior standards”.²¹

Engagement and recruitment of migrant workers²²

Recruiting. The term “recruiting” includes all operations undertaken with the object of obtaining or supplying the labour of persons who do not spontaneously offer their services at the place of employment or at a public emigration or employment office or at an office conducted by an employers’ organization and supervised by the competent authority (Article 5).

During the second discussion of the instruments, it was considered that the term “recruiting” should have the meaning defined in Article 2 of the Recruiting of Indigenous Workers Convention, 1936 (No. 50). It was therefore decided to reproduce this Article. Certain Spanish-speaking delegates pointed out that the term “recruiting” implied an element of force or duress. The Committee noted that this term should be given the meaning usually attributed to the word “engagement”.²³

The recruiting of the head of a family must not be deemed to involve the recruiting of any member of his family (Article 6).

This provision reproduces Article 7, paragraph 1, of the Recruiting of Indigenous Workers Convention, 1936 (No. 50). It was, however, indicated that the members of the family of such a worker could accept engagement on a separate contract.²⁴

Articles 7 and 8 of the Convention contain provisions respecting the licences which must be obtained by persons or associations in order to engage in recruiting. These licences have to be issued by the competent authority.

¹⁹ Report V(1), 1958, op. cit., p. 8.

²⁰ ILO, *Record of Proceedings*, Report of the Committee on Plantations, ILC, 42nd Session, Geneva, 1958, p. 722, paras. 24 to 29.

²¹ ILO, Report V(1), 1958, op. cit., p. 8.

²² Hereinafter Part II.

²³ *Record of Proceedings*, 1958, op. cit., pp. 722-723, paras. 33 and 34.

²⁴ *ibid.*, p. 723, para. 36.

The Convention also provides that a Government for which Part II of the Convention is in force undertakes that it will, so far as national laws and regulations permit, take all appropriate steps against misleading propaganda relating to emigration and immigration. For this purpose, it will, where appropriate, act in cooperation with other Members concerned (Article 17).

Protection of recruited workers. With a view to protecting workers recruited for plantations, it is envisaged that they have to be brought before a public officers, who shall satisfy him or herself that the law and regulations concerning recruiting have been observed and, in particular, that the workers have not been subjected to illegal pressure or recruited by misrepresentation or mistake (Article 9). Where possible, the competent authority has to require the issue of a document in writing, such as a memorandum of information, a work book or a provisional contract, containing such particulars as the authority may prescribe, as for example particulars of the identity of the workers, the prospective conditions of employment and any advances of wages made to the workers (Article 10). Finally, as appropriate, the government has to take measures, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment on a plantation (Article 18).

Medical examination of recruited workers. The Convention also provides that every recruited worker has to be medically examined. Article 11 sets out the conditions under which these examinations have to be carried out. It also provides that governments for which Part II of the Convention is in force undertake to maintain, within their jurisdiction, appropriate medical services, the functions of which are set out in Article 19.

Transport of recruited workers. The recruiter or employer must whenever necessary and possible provide transport to the place of employment for recruited workers. The competent authority is responsible for taking all necessary measures to ensure adequate protection for the workers to be transported (quality of the vehicles, duration of the journey, rest camps, etc.) (Article 12). The expenses of the journey of recruited workers to the place of employment, including all expenses incurred for their protection during the journey, have to be borne by the recruiter or employer. The recruiter or employer must furnish recruited workers with everything necessary for their welfare during their journey to the place of employment, including particularly, as local circumstances may require, adequate and suitable supplies of food, drinking water, fuel and cooking utensils, clothing and blankets (Article 13).

Repatriation of workers. Any recruited worker who: (a) becomes incapacitated by sickness or accident during the journey to the place of employment; (b) is found on medical examination to be unfit for employment; (c) is not engaged after recruiting for a reason for which he or she is not responsible; or (d) is found by the competent authority to have been recruited by misrepresentation or mistake, has to be repatriated at the expense of the recruiter or employer (Article 14).

Protection of the families of recruited workers. Where the families of recruited workers have been authorized to accompany the workers to the place of employment, the competent authority has to take all necessary measures for safeguarding their health and welfare during the journey. In particular: (a) Articles 12 and 13 of the Convention must apply to such families; (b) in the event of the worker being repatriated in virtue of Article 14, his family must also be repatriated; and (c) in the event of the death of the worker during the journey to the place of employment, his family must be repatriated (Article 15).

Contracts of employment and abolition of penal sanctions²⁵

Contracts of employment. The law and/or regulations in force in the territory concerned must prescribe the maximum period of service which may be stipulated or implied in any contract, whether written or oral. In this respect, certain limits are set out: 12 months if the workers are not accompanied by their families, or two years if the workers are accompanied by their families. In the event of employment involving a long and expensive journey, this period must in no case exceed two years if the workers are not accompanied by their families, or three years if the workers are accompanied by their families. Under certain conditions, it is possible to exclude from the application of Part III of the Convention the contracts of non-manual workers. The Convention also envisages the possibility of excluding from the application of Part III all plantation workers in a territory, engaged in the production of a particular crop, in a specified undertaking or in special groups (Article 20).

Penal sanctions. In each country where there exists any penal sanction for any breach of a contract of employment by a plantation worker, the competent authority is under the obligation to take action for the abolition of all such penal sanctions (Article 21).

This provision reproduces the terms of the Penal Sanctions (Indigenous Workers) Convention, 1939 (No. 65). During the second discussion of the instruments, the Worker members submitted amendments to the proposed text. However, they were not accepted because they were not in conformity with similar provisions in other instruments, and particularly Conventions Nos. 65 and 105. The Worker members withdrew their amendments, but requested that the discussions on this point be reflected in the report of the Conferences' work.²⁶

The abolition of all penal sanctions has to be achieved by means of an appropriate measure of immediate application (Article 22).

Breach of contract. For the purpose of Part III of the Convention, the term "breach of contract" means: (a) any refusal or failure of the worker to commence or perform the service stipulated in the contract; (b) any neglect of duty or lack of diligence on the part of the worker; (c) the absence of the worker without the permission or valid reason; and (d) the desertion of the worker (Article 23).

Wages

Minimum wages. Articles 24 and 25 essentially reproduce the provisions of the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99).²⁷ These provisions envisage the existence of minimum wage fixing machinery for plantation workers. However, they may also be covered by the minimum wage rates determined for agricultural workers in general.

Protection of wages. Articles 26 to 35 essentially reproduce the provisions of the Protection of Wages Convention, 1949 (No. 95),²⁸ which are intended to protect both the

²⁵ Hereinafter Part III.

²⁶ *Record of Proceedings*, 1958, op. cit., p. 723, para. 40.

²⁷ See Convention No. 99, as well as Convention No. 131.

²⁸ See Convention No. 95.

wages themselves and the form in which they are paid to workers. By way of illustration, with regard to the payment of wages directly at work, any limitation is prohibited on the freedom of the worker to dispose of his or her wages, and wages have to be paid regularly, etc.

In view of the specific characteristics of work in plantations, the Convention explicitly provides that the competent authority must limit the amount which may be paid to recruited workers in respect of advances of wages and that it shall regulate the conditions under which such advances may be made (Article 16).

Other provisions in Part III of the Convention were taken from the Protection of Wages Recommendation, 1949 (No. 85), the Social Policy in Dependent Territories (Supplementary Provisions) Recommendation, 1945 (No. 74), and the Minimum Wage-Fixing Machinery (Agriculture) Recommendation, 1951 (No. 89). All of these provisions have the same objective, namely to protect wages and to establish minimum wages for workers in plantations.

The various provisions of Part III of the Convention were adopted without very much discussion.²⁹

Recommendation No. 110, which supplements the Convention, contains a very detailed section on the various measures for the protection of wages and the methods of fixing minimum wages (Paragraphs 9 to 26). It also contains another section on provisions relating to equal remuneration (Paragraph 27).

Annual holidays with pay

Annual holidays with pay: Articles 36 to 42 essentially reproduce the provisions of the Holidays with Pay (Agriculture) Convention, 1952 (No. 101).³⁰ These provisions recognize the right of plantation workers to annual holidays with pay. Two or three of these provisions gave rise to discussions, which did not however affect the substance of the proposed text.³¹

Weekly rest³²

Minimum weekly rest. Plantation workers must enjoy in every period of seven days a period of rest comprising at least 24 consecutive hours. The conditions and the exceptions which may be authorized are set out in Articles 43 and 44. The exceptions referred to in the Convention have to be authorized after consultation with responsible associations of employers and workers. However, each government must make, as far as possible, provision for compensatory periods of rest for the suspensions or diminutions made in virtue of Article 44, except in cases where agreements or customs already provide for such periods (Article 45).

The provisions of Part VI of the Convention were taken from the Weekly Rest (Industry) Convention, 1921 (No. 14). This Part was included at the proposal of the Worker members of the Conference Committee. They had initially proposed only to

²⁹ *Record of Proceedings*, 1958, op. cit., pp. 723-724, paras. 41-43.

³⁰ See Convention No. 101.

³¹ *Record of Proceedings*, 1958, op. cit., p. 724, paras. 44-47.

³² Hereinafter Part VI.

produce Article 2 of Convention No. 14. However, a Government member drew the attention of the Committee to “the need for including Articles 3, 4, 5 and 6 of the same Convention if Article 2 were to be included, as these provisions were an organic whole”.³³

Maternity protection

Maternity protection. Articles 46 to 50 essentially reproduce the provisions of the Maternity Protection Convention (Revised), 1952 (No. 103).³⁴

During the first discussion of the instruments, a number of amendments were proposed and adopted by the Conference Committee. One of them concerned the point which was to become Article 47, paragraph 2, respecting the qualifying period giving entitlement to maternity leave and benefits.³⁵ This provision was adopted as follows:

The competent authority may, after consultation with the most representative organizations of employers and workers, where such exist, prescribe a qualifying period for maternity leave which shall not exceed a total of 150 days of employment with the same employer during the 12 months preceding the confinement.

Workmen's compensation³⁶

Under the terms of Article 51 of the Convention, governments for which the Part concerning workmen's compensation (Part VIII) is in force undertake to extend to all plantation workers their laws and regulations which provide for the compensation of workers for personal injury by accident arising out of or in the course of their employment. Moreover, governments have to guarantee equality of treatment for foreign workers and their dependants without any condition as to residence. The modalities for the application of this principle are set out in Articles 52 and 53 of the Convention.

Certain provisions of Part VIII of the Convention are reproduced from the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19). During the first discussion, the Conference Committee adopted the proposed points. During the second discussion, other amendments were adopted, transferring certain of the proposed provisions from the Convention to the Recommendation. These provisions are contained in Paragraphs 46, 47 and 48 of Recommendation No. 110.³⁷ Paragraphs 45 to 49 of the Recommendation also contain provisions respecting the prevention of accidents and their indemnization.

Right to organize and collecting bargaining

Articles 58 to 61 essentially reproduce the provisions of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).³⁸ For example, the right to enjoy

³³ Report V(1), 1958, op. cit., p. 11.

³⁴ See Convention No. 103.

³⁵ Report V(1), 1958, op. cit., pp. 11-13. See also *Record of Proceedings*, 1958, op. cit., pp. 724 and 725, paras. 50 and 51.

³⁶ Hereinafter Part VIII.

³⁷ *Record of Proceedings*, 1958, op. cit., p. 725, paras. 52 and 53.

³⁸ See Convention No. 98.

adequate protection against any act of discrimination prejudicing freedom of association in respect of their employment and adequate protection against any act of interference by workers' and employers' organizations against each other is also reproduced.

Furthermore, the Convention explicitly provides that the right of employers and employed alike to associate for all lawful purposes must be guaranteed by appropriate measures. All procedures for the investigation of disputes between employers and workers must be as simple and expeditious as possible. Employers and workers have to be encouraged to avoid disputes and, if they arise, to reach fair settlements by means of conciliation. Practical measures have been taken in this respect, as set out in the Convention. It is envisaged that the representatives of the employers and workers concerned, including representatives of their respective organizations, where such exist, are to be associated in the operation of such machinery in equal numbers and on equal terms (Articles 54, 55, 56 and 57).

Freedom of association

Articles 62 to 70 essentially reproduce the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).³⁹ These include the right of workers and employers, without distinction whatsoever, and without previous authorization, to establish and join organizations or their own choosing; the right of these organizations to draw up their constitutions and rules, to elect their representatives in full freedom, etc.

The draft text submitted by the Office indicated that the proposed text reproduced the provisions of Conventions No. 87 and 98. These conclusions included a single title "Freedom of association". However, when a Government member indicated that this title did not apply to some of the points contained in the proposed text, the Conference Committee decided, during the discussion, to change the title to read as follows: "Freedom of association, right to organize and collective bargaining."⁴⁰ It was subsequently decided to divide the section into two parts, of which one would be compulsory (Part IX) respecting the right to organize and collective bargaining, and the other optional.⁴¹

Labour inspection

Articles 71 to 84 essentially reproduced the provisions of the Labour Inspection Convention, 1947 (No. 81), the Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947 (No. 85), and the Labour Inspection Recommendation, 1923 (No. 20).⁴² For example, they envisage the obligation to maintain a system of labour inspection; the obligation to have suitably trained inspectors; the duties of labour inspectors; the right for them to enjoy a status and conditions of service which ensure their independence, etc.

During the second discussion, the Employer members of the Conference Committee expressed their concern at the draft text of Article 80, which is the current Article 78, paragraph 1(a), of the Convention, which made it possible for labour inspectors to enter freely any place of employment liable to inspection without previous notice and at any time. Various Government members recalled that it was normal practice for labour

³⁹ See Convention No. 87.

⁴⁰ Report V(1), 1958, op. cit., p. 13.

⁴¹ *Record of Proceedings*, 1958, op. cit., p. 725, para. 54.

⁴² See under these instruments.

inspectors to give notice of their visit, unless there were special situations. The Conference Committee therefore considered that inspectors should normally notify their presence, unless such notification would hamper them in the performance of their duties.⁴³

Recommendation No. 110 includes a section on labour inspection containing detailed provisions on the subject (Paragraph 54).

Housing

In its preparatory report, the Office recalled that as a rule “housing is afforded to workers who have contracts of long duration and are resident on plantations”.⁴⁴ Taking into account this custom and the specific conditions of work in plantations, the Convention envisages that the appropriate authorities, in consultation with the representatives of the employers’ and workers’ organizations concerned, where such exist, must encourage the provision of adequate housing accommodation for plantation workers (Article 85). The minimum standards and specifications of the accommodation to be provided in accordance with the Article have to be laid down by the appropriate public authority. These standards must concern: (a) the construction materials to be used; (b) the minimum size of accommodation, its layout, ventilation and floor and air space; and (c) veranda space, cooking, washing, storage, water supply and sanitary facilities (Article 86). Adequate penalties have to be provided for violations of the relevant legal provisions (Article 87). Where housing is provided by the employer, the conditions under which plantation workers are entitled to occupancy must not be less favourable than those established by national custom or national legislation. Whenever a resident worker is discharged, he or she must be allowed a reasonable time in which to vacate the house. Where the time allowed is not fixed by law, it must be determined by recognized negotiating machinery or, failing agreement on the subject, by recourse to the normal procedure of the civil court (Article 88).

During the first discussion, the Worker members submitted an amendment concerning the standards of housing for plantation workers. They indicated that it was a problem of the greatest importance which was not addressed by the Office’s proposed text. This amendment was based on the resolution on the housing of plantation workers adopted by the Committee on Work on Plantations at its First Session (Bandung, December 1950). The amendment was supported by various Government members of the Conference Committee. During the second discussion, the provisions concerning the housing of plantation workers were adopted without discussion.⁴⁵

Medical care

In Articles 89 and 90, the Convention provides that the appropriate authorities, in consultation with the representatives of the employers’ and workers’ organizations concerned, where such exist, must encourage the provision of adequate medical services for plantation workers and members of their families. The conditions regarding these services and their functioning are set out in the Convention. The appropriate authority, in consultation with the representatives of the employers’ and workers’ organizations concerned, where such exist, has to take steps in plantation areas to eradicate or control prevalent endemic diseases (Article 91).

⁴³ *Record of Proceedings*, 1958, op. cit., p. 725, paras. 55 and 56

⁴⁴ Report VIII(1), 1958, op. cit., p. 39.

⁴⁵ *Record of Proceedings*, 1958, op. cit., p. 725, para. 57.

During the first discussion, the Worker members proposed an amendment designed to include in the Convention a section on medical care for plantation workers. After certain objections made by a number of Government and Employer members, the amendment was adopted.⁴⁶ During the second discussion, it was agreed that the members of a worker's family who could benefit from medical care were those who were actually resident with the worker on or near the plantation.⁴⁷

Plantations Recommendation, 1958 (No. 110)

In addition to the Parts mentioned above, Recommendation No. 110 also contains provisions on *vocational training for plantation workers*. These provisions were taken from the Vocational Training (Agriculture) Recommendation, 1956 (No. 101). They indicate in detail that vocational training should be provided and organized in an effective, rational, systematic and coordinated programme. Responsibility for these programmes should be entrusted to the authority or authorities capable of obtaining the best results. Moreover, the authorities should assist in these programmes in the various ways considered in the Recommendation (Paragraphs 5 to 8).

Part V of the Recommendation addresses *hours of work and overtime*. Paragraphs 28 to 33 set out the principles governing maximum working hours. These should not exceed eight in the day and 48 in the week, except in the case of the exceptions envisaged in the Recommendation (Paragraph 29(a), (b) and (c)). The limits envisaged may be exceeded in case of accident, urgent work or *force majeure*, "but only so far as may be necessary to avoid serious interference with the ordinary working of the undertaking. That limit may also be exceeded in order to prevent the loss of perishable goods or materials subject to rapid deterioration". The limit set out in Paragraph 29 may also be exceeded in the case of shift work. Regulations may provide for permanent or temporary exceptions. The rate of pay for any hours in excess of the maximum hours of work should be increased by at least 25 per cent in relation to the regular rate.

Part VI of the Recommendation sets out principles relating to *welfare facilities* (Paragraphs 34 to 44). The welfare facilities referred to by the Recommendation include facilities for purchasing appropriate food, beverages and meals. The Recommendation also refers to recreation facilities for the workers. In addition, the Recommendation addresses the issue of transport facilities in cases where the workers experience special difficulties in travelling to and from work. These facilities may be provided through laws and regulations, by virtue of collective agreement or in any other manner approved by the competent authority. Workers should in no case be compelled to use these facilities. Where workers have to pay for the facilities, particularly in the case of meals or food supplies, their prices should be reasonable and they should be provided without profit to the employer. The Recommendation envisages various ways of financing the facilities. The consultation, and even participation of workers is also envisaged in the organization and management of these facilities.

Parts IX and X of the Recommendation address the issues of *workmen's compensation for occupational diseases* and *social security* (Paragraphs 50 to 53). It is envisaged that workmen incapacitated by occupational diseases or their dependants should be assured of receiving compensation in accordance with the general principles of the national legislation relating to compensation for industrial accidents. Moreover, governments should extend their laws and regulations establishing systems of insurance or

⁴⁶ Report V(1), 1958, op. cit., p. 14.

⁴⁷ *Record of Proceedings* 1958, op. cit., p. 725, para. 59.

other appropriate systems providing security in case of sickness, maternity, invalidity, old age and similar social risks to plantation workers on conditions equivalent to those prevailing in the case of workers in industrial and commercial occupations.

2. *Problems relating to the application of the Convention*

The principle objective of the instruments on plantation workers is therefore to afford broader protection to this category of workers, taking into account the particularly arduous conditions in which they perform their work. When supervising the application of this Convention, the ILO's supervisory bodies have emphasized the fact that the appropriate application of the Conventions which address the various fields covered by Convention No. 110 also affords adequate protection to plantation workers. Clearly, this can only be achieved in so far as the governments concerned have ratified the Conventions covering the issues addressed by Convention No. 110. Where this is not the case, the Committee of Experts generally insists that the necessary measures be taken to give effect to the provisions of the Convention.

When examining the reports provided by governments on the application of the Convention, the Committee of Experts has emphasized the importance of the existence of specific legislation applicable to plantation workers, either by requesting the government concerned to continue its efforts to adopt such legislation, or by noting that even if the general labour legislation has been amended, the legislation covering plantation workers still exists. Moreover, the Committee of Experts has emphasized that the scope of application of the Convention has to be clearly determined, for example by specifying whether the term "plantation" normally includes services carrying out the primary processing of the product or products of the plantation.

With regard to the substantive provisions of the Convention, it should be noted that the Committee of Experts has on several occasions called for compliance with the provisions respecting minimum wages and the protection of wages. It has also referred to the need to comply with the provisions respecting paid leave and has referred to the comments that it has made on the Holidays with Pay Convention, 1936 (No. 52). The Committee of Experts has also commented on the provisions relating to maternity protection and has referred to its comments under Convention No. 103. It has noted in its comments the problem of compensating for employment accidents. The Committee of Experts has very frequently recalled the need to comply with the provisions concerning freedom of association and the right to collective bargaining and has referred to its comments on Conventions Nos. 87 and 98. The Committee of Experts has also commented on compliance with the provisions respecting labour inspection and the housing of plantation workers.

17.2. Nursing personnel

Instruments	Number of ratification (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations to which member States are invited to give effect.)		
Nursing Personnel Convention, 1977 (No. 149)	36	The Governing Body has invited member States to contemplate ratifying Convention No. 149 and inform the Office of any obstacles or difficulties encountered that might prevent or delay ratification of this Convention.
Nursing Personnel Recommendation,	—	The Governing Body has invited member States to give

1977 (No. 157)		effect to Recommendation No. 157 and to inform the Office of any obstacles or difficulties encountered in the implementation of this Recommendation.
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Outdated instruments	(Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)
No instrument concerning nursing personnel has been considered outdated by the Governing Body.	

The ILO has shown particular interest in the working conditions and career prospects of medical personnel in general, and of nursing personnel in particular. In 1930, the Conference adopted the Hours of Work (Hospitals, etc.) Recommendation, 1930 (No. 39). Subsequently, the Advisory Committee on Salaried Employees and Professional Workers addressed the working conditions of nursing personnel, particularly in 1958. In 1967, it called for the issue to be included on the agenda of the Conference. In 1973, an ILO-WHO Joint Meeting on the Conditions of Work and Life of Nursing Personnel was convened. The Meeting adopted a series of conclusions as a code of practice and recommended that it should be incorporated in an international labour instrument.⁴⁸ The Governing Body therefore decided to include an item on the employment and conditions of work and life of nursing personnel on the agenda of the Conference in 1976.⁴⁹

In the preparatory documents, it was recognized that in most countries nurses form the largest group among those who deal with health, particularly in view of the expansion of health services. It was indicated that “while health services have been growing and health programmes expanding, there has sprung up an enormous demand for nurses. The part played by the nurse has undergone profound changes and become increasingly important and complex”.⁵⁰ However, nursing personnel, considered to form a sub-system within the general system of health personnel, “have been inadequate in numbers and in qualifications to satisfy even the modest aims set for the First and Second Development Decades [...] This chronic shortage is made worse by the aversion observed almost everywhere to nursing as a profession and by the migration of nursing personnel from one country to another, especially from the developing to the industrialized countries [...]”.⁵¹ This situation is due both to the economic and social situation of nurses and to their morale and the general conditions of the profession. The Office’s report emphasized that the chief causes of concern of nursing personnel included: pay, working hours, rest periods and holidays, health protection; initial and further training facilities; the organization of work, etc.⁵²

It should also be noted that the Office’s report indicated that “the preponderance of women in the profession has one very grave consequence: it helps to perpetuate the false notion that nursing is a matter rather of motherly care than of technical specialization”. It

⁴⁸ ILO-WHO Joint Meeting on Conditions of Work and Life of Nursing Personnel (Geneva, 19-30 Nov. 1973), *Report*, JMNP/1973/II.

⁴⁹ ILO, *Employment and conditions of work and life of nursing personnel*, ILC, 61st Session, 1976, Report VII(1), pp. 1 to 3.

⁵⁰ *ibid.*, p. 5.

⁵¹ *ibid.*, p. 5. See also ILO, *Healthcare personnel in Central and Eastern Europe*, Sectoral Activities Programme, Working Paper, Geneva, 1997.

⁵² See also ILO, *Trends and perspectives in the nursing profession*, Sectoral Activities Programme, Working Paper, Geneva, 1995.

was also emphasized that nursing personnel, who tend to form trade unions and engage in collective bargaining on conditions of employment and work, find that “their freedom of action is limited by the fact that nursing is considered a vital public service and so bound by special obligations to avoid interruption. Moreover, a high proportion of nurses – almost all of them in developing countries – are employed in public institutions and hence often subject to restrictions on their freedom of association and even more on their right to bargain collectively and to strike”. Finally, as indicated by the report, nurses are also “affected by factors going well beyond their trade union rights”. The report recalls in this respect the deficiencies in health planning; the transformation of the profession itself; the frequent absence of an adequate legal framework for organizing and supervising the training of nurses and the practice of the profession; and the small part nurses have in decisions affecting the policies of nursing services.⁵³

All of these elements therefore led up to the adoption of an international instrument on the conditions of work and life of nursing personnel. Taking into account the responses received to the questionnaire that it had prepared,⁵⁴ the Office submitted conclusions to the Conference concerning the form to be taken by the instrument, namely a Recommendation.⁵⁵

When the Conference commenced its general discussion on the issue, some of the members of the Conference Committee expressed concern at the adoption of an international instrument specifically drawn up for specific groups of workers. The opinion was expressed that “the proliferation of such instruments would upset the equilibrium of an over-all social policy and adversely affect the labour market.”⁵⁶ This issue was raised once again in the discussion on the form to be taken by the instrument.⁵⁷

When the first discussion commenced, it was decided to debate the Office’s proposal to adopt a Recommendation and only to discuss at the end the question of the possible adoption of a Convention. At that point, the Worker members submitted an amendment proposing the adoption of two instruments, a Convention and a Recommendation. The Employer members opposed the adoption of a Convention and expressed their fear “that a Convention on the subject [...] might not be ratified or implemented.” Government members expressed support both for the adoption of two instruments and for the adoption of only a Recommendation. Following a vote, it was decided that the instrument under discussion should have the form of a Recommendation.⁵⁸

During the second discussion, debate once again covered the form of the instrument. After a general discussion on this point, it was decided to adopt a Convention. The draft

⁵³ Report VII(1), 1976, op. cit., pp. 6-7.

⁵⁴ *ibid.*, pp. 82 and 83.

⁵⁵ *Employment and conditions of work and life of nursing personnel*, ILC, 61st Session, 1976, Report VII(2), pp. 69 to 79. In addition to proposals concerning the content of an international instrument, the Office also submitted a text entitled *Suggestions concerning application*, Report VII(2), pp. 79 to 82.

⁵⁶ ILO, *Employment and conditions of work and life of nursing personnel*, ILC, 63rd Session, 1977, Report VI(1), p. 5. For the discussions and the Conference Committee, see also ILO, *Record of Proceedings*, ILC, 61st Session, 1976, p. 248, para. 12.

⁵⁷ *ibid.*, pp. 270-271.

⁵⁸ *ibid.*, pp. 270-271, paras. 303 to 312.

text had to be prepared by a working group set up within the Conference Committee and was based on a text submitted by the Worker members of the Committee.⁵⁹ In the end this text was adopted by the Conference with a number of amendments. Certain of these provisions had already been discussed when they were in the draft Recommendation.

1. Content of the Nursing Personnel Convention, 1977 (No. 149)

Definition and scope of application. The scope of application of the Convention is determined in relation to the definition given of the personnel to whom it will be applied. In this respect, the Convention defines the term “nursing personnel” as all categories of persons providing nursing care and nursing services. The Convention applies to all nursing personnel wherever they work (Article 1, paragraphs 1 and 2).

During the first and second discussions, there was a brief discussion on the definition of the nursing personnel covered by the instruments. The text adopted corresponds to that initially proposed by the Office for the draft Recommendation. This definition was based on the definition adopted by the ILO-WHO Joint Meeting.⁶⁰

In Article 1, paragraph 3, the Convention provides that the competent authority may establish special rules concerning nursing personnel who give nursing care and services on a voluntary basis. These rules have to be established after consultation with the employers’ and workers’ organizations concerned, where such organizations exist. However, these rules must not derogate from the provisions of Article 2, paragraph 2(a), or from Articles 3, 4 and 7 of the Convention.

Emphasis should be placed on the importance accorded to the fact that the instrument should cover nursing personnel wherever they work and whether or not they are paid. In this respect, it should be recalled that, in relation to the draft Recommendation, an amendment was proposed with a view to deciding whether the text being discussed should be applicable to nursing personnel in the armed forces, in accordance with national laws and regulations. However, this proposal was considered to conflict with the decision already taken that the instrument should cover all the categories of nursing personnel.⁶¹ Proposals were also made concerning the consultations to be held with employers’ and workers’ organizations, which did not affect the meaning of the provision that was finally adopted.

Adoption and application of a policy concerning nursing services and nursing personnel. During the first discussion of the draft text submitted by the Office, a Government member proposed the deletion of this point. He indicated that the instrument under discussion should only deal with those matters directly related to the employment and conditions of work and life of nursing personnel. However, it was recalled that it was not unusual for ILO instruments to deal with the kind of questions touched upon in the point under discussion. Certain other members of the Committee considered that this point

⁵⁹ ILO, *Record of Proceedings*, ILC, 63rd Session, 1997, pp. 475 to 477, paras. 298 to 308. It should also be recalled that certain governments had supported the discussion and adoption of a Convention, rather than a Recommendation. In this respect see ILO, *Employment and conditions of work and life of nursing personnel*, ILC, 63rd Session, 1977, Report VI(2), pp. 3 to 13.

⁶⁰ Report VI(1), 1977, op. cit., p. 10.

⁶¹ *ibid.*, pp. 10 and 11.

was a vital part of the instrument.⁶² During the second discussion, a number of amendments were proposed to the draft Recommendation. Some of these amendments were retained, without however changing the substance of the proposed text.⁶³ The draft Convention submitted by the Worker members was adopted. This text retained most of the draft Recommendation initially submitted.

The Convention provides that each Member which ratifies it undertakes to adopt and apply, in a manner appropriate to national conditions, a policy concerning nursing services and nursing personnel designed, within the framework of a general health programme, where such a programme exists, and within the resources available for health care as a whole, to provide the quantity and quality of nursing care necessary for attaining the highest possible level of health for the population (Article 2, paragraph 1).

For this purpose, measures have to be taken to provide nursing personnel with education and training appropriate to the exercise of their functions, and employment and working conditions, including career prospects and remuneration, which are likely to attract persons to the profession and retain them in it (Article 2, paragraph 1).

One of the major concerns of the ILO and the WHO with regard to nursing personnel concerns training.⁶⁴ This issue is developed in Article 3 of the Convention. During the discussion on this point, it was emphasized that “questions of remuneration could not be considered in isolation from questions of training and career opportunities, which were also mentioned in the paragraph.”⁶⁵

The principles of tripartism and consultation are recognized in Article 2, paragraph 3. This provision envisages that the policy concerning nursing services and nursing personnel has to be formulated in consultation with the employers’ and workers’ organizations concerned, where such organizations exist, and must be coordinated with policies relating to other aspects of health care and to other workers in the field of health.

The Nursing Personnel Recommendation, 1977 (No. 157), develops the above principles in its Paragraphs 4 to 6 and refers in Paragraph 5 to the various categories of nursing personnel.⁶⁶

Training of nursing personnel and conditions in which the profession is practiced. As indicated above, the issue of the training of nursing personnel has always been one of the most important questions for this category of workers. Article 3 of the Convention provides that the basic requirements regarding nursing education and training and the supervision of such education and training are to be laid down by national laws or regulations or by the competent authority or competent professional bodies, empowered by such laws or regulations to do so. Nursing education and training has to be coordinated with the education and training of other workers in the field of health.

The adoption of Article 4 of the Convention was the subject of much discussion, as the text is to cover all categories of nursing personnel. This Article provides that national

⁶² *ibid.*, pp. 12 and 13.

⁶³ *Record of Proceedings*, 1977, *op. cit.*, pp. 477 and 478.

⁶⁴ See chapter III on this issue in Report VII(1), pp. 16 to 21.

⁶⁵ *Record of Proceedings*, 1997, *op. cit.*, p. 478, para. 322.

⁶⁶ These categories were also proposed by the WHO Expert Committee.

laws or regulations must specify the requirements for the practice of nursing and limit that practice to persons who meet these requirements.

Parts III and IV of the Recommendation develop the principles concerning education and training, as well as the practice of the nursing profession. It should also be recalled that in 1944 the ILO adopted the Medical Care Recommendation, 1944 (No. 69), which emphasizes the necessity not only of requiring adequate training for personnel collaborating in the provision of medical care, but also of subjecting the practice of the profession to strict conditions.

Planning of nursing service. The Convention obliges the government to take measures to promote the participation of nursing personnel in the planning of nursing services and consultation with such personnel on decisions concerning them, in a manner appropriate to national conditions (Article 5, paragraph 1).

It should be noted that, during the discussion of this provision, the representative of the WHO pointed out that “in accordance with the multidisciplinary and multi-sectoral approach adopted in WHO policies relating to the planning of health services, the present orientation of the Organization was to promote participation of nursing personnel in the planning of health services at all levels”.⁶⁷

Determination of conditions of employment. The determination of conditions of employment and work is preferably to be made by negotiation between employers’ and workers’ organizations concerned (Article 5, paragraph 2).

Settlement of disputes. The settlement of disputes arising in connection with the determination of terms and conditions of employment must be sought through negotiations between the parties or, in such a manner as to ensure the confidence of the parties involved, through independent and impartial machinery such as mediation, conciliation and voluntary arbitration (Article 5, paragraph 3).

During the discussion of this provision, it was indicated that it “rightly put the accent on the fact that the settlement of disputes should be first sought through negotiations, and on the necessity of a mutual agreement so that a dispute might be settled in a satisfactory manner.”⁶⁸

Part V of the Recommendation contains a series of provisions which supplement those contained in Article 5 of the Convention.

Minimum working conditions. In accordance with the Convention, nursing personnel must enjoy conditions at least equivalent to those of other workers in the country concerned in the following fields: (a) hours of work, including regulation and compensation of overtime, inconvenient hours and shift work; (b) weekly rest; (c) paid annual holidays; (d) educational leave; (e) maternity leave; (f) sick leave; (g) social security (Article 6).

The text of the draft Recommendation initially proposed by the Office contained a series of suggestions concerning the working conditions of nursing personnel, particularly in the fields of remuneration, hours of work and rest periods, health protection and social security. In the preparatory report it was recognized that “the inadequate remuneration of

⁶⁷ *Record of Proceedings*, 1977, op. cit., p. 479, para. 338.

⁶⁸ *ibid.*, p 479, para. 343.

nursing personnel remains a series problem”.⁶⁹ With regard to hours of work and rest periods, it was indicated that it is broadly recognized that, because of the peculiar difficulties of the nursing profession, “nurses must be guaranteed specific rights as regards hours of work, rest and leave”.⁷⁰ Similar concerns were expressed with regard to the social protection of nursing personnel. The Recommendation adopted together with the Convention devotes Parts VII, VIII and X to these issues.

Occupational health and safety. Under the terms of the Convention, each member State which has ratified it undertakes, if necessary, to endeavour to improve existing laws and regulations on occupational health and safety by adapting them to the special nature of nursing work and of the environment in which it is carried out (Article 7).

Nursing personnel are exposed to numerous risks to their health and physical and mental integrity. However, as emphasized in the Office’s preparatory report, it is “paradoxical to see that such workers, who, by the very nature of their profession, protect other people’s lives and health, have in many cases not yet succeeded in solving the problems of their own protection”.⁷¹ In addition to the above provision of the Convention, the Recommendation devotes Part IX to issues related to the health protection of nursing personnel. Moreover, in view of the new developments relating to the risks to which nursing personnel may be exposed, the Committee of Experts made a general observation in 1990, which essentially recalls the need to take measures “to adapt legislation on health and safety at work to the particular risk of accidental exposure to HIV among nursing personnel, in accordance with the provisions of Article 7 of the Convention”. To this effect, it also recalled the provisions of Paragraphs 48(1), 49(2) and 51 of Recommendation No. 157.⁷²

Implementation of the provisions of the Convention. The provisions of the Convention must be given effect by national laws or regulations. However, they may also be made effective by means of collective agreements, works rules, arbitration awards, court decisions, or in such other manner consistent with national practice as may be appropriate under national conditions (Article 8).

In response to a question raised by a Government member of the Conference Committee, the representative of the Secretariat indicated that the wording of this provision “put the accent on the obligation, incumbent on States ratifying the Convention, to adopt the necessary legislation to give effect to the provisions of the Convention where these were not applied by one of the methods enumerated” in the Article in question.⁷³

The Recommendation is supplemented by an Annex entitled “Suggestions concerning Practical Application”. Some of the members of the Conference Committee considered that this latter text duplicated the principle instrument. However, they stated that they

⁶⁹ Report VII(1), 1976, op. cit., p. 44.

⁷⁰ *ibid.*, p. 32.

⁷¹ *ibid.*, p. 57.

⁷² ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), ILC, 77th Session, 1990, pp. 435-436. This observation was reiterated in 1994, ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), ILC, 81st Session, 1994, p. 481.

⁷³ *Record of Proceedings*, 1977, op. cit., pp. 480 and 481, para. 363. Moreover, this provision is in accordance with other similar provisions found in other ILO Conventions.

would accept it “as an accessory instrument which could be considered as providing guidelines for practical application.”⁷⁴

2. Problems relating to the application of the Convention

In its comments on the application of the Convention, the Committee of Experts has frequently raised a number of problems, including, on several occasions, relating to the scope of application of the Convention. In this respect, it has recalled that the Convention applies to all nursing personnel, wherever they work. Accordingly, voluntary nursing personnel, including nurses who work for the Red Cross, and even nursing personnel in armed forces, must be covered by the national laws or regulations giving effect to the Convention.

One of the issues which would appear to give rise to the most problems is the development of policies concerning nursing services and nursing personnel, with particular reference to the consultation of representatives of nursing personnel during the development and application of such policies. It has on many occasions recalled the obligation of the government to consult the representatives of organizations of nursing personnel and to respect the designation of these representatives by the personnel. In the context of the adoption of such policies, the Committee of Experts has requested governments to provide information on the laws and regulations in force which govern the nursing profession, as well as those which determine the conditions in which the profession is exercised. Similarly, particular attention has been given to the measures adopted to ensure an appropriate training for nursing personnel. The Committee of Experts has often requested governments to provide information on training programmes and the coordination between nursing education and training and that of other workers in the field of health. With regard to training programmes, the Committee of Experts has recalled the principles set out in Recommendation No. 157.

With regard to the necessary measures to secure the conditions of employment and work of nursing personnel, the Committee of Experts has frequently recalled the need to take measures guaranteeing nursing personnel remuneration which is commensurate with their level of responsibility and career prospects, with a view to retaining people in the profession. This has become more urgent as governments have indicated shortages in the growth of nursing personnel and that workers are leaving the profession, resulting in a reduction in medical care and even a substantial decline in primary health care.⁷⁵

Moreover, requests have often been made to secure the participation of nursing personnel in the determination of their conditions of employment and work. Indeed, on many occasions, the Committee of Experts has noted that appropriate consultations were not held when determining conditions of work (working time, holidays, wages, etc.). In this respect, the Committee of Experts has constantly requested governments to provide information on the measures taken to secure such consultation and participation. With regard to the settlement of disputes arising in connection with the determination of terms and conditions of employment, the Committee of Experts has also frequently requested that measures be taken so that these disputes are settled through negotiation between the parties, rather than, for example, the imposition of compulsory arbitration.

⁷⁴ *ibid.*, p. 481, para. 367.

⁷⁵ This situation has been recognized, not only by governments in certain countries suffering grave economic problems, but also in certain industrialized countries.

In cases where governments have indicated that conditions of employment and work are determined by collective agreement, the Committee of Experts has requested them to provide examples of such agreements for its examination, particularly in the case of nursing personnel working in the private sector. Moreover, where governments have indicated that the conditions of employment and work established for public servants also apply to nursing personnel, the Committee of Experts has systematically requested information on whether these conditions take into account the special nature of nursing work and whether they also apply to nursing personnel in the private sector. If that is not the case, the governments concerned have been requested to take the necessary measures to ensure that conditions of employment and work are determined for nursing personnel in the private sector.

Certain governments have indicated that the provisions on occupational safety and health applicable to all workers also cover nursing personnel. The Committee of Experts has frequently asked whether these provisions take into account the specific risks to which nursing personnel are exposed. In any case, it has requested that specific measures be taken to cover these special risks. As indicated above, the Committee of Experts has recalled the risks to which nursing personnel are exposed when they are in contact with HIV. The Committee of Experts has therefore requested information concerning the measures adopted to provide specific protection for nursing personnel against these risks.⁷⁶

Finally, reference should be made to the fact that workers' organizations have very frequently had recourse to the right accorded by article 23 of the Constitution of the ILO and have regularly transmitted their observations on the application of the Convention in relation to various of its Articles. This has made it possible for the Committee of Experts to remind governments of their obligations deriving from the Convention and to assist in improving its application.

17.3. Workers in hotels and restaurants

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and recommendations that member States are invited to implement.)		
Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)	12	This Convention was adopted after 1985 and is considered up to date.
Working Conditions (Hotels and Restaurants) Recommendation, 1991 (No. 179)	–	This Recommendation was adopted after 1985 and is considered up to date.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
No instrument concerning workers in hotels and restaurants has been considered outdated by the Governing Body.		

The hotels, travel and leisure industry is growing in importance, as are the workers in this sector of the economy. This is due to the fact that the sector has experienced, and is continuing to experience, exceptionally high rates of growth. In 1990, when the

⁷⁶ These measures should recognize the occupational nature of the disease and provide for longer annual holidays, financial compensation or more frequent breaks.

representative of the Secretary-General of the Conference introduced the subject in the technical committee entrusted with examining the item on the Conference agenda concerning working conditions in hotels, restaurants and similar establishments, he recalled that “there were already 100 million people employed in the hotel, catering, travel and recreation industry which generated an annual revenue of about US\$ 2,000 billion.”⁷⁷ More recently, the report submitted by the Office to the Tripartite Meeting on Human Resources Development, Employment and Globalization in the Hotel, Catering and Tourism Sector indicates that this sector accounts for between 3 and 4 per cent of GDP in most of the world’s economies.⁷⁸ It also indicates that nearly 3 per cent of the total global labour force is employed in the sector. However, it notes that workers in the sector earn wages which are on average at least 20 per cent lower than those of workers in other sectors. Another element emphasized by the report is that half of the workers in the sector are under 25 years of age and that nearly 70 per cent are women. All of these factors had already been noted in the past, with the result that the ILO had begun to address the conditions of workers in these sectors many years ago.

Indeed, the Conference had examined certain aspects of conditions of work in hotels, catering and similar establishments before the Second World War. In 1930, it adopted the Hours of Work (Hotels, etc.) Recommendation, 1930 (No. 37). This Recommendation was adopted due to the fact that the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), provides in Article 1, paragraph 2(b), that its provisions do not apply to persons employed in hotels, restaurants, boarding-houses, clubs, cafes and other refreshment houses. This exclusion had been decided upon due to the special nature of the work carried out in these establishments. Accordingly, Recommendation No. 37 proposes, in the first place, that countries in which no statutory regulation yet exists of the hours of work of persons employed in hotels, restaurants, boarding-houses, clubs, cafes and similar establishments should make special investigations into the conditions obtaining in these establishments in the light of the rules laid down in Convention No. 30. In the second place, the Recommendation advocates that countries in which regulations of the hours of work of these workers already exist should make special investigations into the application of the regulations, taking into account the provisions of Convention No. 30. Finally, the Recommendation proposes that the Office should prepare a special report on these investigations as a basis for considering the desirability of placing the question of the hours of work of persons employed in these establishments on the agenda of a subsequent session of the Conference, with a view to the adoption of a Convention. However, no effect was given to this proposal.

Nevertheless, conditions of work in hotels, restaurants and similar establishments have been examined and discussed in tripartite meetings. In 1931, an Advisory Meeting of Hotel, Café and Restaurant Workers was held and discussed the problems of placement, foreign labour and systems of remuneration, including remuneration based on tips.

Later, the ILO convened the first meeting of the Tripartite Technical Meeting on Hotels, Restaurants and Similar Establishments. This Tripartite Technical Meeting was held on three occasions (in 1965, 1974 and 1983). Resolution No. 26, adopted by the Third Tripartite Meeting, invited the Governing Body to study the possibility of including on the agenda of a session of the Conference an item dealing particularly with the hotel, catering and tourism sector, with a view to the adoption of international labour standards, taking into account the conclusions and resolutions adopted by the Technical Tripartite Meetings.

⁷⁷ ILO, *Record of Proceedings*, ILC, 77th Session, Geneva, 1990, p. 28/2, para. 8.

⁷⁸ ILO, *Human resources development, employment and globalization in the hotel, catering and tourism sector*, Geneva, 2001.

Before the item, entitled “Working conditions in hotels, restaurants and similar establishments” was included on the agenda of the Conference by the Governing Body, the Office on several occasions submitted reports to the Governing Body (1984, 1985, 1986, 1987 and 1988) on the law and practice relating to conditions of work in hotels, restaurants and similar establishments. On the basis of these reports, the Governing Body included this item on the agenda of the 77th Session of the Conference in 1990.

It should also be noted that the Governing Body, on the basis of resolution No. 17 adopted by the Second Tripartite Technical Meeting, in 1980 established the Hotel, Catering and Tourism Committee. The first meeting of the new industrial committee was held in 1989, just before the item was discussed by the Conference.

In accordance with the Office’s report, the text submitted to the Conference for discussion proposed the adoption of a Convention. The form of the instrument to be adopted by the Conference was the subject of long debate. Once again, certain members of the Conference Committee were opposed to the instrument on working conditions in hotels, restaurants and similar establishments taking the form of a Convention. The reasons given were that the Conference should not adopt a Convention for workers in a specific sector because they were already covered by general Conventions which had already been adopted.⁷⁹ Nevertheless, after a double discussion, the Conference adopted the Working Conditions (Hotels and Restaurants) Convention (No. 172) and Recommendation (No. 179) in 1991.

Objective of the instruments: The general objective of the instruments on working conditions in hotels and restaurants is to improve the working conditions of the workers concerned with a view to bringing them closer to those prevailing in other sectors, without prejudicing the autonomy of the employers’ and workers’ organizations concerned.

1. Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)

Scope of application. Convention No. 172 defines its scope of application by indicating that it applies to workers employed within: (a) hotels and similar establishments providing lodging; and (b) restaurants and similar establishments providing food, beverages or both. The definition of the categories covered by the Convention is to be determined by governments in the light of national conditions and after consulting the employers’ and workers’ organizations concerned. However, governments which ratify the Convention may, after consulting the employers’ and workers’ organizations concerned, exclude from its application certain types of establishments which fall within the definition mentioned above, but where nevertheless special problems of a substantial nature arise. Governments may also, after consulting the employers’ and workers’ organizations concerned, extend the application of the Convention to other related establishments providing tourism services. These establishments must be specified in a declaration appended to the ratification. Furthermore, governments may subsequently, after consulting the employers’ and workers’ organizations concerned, notify the Director-General of the ILO by a declaration that they are extending the application of the Convention to further categories of related establishments providing tourism services (Article 1, paragraphs 1 to 3).

⁷⁹ ILO, *Record of Proceedings*, ILC, 77th Session, Geneva, 1990, pp. 28/226, paras. 12, 16, 19, 26, inter alia; see also, ILO, *Record of Proceedings*, ILC, 78th Session, Geneva, 1991, pp. 23/327, paras. 12, 15, 23, inter alia.

It is interesting to note that the Office insisted in the preparatory work submitted to the Conference for the first discussion of the item on “the need for a clear definition and delimitation of the key expressions contained in the agenda item, namely ‘working conditions’ and ‘hotels, restaurants and similar establishments’, and a clear determination of the scope of the future instrument or instruments”.⁸⁰

It was recalled that Recommendation No. 37 describes in detail the activities covered in referring to “persons employed in hotels, restaurants, boarding-houses, clubs, cafes and similar establishments which are exclusively or mainly engaged in providing board and lodging or supplying refreshments for consumption on the premises”.⁸¹ The Office also recalled that when the First Tripartite Technical Meeting had been held, as the Governing Body had not defined the scope of the meeting it had been necessary to discuss in some depth the establishments covered. For this purpose a detailed definition was provided of the following three groups: (1) hotels; (2) restaurants, coffee bars, tea rooms and similar establishments; and (3) bars, dancehalls and nightclubs, cabarets, etc. The report recalled that the word “tourism” appeared for the first time in the text of resolution No. 3 adopted by the Tripartite Technical Meeting in 1965. The Second Tripartite Technical Meeting in 1974 used the term “catering industry”. When the Governing Body decided upon the establishment of a new industrial committee for hotels, restaurants and related establishments in 1980, it decided that its scope should extend to the tourism industry in view of its particular importance for many developing countries. The principal categories of establishments and activities covered were therefore: (a) hotels, boarding-houses, motels, tourist camps and holiday centres; (b) restaurants, bars, cafeterias, snack bars, pubs, nightclubs and other similar establishments; (c) establishments, or parts thereof, for the provision of meals and refreshments within the framework of industrial and institutional catering (for hospitals, factory and office canteens, schools, aircraft, ships, etc.); (d) travel agencies and tourist guides, tourism information offices; and (e) conference and exhibition centres.⁸² Finally, resolution No. 26 of 1983, which invited the Governing Body to study the possibility of including an item on the agenda of the Conference, explicitly stated that the item should deal “particularly with the hotel, catering and tourism sector”.

However, in its report, the Office emphasized the importance of limiting the discussion to the situation in hotels, restaurants and similar establishments and explained why the inclusion of other categories would not be advisable.⁸³ Nevertheless, the questionnaire sent to governments left open the possibility of including other categories of establishments in the instruments to be adopted.⁸⁴ Based on the replies received by the Office, the proposed text left “enough room to member States to adjust its application as the scope of the establishments is concerned, to the specific needs of the country concerned”,⁸⁵ while at the same time proposing that the instrument should also cover

⁸⁰ ILO, *Working conditions in hotels, restaurants and similar establishments*, ILC, 77th Session, Geneva, 1990, Report VI(1), p. 3.

⁸¹ *ibid.*, p. 7.

⁸² *ibid.*, p. 8.

⁸³ *ibid.*, pp. 9 and 10.

⁸⁴ *ibid.*, question 6, p. 53.

⁸⁵ ILO, *Working conditions in hotels, restaurants and similar establishments*, ILC, 77th Session, Geneva, 1990, Report VI(2), p. 23.

persons employed in “travel agencies, tour operators and other establishments providing tourism services.”⁸⁶

During the first discussion, the proposed point 5 was the subject of long discussions and several amendments. It may be noted merely that the Conference Committee decided to delete the inclusion of tourism from the scope of the future instruments. However, it was proposed to include a provision making it possible for member States to include other similar establishments.⁸⁷ During the second discussion, there was once again a discussion on whether or not to include workers in “establishments providing tourist services related to the activity of hotels, restaurants and similar establishments.” This had been proposed in an amendment to Article 1. After long discussion, although it had been adopted beforehand, this amendment was not accepted.⁸⁸

Exclusions. In the first report on the application of the Convention submitted under article 22 of the Constitution of the ILO, governments have to list any type of establishment which may have been excluded in pursuance of Article 1, paragraph 2, giving the reasons for such exclusion, stating the respective positions of the employers’ and workers’ organizations concerned with regard to such exclusion, and they have to state in subsequent reports the position of their law and practice in respect of the establishments excluded. In this respect, they have to indicate the extent to which effect has been given or is proposed to be given to the Convention in respect of such establishments (Article 1, paragraph 4).

With regard to the establishments which could be excluded in accordance with the above provision, it should be recalled that the Office had the occasion to indicate, in reply to a request for information from a government, that if the national laws and regulations were only applicable to establishments employing 50 or more workers, that could in practice mean that an important part of the establishments in the country would not be covered and therefore a majority of workers would not be covered either. Accordingly, a serious examination was needed of the impact that the exclusion authorized by the national legislation would have on workers in hotels and restaurants.

Definition. For the purpose of the Convention, the term “the workers concerned” means workers employed within establishments to which the Convention applies pursuant to the provisions of Article 1, irrespective of the nature and duration of their employment relationship (Article 2, paragraph 1).

With regard to the terms “workers employed within establishments”, the Office has indicated, in clarifications provided at the request of a government, that the intention of this provision is not to limit the application of the Convention to workers employed *by* establishments, but to broaden its coverage to all workers working *in* establishments, irrespective of the nature and duration of their engagement, unless they are excluded in accordance with Article 2, paragraph 1, of the Convention. This is intended to take into account the fact that the Convention endeavours “to remedy some of the hardships arising from the widespread employment of temporary, casual, seasonal or other types of non-permanent employees and to establish the principle that there should be equality of

⁸⁶ *ibid.*, p. 127.

⁸⁷ *Record of Proceedings*, 1990, op. cit., p. 28/8, para. 56.

⁸⁸ *Record of Proceedings*, 1991, op. cit., pp. 23/8 and 9, paras. 57 to 66.

treatment of all workers, irrespective of the duration and nature of their employment relationship”, as indicated in the preparatory work for the instrument.⁸⁹

Nevertheless, governments may, in the light of national law, conditions and practice, and after consulting the employers’ and workers’ organizations concerned, exclude certain particular categories of workers from the application of all or some of the provisions of the Convention. Governments which ratify the Convention must, in their first report on the application of the Convention submitted under article 22 of the Constitution of the ILO, list any categories of workers which may have been excluded in pursuance of paragraph 1 above, giving the reasons for such exclusion, and have to indicate in subsequent reports any progress made towards wider application of the Convention (Article 2, paragraphs 1 and 2).

It should be recalled that the intent of this provision is to include all categories of workers “irrespective of the nature and duration of their employment relationship”, while leaving member States discretion to exclude certain categories of workers. The discussions held in the Conference Committee on this provision referred, among other matters, to the issue of whether or not to include within the scope of the Convention the family members of the employer and managerial staff.⁹⁰

Adoption of a national policy. Governments are obliged, without jeopardizing the autonomy of the employers’ and workers’ organizations concerned, to adopt and apply, in a manner appropriate to national law, conditions and practice, a policy designed to improve the working conditions of the workers concerned. The general objective of this policy is to ensure that the workers concerned are not excluded from the scope of any minimum standards adopted at the national level for workers in general, including those relating to social security entitlements (Article 3, paragraphs 1 and 2).

In the conclusions submitted to the Conference, the Office had proposed a point indicating that “the Convention should provide that Members should adopt and apply, in a manner appropriate to national conditions, a policy designed to improve the working conditions of the workers concerned”.⁹¹ During the first discussion, the Employer members proposed, among others, an amendment to this point to add “a reference to productivity”. They explained that “improvements in working conditions could only usefully be achieved with parallel improvements in the efficiency and productivity of the enterprises”.⁹² This proposal met with almost universal opposition from the other members of the Conference Committee and was not accepted. During the second discussion, the Employer members endeavoured once again to introduce the notion of productivity. However, once again, the idea was not accepted. The Article was therefore adopted after discussion of certain amendments, including one concerning the respect due to the autonomy of the employers’ and workers’ organizations concerned.⁹³

It would appear appropriate to recall that the Office had occasion to indicate, in replying to a request for information from a Government, that the existence of a general

⁸⁹ Report VI(2), 1990, op. cit., p. 28.

⁹⁰ *ibid.*, p. 28; *Record of Proceedings*, 1990, op. cit., pp. 28/9 and 10, paras. 65 to 66; *Record of Proceedings*, 1991, op. cit., p. 23/11, paras. 77 to 80.

⁹¹ Report VI(2), 1990, op. cit., p. 127.

⁹² *Record of Proceedings*, 1990, op. cit., p. 28/10, para. 68.

⁹³ *Record of Proceedings*, 1991, op. cit., p. 23/11, paras. 81-87.

policy respecting the working conditions of workers in the country might not suffice to give effect to this provision of the Convention, as its impact on the working conditions in hotels and restaurants could not be guaranteed. This provision seeks a real improvement in the working conditions of workers in the sector. Moreover, the Office recalled on the same occasion that this provision does not require the adoption of exclusive laws and regulations applicable to hotels and restaurants.

Working conditions

Hours of work. Unless otherwise determined by national law or practice, the term “hours of work” means the time during which a worker is at the disposal of the employer (Article 4, paragraph 1).

Working time and rest periods. The workers concerned have to be entitled to reasonable normal hours of work and overtime provisions in accordance with national law and practice. The workers concerned must be provided with reasonable minimum daily and weekly rest periods, in accordance with national law and practice. The workers concerned must, where possible, have sufficient advance notice of working schedules to enable them to organize their personal and family life accordingly (Article 4, paragraphs 2 to 4).

If workers are required to work on public holidays, they have to be appropriately compensated in time or remuneration, as determined by collective bargaining or in accordance with national law or practice. The workers concerned must be entitled to annual leave with pay of a length to be determined by collective bargaining or in accordance with national law or practice. In cases where their contract expires or their period of continuous service is not of sufficient duration to qualify them for full annual leave, the workers concerned must be entitled to paid leave proportionate to the length of service or payment of wages in lieu, as determined by collective bargaining or in accordance with national law or practice (Article 5, paragraphs 1 to 3).

As indicated in the Office’s preparatory report, one of the problems which arise for workers in hotels, restaurants and similar establishments consists of working time (hours of work, rest periods and holidays).⁹⁴ During the Conference discussions, this problem was recognized and it was decided to address it in the Convention, rather than the Recommendation, as had been proposed by certain members of the Conference Committee.⁹⁵ Recommendation No. 179 devotes Part II (Paragraphs 6 to 11) to issues relating to hours of work and rest periods, thereby supplementing the provisions of the Conventions.

Tips. The term “tip” means an amount of money given voluntarily to the worker by a customer, in addition to the amount which the customer has to pay for the services received. Regardless of tips, the workers concerned must receive a basic remuneration that is paid at regular intervals (Article 6, paragraphs 1 and 2).

One of the most specific problems of workers in hotels, restaurants and similar establishments is that of remuneration, and particularly tips. The Office drew attention to this question and recalled that “the extent to which tips and service charges are taken into account in determining workers’ fixed wage or minimum wage is one of the most difficult

⁹⁴ Report VI(1), 1990, op. cit., pp. 13 to 26). More recently, the issue of working time has been the subject of analysis and discussion in the ILO, see *Human resources development, employment and globalization in the hotel, catering and tourism sector*, op. cit.

⁹⁵ *Record of Proceedings*, 1990, pp. 28/13 to 17, paras. 82 to 98, and also, *Record of Proceedings*, 1991, pp. 23/11 and 12, paras. 89 to 113.

labour relations problems in the industry.”⁹⁶ During the discussions on this provision in the Conference Committee, a clarification was requested on the definition of the term “remuneration”. More precisely, the question concerned whether the text of Article 6, paragraph 2, defined tips as being part of remuneration. The representative of the Secretary-General, while recalling the definition provided in the Equal Remuneration Convention, 1951 (No. 100), indicated that “the wording adopted by the Committee [...] implied a distinction between tips and basic remuneration.”⁹⁷

Sale of employment. Where such a practice exists, the sale and purchase of employment in establishments referred to in Article 1 must be prohibited (Article 7).

The Office’s preparatory report recalled that “in the past, in order to obtain a lucrative job, people sometimes had to pay a certain amount of money to the owner of the premises or establishment: in other words, certain well-tipped jobs had to be purchased.”⁹⁸ It was for this reason that the First Tripartite Technical Meeting stated in conclusions (No. 1) that it condemned “the purchase of jobs” and that the practice should be prohibited. In the proposals submitted to the Conference, point 18 clearly indicated that “the purchase of jobs should be prohibited.”⁹⁹ This point was approved during the first discussion without much debate. The same occurred with the draft text of the Article in the second discussion.

Application of the Convention. The provisions of the Convention may be applied by or through national laws or regulations, collective agreements, arbitration awards or judicial decisions, or in any other appropriate manner consistent with national practice. For member States where the provisions of the Convention are matters normally left to agreements between employers or employers’ organizations and workers’ organizations, or are normally carried out otherwise than by law, compliance with those provisions must be treated as effective if they are applied through such agreements or other means to the great majority of the workers concerned (Article 8, paragraphs 1 and 2).¹⁰⁰

Vocational education and training. The Office’s initial draft text proposed the inclusion in the Convention of a provision respecting vocational education and training of workers in the sector. The Conference Committee decided to delete this provision from the

⁹⁶ Report VI(1), 1990, op. cit., p. 28. It should be recalled that in its examination of this issue in Report VI(1), the Office indicated that it was necessary to make a distinction between “service charges” and voluntary “tips”. In this respect, it indicated that the term “tip” does not only designate “voluntary tips” that is “a special payment in addition to the price of the service, in the form of a tip paid directly to the employee”. Moreover, the problem of the remuneration of the staff of hotels, restaurants and similar establishments is still topical, according to the Office’s latest report on the subject *Human resources development, employment and globalization in the hotel, catering and tourism sector*, op. cit. It should also be recalled that, as indicated by the Office, that the various instruments relating to wages adopted previously are applicable to workers in the sector, including: the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); the Minimum Wage Fixing Convention, 1970 (No. 131); the Protection of Wages Convention, 1949 (No. 95); the Equal Remuneration Convention, 1951 (No. 100); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); and the Recommendations which accompany certain of these Conventions.

⁹⁷ *Record of Proceedings*, 1991, op. cit., p. 23/13, para. 117.

⁹⁸ Report VI(1), 1990, op. cit., p. 32.

⁹⁹ Report VI(2), 1990, op. cit., p. 129.

¹⁰⁰ The provisions of the first paragraph of this Article are frequently found in other ILO instruments.

draft text of the Convention and transfer it to the Recommendation.¹⁰¹ In this respect, the Recommendation proposes that governments should, in consultation with employers' and workers' organizations concerned, establish, or where appropriate, assist employers' and workers' organizations and other institutions in the establishment of policies and programmes of vocational education and training and of management development for the different occupations in hotels, restaurants and similar establishments. The principal objective of training programmes should be to improve skills and the quality of job performance and enhance the career prospects of the participants (Paragraph 12).

2. **Problems related to the application of the Convention**

The Convention entered into force in 1994. By the year 2000 it had received ten ratifications. The supervisory bodies have already had occasion to raise certain problems relating to the application of the Convention. When examining the reports submitted by member States, emphasis has been placed on the obligation of governments to consult the organizations concerned, on the one hand, in determining the categories of workers who may be excluded from the application of the Convention in accordance with Article 1, paragraph 2, and, on the other hand, in determining the policy to improve the working conditions of the workers concerned.

Similarly, questions concerning the information to be provided to workers concerning their conditions of work and, in particular, their schedules of hours of work have been raised on several occasions.

As indicated in the latest report prepared by the Office on this sector,¹⁰² in view of the date of adoption of the Convention, the pace of ratification may be described as slow. Up to now, the procedure for examination of the situation of law and practice concerning the matters covered by the Convention, as provided for in article 19 of the Constitution of the ILO, has not been set in motion. This procedure would normally make it possible to identify obstacles to ratification and the measures which could be taken to overcome these obstacles.

17.4. Homeworkers

Instruments	Number of ratifications (at 01.10.01)	Status
Up-to-date instruments (Conventions whose ratification is encouraged and Recommendations that member States are invited to implement.)		
Home Work Convention, 1996 (No. 177)	2	This Convention was adopted after 1985 and is considered up to date.
Home Work Recommendation, 1996 (No. 184)	–	This Recommendation was adopted after 1985 and is considered up to date.
Outdated instruments (Instruments which are no longer up to date; this category includes the Conventions that member States are no longer invited to ratify and the Recommendations whose implementation is no longer encouraged.)		
No instrument concerning homeworkers has been considered outdated by the Governing Body.		

¹⁰¹ *Record of Proceedings*, 1991, op. cit., pp. 23/13 and 14, paras. 129 to 131.

¹⁰² *Human resources development, employment and globalization in the hotel, catering and tourism sector*, op. cit.

Views on home work can be very divergent. Some condemn this type of work in view of the lower and unregulated conditions of employment which prevail, while others are favourable due to the flexibility that it offers and the income opportunities that it represents.¹⁰³

The ILO has made the following observation: homeworkers constitute a particularly vulnerable category of workers due to their inadequate legal protection, their isolation and their weak bargaining position. They often receive less than the minimum wage, work very long hours, have no security of employment and are unable to ensure that contractual obligations are observed. It has also noted that the majority of homeworkers are women, who have not been able to gain access to regular employment because of family responsibilities or lack of skills.¹⁰⁴ Moreover, even though statistics do not provide a reliable estimate of the overall number of homeworkers, various surveys and studies have shown that home work is very widespread and that it appears to have been increasing in recent years.¹⁰⁵

The ILO has expressed its concern on several occasions concerning the working and living conditions of homeworkers and has emphasized the need to develop the means of protecting these workers more effectively.¹⁰⁶

To give effect to a decision by the Governing Body,¹⁰⁷ the Office convened in October 1990 a Meeting of Experts on the Social Protection of Homeworkers. The Meeting was mandated, inter alia, to examine the nature, extent and problems of home working and experience in the protection and organization of this category of workers. It was also entrusted with advising on future ILO action in the field, including the possible need for new international labour standards.¹⁰⁸ The Meeting of Experts made a number of recommendations, including with regard to ILO standard-setting action. Noting that home work is widespread throughout the world and that it is important to improve the working and living conditions of homeworkers, it suggested that the ILO give greater attention to the problems of these workers and to the promotion of policies and programmes to afford

¹⁰³ With regard to the advantages and disadvantages of home work, see Chapter II of the report on home work, ILO, *Home work*, ILC, 82nd Session, Geneva, 1995, Report V(1), pp. 15-27. For a very specific approach, see also: Prügl, E, *The global construction of gender: Home-based work in the political economy of the 20th Century*, New York, Columbia University Press, 1999, and particularly Chapter 5 "Fordist gender rules at issue: The debate over the ILO Home Work Convention", pp. 101-120.

¹⁰⁴ Report V(1), 1995, op cit., p. 1.

¹⁰⁵ *ibid.*, pp. 6-8.

¹⁰⁶ See, in particular, ILO, *Record of Proceedings*, ILC, 70th Session, Geneva, 1984, Conclusions concerning future action in the field of working conditions and environment, pp. 37/15 et seq.; ILO, *Record of Proceedings*, ILC, 71st Session, Geneva, 1985, Conclusions, submitted by the Committee on Equality in Employment, pp. 36/12 et seq; and ILO, *Record of Proceedings*, ILC, 75th Session, Geneva, 1988, Conclusions concerning rural employment promotion, pp. 34/19 et seq.

¹⁰⁷ ILO, *Official Bulletin*, Vol. LXXIII, 1990, Series A, No. 1, p. 15.

¹⁰⁸ *ibid.*, p. 15.

them adequate protection. They also recommended that the Office examine the extent to which existing ILO standards afford protection to homeworkers.¹⁰⁹

A little later, in 1993, the Governing Body decided to include an item on home work on the agenda of the 82nd Session of the Conference.¹¹⁰ In 1996, the Conference adopted the Home Work Convention, 1996 (No. 177).

1. Content of the Home Work Convention, 1996 (No. 177)

Objective of the Convention. The objective of the Convention is to improve the situation of homeworkers.¹¹¹

Definitions and scope of application. For the purposes of the Convention, the term “home work” means work carried out by a person, to be referred to as a homeworker: (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy or economic independence necessary to be considered an independent worker under national laws, regulations or court decisions (Article 1(a)).

However, persons with employee status do not become homeworkers within the meaning of the Convention simply by occasionally performing their work as employees at home, rather than at their usual workplaces (Article 1(b)).

The Office recalled that the definition of home work should take into account the goal of the Convention, which “is to have a broad definition so as to include those who may not already be recognized as having employee status but who are not truly independent.”¹¹² Moreover, the Office also recalled that “this is not the first time, nor the only example of where there are difficulties in labour law in distinguishing between persons who are to be considered employees or employee-like, rather than independent or self-employed.”¹¹³

For the purposes of the Convention, the term “employer” means a person, natural or legal, who, either directly or through an intermediary, whether or not intermediaries are provided for in national legislation, gives out home work in pursuance of his or her business activity (Article 1(c)).

The Convention applies to all persons carrying out home work within the meaning of Article 1 (Article 2).

Adoption of a national policy on home work. Governments which ratify Convention No. 177 undertake to adopt, implement and periodically review a national policy on home

¹⁰⁹ ILO, *The social protection of homeworkers*, report submitted to the Meeting of Experts on the Social Protection of Homeworkers, Geneva, 1990, (MEHW/1990/7), paras. 19 and 20.

¹¹⁰ ILO, *Official Bulletin*, Vol. LXXVII, 1994, Series A, No. 1, p. 3.

¹¹¹ ILO, *Home Work*, ILC, 83rd Session, Geneva, 1996, Report IV(2A), p. 42.

¹¹² Report IV(2A), 1996, op cit., p. 37.

¹¹³ *ibid.*, pp. 37 and 38.

work aimed at improving the situation of homeworkers, in consultation with the most representative organizations or employers and workers and, where they exist, with organizations concerned with homeworkers and those of employers of homeworkers (Article 3).

During the examination of this provision in the Conference Committee, it was pointed out that the phrase “national policy” was defined by the context in which it occurred in a given instrument.¹¹⁴ Moreover, still with regard to the definition of the term “national policy”, it was emphasized that “it was possible to have a policy on home work within the context of other policies. There did not have to be a separate home work policy.”¹¹⁵

Recommendation No. 184, which supplements the Convention, indicates that governments should, according to national law and practice, designate an authority or authorities entrusted with the formulation and implementation of the national policy on home work referred to in Article 3 of the Convention. Moreover, the Recommendation considers that use should be made of organizations of employers and workers in the formulation of the national policy on home work (Paragraph 3(1) and (2)).

In Part XII, the Recommendation enumerates the matters which should be covered by programmes related to home work. These programmes, which should be promoted and supported by member States, should: inform homeworkers of their rights and the kinds of assistance available to them; raise awareness of home-work-related issues among employers’ and workers’ organizations, non-governmental organizations and the public at large; facilitate the organization of homeworkers in organizations of their own choosing, including cooperatives; provide training to improve homeworkers’ skills (including non-traditional skills, leadership and negotiating skills), productivity, employment opportunities and income-earning capacity; provide training which is carried out as close as practicable to the workers’ homes and does not require unnecessary formal qualification; improve homeworkers’ safety and health such as by facilitating their access to equipment, tools, raw materials and other essentials that are safe and of good quality; facilitating the creation of centres and networks for homeworkers in order to provide them with information and services and reduce their isolation; facilitate access to credit, improved housing and child care; and promote recognition of home work as valid work experience. It is also advocated that access to these programmes should be ensured to rural homeworkers. Moreover, this Paragraph of the Recommendation explicitly indicates that specific programmes should be adopted to eliminate child labour in home work. Finally, the Recommendation provides that, where practicable, information concerning the rights and protection of homeworkers and the obligations of employers towards homeworkers, as well as the programmes referred to above, should be provided in languages understood by homeworkers (Paragraph 30).

Equality of treatment. The national policy on home work must promote, as far as possible, equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of home work and, where appropriate, conditions applicable to the same or a similar type of work carried out in an enterprise. Equality of treatment must be promoted, in particular, in relation to: (a) the homeworkers’ right to establish or join organizations of their own choosing and to participate in the activities of such organizations; (b) protection against discrimination in employment and occupation; (c) protection in the field of occupational safety and health; (d) remuneration; (e) statutory

¹¹⁴ ILO, *Record of Proceedings*, ILC, 82nd Session, Geneva, 1995, p. 25/24, para. 80.

¹¹⁵ ILO, *Record of Proceedings*, ILC, 83rd Session, Geneva, 1996, p. 10/26, para. 88.

social security protection; (f) access to training; (g) minimum age for admission to employment or work; and (h) maternity protection (Article 4 of the Convention).

These principles are developed in Paragraphs 11 to 28 of the Recommendation.

Emphasis should be placed on two points in relation to Article 4 of the Convention. Firstly, as indicated in the discussion in the Conference Committee, this Article does not “oblige member States to have equal treatment, but to have a national policy on home work which promotes equality of treatment”.¹¹⁶ Moreover, although the text adopted provides for the obligation to promote equality of treatment between homeworkers and “other wage earners”, the initial draft referred to equality of treatment between homeworkers and “workers in the enterprise”.¹¹⁷

Implementation. The national policy on home work has to be implemented by means of laws and regulations, collective agreements, arbitration awards or in any other appropriate manner consistent with national practice (Article 5).

Labour statistics. Appropriate measures have to be taken so that labour statistics include, to the extent possible, home work (Article 6).

This provision is the result of an amendment submitted in the Conference Committee by the Worker members. This amendment, which was supported by the Employer members, was intended to resolve the problem of the inadequacy of the statistics on home work. The Office proposed a change to align the text with the terminology used in the Labour Statistics Convention, 1985 (No. 160), in order to envisage that statistics could be established at the regional, provincial and other levels.¹¹⁸ Paragraph 4 of the Recommendation gives further guidance on the detailed information which should be compiled, kept up to date and published.

Safety and health at work. National laws and regulations on safety and health at work must apply to home work, taking account of its special characteristics, and establish conditions under which certain types of work and the use of certain substances may be prohibited in home work for reasons of safety and health (Article 7).

Part VII of the Recommendation (Paragraphs 19 to 22) develops the principles set out in this provision of the Convention.¹¹⁹

Intermediaries. Where the use of intermediaries in home work is permitted, the respective responsibilities of employers and intermediaries must be determined by laws and regulations or by court decisions, in accordance with national practice (Article 8).

During the discussion of this provision by the Conference Committee, it was indicated that the term “intermediary” should be considered in its common meaning, namely “as someone in between the homeworker and the employer.” On the same occasion, it was also pointed out that “where the use of intermediaries was prohibited or

¹¹⁶ *ibid.*, p. 10/27, para. 94.

¹¹⁷ ILO, *Home Work*, ILC, 82nd Session, Geneva, 1995, Report V(2), p. 44.

¹¹⁸ Report IV(2A), 1996, *op cit.*, p. 52.

¹¹⁹ The general principles set out in the instruments on occupational safety and health are also applicable to homeworkers. See Chapter 10.

where they did not exist Governments would not have to take measures to apply the proposed Article.”¹²⁰

Inspection and penalties. A system of inspection consistent with national law and practice must ensure compliance with the laws and regulations applicable to home work. Adequate remedies, including penalties where appropriate, in case of violation of these laws and regulations have to be provided for and effectively applied (Article 9, paragraphs 1 and 2).

During the preparatory work for the Convention, certain delegates emphasized that the need to limit intrusions into the privacy of the home could constitute an obstacle to inspection of home work. It was replied that the draft text of the Article concerned the general principle of an inspection system, and not the limitations that might be imposed upon it, and that the right to privacy could in any case be subordinated to public safety. In this respect, attention was drawn to Article 2, paragraph 1, of the Labour Inspection Convention, 1947 (No. 81), which specifies that labour inspectors are empowered to inspect workplaces in respect of which legal provisions are enforceable by them, including laws respecting privacy.¹²¹

In this regard, the Recommendation indicates that insofar as it is compatible with national law and practice concerning respect for privacy, labour inspectors and other officials entrusted with enforcing provisions applicable to home work should be allowed to enter the parts of the home or other private premises in which the work is carried out (Paragraph 8).

With regard to penalties, the Recommendation indicates that, in cases of serious or repeated violations of the laws and regulations applicable to home work, appropriate measures should be taken, including the possible prohibition of giving out home work, in accordance with national law and practice (Paragraph 9).

More favourable provisions. Convention No. 177 does not affect more favourable provisions applicable to homeworkers under other international labour Conventions (Article 10).

In addition to the paragraphs which develop some of the principles set out in the Convention, Recommendation No. 184 also advocates that homeworkers should be kept informed of their specific conditions of employment in writing or in any other appropriate manner consistent with national law and practice. This information should include, in particular: (a) the name and address of the employer and the intermediary, if any; (b) the scale or rate of remuneration and the methods of calculation; and (c) the type of work to be performed (Paragraph 5).

Moreover, under the terms of the Recommendation, the competent authority should provide for the registration of employers of homeworkers and of any intermediaries used by such employers. It should specify the information employers should submit or keep at the authority's disposal (Paragraph 6).

For their part, employers should be required to notify the competent authority when they give out home work for the first time. They should keep a register of all

¹²⁰ *Record of Proceedings*, 1996, p. 10/30, paras. 109 and 110.

¹²¹ Report IV(2A), p. 63. See also, *Record of Proceedings*, 1995, op cit., p. 25/40, paras. 150 and 151.

homeworkers, classified according to sex, to whom they given work. Employers should also keep a record of work assigned to a homeworkers which shows: (a) the time allocated; (b) the rate of remuneration; (c) costs incurred, if any, by the homeworker and the amount reimbursed in respect of them; (d) any deductions made in accordance with national laws and regulations; and (e) the gross remuneration due and the net remuneration paid, together with the date of payment. A copy of this record should be provided to the homeworker (Paragraph 7).

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ILOLEX CD-ROM. Published bi-annually. Database of ILO standards. Includes Conventions, Recommendations, reports of the Committee of Experts, reports of the Committee on Freedom of Association, General Surveys, and numerous related documents. Also available at the ILO website at www.ilo.org.

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- : *Revision of the Plantations Convention (No. 110) and Recommendation (No. 110)*, 1958, International Labour Conference, 68th Session, Report VII(1), Geneva, 1982.

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Workers in hotels and restaurants

- ILO: *Human resources development, employment and globalization in the hotel, catering and tourism sector*, Report for discussion at the Tripartite Meeting on Human Resources Development, Employment and Globalization in the Hotel, Catering and Tourism Sector, 2001 (Geneva, 2001).
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Homeworkers

- ILO: *Home work*, Report IV, International Labour Conference, 83rd Session, Geneva, 1996.
- : *Home work*, Report V(1), International Labour Conference, 82nd Session, Geneva, 1995.
- : *Social protection of homeworkers*, Document for the Meeting of Experts on the Social Protection of Homeworkers (1990, Geneva) (Geneva, 1991).

Internet resources

ILO sites

Website of the International Labour Organization: www.ilo.org

ILOLEX: (Trilingual database (English, French, Spanish) on international labour standards): <http://ilolex.ilo.ch:1567/english/index.htm>

ILO Declaration on Fundamental Principles and Rights at Work: <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm>

Government, Labour Law, and Administration Department of the ILO (GLLAD):
<http://www.ilo.org/public/english/dialogue/govlab/index.htm>

InFocus Programme on Strengthening Social Dialogue:
<http://www.ilo.org/public/english/dialogue/infocus>

The ILO Multidisciplinary Technical Team, San José, Costa Rica, web pages on indigenous and tribal peoples: <http://www.indigenas.oit.or.cr> and
<http://www.indigenousrights.oit.or.cr>

The ILO Area Office in Lima, Peru, web page on indigenous and tribal peoples:
<http://www.oitandina.org.pe/activi/ria>

Other sites

Centre for World Indigenous Studies: <http://www.cwis.org>

European Industrial Relations Observatory (EIRO): <http://www.eiro.eurofound.ie>

European Trade Union Confederation: <http://www.etuc.org>

European Union (EU): <http://www.europa.eu.int>

International Centre for Human Rights and Democratic Development:
<http://www.ichrdd.ca/111/english/contentsEnglish.html>

International Confederation of Free Trade Unions (ICFTU): <http://www.icftu.org>

International Maritime Organization: <http://www.imo.org/HOME.html>

International Organization of Employers (IOE): <http://www.ioe-emp.org>

International Organization for Migration: <http://www.iom.int>

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Office of NAFTA and Inter-American Affairs: <http://www.mac.doc.gov/nafta>

Office of the High Commissioner for Human Rights: <http://www.unhchr.ch>

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The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up

A. Trebilcock

Forged out of existing provisions of the ILO Constitution, the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up constitutes a new kind of legal tool. As a promotional instrument, it differs from international labour Conventions, and represents a fresh approach to encouraging efforts by the ILO's member States to respect a set of core values that lie at the heart of the ILO's mandate. This section briefly traces the development of the Declaration, points out the main features of its content, explains how it is followed up and offers a few early reflections on its impact to date.

Development of the Declaration

While an exhaustive history of the Declaration is not possible here, a few highlights can be noted. The basic origins of the ILO Declaration lie in the ILO's Constitution of 1919 and the Declaration of Philadelphia of 1944 (now a part of the Constitution). Indeed, the Declaration derives from the ILO Constitution. Yet the immediate incubation period of the Declaration began in 1994, when the ILO used the occasion of its 75th anniversary to reflect upon its mandate and mission in the context of contemporary reality as the twentieth century drew to a close.¹ Following the discussion of this topic at the Conference in 1994, the ILO Governing Body continued exploring various avenues for giving greater focus to the goal of having social progress and economic growth move in tandem. It set up a Working Party on the Social Dimension of the Liberalization of International Trade which provided space for free-flowing debate on issues related to globalization, while the Legal Issues and International Labour Standards Committee pursued a range of ideas for translating the aspiration to have a new type of instrument into something with legal form. Such reflections were mirrored in the Director-General's Report to the 85th Session of the Conference in 1997, which put forward proposals for the adoption by the Conference of a solemn Declaration on fundamental rights.² The result was the decision to place this on the agenda of the Conference in 1998, which adopted the ILO Declaration on Fundamental Principles and Rights at Work on the basis of tripartite support on 19 June 1998.³

With social and labour issues high on the agenda of the international community at the end of the twentieth century, it is not surprising that developments taking place outside the ILO also played a role in the development of the Declaration. At the World Summit for Social Development (Copenhagen, March 1995), the Heads of State committed themselves to pursue the goal of safeguarding –

¹ *Defending values, promoting change*, Report of the Director-General, ILC, 81st Session, 1994, Report I.

² *The ILO, standard-setting and globalization*, Report of the Director-General, ILC, 85th Session, 1997; see also H. Kellerson: "The ILO Declaration of 1998 on Fundamental Principles and Rights: A challenge for the future," in *International Labour Review*, Vol. 137, 1998, No. 2, pp. 223-227.

³ The outcome of the weighted vote is recorded by delegation in *Provisional Record* No. 23, ILC, 88th Session, 2000, available through the ILO website (www.ilo.org) under Conference records.

... the basic rights and interests of workers and to this end, freely promote respect for relevant International Labour Organization Conventions, including those on the prohibition of forced and child labour, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination. 4

This launched the emergence of a consensus on the identification of core labour standards.

As the long Uruguay Round of trade talks was coming to an end in 1994, debate arose over possible reference to international labour standards. At the first Ministerial Conference of the newly established World Trade Organization (Singapore, December 1996), the Ministers adopted the following language in paragraph 4 of their Final Declaration:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them ... 5

In the same paragraph, the Ministers rejected the use of labour standards for protectionist purposes, and agreed that the comparative advantage of countries must in no way be put into question.

In the meantime, the Organisation for Economic Co-operation and Development had launched a study on trade and core labour standards, which it published in 1996. 6 Among its other findings, this study basically concluded that there was no trade advantage from failure to respect freedom of association – in effect endorsing from an economic perspective what the ILO had long asserted in a positive sense from the viewpoint of basic human rights. Reflections of the Singapore Declaration and the OECD study can be detected in the text of what became the ILO Declaration on Fundamental Principles and Rights at Work (in paragraph 5). Its precise wording, however, was very much the product of a lively tripartite discussion of the members of the Conference Committee set up to examine the draft text. 7

Content of the Declaration

The Declaration contains a Preamble, the body of the text set out in five paragraphs, and an annex describing the follow-up to the Declaration, which is an integral part of the Declaration itself (as provided in its paragraph 4).

The Preamble echoes convictions expressed in the ILO Constitution and reaffirms the fundamental principles and rights found in it as a basis for promoting their universal application. Introducing the particular significance of “the guarantee of fundamental principles and rights at work,” the Preamble highlights how they enable people “to claim freely and on the basis of equality of opportunity their fair share of the wealth which they

⁴ Commitment 3(i), Copenhagen Declaration on Social Development, United Nations, 1995, p. 15.

⁵ World Trade Organization: WT/MIN(96)/DEC/W, para. 4.

⁶ OECD: *Trade, employment and labour standards*, OECD, Paris, 1996.

⁷ The report of this Committee to the plenary of the Conference appears in *Provisional Record* No. 20, ILC, 86th Session, June 1998, and is available on the ILO website (www.ilo.org), under Conference documents.

have helped to generate, and to achieve fully their human potential” (fifth preambular paragraph). The competence of the ILO in setting and dealing with international labour standards is recalled by the Preamble, along with universal support for the promotion of fundamental rights at work as the expression of constitutional principles. To evoke the contemporary setting of the Declaration, the Preamble refers to growing economic interdependence, the need for economic and social policy to be mutually reinforcing components to create broad-based sustainable development, the importance of job creation, and the special attention that should be devoted to the problems of persons with special social needs.

In essence, the body of the Declaration reaffirms reciprocal obligations, both for ILO member States and for the Organization itself. Paragraph 1 of the Declaration recalls the voluntary nature of membership in the ILO, and what acceptance of the Constitution by a member State entails in relation to the principles and rights set out in that instrument. Without enumerating them, the Declaration refers to “Conventions recognized as fundamental both inside and outside the Organization”. Paragraph 2 sets out the obligation of all member States, whether or not they have ratified the Conventions in question, “to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.”

At the time of the adoption of the Declaration, seven Conventions were considered fundamental: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), the Minimum Age Convention, 1973 (No. 138), the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). To these has been added the Worst Forms of Child Labour Convention, 1999 (No. 182), which was adopted unanimously in June of that year and entered into force on 17 November 2000.

To return to the obligations set out in the Declaration, the duty placed on the Organization is “to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources...” (paragraph 3). This explicitly includes the mobilization of external resources and support and encouragement of other international organizations with which the ILO has established relations to support these efforts. More specifically, paragraph 3 sets out three forms of such support:

- (a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
- (b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and

-
- (c) by helping the Members in their efforts to create a climate for economic and social development.

The fourth paragraph of the Declaration integrates the follow-up, which is to be “meaningful and effective”. Finally, echoing the conclusions adopted by the WTO Ministerial Conference (Singapore, 1996), the final substantive paragraph “stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes”. Nor should the comparative advantage of any country be called into question by the Declaration or its follow-up (paragraph 5).

The follow-up

In an annex, the follow-up sets out its overall purpose (Part I), includes a description of the annual follow-up concerning non-ratified fundamental Conventions (Part II), the Global Report (Part III) and concludes with a statement of understanding (Part IV). Part IV foresees amendments to the Standing Orders of the Governing Body and the Conference in relation to the follow-up, and provides for the Conference to review the operation of the follow-up “in due course” to assess whether it has adequately fulfilled its overall purpose.

As illustrated graphically in the annex to this section, the follow-up to the Declaration contains three elements: a review of annual reports; a Global Report; and the identification of technical cooperation priorities and plans of action. In operational terms, the follow-up means a significant strengthening of ILO technical cooperation, pursued through various avenues, aimed at achieving greater respect for fundamental principles and rights at work.

Overall, the aim of the follow-up is to “encourage the efforts” of ILO member States to promote the fundamental principles and rights reaffirmed in the Declaration. Of a strictly promotional nature, the follow-up is to allow identification of areas in which ILO assistance through technical cooperation may help member States implement these principles and rights (paragraphs I.1 and I.2).

By its own terms, the follow-up “is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of the those mechanisms shall not be examined or re-examined” within the framework of the follow-up (paragraph I.2). This provision reflects a two-fold concern: to avoid weakening the existing ILO supervisory machinery (described elsewhere in this volume), as well as possible “double scrutiny” for member States.

Under the annual review, countries for which ratifications of any of the fundamental Conventions have not yet been registered by the Director-General are to provide reports requested under article 19, paragraph (5)(e), of the ILO Constitution. In this way, the Declaration follow-up illustrates innovative use of a previously existing obligation, i.e. for countries to report on the position of their law and practice in regard to matters dealt with by a Convention they have not ratified (see ILO Constitution, article 19(5)(e)). The reports under the Declaration follow-up are to be based on forms drawn up “so as to obtain information from governments ... on any changes which may have taken place in their law and practice ...” (Declaration follow-up, paragraph II.B.1). In practice, initial annual reports have necessarily involved the provision of “baseline” information by countries, to fix their own starting points from which future change can be seen. In addition, annual reports are to be provided “taking due account of article 23 of the Constitution and established practice”. This reference to article 23 evokes the obligation on member States to send copies of reports they submit to the ILO to the most representative organizations of employers and workers. The term “established practice” includes the right of employers’ and workers’ organizations at the national, regional or international level to make their

views known about the efforts being made by member States within the framework of the Declaration follow-up.⁸

Under the follow-up, the International Labour Office (the Secretariat of the Organization) compiles the reports, which are reviewed by the Governing Body of the Organization. Under “established practice,” the compilation of reports by the Office includes observations which are not in the nature of complaints and which would not involve a situation of double scrutiny. The InFocus Programme on the Promotion of the Declaration, which prepares the compilation, consults closely with the International Labour Standards Department of the ILO in this regard. The compilation appears both in print and on the ILO’s website as a Governing Body document.

Resorting to a possibility offered by the text of the follow-up, the Governing Body has named a group of experts “with a view to presenting an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion”. (paragraph II.B.3). Seven distinguished, independent ILO Declaration Expert-Advisers were initially appointed for a two-year period in November 1999, with a mandate that included that function as well as the examination of the reports and comments compiled by the Office and the making of proposals for adjustments in the report forms.⁹ The Expert-Advisers’ functions are quite different from those of the members of the Committee of Experts on the Application of Conventions and Recommendations. In line with the intention to have the Declaration and its follow-up serve as a “tool for development,” the Expert-Advisers hail from various professional callings. The ILO Expert-Advisers have made a series of recommendations to the ILO Governing Body in relation to the Declaration and its follow-up, which it has endorsed.¹⁰

The annual review discussion in the Governing Body is to permit Members to “provide, in the most appropriate way, clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports” (paragraph II.B.4). The Governing Body has amended its standing orders to permit Members which do not serve on that body to participate in such a discussion.

The annual review covers all four categories of principles and rights at work every year, but within each category only involves reports from countries that have not yet ratified all of the Conventions in that category. For example, if a member State has ratified the Equal Remuneration Convention, 1951 (No. 100), but not the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), it would be requested to provide an annual report under the Declaration follow-up in relation to efforts made in relation to the elimination of discrimination in employment and occupation. In the initial round of reporting, before the Worst Forms of Child Labour Convention, 1999 (No. 182), had come into force, countries not yet having ratified that Convention were only called upon to report under the Declaration follow-up if they had not yet ratified the Minimum Age Convention, 1973 (No. 138). Beginning with reports due 1 September 2001, a country which by that date has not ratified both Convention No. 138 and Convention No. 182 will be called upon to provide a report under the Declaration follow-up.

⁸ Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Part II, Compilation of annual reports by the International Labour Office, GB.277/3/2 (Mar. 2000), paras. 9-12.

⁹ GB.278/3 (Nov. 1999).

¹⁰ Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Part I, Introduction by the ILO Declaration Expert Advisers, GB.277/3/1 (Mar. 2000) and GB.280/3/1 (Mar. 2001).

In contrast, the Global Report submitted by the Director-General to the International Labour Conference each year addresses only one of the four categories each time. The topics are dealt with in the order in which the principles and rights appear in paragraph 2 of the Declaration (see above). As noted in the overall purpose of the follow-up, the Global Report “will serve to obtain the best results from the procedures carried out pursuant to the Constitution” (paragraph I.3) – a phrase which extends beyond article 19, on which the annual review is primarily based. The more specific purpose of the report is threefold:

- (a) “to provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period”; and
- (b) to serve as a basis for:
 - (i) “assessing the effectiveness of the assistance provided by the Organization”; and
 - (ii) “determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out” (paragraph III.A.1).

Global Reports are drawn up under the responsibility of the Director-General (and thus are not vetted by the Governing Body) “on the basis of official information, or information gathered and assessed in accordance with established procedures” (paragraph III.B.1). Both “the findings” of the annual follow-up for States not having ratified the fundamental Conventions and reports dealt with under article 22 of the Constitution (concerning reports on the effect given to ratified Conventions) are mentioned in particular as sources of information (paragraph III.B.1).

Global Reports are subject to “tripartite discussion” by the International Labour Conference in a sitting devoted entirely to the Global Report or “in any other appropriate way” (paragraph III.B.2). The Governing Body then draws conclusions from this discussion concerning the priorities and plans of action for technical cooperation to be implemented for the following four-year period (*ibid.*).

The first Global Report, *Your voice at work*, generated heated debate at the Conference in June 2000.¹¹ The report pointed out extensive shortcomings in relation to the exercise of freedom of association and the effective recognition of the right to collective bargaining in a wide variety of contexts. The following November, the Governing Body adopted the first plan of action for technical cooperation aimed at making progress and closing this gap. A preliminary report on this technical cooperation was submitted to the June 2001 Conference,¹² and there are plans to do this in future years as well.

Stopping forced labour, the second Global Report, was well received by the Conference delegates.¹³ They broadly endorsed a proposal to intensify ILO work for the elimination of forced labour, an idea the Governing Body approved in November 2001 along with a proposed action plan for technical cooperation in this field. Discussion of the various forms of forced labour also inspired several side events at the Conference, on

¹¹ Report of the Director-General, ILC, 88th Session, Report I, 2000; and ILC, *Provisional Record* No. 12 (2000).

¹² ILC, *Provisional Record* No. 2, 89th Session, 2001,

¹³ Report of the Director-General, ILC, 89th Session, Report I, 2001, and, *Provisional Record* No. 12, ILC, 89th Session, 2001.

topics such as micro-credit as a means of freeing workers from debt bondage and initiatives to combat trafficking in children and adults in relation to forced labour. Press coverage of the report and an accompanying video news release was quite extensive, thus raising public awareness of the contemporary relevance of forced labour.

The third Global Report, on the effective abolition of child labour, will be discussed by the Conference in 2002, and in 2003, the topic of the Global Report will be the elimination of discrimination in employment and occupation. The Global Report for 2002 is being developed together with the ILO's International Programme for the Elimination of Child Labour. The four-year cycle will begin again in 2004, by which time it is hoped that some progress in relation to respect for the principle of freedom of association and the effective recognition of the right to collective bargaining may be noted.

Early reflections on the impact of the Declaration

The Declaration represents a reaffirmation by governments and the social partners of the universality of fundamental principles and rights.¹⁴ A little over three years old now, the Declaration and its follow-up have already clearly had an impact. Fundamental principles and rights at work have been broadly endorsed both within and outside the ILO. Inside the institution, they serve as one of the four pillars of "decent work" on which the ILO's current work is being constructed.¹⁵ More than a verbal commitment, it has meant to some extent a reorientation of institutional resources. An earlier ILO Declaration, the Tripartite Declaration on Multinational Enterprises (adopted in 1979) also now includes in its annex a cross-reference to the 1998 Declaration.

The Declaration has also attracted considerable external donor support for efforts aimed at promoting further respect for fundamental principles and rights in a wide range of countries. By mid-2001, extra-budgetary technical cooperation to the extent of around US\$25 million (from government donors for ILO implementation) was already underway under the auspices of the Declaration, and another US\$12-15 million in extra-budgetary funding was on the horizon for programmes still to be designed and implemented. (Further details can be found on the Declaration pages on the ILO website.) Focused on practical action at the national level, such technical cooperation activities to date range from the strengthening of machinery to prevent and resolve labour disputes, to providing income-generation options for men and women recently released from bonded labour.

Another type of impact can be seen in relation to ratification. Along with the campaign for universal ratification of the ILO fundamental Conventions that was launched in June 1995, the follow-up to the Declaration has contributed to stimulating countries to ratify these instruments. The complementary ratification campaign that focuses on Convention No. 182 (already ratified by 100 of the ILO's member States, in record time) has probably contributed to the recent ratification of other fundamental Conventions as well. Reporting under the follow-up draws attention to Conventions that for various reasons had not been ratified. It provides an opportunity for discussions involving representatives of governments, employers and worker about the removal of possible obstacles to ratification. Whatever the causes, the increase in the level of ratification of the

¹⁴ Kellerson: op. cit., p. 227.

¹⁵ *Decent work*, Report of the Director-General, ILC, 87th Session, 1999; *Reducing the decent work deficit*, Report of the Director-General, ILC, 89th Session, 2001; and ILO Programme and Budget, 2000-01 and 2002-03.

core Conventions has been dramatic.¹⁶ It will be crucial for the ILO to enhance its support for member States' efforts to implement the Conventions they have ratified. Fortunately, the Declaration follow-up offers the promise of assistance to countries that have ratified them, as well as those that are not yet in a position to do so.

One source of major support for the Declaration is the range of promotional efforts that the ILO has undertaken to make the instrument more widely known and better understood. They stress the usefulness of fundamental principles and rights as a development tool, and recognize the nature of the Declaration as a political as well as a legal document. Target audiences include ILO constituents, other decision-makers, regional and international institutions and so forth. The ILO has undertaken an extensive poster campaign to raise awareness of the principles and rights covered by the Declaration. As another example, a pilot programme to introduce fundamental principles and rights at work in secondary school curricula is now underway. More information on promotional activities relating to the Declaration can be found on the ILO website.

Beyond the ILO, the importance of fundamental principles and rights at work has resonated in a variety of global and regional forums since the adoption of the Declaration: the Copenhagen plus Five Social Summit (Geneva, June 2000), the Meeting of Least Developed Countries (Brussels, May 2001), the revised OECD Guidelines for Multinational Enterprises (adopted 27 June 2000) and the Mercosur Social Charter (December 1999) provide a few illustrative examples. An agreement concluded between the Inter-Parliamentary Union and the ILO highlights the Declaration as a focus of action, and several development banks have incorporated respect for fundamental principles and rights at work in the contracts they conclude with service providers. The 1999 Global Compact, an arrangement linking the United Nations and the business community, contains explicit reference to the Declaration's four principles and rights among its nine key points.

It is widely acknowledged that as a new experience, the various aspects of the follow-up are still work in progress, and to some extent still controversial. For some, the follow-up goes too far; for others, not far enough. In part this may reflect the somewhat different expectations that various Conference delegates may have had when they endorsed the Declaration in 1998. The mixed results of globalization and the fact that deep suspicions continue around protectionism have probably also played a role. Discussions in the Governing Body and the Conference during the first two rounds of the annual review and Global Reports have given greater shape and texture to the follow-up in practice.

Clearly the Declaration and its follow-up are only part of a much more complex international relations picture. In an update in 2000 of its 1996 secretariat study on trade and labour standards, the Organisation for Economic Co-operation and Development described the Declaration as a "key milestone", and praised the results of the follow-up.¹⁷

The future prospects of the Declaration and its follow-up lie very much in the hands of the ILO constituents: its 175 member States and the representatives of employers and workers who help shape the policies and priorities of the Organization. Midway through 2001, it seems to be well off to a good start. It has focused attention on core principles, which are now accepted as such. In the words of the ILO Declaration Expert-Advisers, the

¹⁶ Regularly updated ratification figures are available on the ILO's website. By 31st August 2001, 55 countries had ratified all eight of the Conventions considered fundamental, and 49 had ratified seven of those eight. Conventions such as those dealing with forced labour have passed the 90 per cent ratification mark.

¹⁷ OECD: *International trade and core labour standards*, Paris, 2000, p. 9.

Declaration “reflects shared values across the international community. ... They touch on basic freedoms that make us human”.¹⁸ The Declaration has also reaffirmed the centrality of respect for those freedoms as part and parcel of sustainable development.¹⁹ The follow-up paves the way for supporting political will in practical terms. Making this a reality constitutes a challenge to us all.

¹⁸ Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 2001, Part I, Introduction by the ILO Declaration Expert-Advisers to the compilation of annual reports, GB.280/3/1 (Mar. 2001), para. 1.

¹⁹ *ibid.*, para. 7.

Annex 1

Follow-up to the Declaration – Encouraging efforts to respect fundamental principles and rights at work

